

Dual Office-Holding, ethics commission hearing examiner

Number: INFORMAL

Date: February 14, 2011

Mr. Stanford Birnholz
Attorney at Law
1450 Baracoa Avenue
Coral Gables, Florida 33146-1908

Dear Mr. Birnholz:

You have asked for this office's assistance in determining whether a hearing examiner for the Miami-Dade County Ethics Commission is an officer for purposes of the dual office-holding prohibition in section 5(a), Article II of the Florida Constitution. You state that Palm Beach County advised you of your ineligibility to serve as a special magistrate for the value adjustment board in Palm Beach County since such an appointment would be in violation of section 5(a), Article II, Florida Constitution, in light of your position as a hearing examiner for Miami-Dade County. You have resigned from your hearing examiner position, but continue to pursue clarification of the matter.

Regrettably, this office will not render an opinion on the questions you have raised, since to do so would necessarily involve comment upon the actions of Palm Beach County and Miami-Dade County. Should the counties wish to join in your request for comment upon the application of the prohibition to their respective positions, we would be able to offer an advisory opinion on the matter at that time. The following general comments, however, are offered in order to be of some assistance.

Article II, section 5(a), of the Florida Constitution, in pertinent part, provides:

"No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein, except that a notary public or military officer may hold another office, and any officer may be a member of a constitution revision commission, taxation and budget reform commission, constitutional convention, or statutory body having only advisory powers."

This provision prohibits a person from simultaneously holding more than one "office" under the government of the state, counties, and municipalities. The Florida Constitution does not define the term "office" for purposes of the prohibition, nor has the Legislature provided clarification on the parameters of the constitutional prohibition. The Supreme Court of Florida, however, has stated:

"The term 'office' implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office, while an 'employment' does not comprehend a delegation of any part of the sovereign authority. The term 'office' embraces the idea of tenure, duration, and duties in exercising some portion of the sovereign power, conferred or defined by law and not by

contract. An employment does not authorize the exercise in one's own right of any sovereign power or any prescribed independent authority of a governmental nature; and this constitutes, perhaps, the most decisive difference between an employment and an office . . . "[1]

Employment does not subject the holder of the position to dual office-holding considerations since the courts have determined that employment does not involve the delegation of any of the sovereign power of the state.[2] Thus, in determining whether a particular position is an employment or office, careful consideration must be given to the powers and responsibilities imposed upon that position by statute, charter, or ordinance. It is, therefore, the nature of the powers and duties of a position which determines whether it is an office or employment.

While this office has not commented upon the position of a "hearing examiner" who has been delegated the authority to make probable cause determinations for a board or commission imbued with quasi-judicial authority, it has determined that a special magistrate for a value adjustment board is an "officer" for purposes of the dual office-holding prohibition.[3] In that opinion, it was noted that the Florida Supreme Court has stated that a person in the service of the government, who derives his position from a duly and legally authorized election or appointment, whose duties are continuous in their nature and defined by rules prescribed by government and not by contract, consisting of the exercise of important public powers, trusts, or duties, as part of the regular administration of the government is a public officer. The opinion further states that every "office" implicates the authority to exercise some portion of the sovereign power, either in making, executing, or administering the laws. The opinion concludes, therefore, that the delegation of *any part* of the authority of the sovereign to a position distinguishes an officer from an employee.

You also ask whether the Miami-Dade Ethics Commission is an independent special district which would affect the application of the dual office-holding prohibition against an officer of the district. Chapter 189, Florida Statutes, sets forth general provisions for the definition, creation, and operation of special districts in this state.[4] Section 189.403(1), Florida Statutes, defines "special district" as "a local unit of special purpose, as opposed to general-purpose, government within a limited boundary, created by general law, special act, local ordinance, or by rule of the Governor and Cabinet." Section 189.403(2), Florida Statutes, provides that a "[d]ependent special district" is a special district meeting *at least one* of the following criteria:

- "(a) The membership of its governing body is identical to that of the governing body of a single county or a single municipality.
- (b) All members of its governing body are appointed by the governing body of a single county or a single municipality.
- (c) During their unexpired terms, members of the special district's governing body are subject to removal at will by the governing body of a single county or a single municipality.
- (d) The district has a budget that requires approval through an affirmative vote or can be vetoed by the governing body of a single county or a single municipality."

An "[i]ndependent special district" is "a special district that is not a dependent special district as defined in subsection (2). A district that includes more than one county is an independent special district unless the district lies wholly within the boundaries of a single municipality." [5]

While not officially commenting on the status of the Miami-Dade Ethics Commission as a special district, I would note that section 2-1073, Article LXXVIII, Chapter 2, Part III of the Miami-Dade Code of Ordinances, states that the county provides the financial support for the Ethics Commission pursuant to the official county budget, subject to approval by the board of county commissioners.

I trust that these informal comments will be of assistance.

Sincerely,

Lagran Saunders
Assistant Attorney General

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[1] *State ex rel. Holloway v. Sheats*, 83 So. 508, 509 (Fla. 1919). *And see State ex rel. Clyatt v. Hocker*, 22 So. 721 (Fla. 1897).

[2] *See State ex rel. Clyatt v. Hocker, supra*.

[3] *See Ops. Att'y Gen. Fla. 05-29 (2005) and 10-19 (2010)*. *See also Rodriguez v. Tax Adjustment Experts of Florida, Inc.*, 551 So. 2d 537 (Fla. 3d DCA 1989) (special masters for value adjustment boards are quasi-judicial officers).

[4] *See s. 189.402, Fla. Stat.*

[5] *Section 189.403(3), Fla. Stat.*