Dual Office-holding, applicability to division director

Number: INFORMAL

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Mr. John M. Russi
Director, Division of Licensing
The Capitol, MS #4
Tallahassee, Florida 32399-0250

Dear Mr. Russi:

You ask whether a senior management employee who is a division director within the Department of State and has been delegated the authority to take such actions as are required for the effective direction and administration of the division by the Secretary of State may serve as a reserve officer, without compensation, with the Florida Park Patrol, without violating the constitutional prohibition against dual officeholding contained in Article II, section 5, Florida Constitution.

Article II, section 5(a), of the Florida Constitution, 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."

This constitutional provision prohibits a person from simultaneously holding more than one "office" under the government of the state, counties and municipalities.[1] The prohibition applies to both elected and appointed offices.[2]

The Constitution does not define the terms "office" or "officer" for purposes of the dual office-holding 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 . . . ."[3]

It is, therefore, the nature of the powers and duties of a particular position which determines whether it is an "office" or an "employment."[4]

You refer to Attorney General Opinion 94-40 and state that you are concerned about the definition of the term "office" which discusses a delegation of a portion of the sovereign power of the state. In Attorney General Opinion 94-40 this office concluded that the mayor of a municipality may accept the position of code enforcement officer established under chapter 162, Florida Statutes, for another city without violating article II, section 5(a), Florida Constitution.

Clearly, the Secretary of State, as a constitutional officer and member of the Cabinet, constitutes an "officer" for purposes of the dual officeholding prohibition. However, the constitutional prohibition against dual office holding does not generally apply to those persons who are not vested with official powers in their own right but rather merely exercise certain powers as agents of governmental officers.[5] Thus, for example, this office has stated that assistant state attorneys are not officers within the contemplation of the constitutional dual officeholding prohibition. An assistant state attorney acts as "an official court functionary with important power and duties, but without being vested with any of the sovereign powers of the state nor having the status of a state officer'."[6]

According to the information attached to your letter, the division director reports directly to the Assistant Secretary of State. Moreover, while the division director has been delegated the authority to carry out certain functions imposed by the statutes on the division, this office has been advised during a telephone conversation with your office that such duties are primarily ministerial. As a member of the Senior Management System, the division director serves at the pleasure of and is subject to dismissal at the discretion of the agency head, i.e., the Secretary of State.[7] The agency head sets the salary for such position. Thus, these "positions," as senior managers are referred to in the statutes rather than as "offices," lack two of indicia usually present in an "office," namely, tenure and compensation fixed by law.[8]

In light of the above, it appears that the division director would constitute an employment rather than an office for purposes of the dual office holding prohibition contained in article II, section 5(a), Florida Constitution.

I trust that these informal advisory comments which should not be considered as a formal opinion of this office may be of some assistance to you in resolving this matter.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/tgk

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[1] Earlier State Constitutions contain similar prohibitions against dual office holding. *See, e.g.,* Art. VI, s. 18, Fla. Const. 1838, and Art. VI, s. 14, Fla. Const. 1861. Article II, section 5(a), of the 1968 Constitution substantially reproduces Article XVI, section 15 of the 1885 Constitution except that the current provision was expanded to include municipal officers. Court decisions under the 1885 Constitution had excluded such officers from its coverage.

[2] *See* Ops. Att'y Gen. Fla. 69-2 (1969), 80-97 (1980), and 94-66 (1994).

[3] *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).

[4] Based upon existing case law, this office has stated that a law enforcement officer is an "officer" within the scope of the constitutional dual office holding prohibition. *See, e.g.,* Ops. Att'y Gen. Fla. 57-165 (1957), 58-26 (1958), 69-2 (1969), 71-167 (1971), 72-348 (1972), 76-92 (1976), 77-89 (1977), 86-11 (1986), and 89-10 (1989). *And see Curry v. Hammond,* 16 So. 2d 523, 524 (Fla. 1944); *Maudsley v. City of North Lauderdale,* 300 So. 2d 304 (Fla. 4th DCA 1974).

[5] *See* Op. Att'y Gen. Fla. 69-2 (1969).

[6] *See* Op. Att'y Gen. Fla. 71-263 (1971). *And see* Op. Att'y Gen. Fla. 74-73 (1974), stating that deputy tax assessor is an employee rather than on "officer"; Op. Att'y Gen. Fla. 88-56 (1988), stating that deputy clerk performing largely the ministerial duties of an assistant to the clerk rather than the substitute duties of a true deputy constituted an employment rather than an office; and *Blackburn v. Brorein,* 70 So. 2d 293 (Fla. 1954) (true deputy is one who is empowered to act for him in his name and behalf in all matters in which principal may act).

[7] Section 110.403(1)(a), Fla. Stat. *Cf.* s. 112.3145(1)(b), Fla. Stat., which defines "Specified state employee" for purposes of the state's financial disclosure laws to include division directors.

[8] *See State ex rel. Holloway v. Sheats, supra,* stating that 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. In *Sheats,* an important factor was the designation of the appointments as "positions" rather than "offices."