IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NO. 4D12-4421

SHERYL STECKLER, in her Official capacity as Inspector General of Palm Beach County, Florida,

Petitioner,

vs.

TOWN OF GULF STREAM, ET AL.,

Respondents,

INSPECTOR GENERAL'S REPLY TO RESPONSES TO ORDER TO SHOW CAUSE

Petitioner, Sheryl Steckler, in her official capacity as Inspector General of Palm Beach County (the IG), files this reply to the Respondents' responses to this Court's Order to Show Cause, and states:

GENERAL STATEMENT

The IG's petition and the response to the motion to dismiss effectively rebut many of the points advanced by the Respondents. In the interests of brevity, the IG will attempt to refrain from restating in the same detail the identical arguments set forth in those pleadings. The issues of standing and capacity to sue were argued by all Respondents, and will be addressed by the IG later in this brief. Because these issues were at the heart of related case No. 4D12-4325, the IG respectfully

supports the BOCC's request that this Court take judicial notice of its entire file in that case, where the arguments relating to those issues are more detailed.

THE IG FUNDING REQUIREMENTS AND STATUS

The ballot question presented to the voters asked if they wished to mandate:

> "an independent Inspector General funded by the County Commission and all other governmental entities subject to the authority of the Inspector General"

On November 2, 2010, more than 72% of the voters, and a majority in each municipality, voted in favor. This made effective §8.3 of the Charter, which as to IG funding requires:

> The Office of Inspector General shall be funded at minimum in an amount equal to one quarter of one percent of contracts of the County and all other governmental entities subject to the authority of the Inspector General (the "Funding Base") as determined by the Implementing Ordinance.

Details were left to the Implementing Ordinance, which was drafted by a committee comprised of county and municipal appointees and the IG. After months of televised meetings with public participation, the drafting committee unanimously approved a draft Ordinance. The BOCC unanimously adopted the Ordinance without substantive change in May, 2011. It became effective June 1, 2011, and provides:

1. The IG must submit her budget request for the next fiscal year to the BOCC by May 1 of each year, and by April 1 to the League of Cities.

2. As required in the Charter, the minimum annual IG funding is 0.25% of the contracts of each covered governmental entity. To determine this figure, the Clerk must perform a mathematical computation. She must add the numbers in specified categories of the uniform LOGER report which each entity provides to the state annually. The IG's minimum funding is the 0.25% of that total.

3. By the fifth business day of July, the Clerk must also mathematically compute each entity's respective "share" of the IG's requested funding.

4. Because only the IG may reduce the funding to less than the minimum, if the IG's funding request is equal to, or less than, 0.25%, the BOCC must approve the budget request. For FY 2012, the IG's budget request came in at 0.18%.

5. The BOCC must approve a budget for the IG by September 30 of each year. The IG's budget becomes part of the BOCC's official budget for that fiscal year. The IG's expenses are paid by the Clerk from BOCC funds.

6. On the tenth day of October, January, April, and July, the Clerk must bill each entity for its quarterly share. Payment is due within 30 days of the invoice date. Municipal payments are made to the BOCC.

On November 14, 2011, more than 30 days after the date of their first invoice, the Respondent Municipalities filed a declaratory judgment action in circuit court. The Municipalities' complaint never directly challenges the Charter's requirement that the IG's annual funding be no less than:

> "...an amount equal to one quarter of one percent of contracts of the County and all other governmental entities subject to the authority of the Inspector General..."

They only challenge the requirement that they contribute to the IG's funding. In paragraph 2 of the complaint they state: "For the funding mechanism of the Inspector General program to be lawful, the County must fund it in its entirety." (R 31). Concurrent with the filing of the lawsuit, the Municipalities refused to pay any share of IG funding.

Eight days later, the Respondent Clerk filed a motion to intervene, claiming that she required judicial guidance as to her duties under the Ordinance. However, her prayer for relief only requests guidance at the end of the case, if the court finds certain Ordinance provisions to be illegal. The Clerk also advised the County Attorney that effective immediately, unless the BOCC committed to standing behind the entire IG budget, she would no longer bill any municipality for its share of IG funding, even those municipalities not suing, or permit the expenditure of any municipal funds for that purpose. The BOCC refused to provide the requested guarantee. The Clerk then implemented this course of conduct.

Since the filing of the legal challenge, the BOCC has continuously asserted that it is only required to pay "its share" of the IG funding, and its conduct reflects that position. However, the BOCC has not filed any pleading in the case below

specifically seeking to have the Charter's 0.25% minimum funding requirement voided if the municipalities prevail.

