ADDENDUM 4

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LEGAL ADVISORY OPINION NO. 94-3

SUBJECT: RELATIVE RESPONSIBILITIES OF CIVIL SERVICE BOARD AND THE PERSONNEL DIVISION WITH RESPECT TO PROBATIONARY EMPLOYEES, I.E. "NAME CLEARING HEARING"; AND DISCRETIONARY DECISIONS OF THE HEAD OF PERSONNEL

The Office of General Counsel has been requested by C. William Marshall, Chief of Personnel, to render binding opinions regarding the following questions related to Civil Service Board jurisdiction, which will be asked and answered in seriatum:

I.

Does the Civil Service Board have the authority under Charter or the Civil Service and Personnel Rules and Regulations to hold hearings on new hire probationary employees during their probationary period?

The first place to look for the answer to this question is the Charter. Article 17 of the Charter sets forth the regulations on Civil Service. Under s. 17.04(3) "Duties of civil service board," it is provided that "The civil service board shall . . . hear and determine the grievance of any person who may be entitled to be covered by such civil service rules or regulations concerning any action taken in the administration of such rules and regulations which pertains to his employment or employment rights."

Rule 6.03(1)(d) spells out the Board's authority over a probationary employee:

> An employee serving in a class with probationary status may be separated from the class at any time and for any reason which would justify discipline under Rule 9, without the right to appeal to the Civil Service Board and regardless of whether the employee has been evaluated, so long as the reason for separation is documented.

Considering that an employee may be terminated without right of appeal so long as the reason is documented, the question must be answered in the negative, except that the Civil Service Board may confirm that a reason was subject to Rule 9 and was documented.

In the case of Jacksonville Sheriff's Office v. Antonio Richards, Case No. 91-52-AP, Duval County Circuit Court, 1991, Schemer, J., the employee made the following argument:

> Richards contends the action taken before the Civil Service Board was the last step of a grievance procedure authorized by the Addendum to the personnel rules and regulations of the Civil Service Board. He argues that the grievance procedure is available even to a probationary employee to challenge whether the employer met the requirements of Rule 6.03(1)(d) when the employee was terminated.

The Court's response to this argument was, "This interpretation suggests that the language in Rule 6.03(1)(d) which specifically prohibits appeals is but meaningless verbiage without force or effect. This interpretation is rejected."

As a matter of pure application of the Charter and the Rules to a discharge of a probationary employee, therefore, there is no right to an appeal to the Civil Service Board of the justness or correctness of his or her documented dismissal or separation. As a matter of constitutional law, however, a hearing may have to be held for a specific purpose, which has been raised in your second question.

II

> **Should the head of Personnel hold a "name clearing hearing" on probationary or at will employees when separated from the City, assuming the employee believes he or she has been "stigmatized?"**

By the manner in which your question is propounded, it is assumed that you are not asking whether a hearing *need* be held in the case of a probationary employee who asserts that he or she has been "stigmatized" by a dismissal, but whether the hearing may be held *by the head of Personnel* (Director or Chief) rather than the Civil Service Board.

In the case of Jacksonville Sheriff's Office v. Antonio Richards, supra, Judge Schemer opined that when stigmatizing reasons are given as the basis for a dismissal, the probationary employee is entitled to a hearing. In Richards, since sexual harassment charges were made against the probationary employee, he was entitled to a hearing. The case did not revolve around who was required to provide the hearing.

In a case which followed, Sheriff James McMillan v. Lionel Smith, Case No. 93-96-AP, Duval County Circuit Court, 1994, Nachman, J., Judge Nachman quashed an order of the Civil Service Board in a dismissal of a probationary employee who alleged that he had been stigmatized by his dismissal. The judge found that there were no record charges or public

accusations "which accuse him of dishonesty or immorality or affect his good name, reputation, honor, integrity . . ." He was not, therefore, entitled to a hearing. Once again, the issues of who presides at such a hearing was not raised or decided.

