Hillsborough County Florida

A report presented to the

Board of County Commissioners

on 8/7/2019

from County Attorney's Office

regarding

Receive a report on the Employee Discipline Appeal Process outlined in Agenda Item A-30 from the July 17, 2019 Board of County Commissioners Meeting.

Sign-Off Approvals	
Jennie Tarr	8/1/2019
Managing County Attorney	Date
Christine Beck	8/1/2019
County Attorney	Date
Joint Department Director	Date
Tom Fesler	8/1/2019
Management and Budget – Approved as to Financial Impact Accuracy	Date
Rudin Haidermota	8/1/2019
Assistant County Attorney	Date

☐ Consent Section – Informational purposes only. (*No discussion anticipated)*
☐ Consent Section – Board requested report. (*No discussion anticipated)*
☒ Staff Reports Section

Note: Staff reports scheduled for the Consent or Staff Report sections may not contain any recommendations.

HILLSBOROUGH COUNTY CIVIL SERVICE ACT HISTORY

The Hillsborough County Civil Service System was initially created by a special act of the Florida Legislature in 1951. The legislature passed numerous special acts in the ensuing decades amending multiple aspects of the Civil Service System. The legislature also passed special acts which repealed the existing enabling legislation in its entirety and established a "new" civil service system, i.e. the Civil Service Acts of 1985, 1996 and 2000.

The provisions of the Civil Service Act of 2000 ("Act") applied to all classified personnel employed by twenty-two enumerated agencies or authorities. Under the Act, the Civil Service Board provided such services as establishing and maintaining a job classification system, adopting classification, benefit and pay plans, establishing a grievance process, and hearing and determining appeals from certain disciplinary actions.

In 2014, the Act was amended to provide each agency with the option to opt out of any provision of the Act, other than Section 11 (Suspension; Demotion; Dismissal) and Section 12 (Appeal Hearing Procedure). Numerous Agencies have elected to opt out of the applicable provisions of the Act since 2014.

On May 23, 2019 the Governor signed a bill abolishing the Hillsborough County Civil Service Act to be effective October 1, 2019. House Bill 1373, Laws of Florida, provides that all agencies covered by the Act must provide a fair, neutral and impartial system for administering suspensions, involuntary demotions or dismissals and for the appeals of such discipline. Furthermore, this law requires that the system "will be uniform for all agencies and shall provide a tenured employee with substantially similar protections and rights as set forth in Sections 11 and 12..."

Hillsborough County Florida

COUNTY ATTORNEY
Christine M. Beck
PO Box 1110 Tampa, FL 33601-1110
(813) 272-5670 | Fax: (813) 272-5231

MEMORANDUM

TO: Board of County Commissioners

THROUGH: Christine M. Beck, County Attorney
Jennie Granahan Tarr, Chief Assistant County Attorney

FROM: Rudin E. Haidermota, Senior Assistant County Attorney

RE: Legal opinion regarding Employee Discipline Appeal Process outlined in Agenda Item A-30 from the Board of County Commissioners meeting on July 17, 2019

DATE: August 1, 2019

At the July 17, 2019 Board of County Commissioners ("BOCC") meeting, Commissioner Kemp requested a written opinion regarding the legal and policy issues raised during public comment on Agenda Item A-30, the Human Resources Report on Hillsborough County's Employee Discipline Appeal Process ("Process"). This legal opinion is in response to that request and responds to the comments regarding the Process and the utilization of an Appeals Referee.

Since the BOCC meeting, we have reviewed and discussed the public comments, met with the County's Human Resources Director and continued to receive stakeholder's input regarding this evolving issue.

We have received significant comments regarding the use of an Appeals Referee. The use of an Appeals Referee is in compliance with House Bill 1373 and provides tenured employees with substantially similar protections and rights that currently exists in Sections 11 and 12 of the Civil Service Act. However, these comments resulted in the in-depth exploration of other options such as the use of a Board who would serve without compensation.

It was suggested that the Discipline Appeal Process should have disciplinary appeals heard by a panel of individuals, and not one Appeals Referee. The current structure for hearing appeals under Civil Service rests this responsibility with up to seven (7) Board members appointed by the

Governor. The utilization of an unpaid Board moving forward as of October 1, 2019, would also be in compliance with House Bill 1373, and would provide a structure similar to the unpaid Governor appointees under the current Civil Service system. The substitution of a Board or Council for the Appeals Referee is another option for all stakeholders.

