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MEMORANDUM

DATE: August 19, 2024

TO: Sara Hedges, Esq.
City Attorney, City of Fort Pierce

FROM: Randy Mora, Esq., B.C.S.

RE: City of Fort Pierce: Independent Dual Office Holding Analysis

As the City Attorney for the City of Fort Pierce (the “City”), you have requested my assistance as outside counsel to provide independent legal analysis concerning the potential application of constitutional dual office holding restrictions upon the city clerk were she to be made the acting city manager or interim city manager.

I. EXECUTIVE SUMMARY

The city clerk can serve as the *acting* city manager, assuming the duties of that office, while the appointed city manager is on administrative leave or otherwise unable to perform his official duties, while retaining her title as the appointed city clerk. Owing to the constitutional restriction against dual office holding, the city clerk should not, however, serve as the *interim* or *permanent* city manager, effectively occupying the office of city manager, while simultaneously retaining her title as the appointed city clerk.

II. APPLICABLE FACTS & LEGAL AUTHORITY

A. PRESENT POSTURE

On Wednesday, August 14, 2024, the Florida Department of Law Enforcement arrested Fort Pierce City Manager Nicholas “Nick” Mimms (“Mimms”) in connection with charges of bid tampering and official misconduct. In a special meeting held the next day, the City Commission (the “Commission”) unanimously agreed to place Mimms on administrative leave with full pay and authorized an independent investigation into the matter. The Commission also indicated an intention for the city clerk, Linda Cox (“Cox”), to temporarily serve as the *acting* city manager while Mimms is on administrative leave. For whatever period Cox may serve as the acting city

manager, the Commission also expressed its intention to appoint one of the deputy clerks to serve as the acting city clerk.

The Commission will be meeting on Monday, August 19, to provide further guidance and direction concerning this transition period.

B. RELEVANT CHARTER & CODE PROVISIONS

The City's Charter (the "Charter") contemplates the creation of a series of departments and officers.¹ The Commission possesses the authority to appoint and remove, with or without cause: "(1) the city manager, (2) the city clerk, (3) the city attorney, (4) the city prosecuting attorney and (5) the city auditor."² Similarly, the Charter empowers the Commission to "inquire as a body into the conduct of any officer, department or agency of the city and investigate municipal affairs whenever it deems such actions to be in the public interest."³

The Charter contemplates that the city manager shall be the chief executive and administrative head of the City government, subject to appointment by the Commission.⁴ Similarly, the city manager can be removed by the Commission at any time, with or without cause.⁵ The Charter enumerates the city manager's powers and duties, which generally encompass the supervision and control over all city departments, except the office of the city clerk.⁶ This proposition is repeated in the City's Code of Ordinances.⁷

The Charter also provides that the Commission shall appoint an individual to serve as the city clerk.⁸ In contrast to the provisions governing the city manager, the Charter does not enumerate each of the clerk's powers and duties.⁹ Instead, the City's Code of Ordinances (the "Code") enumerates five functions of the city clerk.¹⁰ In addition to four specific duties, the Code tasks the clerk with "perform[ing] such other duties as may be prescribed by the Charter or required by the clerk by the commission."¹¹

C. CHARTER OFFICER EMPLOYMENT AGREEMENTS

On July 6, 2021, the City entered into an employment agreement with Mimms to serve as the City Manager. Mimms' Agreement with the City contemplates his service for a term of five years, unless terminated sooner.¹² Mimms can be terminated by a majority vote of the entire Commission at a duly authorized public meeting, with or without cause, at the sole discretion of the

¹ City Charter at §§ 39, 43, and 44

² City Charter at § 20 (a)

³ City Charter at § 20 (f)

⁴ City Charter at §§ 39 and 42

⁵ City Charter at § 40

⁶ City Charter at § 42

⁷ City Code at § 2-84

⁸ City Charter at § 44

⁹ City Charter at § 44; Cf § 62

¹⁰ City Code at § 2-114

¹¹ City Code at § 2-114 (4); see also §§ 2-53

¹² July 6, 2021, Employment Agreement at § 1

Commission.¹³ Mimms is an employee-at-will and works at the pleasure of the City, which may terminate his agreement at any time.¹⁴

On January 6, 2020, the City entered into an employment agreement with Linda W. Cox to serve as the city clerk. Cox's Agreement with the City contemplates her service as the city clerk for an initial period of three years, and subject to automatic annual renewals thereafter.¹⁵ Cox's Agreement explicitly states that the city clerk is "an independent and co-equal Charter Officer . . ." and "[n]o other Charter Officer shall have any authority or ability to direct, supervise, or interfere with the administration or activity of the Office of the City Clerk."¹⁶

