

## MEMORANDUM

**TO:** Governing Board Members

**FROM:** Sheryl G. Wood, General Counsel, Office of Counsel

**DATE:** December 29, 2008

**SUBJECT:** Reimbursement of Legal Fees and Costs of Nicholas J. Gutierrez.

### **Background**

In July 2007 an ethics complaint was filed against former Governing Board Member, Nicholas J. Gutierrez as a result of his or his firm's representation of clients that have either business or permitting ties with the District. The complainant alleged that Mr. Gutierrez's relationship with these clients created a continuing and frequently recurring conflict between his private interests and the performance of his public duties that impeded the full and faithful discharge of his public duties. The Commission on Ethics unanimously found that there was no probable cause with respect to all of the challenged relationships except one. In that instance, the Commission found that probable cause existed because of the business relationship of his firm's client and the District. Specifically, the Commission found that Mr. Gutierrez's firm's client participated in a sealed competitive bid with the District for which Mr. Gutierrez failed to file the appropriate Ethics form under Chapter 112, Florida Statutes — the form requires him to disclose his interest in a competitive bid for public business. However, while the Commission found probable cause, it also found that it would not serve the public interest to investigate the matter any further because their preliminary investigation revealed that (1) Mr. Gutierrez did not participate in the selection of the company; (2) the conflict would have been negated by an exemption under the Code of Ethics if Mr. Gutierrez had only filed the appropriate Ethics form; and (3) Mr. Gutierrez was able to show he was not aware of the form.

In light of the Commission's findings, Mr. Gutierrez has requested reimbursement of his legal expenses incurred in the defense of the complaint.

A public official may be entitled to reimbursement of reasonable legal expenses incurred in the successful defense of an ethics complaint if the complaint arises out of or in connection with the performance of their official duty and while serving a public purpose. The Governing Board of the District is authorized to reimburse a Governing Board Member after making this determination. It should be noted that a finding of probable cause is not a finding of "guilt" or "culpability." Rather, in this instance, probable cause means only that reasonable grounds for the complaint existed.

Memorandum to Governing Board Members  
December 29, 2008  
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Courts have determined that a public official is performing their official duties by voting on a matter before their agency. The purpose of the rule allowing reimbursement of legal expenses is to avoid the chilling effect that a denial of such reimbursement might have on public officials in performing their duties properly and diligently. While an ethics charge affects a Governing Board member personally, Courts have held that the public has an interest in ensuring the effective and efficient functioning of its governing body.

Mr. Gutierrez has submitted invoices totaling \$2,605.18 for his legal expenses to the Office of Counsel for review. It is the opinion of this office that these expenses are in line with charges for the specialized area of Ethics Law.

If you have any questions, please do not hesitate to call me at ext. 6976.

SGW/SB

*Gutierrez*

NICHOLAS J. JR GUTIERREZ  
BORGOGNONI GUTIERREZ & ARZA, L.L.P.  
GRAND BAY OFFICE PLAZA, SUITE 701  
2665 SOUTH BAYSHORE DRIVE  
MIAMI FL 33133-5402

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December 10, 2008  
Account No: 1888-15659  
Statement No: 45835

Attn: NICHOLAS J. GUTIERREZ, JR

ETHICS COMPLAINT 07-125

Fees

		Hours		
10/05/2008	MH		Reviewed email memorandum from Nick Gutierrez re response to follow-up inquiries from Beau Jackson; prepared email memorandum to Beau Jackson (Ethics) re same;	0.20
10/21/2008	MH		Reviewed email memorandum from Beau Jackson (Ethics) re additional inquiry; prepared email memorandum to Nicholas Gutierrez re same;	0.10
10/27/2008	MH		Reviewed email memorandum from Nicholas Gutierrez in response to Ethics Commission inquiries; prepared email memorandum to Nicholas Gutierrez re same;	0.20
11/18/2008	MH		Reviewed email memorandum from Cindy Lowell / Millie (Ethics) status of supplemental Advocate's Recommendation; prepared email memorandum to Cindy Lowell re same;	
11/23/2008	MH		Reviewed Advocate's Recommendation (Supplemental Report);	0.20
12/05/2008	MH		Prepared for and attended Ethics Commission probable cause hearing; reviewed file re same; prepared email memoranda to Nicholas Gutierrez re same; reviewed email memoranda from Nicholas Gutierrez re same; received telephone call from Nicholas Gutierrez re same;	1.30
12/10/2008	MH		Reviewed Final No Probable Cause Order; prepared letter to Nicholas Gutierrez re same.	0.20
			For Current Services Rendered	2.20
				440.00
			Recapitulation	
	<u>Timekeeper</u>		<u>Hours</u>	<u>Rate</u>
	MARK HERRON		2.20	\$200.00
				<u>Total</u>
				\$440.00
			Total Current Work	440.00

