CITY OF TALLAHASSEE INDEPENDENT ETHICS BOARD

AO 2021-01 – April 20, 2021

MISUSE OF PUBLIC POSITION ORD. NO.: 2-8

CITY COMMISSION MEMBER'S LETTER IN SUPPORT OF STATE ELECTED OFFICIAL FACING DISCIPLINARY ACTION

SUMMARY:

Like its statutory counterpart, Ord. No. 2-8, *Misuse of public position*, does not prohibit a member of the city commission from submitting as a public official a letter of character reference, using official city letterhead, on behalf of a state elected official, who is a constituent, facing disciplinary action. This finding depends on the fact that the state elected official has no direct business relationship to the operations of the City of Tallahassee and that the member of the City Commission received no personal benefit in exchange for the submission. The fact that the member of the City Commission may realize some incidental benefit does not constitute a violation of the applicable ordinance since the act was done for a public purpose.

QUESTION 1:

Does a member of the Tallahassee City Commission misuse his or her official position by identifying himself or herself as a public official when submitting a character reference on behalf of a state elected official facing disciplinary action?

Under the circumstances presented, this question is answered in the negative.

The state ethics code prohibits public officials from misusing their public positions. Specifically, public officials are prohibited from "corruptly" using or attempting to use "his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege benefit, or exemption for himself, herself, or others." § 112.313(6), FLA. STAT. (2020).

For purposes of the state ethics code, the term "corruptly" is defined as an act or omission "done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties." § 112.312(9), FLA. STAT. (2020).

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While the statute fails to define "wrongful intent" as used in the preceding definition, the courts have defined the term to mean the public official "acted with reasonable notice that [his or] her conduct was inconsistent with the proper performance of her public duties and would be a violation of the law or the code of ethics in part III of chapter 112." *See Blackburn v. State*, 589 So. 2d 431, 434 (Fla. 1st DCA 1991).

In December 2019, the Tallahassee City Commission amended its ordinance prohibiting the misuse of public position. While the prior language was nearly identical to the state statute, the new ordinance reads as follows:

No public official or employee of the city shall use or attempt to use his or her official position or any city property or resource which may be within his or her trust, or perform or fail to perform, his or her official duties, in a manner which he or she knows or should know with the exercise of reasonable care will result in a special privilege, benefit, or exemption for himself or herself or others.

§ 2-8, Tallahassee Code of Ordinances (2020).

The revised city ordinance intentionally omits the term "corruptly," which raises the question as to whether an act that is done for a proper public purpose but still benefits another would constitute a violation. This cannot be the case. If this were to be the correct interpretation of the ordinance, then nearly every act of public officials would constitute a violation of the ordinance. The title of the ordinance, Misuse of Public Position, clearly implies that the act must be inappropriate and not serve a public purpose. For this reason, the precedents from the Florida Commission on Ethics related to Misuse of Public Position are applicable here.

The Florida Commission on Ethics has considered numerous cases where public officials used their public titles for the benefit of others. The Commission previously advised the St. Lucie County Clerk of Court that it would be permissible for her to use her official job title in a letter of recommendation on behalf of a person who had applied for an appointment, job, or grant. *See* CEO 99-8. In this case, the Commission conditioned the act on the fact that the appointment, job, or grant as well as the person did not have any business relationship with the Clerk or her office.

The preceding advisory opinion relied on a trio of probable cause hearings that resulted in similar findings. The most applicable is that involving a city council member who issued a letter of recommendation on behalf of a constituent. *See In re: George Keller* (Compl. No. 97-169). In

Keller, the Commission found no probable cause that Mr. Keller misused his public position when he testified as a character witness on behalf of a constituent. In this case, the constituent alleged wrongdoing by a specific police officer, and Mr. Keller appeared in his official capacity of city council member to offer character testimony on behalf of the person. The Commission argued that the act was a "time honored custom of public officials writing letters of recommendation in response to a constituent's request for himself or herself[.]" *Id*. City of Tallahassee Independent Ethics Board AO 2021-01 – April 20, 2021 Page 3 of 4

The facts here mirror those in *Keller*. The member of the City Commission wishes to identify himself or herself as a local public official while providing a character reference during a disciplinary proceeding against a state elected official. The member claims that the other elected official does not have any business relationship with the City of Tallahassee, but instead is a constituent and friend.

Accordingly, under the circumstances described above, this Board finds that the act of a member of the City Commission identifying himself or herself as a public official while providing a character reference for another elected official who has no business relationship with city would not violate the City of Tallahassee Ethics Code.

QUESTION 2:

Does a member of the Tallahassee City Commission misuse his or her official position by submitting a character reference on behalf of a state elected official facing disciplinary action when done so using official city letterhead?

Under the circumstances presented, this question is answered in the negative.

For the same reasons articulated above, the omission of the term "corruptly" from the municipal ordinance prohibiting a misuse of public position does not prevent this Board from relying on opinions rendered by the Florida Commission on Ethics.

The second question differs from the first, because the inquirer intends to not only offer a character reference as an elected official, but also wishes to do so using city stationery. While the facts are slightly different, the outcome is the same. A member of the City Commission offering a character reference on official municipal letterhead on behalf of an elected official facing disciplinary action would not constitute a misuse of position.

As here, the Florida Commission on Ethics responded to a request from the St. Lucie County Clerk of Court regarding personal identification and the use of official stationery. *See* CEO 99-8. As previously stated, the Clerk wished to extend a letter of recommendation on behalf of a person applying for an appointment, job, or grant. Again, the permissibility of the act hinged on the fact that the person did not have a business relationship with the Clerk or her office. *Id*.

For this analysis, the Commission relied on two probable cause hearings. The first involved a county commissioner who used county resources to write a "character reference" letter on behalf of an acquaintance who had been convicted of DUI and faced sentencing. *See In re: Anthony Mosca* (Compl. No. 94-56). Here, the individual did not have a business relationship with the county and/or the commissioner, and the commissioner did not realize any benefit from preparing the letter. The Commission found no probable cause that Commissioner Mosca misused his public position. *Id.*

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The Commission also relied on a case where a mayor issued letters of recommendations on city stationery which were mailed at taxpayer expense, for personal friends. *See In re: Thomas R. Mariani* (Compl. No. 96-238). The Commission held that Mayor Mariani did not misuse his position, because although the letters constituted a "use" of office, it was not an improper use. The Commission further opined that a use of a public position would constitute an ethics violation if and when such act was inconsistent with the proper performance of one's office. *Id*.

Additionally, the Commission found that the letter beneficiary did not have a business relationship with the city or mayor and that the mayor did not realize any benefit for writing the letters. The Commission further argued that writing letters of recommendation is a commonplace practice of elected officials; therefore, the conduct of Mayor Mariani was not improper. *Id.*

As stated above, the inquirer has a personal relationship with the elected official for whom the character letter was drafted. In *Mariani*, the respondent was found to issue letters of recommendations for personal friends, while in *Mosca*, the respondent wrote a character reference on official letterhead in a disciplinary action. The Commission found these acts to be permissible under the state ethics code, even when the letter beneficiaries were personal friends, because the public officials did not have a business relationship with the letters' beneficiaries nor did they receive any personal benefit.

Accordingly, under the circumstances described above, this Board finds that the act of a member of the City Commission providing a character reference on official city letterhead for another elected official who has no business relationship with city would not violate the City of Tallahassee Ethics Code.

ORDERED by the City of Tallahassee Independent Ethics Board meeting in public session on April 20, 2021, and **RENDERED** this 20^{eh} day of April, 2021.



Tallahassee Independent Ethics Board



