School Board Superintendent, elected incumbent's term

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Subject:
School Board Superintendent, elected incumbent's term

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RE: SCHOOL BOARD – SUPERINTENDENT – APPOINTMENT or ELECTION – TERM OF INCUMBENT – Article IX, section 5 of the Florida Constitution allows a county to change the office of superintendent of schools from elective to appointive, but does not authorize the district school board to terminate an elective incumbent's four-year term when electors vote to make the change to appointive. There must be express language in the constitutional provision clearly providing for termination of the incumbent's elective office, which is a property right. Section 5 contains no such language. Art. IX, §5, Fla. Const.; §§ 509.032(7) and 509.242(1)(c), Fla. Stat. (2018).

Dear Mr. Gibbs:

We have received your letter on behalf of the School Board of Marion County, asking this office for an opinion on the following questions, as rephrased:

1. What effect, if any, does the decision of the electors in November 2018 to make the office of the superintendent of schools appointive have upon the term of the incumbent superintendent who was elected in November 2016 to serve a four-year term?
2. If the incumbent superintendent is not required or permitted to complete her four-year term, does the School Board have an obligation to pay her for the loss of emoluments for the remainder of the term?

In the general election this past November 2018, the electors of Marion County voted to change the office of superintendent of schools from elective to appointive, as authorized by Article IX, section 5 of the Florida Constitution, which provides:

"SECTION 5. Superintendent of schools.—In each school district there shall be a superintendent of schools who shall be elected at the general election in each year the number of which is a multiple of four for a term of four years; or, when provided by resolution of the district school board, or by special law, approved by vote of the electors, the district school superintendent in any school district shall be employed by the district school board as provided by general law. The resolution or special law may be rescinded or repealed by either procedure after four years."

A majority of the electors in Marion County voted "yes" to the following:

“Should the office of superintendent of schools of The School Board of Marion County, Florida be appointed and employed by The School Board of Marion County, Florida, as authorized by the Florida Constitution?”

You inquire whether the incumbent Superintendent’s position has thus been terminated, allowing the School Board to immediately appoint a new Superintendent, and, if so, whether there is no duty to pay the incumbent for the loss of emoluments. Based upon pertinent case law, it appears that the current superintendent is entitled to complete her elective term of office.

Section 1001.461, Florida Statutes (2018), sets forth the procedure for changing the office from elective to appointive. Section 1001.47, Florida Statutes (2018), provides the salary of an elected district school superintendent. Section 1001.50, Florida Statutes (2018), sets forth provisions applicable to the employment contract required between the School Board and an appointed superintendent. None of these provisions addresses whether the term of an elected superintendent is terminated when the position is thus changed.

There are several judicial decisions and Attorney General Opinions that have, over the years, addressed variations of the issue you raise based upon changes in the applicable constitutional provisions and statutes. It is useful to review this history.

In 1955, the Florida Constitution, Article VIII, section 6, provided for a county Superintendent of Public Instruction, to be elected for a term of four years.[1] In 1956, Article XII, section 2A of the Constitution was amended to allow the voters in Duval, Sarasota, Dade, and Pinellas Counties (or the Legislature by special act) to change the superintendent position from elective to appointive. In 1957, the Attorney General was asked whether a county superintendent would be able to serve out the balance of his (or her) four-year term if county electors voted during such term to change the position to appointive. The Attorney General concluded in Attorney General Opinion 57-13 that “the term of office of the incumbent school superintendent would terminate at once upon an affirmative vote of the electors at a special election as provided in the amendment,” and thus the superintendent could not serve out his elective term.

The Florida Supreme Court reached a different result eight years later. In 1962, section 2B was added to Article XII, allowing 15 additional counties, including Charlotte, to vote to make the position appointive. Soon after, the Florida Supreme Court considered the effect of the change from election to appointment in *Hancock v. Board of Public Instruction of Charlotte County*, 158 So. 2d 519 (Fla. 1963). The Charlotte County Superintendent of Public Instruction, W. S. Hancock, was elected to a four-year term to run until January 1965. Voters changed the office to appointive as of December 29, 1962. Mr. Hancock sought declaratory relief regarding the effect of amendment 2B, and the circuit court determined that the referendum had the effect of abolishing his elected office and creating an appointive office, and thus his term had expired on the effective date of the referendum and he was not entitled to the emoluments of his office thereafter.

