The Florida Senate

Interim Project Report 2001-023 *October 2000*

Committee on Gubernatorial Appointments and Confirmations Senator William G. "Doc" Myers, Chairman

REWRITE OF CHAPTER 114 AND RELATED PROVISIONS

SUMMARY

The Senate has a constitutional duty to confirm certain appointees to public office. This vital role in Florida government requires the Senate to review qualifications of appointed officials and make a determination as to whether or not the appointee is qualified for the office. Although there are statutory provisions and Senate rules relating to confirmation procedures, several situations have arisen over the years for which there is no statutory or rule guidance. This project identifies issues relating to the confirmation process and makes recommendations for changes to Chapter 114 and Chapter 350 of the Florida Statutes and to the Senate rules.

BACKGROUND

The Governor's authority for making appointments to public office and the Senate's authority to confirm certain appointments are derived from the Constitution and Florida Statutes. Article IV, section 6(a), Florida Constitution, states that when provided by law, confirmation by the Senate will be required for appointment to any designated statutory office. Senate confirmation is a process by which executive appointments to certain offices are subject to review by the Senate. This confirmation process is one of the important constitutional checks and balances between the executive and legislative branches of Florida government.

Section 114.05, F.S., provides the general procedure when a vacancy in office is filled by appointment that requires confirmation by the Senate. Senate Rule 12.7 provides for the referral of appointments to committee, for the committee to make inquiry and investigation and hold hearings, as appropriate, and to make a recommendation to the Senate President. The statutes and rules, however, offer only limited guidance. Over the years, the Senate has been faced with several situations for which there is no specific direction in the statutes or the Senate rules. Thus, many of the procedures used for Senate confirmation evolve through practice.

METHODOLOGY

Staff reviewed committee files relating to confirmations from the 1970's through the current year to identify issues raised during that period. Staff also reviewed statutory provisions, Senate rules, court opinions and Attorney General's opinions.

FINDINGS

Chapter 114

Chapter 114, Florida Statutes, relates to vacancies in office. This chapter provides when a vacancy will occur, how vacancies are filled, and procedures for Senate confirmation of appointments.

Section 114.05, F.S., sets forth procedures for confirmation. When an appointment is made, the Governor is required to transmit a letter of appointment to the Secretary of State. The letter sets forth the legal authority for the appointment, the office, the name and address of the appointee, the term of the office, and the effective date of the appointment. Upon receipt of the letter of appointment, the Secretary of State transmits to the appointee an oath of office, questionnaire for executive appointment, and a bond form, when required. Once the appropriate paperwork is completed by the appointee and returned to the Secretary of State, a certificate is issued by the Secretary of State and sent to the appointee. A copy of the certificate and the completed questionnaire are then sent to the Senate for confirmation consideration. Once received by the Senate, the President lays the appointment before the Senate for confirmation "in accordance with this section and the applicable Senate rules." [s. 114.05(1)(b), F.S.]

The statutes are silent on the procedures from the time the appointment is received by the Senate until following the Senate's action on the appointment. The statutes do provide certain administrative tasks for the Senate and the effect of Senate action.

Section 114.05, F.S., outlines the effect of the following Senate actions:

- confirmation of the appointment.
- refusal to confirm the appointment.
- vote to take no action or failure to consider the appointment.

If the Senate *confirms* the appointment, a certificate of confirmation is issued to the appointee, with a copy to the Secretary of State. The Secretary of State then prepares a commission for the appointee for the unexpired portion of the term. [s. 114.05(1)(c), F.S.]

If the Senate *refuses to confirm* the appointment, the ad interim term of the appointee ends at the "adjournment of the session of the Senate at which the vote on his or her confirmation was taken," unless an earlier date is specified in the motion to refuse to confirm. The appointee whose appointment has been rejected is allowed to hold over until his or her successor is appointed and qualified, but may not hold over for more than 30 days. The appointee is not eligible for reappointment to the same office for one year. [s. 114.05(1)(d), F.S.]

If the Senate votes to *take no action* or if for any reason *fails to consider* an appointment during the regular session immediately following the effective date of the appointment, a vacancy in office exists upon *sine die* of the Legislature. The appointee may hold over until his or her successor is appointed and qualified, but may not hold over for more than 45 days. The appointee *may be* reappointed to the office. [s. 114.05(1)(e), F.S.]

