

Dual office holding, voluntary employees benefit ass'n

Number: INFORMAL

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Mr. Pedro A. Herrera
Attorney, Pompano Beach Police and
Firefighters' Retirement System
2801 Ponce De Leon Boulevard, Suite 750
Coral Gables, Florida 33134

Dear Mr. Herrera:

On behalf of the Pompano Beach Police and Firefighters' Retirement System, you ask whether a member of the board of trustees of the city's retirement system may serve on the board of trustees of a voluntary employee benefit association, created pursuant to a collective bargaining agreement to provide health benefits to retired police and firefighter personnel.

Article II, section 5(a), Florida Constitution, prohibits a person from simultaneously holding more than one "office" under the government of the state, counties and municipalities.[1] While the Constitution does not define the term "office" or "officer" for purposes of the dual office holding prohibition, the courts have generally considered the term to imply a delegation of a portion of the sovereign power of the state.[2] Within the scope of the term are the concepts of tenure, duration and duties in exercising some portion of the sovereign power, conferred or defined by law rather than by contract. In contrast, an "employment" does not "comprehend a delegation of any part of the sovereign authority." [3]

This office has previously stated that membership on a board of trustees empowered to administer a pension fund constitutes an "office" for purposes of Article II, section 5(a), Florida Constitution. In Attorney General Opinion 03-27, this office stated that the administration of public funds and the accomplishment of the responsibilities delegated under Chapter 175, Florida Statutes, by the board of trustees of a pension fund for firefighters represent the exercise of the sovereign powers of the state, and, therefore, denote an "office" rather than an employment. Similarly, the duties imposed under Chapter 185, Florida Statutes, regarding pension plans for police officers have resulted in this office concluding that members of the board of trustees of such funds are officers for purposes of Article II, section 5, Florida Constitution.[4]

Clearly then membership on the board of trustees of the city's retirement system constitutes an office for purposes of dual office holding. However, it is not readily apparent whether membership on the voluntary employee benefits association constitutes a municipal office. As noted above, the courts have generally considered the term to imply a delegation of a portion of the sovereign power of the state conferred or defined by law rather than by contract. The association was created in accordance with a provision of the collective bargaining agreement between the city and the union. Article 37 of the current collective bargaining contract provides in part:

"The City and the Union agree to maintain a health insurance trust fund for the retiree benefits of Local 1549 and all certified employees of the Fire Department as set forth in Article 2. The City and the Union agree that the City will have no liability or responsibility for any of the expenses or benefits of the fund. The Union will hold the City harmless in all matters regarding the health insurance fund."

Moreover, the city has advised this office that it does not consider the voluntary employee benefits association to be a city board. However, you have advised this office that members of the board of trustees of the voluntary employees benefits association file financial disclosure statements.[5]

This office cannot resolve the questions of fact and mixed questions of law and fact.[6] In light of what appears to be conflicting information regarding the nature of the voluntary employee benefits association, you may wish to consider submitting this issue to the courts for resolution by declaratory judgment.

Thank you for contacting the Florida Attorney General's Office.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/tfl

[1] Article II, s. 5(a), Fla. Const., provides in part:

"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."

[2] See *State ex rel. Holloway v. Sheats*, 83 So. 508, 509 (Fla. 1919), stating:

"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"

[3] *Id.*

[4] See Op. Att'y Gen. Fla. 00-38 (2000). *And see*, Ops. Att'y Gen. Fla. 96-24 (1996), 94-98 (1994), and 86-106 (1986).

[5] See s. 112.3145, Fla. Stat., providing for the filing of financial disclosure statements and subsection (1)(a)2. defining "Local officer" as:

"Any appointed member of any of the following boards, councils, commissions, authorities, or other bodies of any county, municipality, school district, independent special district, or other political subdivision of the state:

* * *

f. A pension board or retirement board having the power to invest pension or retirement funds or the power to make a binding determination of one's entitlement to or amount of a pension or other retirement benefit" (e.s.)

[6] See this office's Statement Concerning Attorney General Opinions providing that "Attorney General Opinions are intended to address only questions of law, not questions of fact, mixed questions of fact and law." The statement is available online at: www.myfloridalegal.com