Dual Office-Holding -- Code Enforcement Boards

Number: AGO 2013-18

Date: September 12, 2013

Subject:
Dual Office-Holding -- Code Enforcement Boards

The Honorable Steve Leifman
County Judge
Richard E. Gerstein Justice Building
1351 Northwest 12th Street
Miami, Florida 33125

RE: DUAL OFFICE-HOLDING – CODE ENFORCEMENT BOARDS – TRAFFIC INFRACTIONS – RED LIGHT CAMERAS – CIVIL TRAFFIC INFRACTION HEARING OFFICER – LOCAL HEARING OFFICER – whether a local hearing officer as defined in section 316.003(91), Fla. Stat., is an officer for purposes of dual office-holding; whether civil traffic infraction hearing officers can serve as local hearing officers. ss. 316.003 and 316.0083, Fla. Stat.

Dear Judge Leifman:

You have asked for my opinion on substantially the following questions:

1. Whether a "local hearing officer" as defined in section 316.003(91), Florida Statutes, is an officer for purposes of Florida's constitutional dual office-holding prohibition in Article II, section (5)(a), Florida Constitution?

2. Whether an individual may serve simultaneously as a civil traffic infraction hearing officer and a local hearing officer without violating Article II, section (5)(a), Florida Constitution, in light of the language contained in section 316.003(91), Florida Statutes?

In sum:

1. A "local hearing officer" as that term is defined in section 316.003(91), Florida Statutes, is an officer for purposes of Article II, section (5)(a), Florida Constitution.

2. The language of section 316.003(91), Florida Statutes, appears to provide an *ex officio* exception to the constitutional dual office-holding prohibition for currently appointed code enforcement boards or special magistrates for charter county, noncharter county, or municipal code enforcement boards to also act as "local hearing officers" for purposes of conducting hearings related to violations of section 316.0083, Florida Statutes. However, civil traffic infraction hearing officers have not been included by the Legislature within the scope of this *ex officio* exemption and would violate Article II, section 5(a), Florida Constitution, by simultaneously serving in both offices.

As Associate Administrative Judge for the Miami-Dade County Criminal Division, you oversee the traffic court/infraction section of the circuit court. You advise that this includes matters involving the civil traffic infraction hearing officer program. Civil traffic infraction hearing officers are appointed as provided by the Florida Rules of Traffic Court and have the power to adjudicate civil traffic infractions including red light camera matters. Your questions arise because the Florida Legislature amended section 316.003, Florida Statutes, during the 2013 legislative session to include a definition of "local hearing officer." In light of the changes to the statute, local governments have been contacting the judicial circuit to determine whether they may hire civil traffic infraction hearing officers as "local hearing officers" to preside over their red light camera hearings pursuant to section 316.0083, Florida Statutes.

The "Mark Wandall Traffic Safety Program," section 316.0083, Florida Statutes, provides that the Department of Highway Safety and Motor Vehicles, a county, or a municipality may authorize a traffic infraction enforcement officer[1] to issue traffic citations for violations of section 316.074(1) or section 316.075(1)(c)1., Florida Statutes. Any person who receives a notice of violation under the act "may request a hearing within 60 days following the notification of violation or pay the penalty pursuant to the notice of violation, but a payment or fee may not be required before the hearing requested by the person."[2]

Procedures for conducting hearings under the act were adopted in section 5, Chapter 2013-160, Laws of Florida. In a local jurisdiction that elects to authorize traffic infraction enforcement officers to issue citations, the charter county, noncharter county, or municipality is required to "designate by resolution existing staff to serve as the clerk to the local hearing officer."[3] The act defines "local hearing officer" in what is now subsection (91) of section 316.003, Florida Statutes, as added by Chapter 2013-160, Laws of Florida:

"LOCAL HEARING OFFICER.-The person, designated by a department, county, or municipality that elects to authorize traffic infraction enforcement officers to issue traffic citations under s. 316.0083(1)(a), who is authorized to conduct hearings related to a notice of violation issued pursuant to 316.0083. The charter county, noncharter county, or municipality may use its currently appointed code enforcement board or special magistrate to serve as the local hearing officer. The department may enter into an interlocal agreement to use the local hearing officer of a county or municipality."

