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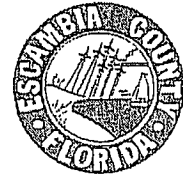
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BOARD OF COUNTY COMMISSIONERS
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OFFICE OF THE COUNTY ATTORNEY

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DEPARTMENT: County Attorney's Office

FROM: Janet Lander, County Attorney 

DATE: February 21, 2007

ISSUE: Support of the Florida Association of Counties in Seeking
Legislative Clarification of the Relative Roles of the Board and
the Clerk on Certain Finance Matters.

RECOMMENDATION:

That the Board authorize the Chairman to sign the attached letter to the Florida Association of Counties seeking assistance in this matter.

BACKGROUND:

On November 12, 2006, Judge Swanson approved the Mediation Settlement Agreement in the case of *Ernie Lee Magaha v. D. M. "Mike" Whitehead, et al*, Case No. 2006-773-CA. The case was thereafter dismissed without prejudice leaving all of the issues raised in the pleadings unresolved. The idea of seeking a legislative solution to the issues raised in the litigation has been discussed and the attached letter to the Florida Association of Counties will be a start in that direction.

BOARD OF COUNTY COMMISSIONERS
ESCAMBIA COUNTY, FLORIDA

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District One
Gene M. Valentino
District Two
Marie Young
District Three
Grover C. Robinson, IV
District Four
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March 26, 2007

Christopher L. Holley, Executive Director
Florida Association of Counties
P. O. Box 549
Tallahassee, Florida 32302-0549

Re: The need for legislative changes to laws relating to the clerk of the circuit court as ex officio clerk of the board of county commissioners

Dear Mr. Holley:

Since 1977, following the Florida Supreme Court decision in Alachua County v. Powers,¹ the scales have been tipped against local governing bodies and in favor of clerks and comptrollers. Many would argue that Alachua County v. Powers was a bad decision. No doubt, it was bad for counties and it is very difficult to overturn such precedent except through the Legislature.

The controversy began when the Board of County Commissioners of Alachua County adopted an ordinance creating the county auditing department. The county auditor was charged with developing accounting systems and procedures and to perform and provide a post audit of county fiscal affairs. The ordinance was declared invalid as to the post audit which, the court explained, must be done by an independent auditing firm. Curtis Powers, the clerk, sought a declaratory judgment clarifying his constitutional and statutory duties.

Neither Article V nor Article VIII imposes "accounting" duties upon the clerk. They provide that the ex officio clerk of the board of county commissioners shall be "auditor, recorder, and custodian of all county funds." Therefore, the legislature has latitude in determining which accounting functions may be better performed by the County and which may be better performed by the Clerk.

The Escambia County Board of County Commissioners is asking for the support of the Florida Association of Counties in examining the existing statutes, as set forth in Exhibit "1," which impose similar financial/accounting duties upon

¹ 351 So.2d 32 (Fla. 1977)

the Clerk (as ex officio clerk of the board) and the Board of County Commissioners, but which following Alachua County v. Powers, have been commandeered by the Clerk. Where appropriate, these and other laws which relate to the Clerk of the Court as ex officio clerk of the board should be amended to restore financial/accounting balance between these constitutional entities.

In 1995, when the Florida Legislature abolished the Office of the Escambia County Comptroller without naming a successor, existing law served as the default mechanism as to the duties which the Clerk of the Circuit Court would assume from that point on. In the spirit of cooperation, and because many of the duties performed by the former Comptroller under the special act were not addressed by general law, the Board of County Commissioners and the Clerk entered into a Memorandum of Understanding assigning the former Comptroller's duties to the parties based upon a rational plan. This plan worked smoothly for the (3 years) duration of the Agreement. Although the Agreement expired more than 8 years ago, the parties had, until last year, worked together in relative harmony.

Two events in 2006 caused increased tension between the Board of County Commissioners and the Clerk. In March of 2006, the Clerk of the Circuit Court and ex officio Clerk of the Board, without prelude or explanation, began to refer to himself as "Clerk of the Circuit Court and Comptroller." In May and June of 2006, the Clerk's management personnel became dissatisfied with the implementation of the Oracle Software Program that had been purchased following a lengthy process involving the Board of County Commissioners, the Clerk and the Sheriff. The Clerk announced his withdrawal from the cooperative effort in June of 2006, effectively crippling the implementation. His personnel had been secretly working with another software provider and after the Clerk withdrew he proceeded to purchase the other software, notwithstanding the fact that the Board of County Commissioners had refused to include it in his budget for the 2006/2007 Fiscal Year. The Clerk used fees collected for recording (BCC side) to fund this purchase which had not been budgeted for Fiscal Year 2005-2006.

