THE PINELLAS COUNTY
UNIFIED PERSONNEL SYSTEM BOARD

IN RE:

ALFONSA RILEY, SR.,

Appellant,

v. **Appeal No. 14-06**

PINELLAS COUNTY
DEPARTMENT OF ENVIRONMENT
AND INFASTRUCTURE,

Appellee.
_____/

MOTION FOR USE OF INDEPENDENT
LEGAL ADVISOR FOR PERSONNEL BOARD

Comes now Employee Alfonsa Riley ("Employee" or "Riley"), by and through his undersigned counsel and moves for the use of an independent legal advisor to the Personnel Board. In support, Employee states:

1. Senior Assistant County Attorney Nancy Meyer is representing Pinellas County ("Employer") in the Appeal of this matter. She reports to County Attorney James L. Bennett.

2. Senior Assistant County Attorney Michelle Wallace is advising the Board in the Appeal of this matter. She reports to County Attorney James L. Bennett.

3. For many years, Senior Assistant County Attorney Michelle Wallace represented the County in Pre-disciplinary Hearings and currently represents the Office of Human Rights. [Show Exhibit 1].

4. Riley filed a charge of discrimination with the Office of Human Rights regarding the same issues involved in this appeal. Senior Assistant County Attorney Michelle Wallace was involved in this investigation. [Show Exhibit 2].

5. It creates the appearance of impropriety and is a denial of fundamental due process to have the County Attorney's Office functioning as both prosecutor and counsel to the Board. The Florida Supreme Court has noted that because our adversarial justice system emphasizes fairness, one side is not to have a "special advantage in influencing the decision." *Cherry Communications, Inc. v. Deason*, 652 So. 2d 803, 805 (Fla. 1995) (holding an attorney may not play dual roles as prosecutor and as post-hearing legal advisor to the board in a Public Service Commission proceeding). Florida courts stress that it is the conflicting duties of prosecutor and advisor to the board that make the roles incompatible. *Forehand v. School Board of Gulf County*, 600 So. 2d 1187 (Fla. 1st DCA 1992)(finding error where an attorney acted as prosecutor and advisor to the board despite arguments that the attorney did not advise on substantive matters and therefore no harm was done).

6. Because of the inherent conflicts with having a county attorney's office both represent the agency and advise a personnel board, numerous other local governments have retained independent legal counsel to advise their personnel boards. The City of St. Petersburg Personnel Board, the City of Tampa Personnel Board and the Hillsborough County Civil Service Board have all retained independent legal counsel to advise the personnel boards so that the boards receive independent legal advice.

7. This is particularly so in this case, where the attorney advising the Board also participated in Riley's separate Office of Human Rights investigation.

Therefore, Employee respectfully requests that Personnel Board utilize an independent legal advisor in this (and all other) matters.

Respectfully submitted,

/s/ Michelle Erin Nadeau
Ryan D. Barack
Florida Bar No. 0148430
Michelle Erin Nadeau
Florida Bar No. 0060396
Kwall, Showers & Barack, P.A.
133 N. Ft. Harrison Ave.
Clearwater, Florida
Tel: (727) 441-4947
Fax: (727) 447-3158
Attorneys for Employee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via electronic mail on this 15th day of September 2014 on:

James L. Bennett, County Attorney
Nancy Meyer, Senior Assistant County Attorney
Michelle Wallace, Senior Assistant County Attorney
Pinellas County Courthouse,
315 Court Street
Clearwater, Florida 33756
jbennett@pinellascounty.org
nmeyer@pinellascounty.org
mwallace@pinellascounty.org

Peggy Rowe
Director of Human Resources
400 S. Fort Harrison Ave
Clearwater, FL 33756
prowe@pinellascounty.org

/s/ Michelle Erin Nadeau
Attorney

PINELLAS COUNTY ATTORNEY'S OFFICE – LAWYERS

JAMES L. BENNETT
COUNTY ATTORNEY

BOARD OF COUNTY COMMISSIONERS
CHARTER REVIEW COMMISSION
CONSTITUTIONAL OFFICERS
COUNTY ADMINISTRATOR
LEGISLATION
LEGISLATIVE DELEGATION
EMERGENCY OPERATIONS #1

DENNIS R. LONG
CHIEF ASS'T COUNTY ATTORNEY

CONDUIT FINANCE AUTHORITIES
- INDUSTRIAL DEV AUTHORITY
- HOUSING FINANCE AUTHORITY
- HEALTH FACILITIES AUTHORITY
- EDUCATIONAL FACILITIES AUTHORITY
BTS BOARD
CONVENTION & VISITORS BUREAU/ TOURIST DEV COUNCIL
ECONOMIC DEVELOPMENT
LIBRARIES
MANAGEMENT AND BUDGET
SPECIAL DISTRICTS
EMERGENCY OPERATIONS #1

INFRASTRUCTURE & LITIGATION

BARBARA S. OKLESEN
MANAGING ASS'T COUNTY ATTORNEY

EMINENT DOMAIN
PUBLIC WORKS
- CIP/PRODUCTIONS
- OPERATIONS
- FINANCIAL SVC & CONTRACTS – PRIMARY ATTY
- TRANSPORTATION
EMERGENCY OPERATIONS #1

DONALD S. CROWELL
SENIOR ASS'T COUNTY ATTORNEY

COLLECTIONS
EMINENT DOMAIN
FORECLOSURES
GENERAL LITIGATION
REAL ESTATE MGMT LITIGATION

CHRISTY D. PEMBERTON
SENIOR ASS'T COUNTY ATTORNEY

EMPLOYMENT LITIGATION
GENERAL LITIGATION
RISK LITIGATION

JOHN "JACK" POWELL
SENIOR ASS'T COUNTY ATTORNEY

CONSTITUTIONAL OFFICER LITIGATION
CONSTRUCTION LITIGATION
GENERAL LITIGATION
RISK LITIGATION

JOHN E. SCHAEFER
SENIOR ASS'T COUNTY ATTORNEY

GENERAL LITIGATION
PROP APP ASSESSMENT LITIGATION
RISK LITIGATION

VACANT
ASS'T COUNTY ATTORNEY

CONSTITUTIONAL OFFICERS, PERSONNEL, PURCHASING & REAL ESTATE

SARAH RICHARDSON
MANAGING ASS'T COUNTY ATTORNEY

TAX COLLECTOR – PRIMARY ATTY
BANKRUPTCY LITIGATION SUPPORT
EMERGENCY OPERATIONS #2

WILLIAM C. FALKNER
SENIOR ASS'T COUNTY ATTORNEY

COG/COOP PLANNING
ETHICS
FINANCIAL DISCLOSURE
HUMAN RIGHTS
MINI-PERC
TAX COLLECTOR – SECONDARY ATTY
EMERGENCY OPERATIONS #1

CHRISTINA M. LEBLANC
SENIOR ASS'T COUNTY ATTORNEY

CLERK OF CIRCUIT COURT – CIVIL
PROPERTY APPRAISER – EXEMPTION LITIGATION
– ASSESSMENT LITIGATION SUPPORT

CAROLE SANZERI
SENIOR ASS'T COUNTY ATTORNEY

HUMAN RESOURCES DEPARTMENT
HUMAN RESOURCES LIT SUPPORT
PUBLIC RECORDS
SHERIFF'S CIVIL SERVICE BOARD

BETSY M. STEG
SENIOR ASS'T COUNTY ATTORNEY

CANVASSING BOARD
CLERK OF CIRCUIT COURT - CRIMINAL
PROPERTY BONDS
SUPERVISOR OF ELECTIONS

MICHELLE A. WALLACE
SENIOR ASS'T COUNTY ATTORNEY

ANIMAL SERVICES
BUSINESS TECHNOLOGY SVCS DEPT
CCNA
FINANCIAL SVCS & CONTRACTS – SECONDARY ATTY
PURCHASING
PREDISCIPLINARY HEARINGS

MICHAEL A. ZAS
SENIOR ASS'T COUNTY ATTORNEY

AIRPORT
FLEET MGMT
REAL ESTATE MGMT (REM)
- FACILITY OPERATIONS
- FACILITY PLANNING
- REAL ESTATE DIVISION
- YOUNG-RAINEY STAR CENTER

ENVIRONMENTAL, LAND USE, PUBLIC SAFETY & UTILITIES

JEWEL WHITE COLE
MANAGING ASS'T COUNTY ATTORNEY

COASTAL MANAGEMENT
DEPT OF ENVIRONMENTAL MGMT
LOCAL PLANNING AGENCY
PLANNING COUNCIL
TAX INCREMENT FINANCING
WATER & NAVIGATION
EMERGENCY OPERATIONS #1

CARL E. BRODY
SENIOR ASS'T COUNTY ATTORNEY

ADULT USE LITIGATION
COMMUNICATIONS
EMS ADVISORY COMMITTEE
HEALTH & HUMAN SERVICES
HIPAA – SECONDARY ATTY
JUSTICE & CONSUMER SERVICES
PUBLIC SAFETY SVCS – SECONDARY ATTY
EMERGENCY OPERATIONS #2

JOSEPH A. MORRISSEY
SENIOR ASS'T COUNTY ATTORNEY

UTILITIES
- SEWER
- SOLID WASTE/RESOURCE RECOVERY
- WATER
EMERGENCY OPERATIONS #2

DAVID S. SADOWSKY
SENIOR ASS'T COUNTY ATTORNEY

BUILDING & DEVELOPMENT REV SVS
INVERSE CONDEMNATION SUPPORT
METROPOLITAN PLANNING ORG
PLANNING DEPARTMENT
EMERGENCY OPERATIONS #2

ROBERT C. SWAIN
SENIOR ASS'T COUNTY ATTORNEY

EMS AUTHORITY
EMERGENCY MGMT
HIPAA – PRIMARY ATTY
PUBLIC SAFETY SVCS – PRIMARY ATTY
RISK COUNSEL
UNIFIED PERSONNEL BOARD
WORKER'S COMPENSATION
EMERGENCY OPERATIONS #1

JASON C. ESTER
ASS'T COUNTY ATTORNEY

BOARD OF ADJUSTMENT
BUILDING DESIGN & CONST (REM)
COMMUNITY DEVELOPMENT
CONSTRUCTION LICENSING BD
DEPT OF ENVIRONMENTAL MGMT – ENVIRONMENTAL LANDS
PUBLIC WKS SURVEY & MAPPING
REAL EST MGMT - SECONDARY ATTY
SOLID WASTE – SECONDARY ATTY
EMERGENCY OPERATIONS #2

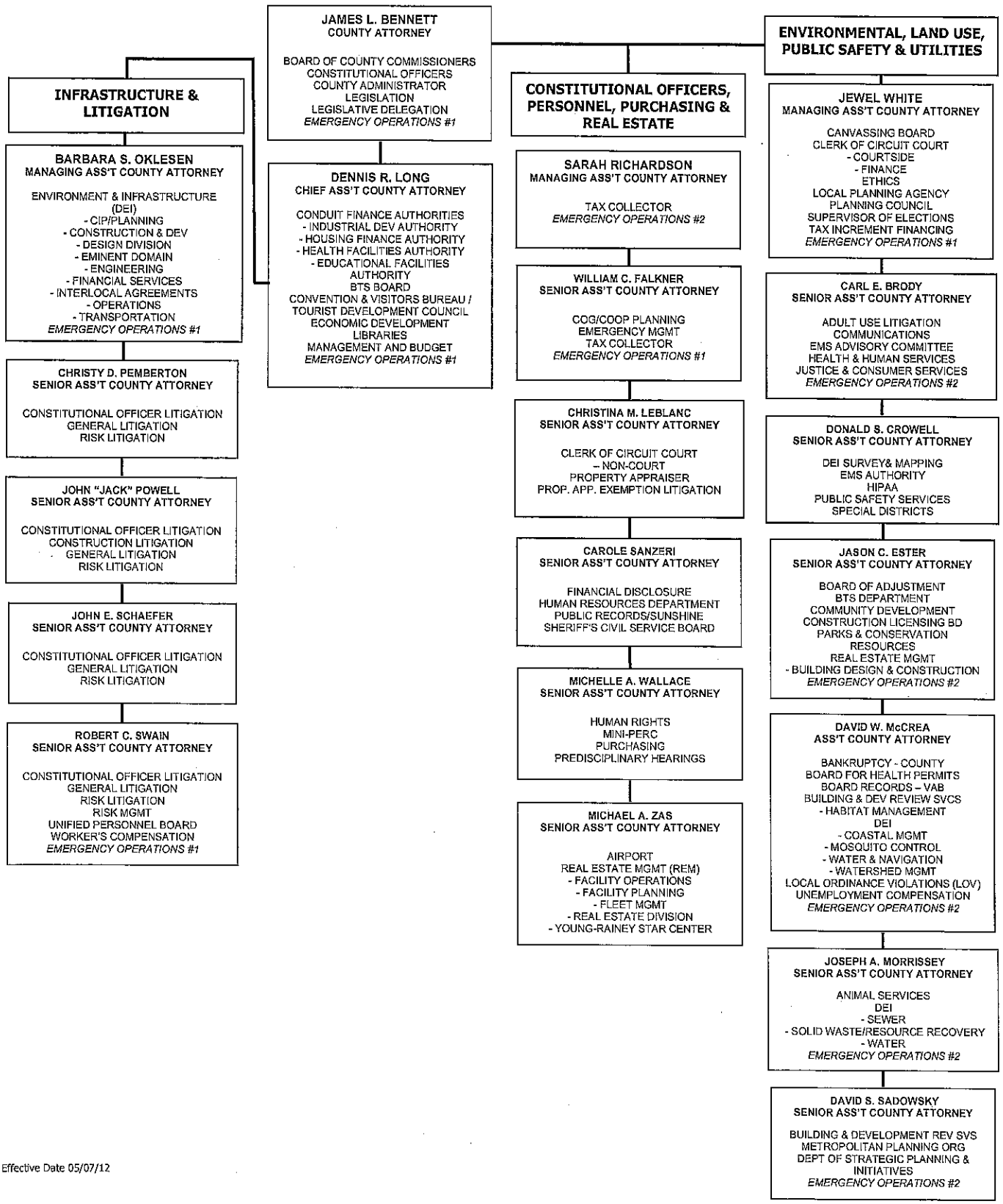
DAVID W. McCREA
ASS'T COUNTY ATTORNEY

BANKRUPTCY
BOARD FOR HEALTH PERMITS
BOARD RECORDS – VAB
BUILDING & DEV REVIEW SVCS
- HABITAT MANAGEMENT
CULTURE, EDUCATION & LEISURE
- CULTURAL AFFAIRS/CULTURAL COUNCIL
- EXTENSION SERVICES
- HERITAGE VILLAGE
- PARKS & RECREATION
LOCAL ORDINANCE VIOLATIONS (LOV)
MOSQUITO CONTROL
SEWER/WATER – SECONDARY ATTY
UNEMPLOYMENT COMPENSATION
EMERGENCY OPERATIONS #2

