Dual Office Holding, housing authority

Number: AGO 2012-35

Date: November 16, 2012

Subject:
Dual Office Holding, housing authority

The Honorable Ira J. Raab (Retired)
Justice, New York State Supreme Court
9452 Lantern Bay Circle
West Palm Beach, Florida 33411-5169

RE: DUAL OFFICE-HOLDING - SPECIAL DISTRICTS - HOUSING AUTHORITIES - HOUSING FINANCE AUTHORITIES - DEPENDENT SPECIAL DISTRICTS - MUNICIPALITIES - housing authority and housing finance authority members as officers for purposes of dual office-holding prohibition. Art. II, s. 5(a), Fla. Const.; Part I, Ch. 421, Fla. Stat.; Part IV, Ch. 159, Fla. Stat.

Dear Justice Raab:

You have requested my opinion on substantially the following question:

Does simultaneous service on the West Palm Beach Housing Authority and the Housing Finance Authority of Palm Beach County violate the dual office-holding prohibition of the Florida Constitution?

In sum:

Simultaneous service on the West Palm Beach Housing Authority and the Housing Finance Authority of Palm Beach County would violate the dual office-holding prohibition of the Florida Constitution as service on either of these would represent holding an office within the scope of Article II, section 5(a), Florida Constitution.

According to your letter, you have been appointed to the West Palm Beach Housing Authority and the Housing Finance Authority of Palm Beach County, but have not accepted either appointment. You are concerned that simultaneous service on both agencies may violate Florida's constitutional dual office-holding prohibition contained in Article II, section 5(a), Florida Constitution, and have requested direction from this office.

Article II, section 5(a), Florida Constitution, provides 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, . . . constitutional convention, or statutory body having only advisory powers."

This provision of the Florida Constitution prohibits a person from simultaneously holding more than one "office" under the state, county, or municipal governments and applies to both elected and appointed offices.[1]

The Constitution does not contain a definition of the terms "office" or "officer" for purposes of the dual office-holding prohibition. However, Florida courts and this office have advised that it is the nature of the powers and duties of a particular position that determines whether it is an "office" within the scope of the dual office-holding prohibition or an "employment" outside the scope of the provision.[2] The Florida Supreme Court has stated that an office "implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office[.]"[3] The term "office" encompasses the idea of tenure, duration, and duties in exercising a portion of the sovereign power, conferred or defined by law and not by contract, whereas an "employment" does not "comprehend a delegation of any part of the sovereign power."[4] Unquestionably service on the governing body of a governmental entity, such as a city or county, constitutes an office.[5] The issue for resolution here is whether your simultaneous service by appointment to the Palm Beach County Housing Finance Authority and the West Palm Beach Housing Authority represents an appointment to office which violates the dual office-holding prohibition of the Florida Constitution.

The dual office-holding prohibition refers only to state, county, and municipal offices. It is not applicable to independent special district officers serving on governmental entities created by law to perform a special and limited governmental function. The Florida Attorney General's Office has concluded that there was no violation of the dual office-holding prohibition when a state, county, or municipal officer also served as an officer of an independent special district.[6] In a Florida Supreme Court advisory opinion from 1994, the Court reiterated that special district officers are not included within the dual office-holding prohibition. In *In re Advisory Opinion to the Governor - Dual Office-Holding*,[7] the Court concluded that a member of a community college district board of trustees was an officer of a special district created to perform the special governmental function of operating a community college and was not a state, municipal, or county officer within the meaning of Article II, section 5(a), Florida Constitution. Thus, this office concluded that the dual office-holding prohibition did not keep a state, county, or municipal officer from serving on a community college board of trustees.

Although membership on the board of trustees of a community college district was determined to constitute a special district office and thus to be outside the parameters of Article II, section 5(a), Florida Constitution, the Florida Supreme Court in *In re Advisory Opinion to the Governor - School Board Member - Suspension Authority*[8] rejected the designation of school board members as district officers. In that case, the Governor had requested that the Court determine whether school board members could be suspended under the constitutional provisions governing county officers or whether a suspension should be accomplished under the statutory provisions governing district officers. The Court concluded that school board members are county officers who have equivalent powers and authority to that of county commission members although their power is exercised in different local governmental spheres. As county officers, therefore, school board members are precluded from simultaneously holding another state, county, or municipal office.

