Dual Office-Holding, county emergency mgt. officer

Number: AGO 2012-28

Date: August 08, 2012

Subject:
Dual Office-Holding, county emergency mgt. officer

Ms. L. Rebecca Behl-Hill
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Office of the County Attorney
2725 Judge Fran Jamieson Way
Viera, Florida 32940

RE: DUAL OFFICE-HOLDING – COUNTIES – EMERGENCY MANAGEMENT – MUNICIPALITIES – CITY COUNCIL – whether county director of county emergency management is officer or employee. Art. II, s. 5(a), Fla. Const.; s. 252.38, Fla. Stat.

Dear Ms. Behl-Hill:

On behalf of a Brevard County employee, you have asked for my opinion on substantially the following questions:

1. May an elected member of a local city council simultaneously hold the position of County Director of the Emergency Operations Center without violating Florida's constitutional dual office-holding prohibition?

2. If the answer to Question One is that a violation will occur, can the Director designate someone else to vote in her place in an emergency; therefore removing any concern over the decision-making authority granted to the Director as a member of the policy group during a declared emergency?

In sum:

1. The position of the Brevard County Director of the Emergency Operations Center is an office, not an employment, and is subject to the dual office-holding prohibition contained in Article II, section 5(a) of the Florida Constitution. Thus, a city councilwoman may not simultaneously hold that office and the office of county Director of the Emergency Operations Center without violating the constitutional dual office-holding prohibition.

2. A violation of the prohibition set forth in Article II, section 5(a), Florida Constitution, cannot be avoided by the abstention or recusal from certain votes by the director of a county emergency operations center.

Question One

According to your letter, a Brevard County employee was recently appointed by the county manager to act as Interim Director of the Emergency Operations Center. This employee is also

an elected member of a local city council. You recognize that the position of city councilwoman is a public office. However, you suggest that the Director of the Emergency Operations Center may be a county employee rather than an officer based on the duties of that position under section 252.38, Florida Statutes.

The constitutional dual office-holding provision is contained in Article II, section 5(a) of the Florida Constitution, and provides in part 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, taxation and budget reform commission, constitutional convention, or statutory body having only advisory powers."

This provision of the constitution prohibits a person from simultaneously holding more than one "office" under the government of the state, counties, and municipalities. It is not necessary that the two offices be within the same governmental unit. Thus, for example, a municipal officer is precluded from holding not only another municipal office, but also a state or county office.

The prohibition applies to both elected and appointed offices. [1] There is no definition of the term "office" in the Constitution, although the Supreme Court of Florida has stated that the term "implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office . . . ." [2] Within the scope of the term are the concepts of tenure, duration, and duties in exercising some portion of the sovereign power, conferred or defined by law rather than by contract. By contrast, an "employment" does not "comprehend a delegation of any part of the sovereign power." [3]

Section 252.38, Florida Statutes, makes provision for the emergency management powers of political subdivisions. With regard to counties, the statute recognizes that "[s]afeguarding the life and property of its citizens is an innate responsibility of the governing body of each political subdivision of the state." [4] To accomplish this responsibility, the Legislature has authorized counties to establish and maintain emergency management agencies. As defined in section 252.34(5), Florida Statutes, "[l]ocal emergency management agency" means "an organization created in accordance with the provisions of ss. 252.31 - 252.90 to discharge the emergency management responsibilities and functions of a political subdivision."

Each agency is required by statute to have a director, appointed by the board of county commissioners or the chief administrative officer of the county and serving at the pleasure of the appointing officer or officers. [5] The statute provides an *ex officio* exception for county constitutional officers to serve as the county emergency management director and an employee of a county constitutional officer also may do so. [6] Section 252.38(1)(b), Florida Statutes, provides that "[e]ach director has direct responsibility for the organization, administration, and operation of the county emergency management agency" and acts as liaison to the Florida Division of Emergency Management and to other local emergency management agencies and organizations.

As discussed above, the county emergency management director is statutorily charged with

discharging the emergency management responsibilities and functions of the county. Section 252.38(3), Florida Statutes, outlines the emergency management powers of political subdivisions. Among the powers political subdivisions may exercise in emergencies is the power:

"1. To appropriate and expend funds; make contracts; obtain and distribute equipment, materials, and supplies for emergency management purposes; provide for the health and safety of persons and property, including emergency assistance to the victims of any emergency; and direct and coordinate the development of emergency management plans and programs in accordance with the policies and plans set by the federal and state emergency management agencies.