Effective Date 01/04/10

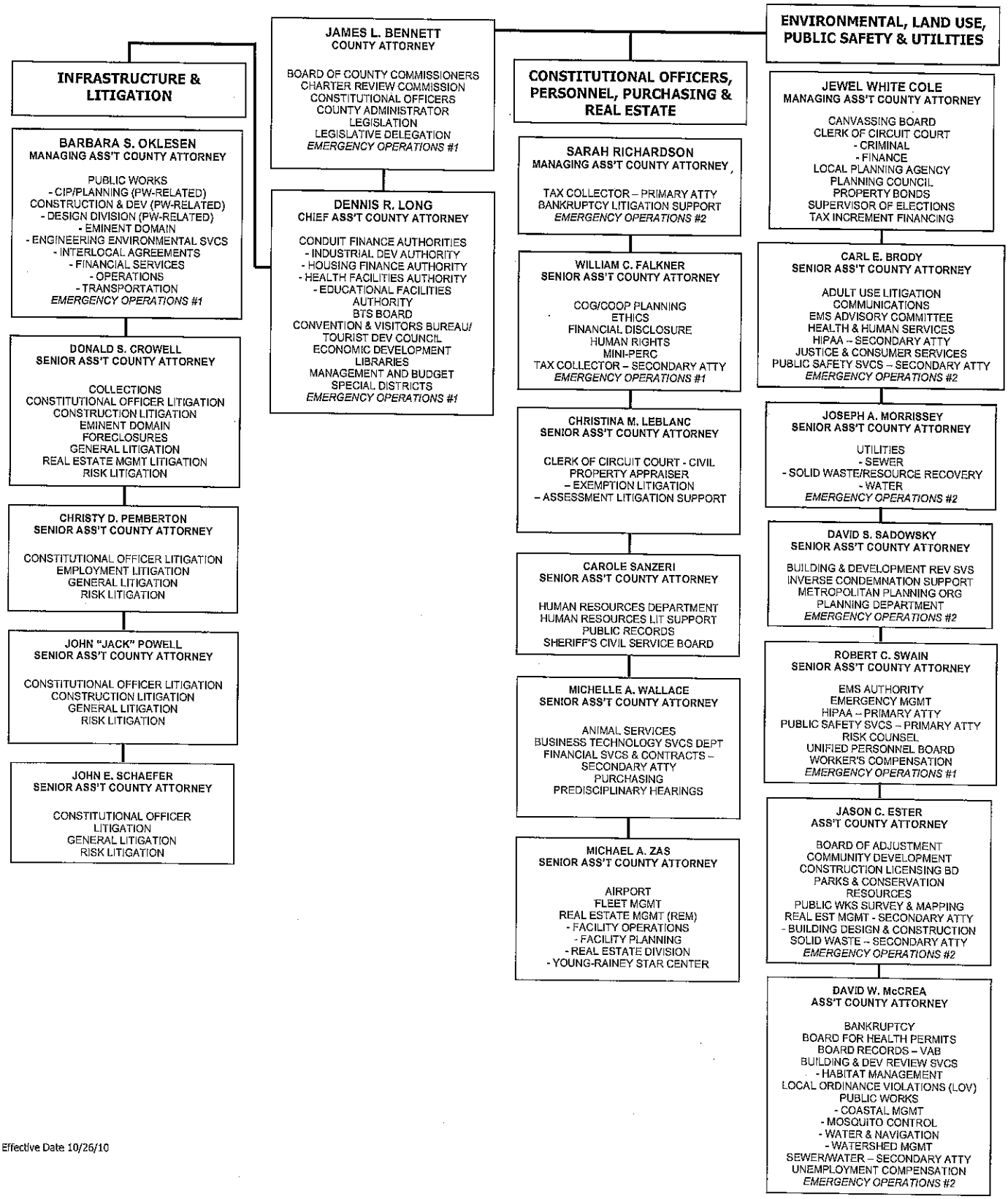
EXHIBIT 1

PINELLAS COUNTY ATTORNEY'S OFFICE – LAWYERS



Effective Date 05/07/12

PINELLAS COUNTY ATTORNEY'S OFFICE – LAWYERS



Effective Date 10/26/10

PINELLAS COUNTY ATTORNEY'S OFFICE – LAWYERS

JAMES L. BENNETT
COUNTY ATTORNEY

BOARD OF COUNTY COMMISSIONERS
CONSTITUTIONAL OFFICERS
COUNTY ADMINISTRATOR
LEGISLATION
LEGISLATIVE DELEGATION
EMERGENCY OPERATIONS #1

DENNIS R. LONG
CHIEF ASSISTANT COUNTY ATTORNEY

SPECIAL PROJECTS AND TRAINING
EMERGENCY OPERATIONS #1

LITIGATION

DONALD S. CROWELL
MANAGING ASST. COUNTY ATTORNEY

BTS BOARD
CONDUIT FINANCE AUTHORITIES
EMINENT DOMAIN LITIGATION
HIPAA
LIBRARY COOPERATIVE
SAFE COMMUNITIES
- EMERGENCY COMMUNICATIONS/911
- EMS AUTHORITY
- FIRE PROTECTION AUTHORITY
- MEDICAL CONTROL BOARD
- PUBLIC SAFETY SERVICES
SPECIAL DISTRICTS
EMERGENCY OPERATIONS #1

NANCY S. MEYER
SR. ASSISTANT COUNTY ATTORNEY

ADMINISTRATION LAW LITIGATION
GENERAL LITIGATION
RISK LITIGATION
WORKER'S COMPENSATION

CHRISTY D. PEMBERTON
SR. ASSISTANT COUNTY ATTORNEY

ADMINISTRATIVE LAW LITIGATION
CONSTITUTIONAL OFFICER LITIGATION
GENERAL LITIGATION
RISK LITIGATION

JOHN "JACK" POWELL
SR. ASSISTANT COUNTY ATTORNEY

CONSTITUTIONAL OFFICER LITIGATION
CONSTRUCTION LITIGATION
GENERAL LITIGATION
RISK LITIGATION
RISK MGMT

YVETTE ACOSTA MACMILLAN
SR. ASSISTANT COUNTY ATTORNEY

AIR QUALITY LITIGATION
CONSTITUTIONAL OFFICER LITIGATION
GENERAL LITIGATION
RISK LITIGATION

VACANT
ASSISTANT COUNTY ATTORNEY

GARNISHMENTS

CONSTITUTIONAL OFFICERS & INTERNAL SERVICES

JEWEL WHITE
MANAGING ASST. COUNTY ATTORNEY

CANVASSING BOARD
CLERK OF CIRCUIT COURT
- BOARD RECORDS
- COURTSIDE
- FINANCE
ETHICS
LOCAL PLANNING AGENCY
OFFICE OF MGMT & BUDGET
PINELLAS PLANNING COUNCIL
PLANNING
- REDEVELOPMENT & TIF
SUPERVISOR OF ELECTIONS
TAX INCREMENT FINANCING
EMERGENCY OPERATIONS #1

CARL E. BRODY
SR. ASSISTANT COUNTY ATTORNEY

HEALTH & COMMUNITY SERVICES
- COMMUNITY DEVELOPMENT
- HEALTH & HUMAN SERVICES
- JUSTICE & CONSUMER SERVICES
EMS ADVISORY COMMITTEE
EMERGENCY OPERATIONS #2

WILLIAM C. FALKNER
SR. ASSISTANT COUNTY ATTORNEY

SAFE COMMUNITIES
- COG/COOP PLANNING
- EMERGENCY MGMT
TAX COLLECTOR
EMERGENCY OPERATIONS #1

CHRISTINA M. LEBLANC
SR. ASSISTANT COUNTY ATTORNEY

CLERK OF CIRCUIT COURT
(RECORDING SERVICES)
– OFFICIAL RECORDS
- PASSPORTS/MARRIAGE LICENSES
- TAX DEEDS
PROPERTY APPRAISER
PROP. APP. EXEMPTION LITIGATION

CAROLE SANZERI
SR. ASSISTANT COUNTY ATTORNEY

FINANCIAL DISCLOSURE
HUMAN RESOURCES DEPARTMENT
- INFORMAL GRIEVANCE PANEL
- MiniPERC
- PREDISCIPLINARY HEARINGS
PUBLIC RECORDS/SUNSHINE
SHERIFF'S CIVIL SERVICE BOARD

MICHELLE A. WALLACE
SR. ASSISTANT COUNTY ATTORNEY

CLERK
– INSPECTOR GENERAL
COMMUNICATIONS
HUMAN RIGHTS
PARKS & CONSERVATION RESOURCES
UNIFIED PERSONNEL BOARD

INFRASTRUCTURE & LAND USE

BARBARA S. OKLESEN
MANAGING ASST. COUNTY ATTORNEY

ENVIRONMENT & INFRASTRUCTURE
(DEI)
- CIP/PLANNING
- CONSTRUCTION & DEV
- DESIGN DIVISION
- EMINENT DOMAIN
- ENGINEERING
- FINANCIAL SERVICES
- INTERLOCAL AGREEMENTS
- OPERATIONS
- TRANSPORTATION
EMERGENCY OPERATIONS #1

MILES S. BELKNAP
ASSISTANT COUNTY ATTORNEY

ANIMAL SERVICES
CLERK – GARNISHMENTS
LOCAL ORDINANCE VIOLATIONS (LOVs)
PURCHASING
UNEMPLOYMENT COMPENSATION

JASON C. ESTER
SR. ASSISTANT COUNTY ATTORNEY

AIR QUALITY
BOARD OF ADJUSTMENT
BTS DEPARTMENT
BLDG DESIGN & CONSTRUCTION
- RUP / BDRS
PC CONSTRUCTION LICENSING BOARD
DEI MAPPING AND SURVEY
TAX COLLECTOR LITIGATION
EMERGENCY OPERATIONS #2

DAVID W. McCREA
SR. ASSISTANT COUNTY ATTORNEY

ADM LAW – CH 120 WATER ISSUES
BANKRUPTCY
BOARD FOR HEALTH PERMITS
BOARD RECORDS – VAB
PLANNING & DEV REVIEW SVCS
- HABITAT MANAGEMENT
DEI
- AGENCY/PERMITTING SUPPORT
- COASTAL MGMT
- MOSQUITO CONTROL
- WATER & NAVIGATION
- WATERSHED MGMT
EMERGENCY OPERATIONS #2

JOSEPH A. MORRISSEY
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ENVIRONMENT & INFRASTRUCTURE
- FINANCE
- SEWER
- SOLID WASTE/RESOURCE RECOVERY
- UTILITY RELOCATION & REHAB
- WATER
EMERGENCY OPERATIONS #2