The Florida Supreme Court reversed, finding that the office had not been abolished, but instead the method of selecting a superintendent had simply been changed by the electors of the county. The Court concluded that the change from elective to appointive did not affect the fact that the superintendent would serve four years either way. The changeover to appointed office would

take effect upon the expiration of the incumbent's elective term (or if the office became vacant because of death, resignation, or removal). The Court observed that "amended Article XII, although self-executing, is clearly designed to be prospective only in its operation."[2]

The following year, 1964, sections 2C and 2D were added to Article XII, allowing eight more counties to make the switch. These provisions, however, also included a subsection (4) that had not been included in 2A or 2B, and which provided:

"In the event a referendum election results in a change in the method of selecting a county superintendent, the incumbent shall be permitted to serve the remainder of the term of office to which he was duly elected or appointed."

In 1966, section 6A was added to Article VIII, effectively removing the requirement that an appointed superintendent serve a four-year term:

"Appointive county superintendents of public instruction; terms and employment.—In those counties authorized to appoint a superintendent of public instruction under Article XII of the state constitution the superintendent shall serve at the pleasure of the board provided that the board may enter into a contract of employment with such appointed county superintendent[.]"

The Board could thereafter determine the length of an appointed superintendent's term by having the officer serve at the Board's pleasure or for a particular term of years by contract.

In 1967, the Attorney General was asked to determine the effect of section 6A on the elected incumbent's four-year term after a referendum changed the office in Broward County from elective to appointive under Article XII, section 2B (which covered Broward County). Floyd Christian had been elected county superintendent in November 1964, to serve until November 1968. After the enactment of section 6A in 1966, voters in Broward County made the office appointive in November 1967, and incumbent superintendent Christian asked the Attorney General what effect this would have on his term of office.

The Attorney General observed in Attorney General Opinion 67-76 that because of the addition of section 6A to the Constitution, dealing with the terms of *appointed* superintendents, "[n]ow … a situation exists which did not exist at the time of the Hancock decision." The Attorney General concluded that when a superintendent's term is changed from elective to appointive, section 6A declares that the term is no longer for four years, "but on the contrary his service is at the pleasure of the county school board." Accordingly, the incumbent's term had expired as of the recent election.

Again, the Florida Supreme Court subsequently decided a case in a manner contrary to the Attorney General Opinion. In *State ex rel. Reynolds v. Roan*, 213 So. 2d 425 (Fla. 1968), W. D. Reynolds was elected Superintendent of Public Instruction in Collier County to successive four-year terms commencing in January 1953, 1957, and 1961, with the latter term expiring in January 1965. In November 1963, pursuant to Article XII, section 2B (which covered Collier County), the electors voted to make the position appointive. Omitting details of the situation that are provided in the opinion, suffice it to say that after the change to appointment in 1963, the Board of Public Instruction appointed Mr. Reynolds to what ended up being a four-year term

following the expiration of his elective term, so that the appointive term would end in January 1969.

After the Constitution was amended in November 1966 to add Article VIII, section 6A, providing that an appointed superintendent would serve at the pleasure of the Board of Public Instruction or pursuant to a contract of employment, the Board in August 1967 declared the office of superintendent to be vacant and appointed John D. Roan as new superintendent. Reynolds filed an action in circuit court to determine which man was entitled to hold the office. The Court approved the validity of the summary removal of the incumbent, Mr. Reynolds, and the appointment of Mr. Roan.

The Supreme Court reversed. As had the Court in *Hancock* with regard to Article XII, section 6, the Court concluded that Article XII, section 6A was "prospective in application."[3] The Court said that nothing in section 6A expressly or impliedly authorized county school boards that have changed from elective to appointive, "to cut short the tenure of office of the incumbent county school superintendents" who had been appointed to a four-year term as previously required, simply because the new amendment allowed the Board to enter into a contract with the superintendent for a term other than four years.