The Supreme Court was advised that the Florida Attorney General's Office had previously

considered school board members to be special district officers and outside the scope of Article II, section 5(a) of the Florida Constitution. Thus, a determination by the Court that school board members were county officers could result in potential dual office-holding violations for school board members who had relied on previously issued Attorney General Opinions. In response, the Court held that "[w]ith regard to those individuals who may be holding dual offices because of the attorney general's opinion 84-73, we conclude that this [*i.e.*, the Court's] opinion should be prospective in application. This prospective application should apply only until such time as the term of one of the dual offices expires."[9]

In light of the Florida Supreme Court's approach to the determination of an office, this office has cautioned that the nature and character of a district or authority must be reviewed to determine whether the governmental entity is an agency of the state, county or municipality so that its officers may be considered state, county or municipal officers for purposes of dual office-holding. In a situation very like the one you have presented, this office, in Attorney General Opinion 84-90, considered whether a member of the Volusia County Health Facilities Authority was a county officer. Although the health facilities authority was created and organized under Part III, Chapter 154, Florida Statutes, as a public body corporate and politic, it was created by county ordinance or resolution following a finding of necessity by the local governing body. The Volusia County governing body appointed the authority members, could exercise the power to remove the members, and was authorized to abolish the authority at any time. This office concluded under these facts that the authority was an instrumentality of the county and that its officers were actually county officers. Thus, the constitutional prohibition against dual office-holding precluded the mayor from also serving on the governing body of the county health facilities authority.

Similarly, in Attorney General Opinion 08-61, this office concluded that membership on the Volusia Growth Management Commission constituted an office for purposes of the constitutional dual office-holding prohibition. The commission was designated a dependent special district and was created by county charter to review comprehensive plan amendments. The council's budget was approved and funded by the county. The commission was made up of voting members appointed by the municipalities located within the county as well as by the county and included nonvoting members appointed by a number of other governmental entities. The commission's determinations of consistency were binding on the submitting governmental agency and actions of the council appeared to this office to be an exercise of the sovereign powers of the state. The opinion concluded that the Volusia Growth Management Commission appeared to be a part of county government and its members would be county officers.[10]

The Housing Finance Authority of Palm Beach County (the authority) is designated a dependent special district by the Division of Community Development.[11] Information supplied to the division by the authority indicates that Palm Beach County is the local governing authority which appoints the members of the authority.[12] Enabling documents for the housing finance authority are a series of county ordinances.[13] The "Florida Housing Finance Authority Law," Part IV, Chapter 159, Florida Statutes, provides statutory authority for this entity and indicates that the purpose for adoption of Part IV, Chapter 159, Florida Statutes, is

"[t]he financing, acquisition, construction, reconstruction, and rehabilitation of housing and of the real and personal property and other facilities necessary, incidental, and appurtenant thereto are exclusively public uses and purposes for which public money may be spent, advanced, loaned,

or granted and are governmental functions of public concern."[14]

In addition, in its "finding and declaration of necessity" for adoption of this legislation, the statute states that "[t]he Congress of the United States has . . . found and determined that housing may be financed by means of obligations issued by any state or local governmental unit . . . and has thereby provided a method to aid state and local governmental units to provide assistance to meet the need for housing."[15] The law specifically provides that

"[t[he county for which the housing finance authority is created may, at its sole discretion, and at any time, alter or change the structure, organization, programs, or activities of any housing finance authority, including the power to terminate such authority, subject to any limitation on the impairment of contracts entered into by such authority and subject to the limitations or requirements of this act."[16]

Among the powers of each housing finance authority is the power to "[c]reate or assist in creating corporations that qualify as not-for-profit corporations under s. 501(c)(3) of Internal Revenue Code of 1986, as amended, and under the laws of this state, and that are engaged in acquiring, constructing, reconstructing, or rehabilitating qualifying housing developments."[17] The authority itself is legislatively declared to "constitute a public body corporate and politic, exercising the public and essential governmental functions" described in the act.[18] The authority can sue and be sued;[19] own real and personal property;[20] borrow money through the issuance of bonds;[21] and purchase or make loans and take assignments of mortgage loans and promissory notes.[22] County housing authorities can also "own, maintain, operate, control, and capitalize a limited-purpose savings and loan association to provide low-cost loans and related services to eligible persons to obtain affordable housing[;]"[23] and make loans or grant surplus funds of the authority to corporations that qualify as not-for-profit corporations to support the development of affordable housing.[24] Authorities are authorized to issue revenue bonds and may issue refunding bonds to pay, retire, or refund the bonds issued by another housing finance authority.[25]