NICHOLAS J. JR GUTIERREZ

December 10, 2008

Account No:  
Statement No:

1888-15659  
45835

ETHICS COMPLAINT 07-125

Previous Balance	\$2,165.18
Balance Due	<u>\$2,605.18</u>
Please Remit	<u>\$2,605.18</u>

**ALL INVOICES DUE UPON RECEIPT.  
THANK YOU FOR YOUR PROMPT PAYMENT.**

NICHOLAS J. JR GUTIERREZ  
 BORGOGNONI GUTIERREZ & ARZA, L.L.P.  
 GRAND BAY OFFICE PLAZA, SUITE 701  
 2665 SOUTH BAYSHORE DRIVE  
 MIAMI FL 33133-5402

Attn: NICHOLAS J. GUTIERREZ, JR

ETHICS COMPLAINT 07-125

Fees

		Hours		
7/22/2008	MH		Reviewed report of investigation; reviewed letter from Kaye Starling (Ethics) re same / probable cause hearing; prepared letter to Nicholas Gutierrez re same;	0.50
3/01/2008	MH		Reviewed email memorandum from Nicholas Gutierrez re response to Report of Investigation;	0.20
3/11/2008	MH		Reviewed Advocate's Recommendation;	0.30
3/25/2008	MH		Prepared letter to Albert Massey (Ethics) requesting continuance;	0.30
3/27/2008	MH		Received telephone call from Phil Claypool (Ethics) re action granting continuance;	0.10
3/28/2008	MH		Prepared email memorandum to Nick Gutierrez re status / continuance;	0.10
	MH		Prepared letter to Albert Massey (Ethics) requesting continuance; prepared email to Nicholas Gutierrez re same / status of matter;	0.40
			For Current Services Rendered	1.90
				380.00

Recapitulation

<u>Timekeeper</u>		<u>Hours</u>	<u>Rate</u>	<u>Total</u>
MARK HERRON		1.90	\$200.00	\$380.00

Expenses

7/22/2008	POSTAGE			1.17
	POSTAGE			1.17

NICHOLAS J. JR GUTIERREZ

September 09, 2008

Account No: 1888-15659  
Statement No: 43603

ETHICS COMPLAINT 07-125

Total Expenses	1.17
Total Current Work	381.17
Previous Balance	\$1,604.01
Balance Due	<u>\$1,985.18</u>
Please Remit	<u>\$1,985.18</u>

**ALL INVOICES DUE UPON RECEIPT.  
THANK YOU FOR YOUR PROMPT PAYMENT.**

NICHOLAS J. JR GUTIERREZ  
BORGOGNONI GUTIERREZ & ARZA, L.L.P.  
GRAND BAY OFFICE PLAZA, SUITE 701  
2665 SOUTH BAYSHORE DRIVE  
MIAMI FL 33133-5402

Account No:  
Statement No:

Attn: NICHOLAS J. GUTIERREZ, JR

ETHICS COMPLAINT 07-125

Fees

		Hours	
2/29/2007	MH		
	Prepared letter to Nicholas Gutierrez re status of matter; reviewed file re same;	0.20	
5/09/2008	MH		
	Reviewed email memorandum from Beau Jackson (Ethics) re Investigative interview; conferred by telephone with Beau Jackson re same; prepared email memoranda to Nick Gutierrez re same; reviewed email memorandum to Nick Gutierrez re same; prepared email memorandum to Beau Jackson confirming May 23 investigative interview,	0.30	
5/20/2008	MH		
	Received telephone message / email memorandum from Nick Gutierrez re status / developments in Ethics investigation / WMD Inspector General investigation;	0.30	
5/23/2008	MH		
	Prepared for and attended investigative interview of Nick Gutierrez by Beau Jackson (Ethics); reviewed file re same; conferred with Nick Gutierrez re same;	2.50	
	MH		
	Travel to / from Tallahassee re investigative interview;		
5/29/2008	MH		
	Reviewed materials forwarded by Nick Gutierrez re Morrison Pump representation; prepared email memoranda to Nick Gutierrez re same; reviewed email memoranda from Nick Gutierrez re same;	0.60	
5/31/2008	MH		
	Prepared letter to Beau Jackson (Ethics) re retainer agreement with Morrison Pump;	0.30	
	For Current Services Rendered	4.20	840.00

