Ethics Ordinance -- Post-Employment Restrictions

Number: INFORMAL

Date: May 13, 2015

Mr. Scott L. Knox
County Attorney's Office
2725 Judge Fran Jamieson Way
Building C, Room 308
Viera, Florida 32940

Dear Mr. Knox:

On behalf of the Brevard County Board of County Commissioners, you have asked for this office's assistance in determining the authority of the board to enact an ethics ordinance and the validity of this proposed ordinance. The ordinance prevents past and current county commissioners, for a period of two years after they leave the board, from being employed by any organization that receives more than half of its funding from the county commission. Thus, the questions presented involve the power of a county to adopt an ethics ordinance, the validity of an ordinance which would limit employment opportunities for county commissioners for a period of time after they have completed their public service, and the retroactive application of such an ordinance to those who have served prior to adoption of the ordinance. Because this office does not comment on local legislation,[1] my comments will be general in nature. I offer the following informal comments with regard to the authority of charter counties to enact legislation and limitations on that authority.

Brevard County is a Florida charter county.[2] Charter counties possess "all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors."[3] The governing body of a charter county "may enact county ordinances not inconsistent with general law."[4] Thus, charter counties have home rule powers to act in a manner that is not inconsistent with state law.

The Code of Ethics for Public Officers and Employees (the ethics code) is set forth in Part III, Chapter 112, Florida Statutes. As expressed by the Legislature in adopting the code

"(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." (e.s.)

Further,

"It is hereby declared to be the policy of the state that no officer or employee of a state agency or of a county, city, or other political subdivision of the state, and no member of the Legislature or legislative employee, shall have any interest, financial or otherwise, direct or indirect; engage in any business transaction or professional activity; or incur any obligation of any nature which is in substantial conflict with the proper discharge of his or her duties in the public interest. To implement this policy and strengthen the faith and confidence of the people of the state in their government, there is enacted a code of ethics setting forth standards of conduct required of state, county, and city officers and employees, and of officers and employees of other political subdivisions of the state, *in the performance of their official duties*. It is the intent of the Legislature that this code shall serve not only as a guide for the official conduct of public servants in this state, but also as a basis for discipline of those who violate the provisions of this part."[5] (e.s.)

The Florida Code of Ethics provides a guide for public officers and employees "in the performance of their *official duties*." The provisions of the code are not directed at governmental officers and employees who have left government service with the exception of provisions relating to lobbying which are specifically included within the scope of the code.[6] In fact, the code states that private economic arrangements should not be denied except when conflicts with public responsibilities cannot be avoided. Thus, any ethics provisions drafted locally must be drawn carefully so as to address problems as narrowly as possible.

You have cited section 112.326, Florida Statutes, authorizing additional ethics requirements to be imposed by political subdivisions and governmental agencies and providing that:

"Nothing in this act shall prohibit the governing body of any political subdivision, by ordinance, or agency, by rule, from imposing upon its own officers and employees additional or more stringent standards of conduct and disclosure requirements than those specified in this part, provided that those standards of conduct and disclosure requirements do not otherwise conflict with the provisions of this part."

I would note that the proposed Brevard County ordinance does not have a state counterpart which would limit employment opportunities for a period of time after leaving public service.

Section 18, Article I of the Florida Constitution provides that "[n]o administrative agency, . . . shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law." I note that the proposed Brevard County ethics ordinance includes a penalties section which includes language such as "[e]ach . . . violation of this ordinance shall constitute a separate violation punishable by a fine not to exceed $500." The ordinance also includes provisions for removal from office for violations of the ordinance.

This office has concluded previously that a county is an "administrative agency" for purposes of section 18, Article I, Florida Constitution.[7] In Attorney General Opinion 79-109, this office concluded that a charter county does not have the authority to enact an ordinance which

provides for the imposition of civil penalties by county agencies or which purports to authorize a county consumer protection board to impose a civil penalty for violation of that board's cease and desist orders.[8] Finally, section 18, Article I of the Florida Constitution prohibits the administrative imposition of any penalty "except as provided by law." The phrase "by law" contemplates an enactment of the Legislature.[9] It does not include or contemplate a county ordinance.[10] Accordingly, unless provided by law, a charter county cannot enact an ordinance which provides for the imposition of civil penalties for violations of county ethics ordinances.