Based on the substantial powers and duties imposed on a county housing finance authority set forth in Part IV, Chapter 159, Florida Statutes, as well as the county's role in appointing its members and enacting ordinances controlling the actions of such an authority, it is my opinion that a member of the Housing Finance Authority of Palm Beach County is a county officer for purposes of Florida(s dual office-holding prohibition.[26]

Similarly, the West Palm Beach Housing Authority is designated a dependent district under the control of the City of West Palm Beach. The housing authority is created pursuant to Part I, Chapter 421, Florida Statutes, by approval of a city resolution. The purpose of Florida's "Housing Authorities Law," Part I, Chapter 421, Florida Statutes, is to address the existence of unsanitary or unsafe dwelling accommodations for low income Floridians through

"[t]he clearance, replanning and reconstruction of the areas in which insanitary or unsafe housing conditions exist and the providing of safe and sanitary dwelling accommodations for persons of low income, including the acquisition by a housing authority of property to be used for or in connection with housing projects or appurtenant thereto, are exclusively public uses and purposes for which public money may be spent and private property acquired and are

governmental functions of public concern."[27]

Housing authorities are constituted by the Legislature as public bodies corporate and politic.[28] Commissioners of a municipal housing authority are appointed by the mayor of the controlling municipality with the approval of the governing body.[29] Commissioners may be removed by the mayor "[f]or inefficiency or neglect of duty or misconduct in office[.]"[30]

Among the powers extended to a municipal housing authority by Part I, Chapter 421, Florida Statutes, is the power to invest funds and issue bonds;[31] to prepare, carry out, acquire, lease, and operate housing projects;[32] to lease or rent houses, lands, buildings, or structures "embraced in any housing project" and to establish rents for those properties.[33] A housing authority is also authorized within its area of operation to investigate living conditions and housing conditions for purposes of improving these conditions and can conduct examinations and investigations and issue subpoenas.[34] The statutes authorize a housing authority to create for-profit or not-for-profit corporations, limited liability companies, or other similar business entities in which the housing authority may hold an ownership interest.[35]

Recognizing the substantial powers and duties exercised by a commissioner of a municipal housing authority under Part I, Chapter 421, Florida Statutes, and the relationship of these entities to the municipality, it is my opinion that the commissioners of a municipal housing authority are municipal officers and subject to the dual office-holding prohibition set forth in Article II, section 5(a), Florida Constitution.[36]

Thus, in answer to your question, it is my opinion that simultaneous service on the West Palm Beach Housing Authority and the Housing Finance Authority of Palm Beach County would violate the dual office-holding prohibition of the Florida Constitution as service on both of these would represent holding dual offices within the scope of Article II, section 5(a), Florida Constitution.

Sincerely,

Pam Bondi
Attorney General

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[1] *See, e.g.,* Ops. Att'y Gen. Fla. 69-2 (1969), 80-97 (1980), 94-66 (1994), and 08-15 (2008).

[2] *See State ex rel. Holloway v. Sheats*, 83 So. 508 (Fla. 1919); Ops. Att'y Gen. Fla. 99-34 (1999) (membership on the Florida State Fair Authority constitutes an office for purposes of Art. II, s. 5[a], Fla. Const.) and 91-80 (1991) (insurance fraud investigator is "office" for purposes of dual office-holding prohibition).

[3] *State ex rel. Holloway v. Sheats, id.* at 509 (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; and employment does not authorize the exercise in one's own right of

any sovereign power or any prescribed independent authority of a governmental nature). *See also State ex rel. Clyatt v. Hocker*, 22 So. 721 (Fla. 1897).

[4] *Id.*

[5] *See* Ops. Att'y Gen. Fla. 72-348 (1972) and 74-73 (1974).

[6] *See, e.g.,* Ops. Att'y Gen. Fla. 08-06 (2008) (mosquito control district); 02-49 (2002); 02-83 (2002) (water control district); and 02-22 (2002) (fire protection district).

[7] 630 So. 2d 1055, 1058 (Fla. 1994).

