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September 18, 2019

Via Email: BecknerK@hillsboroughcounty.org
Kevin Beckner, Director
Hillsborough County Civil Service Board
601 East Kennedy Boulevard
18th Floor
Tampa, Florida 33602

RE: Comments regarding the Final Hillsborough County Employee Discipline Appeal Process

Dear Kevin:

You have requested that we review and comment upon the Final Hillsborough County Employee Discipline Appeal Process ("Appeal Process"), which was presented to the Board of County Commissioners for adoption on August 7, 2019 and which is scheduled to go into effect on October 1, 2019, after the Hillsborough County Service Board ceases operations. The Appeal Process has evolved considerably throughout the drafting process. At your request, I reviewed and evaluated previous versions of the Appeal Process on June 19, 2019, in a letter to you (attached and incorporated into this letter as Exhibit A) and July 16, 2019, in a letter to the Hillsborough County Board of County Commissioners (attached and incorporated into this letter as Exhibit B).

Following my letter of July 16, 2019, the drafting committee for the Appeal Process invited us to participate in the revision process as Hillsborough County Civil Service Board General Counsel. We met with the drafting committee on two separate occasions to address the concerns discussed in the July 16, 2019 letter to the BOCC. Those meetings yielded a number of substantive changes to the Appeals Process that mirror the procedures and protections currently provided by the Civil Service Board Rules.

During our meetings with the drafting committee, we had recommended the implementation of an independent and unpaid Hillsborough County Employee Discipline Appeal Council, which would be tasked with reviewing appeals in three-member panels. However, in the final Appeal Process, the drafting committee rejected our recommendations, and instead opted for the appointment of paid Appeals Referees that would preside over employee appeals hearings. As addressed in our previous letters, the use of the Appeals Referees is our primary concern with the fairness of the final Appeals Process. 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. We believe that the use of private arbitrators diverges from 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. Additionally, we have concerns about the legality of outsourcing of the County's final decision-making authority regarding due process appeals to a private third party paid by the employers.

Another primary issue with the final Appeal Process is that the procedure for appointing an Appeals Referee is quite vague. The Appeal Process provides only that Hillsborough County will utilize an unidentified "independent service (such as the American Arbitration Association)" who will compile a list of potential appeals referees, who will then be selected as Appeals Referees on a "rotating basis with consideration of availability." Without more details (including an identification of what "independent service" will be provided), it is impossible to ascertain how this process will work. While the final Appeal Process does provide that the County will not have input into who is placed on the list, appellants have no part in the process. Additionally, as the County will be paying the appeals referees, there remains potential for a conflict of interest.

Despite our concern that the final Appeals Process does not provide substantially similar protections to those currently afforded to Hillsborough County classified employees, we do not believe that the Appeal Process itself denies employees procedural due process under the Fourteenth Amendment of the United States Constitution. See U.S. Const. amend. XIV, § 1. The Constitutional right to procedural due process protects individuals against erroneous governmental deprivation of something it has within its discretion bestowed, as in circumstances where a statute or governmental practice gives rise to a legitimate expectation of entitlement to a benefit. See *Perry v. Sindermann*, 408 U.S. 593 (1972) (employment); *Arnett v. Kennedy*, 416 U.S. 134, 140 (1974) (employment); *Goldberg v. Kelly*, 397 U.S. 254, 261-262 (1970) (welfare benefits); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (Social Security benefits). Due process protection requires that employees have a fair procedural process before an adverse employment action is taken if the action is related to a property interest. Procedural due process requires both notice and an opportunity to respond, as required by *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), cert. denied, 488 U.S. 946 (1988). We believe that the final Appeal Process meets these basic requirements.

Please let us know if you have any questions or if you would like to discuss further.

Sincerely,

Peter W. Zinober
General Counsel Hillsborough County
Civil Service Board

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Cc: Alma Gonzalez
Gretchen Lehman, Esq.

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June 19, 2019

Via Email: BecknerK@hillsboroughcounty.org

Kevin Beckner, Director
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601 East Kennedy Boulevard
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Tampa, Florida 33602

RE: Comments regarding the draft Hillsborough County Employee Discipline Appeal Process

Dear Kevin:

On June 12th, you requested that I review and comment upon the draft Hillsborough County Employee Discipline Appeal Process ("AP") which you had recently received from Hillsborough County. I will present my comments seriatim, correlating them with the specific provisions of the AP. My observations are as follows:

1. As a preliminary observation, I will only comment on specific provisions which conflict with, or deviate from, existing appeal processes of the Civil Service Board.