Recapitulation

<u>Timekeeper</u>	<u>Hours</u>	<u>Rate</u>	<u>Total</u>
MARK HERRON	4.20	\$200.00	\$840.00

Expenses

01/03/2008	COPYING EXPENSE	0.50
06/02/2008	COPYING EXPENSE	1.25

NICHOLAS J. JR GUTIERREZ

June 09, 2008

Account No:  
Statement No:

1888-15659  
41731

ETHICS COMPLAINT 07-125

COPYING EXPENSE	1.75
Total Expenses	<u>1.75</u>

Advances

5/23/2008	TRAVEL EXPENSES FOR MIAMI, FL TO MEET WITH CLIENT	502.26
	TRAVEL EXPENSES	<u>502.26</u>
	Total Advances	502.26
	Total Current Work	1,344.01
	Previous Balance	\$260.00
	Balance Due	<u>\$1,604.01</u>
	Please Remit	<u>\$1,604.01</u>

ALL INVOICES DUE UPON RECEIPT.  
THANK YOU FOR YOUR PROMPT PAYMENT.

Messer, Capareello & Self, P.A.  
P.O. Box 15579  
Tallahassee, Florida 32317  
Telephone (850) 222-0720  
FEI 59-2921100

September 10, 2007

NICHOLAS J. GUTIERREZ, JR.  
BORGOGNONI GUTIERREZ & ARZA, L.L.P.  
GRAND BAY OFFICE PLAZA, SUITE 701  
2685 SOUTH BAYSHORE DRIVE  
MIAMI FL 33133-5402

Account No: 1888-15659  
Statement No: 36902

Attn: NICHOLAS J. GUTIERREZ, JR

ETHICS COMPLAINT 07-125

Fees

		Hours		
08/02/2007	MH			
	Received telephone message from Nick Gutierrez re status / developments; reviewed email memorandum from Joanna Fiallos re same; reviewed email memorandum from Nicholas Gutierrez re same / background of votes; prepared email memorandum to Nick Gutierrez re same;	0.30		
	For Current Services Rendered	0.30		60.00

Recapitulation

<u>Timekeeper</u>	<u>Hours</u>	<u>Rate</u>	<u>Total</u>
MARK HERRON	0.30	\$200.00	\$60.00
Total Current Work			60.00
Previous Balance			\$200.00
Balance Due			<u>\$260.00</u>
Please Remit			<u>\$260.00</u>

ALL INVOICES DUE UPON RECEIPT.  
THANK YOU FOR YOUR PROMPT PAYMENT.

Messer, Caparello & Self, P.A.  
P.O. Box 15579  
Tallahassee, Florida 32317  
Telephone (850) 222-0720  
FEI 59-2921100

Page: 1  
August 08, 2007  
1888-15659  
36291

NICHOLAS J. GUTIERREZ, JR.  
BORGOGNONI GUTIERREZ & ARZA, L.L.P.  
GRAND BAY OFFICE PLAZA, SUITE 701  
2665 SOUTH BAYSHORE DRIVE  
MIAMI FL 33133-5402

Account No:  
Statement No:

Attn: NICHOLAS J. GUTIERREZ, JR

ETHICS COMPLAINT 07-125

Fees

		Hours	
7/16/2007			
MH	Conferred by telephone with Nicholas Gutierrez and Santiago Echemendia re Ethics Complaint 07-125; reviewed complaint; reviewed and analyzed law re same; prepared email memoranda to Nicholas Gutierrez and Santiago Echemendia re same; reviewed email memoranda from Nicholas Gutierrez and Santiago Echemendia re same;	0.80	
7/24/2007			
MH	Received telephone call from Eileen Coates re conflicting employment / issues and strategy; For Current Services Rendered	0.20 1.00	<u>200.00</u>

Recapitulation

Timekeeper	Hours	Rate	Total
MARK HERRON	1.00	\$200.00	\$200.00
Total Current Work			200.00
Balance Due			<u>\$200.00</u>
Please Remit			<u>\$200.00</u>

**ALL INVOICES DUE UPON RECEIPT.  
THANK YOU FOR YOUR PROMPT PAYMENT.**



MESSER CAPARELLO & SELF, P.A.

