MEMORANDUM

To: Susan Skelton, Executive Director

From: Scott Remington, General Counsel

Date: December 5, 2018

Re: Conflict of Interest Inquiry

At the December 7, 2018, Triumph Board meeting, the Board will take up for consideration the application for an award of grant funds to the Institute of Human and Machine Cognition ("IHMC"), a not-for profit research institute located in Pensacola, Florida. One of the Triumph Board members, Dr. Pam Dana, has been employed by the IHMC as its Chief External Affairs Officer. She began her career with IHMC in 2007 and is an administrative employee; i.e., not involved in the day-to-day activities of the Institute. Her position involves managing the Institute's strategic relationships with affiliated organizations, the State University System and the state and federal government. Ms. Dana's position with the IHMC was well known at the time of her appointment to this Board.

As a result of Dr. Dana's employment by the IHMC she has previously publicly announced and recused herself from any discussion or consideration involving the IHMC's Application and completed a *Form 8A Memorandum of Voting Conflict for State Officers* to disclose the issue. Nevertheless, Counsel recently received a request for clarification regarding the ability of Dr. Pam Dana to serve as a member of the Triumph Board <u>if</u> the Board elects to make a grant award to the IHMC.

Based on a review of the applicable statute governing Triumph Gulf Coast (ss. 288.80-288.8018), the Florida Ethics Laws referenced therein (ss. 112.313, 112.3135, and 112.3143), and applicable case law interpreting these statutes (notably *Fanizza v. Commission of Ethics*, 927 So. 2d 23 (Fla. 4th DCA 2006), Counsel's opinion is that the law

does not require Dr. Dana to step down from the Board in the event Triumph Gulf Coast makes a grant award to the IHMC.

This opinion is based on the understanding that the IHMC is neither "subject to the regulation" of Triumph Gulf Coast, nor "doing business with" Triumph as those words are used in the statute (s.112.313(7)(a)). Additionally, Dr. Dana has completed a Form 8A and recused herself from any consideration of the project. Counsel therefore is not aware of any opportunity for, or risk of, Dr. Dana to influence the decision making process with respect to this application. Further, this appears to be a unique situation and not a situation likely to occur with any regularity or frequency. To hold otherwise would unnecessarily or unreasonably impede Dr. Dana from performing a public service for which she is otherwise capable, competent, and qualified in contravention of the intent of the statute.

This opinion is that of counsel only and is made on behalf of, and to, the Triumph Gulf Coast Board and not to any individual Board Member. If individual Board members have questions or concerns about their specific situation that individual should look to separate counsel.

Finally, attached please find a copy of a letter dated December 3, 2018 from Julie Shepard, Esq., General Counsel for the IHMC. Ms. Shepard directed this letter to Triumph and to Dr. Dana. Counsel relied on Ms. Shepard's letter in preparing this memorandum.

ihmc

December 1, 2018

Scott Remington
Triumph Counsel
Clark Partington
125 East Intendencia Street
Pensacola, FL 32502

Re: Center for Dynamic Ocean Technologies Application to the Triumph Board

Dear Scott,

As you are aware, Dr. Pam Dana is employed at IHMC as the Chief External Affairs Officer. She began her career with IHMC in 2007 and is an administrative employee and is not involved in the day to day research activities of the Institute. Her position involves managing the Institute's strategic relationships with affiliated organizations, the State University System and the state and federal government.

I am writing to confirm that IHMC is a not for profit research institute and does not compensate employees based on projects secured. In addition, IHMC does not provide any bonus compensation to Dr. Dana or other employees for awarded projects. IHMC has no stock options or any other type of reward structure other than standard salaries and benefits.

If the Center for Dynamic Ocean Technologies Project is approved for funding, Dr. Dana will have no direct interest in any contract, franchise, privilege, project, program, or other benefit arising from this award by Triumph Gulf Coast, Inc.

I am aware of the Triumph Statutory language set forth in Section 288.8014 Florida Statutes and of the Section 112.313 Florida Statutes Code of Ethics for public employees. I believe that Dr. Dana is fully compliant with both of these Statutes and has no involvement in the proposed project and will receive no compensation from this project. In addition, at the onset of the applications being received and prior to review, Dr. Dana recused herself on the record from any project involving her employer, IHMC.

Thank you for the opportunity to speak to this issue.

