

**Bradly Roger Bettin, Sr, P.A.**

Attorney and Counselor at Law

Bradly Roger Bettin, Sr.

*Of Counsel*

David M. Presnick

Mariner Square  
96 Willard Street, Suite 202  
Cocoa, Florida 32922  
Telephone (321) 639-3764  
Fax (321) 639-3911

www.bettinlaw.com  
e-mail: brad@bettinlaw.com

Memorandum

To: Sally McCranie, Town Clerk

cc: Mayor Kirkland  
Members of the Town Commission  
Sherri MacDonald, Deputy Clerk

Re: Commissioner White's May 13, 2014 request for investigation

Date: May 13, 2014

You forwarded a written notice served by Commissioner White which begins "I want statements on paper of the following events of Commissioner Smalldridge pointing a gun at people and equipment." You asked "How should we handle this?"

**INITIAL CONSIDERATIONS**

Presently, we don't know whether anyone has or intends to report this incident to the Sheriff's Office. Whether the incident is under investigation by any law enforcement agency may well make a difference in how the Commission proceeds. While it does not apply to Commissioners, Article VII, Section 2.3. A. 1. gives the Town the power to suspend an employee "pending discipline" when the employee is facing pending criminal charges.

If the matter is under investigation by any law enforcement agency, then the Commission may well want to suspend any investigation until it determines whether criminal charges will be brought.<sup>1</sup> You'd do this because the Town would not want to interfere with an ongoing criminal investigation / prosecution and because the Commissioner in question would have every right to invoke his or her Fifth Amendment right due to the possibility of criminal prosecution, which would effectively frustrate the Commission's investigation.

---

<sup>1</sup> "Suspension of the Investigation" would not lead to suspension of the Commissioner - at least, not by the Town - unless the Commission has adopted rules of procedure, etc. which give the Commission to power to suspend a member under such circumstances.

## **THE COMMISSION HAS JURISDICTION**

Article IV, Section 2 of the Charter says:

The Town Commission shall be the judge of the qualifications, election and returns of its own members; it may enact rules of procedure and may prescribe penalties for the nonattendance or disorderly conduct of its members, and enforce the same. Four-fifths (4/5) of its members concurring, it may expel a member for improper conduct in office.

While there's a boatload of questions someone could raise, the power to remove a Commissioner for "improper conduct in office" implicitly gives the Commission the power to investigate allegations of such conduct.

## **IMPROPER CONDUCT IN OFFICE**

The issue would and will be "Whether the conduct in question amounts to "improper conduct in office" for which Commissioner Smalldridge should be expelled.

I'm not in a position today to render an opinion on what constitutes "improper conduct in office" - the narrower reading would hold the conduct has to be related to the Commissioner acting (or claiming to be acting) in his official capacity - the Commission will have to wrestle with this issue someday.

The advantage of a broad definition is it gives the Commission more latitude in determining whether conduct is within its disciplinary authority - the Commission would be far less likely to find itself unable to act even though, under the particular facts of a case, it would be appropriate.

The disadvantage of a broad definition is the potential for abuse. Given expulsion would effectively negate the choice of the voters, there's an argument that expulsion is a remedy which should be rarely invoked.

## **"WHO CONDUCTS THE INVESTIGATION?"**

Given the Commission itself would be the ultimate judge of what conduct occurred and whether it merited expulsion, it should not be a member of the Commission - American "judges" don't investigate cases which are going to come before them.<sup>2</sup>

In the personnel manual, the identity of the investigator depends upon the position of the person being investigated: if it's an employee under a supervisor, the supervisor investigates; if it's the department head, then the Mayor and/or Commissioner responsible for oversight investigate.

---

<sup>2</sup> As a matter of fact, it would be unethical for an American judge to undertake an independent investigation of a case before him or her.

In this instance, it should probably be the Mayor who conducts the “investigation.”

I put “investigation” in quotes because I believe these circumstances require the investigation be much more limited than it would be if we were dealing with alleged misconduct by an employee.

### **What Should the Investigation Consist of?**

The touchstone is that the Commission’s investigation should be fundamentally fair and afford due process to everyone involved. While it applies to employees, I believe Article VII, Section 3.2 of the Personnel Manual gives us some guidance; my recommendation is as follows:

1. The Mayor (or Mayor’s designee) should provide written notification to the Commissioner in question that a complaint has been received and an investigation will be opened.
2. The Mayor/designee identifies potential witnesses and obtains statements from those who have personal knowledge of the situation.
3. When the Mayor/designee believes this task has been completed, those statements are presented to the Commissioner in question to afford the Commissioner an opportunity to respond in writing.
4. If, in the Mayor/designee’s opinion, the Commissioner’s response makes it appropriate to discuss the matter further with the witnesses, the Mayor/designee may do so and the process (steps #2 and #3) will be repeated as necessary.
5. Once the Mayor/designee believes all relevant information has been gathered, the Mayor shall schedule a Special Meeting for consideration and deliberation regarding the same.
6. The Mayor schedules a Special Meeting of the Commission for the consideration of the Complaint.

Given the hour of day (it’s 4:35 p.m. as I write this), I want to leave the issue of the conduct of the Special Meeting for another day.