2. As the General Counsel will recommend to the Board in the *Karl, et al* consolidated appeal, demotions which occur as the result of reorganizations, reductions in force, layoffs or similar job actions are non-disciplinary, and therefore should not be subject to the AP.

Exhibit A

3. Section 2.A.(5). The AP states that there will be an appeal intake office responsible for receiving appeals, serving them on Appointing Authorities, and requesting "an independent service" to appoint a qualified arbitrator with labor and employment experience to serve as an appeal referee. The identity of the "independent service" is not disclosed in the AP, and it is not clear who this might be. The possibility of the American Arbitration Association was discussed extensively in my letter to you dated December 13, 2018, and there is no need to restate the contents of that letter. Regardless of whether AAA, JAMS, Federal Mediation and Conciliation Service or some other arbitration service is used as the "independent service", these agencies typically provide a set of rules and regulations by which arbitrations are conducted, which would appear to conflict with the less rigorous procedures included in the AP. Moreover, these well-known arbitration providers assemble panels of arbitrators who must be extensively vetted in a peer review process, thereby insuring quality control. It is not clear who the "independent service" is going to be, what rules this provider is going to follow, how the provider assembles and vets panels of arbitrators, or as described in this procedure, "appeal referees", and what the costs of such a procedure would be. Typically, there are fees charged by the service for administering the process, and the arbitrators have fee schedules separately in which they charge either by the hour or by the day. Most arbitrators charge between $400.00 and $700.00 per hour. Thus, it is not at all clear how the County will enforce a limit of $15,000.00 per arbitration if the arbitrator is involved in conducting hearings on motions to dismiss, motions for summary judgment, pre-hearing activities, motions in lime and evidentiary hearings, as well as writing findings of fact and conclusions of law.

Apart from the observations above concerning the independent service responsible for providing the panel of arbitrators, there will likely be significant concern on the part of appellants that

the process designed by the appointing authorities is biased in favor of the appointing authorities and against employees, since the arbitrators will be selected and paid entirely by the appointing authorities. Moreover, as will be discussed below, since Hillsborough County has effectively outsourced its constitutional obligation to provide the 14th Amendment Procedural Due Process to private arbitrators who are selected and are being paid entirely by the appointing authorities, it is not clear that this system would comport with the requirement of neutrality required by the 14th Amendment.

In virtually all dispute resolution systems which utilize the services of private, third party arbitrators, the selection of the arbitrator is made jointly by the employer and the appellant or grievant utilizing a system of alternative strikes from a panel of arbitrators provided by the arbitration administrator or provider. (See Part C, pp.2&3, of my letter to you dated December 13, 2018). The process of striking, and finally selecting, an arbitrator, requires knowledge and experience with the decisions of the arbitrators on the panel by those making the selections. This comes either from personal experience over the course of many years participating in arbitrations, or a review of arbitrator biographies and literally thousands of arbitral awards to determine how to rank the arbitrators on a panel. This experience generally resides in experienced labor & employment counsel, such as the assistant county attorneys handling these appeals, and experienced union representatives. These resources are not generally available to, or even known to, the large majority of lawyers representing appellants in these types of cases. They are certainly beyond the reach of unrepresented, pro se, appellants who comprise as much as 25% of the appellants who have appeared before the Board. Thus, appellants appear to be at a distinct disadvantage in the process of selection of arbitrators to serve as appeal referees.

4. Section 2.B.(2)c. This section of the AP deals with requests for appeal and time frames. Subsection c states, "any deadlines set forth herein may be extended by mutual agreement of the parties". What happens if one party does not agree to extend the deadlines? There is no mechanism for a neutral to extend deadlines, and the deadlines in this procedure are very tight. Indeed, Hillsborough County routinely asks for an extension of time to file motions for summary judgment. If appellants refuse to extend the deadlines, what recourse does Hillsborough County have but to go to a full evidentiary hearing? There are other deadlines in this procedure that work to the advantage of appellants, and if the appointing authority does not agree to extend the deadline, what recourse does the appellant have?