Attorneys At Law

[www.lawfla.com](http://www.lawfla.com)

Mark Herron  
Also Admitted in Georgia  
[mherron@lawfla.com](mailto:mherron@lawfla.com)

*Confidential Communication / Attorney-Client Privileged*

December 29, 2008

Nicholas J. Gutierrez, Jr.  
Borgognoni and Gutierrez LLP  
Grand Bay Office Plaza, Suite 701  
2665 South Bayshore Drive  
Miami, FL 33133-5402

RE: *Revised letter from December 10, 2008*  
*In re Nicholas J. Gutierrez, Jr. Complaint No. 07-125 (Ethics Commission)*

Dear Mr. Gutierrez:

The purpose of this correspondence is to apprise you of developments with respect to the above-referenced complaint filed with the Commission on Ethics.

At its meeting of December 5, 2008, the Commission on Ethics concluded that there was "no probable cause" to believe that you violated the Code of Ethics for Public Officers and Employees, with respect to your firm's contractual relationship with Subaqueous Services, Inc., and the Commission concluded there was "probable cause", but voted to take no further action with respect to your firm's contractual relationship with Morrison Pump Company, Inc., as alleged. A copy of the Commission's Order is enclosed for your review and information.

By this action, the Commission has concluded its consideration of this matter. Also enclosed is the final invoice for fees and costs regarding legal representation on your behalf in this matter.

I trust that this information is of assistance to you. If you have additional questions or concerns with respect to this request, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark Herron', is written over the word 'Sincerely' and extends down towards the name 'Mark Herron' printed below.

Mark Herron

Enclosure(s)

DATE FILED

DEC 10 2008

BEFORE THE  
STATE OF FLORIDA  
COMMISSION ON ETHICS

COMMISSION ON ETHICS

In re NICOLAS J. GUTIERREZ, JR.,)

Complaint No. 07-125

Respondent. )  
)  
)  
)  
\_\_\_\_\_)

ORDER FINDING PROBABLE CAUSE

Based on the preliminary investigation of this complaint and on the recommendation of the Commission's Advocate, the Commission on Ethics finds that there is probable cause to believe the Respondent, as a member or Vice Chair of the governing board of the South Florida Water Management District, violated Section 112.313(7)(a), Florida Statutes, by having a conflicting employment or contractual relationship because of his law firm's representation of Morrison Pump Company, Inc., a company doing business with Respondent's agency. However, pursuant to Section 112.324(11), Florida Statutes, the Commission determines that the public interest would not be served by proceeding further regarding this allegation because preliminary investigation and proceedings of the Commission show that the business between the company and the District was via sealed, competitive bidding, show that the Respondent did not participate regarding the business or the selection of the company, show that the competitive bidding exemption of Section 112.313(12)(b), Florida Statutes, would have applied to negate the conflict but for the Respondent's lack of filing of CE Form 3A, and show that the Respondent was not aware of the filing requirement. Therefore, the Commission will take no further action as to this allegation unless the Respondent requests a public hearing. Pursuant to Section 112.324(3), Florida Statutes, the Respondent is given 14 days from the date of this order to request in writing a

public hearing on the basis of which it will be determined whether the Respondent has violated Section 112.313(7)(a), Florida Statutes. If no request for a public hearing is received by the Commission or postmarked within 14 days of the date of this order, the Respondent will be deemed to have waived his right to a public hearing regarding this allegation.

In addition, based on the investigation, the Commission rejects the recommendation of its advocate and finds that there is no probable cause to believe the Respondent violated Section 112.313(7)(a) by having employment or a contractual relationship with Subaqueous Services, Inc., a company doing business with Respondent's agency. The investigation shows that the only relationship remaining between Respondent's firm and the company when the company entered into business with the District was an outstanding bill from the firm to the company for services rendered prior to the inception of the business between the company and the District. Therefore, this allegation is dismissed and will not be at issue in any hearing held in this matter.

ORDERED by the State of Florida Commission on Ethics meeting in public session on December 5, 2008.

December 10, 2008  
Date

Cheryl Forchilli  
Cheryl Forchilli  
Chair

cc: Mr. Mark Herron, Attorney for Respondent  
Ms. Jennifer M. Erlinger, Commission Advocate  
Mr. Paul Reynolds, Complainant

CF/CCA/mwf