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Inspector General


OFFICE OF INSPECTOR GENERAL PALM BEACH COUNTY



Inspector General
Accredited

Date: September 27, 2013

To: Mayor Jeri Muoio
City of West Palm Beach
401 Clematis Street
West Palm Beach, Fl. 33401

From: Donald Balberchak 
Director of Investigations
Office of Inspector General

Subject: OIG Notification #2013-0014

The Office of Inspector General (OIG) received a complaint concerning City of West Palm Beach (City) Resolution #5-13(F). According to the complainant, on January 22, 2013, the City Commission approved the reimbursement of \$7,325.00 to City Commissioner Kimberly Mitchell for legal fees incurred while defending herself against Palm Beach County Commission on Ethics (COE) Complaint #C12-001. The complainant questioned whether Ms. Mitchell met the common law standard of acting in a "public capacity for a public purpose" because the thrust of her defense to the ethics complaint was that she was not acting in her official capacity.

Resolution #5-13(F) contained Agenda Cover Memorandum (ACM) #19219 initiated by City Attorney Claudia McKenna, which recommended approval based on "the common law right of a public official to reimbursement..." The OIG reviewed written materials provided to the City Commission, as well Ms. McKenna's oral presentation, in which she advised that the legal standard for granting Ms. Mitchell's request for reimbursement was based on the common law standard, which permits reimbursement, **if** the "public official was acting in their public capacity for a public purpose."

At issue is the factual basis for which the standard was applied. This standard has been addressed in a number of Florida appellate cases, including *Maloy v. Board of County Commissioners*, 946 So. 2nd 1260 (Fla. 1st DCA 2007), where the Court provided the following quoted explanation, in pertinent part:

"Enhancing Public Trust in Government"

...a public official is not entitled to taxpayer funded representation simply because an allegation of misconduct arises in the course of his public duties. Rather, the context out of which the alleged misconduct arose must also serve a public purpose.

On June 17, 2013, the OIG, while confirming that the appropriate legal standard had been presented to the City Commission, requested that the City (through City Mayor Jeri Muoio) provide "any pertinent factors relating to how Commissioner Mitchell was acting in her official capacity and any underlying public purpose that the [City] Commission may have been made aware of pursuant to their approval of Resolution #5-13(F)..." On July 17, 2013, the OIG received the following quoted response from Ms. McKenna, on behalf of Ms. Muoio, in pertinent parts:

Implicit in the approval of Resolution No. 5-13(F) is the determination by the City Commission that the reimbursement request met the legal standard based on the agenda cover memorandum concerning the item. Any additional pertinent factors taken into account by an individual commissioner would be the prerogative of that commissioner.

Interviews of the four City Commissioners by the OIG, who all voted in favor of passing the Resolution (Ms. Mitchell abstained), revealed the following:

- One Commissioner opined that since the common law standard required that a reimbursement be given to a public individual who was acting in their official capacity and for a public purpose, it conflicted with the fact that Ms. Mitchell advised that she was not acting in her official capacity. The Commissioner further opined that in hindsight, the City Commission should not have voted to reimburse Ms. Mitchell. The Commissioner believed that if in fact, Ms. Mitchell claimed to COE that she was acting as a private citizen, City Commissioners may have been led astray by the City's Legal Department when the ACM was presented to them.
- One Commissioner believed that he/she followed the law as was explained to the City Commission by Ms. McKenna. The Commissioner stated that based on what was explained by Ms. McKenna, the reimbursement request met both of the legal standards, public capacity and public purpose. The Commissioner added that he/she was not an attorney and that the City Attorney is obligated to provide an explanation of the facts. According to the Commissioner, Ms. McKenna indicated that Ms. Mitchell's actions were within public capacity and public purpose because Ms. Mitchell's concerns were for the entire community and not only herself that were affected by a cable outage. The Commissioner advised that he/she was not aware that Ms. Mitchell advised COE that she was not acting in an official capacity and not for a public purpose.
- One Commissioner opined that although common law required that for reimbursement, the public official must be acting in an official capacity for a

public purpose, it did not conflict with Ms. Mitchell's statement to COE that she was not acting in her official capacity. It was this Commissioner's opinion that since Ms. Mitchell was accused in her official capacity, she had to defend the separation of her official capacity from her non-official capacity. According to this Commissioner, Ms. Mitchell was not defending herself as a non-Commissioner; she was defending her position as a Commissioner.

- One Commissioner indicated that he/she was not aware of the OIG's authority to question their rationale and was unable to recall any specifics as to his/her vote, to include his/her rationale for approving Ms. Mitchell's reimbursement. The Commissioner further stated that he/she made a vote consistent with the requirements of the law; however, that Commissioner was unable to provide their factual basis for doing so.

It is noted that during Ms. Mitchell's interview with the COE (December 19, 2011), Ms. Mitchell maintained that she was not using her official position to obtain a benefit and further indicated that the matter involved her personal residential cable and internet service. Ms. Mitchell further stated the following regarding her conversation with City Administrator Ed Mitchell:

"I live in the city. I personally live in the city. I am personally a customer of Comcast. I wasn't calling him as a city commissioner."

During the OIG's interview with Ms. McKenna, the OIG made several attempts to ascertain Ms. McKenna's factual basis to support her own claims that Ms. Mitchell's reimbursement met the legal standard, to which Ms. McKenna stated "...again, until I know what your jurisdiction is, I am not going to respond to your questions..."

Florida's Second District Court of Appeal was presented with a similar situation in the case *Chavez v. Tampa*, regarding whether a city council member was entitled to reimbursement of their attorney's fees that were incurred in successfully defending charges filed against her with the Florida Commission on Ethics. Although the Court determined that the city council member's official vote had indeed been entered while she was acting in her official capacity, the court held that she was not entitled to reimbursement because her vote did not serve a public purpose, stating:

"From our study of the intent and policy of the legislature in the context of ethical behavior, we think "public purpose" equates with "public interest" and excludes any taint of "private interest." *Chavez v. Tampa*, 560 So. 2d 1214 (Fla. 2d DCA 1990)

In this case, Ms. Mitchell represented to the COE that she was not acting in an official capacity. Ms. Mitchell further testified that "[She] wasn't calling [City Administrator Ed Mitchell] as a city commissioner." Ms. Mitchell further maintained (during her COE interview) that she was not using her official position to obtain a benefit and further indicated that the matter involved her personal residential cable and internet service.

Throughout the OIG's interviews of City Commissioners and Legal Counsel, no facts were provided that could reasonably be viewed as supporting the City Commission's decision that Ms. Mitchell was acting in her official capacity for a public purpose, and therefore qualified for reimbursement of her attorney fees. In addition, Ms. Mitchell's own testimony to the COE, when considered in view of the applicable legal standard, indicates that reimbursement of Ms. Mitchell's attorney fees was not justified.

Based on the aforementioned, the OIG makes the following Corrective Action Recommendations:

1. The City Commission should be re-presented with all of the facts in order to make a determination as to whether or not the reimbursement of legal fees totaling \$7,325.00 to Ms. Mitchell met the legal standard.
2. If the City Commission determines that the legal standard for reimbursement was not met, the City should move to recoup those funds.

Please review and notify us of all corrective actions taken by **October 17, 2013**.