If the Senate votes to take no action or for any reason fails to consider an appointment during the session immediately following the effective date of the appointment and the appointee is reappointed to the same office and the Senate votes to take no action or fails to consider the appointment during the session following the effective date of the reappointment, the appointment is considered rejected and a vacancy exists upon *sine die* of the Legislature. The appointee is *not allowed* to hold over and may not be reappointed to the same office for one year. [s. 114.05(1)(f), F.S.] This section is known colloquially as the "two-time loser" provision.

All appointees are issued a certificate by the Senate notifying them of the action the Senate has taken on their appointment during the session. In addition, the actions are recorded in the Senate Journal.

Senate Rule 12.7

Senate rules provide general procedures for confirmations. Rule 12.7(a) requires the President to refer each appointment to the Committee on Gubernatorial Appointments and Confirmations, other appropriate committee, or to a Special Master. Upon referral, the designated committee or Special Master is required to make inquiry or investigation and hold hearings, as appropriate, and make a recommendation to the President. The report of the committee or Special Master may be privileged and confidential. These provisions are the only guidance provided in rule for Senate confirmations.

Issues

Appointments by officials other than the Governor

Section 114.05, F.S., only addresses appointments made by the Governor. Over the years, the Legislature has provided for the confirmation of appointments made by other officers or bodies. For example, the following appointments are made by officials other than the Governor and confirmed by the Senate:

- Education Standards Commission and Education Practices Commission - State Board of Education
- Enterprise Florida - President of the Senate and Speaker of the House
- The Executive Director of the Fish and Wildlife Conservation Commission - Fish and Wildlife Conservation Commission
- Executive Directors of Water Management Districts - Water Management District Board
- Investment Advisory Council - State Board of Administration
- Parole Commission - Governor and Cabinet
- Director and Chief Judge, Division of Administrative Hearings - Administration Commission

Although the Senate has followed the provisions of Chapter 114 for these appointments, questions have arisen regarding the procedures to be used when an official other than the Governor has made the appointment. For example, Water Management District personnel have inquired as to the procedure for notifying the Senate of the appointment of their executive director. Some districts have sent the paperwork directly to the Senate and others have sent the paperwork to the Secretary of State's office. To avoid confusion, the provisions of s. 114.05, F.S., should be made to apply to all appointments subject to Senate confirmation, thereby providing uniformity to the procedures.

Withdrawal of Appointments by Successor Governor

Neither the statutes nor the Senate rules provide for the withdrawal of an appointment. However, the Justices of the Florida Supreme Court have opined that a Governor may withdraw an appointment made by his or her predecessor, if the Senate has not yet acted on the appointment.

In 1971, Governor Askew requested an Advisory Opinion of the Justices regarding his ability to request the return of gubernatorial appointments made by his predecessor, which appointments had not yet been confirmed by the Senate. *In re Advisory Opinion to the Governor*, 247 So.2d 428 (Fla. 1971). The purpose of being able to recall appointments made by a predecessor Governor was expressed by the Justices:

> The Chief Executive, selected by the people, is charged with the responsibility of completing the program he presented to the electorate while seeking the office. It is important that he be allowed to exercise a freedom of choice in selecting those appointees whom he feels are qualified.

Id. at 433. In the opinion, the Justices outlined two distinct terms for each appointment, the ad interim term and the unexpired term. The ad interim term runs from the date of appointment until the end of the next ensuing session or until the Senate takes formal action on the appointment, whichever occurs first. The unexpired term runs from the end of the next ensuing session or when the Senate takes formal action on the appointment, whichever occurs first, until the end of the term as specified in the letter of appointment. A person appointed for an ad interim term cannot be removed during such term except for good cause. However, the Governor can recall ad interim appointments from the Senate and make his or her own appointments for the unexpired term and send them to the Senate for confirmation. In their opinion, the Justices advised Governor Askew:

> Upon your doing so, the only appointments over which the Senate has jurisdiction are those submitted by you and those made by your predecessor and not recalled by you. Upon your recalling any of the appointments the confirmation jurisdiction of the Senate ceases and that body is under a lawful obligation to return them to you.

Id. An ad interim appointee whose appointment has been recalled continues to serve until the end of the next ensuing session or until the Senate takes formal action on the new appointee, whichever occurs first. Since Governor Askew took office in 1971, each new Governor has recalled appointments made by his predecessor Governor.

