Vacancy on town commission

Number: INFORMAL

Date: September 25, 2008

Mr. John Rayson
Town of Davie Attorney
2400 East Oakland Park Boulevard #200
Fort Lauderdale, Florida 33306

Dear Mr. Rayson:

You ask this office about the filling of vacancies under the town charter.

Initially, I would note that as discussed in this office's statement regarding Attorney General Opinions (available online at: http://myfloridalegal.com/opinions), opinions generally are not issued on questions requiring an interpretation only of local codes, ordinances or charters rather than the provisions of state law. In addition, when a request is received from a local government on a question involving the interpretation of state law, this office requires such a request to be accompanied by a memorandum of law from the attorney representing the governmental entity.[1]

In an effort to be of some assistance, I would note that the Florida Supreme Court has held that an appointment to an office in anticipation of a vacancy is proper only when the officer or body making the appointment is still in office when the vacancy occurs. In *Tappy v. State*,[2] the Court stated:

"A prospective appointment is valid if the governor who makes the appointment *is still in office at the time the vacancy occurs and the commission becomes effective.*" (emphasis supplied by the Court)

Subsequently, in *Advisory Opinion to the Governor re Sheriff & Judicial Vacancies Due to Resignations*,[3] the Court considered when the vacancy occurred when a sheriff tendered his resignation in May of 2006, to be effective in October 2006:

"In *Judicial Vacancies*, we acknowledged our prior statement that 'a vacancy does not occur until the date upon which the office actually becomes vacant.' *Id. at 463 n.4* (quoting *In re Advisory Opinion, 301 So. 2d at 6*). However, we explained that our decision in '*Spector v. Glisson, 305 So. 2d 777 (Fla. 1974)*, nullified this statement.' *Judicial Vacancies, 600 So. 2d at 463 n.4.* Accordingly, we are of the opinion that if the sheriff were to tender his resignation in May, a vacancy would occur at that time. Thus, the remainder of the term should be calculated from the date of the resignation letter, not its effective date."

Questions relating to an officer's authority to vote for himself or herself to fill a vacancy should be submitted to the Florida Commission on Ethics which is responsible for interpreting provisions of the Code of Ethics for Public Officers and Employees, Part III, Chapter 112, Florida Statutes.[4]

You also refer to the repeal of the resign to run law. Section 99.012, Florida Statutes, was amended during the 2008 legislative session, not repealed. Section 9 of Chapter 2008-95, Laws of Florida, removed an exception from such restrictions for persons seeking any federal public office. Section 14, Chapter 2008-04, Laws of Florida, a revisor's bill, amended subsection (7) of the statute to conform to the repeal of the referenced section 99.012(4) by section 14, Chapter 2007-30, Laws of Florida.[5]
I trust that the above informal comments may be of assistance to the town in resolving these matters.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/t

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[1] *See* statement concerning Attorney General Opinions (available online at: http://myfloridalegal.com/opinions) stating:

"However, in order to facilitate this expedited response to opinion requests, this office requires that the attorneys for public entities requesting an opinion supply this office with a memorandum of law to accompany the request. The memorandum should include the opinion of the requesting party's own legal counsel, a discussion of the legal issues involved, together with references to relevant constitutional provisions, statutes, charter, administrative rules, judicial decisions, etc."

[2] 82 So. 2d 161, 166 (Fla. 1955).

[3] 928 So. 2d 1218 (Fla. 2006).

[4] The commission may be contacted at: Post Office Drawer 15709, Tallahassee, Florida 32317-5709; telephone: 850-488-7864; fax: 850-488-3077.

[5] The 2007 legislation exempted persons seeking federal office from the resign-to-run law.