In an effort to salvage its considerable financial investment in the software and its implementation (\$2.5 Million), the County created its own finance department, by Resolution, in August 2006 (Exhibit "2"). Shortly thereafter, the Clerk sued the Board of County Commissioners in Circuit Court to prevent the Board from performing those finance functions that were "orphaned" by the Clerk's defection from the Oracle Software. The Court issued a temporary injunction which prevented the County from going forward with its own finance department. The withdrawal of the Clerk from Oracle, coupled with the temporary injunction preventing the County from creating its own finance department wreaked havoc with the implementation. With no one to train, the system implementation suffered a mortal blow. The case was settled with the

parties dismissing all their claims, without prejudice. Therefore, none of the underlying issues have been resolved.

Empowered by Alachua County v. Powers and because of a lack of clarity and definition in general law relating to the accounting and finance duties of the ex officio clerk of the board as auditor, recorder and custodian of all county funds, the following practices have resulted:

1. The Clerk's personnel have periodically refused to enter duly approved budget amendments.
2. The Clerk's personnel change the amount for vouchers to be paid to vendors sometimes without telling the department submitting the payment request.
3. The Clerk's personnel sometimes hold payment because of a minor question or minor error without communicating the fact that they are holding payment to the department that submitted the voucher.
4. The Clerk's personnel have refused to make payment based on considerations other than "legality of expenditure".²
5. The Clerk's personnel are currently in violation of the approved budget with respect to health/life/dental premiums. This in turn is causing financial strain on one of the County's funds.
6. Several years ago, the Board voted to get a loan to finance the construction of the Escambia County Central Commerce Park, the Clerk refused to actually get the loan because the Clerk's personnel convinced one commissioner not to do it.
7. The Clerk's personnel have used their internal audit firm (Carr, Riggs) as a sword rather than a shield. (i.e., as a mechanism to embarrass or play "gotcha" rather than as a protection for County finances.)
8. The Clerk's personnel have compromised the independence of the internal audit firm by directing comments into the audit findings.
9. The Clerk refused to provide advance (quarterly) funding to Delta Dental, the County's third party manager, to handle insurance payments and the County was forced to enter into an agreement with Delta Dental so that Delta can advance the payments to providers at an additional cost of approximately \$4,000.00 per year to the County.

² The Court in Alachua County v. Powers found that the determination of the legality of expenditure requires that funds are spent for a public purpose, that funds are spent in conformity with county purchasing procedures or statutory bidding procedures that the expenditure does not overspend any account or fund of the budget as formally adopted and recorded.

10. Year after year by grossly overestimating anticipated revenue, the Clerk uses the recording fees collected to make purchases which either the clerk has not included in his budget or in any amendment to his budget, or which the Board of County Commissioners has declined to approve in his adopted budget.

11. After the Clerk committed to and subsequently abandoned the Oracle Project, he refused to make payment on the invoice contrary to the terms of the contract between the County and the vendor.

12. The Clerk's financial officers refuse to allow prompt, meaningful access to the Board of County Commissioners' departments for financial information necessary for the operation of these departments.

13. The Clerk refused to process documents and payments on a closing for the sale of surplus County real property because he deemed the prospective purchaser to be "ineligible" to purchase property, which action exceeds his authority as auditor. This as well as paragraphs 4, 9, and 11 are examples of the overreaching behavior behind the assumption of the title of "Comptroller".

In examining the existing general law relative to the County's role in its own finances vis a vis the Clerk, Escambia County suggests that first a consensus of issues be identified by Florida Association of Counties and then, in furtherance of finding solutions to those issues, that the statutes identified in Attachment "A" be amended as necessary. For example, to prevent the Clerk from spending public funds (recording fees) for items not included in his adopted budget, Section 129.06 (5), Fla. Stat., may be amended to expressly require prior consent by the Board of County Commissioners for unbudgeted capital assets purchased with recording fees in the form duly adopted budget amendments.

As to the refusal of the Clerk to provide reasonable access, in a usable form, to financial information needed by the County for day-to-day operations, an amendment to Sections 28.12, 136.05 and 219.04, Fla. Stat., should require the Clerk ex officio to the Board to provide the Board of County Commissioners' users full and prompt access to all necessary finance data. In addition, Section 125.17 should be amended to make it clear that when performing Board related functions, the Clerk must use the software chosen by the Board of County Commissioners.

Finally, because of advances in software programs and complexity of modern employment benefits, counties should be allowed to perform all payroll functions for its employees as a subset to its Human Resources function, except for issuing the checks. Currently, performance of payroll function is not addressed by general law in Florida.

Escambia County is not alone in dealing with issues like those listed above. It is time for the Legislature to tackle the fallout from Alachua County v.

Powers, by enacting general laws to remedy these abuses. The key to success is a unified County effort to bring about these changes.

