

“A PUBLIC OFFICE IS A PUBLIC TRUST”¹

EXAMINATION OF THE IMPLEMENTATION OF CONSTITUTIONAL AMENDMENTS GOVERNING THE ABUSE OF PUBLIC OFFICE

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I. INTRODUCTION

In the November 2018 general election, Florida voters decided on Amendment 12. This Amendment presented an opportunity for the electorate to expand constitutional ethics provisions applicable to public officers and employees in Florida.² Amendment 12 came before the people of Florida through the Constitutional Revision Commission,³

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2. *Florida Amendment 12, Lobbying Restrictions Amendment (2018)*, BALLOTPEDIA, [https://ballotpedia.org/Florida_Amendment_12_Lobbying_Restrictions_Amendment_\(2018\)](https://ballotpedia.org/Florida_Amendment_12_Lobbying_Restrictions_Amendment_(2018)) (last visited Mar. 12, 2022).

3. Established by the Florida Constitution, the Constitutional Revision Commission is a body tasked with reviewing and proposing changes to the Constitution:

(a) Within thirty days before the convening of the 2017 regular session of the legislature, and each twentieth year thereafter, there shall be established a constitution revision commission composed of the following thirty-seven members:

- (1) the attorney general of the state;
- (2) fifteen members selected by the governor;
- (3) nine members selected by the speaker of the house of representatives and nine members selected by the president of the senate; and
- (4) three members selected by the chief justice of the supreme court of Florida with the advice of the justices.

(b) The governor shall designate one member of the commission as its chair. Vacancies in the membership of the commission shall be filled in the same manner as the original appointments.

(c) Each constitution revision commission shall convene at the call of its chair, adopt its rules of procedure, examine the constitution of the state, hold public hearings, and, not later

which is a method of reviewing the Florida Constitution that is largely unique to Florida.⁴ Under this process, a dedicated Commission is convened every twenty years to hold public hearings and vet proposed amendments to the state constitution.⁵ This Article will focus on the history and impact of Amendment 12 on public officials and employees.

Amendment 12 was one of eight proposals voted on by the people of Florida in the 2018 general election.⁶ The Amendment passed with 78.92% of Florida voters approving of the measure when only 60% is required.⁷ This constitutes over six million Florida voters approving of Amendment 12. The significance of adding these provisions to the state constitution is that they are now part of the government's contract with its citizens, the people to be governed. Such an overwhelming majority vote from Florida citizens demonstrates a clear will of the people regarding the acceptable and expected behavior of their public officials and public employees. The text of the Amendment as presented to the people of Florida appeared as follows:

CONSTITUTIONAL AMENDMENT

ARTICLE II, SECTION 8

ARTICLE V, SECTION 13

ARTICLE XII, NEW SECTION

LOBBYING AND ABUSE OF OFFICE BY PUBLIC OFFICERS. —Expands current restrictions on lobbying for compensation by former public officers; creates restrictions on lobbying for compensation by serving public officers and former justices and judges; provides exceptions; prohibits abuse of a public position by public officers and employees to obtain a personal benefit.⁸

than one hundred eighty days prior to the next general election, file with the custodian of state records its proposal, if any, of a revision of this constitution or any part of it.

FLA. CONST. art. XI, § 2.

4. *Florida Constitutional Revision Commission*, BALLOTPEDIA, https://ballotpedia.org/Florida_Constitution_Revision_Commission (last visited Mar. 12, 2022).

5. FLA. CONST. art. XI, § 2. The current Florida Constitution was adopted in 1968 and provides for the Constitution Revision Commission to be convened every twenty years.

6. CONST. REVISION COMM'N 2017-2018, FINAL REPORT MAY 9, 2018 (2018), <http://library.law.fsu.edu/Digital-Collections/CRC/CRC-2018/PublishedContent/ADMINISTRATIVEPUBLICATIONS/CRCFinalReport.pdf>. [hereinafter FINAL REPORT 2018].

7. *Florida Amendment 12, Lobbying Restrictions Amendment (2018)*, *supra* note 2.