LEGAL OPINION

JUST CAUSE STANDARD

Does the Process provide the same standard of just cause contained in the Civil Service Act, Sections 11 and 12?

SHORT ANSWER:

Yes. The standard of just cause under the Process[1] provides the same employee protection as the just cause standard currently in place under Civil Service. In fact, employee protection has been enhanced by shifting the burden of proof from the employee to the Appointing Authority.

Just cause is the standard utilized to issue discipline. The standard for just cause for Civil Service Appeals established by the Civil Service Board has been in place for at least 20 years. House Bill 1373, effective October 1, 2019, requires Agencies previously covered by the Civil Service Act to provide the same level of protection as provided by Civil Service. The Process complies with House Bill 1373, and further enhances employee protection by switching the burden of proof from the employee to the Appointing Authority.

The standard of just cause in the Process is a reiteration of the existing standard under Civil Service, and provides employees with substantially similar protections and rights as set forth in Section 11 and Section 12 of the Civil Service Act.

LEGAL ANALYSIS:

Section 7 (Creation of the Board; Method of Conducting Business; Powers and Duties) of the Civil Service Act created the Hillsborough County Civil Service Board ("Civil Service Board") and provided the Civil Service Board with powers and duties to carry out the Civil Service Act. Under Section 7 (1), the Civil Service Board is provided with authority to "Adopt and amend rules for the uniform administration of this act..."

The Civil Service Board adopted Civil Service Rule 15 to implement Sections 11 and 12 of the Civil Service Act.

Civil Service Rule 15.1 (General/Powers of the Board), Section 1 states:

> (1) The employee appeal procedure mandated in Sections 11 and 12 of the Civil Service Act (Chapter 2000-445, L.O.F., as amended) is implemented by this rule and the relevant provisions contained in Civil Service Rules 2, 3, and 11 which are hereby incorporated by reference.

The Civil Service Board pursuant to its authority under state law, defines just cause primarily in the following Civil Service Rules: Section 15.20, Section 15.22, Section 11.1, and

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[1] Process = "Discipline Appeals Policy"

Section 11.2. These Civil Service Rules form the basis for defining just cause under the Process. Nothing has changed in the application of the standard of just cause with the Process.

Civil Service Rule 15.20 (Burden of Proof) states it is the responsibility of the Appellant (Employee) to prove by the preponderance of the evidence that the Agency lacked just cause for imposing discipline. The standard further explains the Appellant (Employee) must persuade the Civil Service Board that the "facts do not support the Agency's allegations that the Appellant's conduct constitutes a violation of the Civil Service Rules..."

If the facts support a rule violation, the Agency prevails. If the employee shows the underlying facts don't support a rule violation, the employee prevails.

Civil Service Rule 15.22 further reinforces the Civil Service Board's application of just cause.

Civil Service Rule 15.22 - Modification or Reduction of Disciplinary Actions Impermissible states:

> (1) It is not part of the Board's function to determine whether the degree or type of action is appropriate. Therefore, the Board may not reduce, increase or otherwise modify the action imposed upon the appellant by the Agency Head. If the conduct which is proven establishes a violation of at least one of the Civil Service Rules, the action taken must be upheld in its entirety. If the conduct which is proven does not establish a violation of the Civil Service Rules, or if the action taken is found not to be for just cause, the action must be vacated in its entirety and the appellant placed in the same position that he or she would have been in had the action not been taken.
>
> (2) In determining whether or not the conduct which is proven supports the action of the Agency Head, the Board shall consider each alleged violation cited on Civil Service Form 5.
>
> (3) In cases where the appellant does not contest the cited violations of the Civil Service Rules or Law, or the Agency's Operational or Administrative Rules and Procedures; and, when it becomes apparent that the only relief sought is to reduce the discipline imposed, the Board may dismiss the Appeal upon filing of an appropriate motion.

