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Legal experts say Marks' vote was 'textbook' conflict

Mayor's attorney says Marks did nothing illegal, unethical

By Jeff Burlew
senior government editor

When Tallahassee Mayor John Marks voted for a federal grant involving an Atlanta nonprofit that paid him as a board member, he put the grant project and his political future at risk.

Marks may have violated federal regulations, Florida's ethics laws and the city's own ethics policy when he voted Sept. 15, 2010, for a \$1.6-million grant involving the Alliance for Digital Equality, which paid Marks \$86,000 over several years as a member of its board of advisers.

It wasn't the first time Marks, an attorney, voted in a way that left him vulnerable to conflict-of-interest accusations. In 2007, he provided a key vote allowing the smart-meter project with Honeywell International to move forward despite ties between his law firm at the time and the company.

Marks conceded in a March 30 news conference he "made a mistake" when he voted for the ADE grant. He now says he can't comment on the ADE or Honeywell matters because they are the subjects of complaints before the Florida Commission on Ethics.

Officials found guilty of ethics violations can face reprimands, fines and, in the most serious cases, suspension or removal from office.

"I have full confidence in the Ethics Commission's investigation and review process," Marks said in a written statement, "and once this is resolved I look forward to discussing the details of these complaints."

David Moye, former assistant U.S. attorney for the Northern District of Florida, said Marks could face severe penalties over the ADE vote.

"To think you can take \$86,000 from being an 'adviser' and then turn around and direct \$1.6 million in grant money to that very entity because of your elected position without accountability and disclosure is the textbook example of a conflict of interest," said Moye, partner in the Moye Law Firm of Tallahassee.

Tallahassee attorney Barry Richard, who is defending Marks in the ethics complaints, said the mayor acted appropriately under a state law requiring officials to vote absent a conflict.

"In this case, my conclusion — which is unequivocal — is that John did absolutely nothing illegal or unethical," said Richard, who represented George W. Bush during the disputed 2000 election. "In fact, I would have to state it more positively — he did exactly what he was required to do and what we would expect a public official to do."

Bob Stern, an attorney and president of the nonprofit, nonpartisan Center for Governmental Studies in Los Angeles, said public officials must avoid "any hint" that they have a financial stake or bias in a decision.

"There's an appearance anyway if not reality that the mayor was biased and that his nonprofit had a financial stake," Stern said. "It's not necessarily in the best interest of the city."

FBI seeks documents related to ADE grant

The city, which applied for the grant in March 2010 and learned it won the money in August 2010, planned to partner with ADE, the Go Beyond Foundation and Apalachee Ridge Technology Learning Center to bring technology, tutoring, job training and other programs to underserved residents on the south side.

But the project, which wasn't competitively bid, is in limbo as federal authorities review it.

The FBI recently asked for copies of emails between city staff members and ADE and last month dispatched a special agent to City Hall to pick up a copy of the city's purchasing policy. The FBI doesn't confirm or deny investigations.

The National Telecommunications and Information Administration, which is overseeing the grant through its Broadband Technology Opportunities Program, has referred the matter to the U.S. Department of Commerce's Office of Inspector General. BTOP received \$4.7 billion in federal stimulus money for broadband Internet improvements across the country.

Marks doesn't abstain, signs grant agreement

On Sept. 15, Marks joined in a 4-0 City Commission vote, with Commissioner Mark Mustian absent, allowing the city to participate in the grant. The next day, the mayor signed the grant agreement.

The federal government was to contribute \$1.2 million of the \$1.6-million award, with the rest coming from the city, which was to put up \$88,000 for salaries and other costs; ADE, which was to give \$76,000 worth of computers and software; and the Go Beyond Foundation, which was to raise \$210,000.

The city said in agenda materials that the project would use BTOP funds to set up the "ADE Learning Without Walls" initiative at Apalachee Ridge Technology Learning Center, located near Rickards High School.

Agenda changes with city's second vote

When the project came before commissioners again on Dec. 8, the agenda item no longer identified ADE as a partner. It instead listed Partners for Digital Equality, an offshoot of ADE that has the same chairman, Julius Hollis, and adjoining offices. The project was renamed the "PDE Learning Without Walls" initiative.

Cynthia Miller, a spokeswoman for ADE and PDE, said previously that PDE was set up under the federal tax code to offer tax exemptions as part of fundraising. She said ADE was not. City officials say PDE got involved later as the "operating branch" of the organization. Miller did not respond to multiple requests for interviews.

Marks abstained from the Dec. 8 vote. Commissioners voted 4-0 to let the city manager negotiate and execute three-year contracts with PDE, for no more than \$761,609, and Go Beyond, for no more than \$600,187.

The next day, Marks filed a voting-conflict form saying he didn't vote because it would have led to the special gain of ADE.

According to ADE's tax filings, the organization paid Marks \$19,000 in 2007; \$24,000 in 2008; and \$23,000 in 2009. ADE has said Marks was paid \$20,000 in 2010. He joined the board in 2007 and was paid through October 2010, when ADE stopped paying board members. ADE tax filings said Marks worked an average of 10 hours a week.