5. Section 2.B.(3)c. The appeal process discusses the procedure by which appellants would be notified that they are not eligible for an appeal hearing, and if an appellant challenges such determination, an appeal referee would be selected, (presumably by the appeal intake office) to conduct a hearing on the issue of eligibility for an appeal hearing. If the appeals referee conducts such a hearing, and determines conclusively that the appellant is not eligible for an appeal hearing within the terms of this section, is that determination considered "final agency action" under the Florida Rules of Civil Procedure and the Florida Rules of Appellate Procedure, subject to certiorari review? Are the appointing authorities in effect outsourcing the role of rendering a final agency action to a private arbitrator, and is this permissible under Florida Law and the 14th Amendment.

6. Section 2.B.(4)c. This section describes the process for appointing a "qualified arbitrator....to preside over the appeal hearing". It contemplates the County will provide the independent services with a schedule of fees and costs and the cancellation period that will apply to

appeal referees. "Appeal referees must agree to the fee schedule/cancellation period in order to be placed on the rotating panel". It would be interesting to see this document.

7. Section 2.B.(4)d. This paragraph contemplates that all appeals hearings will be scheduled "during normal business hours". What are "normal business hours"? Does this mean that the hearing must start and end during normal business hours, and if it has not been completed, it would carry over to some other work day? Civil Service Board Rule 15 contemplates time limits for hearings, but the new County appeals process has no time limits for presenting cases. Typically, the existence of time limits has served as a restraint on the tendency of Assistant County Attorneys to bulk up their witness lists with two dozen or more witnesses and dozens of exhibits, hence the elimination of any time restrictions on hearings would have the effect of strongly favoring the attorneys for the appointing authorities, who are on salary, whose agencies control the witnesses and exhibits, and have as much time as they choose to invest in preparing and presenting their cases. Appellants typically have far fewer witnesses and exhibits, and unrepresented appellants have fewer still. Travenski Lawson presented two witnesses on his behalf, even though the hearing lasted from 7p.m-2a.m. Thus, eliminating the time limits for hearings strongly favors the position of the appointing authorities in presenting their cases. Moreover, scheduling hearings during "normal business hours" may very well work to the disadvantage of appellants, who have become re-employed and who may experience hardship and risk loss of employment, by attending these hearings during normal working hours. Civil Service hearings typically take place after normal working hours, largely to accommodate the needs of appellants and witnesses who have work responsibilities, as well as the volunteer board members.

8. Section 2.B.(5)c iv. This subsection includes the statement "the appeals referee shall apply the same standard described in Section B(8)(b)." It is not clear what this means in the context of consideration a motion for summary judgment, because the standard for considering a motion for summary judgment differs from the standard that the appeals referee would apply in resolving an appeal at a full evidentiary hearing. Indeed, although the AP refers on multiple occasions to appellants bearing the burden of establishing that they did not violate each and every rule or procedure cited as a basis for discipline, nowhere does it state in these rules that the burden is on the appointing authority to establish by a preponderance of the evidence the absence of a dispute regarding any material fact so as to support summary judgment. Clearly, the burden in summary judgment proceedings and motions to dismiss is on the moving parties, usually the appointing authorities. (See, generally, Rule 15).

9. Section 2.B.(5)c ix. To paraphrase this section, the Appeal Process provides that if the appeals referee rules against the appointing authority on its motion to dismiss or its motion for summary judgment, once the appeals referee "memorializes the ruling in a written Final Order" that appeals referee would be "divested of jurisdiction in the matter". This section continues, and states that "in the event an evidentiary hearing is needed, a new appeals referee will be appointed by the independent service". This is completely inconsistent with any dispute resolution system, either judicial, administrative or arbitral, with which I am familiar. It seems to me that this atypical procedure strongly favors appointing authorities in 2 ways:

a. By divesting the appeals referee from jurisdiction over the case if the referee rules against the appointing authority, a brand new appeals referee will not have the benefit of having

adjudicated the preliminary motions in the case, considering the arguments of the appellant and the appointing authority, and will not have familiarity with the case. In effect, the new appeals referee would be coming in without any background in the case at all.

b. Perhaps even more significant, the appeals referee would in effect be punished for ruling against the appointing authority by being removed from the process, thereby losing the opportunity to generate more income by conducting an evidentiary hearing if he or she were to remain engaged on the case. I can think of no compelling reason to effectively fire an appeals referee because he/she has ruled against an appointing authority on a motion for summary judgment.

