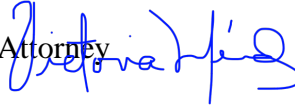


CITY OF MIAMI
OFFICE OF THE CITY ATTORNEY
LEGAL OPINION - #23-001

TO: Honorable Mayor and Members of the
City Commission
FROM: Victoria Méndez, City Attorney 
DATE: September 21, 2023
RE: Filling the Vacancy caused by Suspension of
District 1 Commissioner

You have asked for our research and opinion on the legal requirements for filling the vacancy in the City Commission caused by the suspension of the District 1 Commissioner on September 15, 2023.

Florida law authorizes the suspension, by the Governor, of municipal officials who have been arrested for a felony or misdemeanor. See § 112.51(2), Fla. Stat. (“Whenever any elected or appointed municipal official is arrested for a felony or for a misdemeanor related to the duties of office or is indicted or informed against for the commission of a federal felony or misdemeanor or state felony or misdemeanor, the Governor has the power to suspend such municipal official from office.”).

On September 15, 2023, the Governor signed Executive Order (“EO”) 23-184 which suspended the District 1 Commissioner pursuant to the above authority. The EO stated that the Commissioner was suspended “from the public office, which he now holds[.]” The EO further states that the Commissioner “is prohibited from performing any official act, duty, or function of public office; from receiving any pay or allowance; and from being entitled to any of the emoluments or privileges of public office during the period of this suspension, which period shall be from today until a further Executive Order is issued or as otherwise provided by law.”

The suspension creates a temporary vacancy to be filled by the method provided by the city charter. See § 112.51(3), Fla. Stat. (“The suspension of such official by the Governor creates a temporary vacancy in such office during the suspension. Any temporary vacancy in an office created by suspension of an official under the provisions of this section shall be filled by a temporary appointment to such office for the period of the suspension. Such temporary appointment shall be made in the same manner and by the same authority by which a permanent vacancy in such office is filled as provided by law. If no provision for filling a permanent vacancy in such office is provided by law, the temporary appointment shall be made by the Governor.”); § 166.031(6), Fla. Stat. (“Each municipality shall, by ordinance or charter

provision, provide procedures for filling a vacancy in office caused by death, resignation, or removal from office. Such ordinance or charter provision shall also provide procedures for filling a vacancy in candidacy caused by death, withdrawal, or removal from the ballot of a qualified candidate following the end of the qualifying period which leaves fewer than two candidates for an office.”).

The Miami City Charter provides a method to fill temporary and permanent vacancies in the offices of Commissioners and Mayor. Section 12 of the Charter provides, in its entirety:

Sec. 12. Filling vacancies for mayor and commission.

(a) A vacancy on the city commission or in the office of mayor caused by death, resignation, forfeiture, suspension, removal, or other action or causes shall be filled within ten days after such vacancy occurs by a majority of the remaining city commissioners. The person appointed must meet the qualifications of the office as required in section 4 of this Charter. The term of office of the person so appointed, except in the circumstances detailed in section (c) below, shall be until the successor in office is elected and qualified at whichever of the following occurs first:

(1) the odd-year general municipal election for mayor and city commissioners held pursuant to section 4 of the Charter, or

(2) the even-year State of Florida general election, at which election national, state and county offices are filled,

The candidates for such election shall be qualified as provided in section 4 of this Charter and the qualifying period and requirements for such election shall be as provided in section 7 of this Charter. The person elected as provided in (a)(1) or (a)(2) of this Section shall serve for the remainder of the unexpired term of that office.

(b) If the remaining city commissioners shall fail or refuse to fill such vacancy within ten days after it occurs, as provided herein, the city commission shall call a special election to fill the vacancy to be held at a date not less than thirty-eight or more than forty-five days after the expiration of the ten-day period and the five-day qualifying period. The qualifying period for such special election shall be for the five days not including Saturday, Sunday or legal holidays before the thirty-eighth day before the date of the election and the procedure for the election not otherwise provided for in this section shall be as provided in section 7 of this Charter. Except in the circumstances detailed in section (c), effective November 7, 2017, the person who receives the greatest number of votes for the office in said special election is elected to fill the vacancy for the remainder of the unexpired term of that office.

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- (c) If a vacancy in any elected office is caused by forfeiture, suspension, or removal, the vacancy shall be filled in the same manner as described in sections (a) and (b) above, provided that if the elected official who has so vacated his or her seat is later absolved of the allegations of wrong-doing, that elected official shall be entitled to resume his or her elected position for the remainder of the unexpired term, if any. The term of the individual who assumed the position previously vacated by that elected official shall automatically terminate upon the restoration to office of the original seat-holder.