8. FINAL REPORT 2018, *supra* note 6, at 46.

Amendment 12 has a two-fold application to constitutional law governing the conduct of public business: (1) lobbying restrictions, and (2) preventing the abuse of public positions.⁹ Inherent in safeguarding democracy is the development of adequate policies, standards, and procedures that ensure the maintenance of the “Public Trust.”¹⁰ These Constitutional ethics provisions seek to regulate behavior that could damage the “Public Trust” by depleting government resources that were meant to serve the people, but instead were redirected to benefit a private interest.¹¹ In some instances, a violation of Florida’s ethics laws constitutes a crime, such as bribery.¹² Previously, many violations of Florida’s ethics laws incurred criminal penalties. However, in 1974, the Florida legislature recodified the criminal violations and implemented administrative penalties for violations of Chapter 112, Florida Statutes.¹³ Shortly thereafter, the people of Florida approved the Sunshine Amendment, which became law in 1976 and established the Commission on Ethics as the administrative body responsible for regulating Florida’s ethics laws.¹⁴ The penalties prescribed by the Florida Commission on Ethics and the Florida legislature rely more on civil penalties to deter violations of Section 8, Article II.¹⁵

Theoretically, all tangible and intangible public property is held in trust by the government for the use and benefit of its people, and public corruption depletes property and resources meant for the people.¹⁶

9. *Id.* at 40, 46.

10. A purpose outlined by Florida Statute:

It is essential to the proper conduct and operation of government that public officials be independent and impartial and that public office not be used for private gain other than the remuneration provided by law. The public interest, therefore, requires that the law protect against any conflict of interest and establish standards for the conduct of elected officials and government employees in situations where conflicts may exist.

FLA. STAT. § 112.311(1) (2021).

11. Maureen Kenyon, *Vote Yes or No on Amendment 12? Here’s What 6 Florida Newspapers Recommend*, FLA. TODAY (Oct. 29, 2018, 12:03 PM), <https://www.floridatoday.com/story/news/2018/10/29/amendments-florida-ballot-vote/1807326002/>.

12. FLA. STAT. § 838.015 (2021); *see also id.* §§ 838–839.

13. FLA. STAT. § 112.317 (2021).

14. Reuben O’D. Askew, *Tribute: Talbot D’Alemberte*, 16 FLA. ST. U. L. REV. 897, 897 (1989).

15. *See* FLA. STAT. § 112.317; FLA. CONST. art. II, § 8; *see also History*, FLA. COMM’N ON ETHICS, <http://www.ethics.state.fl.us/AboutUs/History.aspx> (last visited Mar. 12, 2022) (describing the implementation of Florida’s ethical standards for public officials in order to protect the public trust against abuses); FLA. COMM’N ON ETHICS, GUIDE TO THE SUNSHINE AMENDMENT AND CODE OF ETHICS FOR PUBLIC OFFICERS AND EMPLOYEES 1 (2022), <http://www.ethics.state.fl.us/Documents/Publications/GuideBookletInternet.pdf> (describing the purpose of the Code of Ethics as “to ensure that public officials conduct themselves independently and impartially, not using their offices for private gain other than compensation provided by law”).

16. The Public Trust Doctrine, codified in Article X, Section 11, applies primarily to the navigable waters and riparian rights of the sovereign. The basis of this doctrine emanates from the

Protecting such public property and resources forms the basis for these laws and actions regulating public officials and employees. The ethical standards enacted ensure that public property is not converted to a private purpose or used to solely benefit a private interest to the detriment of the “Public Trust.”

II. LOBBYING RESTRICTIONS

Effective December 31, 2022, Section 8(f), Article II of the Florida Constitution will read as follows:

(f) (1) For purposes of this subsection, the term “public officer” means a statewide elected officer, a member of the legislature, a county commissioner, a county officer pursuant to Article VIII or county charter, a school board member, a superintendent of schools, an elected municipal officer, an elected special district officer in a special district with ad valorem taxing authority, or a person serving as a secretary, an executive director, or other agency head of a department of the executive branch of state government.

(2) A public officer shall not lobby for compensation on issues of policy, appropriations, or procurement before the federal government, the legislature, any state government body or agency, or any political subdivision of this state, during his or her term of office.

