Dual Office-holding -- Advisory Boards

Number: AGO 2013-31

Date: December 31, 2013

Subject:
Dual Office-holding -- Advisory Boards

Mr. Vaughan Kimberling
5993 Ackard Avenue
Port St. John, Florida 32927-9101

RE: DUAL OFFICE-HOLDING – COUNTIES – ADVISORY BOARDS – simultaneous service on advisory boards does not violate dual office-holding. s. 5(a), Art. II, Fla. Const.

Dear Mr. Kimberling:

You ask substantially the following question:

Does simultaneous service as a member of the Port St. John Dependent Special District, the Port St. John Public Library Advisory Board, and the Brevard County Contractors' Licensing Board violate the dual office-holding prohibition in section 5(a), Article II, Florida Constitution.

In sum:

While a service on the Brevard County Contractors' Licensing Board would be an office, the Port St. John Dependent District and the Port St. John Public Library Advisory Board would appear to be advisory boards which fall within the exemption from the dual office-holding prohibition in section 5(a), Article II, Florida Constitution.

Section Article II, section 5(a) of the Florida Constitution, provides:

"No person holding any office of emolument under any foreign government, or civil office of emolument under the United States or any other state, shall hold any office of honor or of emolument under the government of this state. 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." (e.s.)

The 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] It is not necessary that the two offices be within the same governmental unit. Thus, for example, a municipal officer is precluded from simultaneously holding not only another municipal office, but also a state or county office.[3]

The Constitution, however, does not define the terms "office" or "officer" for purposes of the dual office-holding prohibition and the Legislature has not attempted to define the term to clarify the parameters of this constitutional provision. Absent such clarification, the courts and the Attorney General's Office have referred to several early decisions of the Supreme Court of Florida in determining what constitutes an "office" as opposed to an "employment." The Supreme Court of Florida 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 . . . .[4]

It is, therefore, the nature of the powers and duties of a particular position which determines whether it is an "office" or an "employment." Historically, this office has based its determination of whether a particular position is an office upon a review of the particular powers of a position and the language of the statute, charter, or ordinance creating the position.

In this instance, you acknowledge that the powers and duties of the Brevard County Contractors' Licensing Board would be consistent with those of an "office" subject to the dual office-holding prohibition in section 5(a), Article II, Florida Constitution. The board's jurisdiction over all matters pertaining to the examination, qualification, regulation, and control of any person or firm desiring to engage in business in the unincorporated area of Brevard County would appear to encompass an exercise of the sovereign power of the county which would make a position on the board an office subject to section 5(a), Article II, Florida Constitution.[5]

The materials you have provided indicate that the Brevard County Attorney's Office has opined that the activities of the Port St. John Dependent Special District (PSJDSD) and the Port St. John Public Library Advisory Board (PSJPLAB) are advisory in nature. The PSJDSD makes non-binding recommendations to the county commission and has not been delegated any portion of the county's sovereign power.[6] You indicate that the PSJPLAB only advises the county commission on the establishment, operation, and maintenance of the Port St. John Public Library.[7]

As discussed above, statutory bodies having only advisory powers are exempt from the constitutional dual office-holding prohibition. This exception has been interpreted by this office. For example, in Attorney General Opinion 05-59, this office stated that a municipal committee that merely makes non-binding recommendations and has not otherwise been delegated any powers to make factual determinations or exercise any portion of the municipality's sovereign power did not appear to be an office. In Attorney General Opinion 08-15, this office concluded that a county advisory board could be considered a "statutory body having only advisory powers" within the constitutional exception if it has been created by legislative enactment of the governing body.

As this office noted in Attorney General Opinions 89-25 and 90-33, only those statutory bodies

which possess exclusively advisory powers are excepted; Article II, section 5(a), Florida Constitution, does not provide for or recognize an exception for statutory bodies which exercise a portion of the sovereign powers, but whose powers may be substantially or predominately advisory.[8]

Inasmuch as neither the Port St. John Dependent Special District nor the Port St. John Public Library Advisory Board appears to exercise a portion of the sovereign power of the county and instead merely serve as advisory boards to the Brevard County Commission, the dual office-holding prohibition in section 5(a), Article II, Florida Constitution, would not preclude your simultaneously serving on either or both of the boards and as a member of the Brevard County Contractors' Licensing Board.

Sincerely,

Pam Bondi
Attorney General

PB/tals

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[1] Earlier state Constitutions contained limited prohibitions against dual office-holding. *See, e.g.*, Art. VI, s. 18, Fla. Const. 1838; Art. VI, s. 14, Fla. Const. 1861; and Art. VI, s. 14, Fla. Const. 1865. Article II, s. 5(a) of the 1968 Constitution substantially reproduces Art. XVI, s. 15 of the 1885 Constitution except that the 1968 Constitution includes municipal officers. Court decisions under the 1885 Constitution had excluded municipal officers from its coverage. *See, e.g.*, *Attorney General ex rel.Wilkins v. Connors*, 9 So. 7, 8 (Fla. 1891).

[2] *See Blackburn v. Brorein*, 70 So. 2d 293, 296 (Fla. 1954), noting that "election by the people or the appointment by the Governor is not the true test in determining whether . . . an office exists and the individual filling the position is an officer [rather than] an employee[;]" Ops. Att'y Gen. Fla. 94-66 (1994), 80-97 (1980), and 69-2 (1969).

[3] *See, e.g.*, Op. Att'y Gen. Fla. 05-29 (2005) (special magistrate for a county value adjustment board could not simultaneously serve on city's code enforcement board).

[4] *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).

[5] *Cf.* Op. Att'y Gen. Fla. 04-07 (2004) (city's building official who administered building code, issuing permits and certificates of occupancy, constitutes an office).

[6] *See* s. 98-105, Brevard County Code of Ordinances.

[7] *See* Resolution 90-081 enacted by Brevard County Commission on March 7, 1990; s. 1.3, Art. I, Port St. John Public Library Advisory Board By-laws.

[8] *And see* Op. Att'y Gen. Fla. 98-36 (1998), concluding that membership on a city water

resources advisory board which, despite its name, exercised substantive powers, constituted an "office."