



To: Diana Gomez, Finance Director

From: Miriam Soler Ramos, City Attorney for the City of Coral Gables *NSM*

RE: Final Opinion regarding Special Taxing Districts and Security Services  
(As Amended)

Date: December 28, 2018

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Effective October 1, 2018, Miami-Dade County (“the County”) transferred control and responsibility for nine (9) special taxing districts to the City of Coral Gables (“the City”). The districts were created in accordance with Chapter 18 of the Miami-Dade County Code of Ordinances. Each district has its own unique enabling ordinance, however, the terms of the transfer are identical for each district and are memorialized in written agreements executed by the County and the City in 2017.

A primary purpose of the districts is the provision of security services for the residents, which can include a manned guard gate, roving patrol, or combination thereof, as detailed in the enabling ordinances which vary in content. While under County control, some of the districts used off-duty City of Coral Gables police officers (“CGPD officers”) to provide the security for the districts. The County, on behalf of the districts, arranged for the officers through the City’s established off-duty detail process and paid the City’s established off-duty rate for these security services.

Upon the transfer from the County to the City, residents of the districts where off-duty services were provided by CGPD officers very much wish to continue retaining those services. In addition, the Chief of CGPD wishes to have CGPD officers continue providing off-duty services to those districts as, in his opinion, it increases public safety in a myriad of ways. The City Commission has also expressed its desire to continue having CGPD officers perform the security services in those districts. In addition, the Coral Gables Fraternal Order of Police, Lodge 7 (“the FOP”) expressed its desire to have CGPD officers continue to perform off-duty work at the districts<sup>1</sup>. As such, the question arose whether the status quo with regard to CGPD officers working

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<sup>1</sup> Representatives from the FOP met with independent City Commissioners and addressed the City Commission at a public meeting expressing their organization’s desire to continue having CGPD officers perform off-duty details at the districts.

off-duty details at those districts would be permissible once the districts were transferred from the County to the City.

In analyzing the question, the only item of concern that this office was able to identify was under the Fair Labor Standards Act (“FLSA”). Pursuant to the FLSA, a non-exempt employee (which would include police officers) is entitled to overtime compensation as 1 ½ times his/her regular rate of pay for all hours worked after 40 hours/workweek. The law contains a “special detail” exception for law enforcement personnel: off-duty detail hours voluntarily worked by a law enforcement officer for a separate and independent employer are not combined with the officer’s regular worktime for the officer’s law enforcement agency employer (i.e., a municipal police department) for purposes of determining overtime compensation. 29 U.S.C. §207(p)(1); 29 CFR §553.227. Notably, the FLSA allows the officer’s law enforcement agency employer (primary employer) to facilitate the off-duty work, including selecting employees for the detail, negotiating the fee, and requiring that the fee be paid to the agency (which then distributes it to the officers).

With the assistance of special counsel, in CAO 2018-025, this office concluded that because, upon the transfer, the City Commission became the governing body of the special taxing districts, work for the districts was the same as work for the City thereby precluding CGPD officers from working in an off-duty capacity for the districts and requiring CGPD officers to work only in an overtime capacity which resulted in higher hourly rates which could not be absorbed by the budgets established for the districts. Subsequently, the FOP provided an independent opinion letter concluding that the continuation of off-duty services by CGPD officers at the districts did not violate the FLSA.

The City hired a consultant to manage the day-to-day operations of the districts. This office also considered whether having the consultant hire the officers would eliminate the FLSA concern and concluded that it did not because the consultant would not likely be considered a “separate and independent employer.”

The FOP also offered to hire the officers through the union. The same analysis was undertaken and the conclusion remained the same. Similar to the third-party consultant hired by the City to assist with operating the special taxing districts, the FOP would not likely be deemed a “separate and independent employer” under the FLSA. The FOP is not a legal entity that routinely engages in the coordination and fulfillment of off-duty assignments or in processing payment to officers for off-duty work performed.

A number of factors are considered when determining whether a particular employer is “separate and independent for purposes of the “special detail” exception for law enforcement personnel. Those factors include: whether the entities have **separate payrolls**, retirement systems, and **separate budgets**; whether the entities deal with each other at arm’s length; whether the entities are independent under state law; and **whether the entities can sue and be sued in their own name**. See DOL Wage and Hour Opinion Letters FLSA 2002-3 (June 7, 2002) and FLSA 2007-12 (December 31, 2007).

The conclusions discussed above were all based on the premise that, while the districts are legal entities, they do not operate independent of the City, the City is the legal governing body, and will have sole authority and responsibility for all matters relating to the districts. The opinions are further based on the fact that the districts are required to obtain approval from the City

Commission for changes in services and will operate through City personnel. In this light, it was concluded that if a special taxing district elects to continue using off-duty City police officers for security services, the employer of the officers is the same: the City of Coral Gables, thereby requiring over-time instead of off-duty payment to the officers.

In further researching and evaluating the districts, however, it became evident that while the districts are now managed by the City, each district is, in reality, a separate entity. Each district has its own enabling ordinance that sets out particular services (often differing from one another) and each district has different concerns that it was created to address. In addition, the districts meet many of the factors considered when determining whether a particular entity is a “separate and independent employer.” A separate special payroll is issue for off-duty work, each district has a separate budget, and each district could potentially be sued in its own name. The City’s property tax revenue cannot be used for district-specific services and the City’s budget is not able to be used to cover any deficiency in a particular district’s budget.