DAVID S. SADOWSKY
SR. ASSISTANT COUNTY ATTORNEY

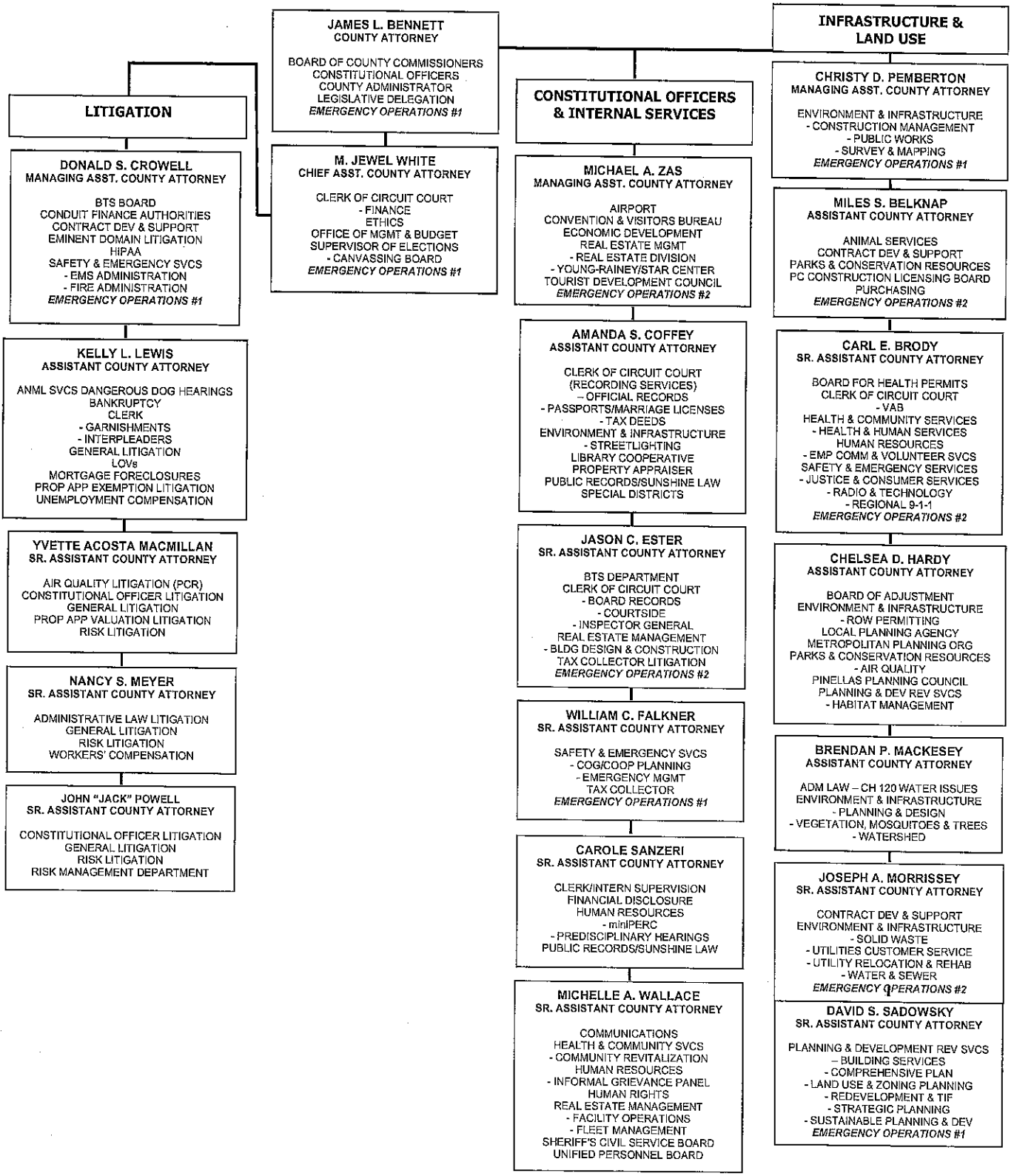
PLANNING & DEVELOPMENT SVCS
– BUILDING
- DEVELOPMENT REVIEW
- COMPREHENSIVE PLAN
- LAND USE & ZONING
METROPOLITAN PLANNING ORG
EMERGENCY OPERATIONS #2

MICHAEL A. ZAS
SR. ASSISTANT COUNTY ATTORNEY

AIRPORT
CONVENTION & VISITORS BUREAU /
TOURIST DEVELOPMENT COUNCIL
ECONOMIC DEVELOPMENT
REAL ESTATE MGMT (REM)
- FACILITY OPERATIONS
- FACILITY PLANNING
- FLEET MGMT
- REAL ESTATE DIVISION
- YOUNG-RAINEY STAR CENTER

Effective Date 11/01/13

PINELLAS COUNTY ATTORNEY'S OFFICE – LAWYERS



Eff. 08/10/14

TO: David Scott, Executive Director
Department of Environment and Infrastructure

THRU: Robert LaSala, County Administrator

CC: James Bennett, County Attorney
Michelle Wallace, Sr. Assistant County Attorney
Carole Sanzeri, Sr. Assistant County Attorney
Peggy Rowe, Director, Human Resources
Virginia Holscher, Bureau Director, Risk Management

FROM: Paul Valenti, Director
Office of Human Rights

SUBJECT: Amended Complaint
Alfonso Riley v DEI
Reference #14-004

DATE: April 15, 2014

The Internal Charge of Discrimination filed by the above noted employee has been amended to include retaliation. Since the complaint was filed on March 27, 2014 the employee has been subjected to retaliation. Specifically, On Friday, April 11, 2014, Mr. Riley was again given a pre-disciplinary hearing notice alleging violation of Personnel Rule XXIV, Paragraph J, Items #24 and #38. (see attached). In addition, Mr. Riley reports that his locker had been vandalized with some sort of liquid poured on paperwork, his county issued tee shirt appears to have had feces smeared on it, and his county issued hat was destroyed. Please review the attached paperwork and photo's and respond to the Office of Human Rights no later than May 8, 2014.

EXHIBIT 2

MEMORANDUM

TO: Members, Unified Personnel Board

FROM: Michelle Wallace MW
Senior Assistant County Attorney

SUBJECT: Motion for Use of Independent Legal Advisor for Personnel Board – Appeal of Alfonsa Riley, Sr.

DATE: September 17, 2014

Please allow this memo to serve as a follow-up to the motion filed by Michelle Erin Nadeau of Kwall, Showers & Barack. I respectfully disagree with the motion in its entirety, especially in regards in my involvement in the referenced investigation. I was not involved in the investigation, nor do I typically get involved in same.

Nevertheless, attached are two prior memos dated May 6, 2010 and February 5, 2009, respectively, where similar motions and issues are addressed. Those memos clearly dispel the concerns regarding ethical conflicts presented in these matters and allow the County Attorney's Office to participate accordingly. In both prior instances, the Board voted, found no conflict existed and denied the motion.

That being said, while there is no conflict otherwise, the County Attorney's Office has decided, in this limited instance in an abundance of caution and to avoid the appearance of impropriety, to appoint Jason Ester as counsel for the Personnel Board in this matter.

MW/elb

Enclosures

THE PINELLAS COUNTY
UNIFIED PERSONNEL SYSTEM BOARD

IN RE:

ALFONSA RILEY, SR.,

Appellant,

v. **Appeal No. 14-06**

PINELLAS COUNTY
DEPARTMENT OF ENVIRONMENT
AND INFASTRUCTURE,

Appellee.
_____/

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LEGAL ADVISOR FOR PERSONNEL BOARD

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Therefore, Employee respectfully requests that Personnel Board utilize an independent legal advisor in this (and all other) matters.

Respectfully submitted,

/s/ Michelle Erin Nadeau
Ryan D. Barack
Florida Bar No. 0148430
Michelle Erin Nadeau
Florida Bar No. 0060396
Kwall, Showers & Barack, P.A.
133 N. Ft. Harrison Ave.
Clearwater, Florida
Tel: (727) 441-4947
Fax: (727) 447-3158
Attorneys for Employee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via electronic mail on this 15th day of September 2014 on:

James L. Bennett, County Attorney
Nancy Meyer, Senior Assistant County Attorney
Michelle Wallace, Senior Assistant County Attorney
Pinellas County Courthouse,
315 Court Street
Clearwater, Florida 33756
jbennett@pinellascounty.org
nmeyer@pinellascounty.org
mwallace@pinellascounty.org

Peggy Rowe
Director of Human Resources
400 S. Fort Harrison Ave
Clearwater, FL 33756
prowe@pinellascounty.org

/s/ Michelle Erin Nadeau
Attorney

MEMORANDUM

TO	:	**Members, Unified Personnel Board**
FROM	:	**Robert C. Swain, Esquire** **Senior Assistant County Attorney**
RE	:	**Expected Motion to Disqualify – Appeal of Rachel Kabza**
DATE	:	**May 6, 2010**

As mentioned at the April meeting of the Personnel Board and in the Pre-Hearing statement in this particular case, I have been advised that Counsel for the Appellant objects to the fact that the County Attorney's office serves as Counsel for the Appointing Authority and as Board Counsel in this matter. I was asked to provide some information to the Board on this issue.

While the particulars of this motion are as yet unknown as it is expected to be made orally at the time of the Appeal, it would appear that the substance is the same as this attorney raised during the Appeal of Barbara Johnson. That motion was heard by the Board on February 5, 2009. I am attaching the material which I provided the Board at that time and which I believe sets forth the argument and the law. I am also including an excerpt from the Minutes of that meeting which summarize the argument and the decision of the Board. As this is a different case, the facts may be different, but the main issue, that of the alleged conflict in the varying roles of members of the County Attorney's office is the same. The governing case-law would be identical.

Excerpt of minutes from meeting of 2/5/2009

MOTION FOR DISQUALIFICATION IN THE APPEAL OF DEMOTION OF BARBARA JOHNSON, HEALTH AND HUMAN SERVICES DEPARTMENT – DENIED

Ryan D. Barack, Esquire, Kwall, Showers & Barack, P.A. representing the appellant, provided background information relating to the appellant's demotion; and explained the rationale for the Motion for Disqualification of Senior Assistant County Attorney Robert C. Swain in his capacity as advisor to the UPB. Mr. Barack noted that by his count at least seven members of the County Attorney's Office have been involved in the demotion process; and that Mr. Swain's continuance as advisor to the UPB could create the appearance of impropriety in this proceeding. He cited the recent situation involving the former Property Appraiser and the former County Attorney; and stated that it is his contention that outside counsel should be hired to act as advisor in Mr. Swain's place.

Senior Assistant County Attorney Christy Donovan Pemberton, representing the Appointing Authority, noted that in the instance referred to by Mr. Barack, the County Attorney has been cleared of any wrongdoing by both the Grand Jury and the Ethics Committee. Attorney Pemberton indicated that she and Attorney Swain have ethical obligations which they will

fulfill; that there is no conflict; that if at any time a conflict arises they will act accordingly and recuse themselves, if necessary; that there is no real appearance of impropriety since Mr. Swain will be advising the UPB in the sunshine; and that in difficult economic times there is no reason to expend funds to hire outside counsel.

Responding to query by Mr. Koelsch, Ms. Pemberton related that part of the allegation against the former County Attorney was that she represented the former Property Appraiser as an individual and not in his official capacity; and that the fact that he was the Property Appraiser was incidental; whereupon, Mr. Barack reiterated his claim that unless outside counsel is engaged, there is an appearance of impropriety.

Ms. Sladden commented that in her 18 years of service on the UPB, she has never witnessed any participation in deliberations by a county attorney; and that the attorney's only role is to advise the members with respect to procedure. Responding to query by Mr. Smith, Mr. Barack related that he is unable to state whether any specific individuals have lodged complaints regarding the County Attorney's role as advisor to the UPB; and that while it is the responsibility of the County Attorney/UPB Advisor to zealously advise the UPB, it is his role to represent his client just as zealously and doing so requires him to raise the concern of the appearance of impropriety; and additional discussion ensued.

Ms. Pemberton related that it is common for boards such as the UPB, that sit in a quasi judicial capacity, to have an attorney from a governmental law firm represent a party in front of the board while another attorney from that governmental law firm sits as an advisor to the board; and that it is policy in the County Attorney's Office to take every measure necessary to ensure that there is no comingling and no discussion of the matter.

Following these presentations, Mr. Swain advised the board that it has the option to vote on the motion or do nothing, and recommended that a vote be taken.

Mr. Koelsch moved, seconded by Ms. Britt and carried unanimously, that the Motion for Disqualification on behalf of Ms. Johnson be denied.

MEMORANDUM

TO	:	**Members, Unified Personnel Board**
FROM	:	**Robert C. Swain, Esquire** **Senior Assistant County Attorney**
RE	:	**Appeal of Demotion of Barbara Johnson – Motion for Disqualification**
DATE	:	**February 5, 2009**

Attached is a motion from Counsel for the Employee. Ms. Johnson seeks to have me and the Office of the County Attorney disqualified from advising the Personnel Board in this matter. The basis of the complaint is a concern regarding the provision of due process that comes about by having various members of the County Attorney's office represent management in the grievance process, at the appellate level before this Board and act as Counsel to the Board in the process at the same time. The motion does not allege an ethical conflict of interest under the Rules of Professional Conduct of the Florida Bar.

The specific facts are that individuals from the County Attorney's office represent Human Resources, (Carole Sanzeri); and Human Services, (Carl Brody) and have provided representation to management in the grievance process – (according to motion, Mucklow, Pemberton, Wallace and Spencer). All in all the Employee lists 7 attorneys and suggests almost half of the office has been involved in this matter. There are currently 23 attorneys in this office.

The motion does not raise any direct allegations against me, other than the fact that Carl Brody and I are in the same management unit (pod), managed by Jewel Cole. I have had no conversations with Carl regarding this matter nor, other than discussing this motion, have I had any discussions with Ms. Cole.

My duties with the County Attorney's office involve representing Emergency Management, EMS/Fire Administration, Emergency Communications and Risk Management. I am also the attorney in our office who handles workers' compensation matters. It is my habit now and in the past not to get involved in personnel matters with my departments unless it involves workers' compensation. I have checked my records and those of Risk Management and can advise the Board that if any Risk/Comp matter regarding Ms. Johnson exists, I have not been involved with it.

