Incompatibility, gas district board appointments

Number: INFORMAL

Date: May 11, 2011

Mr. Douglas M. Wyckoff
Valparaiso City Attorney
116 Live Oak Avenue East
Defuniak Springs, Florida 32435

Dear Mr. Wyckoff:

On behalf of the Mayor of the City of Valparaiso, you ask whether the city has the authority to appoint a city commissioner, other than the mayor, to serve on the Board of Directors of the Okaloosa Gas District, an independent special district created by special act.[1]

Section 8 of the Okaloosa Gas District's charter, as codified by section 2, Chapter 2000-443, Laws of Florida, establishes the membership of the district's board of directors:

"The District shall have a Board of Directors, consisting of one member of each member municipality and one member appointed by the Board of County Commissioners of Okaloosa County, to represent the interest of the unincorporated areas and the interest of the nonmember cities. The member for each member municipality shall be appointed by the governing body of such member municipality . . . . The representative of each municipality may, but need not be, the mayor or chief executive officer of such municipality . . . . "

Thus, it is the responsibility of the governing body, not the mayor, to appoint the representative of the municipality to the gas district's board of directors. As stated in this office's statement of policy, a copy of which is enclosed, questions relating to the powers and duties of a public board or commission (or other collegial public body) should be requested by a majority of the members of that body. In the absence of a request from a majority of the members of the Valparaiso City Commission, this office cannot comment upon of the duties of the commission.

In addition, I note that the circuit court in *Reid v. City of Valparaiso*[2] considered the authority of the city commission to appoint a commissioner other than the mayor to the district board. In addressing a city ordinance that required that the city's representative on the gas board be an elected city commissioner,[3] the court, in granting the request for injunctive relief, stated in its general conclusions of law:

"*Ordinance No. 599* is also contrary to the common-law rule of public policy which disqualifies all officers who have appointing power from filling the offices or positions for which they appoint."[4]

In holding that the appointment of a city commissioner to the Gas District Board was void, the court stated that the ordinance was illegal and against common-law and public policy.[5] Thus, the court, in striking down the ordinance, considered the common law rule disqualifying a governmental body from appointing one of its own members to a position over which it has

appointment power unless such appointment is authorized by law to be applicable to the Valparaiso City Commission's appointments to the district board.

This office cannot, through an opinion, comment upon the validity of a ruling of the court. In an effort to be of some assistance, however, and inasmuch as the court referenced several Attorney General Opinions, I would generally note that in 1994 the Florida Supreme Court in *State ex rel. Clayton v. Board of Regents*,[6] considered whether this common law principle prohibited the Florida Board of Regents from appointing one of its own members as university president, a position over which it had appointment power. The Court concluded that no such common law principle existed in Florida, stating:

"We find there was no common law principle in existence in England on July 4, 1776, that governs the issue in this case. Further, conduct involving public officers, such as dual office-holding, financial benefit from office, and abuse of public trust, are issues directly addressed by the Florida Constitution. *See* art. II, §§ 5, 8. In addition, our Constitution requires that public officials must conduct public business in the open and that public records must be made available to all members of the public. Art. I, § 24, Fla. Const. As noted by Clayton, other jurisdictions may indeed have developed through judicial decisions a common law principle prohibiting a governmental body from appointing one of its own members to a position over which it has appointment power. While such a common law principle does not exist in Florida, however, we note that, when taken as a whole, the constitutional provisions governing public officials in Florida are even more restrictive as to the manner in which public officials may hold office and conduct public business than the judicially enacted common law doctrines in other jurisdictions."[7]

In light of the Florida Supreme Court's decision in *State ex rel. Clayton v. Board of Regents*, this office has stated that no common law principle precludes a member of a governmental body from appointing one of its own members to a position over which it has appointment power.[8]

Regarding the issue of dual office-holding, I would generally note that the courts of this state and this office have recognized that Article II, section 5(a), Florida Constitution, the constitutional prohibition against dual office-holding, refers only to state, county, and municipal offices[9] and thus is not applicable to independent special district offices.[10]

I trust you will understand that the duties of this office are prescribed by law. I hope, however, that the above informal comments may be of assistance.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/tsh

Enclosure: Statement of Policy

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[1] Chapter 2000-443, Laws of Fla.

[2] Order Granting Petitioner's Request for Temporary Injunctive Relief, Case No. 2010 CC 001550 (Fla. 1st Jud. Cir. Okaloosa Co.), filed July 26, 2010.

[3] Ordinance No. 599, amending Art. VII, Div. 2, s. 2-194, Valparaiso City Code.

[4] Order, *supra* at General Conclusions of Law, C., p. 9. The court referenced several Attorney General Opinions issued during the 1980s for this proposition.

[5] *Id.* at D., p. 10.

[6] 635 So. 2d 937 (Fla. 1994).

[7] *Id.*

[8] *See* Op. Att'y Gen. Fla. 03-20 (2003). *See also* Ops. Att'y Gen. Fla. 96-59 (1996), 96-84 (1996), 00-17 (2000), 04-07 (2004), 08-56 (2008), and 11-05 (2011). *And see* s. IX of this office's Dual Office-holding Pamphlet (available online at: http://myfloridalegal.com/webfiles.nsf/WF/MRAY-6S3PP7/$file/dual.pdf) which addresses whether common law principles prohibit a public agency from appointing one of its members to a position over which it has appointment power.

[9] Article II, section 5(a), Florida Constitution, provides in part that except as provided therein "[n]o person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein . . . ."

[10] *See In re Advisory Opinion to the Governor*, 630 So. 2d 1055, 1058 (Fla. 1994) (community college district board of trustees member is an officer of a special district and is not a state, municipal, or county officer within the meaning of Art. II, s. 5(a), Fla. Const.). *And see* Ops. Att'y Gen. Fla. 71-324 (1971) (hospital district's governing body); 85-24 (1985) (community redevelopment district established by general law); 94-83 (1994) (airport and industrial district); 99-49 (1999) (community redevelopment agency); 01-14 (2001) (water control district); 00-17 (2000); 02-49 (2002) and 02-83 (2002) (water control district); and 08-06 (2008) (mosquito control district).