

and the said deputies shall have and exercise each and every power of whatsoever nature and kind as the clerk himself may exercise, excepting the power to appoint a deputy or deputies.

Neither said §28.06 nor any other statute nor any constitutional provision prescribes the manner in which a clerk may appoint a deputy clerk. Therefore, the clerk is free to make the appointment in such manner as he may see fit. Even an oral appointment is sufficient when, as in Florida, there is no statutory inhibition (14 C.J.S. *Clerks of Court* §84; 15 Am.Jur.2d *Clerks of Court* §39).

Therefore, in my opinion, a clerk can appoint a deputy clerk by letter.

However, I do not think that the writing of such a letter, without more, places the addressee in the position of being a deputy clerk. The addressee must in some manner accept the appointment before he can be said to be a deputy clerk.

It appears to me that the following excerpt from 67 C.J.S. *Officers* §37, with respect to the acceptance of an appointment to public office, is equally applicable to the appointment of a deputy clerk, to wit:

Acceptance of office. It has been held that an office may not be considered as filled until there is an acceptance of the appointment by the person chosen. Such acceptance need not be express but may be implied from the subsequent conduct of the appointee, such as . . . entering on the discharge of the duties of the office; and where the appointee fails to take any of such steps nonacceptance may be implied. . . .

The necessity for acceptance is highlighted by the fact that it is possible, even if not probable, that the appointee is wholly unwilling to serve and has no intention of doing so.

073-141—May 3, 1973

CITY COUNCILS

EFFECT OF ABSTENTION FROM VOTING BY COUNCIL MEMBER

To: *Kenneth W. McIntosh, Attorney, Casselberry City Council, Sanford*

Prepared by: *Rebecca Bowles Hawkins, Assistant Attorney General*

QUESTIONS:

1. Is a city council's decision valid when a member abstains from voting upon a matter before that body for decision without filing a sworn statement disclosing a conflicting personal interest?
2. Is the abstaining council member subject to any penalty?
3. Is the abstaining council member subject to removal from office under state law?

SUMMARY:

If a decision of a city council is otherwise valid under applicable law and rules of procedure, the abstention of a member of the council without filing a sworn statement disclosing a disqualifying conflict of interest, as required by §286.012, F. S., will not invalidate the council's decision. The member's abstention without filing the sworn statement will not, under present law, subject him to any criminal sanction or penalty; however, it might constitute grounds for expulsion from the council for "malconduct" under the general law, §165.18, F. S., if applicable.

Section 286.012, F. S. (1972 Supp.), prohibits a member of a governmental

body—state, county, or municipal—from abstaining from voting upon an official matter before that body for decision and provides that

. . . a vote shall be recorded or counted for each such member present, except when, with respect to any such member, there is or appears to be a possible conflict of interest under the provisions of [the Standards of Conduct Law]. In such cases said member shall comply with the disclosure requirements of §112.313.

I find nothing in the statute to indicate that a member's abstention from voting without filing a sworn statement disclosing a conflict of interest will invalidate the action of a city council or other governmental body, if the action of the city council would otherwise be valid under the applicable provisions of the city charter.

In determining whether the action would be otherwise valid, it might be noted that, under standard parliamentary procedure, a quorum always refers to the number of members present and not to the number voting; and the number of affirmative votes required to adopt a particular official action cannot be reduced by the failure of members to vote. *See Sturgis, Standard Code of Parliamentary Procedure*, Ch. 3, p. 16 and Ch. 9, p. 54, interpreting *Robert's Rules of Order*. *Accord*: Attorney General Opinion 055-229, in which it was ruled that action to bind a county by contract cannot be taken by a vote of less than a majority of the county commissioners present, and that a contract approved by only two of the county commissioners, with the other three commissioners abstaining, was not valid. A member who is disqualified because of personal interest in a particular question cannot be counted for the purpose of computing a quorum for a vote on that question or of counting a majority of the quorum. *Id.*, Ch. 3, p. 16.