My normal job duties would not have brought me in contact with any information regarding Ms. Johnson and I have not discussed her case with anyone other than regarding the procedural issues which are my responsibility. So, I have no special knowledge regarding her or her situation and have not had access to that information.

The sole basis for the disqualification is the extent of the involvement of the County Attorney's office in this matter. However, fewer than half of the attorneys have been involved and there is no indication that I have been involved.

Ms. Johnson cites to the Forehand and Cherry Communications decisions. The Supreme Court decision in Cherry Communications sets the standard for attorney conduct in these matters. The Court recognized that an agency must have great flexibility in the utilization of staff in a wide range of capacities, but held that the requirements of due process did not allow the ***same*** attorney to both prosecute and participate in the deliberations of the decision making body. This was the situation in the Forehand case cited by Ms. Johnson.

In this situation, different attorneys have been involved at the various steps. I have not acted as a prosecuting attorney at any level. There is no authority for disqualification of an entire office as noted in Citrus County v. Florida Rock Industries, Inc., 726 So. 2d 383, (5th DCA 1999). Here the Court noted:

> "If the circuit court thought the entire County Attorney's Office was barred from advising the Deparment on reconsideration, nothing in Cherry supports such a ruling. Cherry holds only that a different staff attorney should have performed the different roles.

As Ms. Johnson has not alleged any specific grounds for my individual disqualification and as there is no authority or basis in this matter for the entire office to be disqualified, it is my opinion that the motion, on its face, is legally insufficient.

Our office recognizes that a legal conflict might arise. Each case presents its own set of circumstances and a conflict may arise with the regularly assigned counsel to this Board. In those cases, a determination is made whether there are other attorneys in the office who could competently advise the Board, and if not, then alternative counsel is hired at the expense of the County Attorney to represent the Board. This has been our practice in the past and in the appropriate case will remain our practice in the future.

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FAX TRANSMISSION

KWALL, SHOWERS & BARACK, P.A.
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To: James L. Bennett, County Attorney
Senior Assistant County Attorney Carole Sanzeri
Senior Assistant County Attorney Christy Pemberton
Managing Assistant County Attorney Thomas Spenser
Senior Assistant County Attorney Suzanne Mucklow
Senior Assistant County Attorney Michelle Wallace
Senior Assistant County Attorney Robert Swain ✔
Senior Assistant County Attorney Carl Brody

Date: January 12, 2009

From: Ryan D. Barack

Fax No.: 727-464-4147

No. of pages: 5, including cover sheet

Re: Barbara Johnson

Please see the attached.

PINELLAS COUNTY PERSONNEL BOARD

Barbara Johnson,
Employee

v.

Health & Human Service Department
Agency

AMENDED MOTION REQUESTING USE OF INDEPENDENT LEGAL ADVISOR FOR PERSONNEL BOARD[1]

Comes now Employee Barbara Johnson ("Employee" or "Johnson"), by and through her undersigned counsel and moves to require the use of an independent legal advisor to the Personnel Board. In support, Employee states:

1. This matter has already involved an extraordinary number of assistant county attorneys. In fact, almost half of the office has already been involved in this matter.

A. Senior Assistant County Attorney Carole Sanzeri represents Peggy Rowe who Employee anticipates calling as a witness in this matter.

B. Senior Assistant County Attorney Christy Pemberton represented the Agency before the Informal Grievance Panel.

C. Managing Assistant County Attorney Thomas Spencer also represented the Agency before the Informal Grievance Panel.

D. Senior Assistant County Attorney Suzanne Mucklow was the legal advisor to the Informal Grievance Panel.

E. Assistant County Attorney Michelle Wallace also functioned as the legal advisor to the Informal Grievance Panel.

[1] In the original motion, Michelle Wallace was misidentified as Jamice Pinkney. We apologize to Ms. Pinkney for this mistake.

F. Senior Assistant County Attorney Robert Swain is counsel to the Personnel Board.

G. The Employee may call Senior Assistant County Attorney Carl Brody who advised the Agency on the challenged personnel action as a witness in this matter.

2. It creates the appearance of impropriety and is a denial of fundamental due process to have the County Attorney's Office functioning as both prosecutor and counsel to the Personnel Board. The Florida Supreme Court has noted that because our adversarial justice system emphasizes fairness, one side is not to have a "special advantage in influencing the decision." *Cherry Communications, Inc. v. Deason*, 652 So. 2d 803, 805 (Fla. 1995) (holding an attorney may not play dual roles as prosecutor and as posthearing legal advisor to the board in a Public Service Commission proceeding). Florida courts stress that it is the conflicting duties of prosecutor and advisor to the board that make the roles incompatible. *Forehand v. School Board of Gulf County*, 600 So. 2d 1187 (Fla. 1st DCA 1992) (finding error where an attorney acted as prosecutor and advisor to the board despite arguments that the attorney did not advise on substantive matters and therefore no harm was done).

3. In this case there has been an extraordinary level of involvement of county attorneys in the proceedings, including advising the Agency on the challenged personnel action and representing the Agency below while simultaneously advising the Informal Grievance Panel. The amount of participation the County Attorney's Office has had in this case creates conflicting duties and leads to the appearance of impropriety.

4. When this issue was raised before the informal grievance panel, representatives of the Court Attorney's Office asserted that there was separation between the various departments

or pods and that this was sufficient to eliminate any concerns about due process.[2] However, the level of involvement the County Attorney's Office has had in this matter prevents this separation form being an adequate protection of due process.[3] Further, the attorney advising this Board, Robert Swain, is a member of the same pod as the attorney who advised the Agency on the challenged personnel action, Carl Brody.

5. Undersigned counsel has been advised that in the past when this situation has arisen outside counsel has been retained to advise the Personnel Board.

Therefore, employee respectfully requests that Personnel Board utilize an independent legal advisor.

Respectfully submitted,

Ryan D. Barack
Florida Bar No. 0148430
Michelle Erin Nadeau
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Attorneys for Employee

---

[2] A copy of the organizational chart provided by the County Attorney's Office to the Informal Grievance Panel is attached.

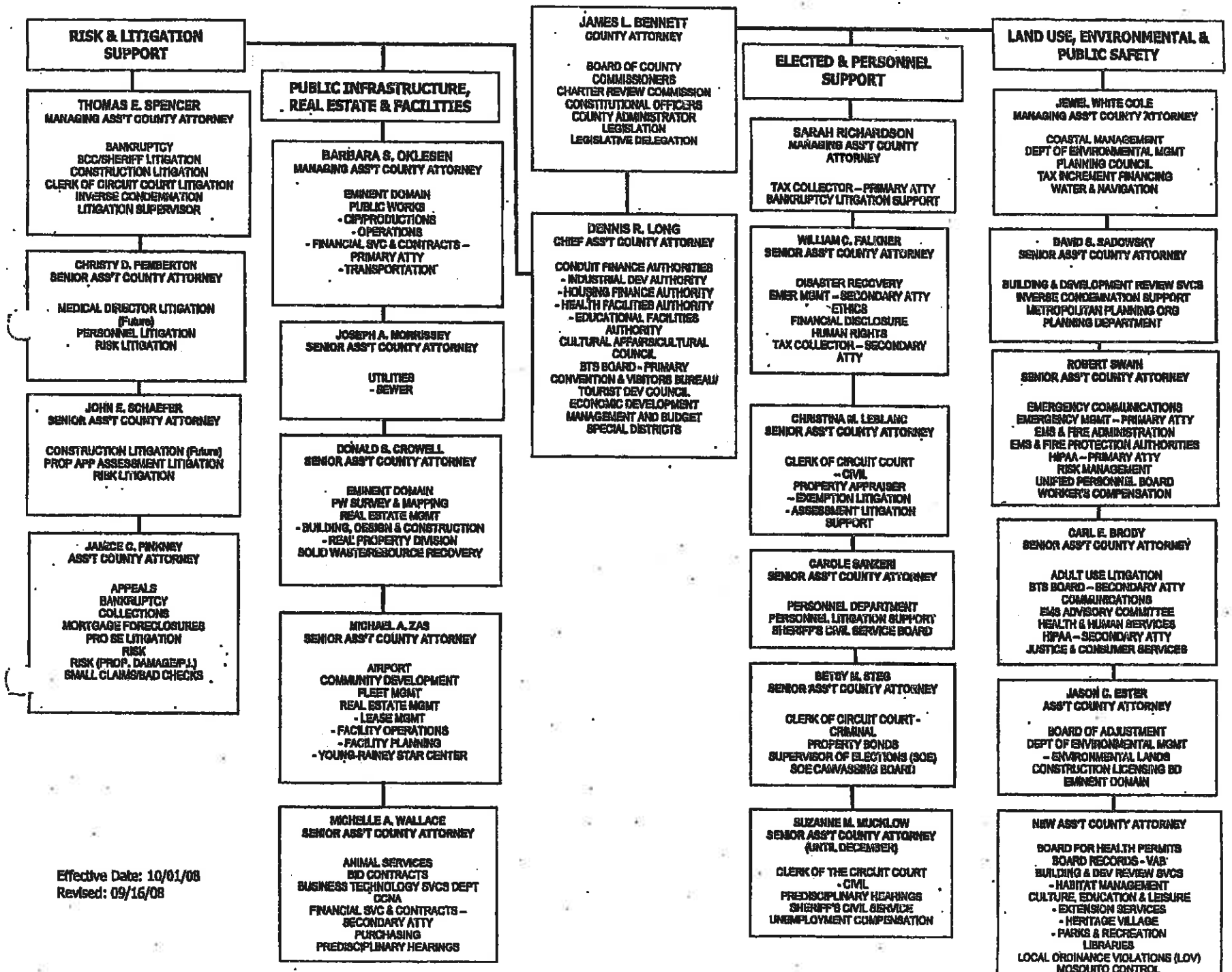
[3] In fact, at the second Informal Grievance Panel hearing, Mr. Spencer stated to the undersigned that this matter had been the source of much discussion among the attorneys at the County Attorney's Office. Mr. Spencer now denies making this statement.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via telecopy and U.S. Mail on this 12 day of January 2009 on:

James L. Bennett, County Attorney
Senior Assistant County Attorney Carole Sanzeri
Senior Assistant County Attorney Christy Pemberton
Managing Assistant County Attorney Thomas Spenser
Senior Assistant County Attorney Suzanne Mucklow
Senior Assistant County Attorney Michelle Wallace
Senior Assistant County Attorney Robert Swain
Senior Assistant County Attorney Carl Brody
Pinellas County Courthouse,
315 Court Street
Clearwater, Florida 33756

Michelle Erin Nadeau
Attorney



Effective Date: 10/01/08
Revised: 09/16/08

H:\USERS\ATYKB23\WPDOCS\County Attorney\OFFICE\Reorganization\CAO Org Chart 2008 ReorganizationFinal 091508.doc

District Court of Appeal of Florida, First District.
Susan FOREHAND, a/k/a Susan Abreu, Appellant,
v.
SCHOOL BOARD OF GULF COUNTY, Florida, Appellee.
No. 90-1676.

May 26, 1992.

Teacher appealed school board order suspending teacher without pay. The District Court of Appeal, Zehmer, J., held that: (1) dual roles played by school board's attorney as legal advisor and prosecutor at hearing on misconduct charges prejudiced teacher and required vacating of suspension order; (2) evidence established that teacher struck student; and (3) evidence failed to support charge relating to name-calling or failure to follow principal's order about grading.

Vacated and remanded.

Wolf, J., concurred in part, dissented in part, and filed opinion.

West Headnotes

[1] Schools 345 ⚿147.44

345 Schools
345II Public Schools
345II(K) Teachers
345II(K)2 Adverse Personnel Actions
345k147.30 Proceedings
345k147.44 k. Judicial Review. Most Cited Cases
Teacher's attorney waived any error on ground that board suspended teacher without notice and opportunity to be heard, where attorney failed to make objection and affirmatively agreed to proceed only with issue of back pay.

[2] Schools 345 ⚿147.38

345 Schools
345II Public Schools
345II(K) Teachers
345II(K)2 Adverse Personnel Actions
345k147.30 Proceedings
345k147.38 k. Hearing. Most Cited Cases
School board's attorney should not have acted as prosecutor and legal advisor to board at evidentiary hearing on misconduct charges against teacher.

[3] Schools 345 ⚿147.38

345 Schools
345II Public Schools
345II(K) Teachers
345II(K)2 Adverse Personnel Actions
345k147.30 Proceedings
345k147.38 k. Hearing. Most Cited Cases
Dual roles played by school board's attorney as legal advisor and prosecutor prejudiced teacher at hearing on misconduct charges and required vacating of suspension order; attorney advised board on procedural matters such as handling of objections and promised to secure information about whether board's deliberations could be held in private.

[4] Schools 345 ⚿147.40(1)

345 Schools
345II Public Schools
345II(K) Teachers
345II(K)2 Adverse Personnel Actions
345k147.30 Proceedings
345k147.40 Evidence
345k147.40(1) k. In General. Most Cited Cases
Student's testimony that teacher struck him on shoulder with candle and principal's testimony that she saw red mark on student's shoulder supported charge that teacher struck student and that the act was serious misconduct impairing teacher's effectiveness in school system, even though teacher denied striking the student and claimed merely to have touched student to get his attention.