The Process mirrors this standard as required by House Bill 1373. In addition, the employee protection has been significantly enhanced by requiring the Appointing Authority to bear the burden of proof. Under Civil Service, as set forth in Civil Service Rule 15.20 (burden of proof), the employee has the burden to prove his or her case. Under the Process, the Appointing Authority has the burden to prove its case.

Civil Service, pursuant to its statutory authority, applies the just cause standard as explained above, and it is not the same application as contained in collective bargaining agreements negotiated by labor unions which generally apply a seven factor test for determining just cause which includes whether the discipline is proportional to the misconduct (i.e. progressive discipline). However, the Process, consistent with Civil Service Rule 15.22, states the discipline must be vacated if the conduct does not establish a rule violation or if the action taken is not for

just cause. The ability to argue just cause under this provision, independent of a rule violation, allows for progressive discipline if the penalty is not proportionate to the misconduct.

The Civil Service Board also adopted Civil Service Rule 11.2 (Reasons for Dismissals, Suspensions, or Involuntary Demotions for Cause) which enumerates the reasons an employee may be suspended, involuntarily demoted, or dismissed. For example, Civil Service Rule 11.2 (5) provides for such disciplinary action if the employee "committed an act of insubordination." The term "cause" was cited in Civil Service Rules 11.1 and 11.2, and accordingly in drafting the Process, the same term "cause" is used in the rule violation provisions of the Process. The use of the same term was intended to further reinforce that the Process was providing the same level of protection that currently exists. Since replacing the term "cause" with the term "just cause" does not have a legal impact, it can be changed in this Process if it provides better clarity.

In addition, the definition of just cause in the Process can be simplified to state "Just cause, as applied herein, is the basis for disciplining a tenured employee." This definition would further clarify any concerns that the definition of just cause was being limited or restricted from the current level of employee protection.

SUMMARY JUDGMENT PROCEDURE

Why does the Process include a Summary Judgment Procedure?

SHORT ANSWER:

A Motion for Summary Judgment is filed when a party believes there is no genuine issue of fact and a judgment should be reached as a matter of law. The Civil Service Rules provide for Summary Judgment which allows either party to file a Motion for Summary Judgment. The Process simply incorporates and maintains the existing process.

LEGAL ANALYSIS:

Section 7 of the Civil Service Act authorized the Civil Service Board to adopt rules for the uniform administration of the Civil Service Act. The Civil Service Board adopted Civil Service Rule 15.12 which sets forth the process for filing a Motion for Summary Judgment. Civil Service Rule 15.12 (1) states:

> Any party may move for Summary Judgment when it is believed that there is no genuine issue of material fact, and he or she is entitled to prevail as a matter of law.

Consistent with the long standing Civil Service Rule permitting the filing of a Motion for Summary judgment, the Process also permits for filing a Motion for Summary Judgment.

ATTORNEY'S FEES AND COSTS

Does the Process provide for attorney's fees and costs?

SHORT ANSWER:

The Civil Service Rules set forth the nature of relief an employee is entitled to upon a successful challenge to a disciplinary action. The relief authorized by Civil Service specifically excludes the recovery of attorney's fees and costs of litigation by either party to an appeal. The

Process mirrors the Civil Service Act/Rules regarding the nature of the relief that may be granted by the decision maker.

LEGAL ANALYSIS:

The Process is modeled after Section 7 of the Civil Service Act authorizing the Civil Service Board to adopt rules to promulgate the Civil Service Act. Civil Service Rule 15.24 provides for the scope of relief to be provided to an employee when he or she prevails. The scope of relief includes (1) Back pay, (2) Reinstatement of lost benefits, (3) Reinstatement of fringe benefit plans, and (4) Retroactive seniority. However, Civil Service Rule 15.24 (3) states: "attorney fees and cost of litigation will not be recoverable by either party to an appeal."

The Process mirrors the Civil Service Rule in that attorney's fees and costs are not recoverable. *See* Section B.9.c.2 of the Process.