[8] 626 So. 2d 684 (Fla. 1993).

[9] *Id.* at 690.

[10] *And see* Op. Att'y Gen. Fla. 91-79 (1991) (Fort Walton Beach Area Bridge Authority, dependent special district within the county, determined to be an instrumentality of the county for dual office-holding purposes). *Cf.* Op. Att'y Gen. Fla. 90-91 (1990), concluding that the Hillsborough County Hospital Authority, created by special act with all powers of a body corporate, whose members are appointed by the Hillsborough County Commission which possesses the power to fill vacancies on the authority, remove members for misfeasance, malfeasance or willful neglect of duty, and approve the authority's budget, was a county agency. *And see* Inf. Op. to the Honorable Bob Starks, dated March 25, 1997, stating that the Sanford Airport Authority, created by special act of the Legislature as a dependent special district to the municipality, was an agency of the city and thus subject to the dual office-holding prohibition.

[11] *See* Division of Community Development Special District Information Program, Official List of Special Districts Online.

[12] *And see* s. 159.605(1), Fla. Stat. Enabling documents for the housing finance authority are a series of county ordinances.

[13] *See* Palm Beach County Ordinances 79-3, 91-7, 98-53, 01-016, and 02-22.

[14] Section 159.602(3), Fla. Stat.

[15] Section 159.602(4), Fla. Stat.

[16] Section 159.604(3), Fla. Stat.

[17] Section 159.605(2)(b)4., Fla. Stat.

[18] Section 159.608, Fla. Stat.

[19] Section 159.608(1), Fla. Stat.

[20] *Id.* at (2).

[21] Section 159.608(4), Fla. Stat

[22] Section 159.608(3), Fla. Stat. *And see* Ops. Att'y Gen. Fla. 09-17 (2009) (Housing Finance Authority of Palm Beach County may loan funds to for-profit developers for development of qualifying housing or construction, purchase, reconstruction, or rehabilitation of qualifying housing under provisions of Part IV, Ch. 159, Fla. Stat., if such housing fulfills purposes of the act) and 00-14 (2000) (Housing Finance Authority of St. Johns County authorized by s. 159.608[3], Fla. Stat., to make mortgage loans to individuals for purchase of qualifying housing developments, such as a small apartment complex to be rented to low-income families or individuals).

[23] Section 159.608(9), Fla. Stat. *But see* Op. Att'y Gen. Fla. 90-64 (1990) (housing authorities created pursuant to Ch. 159, Fla. Stat., not authorized to establish, wholly own, and operate state-chartered savings bank).

[24] Section 159.608(10)(a), Fla. Stat.

[25] Section 159.612(1), Fla. Stat. *And see* Op. Att'y Gen. Fla. 96-73 (1996) (Housing Finance Authority of Monroe County is an agency or subdivision of state and, as agency that may employ professional service consultants, it falls within scope of Consultants' Competitive Negotiation Act and must follow requirements of that act when developing real property; further, authority must comply with s. 255.20, Fla. Stat., in those cases where authority owns the public building, structure, or other public construction work).

[26] *And see* Op. Att'y Gen. Fla. 09-48 (2009).

[27] Section 421.02(3), Fla. Stat.

[28] Section 421.08, Fla. Stat.

[29] Section 421.05(1), Fla. Stat.

[30] Section 421.07, Fla. Stat.

[31] Section 421.08(5), Fla. Stat.

[32] *Id.* at (2).

[33] Section 421.08(4), Fla. Stat.

[34] *Id.* at (6) and (7).

[35] Section 421.08(8)(a), Fla. Stat.

[36] *Compare* Op. Att'y Gen. Fla. 99-49 (1999), in which this office advised that a commissioner

of a county housing authority, appointed by the Governor and subject to removal by the Governor "in the same manner and for the same reasons as other officers appointed by the Governor," was not subject to the dual office-holding prohibition as he or she was an officer of an independent special district; *and compare* Op. Att'y Gen. Fla. 96-73 (1996) (Housing Finance Authority of Monroe County is an agency or subdivision of state and, as agency that may employ professional service consultants, it falls within scope of Consultants' Competitive Negotiation Act and must follow requirements of that act when developing real property; further, authority must comply with s. 255.20, Fla. Stat., in those cases where authority owns the public building, structure, or other public construction work).