[5] Schools 345 ⚿147.40(1)

345 Schools
345II Public Schools
345II(K) Teachers
345II(K)2 Adverse Personnel Actions
345k147.30 Proceedings
345k147.40 Evidence
345k147.40(1) k. In General. Most Cited Cases
Principal's uncorroborated testimony repeating hearsay that teacher had suggested to some students to call other students insulting names did not support finding that teacher had caused students to call other students by insulting names. West's F.S.A. § 120.58(1)(a).

[6] **Schools 345 ⚿147.9**

345 Schools
345II Public Schools
345II(K) Teachers
345II(K)2 Adverse Personnel Actions
345k147.8 Grounds for Adverse Action
345k147.9 k. In General. Most Cited Cases
(Formerly 345k147.8)
Teacher's statement, "Kids, we are not here to have a Bitch conference" was not so serious as to impair effectiveness in school system and did not warrant discipline.

[7] **Schools 345 ⚿147.40(1)**

345 Schools
345II Public Schools
345II(K) Teachers
345II(K)2 Adverse Personnel Actions
345k147.30 Proceedings
345k147.40 Evidence
345k147.40(1) k. In General. Most Cited Cases
Evidence failed to establish teacher's constant, continual, and intentional refusal to obey principal's order not to consider student conduct or behavior in tabulation of academic grades and, therefore, failed to support findings of gross insubordination or willful neglect; principal did not bring teacher's gradebook to hearing, principal's testimony regarding contents of book was uncorroborated hearsay, and teacher testified that she did precisely what she thought principal asked her to do. West's F.S.A. §§ 120.58, 231.36(4)(c).

[8] **Schools 345 ⚿147.4**

345 Schools
345II Public Schools
345II(K) Teachers
345II(K)2 Adverse Personnel Actions
345k147.4 k. Authority to Take Adverse Action. Most Cited Cases
Two-week suspension of teacher without pay did not impose fine for alleged misconduct and was within authority of school board. West's F.S.A. § 231.36(4)(c).

[9] **Schools 345 ⚿147.54**

345 Schools
345II Public Schools
345II(K) Teachers
345II(K)2 Adverse Personnel Actions
345k147.50 Actions
345k147.54 k. Damages; Costs and Fees. Most Cited Cases
School board did not commit "gross abuse of discretion" and, therefore, was not liable to teacher for attorney fees when board used same attorney as prosecutor and legal advisor, found teacher guilty of misconduct based solely on uncorroborated hearsay, and imposed suspension without pay. West's F.S.A. § 120.57(1)(b)10.

*1188 David Brooks Kundin of Dobson & Kundin, P.A., Tallahassee, for appellant.
Charles A. Costin of Costin and Costin, Port St. Joe, for appellee.

ZEHMER, Judge.
Susan Forehand, a fifth grade school teacher employed under a continuing contract by the Gulf County School Board, appeals the Board's final order approving, in part, the superintendent's findings of misconduct, and implementing his recommendation that Forehand be suspended from her position for ten days without pay. Raising four points on appeal, Forehand complains that (1) the manner in which the Board conducted the hearing deprived her of due process and a fair hearing; (2) the findings of misconduct are not supported by competent, substantial evidence; (3) the Board exceeded its statutory author-

ity set forth in chapters 230 and 231 by imposing a fine; and (4) she is entitled to an award of attorney's fees and costs for all proceedings in this cause pursuant to section 120.57(1)(b)10, Florida Statutes (1989), because the Board's gross abuse of discretion precipitated this appeal. Although we find no merit in several of her contentions, we agree that certain of the charges are not supported by competent, substantial evidence, and agree that a procedural error impaired the fairness of the hearing. Accordingly, we vacate the order and remand for a new evidentiary hearing.

I.

Forehand argues three grounds in support of her contention that the proceedings below were conducted in a manner which deprived her of the fundamental right to procedural due process and the right to a fair and impartial hearing in three respects: first, as the Board had initially denied Forehand notice and opportunity to be heard on the charges of misconduct when she was initially suspended without pay and then reinstated after she voluntarily dismissed her federal civil rights action challenging the Board's action, the Board could not act as an impartial fact-finder in the subsequent evidentiary hearing that led to the appealed order now under review; second, the Board's deliberations were not public when it voted on the superintendent's recommendations; third, the Board used the same attorney as prosecutor and legal advisor during the hearing, contrary to well-settled law that traditional notions of justice and fair play require an administrative body in disciplinary proceedings to designate one person to act as its legal advisor and a different person to act as prosecutor.

A.

[1] With respect to Forehand's contention that the Board was unable to give her *1189 a fair and impartial hearing because it had previously suspended her without providing her notice and opportunity to be heard, the Board argues that Forehand is precluded from raising this issue on appeal because the parties' "agreement" to voluntarily dismiss the federal action provided that the only issue to be discussed at the hearing before the Board would be the issue of back pay, and Forehand's attorney made no objection on this ground at the hearing. The Board further argues that any error in the Board's initial suspension of Forehand was cured by the Board's reinstatement of Forehand and subsequent evidentiary hearing on the matter.

The transcript reveals that Forehand's attorney made the following statement at the beginning of the evidentiary hearing:

> Now, as the members of the school and I'm sure Mr. Costin has filled you in on the fact that in the past, with this case there have been some procedural, there have been some things that were not done correctly procedurally and I'm not going to address those procedural errors, because the School Board has saw fit to reinstate Ms. Forehand and proceed anew with this ten day suspension.

We agree, therefore, that Forehand's attorney not only failed to make an objection on the record below and thereby waived any error on this ground, he affirmatively agreed to proceed with the hearing on the issues tried, thus precluding Forehand from raising this issue on appeal. *Lee County Oil Co. v. Marshall*, 98 So.2d 510 (Fla. 1st DCA 1957).

B.

We likewise find no merit in Forehand's argument that she was denied a fair and impartial hearing because the Board did not deliberate in public prior to its vote on the Superintendent's recommendations. Forehand relies on the so-called "Government in the Sunshine Law," section 286.011(1), Florida Statutes (1989), which provides that:

> All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting.

Unquestionably, this law applies to school board meetings and attendant decision-making process. *Canney v. Board of Public Instruction of Alachua County*, 278 So.2d 260 (Fla.1973); *Mitchell v. School Board of Leon County*, 335 So.2d 354 (Fla.

1st DCA 1976). "A county school board should not be authorized to avoid the Government in the Sunshine Law by making its own determination that an act is quasi-judicial. Secret meetings would be prevalent." *Canney*, 278 So.2d at 263.

In this case, the transcript of the Board's deliberations and vote reveals that Forehand's case was discussed briefly before the vote was taken. Forehand has not cited any authority for the proposition that the discussion shown in this record is inadequate and unlawful. Forehand has not cited any evidence or portion of the transcript that supports her contention that the Board deliberated in private, contrary to requirements of the Sunshine Law. The only record indication of any possibility of private deliberation by a Board member is the chairman's statement, made at the end of the evidentiary hearing, that he felt some private deliberation of the case may be necessary. However, pursuant to an *off-the-record* discussion with *counsel for both parties*, the chairman announced that "the School Board members will not deliberate until we, myself, and Mr. Kundin, render an opinion as to the propriety of that [the board's private discussion of the case] under the Sunshine Law." The transcript contains no other references to any private deliberations by Board members.

C.

[2] We conclude there is merit, however, to Forehand's contention that the *1190 Board's attorney acted improperly by participating in the dual role of prosecutor and legal advisor to the Board at the evidentiary hearing. This point was adequately preserved by Forehand's counsel through appropriate objections made throughout the proceedings, without any definitive ruling thereon by the Board or its chairman.

It is well settled in this state that traditional notions of justice and fair play require an administrative board conducting disciplinary proceedings to designate one person to act as its legal advisor and a different person to fulfill the role of prosecutor. *Edgar v. School Board of Calhoun County*, 549 So.2d 726 (Fla. 1st DCA 1989); *McIntyre v. Tucker*, 490 So.2d 1012 (Fla. 1st DCA 1986); *Ford v. Bay County School Board*, 246 So.2d 119 (Fla. 1st DCA 1970). In *McIntyre v. Tucker*, 490 So.2d 1012, a case involving facts quite similar to the case before us, we held that a teacher was denied a fair hearing before the school board when the same attorney served in both capacities at the evidentiary hearing and during the board's deliberations. In so holding, we noted the conflicting duties imposed on one carrying out both functions, stating that "[i]n practice, impartiality and zealous representation are inherently incompatible in the same person at the same time." 490 So.2d at 1013-14.

In this case, it is undisputed that the Board's attorney performed the dual functions of prosecutor and advisor to the Board despite repeated objections by Forehand's attorney from the beginning to the end of the proceedings. The Board neither overruled nor sustained these objections; the chairman merely stated at one point that the respondent's objection was "noted." The Board's attorney questioned witnesses called on behalf of the Board and introduced exhibits in the record on behalf of the Board, clearly acting as a prosecuting attorney. Yet at other times during the hearing, the Board chairman asked for and received legal advice from this attorney on procedural matters that arose during the hearing, such as how objections should be handled. At the end of the hearing, the chairman, in order to determine whether the Board's deliberations should be held in private or in public, asked this attorney to "get us what [information] you can as to what we can and can't do," and the attorney responded, "I sure will." During the Board's deliberations on the superintendent's recommendations, the same attorney, in response to an inquiry from a board member, advised the members on the proper procedure for voting.

[3] The Board attempts to defend its attorney's participation in the hearing with the argument that he really did not advise the Board on any substantive matters that would be prejudicial to Forehand, and that the superintendent rather than the attorney conducted cross-examination of Forehand, thereby insuring the fairness of the proceeding. This argument suggests that the attorney was not acting in a prosecutorial role, notwithstanding his examination of other witnesses. The plain fact is, the Board has never made it clear to us whether the attorney was acting in the role of prosecutor or in the role of advisor. The Board further argues that Forehand has the burden on appeal of demonstrating actual prejudice due to the attorney's participation in the proceeding, citing several federal court of appeal decisions in support of its

argument. However, we reject this argument of the Board, primarily because it does not accord with the law of Florida set forth in the decisions cited above. As we read those decisions, proof that the Board's attorney acted in both capacities during the proceeding is sufficient in itself to demonstrate the requisite prejudice to Ms. Forehand. The extent of participation by the Board's attorney in this case, despite continuing objections by Forehand's counsel, significantly distinguishes this case from the conduct held not to require reversal in *Edgar v. School Board of Calhoun County*, 549 So.2d 726, and *Ford v. Bay County School Board*, 246 So.2d 119. In view of the demonstrated prejudice to appellant's right to a fair hearing, the resulting order ***1191** must be vacated and the cause remanded for a new evidentiary hearing. *McIntyre v. Tucker*, 490 So.2d 1012.

II.

We next address Forehand's argument that the Board's findings of misconduct and gross insubordination are not supported by competent, substantial evidence. The final order concludes that Forehand is guilty of these three charges:

> (1) that Forehand struck a student, and this act "constitutes misconduct so serious as to impair [Forehand's] effectiveness in the school system," contrary to the requirement of rule 6B-4.009(3), Florida Administrative Code;
>
> (2) that Forehand's "instigation of name-calling and the use of the word 'bitch' constitutes misconduct so serious as to impair [Forehand's] effectiveness in the school system. Her use of such language had serious adverse effect on a student. For this reason disciplinary action in some form is appropriate"; and
>
> (3) that Forehand's "continuance of basing academic grading on classroom behavior is a direct violation of direct warnings issued by Principal Kelley. Such conduct constitutes gross insubordination or willful neglect of duties. The conduct was continuing, intentional refusal to obey a direct order, reasonable in nature, given by Principal Jerry Kelley."

The standard of appellate review applicable to this point is set forth in section 120.68(10), Florida Statutes (1989):

> If the agency's action depends on any fact found by the agency in a proceeding meeting the requirements of s. 120.57, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by competent substantial evidence in the record.

Applying this standard, we conclude that the evidence is legally sufficient to support the first charge but legally insufficient to support the other two charges.

A.

[4] The record contains competent, substantial evidence establishing that Forehand struck a student and that this act constitutes serious misconduct that impaired the teacher's effectiveness in the school system. Although the testimony was conflicting, the student testified that Forehand struck him on the right shoulder with a candle and that he reported this incident to his fourth period teacher. The latter teacher reported the matter to the principal, who examined the student and testified that she saw a red mark on the student's shoulder. According to the principal's testimony, other students confirmed this version of the incident when questioned by him. Although Forehand denied striking the student with a candle, saying she only touched him on the shoulder to get his attention, the direct testimony of the student, corroborated by the principal's hearsay testimony, is sufficient evidence to support this charge.

However, as the order must be vacated in its entirety for lack of a fair hearing in accordance with our prior discussion, Forehand's conviction on this charge is remanded for reconsideration at a new evidentiary hearing.

B.

[5] The record lacks competent, substantial evidence to support the charge related to "name-calling." While hearsay evidence is generally admissible in administrative hearings, hearsay alone does not constitute competent, substantial evidence. Section

120.58(1)(a) provides in pertinent part:

> Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless *1192 it would be admissible over objection in civil actions.