Very truly yours,

Julie Sheppard

Julie L. Sheppard
Executive Vice President and
Chief Legal Counsel

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citing *Boston Old Colony Ins. Co. v. Gutierrez,* 386 So.2d 783 (Fla.1980). In that case a directed verdict was granted for an insurer on a bad faith claim based on the insured's unwillingness to settle with the plaintiff, where the insurer wanted to settle. Because this record does not reflect the facts surrounding the letter, which would have presumably become apparent if the insurer had presented its evidence at trial, we are unable to determine the legal significance of it. If I were the trial judge on remand, I would allow the case to go to the jury, because a verdict for the insurer could obviate the need for ruling on the legal effect of the letter. *Ditlow v. Kaplan,* 181 So.2d 226 (Fla. 3d DCA 1965) (commending the trial court for not directing a verdict in favor of the defendant until after the jury returned a verdict for the plaintiff).

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U.S. SECURITY INSURANCE COMPANY, Appellant,

v.

Carmen Maria CONTRERAS, as Administrator and Personal Representative of the estate of Flor Torres Osterman and guardian for and on behalf of Carmen Lorena Duarte, a minor child, as assignee of Kenneth A. Welt, Trustee, Appellee.

No. 4D04–1544.

District Court of Appeal of Florida, Fourth District.

April 5, 2006.

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Robert B. Carney, Judge; L.T. Case No. 98–2065(04).

David B. Pakula of David B. Pakula, P.A., Pembroke Pines, for appellant.

Marjorie Gadarian Graham of Marjorie Gadarian Graham, P.A., Palm Beach Gardens, Diego C. Asencio of Diego C. Asencio, P.A., North Palm Beach, and Joseph S. Kashi of Sperry, Shapiro & Kashi, P.A., Plantation, for appellee.

PER CURIAM.

In case numbers 4D04–1427 and 4D04–4175,[1] this court reversed the judgment in favor of U.S. Security Company. We therefore dismiss as moot this appeal of the denial of its motion for attorney's fees under the offer of judgment statute.

STONE, GROSS and MAY, JJ., concur.

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Joanne FANIZZA, Appellant,

v.

STATE of Florida, COMMISSION ON ETHICS, Appellee.

No. 4D05–888.

District Court of Appeal of Florida, Fourth District.

March 22, 2006.

Rehearing Denied May 19, 2006.

Background: Attorney who was also a member of city council appealed from a

1. *Contreras v. U.S. Sec. Ins. Co.,* Nos. 4D04–1427 and 4D04–4175, 927 So.2d 16, 2006 WL 708567 (Fla. 4th DCA Mar.22, 2006).

decision of the Commission on Ethics, which found her to be in violation of ethics statute governing conflicts of interest by elected officials.

Holdings: The District Court of Appeal, Klein, J., held that:

(1) attorney's continued representation of clients who brought action against city did not create conflict of interest, and

(2) attorney's representation of herself and others in seeking review of council's rezoning did not create conflict of interest.

Reversed.

1. Municipal Corporations ⇐170

Attorney's continued representation, following her election to city council, of clients who brought action against city did not create continuing or frequently recurring conflict of interest, or conflict that would impede full and faithful discharge of her public duties and, thus, did not violate ethics statute governing conflicts of interest by elected officials; attorney undertook representation more than two years before her election, all that remained of matter after her election was city's pending appeal of order awarding her attorney fees, which was affirmed without opinion, and attorney's involvement required her to abstain from only one agenda item at one council meeting. West's F.S.A. § 112.313(7).

2. Municipal Corporations ⇐170

Representation, by attorney who was a member of city council, of herself and other residents of zoning district in an action seeking certiorari review of council's rezoning of district did not create continuing or frequently recurring conflict of interest, or conflict that would impede full and faithful discharge of her public duties and, thus, did not violate ethics statute governing conflicts of interest by elected officials, even though attorney voted on the matter as member of council; attorney was required to miss only a single private council session, at which council and its lawyer discussed resolving the petition, and did not miss any portion of a public meeting. West's F.S.A. § 112.313(7); West's F.S.A. Bar Rule 4–1.11(a).

Joanne Fanizza of the Law Offices of Joanne Fanizza, P.A., Fort Lauderdale, and Jerome R. Schechter of Jerome R. Schechter, P.A., Fort Lauderdale, for appellant.

C. Christopher Anderson, III, and Philip C. Claypool, Tallahassee, for appellee.

KLEIN, J.

Appellant is an attorney who served on the city council of Wilton Manors from 1998 until 2002. She appeals an order of the Commission on Ethics which found that she violated the ethics statute governing conflicts of interest by elected public officials. The proceedings addressed two cases in which she represented clients against the city while on the council. In the first case, *Glasser*, the commission recommended a $1,000 fine, and a public censure and reprimand. In the second case, *Fanizza*, the commission recommended a $2,000 fine and a public censure and reprimand. We reverse.

The cases, which were not related, were considered by the commission on facts which were entirely stipulated. The commission found separate violations resulting from each case, but resolved them together in one order.