Further, the appeal process for discipline is not analogous to claims under the Florida Whistleblower Act, the Florida Civil Rights Act, or Florida law on unpaid wages. The Civil Service Act does not provide for the recovery of attorney's fees and costs, thus the process crafted to replace the Civil Service Board should not provide for attorney's fees to a prevailing employee. Florida courts have long held that "attorney's fees are not recoverable unless a statute or a contract specifically authorizes their recovery." *Civix Sunrise, GC, L.L.C. v. Sunrise Road Maintenance Ass'n, Inc.*, 997 So. 2d 433 (Fla. 2d DCA 2008) (citing *Hampton's estate v. Fairchild-Florida Const. Co., 341 So. 2d. 759 (Fla. 1976).* Since neither House Bill 1373 nor the Civil Service Act specifically authorizes the recovery of attorney's fees, their recovery in a appeals Process created by statutes cannot be authorized. Finally, labor union contracts including the collective bargaining agreements between Hillsborough County and AFSCME and IAFF do not allow for either side to recover attorney's fees and costs.

PRE-HEARING CONFERENCE PROVIDED

Does the Process provide for a pre-hearing conference to include a discussion about time limits?

SHORT ANSWER:

The Process outlined in Agenda Item A-30 allows the Appeals Referee to hold a pre-hearing conference by phone if necessary. *See* Section 2B.8.d of the Process. If consensus is reached this pre-hearing conference could be mandatory.

LEGAL ANALYSIS:

An issue was raised that a pre-hearing conference is necessary in order to provide both parties with the opportunity to exchange exhibit and witness lists prior to the evidentiary hearing. In addition, under the current Civil Service appeals system, Civil Service imposes time limits for the presentation of cases in an evidentiary hearing. For example, Civil Service generally allots sixty (60) minutes per side to present their case. An issue was raised that these time limits are necessary in order to not "overwhelm" the employee. Time limits were excluded in the Process as the hearings would now normally start during regular business hours, and would therefore afford both sides the ability to fully present its case without the need for artificial restraints.

In the Process, the Appeals Referee maintains the discretion to hold a pre-hearing conference. Providing for a mandated pre-hearing conference and time limits for appeal hearings is a policy decision that can be implemented.

COMMENT: HILLSBOROUGH COUNTY COMPARED TO OTHER FLORIDA COUNTIES

Compared to other Florida Counties, where does Hillsborough County stand?

ANSWER:

After reviewing the extensive research compiled by the Human Resources professionals, Hillsborough County under the Process will remain one of eight Florida counties to have the final decision of discipline reviewed by an independent decision maker. This means that the final decision will be reviewed by someone who is not a member of management. If the final decision is rendered by management, the process would not be in compliance with House Bill 1373 as substantially similar protections of the existing Civil Service system would not be in place. The focus of staff in the development of the Process was to ensure that the review of the disciplinary action is made by an independent decision maker and not by management.

As long as the review of discipline provides the same protections and rights currently afforded to tenured employees, it is a policy decision as to whether it is an individual or an unpaid Board who makes the final decision.

DISCIPLINARY APPEAL HEARINGS

Who will hear the disciplinary appeal?

SHORT ANSWER:

The Process outlined in Agenda Item A-30, provides for the appointment of a qualified individual with labor and employment experience to serve as an Appeals Referee on a rotating panel to hear disciplinary appeals. The County would request an independent service like the American Arbitration Association ("AAA") appoint Appeals Referees to a rotating panel with labor and employment experience with consideration to the geographical region for cost control.

As for the selection of an Appeals Referee for any disciplinary appeal, covered agencies would not have any input on who would be selected to serve as an Appeals Referee as the appointment would be made by the independent service with the established rotating panel. This further removes any financial incentive as the Appeals Referee remains on the panel regardless of the ruling. This structure for hearing disciplinary appeals would be in compliance with House Bill 1373, and provide tenured employees with substantially similar protections and rights as set forth in Sections 11 and 12 of the Civil Service Act. Other options to hear disciplinary appeals include the use of an unpaid Board which dependent on its structure, would also provide tenured employees with substantially similar protections and rights as set forth in Sections 11 and 12 of the Civil Service Act.

LEGAL ANALYSIS:

In developing the Process, it was the priority of staff to establish a selection process that was fair and impartial to both the agencies and employees. Also, a priority was placed on flexibility of scheduling by selecting one qualified decision maker as opposed to a Board.