The Florida Constitution contains a number of provisions which could be implicated by provisions which prohibit a governmental officer or employee from employment for a period of time after he or she leaves office. Article I, section 2, Florida Constitution, provides:

"SECTION 2. Basic rights.—All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, *to be rewarded for industry, and to acquire, possess and protect property*; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or physical disability." (e.s.)

Further, Article I, section 10, Florida Constitution, provides:

"SECTION 10. Prohibited laws.—No bill of attainder, ex post facto law or *law impairing the obligation of contracts shall be passed*." (e.s.)

I note that the proposed Brevard County ordinance contains provisions entitled "Prohibited Compensation" and "Remedies; Prohibited Contracts Voidable" both of which contain numerous references to employment contracts or contracts for compensation that would not only regulate the behavior of former governmental officers, but would prohibit private companies and enterprises from paying compensation to those employed by them under certain circumstances. I have serious concerns about the constitutionality of these local provisions in light of the Florida Constitutional provisions cited above.

The language of this proposed ordinance may also operate as a direct infringement upon the basic individual freedom of the right to work. In addition, I note that a liberty interest could be implicated when a state or a county imposes a stigma or other disability on an individual which forecloses his or her freedom to take advantage of other employment opportunities. Further, while regulations relating to serving two masters is acceptable while performing public service, the regulation of employment after the completion of service could compromise or interfere with a former official's right to contract and his or her right to engage in legal employment.

Finally, I would note that section 112.316, Florida Statutes, provides direction as to the intent of the Legislature in construing provisions of the Florida Ethics Code:

"It is not the intent of this part, nor shall it be construed, to prevent any officer or employee of a state agency or county, city, or other political subdivision of the state or any legislator or legislative employee from accepting other employment or following any pursuit which does not interfere with the full and faithful discharge by such officer, employee, legislator, or legislative

employee of his or her duties to the state or the county, city, or other political subdivision of the state involved."

I trust that these informal comments will assist you in advising your client, the Brevard County Commission. I enclose material from my research which appears to be narrowly drawn with regard to former public officials being employed by a business that has a contract with the public body previously represented by the former public official. This material may provide an opportunity for discussion by the commission and may avoid a number of the potential problems discussed herein.

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

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Enclosure: Oregon Public Official Guide "Employment of Former Public Officials"

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[1] *See* Department of Legal Affairs Statement Concerning Attorney General Opinions, stating that "[o]pinions generally are not issued on questions requiring an interpretation only of local codes, ordinances or charters rather than the provisions of state law" available at http://myfloridalegal.com/pages.nsf/Main/dd177569f8fb0f1a85256cc6007b70ad.

[2] *See* Brevard County Charter, adopted by the Brevard County Commission on November 8, 1994.

[3] Article VIII, s. 1(g), Fla. Const.

[4] *Id*.

[5] Section 112.311(5), Fla. Stat.

[6] *See, e.g.,* ss. 112.311(3) and 112.313(9), Fla. Stat., providing postemployment restrictions for legislators, statewide elected officers, appointed state officers, and designated public employees. I note that Brevard County has similar lobbying restrictions in its ethics code.

[7] *See* Op. Att'y Gen. Fla. 79-109 (1979). *See also* Op. Att'y Gen. Fla. 46-180 (1946), reaching the same conclusion as to prior constitutional provisions.

[8] *See Broward County v. Plantation Imports, Inc.*, 419 So. 2d 1145 (Fla. 4th DCA 1982), expressly approving the conclusion reached in Op. Att'y Gen. Fla. 79-109 (1979). *Cf.* Op. Att'y Gen. Fla. 81-76 (1981) (discussing imposition of penalties for violations of municipal ordinances and noting that limitations provided by Legislature in statutory law setting forth penalties should serve as guidelines for municipality exercising home rule powers).

[9] *Grapeland Heights Civic Association v. City of Miami*, 267 So. 2d 321, 324 (Fla. 1972); *Broward County v. Plantation Imports, Inc., supra* at 1148.

[10] *Cf.* Op. Att'y Gen. Fla. 84-51 (1984) (ordinance of a noncharter county is not a "law" within the purview of s. 5[c], Art. II, State Const.) *and* Op. Att'y Gen. Fla. 84-39 (1984) (municipal ordinance is not a "law" within the meaning of s. 8, Art. I, State Const.).