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July 19, 2011

David W. Wagner  
Alachua County Attorney  
Post Office Box 2877  
Gainesville, Florida 32602-2877

Re: Review of County Court Services Director Hiring

Dear Mr. Wagner:

Pursuant to your request, I have completed my review of the County's recent hiring action for a new Court Services Director. The report of my review is below. I will be pleased to schedule a presentation before the County Commission if that is desired.

### Scope of Review

Pursuant to the County Attorney's assignment from the Board of County Commissioners ("BOCC" or "Board"), I have reviewed the process by which the County Manager decided to recommend to the Board the hiring of Thomas Tonkavich as the County's Court Services Director. I have reviewed that process specifically in two contexts:

(1) The impact, if any, of the County Manager's failure to comply with the County's policy relating to recruitment and hiring, and

(2) Whether the County Manager's decision violated any laws prohibiting discrimination in employment.<sup>1</sup>

My review is based on the materials which have been made available to me and those legal authorities which I believe to be material to the subjects of the review.<sup>2</sup>

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<sup>1</sup> I have not made a determination of whether the County Manager complied with County policies, as I believe that question to be within the province of the BOCC and not part of the task assigned to me. I therefore have assumed that the policies were not followed, at least in part, and specifically that the County Manager did not consult with the Equal Opportunity Manager about his written comments prior to making his recommendation to the Commission.

### Summary of Conclusion

Based on the information provided me for this review, it is my opinion that the County Manager did not discriminate against any applicant on the basis of any prohibited characteristic.

### Legal Background

As part of its commitment to equal employment opportunity and workforce diversity, the County has adopted a comprehensive Equal Opportunity Program which includes an Equal Employment Opportunity Plan ("EEO") concerning employee hiring, with an Expanded Recruitment Plan ("ERP"). Policy 4-6(9)(b) of the Alachua County Employee Policy Manual describes the EEO as "a voluntary effort by the Board of County Commissioners to address areas of underutilization (low representation) of women and minorities within the county workforce, based on federally established guidelines."

The County is in fact required to have an EEO as a precondition to the receipt of certain federal funding. Specifically, any recipient of such funding that receives federal monies in excess of \$25,000.00, or employs 50, or more employees must adopt an EEO in order to qualify for the grant. The specific components of an EEO are set forth in a number of federal regulations relating to grants. The Grant awarded to the County for the Regional Drug Enforcement Strike Force is an example of these provisions. The federal rules in 28 C.F.R. §§ 42.301-.308 require these components in the County's EEO:

- (1) Review of the County's workforce and available community labor characteristics to determine utilization of women and minorities,
- (2) Self-examination of the County's hiring practices and policies and the historical results of those practices and policies as they relate to women and minorities, and
- (3) Establishment of a program for the recruitment of minorities and designation of specific personnel to implement and maintain the EEO.

### County's Program

An employer may take actions which are designed to maintain diversity in the workforce. The EEO is one such measure. Although it is required by certain federal

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<sup>2</sup> The materials which I have reviewed include the materials submitted by applicants for the position of County Court Services Director, notes and other materials created by those County officers and employees involved in the decision-making process, the statements of unsuccessful candidates made at the invitation of Commissioner Long after the County Manager had made his decision, County policies relating to recruitment and hiring and the recording of the BOCC meeting at which the County Manager made his recommendation.

grants, the County's program is nonetheless properly characterized as "voluntary" for purposes of determining its compliance with the provisions of the United States and Florida constitutions prohibiting discrimination. Those provisions limit the methods an employer may use to achieve and maintain a diverse workforce and/or correct underutilization. The County's EEOP comprises several components, including:

- (1) Development of a plan for equal employment opportunity,
- (2) Enhanced recruitment, and
- (3) Monitoring of the selection process.