An issue was raised that there is 'no transparency" describing the use of an independent service. In response, the Process references an "independent service" as opposed to a specified Agency so as to allow covered agencies to assess the performance of the "independent service", and to make changes if needed.

The selection process contemplates the use of an entity like the American Arbitration Association (AAA) to handle selection. For several months, there were numerous discussions with AAA in order to determine if this entity could provide Hillsborough County with a customized service in accordance with our established rules and not AAA rules. AAA did confirm in concept that it would be able to administer a customized process.

The County would provide AAA with a request for individuals with (1) Labor and Employment experience and (2) geographic region for cost control. AAA would then in turn decide which individuals would be placed on a rotating panel. The covered agencies would have no input whatsoever on who would be on the panel. The County would pay the entire cost for utilizing the services of an Appeals Referee so the employee has access to an independent review of the discipline without a financial burden. Based on the above structure, there is no conflict of interest. Further, the customized structure in which the Appeals Referee is appointed, as determined by AAA, removes the concern that the payment of the arbitration services being made by the County would somehow created a bias in favor of the Appointing Authority.

An issue was raised that the Process disincentivizes an Appeals Referee from ruling against a covered Agency if the Appeals Referee knows he or she will be replaced by another Appeals Referee after ruling on a motion hearing but before an evidentiary hearing. The replacement of an Appeals Referee after a motion hearing was placed in the Process to ensure that the decision on the motion would be made without any regard to further financial incentive by denying the motion so as to obtain further work.

In addition, a concern has been raised that giving sole responsibility to render a final decision to an Appeals Referee as opposed to an entity like the Civil Service Board with up to seven (7) Board members, results in a "limited review" on Certiorari in Circuit Court. In response, the Appellant's rights of the employee under the Process, would be identical to the Appellate review process under Civil Service.

The use of an Appeals Referee to issue a final order is in compliance with House Bill 1373 and provides tenured employees with substantially similar protections and rights that currently exist in Sections 11 and 12 of the Civil Service Act. That is not to say that other options are not also available, to include an unpaid Board. The type of alternate process implemented is a policy decision subject to the requirement that employees retain substantially similar protections and rights as those under the Civil Service Act and the process is uniform.

OUTSOURCING

Can the covered Agencies outsource their obligations to provide procedural due process?

SHORT ANSWER:

Yes. The Process provides for an Appeals Referee with the authority to make a final decision, just as the Civil Service system provided the Civil Service Board with the authority to make a final decision about employee discipline. Both processes provide for constitutionally required due process before and after disciplinary action (Suspensions, Demotions, Dismissal).

LEGAL ANALYSIS:

The U.S. Supreme Court explicitly defined "what process is due" to a public employee in Cleveland Bd. of Education v. Loudermill, 470 U.S. 532 (1985). **Prior to the employee's discharge**, the employee is entitled to notice and an opportunity to be heard in "some kind of a hearing". Id. at 542. For this reason all tenured employees are provided with a pre-disciplinary hearing where they are allowed to present their response to the charges before discipline is finalized. **After the employee's discharge**, the employee is entitled to a post-termination hearing "at a meaningful time and in a meaningful manner." Id. at 538, 547. In Goldberg v. Kelly, 397 U.S. 254 (1970), the Supreme Court upheld as constitutionally sufficient a pre-disciplinary process coupled with "a [post-termination] proceeding before an independent state hearing officer at which the recipient may appear personally, offer oral evidence, confront and cross-examine the witnesses against him, and have a record made of the hearing." Id. at 260. The Process provides all of the factors which Goldberg upheld as constitutionally sufficient due process protections.

Based on the above legal authority, the pre-disciplinary and post-disciplinary due process are satisfied by the use of an Appeals Referee. However, as a policy decision, the use of an unpaid Board would also satisfy the covered Agencies obligation to provide procedural due process.

FORCED MANDATORY ARBITRATION

Is the Process a "forced mandatory arbitration?"

SHORT ANSWER:

No. The Process for administering discipline appeals of a suspension, demotion, or dismissal is not a forced mandatory arbitration, and employees who believe they have been subject to any form of discrimination are free to challenge the alleged discrimination through applicable local, state, and federal agencies, as well as the courts.