The record evidence of this charge is inadmissible hearsay, uncorroborated by any other admissible evidence. The only evidence consisted of the principal's testimony that some students had told him Forehand had suggested the students call other students certain names, such as "Reecy Greasy," "Albino Gorilla", and "four pawed dog." None of these students testified at the hearing, and Forehand's testimony denied that she had told any student to call other students by those names. Without reaching whether this conduct rises to the level warranting discipline, we conclude that the uncorroborated hearsay testimony of the principal was legally insufficient to support the finding that Forehand had caused students to call other students by blasphemous or insulting names.

[6] The record likewise lacks competent, substantial evidence that Forehand referred to one of her students as a "bitch" and that Forehand had used that word in the classroom in an offensive and profane manner. The only evidence regarding this charge, other than testimony from Forehand herself, was uncorroborated hearsay. Forehand testified that on one occasion, after two students refused to calm down in the class room, she said, "Kids, we are not here to have a Bitch conference, let's get on task." After Forehand made that statement, one of the students exclaimed that Forehand had called her a "bitch" and ran out of the classroom. Forehand's explanation of the context in which she used the word clearly indicates that she did not refer profanely to any student as a bitch. She testified without significant controversion:

> I had two students ... that were trying to rule the classroom. Every day they would come in, they would start fighting with each other in the room. It was a common occurrence, I had to calm down [S.] and calm down [D.] before I could begin teaching. In the afternoon I go home and I watch Oprah Winfrey, she had had a series that month of Bitch conferences, where people had a general gripe session. So every afternoon I would come in and term Bitch conference was used on the T.V., Oprah Winfrey is a social psychologist, she is not just a T.V. personality ... But I did not call the child a Bitch, my children are human beings, and I respect every one of them for being human beings, none of my children are animals in my eyes, nor any other human being. I don't consider any human being an animal-

The word "bitch" has been defined thusly:

> 1. A female dog or other canine animal. 2. *Slang.* A spiteful or lewd woman. 3. *Slang.* A complaint. 4. *Slang.* A difficult or confounding problem. - *intr.v.* bitched, bitching, bitches. *Slang.* 1. To complain; grumble. 2. To botch; bungle. Used with *up.* [Middle English *bicche,* Old English *bicce,* female dog, from Germanic *bekjon-* (unattested).]

The American Heritage Dictionary of the English Language 135 (New College ed. 1979). While "bitch" is a poor choice of words to use in an elementary school classroom, nevertheless it is apparent that Forehand used the word in the sense of holding a "complaint" session, not in a profane sense. As Forehand's use of "bitch" was consistent with an accepted definition in a non-profane sense, this episode does not legally constitute conduct "so serious as to impair the individual's effectiveness in the school system."

C.

[7] Likewise, the record lacks competent, substantial evidence to support the charge of gross insubordination or willful neglect of duties based on Forehand's "continuing, intentional refusal to obey a direct order, reasonable in nature, given by Principal Jerry Kelley." Section 231.36(4)(c), Florida Statutes (1989), gives the School Board authority to suspend a teacher for "gross insubordination" or "willful neglect" of duty. *1193Rule 6B-4.009, Florida Administrative Code, defines "gross insubordination" or "willful neglect of duties" as "a *constant* or *continuing intentional* refusal to obey a direct order, reasonable in nature, and given by and with proper authority" (emphasis added). The word "intent" has been defined as follows:

> The word "intent" is used throughout the Restatement of Torts, 2nd, to denote that the actor *desires to cause consequences* of his act, or that he *believes* that the *consequences are substantially certain to result* from it. Sec. 8A.

Black's Law Dictionary 727 (5th Ed.1979) (emphasis added). An "intentional" act has been defined as one "done *deliberately.*" *American Heritage Dictionary of the English Language* 683 (New College ed. 1979) (emphasis added).

No evidence was presented at the hearing that established that Forehand *constantly, continually* and *intentionally* refused to obey a direct order, reasonable in nature, given by the principal. The principal read into evidence a memorandum he had written to Forehand that stated, among other things:

> "[A]ll grades are to be determined by averaging written assignments, projects, and test grades only. Any variation from this must be approved by me. Student conduct or behavior must not be considered in the tabulation of academic grades. Five, you may report student conduct with an *S* (satisfactory), *N* (needs improving) or *U* (unsatisfactory), personnel file."

Although the principal testified that at a conference with Forehand she "admitted ... that she was still giving 0's and F's in taking off points student [sic] behavior and averaging it in with the grades after I had told her repeatedly, time and time again, personally in conferences and also in writing," not to do so, he could not recall precisely what Forehand said when explaining why she was taking points off for behavior. The principal stated that the only clear evidence of what Forehand had actually done was to be found in her grade book, but he had not brought it to the hearing and consequently it was not introduced in evidence. The principal's testimony regarding the contents of Forehand's grade book was uncorroborated hearsay.

The only other evidence of Forehand's "intent" came from Forehand's essentially uncontroverted testimony. She explained that in grading her students, she did precisely "what I thought [the principal] asked me to do." Forehand stated that earlier in the year, she had been giving 0's and F's to students who were not working in class, but were just talking, writing notes, or doing something other than assigned work. After the principal told her that 0's and F's would have to be based on a product that the student did not produce, she said "okay, I'll just give S's and N's instead of number grades." However, when she placed S's and N's on the report card, the person who entered the grades into the computer told her that everything in the computer would have to be based on number grades; so she "graded just on movement production that they either did or did not-and they still had plenty of 0's and F's, though." Forehand also testified that at her conference with the principal, she told him that she no longer graded the students on behavior but only on product. Thus, there was no competent evidence to corroborate the principal's hearsay testimony concerning the grades that Forehand had recorded in her grade book, leaving this charge unsupported by competent, substantial evidence and legally insufficient to support the Board's conclusion that Forehand was guilty of gross insubordination. *See* § 120.58, Fla.Stat. (1989).

As the evidence is legally insufficient to support a finding of guilt on the last two charges, we vacate those findings and remand with directions to dismiss them. This dismissal brings into question whether the penalty of ten days suspension without pay would be appropriate if, upon a new hearing, the evidence should result in a finding of guilt on the remaining charge.

III.

[8] Forehand's third point contends that the Board's action in authorizing her suspension*1194 for two weeks without pay amounted to the imposition of a fine or penalty that the Board had no authority to impose. She argues that the order exceeds the Board's statutory authority set forth in chapters 230 and 231, Florida Statutes, because no provision of either chapter gives the Board authority to impose a fine as a penalty for misconduct or insubordination.

Section 231.36(4)(c), Florida Statutes (1989), gives school boards the authority to suspend teachers without pay for certain misconduct:

> (c) Any member of the district administrative or supervisory staff and any member of the instructional staff, including any principal, who is under continuing contract may be suspended or dismissed at any time during the school year; however, the charges against him must be based on immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, drunkenness, or conviction of a crime involving moral turpitude.

> *Whenever such charges are made against any such employee of the school board, the school board may suspend such person without pay;* but if such charges are not sustained, he shall be immediately reinstated, and his back salary shall be paid....

(Emphasis added). Contrary to Forehand's contention, the Board's order does not impose a fine for alleged misconduct; the order explicitly determines that "the Superintendent's *recommendation of suspension, without pay, imposed on the Respondent for a period of ten days be sustained and that ten (10) days pay be withheld* along the terms and guidelines set by the Superintendent" (emphasis added). Since Forehand has already served the suspension period (when she was initially suspended by the Superintendent without notice and an opportunity to be heard) and her previously withheld pay has been reinstated, the Board's order upholds the validity of the prior suspension and requires that Forehand's pay now be withheld for the stated time period as authorized by section 231.36(4)(c). We discuss this point only to provide guidance upon remand in the event the Board concludes that Forehand should be disciplined further.

IV.

[9] Finally, Forehand contends that she is entitled to an award of attorney's fees and costs incurred in the entire course of these proceedings pursuant to section 120.57(1)(b)10 based on the Board's conduct of these proceedings, arguing that the following specific conduct amounted to gross abuse of discretion: (1) the use of the same attorney as prosecutor and legal advisor to the Board; (2) finding Forehand guilty of misconduct based solely on uncorroborated hearsay testimony; and (3) imposing the functional equivalent of a monetary fine for her alleged misconduct. We decline to characterize these matters as a gross abuse of discretion. The Board's errors leading to reversal for a rehearing have been more a product of confusion and misunderstanding than evidencing a reckless or wanton disregard of Forehand's legal rights. We hold that none of the specified conduct amounted to a gross abuse of discretion and decline to award attorney's fees and costs pursuant to section 120.57(1)(b)10.

For the foregoing reasons, the appealed order is vacated, and the cause is remanded for a new evidentiary hearing consistent with this opinion.

ORDER VACATED AND REMANDED.

BARFIELD, J., concurs.

WOLF, J., concurs in part and dissents in part with opinion.WOLF, Judge, concurring in part and dissenting in part.

I concur with the majority opinion in all respects but one. I believe that there was competent substantial evidence to support the board's finding that Ms. Forehand continued*1195 "to base academic grading on classroom behavior," and that this "conduct was [a] continuing intentional refusal to obey a direct order, reasonable in nature given by Principal Jerry Kelley."

The board introduced a memorandum from Principal Kelley dated December 15, 1988, which specifically stated, "[S]tudent conduct or behavior must not be considered in the tabulation of academic grades." Principal Kelley testified that in a conference with Ms. Forehand on March 17, 1989, Ms. Forehand "admitted ... that she was still giving zeroes and F's and taking off points [for] student behavior, and averaging it with the grades after I had told her repeatedly, time and time again, personally in conferences and also in writing."

The principal also examined Ms. Forehand's grade book which also indicated that Ms. Forehand was continuing to disobey the principal's orders. The recordings in the grade book, which were made by Ms. Forehand, are not inadmissible hearsay as suggested by the majority, but rather are admissible as admissions of a party.[FN1] The foregoing was competent evidence to support the charges.

> FN1. While a valid objection may have been raised based on best evidence or authentication, no objection, including that of hearsay, was raised at the time this testimony was offered. *See Cohen v. Department of Business Regulation,* 584 So.2d 1083 (Fla. 1st DCA 1991). Further, even if said evidence constituted hearsay, it merely supplements the principal's testimony and is admissible pursuant to § 120.58(1)(a), Fla.Stat.

The majority indicates that because Mr. Kelley could not remember Ms. Forehand's explanation or excuse for her behavior, the board was required to accept

Ms. Forehand's uncorroborated explanation. The finder of fact was free to accept or not to accept this testimony. The court should not substitute its judgment for the agency's judgment. *See* § 120.68(10), Fla.Stat. (1991). Since the agency's finding was supported by competent substantial evidence, it must be upheld. *Pershing Indus., Inc. v. Department of Banking & Finance*, 591 So.2d 991 (Fla. 1st DCA 1991).

Fla.App. 1 Dist.,1992.
Forehand v. School Bd. of Gulf County
600 So.2d 1187, 76 Ed. Law Rep. 261, 17 Fla. L. Weekly D1388

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Supreme Court of Florida.
CHERRY COMMUNICATIONS, INC., Petitioner,
v.
J. Terry DEASON, etc., et al., Respondents.
No. 83274.

Feb. 2, 1995.
Rehearing Denied April 20, 1995.

Switchless reseller of long-distance telephone services petitioned for judicial review of Public Service Commission order revoking reseller's certificate to provide interexchange services in state. The Supreme Court, Anstead, J., held that reseller's state constitutional due process rights were violated when Commission allowed staff attorney who prosecuted case against reseller to serve as posthearing legal advisor to Commission.

Vacated and remanded.

West Headnotes

[1] **Administrative Law and Procedure 15A ⇐108**

15A Administrative Law and Procedure
15AII Administrative Agencies, Officers and Agents
15Ak103 Status and Character
15Ak108 k. Quasi-Judicial. Most Cited Cases

Licenses 238 ⇐38

238 Licenses
238I For Occupations and Privileges
238k38 k. Revocation, Suspension, or Forfeiture. Most Cited Cases
For purposes of Administrative Procedure Act, determination of whether license should be revoked based upon existence of particular facts in dispute entails exercise of quasi-judicial function. West's F.S.A. § 120.50 et seq.

[2] **Attorney and Client 45 ⇐21.5(2)**

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k20 Representing Adverse Interests
45k21.5 Particular Cases and Problems
45k21.5(2) k. Government, Employment by or Representation Of. Most Cited Cases
State constitutional due process rights of switchless reseller of long-distance telephone services were violated when Public Service Commission allowed staff attorney who prosecuted administrative case against reseller to serve as posthearing legal advisor to Commission, in proceeding in which Commission issued order revoking reseller's certificate to provide interexchange services in state after consumers allegedly made complaints. West's F.S.A. Const. Art. 1, § 9.

*803 Robert L. Shevin and Richard B. Simring of Stroock & Stroock & Lavan, Miami, and Michael J. Hayes, Robert W. Cushing and Kenneth M. Sullivan of Gardner, Carton & Douglas, Chicago, IL, for petitioner.
Robert D. Vandiver, Gen. Counsel and Richard C. Bellak, Associate Gen. Counsel, Florida Public Service Com'n, Tallahassee, for respondent.