The adopted IG budget for FY 2012 included funds from other public entities that had voluntarily contracted with the IG, after a public request from the BOCC that they do so. As is material to this case, the IG's BOCC/municipal budget was for $2.8 million. Of that, the BOCC's "share" was approximately $1.536 million, the municipalities' "share" $1.263 million.

Shortly after the filing of the case below, the IG was advised by BOCC representatives that the IG would not receive the full $2.8 million. The BOCC later agreed to provide, in addition to its "share," $400,000, thereby capping total permissible IG BOCC/municipal expenditures at $1.936 million. These budget limitations enabled the IG to retain only 60% of her official staffing complement.

The BOCC's position benefits both itself and the Municipalities to the detriment of the IG. This is because at the end of each year there is a reconciliation of each entity's obligations, based on the IG's actual expenditures. §2-429(4) For example, if at the beginning of the year the IG's budget was $3 million, with Municipalities having a 40% ($1.2 million) responsibility and the BOCC anticipating a 60% ($1.8 million) responsibility, and if due to BOCC restrictions the IG was only permitted to spend $2 million, the Municipalities will receive a

credit of $400,000 and the BOCC a credit of $600,000. This may explain the Respondents' apparent lack of urgency to resolve the case below.

For FY 2013, the IG's approved budget as relates to the BOCC and municipalities is slightly more than $3 million. The BOCC considers its "share" to be $1.651 million. Without action by this Court, the IG will again be denied the minimum funding required by the Charter and Ordinance. To date, the BOCC has not offered to pay any more than what it considers to be its "share" of the IG's funding for the current FY. Therefore, if this Court does not act, the IG's funding will be substantially less than the amount spent last year, and staff layoffs may even be required.

REQUIREMENTS FOR MANDAMUS

As the Respondents have admitted, the requirements for mandamus are a clear legal right to the performance of a ministerial duty, and no adequate remedy at law. The IG's primary claim is that she has a clear right to receive the minimum funding required by the Charter, as further defined in the Ordinance. This is supported by the case law cited in the petition:

> "A regularly enacted ordinance will be presumed to be valid until the contrary is shown..." *State v. Ehinger*, 46 So. 2d 601 (Fla. 1950); *Seaboard Air Line Railroad Company v. Hawes*, 269 So. 2d 392 (4th DCA 1972).
>
> "State officers and agencies must presume legislation affecting their duties to be valid..." (citations omitted) *Department of Education v. Lewis*, 416 So. 2d 455, at 458 (Fla. 1982).

The mere filing of a lawsuit challenging a law does not "show" that the law is invalid. A judicial determination that the claim is meritorious is required. Therefore, public officials may not cease performing their lawful duties merely because a lawsuit has been filed.

The case below was filed in November, 2011. It could be in the circuit court for another year, and on appeal in this Court after. Further, there is no impediment to any of the 24 municipalities which are not parties to this case thereafter filing another challenge under a new theory, and if the Respondents are permitted to act as here, the IG will be deprived of the minimum required funding for another period of years. This could be repeated for our lifetimes.

For a number of reasons, the IG has no adequate remedy at law. The Charter and Ordinance, by establishing a minimum level of IG funding, are intended to ensure a minimum level of IG staffing and oversight. Additional funding in FY 2015 would not enable the IG to oversee current activities and detect or prevent misconduct detrimental to the public welfare that may currently be occurring.

Additionally, the IG is not entitled to a future damage award. The IG is only entitled to her annual funding under the formula in the Ordinance. While the IG may request more, the primary criteria for considering any such request is proof of

"need." §2-429.1(2) If at a future date the BOCC obtains restitution from the municipalities that will be irrelevant to the then current "needs" of the IG.

THE BOCC

The IG has a clear legal right to require the BOCC to fund the entire approved IG budget, which must be no less than the minimum required in the Charter and Ordinance. There may have been other ways for the BOCC to have implemented the Charter's minimum funding requirement. It chose in its Ordinance to make itself the responsible party. The Ordinance requires the BOCC to approve the IG's full annual budget, which then becomes a component of its own budget. Thereafter, the Clerk pays the IG's expenses with BOCC funds. Under the Ordinance the municipalities do not pay the IG, they pay the BOCC. The BOCC asserts on pages 32-33 of its answer brief in the related case: "The Board of County Commissioners has ultimate responsibility for the OIG's funding." In the context of the instant case, that is absolutely true. §129.06(1), Fla. Stat. establishes the BOCC's responsibility for funding the budgets it has approved. In opining on this law Florida's Attorney General explained:

> "'Upon the final adoption of the budgets as provided in this chapter, the budgets so adopted shall regulate the expenditures of the county and district, and the itemized estimates of expenditures shall have the effect of fixed appropriations and *shall not be amended, altered, or exceeded except as provided in this chapter.*' (e.s.)
>
> Thus, the Legislature has provided the exclusive method for amendment of county budgets in these provisions of Ch. 129, F.S."