LEGAL ANALYSIS:

The Process is neither "forced" nor "mandatory" nor is it an "arbitration." (The latter is derived from a contractual agreement, whereas the Process is derived from a mandate from the Florida Legislature.)

The reference appears to equate the Process with an arbitration process that truly is mandatory. In the employment context, and the one which the reference really seems to be addressing, is one in which an employee's initial or continued employment is conditioned upon an agreement to submit every potential claim against the employer to arbitration. The Process does

not resemble this type of mandatory arbitration. To begin with, the only claims governed by the Process are those appealing a suspension, involuntary demotion or termination. Union employees still have the right to challenge any discipline through the arbitration process under the collective bargaining agreement. All employees who believe the discipline resulted from any form of discrimination are still free to challenge the alleged discrimination through the applicable local, state and federal agencies as well as the courts.

An issue was raised that "the use of juries would be less expensive than other options." However, the driving force behind the move to arbitration in the private sector has been the expense and time involved in litigation. The Process is designed to resolve an employee's case in a relatively short period of time. This is especially important to someone who has been terminated. Getting that employee's case before a jury in Hillsborough County could take months or years.

The use of arbitrators approved by the American Arbitration Association ("AAA") to serve as Appeals Referees under the Process has been considered, but the criticisms against the use of these individuals are incorrect. The County has contemplated utilizing these arbitrators because they unquestionably have the experience and expertise to hear the appeals, but they are by no means the only such individuals. Other possibilities include the permanent list of special magistrates approved by the Public Employee Relations Commission. The Process contemplates assigning the appeals to a rotating panel of Appeals Referees. Such a process of rotating panelists completely negates any concern that the panelist will rule in the employer's favor so he or she will be retained again. The Appeals Referee under the Process will know that whether the County "wins, loses or draws", he or she is guaranteed to be selected the next time his or her name rotates to the top of the list.

Finally, if the Process utilized arbitrators approved by the AAA to serve as Appeals Referees, the AAA Employment Arbitration Rules would not apply because the Process is not an arbitration. In fact, the Appeals Referee would be mandated to utilize the customized procedures set forth in the Process. Of course, as a policy decision, the covered agencies could implement another system to protect employee rights such as an unpaid Board to decide the disciplinary appeals of a suspension, demotion, or dismissal of a tenured employee.

Hillsborough County Florida

COUNTY ATTORNEY
Christine M. Beck
PO Box 1110 Tampa, FL 33601-1110
(813) 272-5670 | Fax: (813) 272-5231

MEMORANDUM

TO: Board of County Commissioners

THROUGH: Christine M. Beck, County Attorney CMB

FROM: Mary Helen Farris, Deputy County Attorney/General Counsel MHF

RE: Employee Discipline Appeal Process

DATE: August 1, 2019

QUESTION:

What role does the Board of County Commissioners ("Board") play in the formulation of the Employee Discipline Appeal Process required by Chapter 2019-183, Laws of Florida (House Bill 1373)?

ANSWER: Although the Board does not currently have any tenured employees, the Board has two paths to provide for the formulation of the Employee Discipline Appeals Process.

ANALYSIS: There are two possible roles the Board can play in the formulation of the Employee Discipline Appeal Process. One is as an Appointing Authority, covered by the Civil Service Act; "the Appointing Authority role." This role is separate and apart from the County Administrator, which is also a separately identified Appointing Authority under the Civil Service Act. The other role is as the legislative, policy-setting, and governing body of the County, "the Legislative Body role."

As the Board does not currently employ tenured employees, in its Appointing Authority role, the Board may provide a system for administering employee discipline and appeals. Should the Board employ tenured employees, this discretion to provide such a system would become an obligation to provide such a system. Under either circumstance, the system for administering employee discipline and appeals must be uniform for all covered Agencies and provide substantially similar protection and rights as set for in Section 11 and 12 of the Civil Service Act.

In its Legislative Body role, the Board must provide a system for administering employee discipline and appeals. In this role, the Board would be providing such a system which would cover all tenured employees under its jurisdiction, (i.e., tenured employees under the BOCC, County Administrator, County Attorney, and County Internal Auditor) and must be uniform for all covered Agencies and provide substantially similar protection and rights as set for in Section 11 and 12 of the Civil Service Act.