The Attorney General subsequently issued an opinion regarding the withdrawal of the name of an appointee whose appointment was required to be approved by another body prior to Senate confirmation. The Attorney General opined that where the Governor's appointment power is conditioned upon the approval of some other body, such as the Cabinet or the State Board of Education, the Governor's power to recall an appointment and initiate a new appointment is contingent upon the concurrence of the other body. [AGO 87-22]

In the context of a new Governor taking office and reviewing appointments made by his or her predecessor, timing is a potential issue. A newly elected Governor takes office in January and the legislative session begins less than two months later. This does not give a new Governor a great deal of time to review appointments made by his or her predecessor. If the appointment is required to be approved by another body, then that other body must not only approve the Governor's request for return, but also must approve the subsequent appointment.

Under these time frames, it is likely that an ad interim appointment will be withdrawn to give the Governor an opportunity to review the application of the appointee and for a subsequent appointment to be made *following* the end of the legislative session. After reviewing the applications, the Governor may decide to reappoint the individual whose ad interim appointment was withdrawn. In such case, does the session in which the Senate had no jurisdiction due to the withdrawal count as one year of "taking no action" for the purposes of s. 114.05?

Since this issue involves the procedures of the Senate following receipt of an appointment, it should be addressed in Senate rules. Senate rules should be amended to provide the procedures to be followed when an appointing official requests the return of his or her predecessor's appointments and to provide the effect of those withdrawals. Staff recommends that in the situation where an appointing official withdraws a predecessor's appointment and subsequently reappoints that same individual, the subsequent reappointment should be treated as if it were the initial appointment and therefore should not be subject to the provisions of s. 114.05(1)(e) or (f), during the period of withdrawal.

Withdrawal of one's own appointment

The 1971 Advisory Opinion of the Justices dealt specifically with the situation of a successor Governor's withdrawal of his predecessor's appointments. However, another withdrawal situation exists. Several times in past years, faced with the potential of having one of his appointees refused to be confirmed by the Senate, a Governor has requested the return of an appointment. Since the statutes are silent on the issue of withdrawals and the Advisory Opinion does not address these types of withdrawals, the issue is whether the Senate is required to return such an appointment, and if it does, the effect of such withdrawal. Of specific concern is whether this type of withdrawal could be used to circumvent the statutory requirement of Senate confirmation. In our view, an appointing official should not be allowed to withdraw an appointment which appears to be in trouble, thereby depriving the Senate of jurisdiction over the appointment, only to reappoint the person following the end of the session and thus avoid the effect of the so called "two-time loser" provision of s. 114.05(1)(f), F.S.

Since there is no statutory provision regarding these types of situations, Senate rules should provide the necessary procedures and effect of such withdrawals. It is recommended that the rules provide that in the event an appointing official withdraws one of his or her *own* appointees, the appointment will be treated as if the Senate failed to take action on the appointment. This approach would assure that the withdrawal process could not be used to circumvent the Senate's constitutionally-based prerogative to confirm certain appointments. In addition, Chapter 114 should be amended to provide that in the event an appointing official withdraws one of his or her own appointments, a vacancy would be created upon the return of the appointment documentation.

Qualifying for office

When an appointment is made, the Governor notifies the Secretary of State of the appointment. The Secretary of State mails the appointee a packet of information to be completed, including the Questionnaire for Senate Confirmation, financial disclosure forms, oath of office, and request for bond, if required. A vacancy in office occurs if the appointee fails to "qualify for office" within 30 days of the beginning of the term. [Art. X, s. 3, Fla. Const.; s. 114.01(1)(h), F.S.] There is no statutory definition of the phrase "qualify for office"; therefore, the Secretary of State issues the certificate whenever the appropriate forms are received. Often the paperwork is not completed by the appointee within the 30-day period.

The statutes should clearly indicate what is necessary for an appointee to qualify for office. This will assure that the Senate will receive the papers for any person who is appointed prior to the beginning of session in time to consider the appointment during the next ensuing session and will also assure that the Senate does not receive papers for confirmation when a vacancy has been created due to that appointee's failure to timely qualify. The Secretary of State should be required to notify the appointing official when a vacancy has occurred due to the failure of the appointee to timely qualify for office.