(3) A public officer shall not lobby for compensation on issues of policy, appropriations, or procurement for a period of six years after vacation of public position, as follows:

a. A statewide elected officer or member of the legislature shall not lobby the legislature or any state government body or agency.

b. A person serving as a secretary, an executive director, or other agency head of a department of the executive branch of

common law of England, where the law differentiated between property rights as either (1) *jus privatum*, which could be held by a king’s subject and conferred privileges and benefits that could not be enjoyed by the general public, or (2) *jus publicum*, wherein the king as sovereign holds all “shores and navigable rivers for the common use and benefit of all subjects.” *State v. Black River Phosphate Co.*, 32 Fla. 82, 90 (Fla. 1893). “This royal right, or *jus publicum* is held by the crown in trust for such common use and benefit, and can not be transferred to a subject or alienated, limited or restrained, by mere royal grant, without an act of parliament.” *Id.* (emphasis added). The premise that certain lands and property are for the use and benefit of the public forms the basis of the tax exemptions written into the Florida Constitution, Article VII, Section 3. *See also* Clay Henderson, *The Greening of Florida’s Constitution*, 49 STETSON L. REV. 575, 599 (2020).

state government shall not lobby the legislature, the governor, the executive office of the governor, members of the cabinet, a department that is headed by a member of the cabinet, or his or her former department.

c. A county commissioner, a county officer pursuant to Article VIII or county charter, a school board member, a superintendent of schools, an elected municipal officer, or an elected special district officer in a special district with ad valorem taxing authority shall not lobby his or her former agency or governing body.

(4) This subsection shall not be construed to prohibit a public officer from carrying out the duties of his or her public office.

(5) The legislature may enact legislation to implement this subsection, including, but not limited to, defining terms and providing penalties for violations. Any such law shall not contain provisions on any other subject.¹⁷

The previous, and currently effective, iteration of this provision solely applies to the legislature and statewide elected and appointed officers, with a caveat that encourages the Florida legislature to adopt rules governing officials at other levels of government.¹⁸ The prohibition on lobbying extended for their term of office, and for two years after vacating the office.¹⁹ Similarly, the restrictions enacted by the Florida legislature in Chapter 112, Florida Statutes, for county and municipal officials prohibit them from lobbying before their previous governing body or agency for a period of two years.²⁰ Amendment 12 expands the applicable scope of Section 8, Article II of the Florida Constitution, to include local government officials holding county, municipal, and special district offices, and duly draws members of the judiciary into the fold through Section 13, Article V.²¹ Furthermore, the time limit on representation for compensation expands to six years after vacating the office, three times longer than the two-year prohibition currently contained in the constitution and state statute.²²

17. FLA. CONST. art. II, § 8 (effective Dec. 31, 2022).

18. *Id.*

19. *Id.* § 8(e).

20. FLA. STAT. § 112.313(13)–(14) (2021).

21. FLA. CONST. art. II, § 8 (effective Dec. 31, 2022); *id.* art. V, § 13 (effective Dec. 31, 2022).

22. FLA. CONST. art. V, § 13 (effective Dec. 31, 2022); *id.* art. II, § 8 (effective Dec. 31, 2022); FLA. STAT. § 112.313(13)–(14) (2021).

Another nuance encompassed by this restriction is the scope of lobbying activities enumerated in the revisions. This provision specifically directs attention to lobbying on “issues of policy, appropriations, [and] procurement” during a public official’s term of office.²³ This prohibition establishes a blanket prohibition on all public officers during his or her term of office, regardless of the level of government or type of public position.²⁴ However, this prohibition specifically applies to lobbying for compensation.²⁵ Inherent with certain public positions and offices is advocacy for the constituency that the public official represents; the difference between lobbying for private gain versus lobbying for the will of the people should guide a determination of whether the activity is prohibited, with specific attention to the public official’s duties in office. A public official should not receive any form of private compensation for lobbying on matters of policy, appropriations, or procurement while in office, with the caveat that it is permissible provided such lobbying is incumbent to the office he or she holds and ultimately reflects his or her public service. Paragraph (f)(4) of the Amendment duly reflects this notion, stating: “[t]his subsection shall not be construed to prohibit a public officer from carrying out the duties of his or her public office.”²⁶

The scope of the six-year prohibition following the vacating of the office notably narrows to representation before the public officer’s former agency, governing body, or department, and reflects the goal of prohibiting the ability of a public officer from using his or her former office as a tool to increase compensation or exercise undue influence.²⁷ This seeks to maintain the independence and impartiality of decision makers in public office. The limited scope of the prohibition to a public officer’s former agency further mirrors the state statutory regulation currently in effect.²⁸ By narrowing the applicability of the six-year prohibition, it enables public officers to transition to other levels of government without transgression, with the goal that responsible and ethical public officials will continue to seek office and positions in service to the people of Florida.²⁹

23. *Id.* art. II, § 8 (effective Dec. 31, 2022).