Very truly yours,

Kevin W. White, Chairman, District 5

KW:JL:bjs

Attachments

cc: Commissioner Marie Young, Vice Chairman, District 3
Commissioners D. M. "Mike" Whitehead, District 1
Commissioner Gene Valentino, District 2
Commissioner Grover C. Robinson, IV, District 4
George Touart, County Administrator

November 27, 2006

Ms. Virginia "Ginger" Delegal
General Counsel
Florida Association of Counties
P. O. Box 549
Tallahassee, Florida 32302

Re: Florida Association of Counties Support for Amendments to General Law
Relating to Clerks of the Circuit Courts and the Boards of County Commissioners
Relating to Accounting and Budgets

Dear Ms. Delegal:

As you may be aware, Escambia County was recently sued by the Clerk of the Circuit Court, who also serves as ex officio Clerk of the Board of County Commissioners, for declaratory and injunctive relief. The lawsuit was filed by the Clerk after the Board of County Commissioners adopted a resolution creating a finance department (Resolution R2006-166 and letter from Clerk are attached).

The parties have mediated the dispute and all claims have been dismissed without prejudice. One of the major issues in the case, which Escambia County believes has relevance to many if not most counties in the State of Florida, was how much "accounting" the Board of County Commissioners can do on its own behalf notwithstanding the language in Chapter 28, "Clerks of the Circuit Court", Section 28.12, F.S., which provides that the clerk shall be...accountant of the board...keep the minutes and accounts.... This language is repeated in Chapter 125, "County Government", Section 125.17, F.S. Taken together these two laws appear to make the Clerk the accountant/bookkeeper for the Board of County Commissioners.

However, Chapter 136, "County Depositories", Section 136.05, F.S., states that "the board of county commissioners shall keep an accurate and complete set of books showing the amount on hand, amount received, amount expended and the balances thereof at the end of each month for each and every fund carried by said board, and no check or warrant shall ever be drawn in excess of the known balances to the credit of that

COUNTY ATTORNEY'S REPORT I-1

EXHIBIT

"1"

fund as kept by said board.” This negates the notion of exclusivity belonging to the Clerk as to accounting and bookkeeping for the Board of County Commissioners.

Similarly, Chapter 219, “County Public Money”, Section 219.04, provides “Each officer as defined in this act (the definition includes both the Clerk and the Board of County Commissioners), shall keep a cash book, or books, wherein shall be entered daily all receipts and disbursements of public money, either by items or by summaries of itemized entries in other records, including machine tapes, kept in such office. The cash book shall be balanced, it shall show the amount of money on hand, and shall be a permanent record of the office.” Under Chapter 129, “County Annual Budget”, Sections 129.08 and 129.09, F.S., both the clerk and the members of the Board of County Commissioners individually are subject to both fine and imprisonment for voting for (Board of County Commissioners) or signing (clerk) for payment of any indebtedness against the County in excess of the expenditure allowed by law or county ordinances, or to pay an illegal charge against the county, or to pay any claim against the county not authorized by law or county ordinance.

The County Attorney’s Office has not found anything in Florida with the exception of the Alachua County v. Powers case to illuminate the issue of whether the statutory responsibility of the Boards of County Commissioners may be performed through the Clerk or must be performed by the Clerk. It is noteworthy that Michigan, Texas and Kansas courts have approached the issue from a plain language/home rule powers analysis have held that where the statutes do not vest a power or duty exclusively with, e.g., the clerk, the county may perform all functions of local government not inconsistent with general law or special act. In Florida, only the so-called “pre-audit” function of the clerk is exclusive to that office.

In addition, on the subject of auditing, it appears that although there is an established “pre-audit” procedure in place for Boards of County Commissioners expenditures, no such scrutiny is given to expenditures of the Clerk until after the close of the fiscal year and even then, the Independent Auditor has no enforcement power. This means that even if the Independent Auditor finds serious issues, all the Independent Auditor can do is to report such irregularities to the Board of County Commissioners. The Board of County Commissioners, in turn, may ask the Auditor General to review the audit findings but unless the Joint Legislative Auditing Committee appoints a task force to investigate such irregularities, the Auditor General will not review the findings.

These matters merit further study to determine whether FAC should lead the effort to seek changes to general law which at the very least would allow Boards of County Commissioners to fully exercise the powers and responsibilities granted to counties pursuant to the Home Rule Powers Act and the specific statutes referenced in this memorandum. Furthermore, I hope that FAC would support a change in the law which currently allows the clerks to audit their own accounting. Finally, I ask that FAC also support an amendment to Section 129.06 (5), F. S., to require the Clerks to get Board approval for all (Clerk) budget amendments described in Section 129.06 (2), F. S.

Please let me know how I can introduce this as a topic for discussion for the FAC legislative agenda.