ANSTEAD, Justice.
We have for review the Public Service Commission's (Commission) order revoking Cherry Communications, Inc.'s (Cherry) Certificate to Provide Interexchange Services in Florida. We have jurisdiction. Art. V, § (3)(b)(2), Fla. Const. We vacate the Commission's order revoking Cherry's license and remand with instructions for a new hearing consistent with this opinion.

Cherry is a switchless re-seller of long-distance telephone services. In 1992 the Commission issued Cherry a Certificate to Provide Interexchange Services in Florida. Subsequently, as a result of a number of alleged consumer complaints, the Commission ordered Cherry to show cause why it should not have its certificate cancelled or pay a substantial fine.

Cherry timely responded to the Commission's order and filed a Petition for Formal Proceeding. A hearing was conducted before the Commission wherein a Commission attorney served as the prosecutor. During the hearing, another attorney served as the Commission's legal advisor. After the hearing, the prosecuting attorney met with the Commission during its deliberations and submitted advisory memoranda, much of which the Commission adopted in a final order revoking Cherry's certificate to operate in Florida.

On appeal, Cherry has submitted three issues: (1) whether the Commission's post-hearing procedure violated Cherry's due process rights; (2) whether the Commission committed reversible error by admitting hearsay evidence; and (3) whether the Commission's order revoking Cherry's license is unsupported by substantial competent evidence.

*804 Initially, we must determine whether the Commission's post-hearing procedure violated Cherry's right to due process of law, because the same staff attorney who prosecuted the case against Cherry also served as the legal advisor to the Commission post-hearing.

[1] Florida's Administrative Procedure Act empowers administrative agencies to prescribe rules and regulations for its administration, as well as to exercise quasi-judicial functions.[FN1] The determination of whether a license should be revoked based upon the existence of particular facts in dispute entails the exercise of a quasi-judicial function. In such proceedings, we have held that the "administrative context does not and need not match the judicial model," but that an " 'impartial decision-maker is a basic constituent of minimum due process.' " *Ridgewood Properties, Inc. v. Department of Community Affairs*, 562 So.2d 322, 323 (Fla.1990) (quoting *Megill v. Board of Regents*, 541 F.2d 1073, 1079 (5th Cir.1976)). *See also Barry v. Barchi*, 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979) (finding an unbiased decisionmaker essential, especially in a license revocation case where a license enables the pursuit of a livelihood).

FN1. Ch. 120, Fla.Stat. (1993).

[2] We have recognized that an agency should have great flexibility in carrying out its diverse functions and in the utilization of staff in a wide range of capacities. *See South Florida Natural Gas v. Florida Pub. Serv. Comm'n*, 534 So.2d 695 (Fla.1988).[FN2] The question we now face is whether the same individual who prosecutes a case on behalf of the agency may also serve to advise the agency in its deliberations as an impartial adjudicator. Florida courts and the Florida Attorney General have cautioned against such practice for a long time. *See*Op.Att'y Gen.Fla. 72-64 (1972).[FN3] In *Ford v. Bay County School Board*, 246 So.2d 119, 121-122 (Fla. 1st DCA 1970), the court considered a similar issue and stated:

FN2. This case involved the Commission's exercise of its rate-setting authority rather than its quasi-judicial disciplinary authority.

FN3. In opinion 72-64, the Attorney General advised an agency in 1972 that in order to maintain fundamental fairness in administrative adversary hearings, there should be a delegation of duties such that one attorney acts as a prosecutor, while another serves as legal advisor to the board. The opinion states in part:

> In a vacuum and idealistically, the board could be properly and impartially advised by its own attorney while he is actively involved as prosecuting attorney as to motions, presentation of evidence, objections, recommended final rulings and the type of penalty imposed without prejudice to the defendant or without denying him fundamental fairness. However, more often than not, when a hearing has become heated due to the adversary nature of the particular proceeding, the natural tendency of the prosecuting attorney is to advise his board in a manner most advantageous to what he anticipates is its particular desire within the law and morality of the issues presented.

> Thus, it readily appears that the objectivity required by a board sitting as the finder of fact is not practically attained in reference to affording the respondent in such proceeding the full benefits of due process and a fair and impartial hearing. The courts have recognized the inequities in

> the present proceedings, but, without preempting the responsibilities of various agencies, have stated in the *Mack* and *Florida Processing* cases that there is an irregularity in the system of procedures and the procedures should be changed.
>
> The judiciary has left the manner of change open to the legislative and executive branches of government, thus avoiding the assumption of administrative responsibilities residing within the agencies themselves which have the basic authority to employ the necessary personnel to avoid and eliminate the existing inequities of their administrative proceedings.
>
> *Id.* at 116-17.

With respect to the school board attorney acting as prosecutor during the hearing, we recognize and agree with the wording in the opinion of *Metropolitan Dade County v. Florida Processing Company*, 218 So.2d 495, 497 (Fla.App. 3rd, 1969), wherein it was said:

"It is sufficient for us to point out that it would be in closer accord with traditional notions of justice and fair play for a quasi-judicial administrative board to designate one person to act as its legal adviser and a different person to act as its prosecutor."

Nevertheless, an examination of the record shows that while the prosecuting officer was the retained counsel of the school *805 board, *he did not proffer legal advice during the hearing nor was he present at the separate meeting at which the final judgment of the respondent Board was rendered....* Such error as there was in the proceedings was harmless and does not justify quashal of the action here reviewed.

(Emphasis added.)

These holdings simply emphasize the point that in our adversarial system of justice, which places a premium on the fairness of the judicial or quasi-judicial procedure, the decisionmaker must not allow one side in the dispute to have a special advantage in influencing the decision. Obviously, for example, it would be unfair to allow a criminal prosecutor to advise a jury during deliberations.

Initially, we note that the Commission appears to have followed the holdings set out above by having two attorneys at the hearing, one to advise and one to prosecute. However, it appears that the prosecuting attorney, unlike the attorney in *Ford*, played dual roles in these quasi-judicial proceedings. In the role of prosecutor, the attorney cross-examined witnesses, made objections, and argued against Cherry. However, after the hearing, the same attorney assumed the role of advisor to the Commission, which was now supposedly deliberating as an "impartial" adjudicatory body. In this latter capacity, the prosecutor submitted memoranda to the Commission panel, which were not initially provided to Cherry. In the memoranda, the prosecutor commented on the evidence and made recommendations based on his analysis of the record. Significantly, the Commission adopted in substantial form the prosecutor's memoranda in its final order.

While the Commission initially acted wisely in separating the functions of legal prosecutor and legal advisor, we agree with petitioner that the playing field appears to have been tilted when the prosecutor was invited into the deliberations and his advice was acted upon. Because the prosecution was given special access to the deliberations, this adjudicatory process "can hardly be characterized as an unbiased, critical review." *Ridgewood Properties, Inc. v. Department of Community Affairs*, 562 So.2d 322, 323 (Fla.1990). Accordingly, we hold Cherry's rights were violated under the due process clause of our state constitution when the Commission invited the prosecutor to participate in its deliberations. *See* Art. I, § 9, Fla. Const.

Accordingly, we vacate the orders under review and remand for a new hearing consistent with this opinion.[FN4]

> FN4. Because of our resolution of this issue, we decline to address the remaining issues.

It is so ordered.

GRIMES, C.J., and OVERTON, SHAW, KOGAN, HARDING and WELLS, JJ., concur.

Fla.,1995.
Cherry Communications, Inc. v. Deason
652 So.2d 803, 20 Fla. L. Weekly S50

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CDistrict Court of Appeal of Florida,
Fifth District.
CITRUS COUNTY, Florida, Petitioner,
v.
FLORIDA ROCK INDUSTRIES, INC., Respondent.
No. 98-2218.

Feb. 12, 1999.

Landowner sought certiorari review of order of county department of developmental services granting in part and denying in part landowner's vested land rights application. The Circuit Court, Citrus County, John W. Springstead, J., directed that vested rights application be granted in full. County filed petition for certiorari review. The District Court of Appeal, W. Sharp, J., held that: (1) department was not required to accept hearing officer's recommendation; (2) equitable estoppel was not an issue in administrative proceeding; and (3) evidence did not support finding that landowner's due process rights were violated.

Petition granted.

West Headnotes

[1] Zoning and Planning 468.1
414k468.1 Most Cited Cases
Under county land development code, upon reconsideration of decision denying vested land rights application, county department of developmental services could re-evaluate testimony or evidence following referral from hearing officer.

[2] Zoning and Planning 468.1
414k468.1 Most Cited Cases
County department of developmental services did not take unreasonable position by interpreting county land development code to mean that hearing officer's recommendations to department on reconsideration of denial of vested land rights application were primarily advisory and not binding.

[3] Zoning and Planning 610
414k610 Most Cited Cases

[3] Zoning and Planning 708
414k708 Most Cited Cases
In reviewing denial of vested land rights application by county department of developmental services, circuit court was to review record before department to see if its findings were based on competent, substantial evidence, or if department's interpretations of code were reasonable and not arbitrary.

[4] Zoning and Planning 377
414k377 Most Cited Cases
Equitable estoppel was not a viable issue on judicial review of administrative proceeding that resulted in decision of county department of developmental services to deny vested land rights application.

[5] Administrative Law and Procedure 669.1
15Ak669.1 Most Cited Cases
Appellate court cannot consider issues not presented or addressed by the lower tribunal and not presented as issues for review.

[6] Zoning and Planning 645
414k645 Most Cited Cases
Evidence did not support finding that landowner's due process rights were violated, with respect to landowner's vested land rights application, when county attorney allegedly provided legal advice to county department of developmental services during initial phase of dispute, litigated for county before hearing officer, and advised department on reconsideration; record did not show which attorney played what role and when. U.S.C.A. Const.Amend. 14.

*383 Thomas G. Pelham and Douglas W. Ackerman of Apgar & Pelham, Tallahassee, and Richard Wesch, Assistant County Attorney, Lecanto, for Petitioner.

Clark A. Stillwell of Brannen, Stillwell & Perrin, P.A., Inverness, for Respondent.

*384 W. SHARP, J.

Citrus County seeks certiorari review of an order of the circuit court in a zoning case. The circuit court granted certiorari review of the Citrus County Department of Development Services' order which

granted in part and denied in part Florida Rock Industries, Inc.'s vested rights application under the Citrus County Land Development Code. The circuit court quashed the order rendered by the Department, and directed that on remand the vested rights application be granted in full. We have jurisdiction, [FN1] and because we find the circuit court failed to apply the correct law in this case, we grant the writ and quash the circuit court's order.

FN1. Fla.R.App.P. 9.030(b)(2)(B).

The defects in the circuit court's decision under review are basically three-fold: 1) it imposed on the Department a duty to accept a hearing officer's opinion in an administrative review process provided for by the Code, which duty or obligation is not supported by the Code or by the interpretation of the Department; 2) it buttressed its opinion with fact findings consistent with the common law of equitable estoppel, which was not a viable issue in these proceedings; and 3) it erroneously determined Florida Rock had been deprived of procedural due process because the county attorney acted in the dual role of prosecutor and advisor to the Department.

The facts in this case are complex, but a brief summary is necessary to explain this decision. Florida Rock owns and operates a rock processing plant in Brooksville, in Hernando County. Florida Rock has used the plant since 1955 to serve its mining operations in both Hernando and Citrus Counties. In Citrus County, Florida Rock has mining leases on four sites; Montague, Landrum, Storey and Rose Hill. The fee is owned by the successor of General Portland, Inc., who in 1978, obtained a ruling affirmed by this court, [FN2] that it was entitled to have the County issue it a permit for mining those four sites, upon due application and payment of fees. However, no one applied for mining permits, although Florida Rock has been engaged in mining operations on at least the Montague and Landrum sites, since 1981.

FN2. *Citrus County v. General Portland*, 380 So.2d 603 (Fla. 5th DCA 1980).

Apparently because Florida Rock anticipated Citrus County might change the zoning on the mining sites to make mining operations difficult or impossible, it applied for a determination of vested rights pursuant to section 3160 of the Land Development Code. That section allows an applicant to preserve development rights, provided it can establish various conditions. Section 3160B. requires that the applicant establish that its development expectations were reasonable and final when they were formulated; that the development is investment backed to a substantial degree; and that failure to allow the development will deprive the applicant of a reasonable return on its investment, exclusive of various specified costs and expenses. Section 3160C. presumes development rights are vested if they were previously granted by prior development orders.

Pursuant to Code, an application for vested rights is filed with the County--specifically, the Department of Development Services. [FN3] It must review the application to see whether criteria for vested rights is met. As part of the procedure, it consults with the county attorney, who is required to sign off on the decision rendered. [FN4] The Department makes a written determination, which is furnished to the applicant.

FN3. § 3161.

FN4. § 3161.

If the applicant is dissatisfied with the decision of the Department, it may appeal to a hearing officer. [FN5] The hearing officer is limited to a review of the record and the applicable law. The Code specifically provides that the hearing officer may treat as a question of law, whether the decision of the Department is supported by competent, substantial evidence in the record as a whole. [FN6] If the hearing officer finds the Department erred in its decision, the officer refers the matter back to the Department for reconsideration. *385 However, if the Department reaffirms its original decision, that decision becomes final, and the administrative process concludes. [FN7]

FN5. § 2500B.

