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July 16, 2019

Commissioner Sandra Murman
Commissioner Ken Hagan
Commissioner Lesley “Les” Miller, Jr., Chair
Commissioner Stacy White
Commissioner Mariella Smith
Commissioner Pat Kemp
Commissioner Kimberly Overman
Hillsborough County Board of County
Commissioners
601 W. Kennedy Blvd.
Tampa, FL 33602

VIA HAND DELIVERY

RE: Hillsborough County Employee Discipline Appeal Process

Dear Commissioners:

I have had the honor of serving as the General Counsel of the Hillsborough County Civil Service Board (“the Board”) since 1986. Board Executive Director Kevin Beckner has requested that I review and evaluate the proposed Hillsborough County Employee Discipline Appeal Process (“the Appeal Process”) that has been added to the consent agenda for the July 17, 2019 meeting of the Board of County Commissioners as Agenda Item No. A-30. Chapter 2019-183, Laws of Florida, requires that the Appeal Process provide substantially similar protections and rights to those presently included in sections 11 and 12 of the Civil Service Act. However, there are some significant divergences between the proposed Appeal Process and the existing Civil Service Act and its Rules and Regulations, which in virtually all circumstances would offer significantly weaker protections of the constitutional due process rights of Hillsborough County classified employees.

The Board and its staff have been willing and available to participate in the process of drafting the new Appeal Process, but were not invited to do so. Nonetheless, in my capacity as Board General Counsel, I had an informal meeting with one of the Senior Assistant County Attorneys who participated in drafting the Appeal Process, which had been set for other purposes. I presented a number of concerns about the original draft of the Appeal Process. It appears that some of those concerns were addressed by the most recent draft of the Appeal Process attached to Agenda Item No. A-30. However, several of my most serious concerns about the Appeals Process remain, and represent significant disadvantages to the classified employees of Hillsborough County, compared to the system under the Civil Service Act, which has been in place for at least 20 years. Among my concerns are the following:

- The Appeal Process does not require the disclosure of witnesses or the identification or exchange of exhibits prior to the appeals evidentiary hearing, and does not require any type of pre-hearing conference. This creates a significant risk of trial by ambush that has the likely potential to negatively impact an appellant's ability to present his or her case at the hearing and to adequately respond to the County's evidence. The County will in most cases have possession of the relevant documents in question, and will employ the witnesses in question, which puts an appellant at a disadvantage if he or she is not advised which documents or witnesses the County intends to rely upon at the hearing.
- This concern is compounded by the fact that there are no limits to the timeframes that either party may have to present its case. Since it is common for the County to list 25 or more witnesses, dozens of exhibits and video and audio tapes, none of which are available to an appellant before the hearing under the new Appeal Process, an appellant, who in at least 20% of the appeals will be representing himself, will be facing a trial which in most cases will be conducted under the Florida Rules of Civil Procedures and Rules of Evidence, where the County (or the other agencies) will call dozens of witnesses of whom the appellant is unaware, introduce hundreds of pages of exhibits the appellant has never seen, and introduce video and audio tapes the appellant has never seen or heard. Unlike the present system under Board Rule 15, which limits hearing time for terminations to one hour per side, the new Appeal Process has no time limits, permitting the County to present its case over many hours and to overwhelm most appellants.
- The County has represented that its proposed Appeal Process is in line with the disciplinary appeals programs utilized by the large majority of other Florida counties. However, the statistics it provides in its Background Section (p. 5) contradict this position, as 57 of the 65, or 88%, of the reporting Florida counties provide that the government makes the final decision on appeals. Only 8 counties outsource the final decision-making authority to a third party, such as an arbitrator.
- The Appeals Process appears to use the terms "just cause" and "cause" interchangeably at times, making it unclear what standard applies to the employment decisions to be reviewed.
- The largely unspecified procedure for selecting and appointing an appeals referee presents a conflict of interest. The County appears to have the authority to select all of the appeals referees for the panel, and to select the appeals referee for each hearing, from the rotating panel, through the use of an unidentified "independent service." Furthermore, the County will presumably pay the appeals referees, although the payment procedures are unidentified. Finally, the Appeals Process disincentivizes an appeals referee from ruling against an Appointing Authority's Motion to Dismiss or either party's Motion for Summary Judgment, because the appeals referee is then replaced with a new appeals referee before any evidentiary hearing, a relatively obscure procedure not allowed in any courts or agencies of which we are aware.

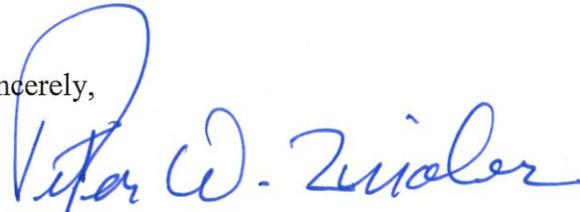
The proposed Appeal Process vests sole responsibility for analyzing findings of fact, conclusions of law and the ultimate decision in the hands of the appeals referee, with only "limited

review” on certiorari in circuit court. In contrast, the present system under the Civil Service Acts vests responsibility for the final decisions on appeals in the hands of up to seven (7) Board Members, appointed by the Governor, who are uncompensated. At a minimum, if Hillsborough County is insistent on moving forward with appeals referees, the decisions of such individuals should issue as recommendations to the management or the agencies (or the County) in whom the ultimate authority, and accountability for managing constitutional due process, should reside. Management could then decide who would make the final decisions, including the possibility of appointing an unpaid board of disciplinary appeals to evaluate the recommendations of appeals referees. Apparently, this is the approach followed by 57 of the 65 counties who reported to the County Attorney regarding their systems. This is also similar to the systems followed by the Public Employees Relations Commission and the Florida Commission on Human Rights.

Finally, we have some broader concerns over the Appeal Process as a whole. We question whether the Hillsborough County government has the constitutional right to outsource its constitutional obligation to provide procedural due process to its classified employees. Indeed, the data provided by the County clearly shows that at least 57 of the 65 Florida counties who reported do not outsource this important constitutional protection. This is contrary to what has been represented to the news media and shows that the proposed Appeal Process would be an outlier.

Based on the foregoing, we do not believe that this Appeal Process provides substantially similar rights to those currently available to employees under the Civil Service Act. We are available to work with the County Attorney’s Office to develop a new process that satisfies the goals of the legislation. We would ask that the Board of County Commissioners intervene and address these critical issues.

Sincerely,



Peter W. Zinober
Gretchen M. Lehman

PWZ:gml/dkb