Cox's Agreement requires that she at all times "faithfully, industriously, and diligently perform to the best of her ability all duties that may be required of her by virtue of her position as City Clerk, including the performance of all duties set forth in the City Charter, Ordinances, Resolutions and other City policies, and to perform other legal permissible and proper duties and functions to the reasonable satisfaction of the City Commission."¹⁷

D. FORT PIERCE PERSONNEL POLICIES

Cox's Employment Agreement specifically references or explicitly incorporates the City's Personnel Rules and Regulations (the "PRR") to state that she shall be entitled to receive the same vacation, sick leave, and holiday time as the City Manager, each of which shall be defined in the PRR.¹⁸

The PRR explicitly provides that, except as modified by contract, "all city offices and positions shall be governed by these Rules and Regulations."¹⁹ The PRR identifies both the City Manager and City Clerk, among others, as members of the "Unclassified Service."²⁰ Apart from their identification as members of the Unclassified Service, the PRR does not address the potential interplay, overlap, or direct dynamic between the positions of City Clerk and City Manager.

¹³ July 6, 2021, Employment Agreement at § 5 (a)

¹⁴ July 6, 2021, Employment Agreement at § 11

¹⁵ January 6, 2020, Employment Agreement at § 1

¹⁶ January 6, 2020, Employment Agreement at § 1

¹⁷ January 6, 2020, Employment Agreement at § 1

¹⁸ See January 6, 2020, Employment Agreement at §§ 4 and 6; see also Fort Pierce, Florida Personnel Rules and Regulations, Rev. April 1, 2017, and Adopted Feb. 20, 2018. *available at* www.cityoffortpierce.com/175/Human-Resources

¹⁹ See PRR at § 2.01

²⁰ See PRR at § 2.02 C

E. DUAL OFFICE HOLDING RESTRICTIONS

Article II, Section V of the Florida Constitution governs the performance of public officers. It provides, in pertinent part:

. . . . No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein, except that a notary public or military officer may hold another office, and any officer may be a member of a constitution revision commission, taxation and budget reform commission, constitutional convention, or statutory body having only advisory powers.

“Underlying this objective is the concern that a conflict of interest will arise by dual officeholding whenever the respective duties of office are inconsistent.”²¹ In contrast, “[w]here additional duties are assigned to constitutional officers and there is no inconsistency between these new and pre-existing duties, however, the dual officeholding prohibition does not preclude such an assignment.”²² In these instances, “newly assigned duties are viewed merely as an addition to existing responsibilities.”²³

While the term “office” is not defined by the Constitution, the Supreme Court of Florida has stated that “[t]he term ‘office’ implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office. . . .”²⁴ The Court added “the term ‘office’ embraces the idea of tenure, duration, and duties in exercising some portion of the sovereign power, conferred or defined by law and not by contract.”²⁵ Consequently it is the nature of the powers and duties of a particular position which determines whether it is an “office”, as opposed to an employment.

Persuasive legal authority²⁶ has opined that persons serving as city managers and city clerks, whose office and duties are provided for in their respective charters, hold ‘offices’ as opposed to employment.²⁷ Consequently, similar persuasive legal authority has opined that while a city manager *cannot* simultaneously serve as a city clerk, and *vice-versa*, their respective duties *can* be imposed on one another in an *ex officio* fashion.²⁸ In 1981, for example, the Office of the Attorney General specifically considered the question of whether “the city clerk [could] serve as acting city manager, performing the duties of that office, without violating the dual officeholding prohibition?” There, the opinion concluded that “the imposition of additional or *ex officio* duties

²¹ Bath Club, Inc. v. Dade County, 394 So.2d 110, 112 (Fla. 1981)

²² Id.

²³ Id.

²⁴ State ex rel. Holloway v. Sheats, 83 So. 508, 509 (Fla. 1919)

²⁵ Id.