GLASSER CASE

In *Glasser* appellant had represented nine residents opposing a rezoning request which was granted by the city council

more than two years before appellant was elected to the council. Appellant filed a petition for certiorari in the circuit court seeking to quash the rezoning. The city confessed error and the circuit court granted the petition. Appellant then filed in circuit court a motion for attorney's fees and costs which was granted, and the city appealed that award to this court. It was during the appeal of the order awarding attorney's fees and costs, and after all of the briefs were filed, that appellant took office, in March 1998.

After her election this court affirmed and awarded appellate attorney's fees. Appellant then filed a motion in circuit court to set the amount of appellate costs and attorney's fees, and to compel the city to pay the attorney's fees already awarded. After the city attorney sent a memorandum to the mayor and council members to bring them up to date, the matter came before the council in June 1998. Appellant filed the proper form indicating a conflict of interest and was not involved. A few weeks later an agreed order was entered by the circuit court setting the amount of appellate costs and attorney's fees.

This proceeding, as well as the *Fanizza* matter, came about as a result of complaints filed against appellant by citizens. The commission found separate ethical violations for each case, based on section 112.313(7), Florida Statutes (2002), which provides:

> No public officer or employee of any agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee . . .; *nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interest and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.* [e.s.]

After acknowledging that "conflict" or "conflict of interest" is defined by section 112.312(8) to mean "a situation in which regard for a private interest tends to lead to disregard of a public duty or interest," the commission went on to state:

> Regarding the *Glasser* case and the *Fanizza* case, we find, based on clear and convincing evidence, that Respondent held a contractual relationship with her clients (private litigants suing the City and adverse to the position of Respondent's public agency), notwithstanding that she did not receive monetary remuneration for her services in the *Fanizza* case. While we have in a number of instances found that a public official did not hold a contractual relationship in situations in [sic] which he or she was not paid or otherwise compensated, it our view of the statute, long held and often stated, that a public official holds a contractual relationship with all clients of his or her law firm or practice, recognizing, as do courts, the special and professional connections between attorneys and their clients . . .
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> * * *
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> Further, we find, based on clear and convincing evidence, that Respondent's contractual relationships with her private clients in the *Glasser* and *Fanizza* cases created a continuing or frequently recurring conflict between her private interest as an attorney representing private litigants adverse to her public agency and its governmental decisions and the performance of her public duties as a member of the governing body of her public agency, and that the contractual relationship impeded the full and faithful

discharge of her public duties. Not only was the City deprived of the services of one of its governing board members ("wearing her public/Council hat") by virtue of her private entanglements occasioned by her representation of parties against her City, but she ("wearing her private lawyer hat") and her private clients had the benefit of her intimate knowledge of many of the workings of her public agency regarding the very matter in which she was acting as a private partisan. Plainly, it is difficult for us to conceive of a situation more fraught with the inability of a public official to serve two masters ... than the instant matter....

We begin our analysis by noting that our legislature recognized, in section 112.311, that the conflict of interest standards applicable to elected officials should not be so restrictive as to discourage those most qualified to serve from seeking office. The statute states, in part:

(1) It is essential to the proper conduct and operation of government that public officials be independent and impartial and that public office not be used for private gain other than the remuneration provided by law. The public interest, therefore, requires that the law protect against any conflict of interest and establish standards for the conduct of elected officials and government employees in situations where conflicts may exist.

(2) It is also essential that government attract those citizens best qualified to serve. Thus, the law against conflict of interest must be so designed as not to impede unreasonably or unnecessarily the recruitment and retention by government of those best qualified to serve. Public officials should not be denied the opportunity, available to all other citizens, to acquire and retain private economic interests except when conflicts with the responsibility of such officials to the public cannot be avoided.

* * *

(4) It is the intent of this act to implement these objectives of protecting the integrity of government and of facilitating the recruitment and retention of qualified personnel by prescribing restrictions against conflicts of interest without creating unnecessary barriers to public service.

In the *Glasser* case the appellant undertook the representation of her clients more than two years before her election to the city council, and what remained in the litigation, after her election, was the ruling on the city's pending appeal of the order awarding her attorney's fees, which was affirmed without opinion. Appellant's involvement in the litigation, after her election, resulted in her having to abstain from only one item on the agenda, at only one meeting of the council.

Our standard of review, where the facts are not in dispute and the administrative agency is interpreting the law, is to determine if the agency "has erroneously interpreted a provision of law." § 120.68(7)(d), Fla. Stat. (2002). We agree with appellant that the commission erroneously interpreted section 112.313(7).