24. *Id.*

25. *Id.*

26. *Id.* § 8(f)(4).

27. *Id.* § 8.

28. FLA. STAT. § 112.313(13)–(14) (2021).

29. It is also essential that government attract those citizens best qualified to serve. Thus, the law against conflict of interest must be designed in a way that does not unreasonably or

In addition to the language cited above, Section 13, Article V was amended to specifically address the conduct of judicial officers in the same manner as other public officers.³⁰ Also effective December 31, 2022, the language added will read as follows:

(a) All justices and judges shall devote full time to their judicial duties. A justice or judge shall not engage in the practice of law or hold office in any political party.

(b) A former justice or former judge shall not lobby for compensation on issues of policy, appropriations, or procurement before the legislative or executive branches of state government for a period of six years after he or she vacates his or her judicial position. The legislature may enact legislation to implement this subsection, including, but not limited to, defining terms and providing penalties for violations. Any such law shall not contain provisions on any other subject.³¹

This Section further implements the six-year prohibition on the judiciary, specifying its applicability solely to the legislative and executive branches of state government.³² Notably, there are no provisions governing lobbying for compensation before local governments, school boards, and federal bodies, which are specifically addressed as to other officials while in office per Section 8, Article II.³³ This would allow former members of the judiciary to represent clients in local government matters without running afoul of the six-year prohibition and further allow for representation of local government clients with the exception of lobbying before the legislature.

The constitutional lobbying prohibitions will supersede the state statutory provisions as a more stringent regulation on lobbying one’s former agency or government body. The implementation of these provisions through the administrative penalties already in place will serve as the sole deterrent for violations of the lobbying restrictions.³⁴

unnecessarily impede the recruitment and retention of the most qualified candidates for government positions. Public officials should not be denied the opportunity, available to all other citizens, to acquire and retain private economic interests except when such economic opportunities unavoidably conflict with their responsibility as a public official. *Id.* § 112.311(2).

30. FLA. CONST. art. V, § 13 (effective Dec. 31, 2022).

31. *Id.*

32. *Id.*

33. *Id.* art. II, § 8 (effective Dec. 31, 2022).

34. See H.B. 7009, 2020 Leg., Reg. Sess. (Fla. 2020), Act of Sept. 18, 2020, ch. 2020-182, 2020 Fla. Laws 1 (2020) (codified at FLA STAT. § 112.317).

III. ABUSE OF POWER

In addition to the lobbying restrictions, Amendment 12 also prohibits public officials and employees from exercising discretionary authority to receive a disproportionate benefit.³⁵ This provision became effective December 31, 2020, and currently reads as follows:

(g) (1) A code of ethics for all state employees and nonjudicial officers prohibiting conflict between public duty and private interests shall be prescribed by law.

(2) A public officer or public employee shall not abuse his or her public position in order to obtain a disproportionate benefit for himself or herself; his or her spouse, children, or employer; or for any business with which he or she contracts; in which he or she is an officer, a partner, a director, or a proprietor; or in which he or she owns an interest. The Florida Commission on Ethics shall, by rule in accordance with statutory procedures governing administrative rulemaking, define the term “disproportionate benefit” and prescribe the requisite intent for finding a violation of this prohibition for purposes of enforcing this paragraph. Appropriate penalties shall be prescribed by law.³⁶

This provision expands certain ethics laws previously stated as the misuse of official position in Chapter 112, Florida Statutes.³⁷ As part of this enactment, the Florida Ethics Commission was specifically tasked with promulgating rules governing what constitutes a “disproportionate benefit” along with the requisite intent for finding a violation.³⁸ To that extent, the Commission developed Rule 34-18.001, Florida Administrative Code, effective September 30, 2019.³⁹

Rule 34-18.001 enumerates six factors for the Commission to consider when examining whether a public official has received a disproportionate benefit in exchange for the exercise or failure to exercise his or her discretionary decision-making authority.⁴⁰ The Commission has defined a disproportionate benefit as a “benefit, privilege, exemption or result arising from an act or omission by a public officer or public employee inconsistent with the proper performance of

35. FLA. CONST. art. II, § 8.

36. *Id.*

37. See FLA. STAT. § 112.313(6) (2021).

38. FLA. CONST. art. II, § 8.

39. FLA. ADMIN. CODE r. 34-18.001.

40. *Id.*

his or her public duties."⁴¹ This definition casts a wide net to catch a variety of tangible and intangible benefits beyond just monetary compensation. However, the six factors enumerated in this rule help to narrow the scope of benefits entangled in this web.