I note that the Charter Act of the City of Casselberry (§§39 and 40 of Ch. 65-1351, Laws of Florida, as amended by Ch. 69-927, *id.*) requires an emergency ordinance to be approved by the affirmative vote of four members of the city council, and that a nonemergency ordinance may be adopted by unanimous vote (apparently of those present) at one meeting, or by a majority vote at two regular meetings. A majority of the five-member city council constitutes a quorum. The validity of the official action in question must be decided in light of these charter act provisions and the rules referred to above.

Answering your second question: Chapter 72-311, Laws of Florida (which was incorporated as §286.012, *supra*) did not contain a penalty clause. Nor does the chapter into which it was placed (Ch. 286, entitled "Public Business, Miscellaneous Provisions") contain a penalty clause—obviously for the reason that such a clause could not appropriately be applied generally to the miscellany of statutes therein incorporated.

Your second question is, therefore, answered in the negative.

Answering your third question: You state that there is nothing in the city's charter act respecting removal of city councilmen from office. The general law, §165.18, F. S., provides that "two-thirds of the council may expel a member of the same or other officer of the city or town for disorderly behavior or malconduct in office." In *Etzler v. Brown*, 50 So. 416, 417 (Fla. 1909), in upholding the action of a city council in expelling one of its members for "malconduct in office," the court said that

Malconduct in office, like misconduct in office, includes such acts as amount to a breach of the good faith and right action that are tacitly required of all officers. [*See 5 Words & Phrases*, 4296, 4532.]

In *Sausbier v. Wheeler*, 11 N.E.2d 897 (N.Y. 1937), it was said that "malconduct" within the meaning of a charter provision authorizing removal of

public safety commissioners by the mayor for "malconduct" was not intended to be restricted exclusively to malfeasance or nonfeasance or corruption in office. And in *State ex rel. Hardie v. Coleman*, 155 So. 129 (Fla. 1934), the court said that "nonfeasance" as a ground for the suspension of an officer refers to neglect or refusal, without sufficient excuse, to do that which it was the officer's legal duty to do. As §286.012, *supra*, makes it the councilman's statutory duty either to vote upon a matter before the city council or to file a sworn statement disclosing a conflict of interest which disqualifies him from participating in that particular decision, the failure of the councilman to file the sworn statement disclosing a disqualifying interest in support of his abstention was a breach of a positive statutory duty which, if intentionally done, might be sufficient to justify his expulsion from the council on the ground of malconduct in office.

073-142—May 3, 1973

PAROLE AND PROBATION COMMISSION

NOT REQUIRED TO CONDUCT PRESENTENCE INVESTIGATION PRIOR TO FINDING OF GUILT

To: *Armond R. Cross, Chairman, Florida Parole and Probation Commission,
Tallahassee*

Prepared by: *Reeves Bowen, Assistant Attorney General*

QUESTION:

Does a trial court have the authority to require the Parole and Probation Commission to conduct a presentence investigation on a defendant before he is found guilty or pleads guilty or nolo contendere and, if it undertakes to do so, is the commission required to proceed with such investigation?

SUMMARY:

A trial court has no authority to *require* the Parole and Probation Commission to make a presentence investigation on a defendant in a criminal case who has not pleaded guilty or nolo contendere and has not been found guilty by the verdict of a jury or by the court trying the case without a jury. The commission would not be required to comply with an order requiring a presentence investigation before any of these steps take place.

Section 948.01, F. S., provides in pertinent part that:

948.01 When courts may place defendant on probation.—

(1) Any court of the state having original jurisdiction of criminal actions, *where the defendant in a criminal case has been found guilty by the verdict of a jury or has entered a plea of guilty or a plea of nolo contendere or has been found guilty by the court trying the case without a jury*, except for an offense punishable by death, may at a time to be determined by the court, either with or without an adjudication of the guilt of the defendant, hear and determine the question of the probation of such defendant. (Emphasis supplied.)

(2) Prior to such hearing the court may refer the case to the parole and probation commission for investigation and recommendation. . . .

These statutory provisions authorize a trial court to require the commission to make a presentence investigation only after the defendant has pleaded guilty or