

Office of  
City Attorney

City of  
Pensacola



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MEMORANDUM

To: Maren DeWeese, Council President  
Date: July 25, 2011  
Re: Power of Council to Hire Council Staff

This memo will serve to respond to council's request for a written opinion on the subject issue.

The City, as a body corporate and politic, derives all of its powers from the Charter. The City is like a miniature state, the council is its legislature, the Mayor is its executive and the Charter is its constitution. The charter supersedes all municipal laws, ordinances, rules or regulations that are inconsistent with its provisions.

Charters are ordinarily construed as constituting a grant, not a limitation of power. The implications of the powers that are granted are construed as those that reasonably arise from the enumerated powers. If a power is neither granted nor implied, it does not exist.

General accepted judicial rules of construction are applicable to the interpretation of Charters. A primary rule is that the Charter is a measure of powers and the enumeration of those powers implies the exclusion of all other powers.

Another rule is that all words and phrases must be interpreted in the sense in which they are ordinarily used and understood.

The other rule of construction that may be applicable to this case is that all provisions bearing on a power must be read together in construing the true meaning of that power in the Charter.

Although not relevant to this discussion, in cases of ambiguity and/or apparent conflict, the intent of the framers of the Charter must be ascertained.

City Charter §4.01 grants exclusive power to the Mayor to "... exercise the executive powers of the City ... appoint, discipline, and remove all officers and employees" of the City.

City Charter §4.02 is silent on any power whatsoever of the Council relative to personnel matters. Council powers and duties are expressly limited to the legislative function and adoption of the budget.

On the other hand, City Charter §4.04 expressly prohibits the Council from dictating the appointment or removal of any employee, as well as interference with any officers or employees of the City.

In summary, the City Charter plainly and expressly grants to the Mayor the power to administer the City including, but not limited to, the power to hire city employees. Additionally, the City Charter is deliberately and plainly silent on the grant of any power to hire city employees to the Council. This is a classic rendition of the difference between the power of the executive and the power of the legislature.

Not only is the Charter silent on this point, but the Charter expressly prohibits the Council from the appointment or removal of any City employee and the interference with employees.

Although not necessary to a resolution of this issue, there is some case law that may serve to corroborate this interpretation. The case of *City of Tampa v. Lewis*, 993 So. 2d 1096 (Fla. 2<sup>nd</sup> DCA 2008) interpreted Florida's resign to run law, relative to the Tampa City Charter. Pursuant to that interpretation, it discussed the Mayor's power to supervise and appoint employees. A police captain was a classified employee under the City's Civil Service law and challenged the Mayor's authority under the Charter to directly control and supervise him. The captain's theory was that he was supervised by the police chief, not the Mayor; further, that the Mayor's supervisory powers over him were limited because he was a Civil Service employee.

The Court also interpreted the Tampa Charter. That Charter gave the Mayor much the same powers as our City Charter. The court decided that, pursuant to the literal and plain language of the Charter, the Mayor had full power and authority to control and supervise departments and divisions of the City, appoint and remove employees. It stated that nothing in the Charter limits the authority of the Mayor to department heads and that the Mayor's power and authority to direct, control and supervise was all inclusive and extended to all employees and departments.

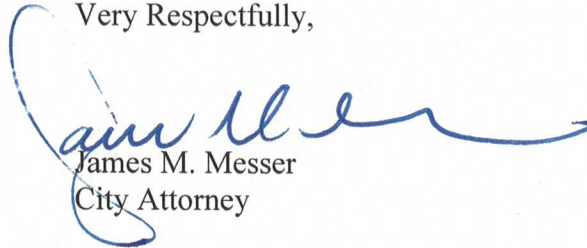
Although not necessary to my opinion in this matter, I have conducted an informal inquiry and ascertained that the intent of the framers, i.e. the Charter Review Commission, supports this interpretation of the Charter.

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If there are outstanding legal opinions to the contrary, I am unaware of them. Should they be brought to my attention, I would be glad to analyze them and determine what, if any, effect they may have on my opinion.

Very Respectfully,

A handwritten signature in blue ink, appearing to read "James M. Messer", is written over the typed name and title.

James M. Messer  
City Attorney

Attachment

cc: Ashton J. Hayward, III, Mayor  
Members of City Council  
Alvin G. Coby, Assistant City Administrator  
John Asmar, Chief of Staff  
Richard Barker, Jr., Director of Finance  
Sherrer Kuchera, Human Resources  
Travis Peterson, Public Relations Officer

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**H**

District Court of Appeal of Florida,  
Second District.  
CITY OF TAMPA, Appellant,  
v.  
Marion S. LEWIS, Appellee.

No. 2D07-3282.  
Sept. 26, 2008.