First, the Commission will look at the number of persons and entities connected to the official that will benefit from the action or inaction in the exercise of his or her public duties.⁴² This extends to immediate family as well as businesses connected with the official, regardless of whether a business solely or regularly contracts with the official, or whether he or she owns an interest in a business.⁴³ Second, the nature of the interests involved are examined.⁴⁴ Third, the degree to which the interests will benefit is examined.⁴⁵ Fourth, the analysis turns to similarly situated individuals who have a comparable interest, and whether the public official's benefit is greater, more advantageous, or more detrimental than the benefit received by others.⁴⁶ Fifth, the Commission examines the public official's degree of certainty that the potential abuse would lead to their personal benefit, where presumably, a definite or definitive result will weigh heavier in the examination of this element than merely speculative or inconsequential benefits.⁴⁷ Finally, the Commission will look at whether the benefit extends to similarly situated persons unrelated to public office in determining whether a disproportionate benefit exists.⁴⁸

If after an examination of these factors the Commission determines there is no disproportionate benefit, then there is no abuse of power as no tangible or intangible benefit was received. However, if a disproportionate benefit exists, the Commission will then turn to the requisite intent for determining whether an abuse of public position occurred.⁴⁹ A determination that the public official has violated this provision is triggered if the act or omission resulting in the benefit was "inconsistent with the proper performance of his or her public duties."⁵⁰ The Commission has already had the opportunity to examine circumstances presented in opinion requests and implement these factors and distinctions. For example, the Ethics Commission found that

41. *Id.* at (2)(a).

42. *Id.* at (3)(a).

43. *Id.*

44. *Id.* at (3)(b)–(c).

45. *Id.*

46. *Id.* at (3)(d).

47. *Id.* at (3)(e).

48. *Id.* at (3)(f).

49. *Id.* at (4).

50. *Id.*

no disproportionate benefit existed when a County Commission member voted on a retirement resolution providing lump-sum payouts to all eligible public officers.⁵¹ The Commission reasoned that since the County Commissioner's benefits when voting on the measure were subject to the same factors and standards applicable to other members of the class, there was no benefit that differed in kind or degree.⁵² The resolution at issue applied equally to similarly situated elected officials and county employees; thus, it would not result in a disproportionate benefit when compared to other eligible class members.⁵³

In *CEO 21-1*, the Chief of Police for Holly Hill inquired as to whether an officer violates Florida's ethics laws by accepting a reduction in rent at an apartment complex in exchange for part-time, off-duty work as a courtesy officer for the complex.⁵⁴ While the Commission determined that the officer would be receiving a disproportionate benefit as described in the constitution and under the Florida Administrative Code, this benefit would not be considered inconsistent with the officer's proper performance of his or her public duties.⁵⁵ The Commission stated that the presence of a disproportionate benefit "is not automatically indicative of an abuse or a wrongful intent," and unless there was some other fact demonstrating the recipient's state of mind, no intent could be inferred.⁵⁶

Similarly, in *CEO 19-23*, the Commission found that the Supervisors from a Community Development District Board did not run afoul of the new constitutional provision because their actions were not "inconsistent with the proper performance" of their public duties.⁵⁷ This analysis involved supervisors employed by the developer of a Community Development District where the District continued to contract with the developer for disposal of byproducts from the wastewater system administered by the District; also, some of the supervisors were members of the District, thereby subject to the water

51. Cnty. Comm'n Member Voting on Pub. Officer Ret. Comp., CEO 21-2 (Fla. Comm'n on Ethics Mar. 5th, 2021), <http://www.ethics.state.fl.us/Documents/Opinions/21/CEO%2021-002.htm>.

52. *Id.*

53. *Id.*

54. City Police Officer Receiving Rent Reduction in Exchange for Providing Sec. Servs., CEO 21-1 (Fla. Comm'n on Ethics Feb. 5, 2021), <http://www.ethics.state.fl.us/Documents/Opinions/21/CEO%2021-001.htm>.

