



FYI

FLORIDA DEPARTMENT of STATE

RICK SCOTT
Governor

KEN DETZNER
Secretary of State

May 9, 2018

Ms. Gelien Perez
501 Palm Avenue, 3rd Floor
Hialeah, Florida 33010

Re: DE 18-08 Resign-to-Run – City Human
Resources Department Director – § 99.012,
Florida Statutes

Dear Ms. Perez:

This letter responds to your request for an advisory opinion as to whether you must resign your current position to run for a seat on the city council. Because you are a person engaged in political activity proposing to take action relating to Florida election laws, the Division of Elections is authorized to issue you an opinion pursuant to section 106.23(2), Florida Statutes.

FACTS

According to your request, you are employed as the Human Resources Department Director for the City of Hialeah, Florida. You intend to run for Hialeah's City Council in 2019. You state that the Mayor of Hialeah appointed you to this position in 2014 and, as the Chief Executive Officer of the City, he (and not the City Council) has the authority to appoint, employ, promote, discipline or otherwise supervise you. You included provisions of the City Charter in your request for an opinion. The Charter creates a human resources department and specifically details the powers and duties of the director of the human resources department. In particular, the Charter, in part, provides that the director

“shall be the administrative head of the human resources department and recording secretary to the personnel (human resources) board. Subject to the supervision of the mayor, the director shall administer the affairs of the department. In addition to the general responsibilities, the director shall have the following enumerated powers and duties:

- (1) Administer collective bargaining agreements, including resolution of grievances and reprimands. ...
- (4) Act as a labor negotiator for the city at the discretion of the mayor. ...

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- (7) Advertise for employment and promotional opportunities. ...
- (8) Maintain a classification plan based on job description and salary range within the city. ...
- (9) Maintain and be the custodian of personnel records within the city.
- (10) Develop and establish training and education programs and opportunities for employees.
- (11) Certify payrolls.”

You also provided the personnel job description for your position which, in part, reads to “[p]erform the duties of Human Resources Director as prescribed by City Charter.” Regarding your role as the secretary to the personnel board, you indicate that you perform a purely clerical function and are not a voting member of the board.

You ask whether you are an “officer” or “subordinate officer” under section 99.012, Florida Statutes (2017), and whether you must resign your position under that statute to run for a city council seat; and, if so, what must be the effective date of the resignation.

ANALYSIS

Whether an individual is an officer or employee for resign-to-run purposes hinges upon the Florida Supreme Court’s holdings in *State ex. rel. Clyatt v. Hocker*, 22 So. 721 (Fla. 1897), and *State v. Sheats*, 83 So. 508 (Fla. 1919).¹ In *Clyatt v. Hocker*, the Florida Supreme Court stated:

The term 'office' implies a delegation of a portion of the sovereign power to, and possession of it by, the person filling the office; a public office being an agency for the state, and the person whose duty it is to perform the agency being a public officer. The term embraces the idea of tenure, duration, emolument, and duties, and has respect to a permanent public trust to be exercised in behalf of government, and not merely a transient, occasional or incidental employment. A person, in the service of government, who derives his position from a duly and legally authorized election or appointment, whose duties are continuous in their nature, and defined by rules prescribed by government, and not by contract, consisting of the exercise of important public powers, trusts, or duties, as a part of the regular administration of the government, the place and duties remaining, though the incumbent dies or is changed, . . . is a public officer . . . ; every 'office' in the constitutional meaning of the term, implying an authority to exercise some portion of the sovereign power, either in making, executing, or administering the law. 22 So. at 723.

In *State v. Sheats*, the Court further stated:

¹ Op. Att’y Gen. Fla. 80-01 (1980). The Division of Elections accepted this rationale in *Div. of Elections Op. 80-05* (May 5, 1980) (the opinion has since been rescinded because of its discussion of the then-sanctioned leave of absence provision, which no longer exists in the “resign-to-run” law; however, the test for determining whether a person is an “officer” remains valid. See *Div. of Elections Op. 00-08* (August 1, 2000).)

The term 'office' implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office, while an 'employment' does not comprehend a delegation of any part of the sovereign authority. 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. An employment does not authorize the exercise in one's own right of any sovereign power or any prescribed independent authority of a governmental nature; and this constitutes, perhaps, the most decisive difference between an employment and an office, and between an employee and an officer. . . . 83 So. at 509.

Florida's "resign-to-run" law requires "officers" to resign before qualifying for other offices.