 - (d) If the city commissioners shall fail to comply with their duties as set forth in this section, then, and in that event, the court is hereby empowered and authorized to enforce compliance with this act or to call an election itself to fill such vacancy or vacancies on the city commission or in the office of mayor.

Pursuant to Section 12 above, a vacancy on the City Commission is filled by two methods: (1) appointment by the remaining members of the City Commission within ten (10) days; or (2) if the remaining Commissioners fail to appoint within the ten-day period, a special election to occur no earlier than thirty-eight days after the ten-day appointment period and the five-day qualifying period. These two options and their availability under these specific circumstances are discussed in turn.

APPOINTMENT BY REMAINING COMMISSIONERS WITHIN TEN (10) DAYS FROM SUSPENSION (NO LATER THAN SEPTEMBER 25, 2023).

Under Section 12(a) above, “A vacancy on the city commission or in the office of mayor caused by death, resignation, forfeiture, suspension, removal, or other action or causes shall be filled within ten days after such vacancy occurs by a majority of the remaining city commissioners.” By its plain terms, Section 12(a) of the Charter requires the remaining City Commissioners to appoint an individual to fill the vacancy within ten (10) days after the vacancy occurs. Since the Governor suspended the Commissioner on September 15, 2023, the remaining Commissioners have until September 25, 2023, to appoint an individual to fill the vacancy, which will encompass between approximately fifty-four and seventy-two days depending on whether there is a runoff.

CONDUCTING A SPECIAL ELECTION WOULD BE FUTILE; THE EARLIEST DATE FOR A SPECIAL ELECTION IS ON NOVEMBER 9, 2023, WHICH IS AFTER THE GENERAL ELECTION AND AT THE EXPIRATION OF THE TERM.

Under Section 12(b) above, “If the remaining city commissioners shall fail or refuse to fill such vacancy within ten days after it occurs, as provided herein, the city commission shall call a special election to fill the vacancy to be held at a date not less than thirty-eight or more

than forty-five days after the expiration of the ten-day period and the five-day qualifying period. The qualifying period for such special election shall be for the five days not including Saturday, Sunday or legal holidays before the thirty-eighth day before the date of the election[.]”

In general, pursuant to Section 12(b), if the remaining Commissioners fail or refuse to fill the vacancy, the Commission is required to call a special election to fill the vacancy. Said special election must occur no earlier than 38 days after the ten-day appointment period and the five-day qualifying period.

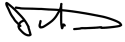
Because of the timing of the vacancy, however, conducting a special election would be an act of futility in the present circumstances. Taking into account the 10-day appointment period, the five-day qualifying period (only on weekdays), and the 38-day minimum period to have a special election, the earliest date of a special election would be on November 9, 2023. This date is two (2) days after the general election on November 7, 2023. The purpose of providing a method to fill a vacancy is to ensure representation for the balance of an unexpired term of office; holding a special election after the general election does not serve this purpose.

An interpretation of the Charter requiring a special election under these circumstances, after the general election, would lead to an absurd result which is disfavored in the law. See State v. Atkinson, 831 So. 2d 172, 174 (Fla. 2002) (“A basic tenet of statutory construction compels a court to interpret a statute so as to avoid a construction that would result in unreasonable, harsh, or absurd consequences.”); City of Boca Raton v. Gidman, 440 So. 2d 1277, 1282 (Fla. 1983) (“The law favors a rational, sensible construction.”); Hardee Cnty. v. FINR II, Inc., 221 So. 3d 1162, 1165 (Fla. 2017) (“Where a statute is open to multiple interpretations, Florida courts endeavor to avoid interpretations which would lead to absurd results.”); Miller v. City of Indian Harbour Beach, 453 So. 2d 107, 112 (Fla. 5th DCA 1984) (courts are to avoid an interpretation of a statute which would produce an unreasonable consequence); Brown v. Nationscredit Fin. Servs. Corp., 32 So. 3d 661, 663 (Fla. 1st DCA 2010) (“However, a literal interpretation of the statutory language need not be given if doing so would lead to an unreasonable or absurd result.”); ABA Interior Inc. v. Owen Group Corp., 338 So. 3d 264, 266 (Fla. 4th DCA 2022) (same). Furthermore, it is likely that conducting two elections under these circumstances would result in voter confusion. Moreover, the general election has already cured the need for a special election.

Therefore, based upon the above reasoning and legal authorities, the conducting of a special election is not available under these facts. The only available method to fill the vacancy in the District 1 Office for the balance of the term would be for the remaining Commissioners to fill the vacancy within ten days by September 25, 2023 by appointment or let the general election

supplant the need for the calling of a special election since having a special election would be an act of futility.

PREPARED BY:



John A. Greco, Chief Deputy City Attorney

cc: Arthur Noriega, City Manager
VM/JAG/kdw