55. *Id.*

56. *Id.*

57. Abuse of Pub. Position, CEO 19-23 (Fla. Comm'n on Ethics Oct. 30, 2019) <http://www.ethics.state.fl.us/Documents/Opinions/19/CEO%2019-023.htm> (citing FLA. ADMIN. CODE r. 34-18.001).

and wastewater rates imposed by the Board of Supervisors.⁵⁸ The Commission emphasized that a violation of the constitutional provision is only triggered if public employees and officers act contrary to the performance of their public duties.⁵⁹

The Commission went a step further in these opinions to analyze and compare the new constitutional provision’s application to a misuse of public position violation.⁶⁰ The Florida legislature has long maintained that a public officer may not “corruptly use” his or her official position or property to obtain a “special privilege, benefit, or exemption.”⁶¹ A key difference enumerated by the Commission notes that the statutory provision is much more broad in its application because it is not limited to those benefits received by a “public officer or public employee, his or her spouse, children, or employer, or a business with which he or she has an enumerated affiliation.”⁶² The statutory language specifically states that the public official cannot use their official position to benefit themselves “or others,” which can encompass and surpass the categories of individuals enumerated under the constitutional provision.⁶³

Although the provisions are not identical, the intent requirements under the constitution and state statute are similar. Both require wrongful intent and actions inconsistent with the proper performance of one’s public duties.⁶⁴ The Commission even went on to state that previous interpretations regarding intent under the statutory provision would be equally applicable to evaluating intent under the constitutional provision.⁶⁵ These previous interpretations include an examination and application of the term “corruptly,” defined by the Florida legislature as “done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties.”⁶⁶ These statutory provisions have served the people of Florida for decades, as opinions from courts and the Commission have established a sufficient body of law. To this point, turning to the Commission on Ethics’ opinions and

58. *Id.*

59. *Id.*

60. *Id.*

61. FLA. STAT. § 112.313(6) (2021).

62. *Abuse of Pub. Position*, CEO 19-23 (citing FLA. CONST. art. II, § 8(h)(2)).

63. FLA. STAT. § 112.313(6).

64. *Abuse of Pub. Position*, CEO 19-23.

65. *Id.*

66. FLA. STAT. § 112.312(9).

caselaw interpreting misuse of official position provides insight into how the Commission intends to implement the new constitutional prohibitions on abuse of power.

Looking first at caselaw interpreting intent under Section 112.313(6), Florida Statutes, the seminal and often cited case of *Blackburn* provides insight pertaining to whether a public official acted corruptly.⁶⁷ This case overturned a determination by the Ethics Commission that a County Commissioner committed a violation of the ethics code when she used an article prepared by a county employee to support and tout the effectiveness of a specified legislative action passed during her term of office as part of her reelection campaign.⁶⁸ The court ultimately determined that the Commissioner did not act corruptly because she acted without reasonable notice that her “conduct was inconsistent with the proper performance of her public duties” and would therefore be unlawful.⁶⁹ “Both the hearing officer and the Ethics Commission [noted] that it would have been” proper to obtain and use the referenced article and information absent its use in the Commissioner’s reelection campaign.⁷⁰ Essentially, this led the court to conclude that there was nothing inconsistent with the Commissioner’s duties as a county commissioner in relying on the research article prepared by a county employee, and therefore she did not act inconsistent with the proper performance of her duties as a commissioner.⁷¹

Ethics opinions have continued to cite the *Blackburn* case when interpreting what constitutes a misuse of public position. For instance, *CEO 16-2* used the *Blackburn* opinion to determine that an appointed board member to a County Parks and Recreation Committee would not violate the statute by putting matters regarding a Commercial Recreation Tour Operators program on the agenda, even when the board member ran a company that would be covered by the program.⁷² The Commission reasoned that even though the board member might benefit, there was a public purpose for the action because the board is “specifically tasked to make recommendations concerning issues related

67. *Blackburn v. State*, 589 So. 2d 431, 432 (Fla. 1st Dist. Ct. App. 1991).

68. *Id.*

69. *Id.* at 434.

70. *Id.* at 435.

71. *Id.* at 436.

72. Cnty. Advisory Bd. Member Contracting with and Obtaining Permits from Cnty., CEO 16-2 (Fla. Comm’n on Ethics Mar. 9, 2016) <http://www.ethics.state.fl.us/Documents/Opinions/16/CEO%2016-002.htm>.

to county parks.”⁷³ Therefore, because there was a public purpose and any benefit the board member’s company would receive was merely incidental, there was no misuse of public position.