**Background:** City brought action for a declaration that police captain who ran for mayor against the incumbent was required to resign his position, and that he was in fact deemed to have resigned, and captain counterclaimed for a declaration that he was not required to resign. The Circuit Court, Hillsborough County, Marva L. Crenshaw, J., awarded summary judgment to captain. City appealed.

**Holding:** The District Court of Appeal, LaRose, J., held that statute requiring a police officer to resign in order to run for office against an incumbent with "authority to appoint, employ, promote, or otherwise supervise" him required captain to resign.

Reversed and remanded.

## West Headnotes

**[1] Courts 106**  89106 Courts

106II Establishment, Organization, and Procedure  
106II(G) Rules of Decision

106k88 Previous Decisions as Controlling or as Precedents

106k89 k. In General. Most Cited Cases

Advisory opinions by the Department of State are not binding on the District Court of Appeal.

**[2] Officers and Public Employees 283**  30.5283 Officers and Public Employees

283I Appointment, Qualification, and Tenure

283I(C) Eligibility and Qualification

283k30 Holding Other Office or Employment  
283k30.5 k. Other Matters. Most Cited Cases

Fact that police captain who ran for mayor did not win the election did not moot city's appeal from trial court's decision that captain was not required to resign his position in order to run for office; issue of captain's return to the police department remained alive. F.S.2006, § 99.012(5).

**[3] Officers and Public Employees 283**  30.5283 Officers and Public Employees

283I Appointment, Qualification, and Tenure

283I(C) Eligibility and Qualification

283k30 Holding Other Office or Employment  
283k30.5 k. Other Matters. Most Cited Cases

Statute requiring a police officer to resign in order to run for office against an incumbent with "authority to appoint, employ, promote, or otherwise supervise" him required police captain to resign in order to run for **mayor** against the incumbent, even if **mayor** allowed police chief to operate police department; city charter placed police chief under **mayor's** "control and supervision," and gave **mayor** sweeping **power** to exercise "direct control and supervision over all departments," and over the "appointment and removal and the fixing of the compensation of all officers and employees of the city." F.S.2006, § 99.012(5).

\***1096** David Lisle Smith, City Attorney, and Jerry M. Gewirtz, Chief Assistant City Attorney, Tampa; and Thomas M. Gonzalez of Thompson, Sizemore & Gonzalez, Tampa, for Appellant.

Steven G. Wenzel and Matthew K. Fenton, of Wenzel & Fenton, P.A., Tampa, for Appellee.

LaROSE, Judge.

We are called upon to address Florida's "resign-

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to-run” law, section 99.012(5), Florida Statutes (2006), in the context of the 2007 Tampa mayoral election. The City of Tampa sued for a declaratory judgment that Marion S. Lewis was required to resign as a captain in the Tampa Police Department (TPD) in order to run for the office of mayor against the incumbent, Pam Iorio. The trial court entered a final summary judgment in favor of Mr. Lewis. We conclude that the trial court erroneously ruled that Mr. Lewis did not have to resign. Accordingly, we reverse and remand for further proceedings.

#### *Background*

Mr. Lewis, as a TPD captain, was a classified employee under the City's Civil \*1097 Service Law. See Tampa, Fla., Code of Ordinances part B, art. IV, § 4.11(B) (1990). According to Mr. Lewis, he reported to a major who, in turn, reported to an assistant police chief, who, in turn, reported to the police chief, Stephen Hogue. Chief Hogue reported directly to Mayor Iorio.

[1] Mr. Lewis decided to run for mayor. In August 2006, he sought an advisory opinion from the Florida Department of State as to whether he had to resign his position in order to seek office. Based upon the information Mr. Lewis provided concerning his chain of command, the Department opined that he did not have to resign.<sup>FN1</sup> The City had a different view. The City Attorney issued a formal written opinion concluding that Mr. Lewis was required, under section 99.012(5) and *Parker v. Baker*, 499 So.2d 843 (Fla. 2d DCA 1986), to resign upon qualifying as a mayoral candidate. Thereafter, the City Attorney advised Mr. Lewis that he would be deemed to have resigned upon filing his Oath of Candidate.<sup>FN2</sup>

<sup>FN1</sup>. Neither party has addressed the weight, if any, that we should give to the advisory opinion. We note that such opinions are not binding on us. See *Gonzalez v. Vogel*, 616 So.2d 473, 475 (Fla. 2d DCA 1993). We also observe that the advisory opinion was not based on an analysis of the applicable City Charter provisions discussed in this opinion. See *Krivanek v. Take Back Tampa Political Comm.*, 625 So.2d 840, 844 (Fla.1993) (stating advisory opinion is persuasive authority if reasonable construction of law).