In addition, while the City Commission sits as the governing board for each district, when it is acting in that role, it is are not representing the City at-large, but rather, that district particularly. In fact, this is similar to when the City Commission sits as a condominium board for certain city-owned buildings. When it meets as the board of a particular condominium, it is only making decisions for a limited group of individuals. Consistent with this view, going forward, the City Commission will hold separate meetings when making decisions affecting each district within the confines of the enabling ordinance.

While this office was engaging in this analysis, the FOP provided the City with the published opinion, United States v. City of New Orleans, 947 F.Supp.2d 601 (E.D. LA 2013). In that case, the City established an off-duty office independent of the police department to arrange for off-duty details. The court found that the City did not run afoul of the FLSA because, “when on detail...the officers are paid and largely controlled by entities other than NOPD.”

In addition, opinion letter FLSA2002-3 concluded that a Downtown Development Authority (DDA) may use city police officers for downtown security in an off-duty capacity without violating the FLSA as it deemed the DDA a “separate and independent employer.” The city provided ten reasons why it believed that the DDA is separate employer. Of the ten reasons provided, six are applicable in the current situation: (1) the districts have the authority to hire and compensate their personnel, (2) the districts have separate budgets and funding authorities, (3) work for the districts would be voluntary, (4) officer would not be promised additional work from the districts, (5) work for the districts would be occasional and irregular, and (6) officer would work for the City a higher percentage of time than for the districts. In that case, the union argued that the DDA was not a separate employer because the DDA was described as a “body corporate and agency of the city.” Relying on several factors, the opinion concluded that the DDA was a separate employer and noted that the determination of whether two employers are separate and independent is made on a case-by-case basis.

In a June 1988 memorandum from the County’s Public Works Director to the Director of the Miami-Dade Police Department (MDPD), the FLSA concern is noted. Notably, however, in 2017 (while the districts were still under the County), the Miami-Dade Board of County Commissioners (“BCC”) amended the ordinance establishing the Pine Bay Estates Security Guard Special Taxing District to allow for **Miami-Dade Police officers** and officers from other agencies

to provide services to that district, in addition to Florida Highway Patrol officers who had been the exclusive providers. In doing so, a Whereas clause states: “Whereas, other special taxing district ordinances allow for off-duty MDPD or municipal police officers to provide security services within such districts.” In addition, in a memorandum in favor of Resolution No. 899-95 adopted by the BCC in July 1995 regarding the Devonwood Security Guard Special Taxing District which was under the County, the County Manager states: “Because of this districts location, only Florida Highway Patrol (FHP) and **Metro-Dade Police Department (MDPD) officers** can provide the required guard services.” **[Emphasis added.]**

As noted above, these determinations are ultimately made on a case-by-case basis. For this reason, there is no guarantee that the U.S. Department of Labor or a court would agree that the districts are “separate and independent employers” for purposes of the special detail exception, however, many of the relevant factors with regard to the districts weigh in favor of them being considered a “separate and independent employer.” Attorneys for the FOP agree with this analysis and have also provided their own independent opinion letter. In reliance on all of the above, the City believes it is acting in good faith and complying with the requirements of the FLSA.

Due to the uncertainty involved, however, the FOP has offered to fully indemnify the City and hold it harmless with regard to any FLSA claims arising out of off-duty work by CGPD officers at the districts. In Local 1035, International Brotherhood of Teamsters v. Pepsi Allied Bottlers, Inc., 99 F.Supp.2d 219 (D. CT 2000), the court found that a union indemnifying an employer for FLSA claims was not enforceable as a matter of public policy, however. In order to address that concern, the FOP and the City have agreed to enter into a Contribution Agreement (which is not an indemnification agreement) whereby the FOP will contribute to the defense of any FLSA suit brought against the City for off-duty work performed by Coral Gables police officers at the districts.

In consultation with special counsel, this opinion is issued pursuant to Sec. 2-252(e)(1) and (8) of the City Code, authorizing the City Attorney’s Office to issue opinions and interpretations on behalf of the City.

CITY OF CORAL GABLES  
CITY ATTORNEY'S OFFICE

**FINAL OPINION REGARDING SPECIAL TAXING DISTRICTS AND SECURITY SERVICES**

**(AS AMENDED)**

To: Diana Gomez, Finance Director

From: Miriam Soler Ramos, City Attorney

C: Chief Edward J. Hudak

Date: December 28, 2018

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**From:** [Ramos, Miriam](#)  
**To:** [Paulk, Enga](#)  
**Cc:** [Suarez, Cristina](#)  
**Subject:** Amended Special Taxing District opinion  
**Date:** Tuesday, July 2, 2019 10:33:43 AM  
**Attachments:** [opinion - AS AMENDED - security services - special taxing district.docx](#)  
[image003.png](#)

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Enga, please republish this opinion using the version attached. It should have the same number but note "As Amended."

Thanks,

*Miriam Soler Ramos, Esq., B.C.S.*

*City Attorney*

*Board Certified by the Florida Bar in*

*City, County, and Local Government Law*

City of Coral Gables

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