When a public employee is dismissed, and the reason for the dismissal *is* a "stigmatizing" reason, i.e., one which affects his good name, reputation, honor, or integrity, courts have found that the constitutional guarantee against having one's liberty deprived through state action comes into play. In the case of Buxton v. City of Plant City, Florida, 871 F. 2d 1037, 1045 (11th Cir. 1989), which involved dismissal of a public employee, the Court explained the nature of the liberty interest at stake:

> The Supreme Court has held liberty, as guaranteed in the due process clause of the fourteenth amendment to mean not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but also the right of the citizen to be free in the enjoyment of all his facilities; to be free to use them in all lawful ways; to live and work where he will; to each his livelihood by any lawful calling; and to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.

In Florida, with personnel files being public records and available should a prospective employer wish to see it, the stigmatizing information may affect the discharged employee's future employment prospects. Under such circumstances, the Court held that "a public employer is required to provide the opportunity for a post-termination name-clearing hearing when stigmatizing information is made part of the public records, or otherwise published. Notice of the right to such a hearing is required." 871 F. 2d at 1046. A recent Florida case which followed the holding in Buxton is Housing Authority v. White, 617 So. 2d 17 (Fla. 2nd DCA, 1993), in which the discharged employee claimed that he had a liberty and property interest in his continued employment. The Court found that he had a protectable liberty interest in not being publicly stigmatized in the course of his discharge, "but that the post termination hearing afforded him gave him the opportunity to clear his name." He was therefore, not deprived of liberty without due process of law. 617 So. 2d at 720.

So, the right to a hearing is not in dispute. The question is, should the head of Personnel be the one to hold the "name clearing" hearing?

Turning to section 17.05 of the Charter, which sets forth the duties of the personnel department, there are six subparagraphs defining such duties. There is nothing in the duties listed which would imply that the head of Personnel is commanded to hold such hearing. On the other hand, there is nothing which would prohibit the head of Personnel from doing so. It is my opinion, therefore, that he may do so; especially since there is nothing in the Charter or civil service rules which authorizes the Civil Service Board to conduct such hearings. As a quasi judicial body, the Civil Service Board operates exclusively within its legislated jurisdiction.

It would not be constitutionally inappropriate for the head of Personnel to hold such a hearing. Constitutionally, all that is required is that the discharged employee be given a "meaningful opportunity for a name clearing hearing." Brewer v. Purvis, 816 F. Supp. 1560 (M.D. Ga., 1993). Such a hearing must be held at a "meaningful" time, which is to say that due process is violated when "a substantial amount of time" has elapsed between the termination and the hearing. Campbell v. Pierce County, 746 F. 2d 1342 (11th Cir. 1984). In the case of a hearing afforded when damage to reputation is at issue, the purpose of the hearing is *not to remedy the denial of the specific benefit*, but to allow the aggrieved party to *clear his name*. Buxton, supra, at 1046. As long as the head of Personnel gives the employee the opportunity to present his reasons as to why the "stigmatizing" information is not correct and the hearing officer is objective, and prepares a written opinion, this would suffice for the name clearing hearing which the constitution requires.

III

Does the "Name Clearing Hearing" for a probationary or at will employee require or allow the option of reinstatement?

No. The name clearing hearing is afforded solely for the purpose of fulfilling the constitutional requirement. Dismissal or separation of a probationary employee is governed by Rule 6.03(1)(2), which was discussed in Section I. The name clearing hearing does not allow for reinstatement. All that is required is a "meaningful opportunity to clear his name." Brewer, supra, at 1578. This affords the employee an opportunity to improve the employee's chances for reemployment elsewhere.

IV

Could the result of a name clearing hearing be used by another forum to reinstate an at will or probationary employee, i.e. Civil Service Board, State Court, EEOC, Federal Court, etc.?

Inasmuch as this question seeks advice on what non-City agencies may do, the General Counsel cannot issue a binding legal opinion with respect to them.