"Appellant was a duly appointed constitutional officer for a term ending in January, 1969, and his right to exercise the duties of the office and enjoy the emoluments thereof is a species of property which the law will protect and will also redress if wrongly deprived of it. Admittedly, the sovereign power creating the office—in this case, the people speaking through the Constitution—can abolish it at will, or the term of office may be shortened, including that of the incumbents, when this becomes necessary in making a fundamental change in the office. But we think that an intention to apply the shortened term of an office, or the changed qualifications thereof, to an incumbent, resulting in his ouster from the office before the end of his term, must be clearly expressed in the statute or constitutional amendment making the change before it will be given that effect."[4]

The Court concluded that the amendment was intended to "supplement the appointive powers" of the Board of Public Instruction. Absent express language allowing ouster of an incumbent, no Board could "arbitrarily vitiate" an incumbent's term.[5]

Although *Reynolds* dealt with a superintendent who had gone from an elective four-year term to an appointive four-year term, and the holding applies to the invalid termination of his appointive term, both *Hancock and Reynolds* demonstrate that a term of office is not terminated by a constitutional provision applicable to such office absent "clear and unequivocal" language authorizing the truncation of an incumbent's term.[6]

The current constitutional provision quoted at the beginning of this opinion, Article IX, section 5, was enacted in the 1968 constitutional revision and replaced the provisions discussed above with regard to school superintendents. It provides two options. First, "there shall be a superintendent of schools who shall be elected at the general election in each year the number of which is a multiple of four for a term of four years." In the alternative, "when provided by resolution of the district school board, or by special law, approved by vote of the electors, the district school superintendent in any school district shall be employed by the district school board

as provided by general law." The two provisions are separated by the conjunction "or." There is no language therein that allows a new appointive term to cut off an elected four-year term.

As observed in *Reynolds*, a public officer has a property right to serve out his or her tenure of office and to receive the emoluments of such office, assuming the officer's continuing qualification for the office. When the Constitution creates the office, it can be shortened only by a constitutional provision clearly expressing such effect.[7]

You refer to section 1001.46, Florida Statutes (2018), as supporting a conclusion that the change from elective to appointive superintendent immediately terminates the incumbent's term. That statute provides:

"District school superintendent; election and term of office.—The district school superintendent shall be elected for a term of 4 years or until the election or appointment and qualification of his or her successor."

This provision, however, existed before the office of superintendent was permitted to be appointive. In 1955, when the term of the elective office was four years, section 230.19, Florida Statutes, provided that when a vacancy occurred on the county board of schools, it "shall be filled by appointment by the governor." Section 230.24, Florida Statutes, provided what section 1001.46 now provides, almost verbatim. Accordingly, the provision authorized an incumbent elected superintendent to remain in office until an elected successor was qualified for the position post-election, or, in the event of a vacancy due to relocation, death, resignation, retirement, etc., until the governor appointed a successor. This provision does not support early termination of an incumbent's elective term in the absence of express language authorizing such procedure in Article IX, section 5.

Having concluded that Article IX, section 5 does not authorize the removal from office of the elected Marion County Superintendent of Schools before the end of her term, we need not address the question of emoluments in the event of ouster.

Sincerely,

Pam Bondi
Attorney General

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[1] *See also* §§ 230.03 and 230.24, Fla. Stat. (1955).

[2] *Hancock*, 158 So. 2d at 522. As stated in a different case by the First District: "A strict rule of statutory construction indulged in by the courts is the presumption that the legislature, in the absence of a positive expression, intended statutes or amendments enacted by it to operate prospectively only, and not retroactively." A statute operates retrospectively or retroactively "if it takes away or impairs vested rights acquired under existing laws[.]" *Heberle v. P.R.O. Liquidating Co.*, 186 So. 2d 280, 282 (Fla. 1st DCA 1966); *Accord Thayer v. State*, 335 So. 2d

815, 817-18 (Fla. 1976); *Seaboard System R.R., Inc. v. Clemente for and on Behalf of Metropolitan Dade Cty.*, 467 So. 2d 348, 357 (Fla. 3d DCA 1985).

[3] *Reynolds*, 213 So. 2d at 428.

[4] *Id.* (citations omitted).

[5] *Id.*

[6] *See also* Op. Att'y Gen. Fla. 78-153 (1978) (statutory amendment requiring Taylor County Board of County Commissioners to appoint hospital's governing board instead of the Governor did not operate to shorten the terms of incumbent members of the hospital board, citing *Hancock and Reynolds*).

[7] *See also DuBose v. Kelly*, 181 So. 11, 17 (Fla. 1938); *State ex rel. Landis v. Tedder*, 143 So. 148, 146 (Fla. 1932); *Piver v. Stallman*, 198 So. 2d 859, 862 (Fla. 3d DCA 1967).