AGO 91-56 (emphasis original)

Therefore, the budget adopted by the BOCC for the IG has the effect of a "fixed appropriation," and cannot simply be disavowed by the BOCC.

The statutory procedures for reducing an adopted budget are provided in §129.06(2), F.S., which requires, with limited exception, that amendments be made through either a formal resolution or an ordinance, following a public hearing which has been advertised in advance for at least two days. In the case of the IG, even if the BOCC complies with those requirements it may not reduce the IG budget to less than the minimum required by the Charter and Ordinance.

In addition, rather than presuming the validity of the current Charter and Ordinance provisions, the BOCC's position presumes their invalidity. There has been no "showing" that the requirement for municipalities to contribute to IG funding is illegal. Moreover, there has not even been a pleading asserting that the Charter's minimum funding requirement is illegal, much less a "showing" of that.

THE CLERK

The Clerk has ceased billing the county's 38 municipalities (although only 14 are challenging the Ordinance), and has prohibited the expenditure of any municipal funds received.

The Clerk admits the general rule "that public officials 'have no authority to decline the performance of purely ministerial duties which are imposed on them by

law.'" (Brief p. 10) She claims the benefit of two exemptions from the general rule. The first is the "public funds" exemption. This exemption permits a government official to challenge a law which he or she believes is unconstitutional or illegal, if the law requires the expenditure of public funds. However, this exemption is irrelevant to the Clerk in the instant case, because the Clerk has never challenged the validity of these provisions. She is a self described neutral party. This exemption is also irrelevant because, as explained above, the filing of a challenge to a law does not constitute a "showing" that the law is invalid. As do the other parties, instead of presuming the validity of the laws relating to her duties, the Clerk has presumed the invalidity of those laws.

The Clerk's second claimed exemption is the "personal injury" exemption, addressed in detail and refuted on pages 18-20 of the IG's petition.

It should be noted that the Clerk's original and amended complaints in intervention each seem to show that she requires immediate guidance from the court regarding her duties. (R 63-77; 80-89) But in each, her prayer for relief is confined to a request for guidance only if and when the court ultimately declares the challenged provisions to be unlawful.

THE MUNICIPALITIES

The Municipalities also rely on the "public funds" exception. They do come within its limited scope, as they have actually challenged the law. However, as

with the Clerk, the Municipalities have failed to produce a single case holding that the mere filing of a lawsuit by a public official constitutes a "showing" that the law is invalid, and allows that public official to refuse to comply with the law.

When a public official is in doubt as to whether to comply with his or her lawful duties in a matter involving the public welfare, the official should proceed to court and request a prompt adjudication. In the instant case, the Respondents have exhibited a lack of urgency.

STANDING AND CAPACITY TO SUE

The issues of the IG's capacity to sue and standing to bring this action are addressed more fully in related case No. 4D12-4325. However, the IG will briefly rebut the Respondents' arguments on these points.

The IG, as a natural person with no legal disability, has the capacity to sue. Provisions in the "IG Ordinance" also specifically imply the IG's capacity to sue:

a. "In the case of a refusal to obey a subpoena served to any person, the inspector general may make application to any circuit court of this state..." § 2-423(3),

b. "This article is enforceable by all means provided by law, including seeking injunctive relief in the Fifteenth Judicial Circuit Court in and for Palm Beach County" § 2-431, and

c. "The inspector general may exercise any of the powers contained in this article upon his or her own initiative." § 2-423(7).

The provisions in b. and c. above also provide the IG standing in a case intended to enforce the Ordinance's funding requirements, such as the instant case. The natural law of standing would also provide the IG's standing to advance this

case, even in the absence of specific Ordinance language so providing.

> "Standing is, in the final analysis, that sufficient interest in the outcome of litigation which will warrant the court's entertaining it."

General Development Corp. v. Kirk, 251 So.2d 284, 286 (Fla. 2d DCA 1971).

More than anyone else, the IG has a direct interest in the issues before this Court. The IG has standing to present these issues.

The BOCC's only Ordinance- based capacity and standing argument relies on § 2-429(7), which states:

> "In the event payment is not timely received, the county or any municipality in compliance with this section may pursue any available legal remedy."

The BOCC asserts that this provision excludes all not mentioned, including the IG. However, this language must be read *in pari materia* with §§ 2-423(7) and 2-431. Listing the IG in § 2-429(7) would have been an unnecessary redundancy. Any other construction would produce an absurd result. For example, when all parties fail to pay, under the BOCC's theory no one has standing to enforce the payment requirements because no one is "in compliance with this section."

