Municipal limitation on holding public office

Number: INFORMAL

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Mr. Paul J. Marino
Town Attorney
Town of Kenneth City
Post Office Box 344
Indian Rocks Beach, Florida 33767

Dear Mr. Marino:

As Town Attorney for the Town of Kenneth City, you have written to request our comment on several issues that have arisen relating to the municipal charter of the Town of Kenneth City. It appears that the city charter contains the following provision: "The mayor shall discharge the duties of the office and shall hold no other public office or public employment during the term." Your questions relate to this provision and request this office to comment on the constitutionality and statutory validity of this provision.

Pursuant to section 16.01(3), Florida Statutes, the Attorney General is authorized to provide legal advice and opinions to governmental entities and officers on questions of state law. *And see* Department of Legal Affairs Statement Concerning Attorney General Opinions (available at www.myfloridalegal.com). Thus, this office has no authority to comment on local legislation, such as charter provisions or ordinances. Further, the Attorney General cannot declare a statute or ordinance unconstitutional or invalid or advise any officer to disregard a legislative direction or mandate. On the contrary, a statute is presumed to be constitutional and must be given effect until judicially declared invalid.[1]

However, in an effort to be of some assistance to you, I offer the following general comments which may be helpful in resolving these matters. Initially, you have asked for a definition of the term "public employment." While the term is not defined in the Florida Statutes, the general rule is that, in the absence of a statutory definition, words of common usage are construed in their plain and ordinary sense and, if necessary, the plain and ordinary meaning of the word can be ascertained by reference to a dictionary.[2]

The word "public" is defined to mean "of, pertaining to, or affecting a population or a community as a whole[;] done, made, acting, etc., for the community as a whole[;] and "maintained at the public expense and under public control[.]"[3] The term has also been defined as "[o]f, concerning, or affecting the community or the people."[4] For purposes of Chapter 283, Florida Statutes, relating to public printing, the term "[p]ublic" is defined to mean "those entities and persons other than subordinate and functionally related or connected federal, state, or local governmental agencies."[5] An "employee" is generally defined as "a person working for another person or a business firm for pay[;]"[6] and "[o]ne who works for another."[7] The Florida Statutes contain a variety of definitions for "employee," but pursuant to section 218.077(1)(b), Florida Statutes, relating to minimum wage requirements by political subdivisions the term is defined as

"any person who is required under federal law to pay a federal minimum wage to the person's employees."

A "public employee" for purposes of the per diem and travel expenses of public officers, employees, and authorized persons is defined as "[a]n individual, whether commissioned or not, other than an officer or authorized person as defined herein, who is filling a regular or full-time authorized position and is responsible to an agency head."[8] Part II, Chapter 447, Florida Statutes, dealing with the Public Employees Relations Commission defines a "[p]ublic employee" to be "any person employed by a public employer [with specified exceptions]"[9] and a "[p]ublic employer" is

"the state or any county, municipality, or special district or any subdivision or agency thereof which the commission determines has sufficient legal distinctiveness properly to carry out the functions of a public employer. With respect to all public employees determined by the commission as properly belonging to a statewide bargaining unit composed of State Career Service System employees or Selected Professional Service employees, the Governor shall be deemed to be the public employer; and the Board of Governors of the State University System, or the board's designee, shall be deemed to be the public employer with respect to all public employees of each constituent state university. The board of trustees of a community college shall be deemed to be the public employer with respect to all employees of the community college. The district school board shall be deemed to be the public employer with respect to all employees of the school district. The Board of Trustees of the Florida School for the Deaf and the Blind shall be deemed to be the public employer with respect to the academic and academic administrative personnel of the Florida School for the Deaf and the Blind. The Governor shall be deemed to be the public employer with respect to all employees in the Correctional Education Program of the Department of Corrections established pursuant to s. 944.801."[10]

While I cannot say that any of these definitions would control in interpreting the provision of the Town of Kenneth City's charter, they may be helpful when read together with any legislative history for enactment of the charter provision.

You have also requested that this office comment generally on the home rule powers of municipalities in adopting legislation. Section 2(b), Article VIII of the Florida Constitution provides, in part that:

"Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law."

The Florida Supreme Court has stated that this constitutional provision "expressly grants to every municipality in this state authority to conduct municipal government, perform municipal functions, and render municipal services."[11] The Court stated, in *State v. City of Sunrise*, that the only limitation on the power of municipalities under this constitutional section is that such power must be exercised for a valid municipal purpose. As determined by the Court, "[l]egislative statutes are relevant only to determine limitations of authority" and municipalities need no further authorization from the Legislature to conduct municipal government.[12]

Pursuant to section 166.021(1), Florida Statutes, municipalities are granted "the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law." Subsection (3) of the statute prescribes limitations on the subjects that municipal legislation may address:

"The Legislature recognizes that pursuant to the grant of power set forth in s. 2(b), Art. VIII of the State Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except:
(a) The subjects of annexation, merger, and exercise of extraterritorial power, which require general or special law pursuant to s. 2(c), Art. VIII of the State Constitution;
(b) Any subject expressly prohibited by the constitution;
(c) Any subject expressly preempted to state or county government by the constitution or by general law; and
(d) Any subject preempted to a county pursuant to a county charter adopted under the authority of ss. 1(g), 3, and 6(e), Art. VIII of the State Constitution."

Because I am also concerned that you may wish to counsel your client on the amendment of this charter provision, I am enclosing a copy of a recently issued Informal Opinion of the Attorney General that addresses pre- and post-1973 adopted charter provisions and the procedures for amendment of these provisions. Many other Attorney General Opinions discussing this issue are available on the Attorney General's website: www.myfloridalegal.com.

I trust that these informal advisory comments will be helpful to you in addressing this matter with the Town of Kenneth City. This office would strongly suggest that a judicial declaratory action to definitively resolve these questions would be appropriate considering that the matter involves an upcoming election and qualifications to hold public office.

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

GH/tsh

Enclosure: Inf. Op. to Wolland dated December 12, 2008

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[1] *See, e.g., Belk-James, Inc., v. Nuzum*, 358 So. 2d 174 (Fla. 1978), *Pickerill v. Schott*, 55 So. 2d 716 (Fla. 1951), and *State ex rel. Atlantic Coast Line Railroad Company v. State Board of Equalizers,* 94 So. 681 (Fla. 1922).

[2] *See, e.g., Sieniarecki v. State*, 756 So. 2d 68 (Fla. 2000); *Rollins v. Pizzarelli*, 761 So. 2d 294 (Fla. 2000).

[3] Webster's New Universal Unabridged Dictionary p. 1562 (2003).

[4] The American Heritage Dictionary p. 555 (Office Edition 1983).

[5] Section 283.30(5), Fla. Stat.

[6] Webster's New Universal Unabridged Dictionary p. 638 (2003).

[7] The American Heritage Dictionary p. 232 (Office Edition 1983).

[8] *See* s. 112.061(2)(d), Fla. Stat.

[9] Section 447.203(3), Fla. Stat.

[10] Section 447.203(2), Fla. Stat.

[11] *State v. City of Sunrise,* 354 So. 2d 1206 (Fla. 1978).

[12] *Supra* at 1209. *See also City of Miami Beach v. Forte Towers, Inc.,* 305 So. 2d 764 (Fla. 1974).