Dual Officeholding -- Special Magistrates

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November 15, 2016

Mr. Lonnie N. Groot
Stenstrom, McIntosh, Cobert & Whigham
1001 Heathrow Park Lane, Suite 4001
Lake Mary, Florida 32746

Dear Mr. Groot:

As a hearing officer/special magistrate for Seminole County, you have asked whether an attorney may adjudicate code enforcement cases as a special magistrate for multiple jurisdictions by way of an interlocal agreement without violating the dual office-holding prohibition in section 5(a), Article II, State Constitution. You also inquire whether an individual may enter into multiple contracts to act as a special magistrate for multiple jurisdictions where the magistrate's jurisdiction is effective only for the period he or she is actively involved with a case and there is no overlapping of the service for each jurisdiction. Finally, you ask whether section 162.07, Florida Statutes, requires a special magistrate to render an oral decision at the conclusion of a hearing in which he or she has issued findings of fact and conclusions of law.

Regrettably, the answer to your first question necessarily involves comment upon the ability of local governments to enter into an interlocal agreement to carry out their individual code enforcement authority. This office would not be able to comment upon the authority of an individual governmental unit absent a request from a majority of the members of the governing body of said local government. While section 163.01, Florida Statutes, authorizes the joint exercise of any power, privilege, or authority which public agencies share in common, there are restrictions on the exercise of extra-territorial powers which must be followed.[1] Moreover, the plain language of the Interlocal Cooperation Act states "[t]his section is intended to authorize the entry into contracts for the performance of service functions of public agencies, but shall not be deemed to authorize the delegation of the constitutional or statutory duties of state, county, or city officers."[2]

Without entering into a detailed discussion of the use of mutually exclusive intermittent contracts under which an individual would act as a special magistrate for one jurisdiction and upon conclusion of the case would end his or her contractual obligation as a special magistrate for one jurisdiction before beginning service as a special magistrate for another jurisdiction, it would appear that such an arrangement would not fit within the spirit or actual definition of carrying out the duties of an office. While the term "office" has not been defined in the Florida Constitution or by statute for purposes of the dual office-holding prohibition, the Supreme Court of Florida has stated:

"The term 'office' implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office, while an 'employment' does not comprehend a delegation of

any part of the sovereign authority. *The 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*. 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 . . . ."[3] (e.s.)

Thus, the use of individual contracts, albeit exclusive to designated time periods which would not overlap, would be contrary to a delegation of a portion of sovereign power which is conferred or defined by law.

In addressing your question regarding whether section 162.07, Florida Statutes, requires the immediate rendering of an oral determination, it is recognized that section 162.03(2), Florida Statutes, authorizes a county or municipality to adopt an alternative code enforcement system giving code enforcement boards or special magistrates designated by the local governing body the authority to hold hearings and assess fines for code violations. The subsection also provides that a special magistrate "shall have the same status as an enforcement board under this chapter." Thus, while a special magistrate is not a member of the code enforcement board, there has been a delegation of the code enforcement authority to conduct hearings and the special magistrate is subject to the same requirements for conducting hearings as are imposed on a code enforcement board.

Section 162.07, Florida Statutes, prescribes the manner in which hearings will be conducted:

"(1) Upon request of the code inspector, or at such other times as may be necessary, the chair of an enforcement board may call a hearing of an enforcement board; a hearing also may be called by written notice signed by at least three members of a seven-member enforcement board or signed by at least two members of a five-member enforcement board. Minutes shall be kept of all hearings by each enforcement board, and all hearings and proceedings shall be open to the public. The local governing body shall provide clerical and administrative personnel as may be reasonably required by each enforcement board for the proper performance of its duties.

(2) Each case before an enforcement board shall be presented by the local governing body attorney or by a member of the administrative staff of the local governing body. If the local governing body prevails in prosecuting a case before the enforcement board, it shall be entitled to recover all costs incurred in prosecuting the case before the board and such costs may be included in the lien authorized under s. 162.09(3).

(3) An enforcement board shall proceed to hear the cases on the agenda for that day. All testimony shall be under oath and shall be recorded. The enforcement board shall take testimony from the code inspector and alleged violator. Formal rules of evidence shall not apply, but fundamental due process shall be observed and shall govern the proceedings.

(4) *At the conclusion of the hearing, the enforcement board shall issue findings of fact, based on evidence of record and conclusions of law, and shall issue an order affording the proper relief consistent with powers granted herein*. The finding shall be by motion approved by a majority of those members present and voting, except that at least four members of a seven-member enforcement board, or three members of a five-member enforcement board, must vote in order

for the action to be official. The order may include a notice that it must be complied with by a specified date and that a fine may be imposed and, under the conditions specified in s. 162.09(1), the cost of repairs may be included along with the fine if the order is not complied with by said date. A certified copy of such order may be recorded in the public records of the county and shall constitute notice to any subsequent purchasers, successors in interest, or assigns if the violation concerns real property, and the findings therein shall be binding upon the violator and, if the violation concerns real property, any subsequent purchasers, successors in interest, or assigns. If an order is recorded in the public records pursuant to this subsection and the order is complied with by the date specified in the order, the enforcement board shall issue an order acknowledging compliance that shall be recorded in the public records. A hearing is not required to issue such an order acknowledging compliance." (e.s.)

The plain language of the statute contemplates that there may be multiple cases placed on the agenda for a day of hearings by a code enforcement board or, in this instance, a special magistrate acting on behalf of the code enforcement board. While the language of the statute indicates that at the conclusion of the hearing, the enforcement board is to issue findings of fact, based upon the evidence presented and conclusions of law, and to issue an order affording relief, there is no specific requirement that an oral pronouncement be made, nor is there a specified timeframe within which the order must be rendered. It is noteworthy that the statute allows a certified copy of such order to be recorded with the county as notice to subsequent purchasers of real estate. This would be an indication that the section contemplates a written order.

Absent a requirement that an oral determination be delivered at the end of a hearing, it is beyond the authority of this office to read such a requirement into section 162.07, Florida Statutes.[4]

I trust these informal comments will be of assistance in clarifying the manner in which an office is conferred and the limitations on one individual exercising the powers of two or more offices, no matter how a contractual agreement is constructed.

Sincerely,

Lagran Saunders
Senior Assistant Attorney General

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[1] *See* s. 4, Art. VIII, State Const.

[2] Section 163.01(14), Fla. Stat. *Cf.* Op. Att'y Gen. Fla. 13-25 (2013) (s. 468.619, Fla. Stat., authorizes local jurisdictions by contract to create and support a joint building code inspection department and may designate a building code inspector from another local jurisdiction to serve as building code inspector; statute operates to impose *ex officio* duties upon the building code inspector to act in another jurisdiction).

[3] *State ex rel. Holloway v. Sheats*, 83 So. 508, 509 (Fla. 1919). *See also State ex rel. Clyatt v. Hocker*, 22 So. 721 (Fla. 1897).

[4] *Cf. Chaffee v. Miami Transfer Company, Inc.*, 288 So. 2d 209 (Fla. 1974), and Ops. Att'y Gen. Fla. 06-26 (2006) and 81-10 (1981), for the proposition that the Attorney General is without authority to qualify or read into a statute an interpretation or to define words in a statute in a manner which would result in a construction that seems more equitable under circumstances presented by a particular factual situation; such construction when the language of a statute is clear would, in effect, be an act of legislation which is exclusively the prerogative of the Legislature.