In a more recent case, the *Robinson* court reached a much different conclusion.⁷⁴ In this case, city attorney Robinson created two new magistrate positions by ordinance for the city, enumerated the qualifications for those positions, and then opined that he was the best candidate to fill those positions.⁷⁵ The court deemed Robinson had used his influence and position as the long-serving city attorney to persuade the city commission to appoint him to those positions, thereby creating a conflict of interest.⁷⁶ This demonstrated that Robinson used his position “to create an unfair advantage for himself and gain a personal benefit.”⁷⁷ Furthermore, the court determined that he acted corruptly because he knew or should have known that encouraging the city commission to act on “a matter benefitting himself personally was inconsistent with his public duties as city attorney.”⁷⁸ In this regard, the court in its appellate capacity upheld the findings of the administrative law judge when it determined that competent substantial evidence supported the finding that Robinson’s actions were “motivated by Robinson’s pecuniary self-interest.”⁷⁹

Part of the enactment of the new constitutional ethics provisions includes prescribing penalties for violations. The Florida legislature enacted Chapter 2020-182, Laws of Florida, which was incorporated into Section 112.317, Florida Statutes. These penalties include discipline in the form of civil fines, restitution, public reprimand and censure, impeachment, removal or suspension, and forfeiture of benefits.⁸⁰ The exactment of the penalties differs based on whether the charged individual is a public officer, public employee, department head, candidate for office, lobbyist, or formerly situated in one of these roles at the time of the offense.⁸¹ Furthermore, the legislature specifically stated that a violation of Section 8, Article II of the Florida Constitution “constitutes malfeasance, misfeasance, or neglect of duty in office”

73. *Id.*

74. *Robinson v. Comm’n on Ethics*, 242 So. 3d 467, 468 (Fla. 1st Dist. Ct. App. 2018).

75. *Id.* at 469.

76. *Id.* at 471.

77. *Id.* at 471–72.

78. *Id.* at 472.

79. *Id.*

80. FLA. STAT. § 112.317 (2021).

81. *Id.*

sufficient to allow the Governor to suspend him or her from office and appoint a suitable replacement.⁸²

IV. EFFECTIVENESS OF DETERRENTS

Over the past two decades, there has been a push to implement stricter monetary penalties and return to the criminal implications for violations of Florida's ethics laws. Back in 2010, then-Governor Charlie Crist petitioned the Florida Supreme Court to convene a grand jury to investigate public corruption throughout the state and make recommendations to address the issue.⁸³ In February 2010, the Florida Supreme Court empaneled a grand jury that released its first interim report and recommendations on December 17, 2010, with a final report in 2011.⁸⁴ Then, when Governor Rick Scott took office on January 4, 2011, he issued Executive Order 11-03 in an attempt to encourage implementation of the recommendations contained in the first interim report.⁸⁵

Some the recommendations included: (1) increasing the civil fine, which still stands at only \$10,000.00, to upwards of \$100,000.00; (2) giving the Commission on Ethics authority to independently investigate ethics violations; and (3) returning to the criminal penalties for violations of Florida's ethics laws.⁸⁶ Despite some legislators' best efforts, such as Senator Mike Fasano's 2011 SB 1484, many of the reforms championed by the 2010 grand jury report never came to fruition.⁸⁷ Unfortunately, a similar grand jury report and recommendation from 1999-2000 under then-Governor Jeb Bush had a similar fate, with slow reforms that failed to address the most crucial recommendations of the Public Corruption Study Commission.⁸⁸ The following are some of the recommendations from the 1999-2000 study that were not implemented by the time of the 2010 grand jury report:

82. *Id.* § 112.317(4); *see also*, FLA. CONST. art. IV. § 7.

83. NINETEENTH STATEWIDE GRAND JURY, FIRST INTERIM REPORT: A STUDY IN PUBLIC CORRUPTION IN FLORIDA AND RECOMMENDED SOLUTIONS 5-6 (2010), [http://myfloridalegal.com/webfiles.nsf/WF/JFAO-8CLT9A/\\$file/19thSWGJInterimReport.pdf](http://myfloridalegal.com/webfiles.nsf/WF/JFAO-8CLT9A/$file/19thSWGJInterimReport.pdf). [hereinafter FIRST INTERIM REPORT: A STUDY IN PUBLIC CORRUPTION]

84. *Id.* at 5, 125; NINETEENTH STATEWIDE GRAND JURY, FINAL REPORT OF THE NINETEENTH STATEWIDE GRAND JURY IN THE SUPREME COURT OF THE STATE OF FLORIDA (2011), https://efactssc-public.flcourts.org/casedocuments/2009/1910/2009-1910_miscdoc_275049_e20f.pdf.

