Procurement -- Public Servant

Number: INFORMAL

Date: September 25, 2014

Ms. Sonja K. Dickens
City of Miami Gardens Attorney
1515 Northwest 167th Street
Building 5, Suite 200
Miami Gardens, Florida 33169

Dear Ms. Dickens:

You have asked for this office's assistance in determining whether an advisory committee member appointed by the city council to provide recommendations for public procurement projects is a "public servant" pursuant to section 838.014(6), Florida Statutes.[1] You also inquire whether the committee member may be prosecuted for bribery as defined in sections 838.015 and 838.016, Florida Statutes.

In sum, the definition of a "public servant" in section 838.014(6), Florida Statues, appears to broadly apply to any officer or employee of a governmental entity and does not exclude an individual who is serving in a purely advisory capacity. Whether an individual may be prosecuted for bribery under sections 838.015 and 838.016, Florida Statutes, is a determination which would be within the prosecutorial discretion of the state attorney for the circuit in which the alleged activity occurred.

Section 838.014(6), Florida Statutes, defines "Public servant" as:

"(a) Any officer or employee of a state, county, municipal, or special district agency or entity;
(b) Any legislative or judicial officer or employee;
(c) Any person, except a witness, who acts as a general or special magistrate, receiver, auditor, arbitrator, umpire, referee, consultant, or hearing officer while performing a governmental function; or
(d) A candidate for election or appointment to any of the positions listed in this subsection, or an individual who has been elected to, but has yet to officially assume the responsibilities of, public office." (e.s.)

While the term "officer" is not defined for purposes of Chapter 838, Florida Statutes, the Supreme Court of Florida, for purposes of the dual office-holding prohibition in section 5(a), Article II, Florida Constitution,[2] has stated:

"The term 'office' implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office, while an 'employment' does not comprehend a delegation of any part of the sovereign authority. The term 'office' embraces the idea of tenure, duration, and duties in exercising some portion of the sovereign power, conferred or defined by law and not by contract. An employment does not authorize the exercise in one's own right of any sovereign

power or any prescribed independent authority of a governmental nature; and this constitutes, perhaps, the most decisive difference between an employment and an office . . . ."[3]

It is, therefore, the nature of the powers and duties of a particular position that determines whether it is an "office" or an "employment." Membership on the governing body of a governmental entity, such as a county or municipality, clearly constitutes an office. For purposes of the constitutional dual office-holding prohibition, however, a statutorily created position having purely advisory duties is exempt from the constitutional prohibition.

You have not directed my attention to, nor have I found, a similar exemption from Chapter 838, Florida Statutes, for a public position having a purely advisory capacity. The definition of a "public servant" in Chapter 838, Florida Statutes, appears to have a broader application than the constitutional dual office-holding prohibition and I cannot say that a member of a municipal board with the role of making recommendations regarding procurements would not fall within the definition. It would appear, therefore, that any individual serving in a public position as an officer or an employee could be considered a "public servant" under the definition in section 838.014(6), Florida Statutes.[4]

Sections 838.15 and 838.16, Florida Statutes, criminalize "commercial bribe receiving" and "commercial bribery."[5] Due to the criminal nature of the statutes, it would be within the province of the state attorney for the circuit in which an alleged violation of the statute has occurred to make the determination of whether a person would be subject to prosecution under the act.

Sincerely,

Lagran Saunders
Assistant Attorney General

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[1] Your correspondence reflects s. 838.014(5), Fla. Stat., but subsection (6), is the definition for "public servant."

[2] Section 5(a), Art. II, State Const., provides:

"No person holding any office of emolument under any foreign government, or civil office of emolument under the United States or any other state, shall hold any office of honor or of emolument under the government of this state. No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein, except that a notary public or military officer may hold another office, and any officer may be a member of a constitution revision commission, taxation and budget reform commission, constitutional convention, or statutory body having only advisory powers."

[3] *State ex rel. Holloway v. Sheats*, 83 So. 508, 509 (Fla. 1919). *And see State ex rel. Clyatt v. Hocker*, 22 So. 721 (Fla. 1897).

[4] *Cf.* Op. Att'y Gen. Fla. 12-21 (2012) (executive director of private non-profit organization performing a governmental function does not fall within definition of "public servant" for purpose of prosecution under s. 838.22, Fla. Stat.).

[5] Section 838.15, Fla. Stat., provides:

"Commercial bribe receiving.—
(1) A person commits the crime of commercial bribe receiving if the person solicits, accepts, or agrees to accept a benefit with intent to violate a statutory or common-law duty to which that person is subject as:
(a) An agent or employee of another;
(b) A trustee, guardian, or other fiduciary;
(c) A lawyer, physician, accountant, appraiser, or other professional adviser;
(d) An officer, director, partner, manager, or other participant in the direction of the affairs of an organization; or
(e) An arbitrator or other purportedly disinterested adjudicator or referee.
(2) Commercial bribe receiving is a third degree felony, punishable as provided in s. 775.082, s. 775.083, or s. 775.084."

Section 838.16, Fla. Stat., provides:

"Commercial bribery.—
(1) A person commits the crime of commercial bribery if, knowing that another is subject to a duty described in s. 838.15(1) and with intent to influence the other person to violate that duty, the person confers, offers to confer, or agrees to confer a benefit on the other.
(2) Commercial bribery is a third degree felony, punishable as provided in s. 775.082, s. 775.083, or s. 775.084."