The alliance says it is a nonprofit consumer-advocacy organization designed to ensure equal access to technology in underserved communities. Neither ADE nor PDE are registered to do business in Florida, according to state Division of Corporation records.

Attorney: Apology from Marks unnecessary

Under Florida ethics laws, public officials can't use their official position to secure a special gain for themselves or others, and they can't work for any entity doing business with the board on which they serve. They also can't have any interest, financial or otherwise, or take part in any business transaction

or professional activity that conflicts with their public duties.

Officials who have a conflict of interest must state their conflict before a vote occurs and file a memo within 15 days disclosing the nature of the conflict.

The city's Code of Ethics says public representatives are responsible for applying common sense and sound judgment in all actions:

"To establish the highest level of public trust, we shall maintain exemplary standards for personal integrity, truthfulness and fairness in carrying out our public duties. We should avoid any appearance of improprieties or a conflict of interest in our roles as public servants and in our personal lives."

On March 30, Marks said in a news conference he erred by voting on the grant. It's a concession Marks' attorney Richard says was unnecessary. Richard said Marks had to weigh Florida ethics laws against a state statute that says no public official may abstain from voting unless "there is, or appears to be, a possible conflict of interest" under the ethics laws.

Richard said there was no conflict because Marks voted only to accept the federal grant.

"I think that John was not permitted to abstain from that vote," Richard said. "He clearly had no immediate special, private gain nor did ADE at that point. And at that point, I think it was not only appropriate for John to vote, I think he was mandated by law to accept the grant for the city."

Richard said that at the time of the vote, the city had no contracts with ADE or the other partners. But Moye said the grant was directly linked to ADE.

"They married up to ADE in the grant," Moye said. "So they're approving that grant. It was accepting federal money that would go through ADE as proposed in the grant."

Richard said Marks' deal with ADE was a straight sum of money annually regardless of whether he ever produced business for them.

"And if the city got this program, John got nothing from it," Richard said.

Bruce Jacob, a professor at the Stetson University College of Law, said Marks had "a clear conflict of interest."

"It seems to me at the very least that he should not have taken part in discussions on that issue and should not have voted on that issue without at least disclosing his relationship with that organization and getting the views of the others on the commission on whether or not he should have voted," Jacob said.

Ethics Commission has questions

Marks sent a letter to the Ethics Commission dated March 31 asking for an advisory opinion on the vote. He asked whether any voting conflict would be "cured" by the fact that he abstained Dec. 8.

Philip Claypool, executive director of the Ethics Commission, responded in an April 28 letter, saying it was not clear what involvement ADE has or is expected to have with the federal grant.

"What is the nature and extent of ADE's anticipated involvement with the grant?" Claypool asked. "Also, will the city be contracting with ADE? If they will, can you provide us with the terms of that agreement, or at least an explanation of the parties' obligations?"

Claypool went on to say that he saw no reference to ADE affiliate PDE in the grant documents.

"What is the nature and extent of their anticipated involvement? Will PDE replace ADE under the federal grant?" he asked.

On April 25, Erwin Jackson, a real-estate businessman who ran for the City Commission last year, filed ethics complaints over the ADE and Honeywell votes. Recently, Marks stepped down from the ADE board, a decision that both parties described as "mutual."

Federal government bans conflicts

The federal grant document Marks signed requires the recipient to comply with a number of provisions, including parts of the Code of Federal Regulations.

A conflict-of-interest prohibition is spelled out in Part 24 of the code, which establishes uniform administrative rules for federal grants and cooperative agreements involving state and local governments.

The code says that no employee, officer or agent of the grantee — in this case the city — may participate in the selection or the award of a contract supported by federal funds if it involves a conflict of interest, either "real or apparent." The code says that a conflict would arise if an employee, officer or agent has a financial or other interest in the firm selected for award.

The NTIA issued a statement saying it referred the grant to the Inspector General as soon as it became aware of the ADE controversy.

"NTIA has put into place a robust grants monitoring system to mitigate waste, fraud and abuse to ensure compliance with award conditions," the agency said.

In a February report to Congress, the NTIA said it was working to strengthen oversight of its projects after the Inspector General raised concerns.

No contracts have been signed with the grant partners. Raoul Lavin, the city's director of management and administration, said the city remains in contact with officials from the Department of Commerce.

"We're still waiting to see what we hear from all these reviews that are going on before we proceed with anything," Lavin said. "In the interim, we've been working to make sure all the contracts are finalized. As soon as we hear anything, we can move forward."

But City Commissioner Gil Ziffer, who said he was disappointed by the mayor's actions, is worried the project will lose federal funding.

"My guess is the feds aren't going to feel very comfortable with this even if the mayor's cleared," Ziffer said. "But I don't know that — I have a suspicion."

Additional Facts

Mayor John Marks' board and professional memberships:

- Fringe Benefits Management Company, paid board member and general counsel
- Sunshine State Governmental Financing Commission, board member
- Tallahassee Cultural Resources Commission, board member
- Collins Center for Public Policy, board member
- U.S. Conference of Mayors, board member

FORMER BOARD MEMBERSHIP:

- Alliance for Digital Equality, board of advisers, 2007 until April 2011
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