Several of these components are of special relevance to an analysis of the selection process at issue herein. The County's EEOP calls for the several steps in the hiring process:

- (1) Conduct of "expanded recruitment efforts aimed at increasing the diversity of the applicant pool";
- (2) Notification of decision makers of "the presence in the qualified pool [of applicants] who fall in the groups underrepresented in the County's workforce";
- (3) "Monitoring the selection process" and
- (4) "Reviewing and commenting on the recruitment and selection process prior to an offer being made to ensure that departments have demonstrated a good faith effort to achieve the goals and objectives of the current Equal Employment Opportunity Plan."

All of these activities are appropriate, but they also circumscribe the range of legal methods which the County may employ to achieve diversity. The County may expand recruitment to achieve the maximum number and types of applicants. It may not, however, "force" a certain demographic mix in the interview pool to remedy underutilization. It may notify decision-makers of the "presence" in the applicant pool of persons who belong to underrepresented groups. It may not make a protected characteristic the motivating factor for the decision on which applicants to interview or which applicant to hire. The County may require the involvement of the Equal Opportunity Manager, but it may not use that involvement to require a decision to be made on an illegal factor.

### Review of Hiring Action by EO Manager

In the context of the process under review, it seems clear that there was an expanded recruitment effort which in fact resulted in a diverse pool of applicants. Notification was given to the hiring supervisor of those groups which are underrepresented in the Alachua County government workforce. It is also clear, however, that the EO Manager did not have the opportunity to review the County Manager's selection before it became final. It is not within the scope of this review to determine whether or not the County Manager was justified in proceeding to make an employment offer and announce his decision without those discussions. But we have reviewed the impact of his failure to have those discussions upon the legality of his recommendation.

The EO Manager reviewed the County Manager's decision after he announced it. The EO Manager's review is legally conducted at this stage of the proceedings (though a deviation from the County policy) and is as effective as it would have been at an earlier point in the process. Her review was properly focused on the question of whether there is evidence of a discriminatory intent in the County Manager's choice. As noted above, no matter how justified and righteous may be the determination of a public employer to have a workforce reflective of the population that the agency serves, it cannot make decisions based on that motivation. It can only take appropriate steps to insure that equal opportunity has been afforded to all applicants. The involvement of the EO Office is of course vital to attaining that promise, but it may contribute its efforts before or after the recommendation is made. That the County Manager did not consult with the office before his decision was announced does not prohibit the office's involvement after the announcement. And because the employer may not use minority status or gender as a substantial motivating reason for selection, and the pool from which the selection under review here was made was in fact diverse, the County Manager's recommendation and the ultimate decision of the BOCC cannot be based on those factors. In other words, the desire to increase the presence of women or minorities in a particular job may not be used as a factor. The only question is whether the recommendation is in fact based on a discriminatory factor or not.

### Conclusion

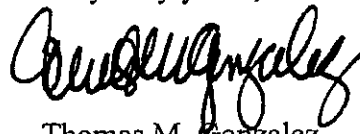
In determining whether an employment decision was motivated by unlawful animus, the reviewing court or agency reviews the employment action in terms of the basis actually used by the decision-maker. It is impossible and the law does not require that an employer make use of specific standards or factors. To the contrary, an employer may use any basis or bases for decision except those which are prohibited to him by law, such as race, national origin, sex and the like. The analysis of the choice made by the employer therefore cannot be based on an assumption that certain factors are desirable or even vital. So long as race or sex, or any other protected characteristic is not the motivation for action, the action is legal. While the opinions of an unsuccessful candidate may be helpful in

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providing information that was ignored or discounted by the decision-maker, they do not assist the analysis when they consist of attempts to argue the weight that a decision-maker attributed to a certain factor or suggest factors which were not disclosed at the time the decision was made.

Based on the information provided me for this review, it is my opinion that the County Manager did not discriminate against any applicant on the basis of any prohibited characteristic.

Very truly yours,

A handwritten signature in black ink, appearing to read "Thomas M. Gonzalez", written in a cursive style.

Thomas M. Gonzalez

TMG/hs

cc: William E. Harlan