<sup>FN2</sup>. At the time of submitting his qualifying papers to the Hillsborough County Supervisor of Elections, Mr. Lewis was required to submit an Oath of Candidate:

Before me, an officer authorized to administer oaths, personally appeared (*please print name as you wish it to appear on the ballot*), to me well known, who, being sworn, says that he or she is a candidate for the office of \_\_\_\_\_; that he or she is a qualified elector of \_\_\_\_\_ County, Florida; that he or she is qualified under the Constitution and the laws of Florida to hold the office to which he or she desires to be nominated or elected; that he or she has taken the oath required by ss. 876.05-876.10, Florida Statutes; that he or she has qualified for no other public office in the state, the term of which office or any part thereof runs concurrent[ly] with that of the office he or she seeks; and **that he or she has resigned from any office from which he or she is required to resign pursuant to s. 99.012, Florida Statutes.**

§ 99.021(1)(a), Fla. Stat. (2006) (emphasis added).

[2] Mayor Iorio qualified as a candidate for reelection in mid-January 2007. Shortly thereafter, Mr. Lewis qualified, maintaining that he was not required to and, in fact, did not resign. In late January 2007, the City ousted Mr. Lewis from his position and filed its action for declaratory judgment. See § 86.011, Fla. Stat. (2006). The City sought a ruling that section 99.012(5) required Mr. Lewis to resign and that he was deemed to have resigned when he executed the Oath of Candidate. See *Baker v. Alderman*, 766 F.Supp. 1112, 1115 (M.D.Fla.1991), *aff'd sub nom. Baker v. Parker*, 979 F.2d 1537 (11th Cir.1992). We are not aware that anyone challenged Mr. Lewis' qualifications to seek office. See § 99.012(6) (“The name of any person who does not comply with this section may be removed from every ballot on which it appears when ordered by a circuit court upon the petition of an elector or the Department of State.”). Mr. Lewis counterclaimed, seeking a declaratory judgment that he did not have to resign, that he was not deemed to have resigned, and that he could return

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to his position if he were not elected. <sup>FN3</sup>

FN3. Mr. Lewis actively campaigned for office, albeit unsuccessfully. The mayoral election occurred in early March 2007. The failure of Mr. Lewis's campaign does not render this appeal moot. The very real issue of Mr. Lewis's possible return to the TPD remains alive. See *Godwin v. State*, 593 So.2d 211, 212 (Fla.1992) ("A case is 'moot' when it presents no actual controversy or when the issues have ceased to exist.").

\*1098 The City moved for summary judgment. In support of its motion, the City submitted the affidavits of Mayor Iorio and Chief Hogue attesting that, pursuant to the City charter, Mayor Iorio directly controlled and supervised the TPD, including all appointments to the rank of captain. Mr. Lewis filed opposing depositions and affidavits. The thrust of Mr. Lewis's argument was that Mayor Iorio did not supervise him; she left control of the TPD in the hands of Chief Hogue. Mr. Lewis contended that he did not have to resign his position because Mayor Iorio did not supervise him. The trial court denied the City's motion, finding that Mayor Iorio was not Mr. Lewis' supervisor. Although Mr. Lewis had not moved for summary judgment, the trial court entered a final summary judgment in his favor on the counterclaim.

#### *Analysis*

Simply put, we must decide whether Mr. Lewis had to quit his job to run for political office against his boss. Accordingly, we must determine if Mayor Iorio was Mr. Lewis's boss. That determination requires an analysis of statutes and codes. As framed by the record before us, therefore, whether section 99.012(5) required Mr. Lewis to resign is a question of statutory interpretation, making our standard of review de novo. See *BellSouth Telecomms., Inc. v. Meeks*, 863 So.2d 287, 289 (Fla.2003).

The City's Civil Service Law addresses employee political activity, including seeking public office:

**Any person holding a position with the City of Tampa, Florida, in the classified service or in the unclassified service, except an elected officer, must take a leave of absence, without pay, begin-**

ning when said person completes his qualification as a political candidate in any election for:

(1) A City of Tampa office....