If a record were made of the name clearing hearing, it would be a public document under Florida law, and would be available for whatever purposes the discharged employee chooses to use it, but whether it could be used in another forum would depend upon the rules and powers of the forum in which the case is brought.

V

What jurisdiction does the Civil Service Board have over the results of a name clearing hearing conducted by someone or some body other than the Civil Service Board?

At this point, there is no provision in the Civil Service and Personnel Rules and Regulations for a hearing designated as a name clearing hearing. A name clearing hearing is

required only in the event that a probationary employee is charged with an offense involving immorality or dishonesty. Under such circumstances, a name clearing hearing is a constitutional requirement, for if the stigmatizing reason is documented, the record is available as public document in the State of Florida which may later affect such employee's employment opportunities, which is considered a deprivation of a liberty interest under the United States Constitution. See Buxton v. City of Plant City, Fla., 871 F. 2d 1037 (11th Cir. 1989).

At the present time, if a probationary employee was dismissed because of a stigmatizing reason, and the head of Personnel, for example, was to give the discharged probationary employee a name clearing hearing, the Civil Service Board would have no jurisdiction to take any action in regard to the result of the name clearing hearing. It could only determine whether the reason asserted by the appropriate authority is documented and is one which would justify discipline under Rule 9, as Rule 6.03(1)(d) would prohibit an appeal on the merits to the Civil Service Board.

An amendment to either the Charter of the Civil Service Rules would be required before the Civil Service Board would have jurisdiction to review the results of a name clearing hearing.

VI

What jurisdiction does the Civil Service Board have over the discretionary decisions of the head of Personnel?

The duties of the Civil Service Board are found in s. 17.04 of the Charter. The duties of the Personnel Department are in s. 17.05. There is nothing in either section which grants the Civil Service Board the right to review discretionary decisions of the head of Personnel.

In trying to put this question in some factual context, the question would have to arise when an employee complains to the Civil Service Board that a decision of the head of Personnel has violated a provision of the Civil Service and Personnel Rules and Regulations. In that case, the rule at issue must be examined in order to see just what it is the head of Personnel is alleged to have done which violated a rule. If the employee alleges a violation of a rule which leaves something to the sole discretion of the head of Personnel, then the Civil Service Board does *not* have the authority to substitute its judgment for that of the head of Personnel.

For example, Rule 10.04(1) authorizes the head of Personnel to require submission of any reports he deems necessary. If an employee were to complain to the Civil Service Board that he was required to submit a report which was not necessary, the Civil Service Board would not be in a position to rule that the head of Personnel did not have the right to require such a report.

As another example, Rule 5.03 states that the head of Personnel may remove a person's name from an eligibility list for any one of seven specified reasons. One reason specified is "When two (2) offers of appointment to the class for which an open or promotional list was established have been declined." Suppose two offers have been declined, and the head of Personnel does not remove the person's name from the list, and makes a third offer, which is accepted. The next person on the list complains to the Civil Service Board that the head of

Personnel should have removed the hired person's name. The head of Personnel responds that the person in question was recovering from an illness, and it would be unfair to that person to remove his name. Does the Civil Service Board have the authority to overrule the head of Personnel? The use of the word "may" leaves the decision to the head of Personnel, whereas had the word "shall" been used, the Civil Service Board would have the authority to overrule the head of Personnel. Under the rules of statutory construction, the use of the word "may" indicates that the provision is permissive and is to be used in its ordinary sense, unless such a construction would "manifestly defeat the object of the provision." 73 Am. Jur. 2d "Statutes," §73. See also City of St. Petersburg v. Austin, 355 So. 2d 486 (2nd DCA 1978).

My opinion, therefore, is that if the Rules clearly leave a decision to the discretion of the head of Personnel, the Civil Service Board has no jurisdiction over such decisions. Use of the words "may" or "deems necessary" or other permissive language should guide the Civil Service Board as to when a matter is left to the head of Personnel's discretion. Of course when no jurisdiction lies with the Civil Service Board, a person does have the right to seek judicial relief challenging the administrative decision of the City official.

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Enclosures