

## Dual officeholding, hearing officer

**Number:** INFORMAL

**Date:** April 12, 1999

Ms. Susan H. Bingham  
Fisher & Sauls, P.A.  
Post Office Box 387  
St. Petersburg, Florida 33731

RE: DUAL OFFICEHOLDING--TRAFFIC COURT--HEARING OFFICERS--ADMINISTRATIVE LAW JUDGES--SPECIAL MASTERS--authority of traffic court hearing officer to serve as municipal hearing master for vehicle impoundment program. s. 318.30, Fla. Stat. Art. II, s. 5(a), Fla. Const.

Dear Ms. Bingham:

You have asked whether your simultaneous service as a traffic court hearing officer and a municipal administrative hearing master would violate the dual officeholding prohibition contained in Article II, section 5(a), Florida Constitution. As discussed more fully below, it is my conclusion that such simultaneous service would violate the dual officeholding prohibition.

This office has previously determined that civil traffic infraction hearing officers serving pursuant to section 318.30, Florida Statutes, are officers for purposes of the constitutional provision.[1] Thus, your situation will be controlled by the nature of the municipal administrative hearing officer position.

The constitutional dual officeholding provision is contained in Article II, section 5(a), of the Florida Constitution, and states that:

"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."

Thus, without a definition of the word "office" or "officer" for this purpose, the question becomes whether a particular undertaking constitutes an "office" or an "employment." Employment does not subject the holder of the position to dual officeholding considerations since the courts have determined that employment does not involve the delegation of any of the sovereign power of the state.[2] As the Florida Supreme Court has stated:

"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 a part of the regular administration of the government, the

place and the duties remaining though the incumbent dies or is changed, is a public officer; every 'office,' in the constitutional meaning of the term, implying an authority to exercise some portion of the sovereign power, either in making, executing, or administering the laws." [3]

You have indicated in your letter that hearing masters for the City of St. Petersburg, Florida, conduct administrative hearings to determine whether probable cause exists to impound vehicles used in the perpetration of crimes. This program is established pursuant to an ordinance of the City of St. Petersburg creating section 20-122 of the St. Petersburg City Code. [4]

The ordinance reflects the city's concern that "motor vehicles are frequently used as part of or to facilitate the commission of prostitution and drug related crimes, which use has the effect of bringing the undesirable aspects of those crimes to neighborhoods, schools and other areas[.]" In order to discourage the commission of these crimes the city proposes to impose a civil administrative penalty for the use of a motor vehicle to commit prostitution and drug related crimes. The city has recognized the requirements for due process expressed in the Florida and U.S. Constitutions and established a hearing process relating to the impoundment of motor vehicles under this ordinance. [5]

Under section 20-122 of the city code a hearing master is

"the person or persons contracted with by the City as provided herein for the purpose of conducting the administrative hearing provided for herein." [6]

The Mayor of the City of St. Petersburg is authorized by the ordinance to contract with individuals to perform the functions of a hearing master. [7]

Hearings under the ordinance are held at the request of the owner or lienholder of a motor vehicle that has been impounded. A time table is established for notice and scheduling of the hearing. The ordinance provides that:

"The hearing shall be held before a hearing master provided by the City. At the outset of such hearing, the hearing master shall determine that notice of the hearing was perfected. The sole issue to be considered by the hearing master is whether the impounding police officer had probable cause under this section to seize and impound the vehicle. The formal rules of evidence shall not apply and hearsay evidence, including any relevant police report, is admissible. The burden of demonstrating probable cause is on the City." [8]

If the hearing master determines that there is probable cause to support the impoundment, he or she must order the continued impoundment of the vehicle pending a final hearing or the payment of an administrative civil penalty of \$500 together with all towing costs and storage costs (which cannot exceed \$10 per day). [9] An owner may elect to waive any hearing and pay the administrative penalty to the city directly. [10] If the vehicle owner is subsequently found not guilty of any criminal offense arising from the conduct that caused the vehicle to be impounded or has had all such criminal charges dismissed he or she may receive a refund of the penalty.

The ordinance also establishes a procedure for a final hearing to be held "[w]ithin ten (10) business days of the date the motor vehicle is impounded or within three (3) business days of a

finding of probable cause following a preliminary hearing, whichever is later[.] "[11] Again the formal rules of evidence do not apply and the city has the burden of showing, by a preponderance of the evidence, that the vehicle was used as provided in the ordinance. Hearsay evidence is admissible, cross examination is permitted and all witnesses must be sworn.[12]

If, after the final hearing is conducted, the special master determines that the vehicle is subject to impoundment, the hearing master must enter an order which continues the impoundment "for a period not to exceed thirty (30) days pending payment of \$500 administrative civil penalty, plus hearing costs of \$50 with the City, and payment of towing and storage charges to the wrecker company." [13]

Clearly then, under this scheme, a hearing master weighs evidence, makes determinations of probable cause, and issues orders for the payment of penalties or the continued impoundment of personal property. The hearing master is hired by contract but the duties of this position are established by ordinance and involve the exercise of quasi-judicial powers. These duties appear to require the exercise of important public powers and represent a part of the regular administration of the government.

Thus, it is my conclusion that a hearing master for the City of St. Petersburg, Florida, as that position is created by ordinance number 350-G, is an office within the contemplation of Article II, section 5(a), Florida Constitution.

I trust these informal comments will help you in resolving this matter. This informal advisory opinion was prepared by the Attorney General's Office in an effort to assist you and should not be considered a formal opinion of the Attorney General.

Sincerely,

Gerry Hammond  
Assistant Attorney General

GH/tgk

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[1] See Op. Att'y Gen. Fla. 96-91 (1996).

[2] See *State ex rel. Holloway v. Sheats*, 83 So. 508 (Fla. 1919) ("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, and between an employe[e] and an officer."). And see Ops. Att'y Gen. Fla. 96-91 and 84-93(1984)(legal counsel to local government code enforcement board an employee.)

[3] *State ex rel. Clyatt v. Hocker*, 22 So. 721 (Fla. 1897).

[4] See City of St. Petersburg Ordinance No. 350-G.

[5] See "whereas" clauses, City of St. Petersburg Ordinance 350-G.

[6] Section 20-122(a)3., St. Petersburg City Code.

[7] Section 20-122(l), St. Petersburg City Code.

[8] Section 20-122(e)3., St. Petersburg City Code.

[9] Section 20-122(e)4., St. Petersburg City Code.

[10] Section 20-122(e)5., St. Petersburg City Code.

[11] Section 20-122(f)1., St. Petersburg City Code.

[12] *Id.*

[13] Section 20-122(f)2., St. Petersburg City Code.