No *officer* may qualify as a candidate for another state, district, county, or municipal public office if the terms or any part thereof run concurrently with each other without resigning from the office he or she presently holds.²

With respect to a municipality, the term "officer" means a person, whether elected or appointed, who has the authority to exercise municipal power as provided by the State Constitution, state laws, or municipal charter.³

Moreover, even if a person is not an "officer," the person still may be required to resign if he or she is a "subordinate officer" who is seeking an office held by a supervisor, as follows:

A person who is a subordinate officer, deputy sheriff, or police officer must resign effective upon qualifying pursuant to this chapter if the person is seeking to qualify for a public office that is currently held by an officer who has authority to appoint, employ, promote, or otherwise supervise that person and who has qualified as a candidate for reelection to that office.⁴

With respect to a municipality, a "subordinate officer" is a person who has been delegated the authority to exercise municipal power by an officer.⁵ While the Division of Elections has no authority to interpret city charters, it is clear that the City Charter of Hialeah creates the office of director of the human resources department and provides the director's powers and duties. However, the charter provides that the director operates under the supervision of the mayor. Therefore, to the extent that the director's duties are prescribed by the City Charter and include a delegation of some municipal power under the mayor's supervision, it appears that you are more than a mere city employee; instead, you are a "subordinate officer" for purposes of the "resign-to-run" law.

² §§ 99.012(1)(a) and (3)(a), Fla. Stat. (2017) (emphasis supplied).

³ § 99.012(3)(a), Fla. Stat. (2017).

⁴ § 99.012(4), Fla. Stat. (2017).

⁵ § 99.012(1)(b), Fla. Stat. (2017).

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As mentioned above, the “resign-to-run” law contains a special provision requiring any “subordinate officer” to resign upon qualifying if he or she seeks to qualify for “a public office that is currently held by an officer who has authority to appoint, employ, promote, or otherwise supervise that person and who has qualified as a candidate for reelection to that office.” You specifically assert that Hialeah is under a strong-mayor form of Government; the mayor is elected, but does not have a vote on the city council, and the council “has no direct authority to appoint, promote, employ, discipline or otherwise supervise” you.⁶ As long as the city councilmembers do not have the authority to “appoint, employ, promote, or otherwise supervise” the Director of the Human Resources Department, you are not required to resign to run for city council.⁷

Because the Division of Elections concludes you do not need to resign under section 99.012, it is not necessary to address your question of the proper effective date for a resignation. Moreover, please note that the Division issues this opinion only for purposes of the “resign-to-run” law. This opinion does not address or interpret any ethical concerns or city regulations that could be applicable to your situation. For example, if you are elected to the city council, section 112.313(10)(a), Florida Statutes (2017), which is a part of the statutory “Code of Ethics for Public Officers and Employees,” provides:

No employee of a state agency or of a county, municipality, special taxing district, or other political subdivision of the state shall hold office as a member of the governing board, council, commission, or authority, by whatever name known, which is his or her employer while, at the same time, continuing as an employee of such employer.

The Florida Commission on Ethics has authority to provide advisory opinions about this statute to any public officer, public employee, or candidate for public office.⁸

⁶ As stated, the Division lacks authority to interpret city charter or ordinance provisions. However, the Division notes that the Hialeah City Charter provides:

Except for the purpose of inquiries and investigations made in good faith, the city council or councilmembers shall deal with city officers and employees, who are subject to the direction and supervision of the mayor, solely through the mayor. Neither the city council nor councilmembers shall give orders to any such officer or employee, either publicly or privately. It is the express intent of this charter that recommendations for improvement of municipal governmental operations by individual councilmembers be made solely to and through the mayor.

Art. III, § 3.02(b), City Charter of Hialeah, Fla.

⁷ See *Div. of Elections Op.* 07-08 (Dec. 5, 2007) (explaining that section 99.012(4) creates an exemption from the resign-to-run law for subordinate officers, deputy sheriffs, and police officers who are not running against an incumbent officer who has authority to appoint, employ, promote, or otherwise supervise them).

⁸ § 112.322(3), Fla. Stat. (2017).

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SUMMARY

A subordinate officer is not required to resign under section 99.012(4), Florida Statutes (2017), if the subordinate officer is seeking an office that is not held by an officer who has authority to appoint, employ, promote, or otherwise supervise the subordinate officer.

Respectfully,

A handwritten signature in cursive script, appearing to read "M. Matthews", written in black ink.

Maria A. Matthews, Esq.
Director, Division of Elections