Tampa, Fla., Code of Ordinances part B, art. IV, § 4.23(B) (1990) (emphasis added). If this law applied, Mr. Lewis would have been required to take only a leave of absence to run for office. Section 99.012(5), however, imposes a more stringent requirement:

**A person who is a subordinate officer, deputy sheriff, or police officer must resign effective upon qualifying pursuant to this chapter if the person is seeking to qualify for a public office that is currently held by an officer who has authority to appoint, employ, promote, or otherwise supervise that person and who has qualified as a candidate for reelection to that office.**

(Emphasis added.) Both section 4.23(B) and section 99.012(5) deal with government employees seeking public office. But, section 99.012(5) controls where an employee is seeking office against an incumbent "who has authority to appoint, employ, promote, or otherwise supervise" him. Section 99.012(5) addresses a specific issue that section 4.23(B) does not and, consequently, governs our analysis. See *Parker*, 499 So.2d at 845. <sup>FN4</sup>

FN4. To the extent that the City relies on *Parker* to support its argument that the Oath of Candidate operated as Mr. Lewis' resignation, we note that *Parker* did not address that issue. See 499 So.2d 843. We must also observe that *Parker*, 499 So.2d 843, and *Baker*, 766 F.Supp. 1112, a federal case involving allegations of wrongful discharge, were decided before the amendment of section 99.012 to include the provision that "[t]he name of any person who does not comply with this section may be removed from every ballot on which it appears when ordered by a circuit court upon the petition of an elector or the Department of State." See § 99.012(6), Fla. Stat. (2002 Supp.); Ch. 91-107, § 31, at 899, Laws of Fla. Although section 99.012(6) was in effect at the time Mr. Lewis sought office, its applicability was not raised below. Further, because the issue was not presented to us, we have no

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occasion to address it here. Whether section 99.012(6) applies to the issue of resignation or to the remedies that might have been available to the City, we leave for further development on remand.

\*1099 [3] As a matter of law, Mayor Iorio, at a minimum, had the authority to supervise Mr. Lewis. Thus, section 99.012(5) required him to resign. The City Charter emphasizes that the police chief shall be “under the control and supervision of the mayor” and shall manage the TPD “with the advice and consent of the mayor.” Tampa, Fla., Code of Ordinances part A, art. IV, § 5.01(d) (1990). The Charter, however, grants Mayor Iorio more sweeping control and supervisory functions over all City departments:

There shall be a mayor in whom all executive power of the city shall be vested and who shall be the administrative head of the municipal government. Responsibility for the proper administration of the city government shall be solely that of the mayor.... The mayor shall be responsible to the people of the city for the proper administration of the affairs of the city and to that end [her] powers and duties shall include, but shall not be limited to, (1) the administration and enforcement of all laws, ordinances, contracts, and franchises, ... (3) the exercise of direct control and supervision over all departments and divisions of the municipal government, (4) except as herein otherwise expressly provided, the appointment and removal and the fixing of the compensation of all officers and employees of the city, the employment and compensation of whom are not otherwise provided for herein, all such appointments to be made upon merit and fitness alone and in accordance as nearly as possible with civil service requirements, ... (6) the promulgation by executive order of such administrative directives, decisions, and codes and personnel rules and regulations as the mayor shall deem necessary and proper

Tampa, Fla., Code of Ordinances part A, art. IV, § 4.01 (1990). Based on the broad powers given to the Mayor by the Charter, we cannot accept the proposition that her control and supervision of the TPD was limited to oversight of only Chief Hogue. The Mayor's direct control and supervision extends over all departments; nothing in the Charter limits that authority to department heads. The affidavits

submitted by Mayor Iorio and Chief Hogue are consistent with our reading of the Charter.

We are also unpersuaded by Mr. Lewis's argument that rules promulgated by the City's Civil Service Board eliminated the Mayor's authority over classified employees. Even if classified employees must be hired from a Civil Service candidate list <sup>FN5</sup> and can be discharged only for cause, <sup>FN6</sup> such limitations on the exercise of authority do not divest the Mayor of all authority to supervise a TPD captain. Indeed, the promulgation of personnel rules and regulations is a power and duty granted the Mayor under the Charter. <sup>FN7</sup>

FN5. Tampa, Fla., Code of Ordinances part B, art. IV, § 4.13(D) (1990).

FN6. *Id.* at § 4.21(A).

FN7. *Id.* at § 4.12(A)(1).

Mr. Lewis submitted affidavits and depositions contesting Mayor Iorio's actual supervision over him. Such evidence does not create a factual issue sufficient to defeat the City's motion. Essentially, Mr. Lewis argues that these affidavits and depositions\*1100 established that Mayor Iorio delegated all control and supervisory functions to Chief Hogue. Even if we were to assume that Mayor Iorio has a hands-off management style relative to the operation of the TPD, the Charter vests her with the ultimate authority to supervise Mr. Lewis. Accordingly, the trial court erred in denying summary judgment to the City on this point. It follows, necessarily, that Mr. Lewis was not entitled to a final summary judgment.

#### Conclusion

Section 99.012(5) dictated that Mr. Lewis resign his position as TPD captain in order to run for office against Mayor Iorio. The trial court erred in granting a final summary judgment for Mr. Lewis.

We reverse and remand for further proceedings.

CASANUEVA, J., and CANADY, CHARLES T.,  
Associate Judge, Concur.

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