²⁶ See, e.g., Palm Beach County v. Hudspeth, 540 So.2d 147, 152 (Fla. 4th DCA 1989) (“Opinions of the Attorney General are considered persuasive, but do not constitute binding authority on the courts of Florida”)

²⁷ State v. Bloodworth, 134 Fla. 369 (Fla. 1938); Fla. Attorney Gen Ops. 81-72 (Oct. 4, 1981); 86-48 (June 24, 1986), 91-48 (July 8, 1991)

²⁸ Attorney Gen. Ops. 81-72 (Oct. 4, 1981), 91-48 (July 8, 1991) and 2007-43 (Oct. 16, 2007); see also “EX OFFICIO”, Black’s Law Dictionary (12th ed. 2024) (defined as “[b]y virtue or because of an office; by virtue of the authority implied by office”)

and responsibilities upon the city clerk by the city council to perform *ex officio* duties of another office would not be violative of s. 5(a), Art. II, State Const., provided that the additional duties imposed are in no way inconsistent with the municipal duties already being performed by the city clerk.”²⁹

Indeed, it has long been a settled rule in the State of Florida that, assuming an officeholder is subject to the constitutional dual office holding prohibition, they can, by legislative designation, perform the functions of another or additional office without contravening the constitutional limitation.³⁰ Again, the newly assigned duties are merely viewed as an addition to the existing duties of the officer, and not the appointment to or occupancy of another office.

The established consequence for dual office holding has traditionally been the resignation of the first office.³¹ The constitutional prohibition provides no sanction for its violation, but instead reflects the common law rule that by accepting an incompatible office, the officeholder made a binding choice to vacate the first office.³² Notably, though Florida recognizes this rule, it also recognizes that in such situations the officer becomes a *de facto* officer as to their original office. In practice, this means that the surrender of the first office does not invalidate the acts in that office, but rather the official is deemed the *de facto* person holding the office until ousted by proper process.

III. LEGAL ANALYSIS & CONCLUSIONS

Based on the foregoing, Cox can serve as the *acting* city manager, assuming the duties of that office, while the appointed city manager is on administrative leave or otherwise unable to perform his official duties. According to the City’s Code the city clerk is tasked with “perform[ing] such other duties as may be . . . required by the clerk by the commission.”³³ Similarly, Cox’s employment agreement provides she must “perform other legal permissible and proper duties and functions to the reasonable satisfaction of the City Commission.”³⁴ At present, the Commission intends to adopt a resolution appointing the Cox, the city clerk, as the “acting” city manager, while the appointed city manager, Mimms, remains on administrative leave. The delegation of the manager’s duties to Cox does not, based on the foregoing authority, contravene dual office restrictions.

The city clerk should not, however, serve as the *interim or permanent* city manager while simultaneously retaining her title as the appointed city clerk. This is a distinction with a meaningful legal difference because, in this context, the city clerk would not merely be performing the manager’s duties but occupying the office of city manager as well. If the Commission desired to

²⁹ Attorney Gen. Op. 81-72 (Oct. 4, 1981)

³⁰ State v. Florida State Turnpike Authority, 80 So.2d 337 (Fla. 1955); State ex rel. Gibbs v. Gordon, 189 So. 437 (Fla. 1939); Bath Club, Inc., 394 So.2d 110 (Fla. 1981); City of Riviera Beach v. Palm Beach County Solid Waste Authority, 502 So.2d 1335 (Fla. 4th DCA 1987); and City of Orlando v. State Dep’t of Ins., 528 So.2d 468 (Fla. 1st DCA 1988).

³¹ Holley v. Adams, 238 So.2d 40, 407 (Fla. 1970)

³² Gryzik v. State, 380 So.2d 1102, 1104-05 (Fla. 1st DCA 1980), *citing* O’Connor v. Calandrillo, 117 N.J. Super. 586, 592-93 (N.J. 1971).

³³ See City Code at § 2-114

³⁴ January 6, 2020, Employment Agreement at § 1

appoint Cox as the interim or permanent manager, and Cox were agreeable to such change, she should first resign from the office of city clerk.

For the same reason, I recommend that the City not appoint one of the deputy clerks to serve as the “acting” city clerk while Cox is serving as the acting city manager. Doing so may imply that the office of the city clerk is vacant, which it would not be as Cox will remain the city clerk while performing some or all of the manger’s duties in an “acting” capacity. The duties Cox performs will be *in addition to* her duties as the city clerk, not in replacement of those duties. Instead, the Commission should allow the city clerk to utilize the City’s deputy clerks and other staff to assist Cox in the performance of her regular and temporary acting duties until the Commission is able to appoint an interim or permanent manager.

This analysis is premised upon an understanding of the facts as they are set forth in this memorandum. The legal analysis and conclusions set forth herein may differ should additional facts become available. This legal analysis does not consider how any such reappointment may impact eligibility for or contributions to any employment benefit, retirement, or deferred compensation program, or any professional membership organization.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be "R. J. [unclear]", written in a cursive style.

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