Any petitioner who requests a hearing shall be scheduled for a hearing by the clerk to the local hearing officer.[4] All testimony at the hearing is under oath and must be recorded. The hearing officer is required to take the testimony of the traffic infraction enforcement officer and the petitioner and is authorized to take testimony from others. Formal rules of evidence do not apply to these hearings, but "due process shall be observed and govern the proceedings."[5]

At the conclusion of the hearing:

"the local hearing officer shall determine whether a violation under this section has occurred, in which case the hearing officer shall uphold or dismiss the violation. The local hearing officer shall issue a final administrative order including the determination and, if the notice of violation is upheld, require the petitioner to pay the penalty previously assessed under paragraph (1)(b), and may also require the petitioner to pay county or municipal costs, not to exceed $250. The final

administrative order shall be mailed to the petitioner by first-class mail."[6]

The final administrative order may be appealed by an aggrieved party (including the local jurisdiction) as provided in section 162.11, Florida Statutes, which provides for appeals of orders of county or municipal code enforcement boards.[7]

Based on the duties and responsibilities exercised by "local hearing officers" under section 316.0083, Florida Statutes, it is my opinion that they would come within the scope of section (5)(a), Article II, Florida Constitution, for purposes of the dual office-holding prohibition. This office has, in several previously issued Attorney General Opinions, concluded that quasi-judicial actors such as special magistrates and hearing officers are officers for purposes of Florida's constitutional prohibition on dual office-holding.[8]

The constitutional dual office-holding prohibition limits an individual's ability to serve in two offices simultaneously under the government of the state, counties, or municipalities. Section 5(a), Article II 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."

In Attorney General Opinion 2010-19, this office was asked whether service as a code enforcement hearing officer for one city would preclude service as a special magistrate for another. Recognizing previous determinations that service as a special magistrate for a value adjustment board constitutes an office within the scope of Article II, section 5(a), Florida Constitution, and that service on a code enforcement board also constitutes an office for purposes of the prohibition on dual office-holding, it was concluded that an individual serving as a hearing officer could not simultaneously serve as a special magistrate without violating the dual office-holding prohibition.[9]

Similarly, this office concluded in Attorney General Opinion 2012-17 that a special magistrate appointed to serve the county value adjustment board would violate the constitutional dual office-holding prohibition by serving as a city's hearing officer, without regard to whether the officer is simultaneously conducting hearings during the term of office.

However, it is a long-settled rule in this state that, assuming a particular officeholder is subject to the constitutional dual office-holding prohibition, a legislative designation of that officer to perform *ex officio* the function of another or additional office is not a holding of two offices at the same time in violation of the Constitution, provided the duties imposed are consistent with those being exercised.[10] Section 4, Chapter 2013-160, Laws of Florida, includes what appears to be an *ex officio* designation within the definition of a "local hearing officer." As amended, the statute provides that the charter county, noncharter county, or municipality that elects to undertake a traffic infraction enforcement program "may use its currently appointed code enforcement board

or special magistrate to serve as the local hearing officer." I read this language as related to the authority set forth in section 162.03(2), Florida Statutes, for "[a] charter county, a noncharter county, or a municipality" to "give[ ] code enforcement boards or special magistrates designated by the local governing body, or both, the authority to hold hearings and assess fines against violators of the respective county or municipal codes and ordinances."[11] Based on the reference in Chapter 2013-160, Laws of Florida, to the procedures in section 162.11, Florida Statutes, for appeal of final administrative orders, it appears that the reference to "currently appointed code enforcement board[s] or special magistrate[s]" is a specific reference to those officers involved in county or municipal code enforcement pursuant to Chapter 162, Florida Statutes, rather than to hearing officers or special magistrates serving in other capacities.[12] Thus, in response to your second question, a civil traffic infraction hearing officer is not included within the scope of this *ex officio* exemption and would violate Article II, section 5(a), Florida Constitution, by simultaneously serving in both offices.[13]

In sum, it is my opinion that a "local hearing officer" as that term is defined in section 316.003(91), Florida Statutes, is an officer for purposes of Article II, section (5)(a), Florida Constitution, and thus, would be precluded from holding simultaneously any other state, county, or municipal office. The language of section 316.003(91), Florida Statutes, appears to provide an *ex officio* exception to the constitutional dual office-holding prohibition for currently appointed code enforcement boards or special magistrates for charter county, noncharter county, or municipal code enforcement boards to also act as "local hearing officers" for purposes of conducting hearings related to violations of section 316.0083, Florida Statutes. However, civil traffic infraction hearing officers have not been included by the Legislature within the scope of this *ex officio* exemption and would violate Article II, section 5(a), Florida Constitution, by simultaneously serving in both offices.