85. Fla. Exec. Order No. 11-03 (Jan. 4, 2011).

86. FIRST INTERIM REPORT: A STUDY IN PUBLIC CORRUPTION, *supra* note 83 at 39, 66, 81.

87. Steve Bousquet, *Scott Failed to Follow up on Ethics*, TAMPA BAY TIMES (Mar. 8, 2013), <https://www.tampabay.com/archive/2013/03/08/scott-failed-to-follow-up-on-ethics/>.

88. FIRST INTERIM REPORT: A STUDY IN PUBLIC CORRUPTION, *supra* note 83 at 10-11.

- Make it a second degree felony to 'refrain from performing a mandatory constitutional or statutory duty or cause another person to refrain from performing such duty,' with corrupt intent to obtain a benefit for any person, or to cause harm to another person;
- Make it a second degree felony to criminally misuse one's official position with the following language:
 - (1) It is unlawful for any public servant to corruptly use, or attempt to use, his or her official position or any public property or public resource which may be within his or her trust, to:
 - (a) Establish any business relationship between the public servant's own agency and any business entity in which the public servant receives or has an expectation of receiving a benefit; or
 - (b) Perform his or her official duties to secure for himself or herself a benefit that is not generally available to the public;
- Expand the jurisdiction of the Statewide Prosecutor to include any violation of Ch. 838, F.S., which concerns the offenses by public servants;
- Require elected officials to be educated in ethics laws, the public records law, the "Sunshine Law," and the criminal laws regarding government corruption;
- Give the Commission the authority to initiate investigations based upon receipt of sufficient evidence, as judged by an extraordinary majority of the Commission;
- Allow the Commission to investigate situations when referred directly to the Commission by the Governor, the Comptroller (now, CFO), the State Attorneys; and others (law enforcement or regulatory agencies such as the Florida Bar, DBPR, Elections Commission, etc.).⁸⁹

The legislature haphazardly addressed the educational component by enacting Section 112.3142, Florida Statutes, which required specific public officials and employees to receive four hours of ethics training

89. *Id.*

annually.⁹⁰ The legislature had to come back in 2014 in order to include municipal officials from Florida's 411 municipalities in the statutory educational requirements.⁹¹ The contents of the training are enumerated in the state statute, and reiterated in Rule 34-7.025, Florida Administrative Code, which covers the basics of Florida's ethics laws. Public officials required to undergo this education and training simply need to check a box on their annual Financial Disclosure to verify that they completed a four-hour course.

The jurisdiction of the Ethics Commission to independently investigate malfeasance in public office has not significantly changed since its creation in 1974. Currently, the Ethics Commission solely investigates sworn complaints submitted under oath or affirmation by any person.⁹² Written referrals to the Ethics Commission may be made by the Governor, state attorneys, U.S. Attorneys, or the Florida Department of Law Enforcement, and requires an affirmative vote of six members of the Commission that the written referral contains allegations sufficient to indicate a violation has occurred.⁹³ Neither of these scenarios give the Ethics Commission independent jurisdiction to initiate investigations, and both fall short of the recommendations from the 1999-2000 Public Corruption Study Commission discussed above.

Now, more than a decade has passed since the 2010 study in public corruption and the people of Florida have spoken at the ballot box regarding how they expect their public officials to behave in office. With insufficient deterrents and rare prosecutions under the criminal ethics code, the constitutional provisions will likely not have the impact desired by the people of Florida, absent significant statutory reforms. Only those state and local government officials who of their own volition heed the will of the people will take note and act accordingly. Until the state legislature itself makes appropriate reformation of the ethics laws a priority, the will of over six million Florida voters has yet again fallen on deaf ears. Little will change with the implementation of Amendment 12 unless there are more powerful deterrents enacted by the legislature, or the Ethics Commission is empowered to independently investigate and prosecute violations of Florida's ethics laws.

90. FLA. STAT. § 112.3142 (2021).

91. 2014 Fla. Laws 183.

92. FLA. STAT. §§ 112.322, 112.324.

93. *Id.* § 112.324.