

Vacancy, filling vacancy for future resignation

Number: INFORMAL

Date: September 19, 2008

Mr. James T. Humphrey
Counsel to the Lee Memorial Health
System
Fowler, White, Boggs, Banker, P.A.
Post Office Box 1567
Fort Myers, Florida 33902

Dear Mr. Humphrey:

You have asked for this office's opinion on whether an office becomes "vacant" upon the Governor's acceptance of the resignation from a special district board member or upon the resignation date set forth in the resignation letter.

You state that Lee Memorial Health System is a special district, with a board of directors publicly elected for four-year terms and receiving annual compensation.[1] On August 1, 2008, Mr. Jason Yost, a board member, submitted his letter of resignation to the Governor, with a stated effective date of January 1, 2009. A determination of the date a vacancy occurs due to a member's resignation will affect the manner in which the vacancy on the board will be filled.[2]

Section 3, Article X of the Florida Constitution addresses when a vacancy occurs and provides:

"Vacancy in office shall occur upon the creation of an office, upon the death, removal from office, or *resignation of the incumbent* or the incumbent's succession to another office, unexplained absence for sixty consecutive days, or failure to maintain the residence required when elected or appointed, and upon failure of one elected or appointed to office to qualify within thirty days from the commencement of the term." (e.s.)

Section 114.01(1)(d), Florida Statutes, provides, among other enumerated instances, that a vacancy in office shall occur "[u]pon the resignation of the officer and acceptance thereof by the Governor." The Supreme Court of Florida has determined that when a letter of resignation to be effective at a later date is received and accepted by the Governor, a vacancy in that office occurs and actuates the process to fill it.[3]

As previously related to Mr. Yost, in *Advisory Opinion to the Governor Re: Sheriff and Judicial Vacancies Due to Resignation*,[4] the Supreme Court of Florida considered the effect of section 3, Article X, Florida Constitution, on a vacancy created by the resignation of a sheriff that was submitted in May, 2006, but by its terms became effective October, 2006. The Court concluded that the date the resignation is tendered is the date a vacancy occurs for purposes of determining the remainder of the term and the Governor's appointment of a replacement. As the most recent consideration of the issue by the Court, it should be followed in making a determination of when a vacancy occurs for the purpose of starting the process to fill the

vacancy.

Determination of the existence of a vacancy for purposes of initiating the replacement of an officer either by appointment or election, however, would not appear to affect the ability of an officer who has submitted his or her resignation to be effective at a future date to carry out duties or receive compensation while still serving on the board. No constitutional, statutory or case authority has been cited or found suggesting that an officer whose resignation is at a future date has diminished powers and duties during the period he or she continues to serve.

I trust that these informal comments will be of assistance to you in resolving this matter.

Sincerely,

Lagran Saunders
Assistant Attorney General

ALS/tsh

[1] See Ch. 2000-439, Laws of Fla., codifying Chs. 63-1552 and 78-552, Laws of Fla.

[2] Section 114.04, Fla. Stat., states:

"Except as otherwise provided in the State Constitution, the Governor shall fill by appointment any vacancy in a state, district, or county office, other than a member or officer of the Legislature, for the remainder of the term of an appointive officer and for the remainder of the term of an elective office, if there is less than 28 months remaining in the term; otherwise, until the first Tuesday after the first Monday following the next general election. . . ."

[3] *In re Advisory Opinion to the Governor*, 600 So. 2d 460, 462 (Fla. 1992).

[4] 928 So. 2d 1218 (Fla. 2006).