Dual office-holding, railroad special officer

Number: AGO 2012-10

Date: February 29, 2012

Subject:
Dual office-holding, railroad special officer

Mr. George Gingo
Gingo & Orth
2215 Garden Street
Suite B
Titusville, Florida 32796

RE: DUAL OFFICE-HOLDING – SPECIAL OFFICERS FOR CARRIERS – RAILROADS – RESERVE OFFICERS – LAW ENFORCEMENT OFFICERS – special officer for railroad simultaneously serving as reserve officer without pay for local law enforcement agency. Art. II, s. 5(a), Fla. Const.; Ch. 354, Fla. Stat.

Dear Mr. Gingo:

On behalf of your client, Mr. Clifford Webster, you have asked for my opinion on substantially the following question:

Whether a special officer for a carrier under Chapter 354, Florida Statutes, may serve simultaneously as an unpaid reserve deputy sheriff without violating the Florida constitutional prohibition against dual office-holding?

In sum:

A special officer for a carrier under Chapter 354, Florida Statutes, may serve simultaneously as an unpaid reserve deputy sheriff without violating the Florida constitutional prohibition against dual office-holding expressed in Article II, section 5(a), Florida Constitution.

According to your letter, Mr. Webster has been a Brevard County deputy sheriff for the past 17 years and recently left the sheriff's office to take a position as a special officer for the Florida East Coast Railway Police Department. As described in section 354.01, Florida Statutes, Mr. Webster is a special officer for a carrier appointed by the Governor. Mr. Webster is considering volunteering his time with a local law enforcement agency as a reserve officer without remuneration, but is concerned that the Florida constitutional prohibition against dual office-holding could preclude his service in both positions. You have asked for my assistance in determining whether Mr. Webster may lawfully serve simultaneously in both capacities.

Chapter 354, Florida Statutes, provides for the appointment of special officers employed by railroads and other common carriers for the protection of the carrier's employees, passengers, freight, equipment, and properties.[1] Appointments of special officers for carriers are made by

the Governor, and applicants are required to meet specified law enforcement qualifications.[2] While special officers are required to meet the standards of a certified law enforcement officer in order to be commissioned, certification is not granted to these officers.[3] Section 354.02, Florida Statutes, provides for the powers of such special officers:

"Each special officer shall have and exercise throughout every county in which the common carrier for which he or she was appointed, shall do business, operate, or own property, the power to make arrests for violation of law on the property of such common carrier, and to arrest persons, whether on or off such carrier's property, violating any law on such carrier's property, under the same conditions under which deputy sheriffs may by law make arrests, and shall have authority to carry weapons for the reasonable purpose of their offices."

These officers are required to provide a surety bond to the Governor for the faithful performance of their duties.[4] The statutes prescribe a term of office for special officers and they may be removed by the Governor at any time.[5] Compensation for special officers is paid by the carrier and they receive no fees or salary from the state or any county.[6] Your question requires a determination of whether this position constitutes an "office" for purposes of Florida's dual office-holding prohibition.

Article II, section 5(a) 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 constitutional 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.[7] 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."[8]

This office and the courts have long recognized that law enforcement officers are "officers" subject to the constitutional dual office-holding prohibition.[9] The Florida Supreme Court has said:

"It can hardly be questioned that a patrolman on a city police force is clothed with sovereign power of the city while discharging his duty. . . . True, he is an employee of the city but he is also an officer. It is the character of duty performed that must determine his status."[10]

It is the powers that a law enforcement officer may exercise, particularly the authority to arrest without a warrant and to carry firearms in carrying out his duties, not the salary or certification requirements, that characterize the law enforcement officer as an "officer."[11] Based on these considerations, this office has stated that a certified reserve police officer is an "officer" for

purposes of section 5(a), Article II, Florida Constitution.[12]

However, the Supreme Court of Florida has recognized a limited exception to the constitutional dual office-holding prohibition in *Vinales v. State*,[13] which concerned the appointment of municipal police officers as state attorney investigators pursuant to statute. Since the police officers' appointment was temporary and no additional remuneration was paid for performing the additional criminal investigative duties, the Court held that the officers were not simultaneously holding two offices and thus the constitutional dual office-holding prohibition did not apply. The Second District Court of Appeal in *Rampil v. State*,[14] following the *Vinales* exception, concluded that it was not a violation of Article II, section 5(a), Florida Constitution, for a city police officer to act in the capacity of deputy sheriff since that officer received no remuneration for such duties.