2. To appoint, employ, remove, or provide, with or without compensation, coordinators, rescue teams, fire and police personnel, and other emergency management workers.

* * *

4. To assign and make available for duty the offices and agencies of the political subdivision, including the employees, property, or equipment thereof relating to firefighting, engineering, rescue, health, medical and related services, police, transportation, construction, and similar items or services for emergency operation purposes, as the primary emergency management forces of the political subdivision for employment within or outside the political limits of the subdivision." [7]

In addition, the political subdivision has the authority to waive the procedures and formalities otherwise required of political subdivisions for:

"a. Performance of public work and taking whatever prudent action is necessary to ensure the health, safety, and welfare of the community.
b. Entering into contracts.
c. Incurring obligations.
d. Employment of permanent and temporary workers.
e. Utilization of volunteer workers.
f. Rental of equipment.
g. Acquisition and distribution, with or without compensation, of supplies, materials, and facilities.
h. Appropriation and expenditure of public funds."[8]

As the officer charged with discharging the emergency management responsibilities and functions of the county, the county emergency management director appears to have been delegated a substantial portion of the sovereign power of the county.

Based on the statutory enumeration of powers set forth in section 252.38, Florida Statutes, and exercisable by the director of the county emergency management agency on behalf of the county, it is my opinion that the director of a county emergency management agency is an officer rather than an employee. The county emergency management director acts in the service of the government and derives his or her position from a duly and legally authorized appointment. The duties of the emergency management director are continuous in nature and defined by rules prescribed by government and not by contract. The director of the county emergency management exercises important public powers, trusts, and duties, as part of the administration

of the government.

In sum, it is my opinion that the position of the Brevard County Director of the Emergency Operations Center is an office, not an employment, and is subject to the dual office-holding prohibition contained in Article II, section 5(a) of the Florida Constitution. Thus, a city councilwoman may not simultaneously hold that office and the office of Director of the Emergency Operations Center without violating the constitutional dual office-holding prohibition.

Question Two

You also ask whether the constitutional prohibition can be avoided if the director of the emergency operations center designates an alternate to vote in her place during an emergency.

The dual office-holding prohibition is a limitation on the holding of two offices, it is not a conflict provision which could be avoided by abstention or recusal from a particular vote as is contemplated by section 112.3143(3), Florida Statutes. The dual office-holding prohibition cannot be overcome by delegating some of the duties of a second office to another while continuing in that office.

I would note that the Florida Supreme Court in *Holley v. Adams,*[9] a 1970 decision, established the general rule that "[t]he acceptance of an incompatible office by one already holding office operates as a resignation of the first." [10] Thus, an officer accepting another office in violation of the dual office-holding prohibition may create a vacancy in the first office.

In sum, it is my opinion that a violation of the prohibition set forth in Article II, section 5(a), Florida Constitution, cannot be avoided by the delegation of certain voting rights by the director of a county emergency operations center.

Sincerely,

Pam Bondi
Attorney General

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[1] *See State ex rel. Holloway v. Sheats*, 83 So. 508 (Fla. 1919) ("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, and between an employe[e] and an officer."). *And see, e.g.,* Ops. Att'y Gen. Fla. 96-91 (1996) (special master of county value adjustment board an officer); 84-93 (1984) (legal counsel to local government code enforcement board an employee); and 73-332 (1973) (attorney for county commission an employee).

[2] *Holloway v. Sheats, id*.

[3] *See* Ops. Att'y Gen. Fla. 05-15 (2005), 96-24 (1996), 80-97 (1980), and 69-2 (1969).

[4] Section 252.38, Fla. Stat.

[5] Section 252.38(1)(b), Fla. Stat.

[6] *Id.*

[7] Section 252.38(3)(a)1. - 4., Fla. Stat.

[8] Section 252.38(3)(a)5., Fla. Stat.

[9] 238 So. 2d 401 (Fla. 1970).

[10] *Id.* at 407.