Sincerely,

Pam Bondi
Attorney General

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[1] *See* s. 316.640(5)(a), Fla. Stat., providing that "[a]ny sheriff's department or police department of a municipality may employ, as a traffic infraction enforcement officer, any individual who successfully completes instruction in traffic enforcement procedures and court presentation . . ., but who does not necessarily otherwise meet the uniform minimum standards established by the Criminal Justice Standards and Training Commission for law enforcement officers or auxiliary law enforcement officers under s. 943.13." Traffic infraction enforcement officers are authorized to issue traffic citations for certain non-criminal traffic infractions. The statute does not permit the carrying of firearms or other weapons and traffic infraction enforcement officers do not have arrest authority other than the authority to issue traffic citations as provided in subsection (5).

[2] Section 316.0083(1)(b)1.c., Fla. Stat., as amended by s. 5, Ch. 2013-160, Laws of Fla.

[3] Section 316.0083(5)(b), Fla. Stat., as added by s. 5, Ch. 2013-160, Laws of Fla.

[4] *Supra* n.3 at (5)(c).

[5] *Id.*at (5)(d).

[6] *Id.*at (5)(e).

[7] Section 162.11, Fla. Stat., provides that:

"An aggrieved party, including the local governing body, may appeal a final administrative order of an enforcement board to the circuit court. Such an appeal shall not be a hearing de novo but shall be limited to appellate review of the record created before the enforcement board. An appeal shall be filed within 30 days of the execution of the order to be appealed."

[8] *See, e.g.,* Ops. Att'y Gen. Fla. 12-17 (2012) (special magistrate for county value adjustment board may not also serve as city's hearing officer); 10-19 (2010) (attorney who is city commissioner, member of a planning and zoning commission, code enforcement hearing officer or member of regional planning commission may not serve as special magistrate, hearing officer, or magistrate without violating dual office-holding prohibition); and Inf. Op. to Hinds, dated November 20, 2008 (general magistrate serving as civil traffic infraction hearing officer).

[9] *See* Op. Att'y Gen. Fla. 05-29 (2005) (service as special magistrate for value adjustment board constitutes an office within the scope of Art. II, s. 5(a), Fla. Const., and service on code enforcement board constitutes an office for purposes of dual office-holding prohibition). *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).

[10] *See State v. Florida State Turnpike Authority*, 80 So. 2d 337, 338 (Fla. 1955); *State ex rel. Gibbs v. Gordon*, 189 So. 437 (Fla. 1939); *City of Riviera Beach v. Palm Beach County Solid Waste Authority*, 502 So. 2d 1335 (Fla. 4th DCA 1987) (special act authorizing county commissioners to sit as members of county solid waste authority does not violate Art. II, s. 5(a), Fla. Const.); *City of Orlando v. State Department of Insurance*, 528 So. 2d 468 (Fla. 1st DCA 1988) (where the statutes had been amended to authorize municipal officials to serve on the board of trustees of municipal police and firefighters' pensions trust funds, such provision did not violate the constitutional dual office-holding prohibition). *And see* Ops. Att'y Gen. Fla. 00-72 (2000) (legislative designation that a representative from county government, the school district, the sheriff's office, the circuit court, and the county children's board serve on a Community Alliance constituted an *ex officio* designation of officers from the enumerated governmental entities); 80-97 (1980) (membership of elected municipal officer on metropolitan planning organization as prescribed by statute does not violate Art. II, s. 5, Fla. Const.); 02-44 (2002); and 03-20 (2003).

[11] *And see* CS/CS/HB 7125, House of Representatives Final Bill Analysis, dated June 18, 2013, p. 31, stating that "[t]o facilitate the hearings, local governments may use their currently appointed code enforcement board or special magistrate to serve as the local hearing officer."

[12] It is a well-recognized principle of statutory construction that the mention of one thing implies the exclusion of another – *expressio unius est exclusio alterius*. Thus, when a statute enumerates the things upon which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all things not expressly mentioned. *See Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976); *Dobbs v. Sea Isle Hotel*, 56 So. 2d 341, 342 (Fla. 1952); *Ideal Farms Drainage District v. Certain Lands*, 19 So. 2d 234 (Fla. 1944).

[13] *And see* Op. Att'y Gen. Fla. 96-91 (1996), concluding that a person simultaneously serving as a value adjustment board special master and a civil traffic hearing officer would violate the constitutional dual office-holding provision.