Provisions in other chapters relating to Senate confirmation of appointments

The provisions of s. 350.031, F.S., provide the procedures for appointment of Public Service Commissioners. The Public Service Commission Nominating Council nominates a list of at least three persons to fill vacancies on the Public Service Commission. This section provides that if the Senate "refuses to confirm, or rejects the Governor's appointment, the council shall initiate, in accordance with this section, the nominating process within 30 days." This is consistent with the provisions of s. 114.05, F.S., which provide for a vacancy to occur upon the Senate's *refusal to confirm* and prohibits the appointee from being reappointed to the office for one year. However, the provisions of subsection (5) of s. 350.031 require the council to "submit recommendations to the Governor....within 60 days after a vacancy occurs for *any reason* other than the expiration of the term." Therefore, it appears that if the Senate fails to consider an appointment to the Public Service Commission during the session immediately following the effective date of the appointment and a vacancy is created pursuant to s. 114.05(1)(c), F.S., the nominating council process must begin again. This approach appears to conflict with other provisions in s. 114.05, F.S., which allow the Governor to reappoint a person upon whose appointment the Senate failed to act.

The issue is whether the Governor should have the authority to reappoint a person to the Public Service Commission, without the PSC Nominating Council having to initiate the process again, if the Senate fails to consider an appointment during the session.

It is recommended that if a vacancy in office occurs due to the failure of the Senate to consider an appointment to the PSC during the session immediately following the

appointment, the Governor be allowed to reappoint the original appointee, so long as the appointee is not a "two-time loser," or the Governor may appoint one of the individuals on the list previously provided to the Governor for that position.

Citizenship

Questions have arisen regarding the general qualification of persons who are not United States citizens being appointed to various boards and commissions requiring Senate confirmation. There is no general constitutional or statutory provision requiring each appointee to be a citizen of the United States. Only a few specific boards and commissions require citizenship and those provisions are listed in the substantive chapters providing qualifications of the members of the specific board.

Duties and responsibilities of members of boards and commissions vary greatly. Some boards are merely advisory and others have significant powers. The policy question is whether appointees should be required to be United States citizens. Should a distinction be made between advisory boards and boards that have the authority to spend tax dollars and set rules and policies of the State?

Proponents of allowing non-citizens to serve argue that those persons who have been involved in community activities and are otherwise qualified have much to offer and should be allowed to be appointed regardless of their citizenship status. Opponents believe that, especially for policy making positions, only those persons who have pledged their allegiance to the United States should be allowed to serve.

It is recommended that the statutes be amended to require any appointed official required to be confirmed by the Senate, except one who is appointed to a body having only advisory powers, to be a citizen of the United States.

RECOMMENDATIONS

Several issues relating to Senate confirmation procedures have arisen in past years that need clarification. Issues relating to procedures of the Senate should be clarified in Senate rules. Other issues should be clarified in statute. Specifically, it is recommended that:

- Section 114.05, F.S., be amended to clarify that the confirmation procedures apply to all appointments subject to Senate confirmation, including those made by officials other than the Governor.

- A definition of the phrase "qualify for office" be included in s. 114.01, F.S., to provide clear guidance regarding when a vacancy occurs.

- Section 350.031, F.S., be amended to change the effect when a vacancy on the Public Service Commission is created by the failure of the Senate to consider an appointment during the session immediately following the effective date of the appointment.

- Chapter 114 be amended to provide that persons who are not United States citizens are permitted to serve only on Senate confirmed boards or commissions that are solely advisory.

- Senate rules be amended to provide the procedures and effect of requests by the appointing official for return of ad interim appointments. This should include procedures relating to withdrawal of a predecessor's appointment and the withdrawal of one's own appointment.

- Chapter 114 be amended to provide that a vacancy will be created upon the return of the documentation of an ad interim appointment made by the official requesting the return.

- Chapter 114 be amended to provide that a vacancy is created when an appointing official recalls the documentation relating to an ad interim appointment made by his or her predecessor. The vacancy would occur at the end of the next ensuing session or when the Senate takes formal action on a successor, whichever occurs first.

COMMITTEE(S) INVOLVED IN REPORT ***(Contact first committee for more information.)***
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MEMBER OVERSIGHT
Senator Jack Latvala