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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 14, 2014

FOLLOWING UP ON YESTERDAY'S MEMORANDUM . . .

Once again, Article IV, Section 2 of the Charter reads:

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.

This language invites a number of questions

- Have rules of procedure been adopted and penalties prescribed for dealing with disorderly conduct of Commissioners?
- What is the scope of "improper conduct in office?"
 - > Does it pertain only to actions which the accused Commissioner took in his/her capacity of Commissioner or in which the accused Commissioner invoked his/her position?

- > Or does it apply to all conduct which occurs, whether related to service on the Commission or not, during one's term as a Commissioner?

You forwarded a copy of Norm Fugate's opinion dated April 12, 2011, in which Mr. Fugate opined that a sitting Commissioner may only be removed by the Governor or via a §100.361, Fla. Stat. recall, on the grounds that state law supercedes Article IV, Section 2 of the Charter.

Mr. Fugate's opinion is premised upon preemption, the theory being that the removal options created by the Legislature are the only methods of removal permitted.

I'm not sure I agree with Mr. Fugate on that.¹

Preemption occurs one of two ways - either the Legislature expressly says "We're preempting counties and municipalities from legislating on this subject" or courts imply preemption on a case-by-case basis after examining the Legislature's regulatory scheme, etc. to determine whether there's any "room" for county/municipal legislation on that subject matter.

EXPRESS REMOVAL PREEMPTION

There's nothing explicit in §112.51, §112.52 (Governor) or §100.361 (recall elections) which says these statutes are the only avenues for removal of a Town Commissioner.

The Governor's power to remove a municipal officer is limited - it requires conviction of a felony or misdemeanor. §112.51(5), Fla. Stat. Simple misconduct in office is not sufficient.

Recall is only authorized under certain circumstances:

The grounds for removal of elected municipal officials shall be limited to the following and must be contained in the petition:

1. Malfeasance;
2. Misfeasance;
3. Neglect of duty;
4. Drunkenness;
5. Incompetence;
6. Permanent inability to perform official duties; and
7. Conviction of a felony involving moral turpitude.

§100.361(2)(d), Fla. Stat.

The statute indicates it's not "exclusive" - but how "not exclusive" is an open question:

¹ I'm not going further than "I'm not sure" right now for reasons which will become apparent as you read further.

This method of removing members of the governing body of a municipality is in addition to any other method provided by **state law**.

§100.361(1), Fla. Stat. (emphasis added).

And then there's this:

Upon completion of any investigation initiated under this subsection, the commission shall make a finding and public report as to whether any provision of the code of ethics has been violated or any other breach of the public trust has been committed by the subject official or employee. In the event that a violation or breach is found to have been committed, the commission shall recommend appropriate action **to the agency²** or official having power to impose any penalty provided by s. 112.317.

§112.322(2)(b), Fla. Stat. (emphasis added).

One of the recommendations the Commission on Ethics can make is removal from office. §112,317(1)(a) 2., Fla. Stat.

Does the Town have the power to remove a Commissioner? Per Florida law, the Town's municipal powers are to be

so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited.

§166.021(4), Fla. Stat.

Given which, it would appear the Town Commission would have the power to impose whatever penalty it wished, including the penalty recommended by the Commission on Ethics, in any case in which the Commission on Ethics reported a violation.

Which leaves the question "Does the Commission have the power & jurisdiction to consider and rule on charges against a Commissioner?" Or, to put it another way . . .

DEFINE "IMPROPER CONDUCT IN OFFICE"

The definition is important because Article II, Section 8 of the Florida Constitution provides

² "Agency" includes "any . . . local or municipal government entity of this state." §112,312(2), Fla. Stat.

There shall be an independent commission to conduct investigations and make public reports on **all** complaints concerning breach of public trust by public officers or employees not within the jurisdiction of the judicial qualifications commission.

Article II, Section 8(f), Florida Constitution (emphasis added).

That “all” is significant - in *Pedraza v. Hernandez*, 12-19392-CA-27, *affirmed* 95 So. 3d 237, it led the Miami/Dade Circuit Court to dismiss with prejudice a lawsuit which claimed a candidate for election filed false financial disclosures because the subject matter - breach of public trust by filing false disclosures - was within the exclusive jurisdiction of the Commission on Ethics. Applying that reasoning to the present case, any claim that a Town Commissioner has committed a “breach of public trust” - has violated the code of ethics - is within the sole and exclusive jurisdiction of the Commission on Ethics.

What are the Charges?

The Standards of Conduct applicable to members of the Commission are codified in Chapter 112, Florida Statutes. Generally speaking, Commissioners can’t solicit/accept gifts with the understanding that votes/actions will be influenced, do business with the Town, receive unauthorized compensation tendered to influence votes/actions, use their public office corruptly to obtain some advantage, be involved in disqualifying business relationships, disclose “non-public” information obtained by virtue of their official position to obtain some advantage. §112.313, Fla. Stat. There are other prohibitions - nepotism, voting when the Commissioner has a disqualifying conflict of interest, failure to make required financial disclosures, etc.

Generally speaking, if the “charge” in question is one which falls within the broad jurisdiction of the Commission on Ethics, then, based on Art. II, §8(f) of the Florida Constitution, the Commission on Ethics has exclusive jurisdiction per *Pedraza*.

There is one “caveat,” however. In adopting its code, the Legislature also adopted §112.326, Fla. Stat., which reads

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.

From which it’s clear a local government can adopt additional and/or more stringent standards of conduct, etc. so long as those standards do not conflict with state law.³

UPDATED RECOMMENDATION

³ How a municipality would go about doing that is a question for another day.

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1. It's appropriate to continue gathering information from all persons who have personal knowledge of the incident and to follow that evidence wherever it may lead.
2. "What happens next?" will need to be evaluated in light of what the information gathered reveals.
3. *At present*, I'm withdrawing my recommendation for a public meeting of the Commission to address the issue. If it turns out this is a matter within the jurisdiction of the Ethics Commission, it may have to go there, in which case a public meeting airing all the issues would be inappropriate.