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July 30, 2015

The Honorable Lila Jaber  
Chair, Tallahassee Independent Ethics Board  
300 S Adams St. # A-25  
Tallahassee, Fl. 32301-1721

Re: Tallahassee Ethics Opinion 2015-2  
July 30, 2015  
Subject: Hiring protocol for Ethics Officer

Dear Chair Jaber:

At the July 13, 2015 Ethics Board meeting there was a discussion regarding the Ethics Board's intentions with respect to the interviewing/hiring/rehiring/retention of the current Ethics Officer or, alternatively, whether it intended to go through the hiring process anew. In light of that discussion, you have asked for my opinion on substantially the following question:

Whether the Ethics Board has the discretion to hire an Ethics Officer without advertising?

In sum:

The Ethics Board has the discretion to establish its own hiring process for the hiring of the Ethics Officer (or any other staff), which process may or may not include advertising as a matter of policy. The Ethics Board has the discretion to adopt the City's hiring process, in total, in part, or not at all. The Ethics Board may decide to interview/hire/rehire/retain its current Ethics Officer or go through the hiring process anew.

As I understand the relevant facts, by way of background, the current Ethics Officer was hired by the City of Tallahassee (City) staff after an open, nationwide search and hiring process. The hiring process followed all of the City's hiring policies and procedures. There has been no allegation, or any evidence of, any violations of law or of City policies or procedures.

Your question addresses how the Ethics Board will hire staff and whether the process requires advertising; it addresses the Ethics Board's hiring process and not that of the City. In answering your question we must first look to the Florida Constitution, Article VIII, Section 2(b) which provides that: "Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law..." In implementing this Article, the Florida Legislature enacted Chapter 166, Florida Statutes, and specifically, Section 166.021(4), which declares that "[t]he provisions of this section shall 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." Furthermore, Section 166.021(3), Florida Statutes, states that municipalities have the power to enact legislation concerning any subject matter which the state legislature may act. The state legislature has enacted personnel hiring practices for state agencies in Chapter 110, Florida Statutes. In construing Section 166.021(3), Florida Statutes, the Attorney General opined that establishing the qualifications for employment of a city attorney is an appropriate subject for municipal legislation. See AGO 84-15. See also, AGO 2005-30 (The terms and conditions of municipal employment are a matter of local discretion subject to the municipality's code and charter.) These provisions embody Florida's Municipal Home Rule Law which is designed and intended to be a general law grant of home rule authority to all municipalities. Florida's Municipal Home Rule Law should be construed to effectuate that purpose where possible. City of Miami Beach v. Forte Towers, Inc., 305 So. 2d 764, 766 (Fla. 1974). The only limitation on that power is that it be exercised for a valid "municipal purpose". State v. City of Sunrise, 354 So. 2d 1206, 1209 (Fla. 1978). Finally, while very broad and liberally construed, the exercise of home rule power by a municipality cannot be inconsistent with either a general law or a special act.

As contemplated by Florida's home rule laws, the Legislature has prescribed some hiring practices. For example, the Legislature enacted Section 760.10 (1)(a), Florida Statutes, which declares it an unlawful employment practice for an employer to "discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status." However, undersigned counsel has been unable to find any other relevant legislative proscription regarding municipal hiring practices.

In light of Florida's Municipal Home Rule Law as described above, there appears to be no question that the City of Tallahassee and its various boards and commissions have the power to prescribe their hiring policies and procedures, provided they serve a municipal purpose and do not violate general law or special act. Pursuant to such home rule power, the City has adopted its "Personnel Policies and Procedures Manual-Chapter 702 Employment".

Given the City's adoption of its hiring policies and procedures, the next question is whether the Ethics Board is constrained by the City's Charter or its hiring policies and procedures or, alternatively, whether the Ethics Board may establish its own hiring policies and procedures. In answering this question we must look at the City's Charter Amendment adopted on November 4, 2014 which directed the creation of an independent citizens Ethics Board. Section 2 of the Charter Amendment directs that the "Ethics Board shall: ... (ii) adopt bylaws and due process procedures for the administration of the Ethics Board...; and (viii) employ staff serving in the ethics office." Further, Section 2 of the Charter Amendment directs that a "structure shall be established for the Ethics Board that ensures independence and impartiality...." The Charter Amendment in Section 3 then directs "the establishment of a citywide Ethics Office under the exclusive jurisdiction of, and reporting to the independent Ethics Board, to discharge the duties and responsibilities of the Ethics Board". Read together, it is unambiguous from these Charter Amendment provisions that the citizens of Tallahassee voted for an independent Ethics Board and directed that the Ethics Board would adopt bylaws and procedures for its administration, including the employment of staff; which bylaws and procedures would ensure its independence and impartiality; and that the Ethics Office was to be established under the exclusive jurisdiction of, and reporting to the independent Ethics Board. Moreover, if there were any ambiguity in the Charter Amendment on this question, which there is not, the Charter Amendment must be liberally construed to effectuate its clear purpose of establishing an independent Ethics Board.

Accordingly, in light of the above cited law and the City's recently adopted Charter Amendment, it is my opinion that the independent Ethics Board may and should adopt its own bylaws or procedures for the administration of matters under the Ethics Board's exclusive jurisdiction, including the employment of staff, if it is to be truly independent. Such procedures should include hiring policies and procedures that ensure that the Ethics Board remains impartial and that it discharges its duties and responsibilities to enforce the City's Ethics Code independently of the City Commission. It seems self-evident that the Ethics Board cannot truly discharge its duties and responsibilities independently if it is bound by the City's hiring policies and procedures. While the Ethics Board cannot be bound by the City's hiring policies and procedures it

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may, at its sole discretion, choose to adopt the City's hiring policy and procedures in total, in part, or not at all.

Sincerely,

A handwritten signature in black ink, appearing to read "Gerald B. Curington". The signature is fluid and cursive, with the first name "Gerald" being more prominent.

Gerald B. Curington

GBC:mm

✓cc: Julie Meadows-Keefe