Sincerely,

Marie Young
Board of Directors, FAC, District 2

Attachments

cc: Susan Latvala, President, FAC
Teresa Jacobs, Vice President, FAC
Commissioner Kevin White, Chairman, BCC
Commissioner Mike Whitehead, District 1, BCC
Commissioner Gene Valentino, District 2, BCC
Commissioner Grover Robinson, District 4, BCC

8/17/2006 CAR III-2

RESOLUTION R2006-166

A RESOLUTION OF THE BOARD OF COUNTY COMMISSIONERS OF ESCAMBIA COUNTY, FLORIDA, ESTABLISHING THE COUNTY'S FINANCE DEPARTMENT; DEFINING THE DUTIES OF THE FINANCE DEPARTMENT; AUTHORIZING THE COUNTY ADMINISTRATOR TO EITHER HIRE ADDITIONAL EMPLOYEES TO OPERATE THE FINANCE DEPARTMENT OR CONTRACT FOR THE SERVICES OF AN INDEPENDENT CONTRACTOR; AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, Article VIII, § 1(d), Florida Constitution, provides that the Clerk of the Circuit Court shall be the ex officio clerk of the Board of County Commissioners, auditor, recorder and custodian of all county funds; and

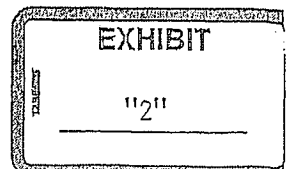
WHEREAS, pursuant to a Memorandum of Understanding between Escambia County Board of County Commissioners (County) and Ernie Lee Magaha, Clerk of the Circuit Court (Clerk), dated July 27, 1995, the Clerk has assumed certain additional responsibilities, including payroll preparation for County employees, accounts receivable, accounts payable, fixed assets and grants/projects; and

WHEREAS, the above mentioned responsibilities are not legislatively mandated functions of the Clerk; and

WHEREAS, during the past year the County has proceeded in good faith to cooperate with the Clerk, the Escambia County Sheriff, and the County's computer consultant, Solbourne Computer, Inc., to acquire a modern, reliable, and integrated computer software system (Oracle E-Business Suite) for the core administrative and financial processes of those local government entities; and

WHEREAS, the Clerk has recently withdrawn from the cooperative effort to develop and

Verified By: *Atkins*
Date: 8/21/2006



implement the Oracle E-Business Suite; and

WHEREAS, the Clerk's refusal to cooperate in the development and implementation of the Oracle E-Business Suite would necessarily require the Clerk to obtain a different and potentially incompatible software system in order to continue performing the aforementioned responsibilities.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF ESCAMBIA COUNTY, FLORIDA:

Section 1. The foregoing recitals are true and correct and incorporated herein by reference.

Section 2. Beginning October 1, 2006, the structure of Escambia County's Administration is hereby amended to include a Finance Department under the direct supervisory authority of the County Administrator that shall have among its responsibilities preparation of payroll for county employees, accounts payable, accounts receivable, fixed assets, projects/grants and associated administrative functions necessary to support those responsibilities.

Section 3. The specific duties of the Finance Department shall include but not be limited to: calculation of time worked and compensation earned by County employees; preparation of all payroll checks, deposits, or funds transfer authorizations (except that all authorizations mandated by the Florida Constitution and Florida Statutes shall still be required by the appropriate party); preparation of all necessary payroll reports for outside agencies; preparation and processing of all W-2 and other federal tax forms; management of all taxable reimbursements; management of contracts with all outside agencies regarding pensions and employee benefits; receiving and reviewing invoices and preparing receiving reports and vouchers, verification and recording of deposits in County accounts, and periodic reconciliation of account statements, and the

responsibility for ensuring that the County complies with all applicable federal, state, and local laws and regulations.

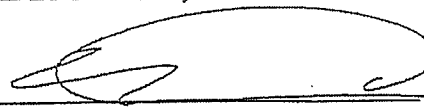
Section 4. The Finance Department shall provide periodic reports and supporting documentation to the Clerk to allow him to fulfill his functions as auditor and accountant for the County and to allow him to authorize disbursement of funds as required by the constitution and laws of the State of Florida.

Section 5. At the discretion of the County Administrator and upon approval of necessary budgetary appropriations and additional positions by the Board of County Commissioners, the Finance Department may fulfill the responsibilities described in this resolution by hiring additional employees or by contracting for specific services with an independent contractor in accordance with the County's established procurement procedures.

Section 6. This Resolution shall take effect immediately upon adoption by the Board of County Commissioners.

ADOPTED this 17th day of August, 2006.

BOARD OF COUNTY COMMISSIONERS
ESCAMBIA COUNTY, FLORIDA

By: 
D. M. "Mike" Whitehead, Chairman

ATTEST: ERNIE LEE MAGAHA
Clerk of the Circuit Court



By: [Signature]
Deputy Clerk

BCC Approved: August 17, 2006

Date Executed
August 21, 2006

This document approved as to form and legal sufficiency.

By: [Signature]
Title: County Attorney
Date: August 16, 2006