The exception articulated in *Vilales* and *Rampil* has been applied only when both offices have related to criminal investigation or prosecution and not to the exercise of governmental power or performance of official duties on a disparate board or position. Thus, this office, in considering the *Vinales* and *Rampil* exception, has stated that the exception is limited and does not apply to a member of a municipal board of adjustment serving as a part-time law enforcement officer or to a police officer who serves as a law enforcement officer.[15] Likewise, in Attorney General Opinion 2006-27, this office concluded that the exception to dual office-holding recognized by the courts in *Vinales* and *Rampil* does not permit the police chief to serve as acting city manager without resigning his or her office.

Based upon the powers extended to special officers for carriers, I conclude that these officers would come within the scope of the term "officers" for purposes of Florida's constitutional prohibition against dual office-holding, *i.e.*, they are commissioned by the Governor, serve terms of office, have powers of arrest, and carry firearms. However, based on the exception recognized in the *Vinales* case for law enforcement officers performing additional law enforcement duties without remuneration, it is my opinion that Mr. Webster may simultaneously serve as a special officer and volunteer his time with a local law enforcement agency as an unpaid reserve officer without violating Article II, section 5(a) of the Florida Constitution.[16]

In sum, it is my opinion that a special officer for a carrier under Chapter 354, Florida Statutes, may serve simultaneously as an unpaid reserve deputy sheriff without violating the Florida constitutional prohibition against dual office-holding expressed in Article II, section 5(a), Florida Constitution.

Sincerely,

Pam Bondi
Attorney General

PB/tgh

---

[1] Section 354.01, Fla. Stat.

[2] *Id.*

[3] As to training requirements, *see* s. 943.13(1) - (10), Fla. Stat. *And see* Sunset Review of Railroads, Chs. 351, 354, and s. 361.025, Fla. Stat., prepared by the Staff of the Florida House of Representatives Committee on Regulatory Reform, November 1991.

[4] Section 354.03, Fla. Stat.

[5] *See* s. 354.05, Fla. Stat., which provides that a special officer's commission shall continue so long as he or she is employed in that capacity by the railroad or other common carrier.

[6] Section 354.04, Fla. Stat.

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

[8] *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).

[9] *See, e.g., Curry v. Hammond*, 16 So. 2d 523, 524 (Fla. 1944); *Maudsley v. City of North Lauderdale*, 300 So. 2d 304 (Fla. 4th DCA 1974); Ops. Att'y Gen. Fla. 57-165 (1957), 58-26 (1958), 69-2 (1969), 71-167 (1971), 72-348 (1972), 76-92 (1976), 77-89 (1977), 86-11 (1986), and 89-10 (1989).

[10] *Curry v. Hammond, id.*

[11] *Maudsley v. City of North Lauderdale*, 300 So. 2d 304 (Fla. 4th DCA 1974). *See State ex rel. Gibbs v. Martens*, 193 So. 835, 837 (Fla. 1940), in which the Court held that a probation officer was an "officer" since he had the right to arrest without a warrant for "no light is more sacred or more jealously guarded than the one that liberty shall not be infringed except by due process of law." *And see* Ops. Att'y Gen. Fla. 89-10 (1989), stating that the absence of a requirement that police officers file financial disclosure forms required of "public officials" does not alter their status as "officers" for purposes of dual office-holding.

[12] *See* Op. Att'y Gen. Fla. 77-63 (1977). *And see* Op. Att'y Gen. Fla. 86-105 (1986) concluding that auxiliary police officers who did not have authority to make arrests but who were certified, carried firearms and assisted regular police officers in carrying out their duties were "officers." *Compare* Op. Att'y Gen. Fla. 89-10 (1989) concluding that an administrative law enforcement position, having no law enforcement certification requirements or arrest powers and not authorized to independently exercise the sovereign powers of the state, is an employment and not an office for purposes of dual office-holding.

[13] 394 So. 2d 993 (Fla. 1981).

[14] 422 So. 2d 867 (Fla. 2d DCA 1982).

[15] *See* Op. Att'y Gen. Fla. 84-25 (1984). *And see* Op. Att'y Gen. Fla. 86-84 (1986) (*Vinales* and *Rampil* exceptions do not apply to a city council member simultaneously serving as a certified

auxiliary law enforcement officer).

[16] This office has stated that a part-time auxiliary or certified reserve police officer is an "officer" for purposes of s. 5(a), Art. II, Fla. Const. *See, e.g.,* Ops. Att'y Gen. Fla. 86-105 (1986) and 77-63 (1977).