The following laws were analyzed in the formulation of this opinion:

Chapter 2019-183 (House Bill 1373) **Laws of Florida and the Civil Service Act of 2000**

The Bill was approved by the Governor and the law is to take effect October 1, 2019. It repeals the Civil Service Act. Appointing Authorities previously covered by the Civil Service Act must provide a fair, neutral, and impartial system for administering employee discipline and appeals of such discipline. The system must be uniform for all agencies and provide tenured employees with substantially similar protections and rights as set forth in sections 11 and 12 of the Civil Service Act. The Civil Service Act of 2000 applied to all classified employees of various listed agencies or authorities, including the BOCC, the County Administrator, and others. Section 11 of the Civil Service Act addressed Suspension, Demotions, and Dismissals. Section 12 of the Act addressed Appeal Hearing Procedures. The Civil Service Board adopted Civil Service Rules whose purpose was to provide general guidelines for the uniform administration and enforcement of the Civil Service Act.

Florida Statutes

Section 125.01, Florida Statutes, in addressing the County Commissioners powers and duties provides the legislative and governing body of a county shall have the power to carry on county government, and this power includes the power to create civil service systems and boards, and perform any other acts not inconsistent with law, and exercise all powers and privileges not specifically prohibited by law.

Section 125.74, Florida Statutes, outlines the powers of the County Administrator. These powers may be altered by the adoption of a County Charter as Hillsborough County has done, but nonetheless the statute is helpful in understanding the Legislature's view of what actions or powers are administrative versus those actions and powers that are legislative. The Statute provides the Administrator, among other powers, with the power to "recommend to the board a current position classification and pay plan for all positions in county service."(emphasis added); develop personnel procedures; with the exception of the employment of department heads which require board confirmation, employ and supervise all personnel under the jurisdiction of the board; and "suspend, discharge, or remove any employee under the jurisdiction of the board pursuant to procedures adopted by the board."(emphasis added). The Statute also provides, "in any exercise of governmental power the administrator shall only be performing the duty of advising the Board of County Commissioners in its role as the policy-setting governing body of the county."

County Charter

The Charter assigned all legislative responsibilities to the Board, and assigned all executive responsibilities to the County Administrator. The Charter established a separation of powers

whereby a person belonging to one branch of County government could not exercise any powers appertaining to the other branch, unless expressly provided in the Charter.

The Charter adopted a "County Manager" form of government in which the county manager was to exercise the executive responsibilities assigned by the Charter. The Charter did not detail the executive responsibilities or powers, but indicated the Board would adopt an administrative code setting forth the duties, responsibilities, and powers of the County Administrator. The Charter did not alter the limited administrative powers outlined in Section 125.74, Florida Statutes, above.

Administrative Code

The Administrative Code makes the Administrator accountable to the Board for the proper administration of the executive affairs of the County. The Administrator's powers include the power to maintain written personnel procedures, which is similar to the power listed in Section 125.74, Florida Statutes, above, but the Code adds that the procedures are to be presented to the Board for information and discussion. Personnel procedures are separate and distinct from the Employee Discipline Appeal Process which had been set out in State law since 1951, as amended, and which is the main protection to provide employees with due process. Other powers include the power to supervise, direct and control all County administrative departments; and the power to exercise exclusive power to appoint and employ persons, but not as to those positions under Civil Service Law and those positions requiring advise and consent of the Board. Like the Charter, the Code did not substantially alter the limited administrative powers outlined in Section 125.74, Florida Statutes.

Conclusion

In the context of Chapter 2019-183, Laws of Florida, and in relation to tenured employees under the Board of County Commissioners, the County Administrator, the County Attorney and the County Internal Auditor, the obligation to provide a fair, neutral, and impartial system for administering employee discipline and appeals of such discipline is best accomplished by the Board of County Commissioners. The adoption of such a system and the provision of such rights, as shown above, is more of a legislative act to be accomplished by the policy-setting, governing body of the county. Pursuant to state law, this appeals process must be uniform with the other covered agencies, therefore consensus on the Employee Discipline Appeals Process will be necessary.

MHF:lm

cc: Mike Merrill, County Administrator
Peggy Caskey, County Internal Auditor