FN6. § 2500G.2.

FN7. § 2500H.3.

In this case, the Department granted Florida Rock's

vested rights application only for the Montague and Landrum tracts, and denied it for the Storey and Rose Hill sites. The Department made numerous findings of fact in denying vested rights for Storey and Rose Hill. In summary, the Department found that all four sites are separate properties, treated as such by Florida Rock's lease with General Portland and others (DEP permits, etc.), and that they are not contiguous but are separated by roads. [FN8] It found that neither Florida Rock nor General Portland had ever obtained a special exception to mine the sites or other permit from the County. Thus it concluded, there was no development order issued by the County for these sites. It also found that Florida Rock had never mined the Storey or Rose Hill sites. Mining had been undertaken by another corporation on the Storey site, but mining had ceased there and there was no linkage between Florida Rock and that other mining company. There was an easement granted to Florida Rock for haul trucks to cross a county road on the Landrum and Montague tracts. This was part of the basis for granting Florida Rock vested rights for those tracts.

FN8. Maps in the record disclose Rose Hill lies three miles from Storey and is separated by two county roads and residential areas; Storey is separated from Montague by one mile and residential areas.

This decision was appealed to a hearing officer under the Code. [FN9] The hearing officer recommended that vested rights be granted to Florida Rock on all of the sites "as a matter of law." The hearing officer concluded that there were two prior development "orders" in the record for mining all four sites: the 1978 judgment affirmed by the Fifth District Court of Appeal; and the haul road easement issued by the County. He also concluded that all four sites should be treated as one property for purposes of vested rights, and that the sites were contiguous. In addition, he found that there was no period of time over 180 days during which the property had not been continuously mined since 1981, and he found that the investments made by Florida Rock in its Brooksville plant and in the mining operations in Citrus County were sufficient expenditures to establish the Code's requirement for vested rights. [FN10]

FN9. § 2500.

FN10. § 3160B.2.

The Department reconsidered the matter as required by the Code. Florida Rock sought to have the county attorney and any staff or assistant counsel removed from the function of advising the Department because the county attorney had signed off on the original decision of the Department and because a county attorney had defended the Department's decision before the hearing officer. The record, however, is not clear as to whether the same attorney acted in all of these capacities.

The Department affirmed its original decision in all regards. It rejected the hearing officer's recommendation because it said the hearing officer had reweighed the evidence presented and substituted his judgment for that of the Department. It disagreed that Florida Rock had ever obtained development orders as required by the Code. The special permit that was in the record pertained only to the original special exception application, which was denied and had resulted in the litigation culminating in the Fifth District Court of Appeal's decision. It rejected the hearing officer's conclusion that the haul easement was a "development order" under the Code. At best, the Department concluded, the easement related only to the Landrum and Montague tracts.

The Department also reaffirmed its original conclusion, based on its fact findings, that the four sites are separate and should be considered individually. It maintained the view that the substantial investment expenses put forth by Florida Rock on its mining operations in Citrus County pertained primarily to the Landrum and Montague sites. Buttressing that finding, it pointed out *386 that Florida Rock had filed a separate application to mine Storey in 1992, which was not granted nor pursued, and that mining operations there had stopped from 1987 to 1991.

At this point, the administrative process was complete and final under the Code. [FN11] Florida Rock filed a petition for writ of certiorari in the circuit court to review the decision of the Department, and a complaint for declaratory relief under the common law doctrine of equitable estoppel. Florida Rock maintained throughout these proceedings that it had a dual remedy and that in the certiorari proceeding it was only seeking review of the administrative decision. It intended to preserve and later pursue other

potential rights to establish common law estoppel or other grounds to force the County to permit it to mine all four sites. Only the certiorari case went forward and is the subject of our review.

FN11. § 2500H.3.

[1] The circuit court quashed the Department's decision, in part, and directed that on remand it must grant Florida Rock's vested rights application for all four sites. The major source of the difficulty in unraveling the various levels of standards of review in this case is the Code's "appeal" process to a hearing officer. The circuit court interpreted the Code to require the Department, on reconsideration, to apply an appellate standard of review to the hearing officer's decision. In other words, the court concluded that the Department could not reject the hearing officer's findings and conclusions, if reasonable people could have reached the same conclusion and if the findings were supported by substantial, competent evidence. The circuit court judge said the Department could not re-evaluate testimony or evidence on reconsideration. However, as the County points out, there is no support for this interpretation of the Code. The Code limits the hearing officer to a review of the record submitted to the Department, not a new evidentiary hearing. And the hearing officer is only supposed to rule on questions of law. [FN12]

FN12. § 2500G.2.

[2] Most importantly, the Code does not say or infer that on reconsideration the Department is bound in any way by the hearing officer's recommendations. [FN13] It does not require the Department to act as an appellate body, reviewing the hearing officer's conclusions and findings. It simply requires the Department to reconsider the matter in light of the recommendations. If rejected, the Department's decision becomes final. [FN14] The Department has taken the position in interpreting the Code that the hearing officer's recommendations to the Department on reconsideration of its decision are primarily advisory and not binding. We do not find that interpretation unreasonable or arbitrary. [FN15]

FN13. *See, e.g., Rinker Materials Corp. v. City of North Miami*, 286 So.2d 552, 553-554 (Fla. 1973) (court must give plain, ordinary meaning to words of an ordinance and may not insert words or phrases to express intentions which do not appear in ordinance). *See also Mandelstam v. City Commission of S. Miami*, 539 So.2d 1139 (Fla. 3d DCA 1988) (court departed from essential requirements of law when it inserted additional terms into a zoning ordinance to express intentions that do not appear and defined words in derogation of their ordinary meaning); *Rose v. Town of Hillsboro Beach*, 216 So.2d 258 (Fla. 4th DCA 1968) (courts may not insert words or phrases into ordinance to express speculative intention unless it clearly appears the omission was inadvertent).

FN14. § 2500H.3.

FN15. *Campus Crusade for Christ v. Unemployment Appeals Comm'n*, 702 So.2d 572, 575 (Fla. 5th DCA 1997) (conclusions of law of agency that construes a statute which it is charged to enforce, while not immune from judicial review, are entitled to great deference); *D.A.B. Constructors, Inc. v. State, Dept. of Transportation*, 656 So.2d 940, 944 (Fla. 1st DCA 1995) (agency's construction of statute it administers is entitled to great weight and will not be overturned unless clearly erroneous); *Erfinan v. Dept. of Professional Regulation*, 577 So.2d 710, 711 (Fla. 5th DCA 1991) (interpretation of relevant statutes by governing agency acting by legislative mandate is given deference by courts).

[3] Having made that erroneous decision, the circuit court made new findings of fact, based largely on the findings of the hearing officer, plus other new ones, the source of *387 which is not clear. It found that there were two development orders in the record which established Florida Rock's vested rights to all four sites--the easement and the 1978 judgment. It found that all sites should be treated as one property and one mining project. And, it found that Florida Rock's mining expenditures and expectations were reasonable and final. Clearly, the circuit court did not give the Department's decision the appropriate appellate review as required by *City of Deerfield Beach v. Vaillant*, 419 So.2d 624 (Fla. 1982). It did not review the record before the Department to see if

its findings were based on competent, substantial evidence, or if its interpretations of the Code were reasonable and not arbitrary. [FN16]

FN16. *Education Development Center, Inc. v. City of West Palm Beach Zoning Board of Appeals*, 541 So.2d 106, 108 (Fla. 1989). *See also Department of Highway Safety and Motor Vehicles v. Smith*, 687 So.2d 30 (Fla. 1st DCA 1997) (circuit court is prohibited from reweighing evidence and is not empowered to conduct independent fact finding mission when reviewing administrative decision); *Maurer v. State*, 668 So.2d 1077, 1079 (Fla. 5th DCA 1996) (circuit court departed from essential requirements of law when it reweighed evidence and substituted its judgment for county court's); *City of Deland v. Benline Process Color Co., Inc.*, 493 So.2d 26, 28 (Fla. 5th DCA 1986) (circuit court acting in appellate capacity departed from the essential requirements of law when it re-evaluated credibility of evidence or reweighed conflicting evidence).

[4][5] The circuit court also buttressed its decision with findings that might be appropriate in the declaratory action, which has yet to be heard, but which clearly have nothing to do with the administrative proceeding and its review. [FN17] For example, it found: 1) that the County had acquiesced in Florida Rock's mining activities over many years without demanding permits and encouraged same by granting the haul easement; 2) that Florida Rock acted in good faith reliance on these acts and omissions of the County; and 3) that Florida Rock had incurred substantial obligations and expenses in its mining operations in Citrus County. The court reasoned that to deny Florida Rock the right to mine all four sites would be highly inequitable and unjust. These common law issues [FN18] may or may not be tried in another law suit, but since they had no place in the administrative proceeding under review, they cannot provide support for the trial court's decision in this case. [FN19]

FN17. *See, e.g., Haines City Community Development v. Heggs*, 658 So.2d 523, 530 (Fla. 1995) (circuit court functions as an appellate court when reviewing local administrative action); *City of Kissimmee v. Grice*, 669 So.2d 307, 308 (Fla. 5th DCA 1996), *quoting DeGroot v. Sheffield*, 95 So.2d 912, 915 (Fla. 1957) (certiorari is in the nature of an appellate process, as it is a method to obtain review rather than a collateral assault). An appellate court cannot consider issues not presented or addressed by the lower tribunal and not presented as issues for review. *See Sirod, Inc. v. Lycouris*, 667 So.2d 903 (Fla. 4th DCA 1996); *Sparta State Bank v. Pape*, 477 So.2d 3 (Fla. 5th DCA 1985).

FN18. *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So.2d 10 (Fla. 1976) (equitable estoppel precludes city from exercising zoning power where property owner (1) in good faith (2) upon some act or omission of the government (3) has made some substantial change in position or incurred extensive obligations and expenses so that it would be highly inequitable and unjust to destroy the right acquired).

FN19. *See, e.g., Sparta State Bank v. Pape*, 477 So.2d 3 (Fla. 5th DCA 1985) (appellate court cannot consider issues not presented below).

[6] The circuit court also determined that Florida Rock had not been accorded procedural due process before the Department because the county attorney provided legal advice to the Department during the initial phase of the dispute and then litigated for the county before the hearing officer, and finally advised the Department on reconsideration. It concluded one attorney could not serve both as advisor to an administrative body and an advocate. However, beyond these general statements, the circuit court did not discuss the facts concerning the role played by the county attorney at the various stages of the case, nor does this record show which attorney played what role and when.

In *Cherry Communications, Inc. v. Deason*, 652 So.2d 803 (Fla. 1995), the Florida Supreme Court held that a license holder's due process rights were violated when the Public Service Commission allowed its staff attorney, who had prosecuted the license revocation action, to also serve as a legal advisor to the Commission during its post-hearing *388

deliberation. The court in ***Cherry*** pointed out that the decision to revoke a license entails the exercise of a quasi-judicial function, and in such an administrative context an impartial decision maker is a basic constituent of minimum due process. In ***Cherry***, the attorney who prosecuted the case and cross-examined witnesses subsequently assumed the role of the advisor to the Commission in its supposedly impartial deliberations. The court concluded that "because the prosecution was given special access to the deliberations, this adjudicatory process 'can hardly be characterized as unbiased, critical review.' "

However, ***Cherry*** is distinguishable from this case. The assistant county attorney, Wesch, signed off on the Department's original decision, as was required by the Code, but it is a far leap to say he "prosecuted" the case before the Department, at that point. Also, there is no evidence in the record that Wesch "prosecuted" the case before the hearing officer. As noted above, we agree with the County that this step in the case was primarily advisory and not binding on the Department. Finally, there is no evidence in the record that Wesch or any other county attorney played any role in the Department's final decision after reconsideration. If the circuit court thought the entire County Attorney's Office was barred from advising the Department on reconsideration, nothing in ***Cherry*** supports such a ruling. ***Cherry*** holds only that a different staff attorney should have performed the different roles.

Agencies do sometimes have dual rules in administrative proceedings. There is no single test to be applied to determine if the requirements of procedural due process have been met. *See* *Hadley v. Department of Administration*, 411 So.2d 184 (Fla. 1982); *Varney v. Florida Real Estate Commission*, 515 So.2d 383 (Fla. 5th DCA 1987). However, in this case, the record does not support the conclusions that the same county attorney both advocated for the Department and advised the Department during its reconsideration. [FN20]

FN20. *See, e.g.*, *City of Dania v. Florida Power & Light*, 718 So.2d 813 (Fla. 4th DCA 1998) (circuit court order quashing city's denial of special exception fails to include specific findings and reasons for conclusions, hampering review).

For the reasons set forth above, we conclude that the circuit court departed from the essential requirements of law in quashing the decision of the Department. *Haines City Community Development v. Heggs*, 658 So.2d 523, 530 (Fla. 1995); *City of Deerfield Beach v. Vaillant*, 419 So.2d 624 (Fla. 1982). Accordingly, we grant the petition and quash the decision under review.

Petition for Writ of Certiorari GRANTED.

DAUKSCH and ANTOON, JJ., concur.

726 So.2d 383, 24 Fla. L. Weekly D430

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