Dual Office-holding, temporary office

Number: AGO 2013-08

Date: April 18, 2013

Subject:
Dual Office-holding, temporary office

Ms. Julie O. Bru
City Attorney
City of Miami
444 Southwest 2nd Avenue
Miami, Florida 33130-1910

RE: PUBLIC OFFICERS – DUAL OFFICE-HOLDING – MUNICIPALITIES – LAW ENFORCEMENT – temporary appointment of law enforcement officer as city manager violates dual office-holding prohibition when city manager is an officer. s. 5(a), Art. II, Fla. Const.

Dear Ms. Bru:

On behalf of the City of Miami, you ask the following question:

May a law enforcement officer serve as acting city manager when such appointment is of a limited and finite duration, without tenure or additional remuneration?

In sum:

A law enforcement officer may not serve as acting city manager when the city manager's position constitutes an office, regardless of the limited duration or benefits attendant to the office, without violating the dual office-holding prohibition in section 5(a), Article II, Florida Constitution.

You acknowledge that a law enforcement officer is an officer for purposes of the constitutional prohibition against dual office-holding in section 5(a), Article II, Florida Constitution, and state that the city manager for the City of Miami is also such an office. While you cite to Attorney General Opinion 2006-27, in which this office concluded that a city police chief could not serve as city manager until a successor was appointed without violating the dual office-holding prohibition, you question whether the fact that the appointment is temporary due to the city manager's being away from his or her office due to vacation or a medical procedure would affect the application of the dual office-holding prohibition.

Your letter indicates that the city manager is the appointed head of the administrative branch of city government and is empowered to exercise control over all departments and divisions of the city, execute contracts, and carry out policies adopted by the city commission. During temporary absences, the mayor, subject to the city commission's approval, may designate a qualified administrative officer to carry out the duties of the city manager.

Section 5(a), Article II of the Florida Constitution, provides in pertinent 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 provision prohibits a person from simultaneously serving in more than one "office" under the governments of the state, counties, or municipalities. This office has concluded that the constitutional prohibition applies to both elected and appointed offices.[1] While the Constitution does not define the term "office," the courts have stated that the term "implies a delegation of a portion of the sovereign power . . . [and] 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."[2]

A long recognized rule in this state, however, is that a legislative designation of an officer to perform *ex officio* the function of another office does not constitute holding two offices at the same time, provided the duties imposed are consistent with those being exercised.[3] Rather, the legislatively assigned duties are considered an addition to the existing duties of the officer.[4] It does not appear, nor have you proposed, that the law enforcement officer would be appointed to temporarily serve as city manager in an *ex officio* capacity.

The Florida Supreme Court in *Vinales v. State*,[5] held that the constitutional dual office-holding prohibition did not apply to the appointment of municipal police officers as state attorney investigators since the appointment was temporary and no additional remuneration was paid to such municipal police officers for performing such additional criminal investigative duties. In *Vinales*, however, there was a statute which specifically authorized the appointment of municipal police officers for some purposes as investigators for the state attorney.[6] The district court's opinion, adopted by the Supreme Court, concluded that "the legislature has thus construed the applicable section of our state constitution as one which does not prohibit dual office holding on a temporary basis without remuneration for the purpose of criminal investigation."[7] In Attorney General Opinion 84-25, this office considered whether a member of a municipal board of adjustment could also serve as a part-time municipal police officer. Concluding that the *Vinales* exception would not apply to such a situation because the law enforcement duties were performed on a periodic and regular basis, not a temporary one, the opinion also observed that the *Vinales* case dealt "with the performance of additional law enforcement functions and duties in a police capacity and not the exercise of governmental power or performance of official duties on a disparate municipal board exercising and performing quasi-judicial power[s] and duties."

While the courts have enumerated "tenure, duration and duties in exercising some portion of the sovereign power, conferred or defined by law and not by contract" as noted above, I have found no discussion which imposes a minimum or maximum time on the duration of serving in an office which would otherwise affect the position’s characterization as such. While in the instance you have proposed, the law enforcement officer would be serving only for a limited time, he would be holding the office for a specified time and exercising the powers attendant thereto.[8] Had the constitution considered temporary appointments to be an exception to the dual office-holding

prohibition, the provisions in section 5(a), Article II, Florida Constitution, could have easily addressed such a situation as an exemption.[9]

Accordingly, it is my opinion that a law enforcement officer may not be appointed to act as the city manager for the City of Miami, where the city manager's position is an office, without violating the dual office-holding prohibition in section 5(a), Article II of the Florida Constitution.

Sincerely,

Pam Bondi
Attorney General

PB/tals

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[1] *See, e.g.,* Op. Att'y Gen. Fla. 80-97 (1980).

[2] *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).

[3] *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).

[4] *See* Webster's Third New International Dictionary *Ex officio*, p. 797 (unabridged ed. 1981) ("ex officio" means "by virtue or because of an office").

[5] 394 So. 2d 993 (Fla. 1981).

[6] *See* s. 27.251, Fla. Stat. (1978 Supp.).

[7] 394 So. 2d at 994. *And see Rampil v. State*, 422 So. 2d 867 (Fla. 2d DCA 1982), following the *Vinales* exception and concluding that it did not violate the dual office-holding provision for a city police officer, in conducting a wiretap, to act in the capacity of a deputy sheriff, since that officer received no remuneration for such duties.

[8] *See* Webster's Third New International Dictionary *Tenure*, p. 2357 (unabridged ed. 1981) ("tenure" means "the act, action, or a means of holding something").

[9] *Cf.* s. 5(a), Art. II, Fla. Const., providing in pertinent part, "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."