[1] Appellant's representation in the *Glasser* case, to resolve the attorney's fees and costs, after her election, did not create a "continuing or frequently recurring conflict" or one which would "impede the full and faithful discharge of" her public duties. We cannot agree with the commission that there is any similarity between this case and *Velez v. Commission on Ethics*, 739 So.2d 686 (Fla. 5th DCA 1999), in which a full time employee of the city health department had a part-time job consulting with a local private water system

regarding compliance with environmental regulations. Unlike the present case, *Velez* involved an ongoing conflict. The commission has not cited any cases which would support a finding that appellant's involvement in *Glasser* violated the statute. It is worth noting that even if appellant had withdrawn as counsel in *Glasser,* and pursued her fees by retaining other counsel, appellant would still have had the conflict which required her to abstain when the matter came before the counsel.

FANIZZA CASE

In the second case, while appellant was on the city council, the council granted a special exception to allow townhouses in a single family zoning district by a four-to-one vote, with appellant dissenting. After that meeting, several of the property owners opposing the change asked appellant to represent them in a certiorari petition to the circuit court. Appellant agreed and named herself as a party, as well as the others, because she lived in the same zoning district that was affected by the vote. Appellant did not charge these clients a fee.

She then filed a petition for writ of certiorari in the circuit court and requested attorney's fees under section 57.105, Florida Statutes (2001), on the ground that there was no justiciable issue of law in light of the city attorney's opinion that the council should not have allowed the rezoning. The city moved to dismiss the petition, which was denied, and appellant then wrote a letter to the attorney representing the city, stating that she and the other litigants would waive attorney's fees and costs if the city would rescind the rezoning. The council, in a private session not attended by appellant, considered the offer but did not resolve the case.

The circuit court then granted the petition for certiorari, finding that the city failed to observe the essential requirements of law and due process. The court also found that the appellant did not have standing to be a party because she did not live close enough to the rezoned property. The court denied the request for attorney's fees. The city did not appeal.

Appellant then filed a motion to tax costs, and appellant and the attorney representing the city agreed on $500 for costs, which did not have to go before the council. These costs were paid and reimbursed to the plaintiffs who had advanced the costs. Appellant received no attorney's fees, and she has stated that she never intended to seek fees for herself; she intended to use the possibility of a fee award against the city as only a bargaining tool for settlement.

The commission, as we said earlier, found the same violation of section 112.313(7), in the order quoted above.

This case is more troubling than *Glasser,* because in *Glasser* appellant filed the petition for certiorari against the city about two years before she was elected, and very little remained after her election. In this case she was a member of the council, and had voted on the matter, before she filed the petition for certiorari. As a lawyer, appellant should have known better.[1]

[2] We have concluded, however, that appellant's involvement in the *Fanizza* case did not violate the statutory conflict

1. R. Regulating Fla. Bar 4–1.11(a) provides:
Representation of Private Client by Former Public Officer or Employee. A lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation.

of interest standards for public officials. Although appellant filed the petition for certiorari while she was a member of the council, her involvement in the litigation did not create a "continuing or frequently recurring conflict," nor did it "impede the full and faithful discharge" of appellant's public duties. All that this stipulated record shows is that the appellant, as a result of the conflict, was unable to attend one private session at which the city council and its lawyer discussed resolving the petition for certiorari. Although the conflict in this case appears greater than the conflict in *Glasser,* where the case against the city was filed more than two years before appellant was elected, this case did not actually require her to miss any portion of even one public meeting.

We reverse the final order of the commission in respect to both violations.

Reversed.

WARNER, J., and BAILEY, JENNIFER D., Associate Judge, concur.

Patricia FULLER, Appellant,

v.

DEPARTMENT OF EDUCATION, Appellee.

No. 1D05–1399.

District Court of Appeal of Florida, First District.

March 27, 2006.

Rehearing Denied May 4, 2006.

Background: Former employee of the Department of Education sought review of Department's decision reclassifying her position from that of career service to selected exempt service (SES), which resulted in her termination from employment.

Holdings: The District Court of Appeal, Davis, J., held that:

(1) Department was authorized to reclassify employee's position as managerial, and

(2) Department was not authorized to reject the administrative law judge's findings and substitute its own findings regarding classification.

Reversed and remanded.

Ervin, J., filed an opinion concurring and dissenting.

1. Officers and Public Employees ⇐11.2

Public Employee Relations Commission (PERC) did not have exclusive jurisdiction to classify Department of Education employee's position as managerial; after the Department of Management Services restructured the state's personnel system and established the required classification system, the state agencies became responsible for the application of the system, and thus, the Department of Education was authorized to reclassify employee's position as managerial. West's F.S.A. § 110.2035.

2. Officers and Public Employees ⇐11.2

Administrative law judge's (ALJ) findings that Department of Education employee's position was not managerial and was improperly classified from that of career service to selected exempt service (SES) were supported by competent and substantial evidence, and thus, the Department was not authorized to reject the ALJ's findings and substitute its own findings that employee was properly reclassi-