10. Section 2.B.(7)b. This subparagraph includes the sentence "Conformity to legal rules of evidence shall not be necessary". This is a deviation from the approach which has been routinely followed in appeals hearings under Rule 15. Although the 14th Amendment does not require rigid adherence to rules of evidence as applied in the courts of Florida, we have followed the rules of evidence to the greatest extent possible, and in so doing, they have generally provided "guardrails" in the evidentiary hearings which has prevented the parties from straying too far in introducing evidence in these hearings. I have some concern that by memorializing a policy of specifically not following "legal rules of evidence", this will be a license on the part of appointing authorities to base their cases to a much greater extent on hearsay evidence, character evidence, evidence in which a proper evidentiary foundation has not been laid, and other evidence which has not typically been admitted in Rule 15 appeals hearings. Under Florida Administrative Law, while hearsay evidence is permissible, the decision in a case conducted under the Florida Administrative Procedures Act cannot be based solely on hearsay. Hearsay thus can only corroborate evidence, but may not be the sole

basis for such a decision. What does the language quoted above mean then, in terms of its effect on the introduction of hearsay evidence in appeals hearings?

11. Section 2.B.(7)f. In evidentiary hearings under Rule 15, even though the ultimate burden falls to the appellant to prove by preponderance of the evidence that each rule and procedure was not violated, the Civil Service Board for many decades has followed the procedures which tend to be followed in administrative proceedings in Florida, and in arbitrations of employment claims, of requiring the employer to put on its case in-chief first, and to have the opportunity to put on rebuttal evidence. The purpose of following this protocol has been to recognize that the employer controls the records and the witnesses who are involved in the ultimate decisions being challenged, and therefore to require the employer to put its case on first so that the fact finders have the opportunity to understand the case prior to the appellant attempting to respond. This procedure has been flipped in Subparagraph f by requiring the appellant to proceed with his/her case in-chief first before the appeals referee, and only afterwards requiring the employer to put its case in-chief into the record. This, again, represents a significant disadvantage for appellants, and would effectively convert employee appeals into employment litigation in court. The consequence of shifting the burden to appellants to put their cases on first would be to invite appointing authorities to move for involuntary dismissal of appeals after the appellants put on their cases.

12. Section 2.B.(8)c. In this paragraph the appeals process describes the decision of the appeals referee in any appeal hearing to be considered "final and binding on all affected parties subject to review pursuant to the Florida Rules of Appellate Procedure". In effect, the appointing authorities, including Hillsborough County, have outsourced their responsibilities to insure procedural due

process under the 14th Amendment to a private arbitrator, an independent contractor with the government. In so doing, the appointing authorities have abdicated their constitutional responsibilities to be the ultimate decision makers subject to review by petitions for certiorari in circuit court. In the case of Hillsborough County, the ultimate decision typically would be that of the Hillsborough County Commission. Under the Civil Service Act, that responsibility falls on the Hillsborough County Civil Service Board, at least until October 1, 2019. There is a significant legal issue, which I have not researched, as to whether or not the appointing authorities, including Hillsborough County, can lawfully subcontract their responsibility to provide final agency action regarding due process appeals to a private arbitrator.

Please feel free to contact me if you have any questions regarding the foregoing.

Sincerely,

Peter W. Zinober
General Counsel Hillsborough County
Civil Service Board

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Cc: Alma Gonzalez
Gretchen Lehman, Esq.

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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:

Exhibit B

- 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

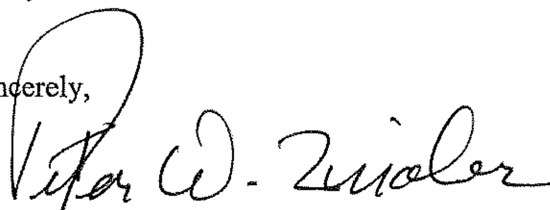
Ogletree Deakins

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,



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