The BOCC's other arguments on capacity or standing all essentially imply that, for one reason or another, the plain language in these Ordinance and Charter provisions must be illegal. Each such argument will now be addressed.

The first argument is that the Ordinance language conflicts with

§125.01(1)(b), Fla. Stat., which provides the BOCC the power to "prosecute or defend legal causes in behalf of the county or state..." However, a plain reading of this law shows that it does not give the BOCC the *exclusive* authority to prosecute or defend legal causes involving either the county or the state. There is no conflict.

The second argument is that section 4.3 of the county charter, which requires the County Attorney to represent "county commissioners, the county administrator, and all other departments, divisions, regulatory boards and the advisory boards of county government..." deprives the IG capacity to sue or standing, or both. But section 4.3 addresses only legal representation, not capacity or standing, and the IG is not even a covered party, as she is not among the listed entities or persons.

The third argument is that the IG lacks capacity to sue because there is no specific statute authorizing the BOCC to create a completely separate legal entity. This is a "straw man" argument. The IG has never asserted that she is a completely separate entity from the BOCC. Moreover, a completely separate legal entity is not required in order to have capacity to sue. See *Lederer v. Orlando Utilities Commission*, 981 So. 2d 521, 524-525 (Fla. 2d DCA 2008); (The Commission was part of the city for some purposes, but independent for others, and had the capacity to sue.) The argument is also flawed because of the home rule provision in the constitution, and the failure of Respondents to identify any general law which conflicts with these Ordinance provisions.

Additionally, Article I, §1 Fla. Const. states: "All political power is inherent in the people." These principles were affirmed in *Telli v. Broward County*, 94 So. 3d 504 (Fla. 2012) and in *Metro-Dade Fire Rescue Serv. Dist. v. Metro. Dade County,* 616 So. 2d 966 (Fla. 1993), where the court upheld the citizens' vote specifying in the Charter that the Miami Dade BOCC "shall not be the governing body of the Metro-Dade Fire and Rescue Service District." Here, the Palm Beach County public voted to require an "independent inspector general."

Respondents' fourth argument for this Court refusing to give the words in the Charter and Ordinance their plain meaning is that, if every county department had standing and the capacity to sue, havoc would result. This is another "straw man" argument. County department have neither capacity to sue nor standing, and the IG has never asserted to the contrary. County departments are subject to the control of the BOCC, which sets policy for them, speaks for them, has total discretion over their funding, and may abolish them at its pleasure. County departments do not oversee the BOCC. The BOCC oversees them.

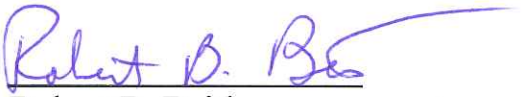
In contrast to county departments, the Charter requires an IG position and OIG which cannot be abolished by the BOCC, are not subject to the BOCC's control, and which must oversee the actions of the BOCC and its departments, employees, and vendors. Further in contrast, the Charter and Ordinance also establish a minimum level of funding for the IG. The Ordinance also specifies the

IG's capacity to sue and standing, which is vital to the Ordinance, Denying the IG the capacity to sue would require a judicial rewriting of the Charter and Ordinance. Moreover, without the capacity to sue, all of the mandatory provisions of the IG Ordinance would become voluntary.

CONCLUSION

The citizens of Palm Beach County voted for an "independent inspector general" and a Charter specifying a minimum level of IG funding and requiring "independent oversight" of their governments. It has now been 27 months since that public vote. The funding requirements have yet to be fully implemented. Further, the Respondents have used the IG's attempt to remedy this in court as an opportunity to challenge the IG's functional independence and her authority to enforce any aspect of the IG Ordinance. The IG requests that this Honorable Court issue an Order in conformity with the requests in the IG's petition, and thereby finally implement the public will which was so clearly expressed.

Respectfully submitted this 8th day of February, 2013.



Robert B. Beitler
P.O. Box 16568
West Palm Beach, FL 33416
Fla. Bar No. 327751
Email: RBeitler@pbcgov.org
Tel: 561-233-2350
Fax: 561-233-2370

Attorney for Appellant
Sheryl Steckler, Inspector General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Inspector General's Reply to Responses to Order to Show Cause has been provided by email this 8th day of February, 2013, to those on the attached service list.

CERTIFICATE OF E-FILING

I HEREBY CERTIFY that a copy of the foregoing Inspector General's Reply to Responses to Order to Show Cause has been e-filed this 8th day of February, 2013, pursuant to the requirements of Administrative Order No. 2011-1.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this Inspector General's Reply to Responses to Order to Show Cause is Times New Roman 14-point font, in compliance with Fla. R. App. P. 9.210(a)(2).

Robert B. Beitler