Charter Schools -- Dual Office-holding

Number: INFORMAL

Date: August 05, 2014

Ms. Kimberly Rothenburg
Interim City Attorney
City of West Palm Beach
Post Office Box 3366
West Palm Beach, Florida 33402

Dear Ms. Rothenburg:

As Interim City Attorney for the City of West Palm Beach, you have asked whether a City Commissioner and the Mayor of the City of West Palm Beach can serve as *ex officio* members of the governing body of a municipal charter school created pursuant to section 1002.33, Florida Statutes, while simultaneously serving as members of the City Commission without violating the Florida's constitutional dual office-holding prohibition. Attorney General Bondi has asked me to respond to your letter.

Your letter relates that the City of West Palm Beach plans to open a municipal charter school pursuant to section 1002.33, Florida Statutes. The City intends to establish the school by ordinance which will include a governing board for the school to include one city commissioner and the mayor or a designee. You ask whether Article II, section 5(a), Florida Constitution, Florida's constitutional dual office-holding prohibition, would preclude simultaneous service on the charter school board by the mayor and a city commissioner if this simultaneous service is characterized as "ex officio" in the ordinance creating the school and establishing the board.

I understand from your letter that this ordinance has not been drafted and this office has received no details of the powers and duties of the charter school governing board. In the absence of such information, my comments must be limited to a general discussion of the *ex officio* designation as it relates to Article II, section 5(a), Florida Constitution.

The Florida constitutional dual office-holding prohibition is set forth in Article II, section 5(a), Florida Constitution, and provides in relevant 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."

The Constitution prohibits a person from simultaneously serving in more than one "office" under the state, county, or municipal governments. Both appointed and elected offices come within the scope of the constitutional prohibition.[1] While the term "office" is not defined in the Constitution, 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]

However, assuming a particular officeholder is subject to the dual office-holding prohibition, it is a long settled rule in this state that a legislative designation of that officer to perform *ex officio* the function of another or additional office is not a holding of two offices simultaneously in violation of the Constitution, provided the duties imposed are consistent with those being exercised.[3] As the Supreme Court of Florida stated in *Bath Club Inc. v. Dade County*,[4]

"Article II, section 5(a) was manifestly fashioned to ensure that multiple state, county, and municipal offices will not be held by the same person. Underlying this objective is the concern that a conflict of interest will arise by dual officeholding whenever the respective duties of office are inconsistent. Where additional duties are assigned to constitutional officers and there is no inconsistency between these new and pre-existing duties, however, the dual officeholding prohibition does not preclude such an assignment. In such cases, newly assigned duties are viewed merely as an addition to existing responsibilities."

As the Court recognized, the Legislature may assign additional powers and duties, not inconsistent with pre-existing duties, to a public official such that there is an *ex officio* extension of the office. The *ex officio* exception exists when the enabling legislation authorizing the creation of the board in question designates a public officer to serve as a member of the board and thereby imposes additional or *ex officio* duties upon that officer.[5]

This office, in Attorney General Opinion 00-72, stated that a legislative designation that a representative from county government, the school district, the sheriff's office, the circuit court, and the county children's board serve on a Community Alliance established in section 20.19, Florida Statutes, constituted an *ex officio* designation of officers from the enumerated governmental entities. Thus, the opinion concluded that public officers of the entities statutorily enumerated could serve on Community Alliances in an *ex officio* capacity without violating the dual office-holding prohibition in section 5(a), Article II, Florida Constitution.[6] Similarly, in Attorney General Opinion 03-20, it was determined that a member of the Nassau County School Board could also serve in an ex officio capacity on the county planning and zoning board with the authority to vote on matters relating to comprehensive plan amendments and rezoning. A statute required that a representative of the school district be appointed by the school board to the local planning agency.

Thus, it would appear that Article II, section 5(a), Florida Constitution, Florida's constitutional dual office-holding prohibition, would not preclude simultaneous service on the charter school board by the mayor and a city commissioner if this simultaneous service is characterized as "ex officio" in the ordinance creating the school and establishing the board so long as the two offices are not incompatible or inconsistent.

This informal advisory opinion was prepared by the Department of Legal Affairs in an effort to be of assistance to you. The opinions expressed herein are those of the writer and do not constitute a formal opinion of the Attorney General.

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

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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). *See also 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). *And see* Op. Att'y Gen. Fla. 80-97 (1980) (membership of elected municipal officer on metropolitan planning organization as prescribed by statute does not violate Art. II, s. 5[a], Fla. Const.).

[4] 394 So. 2d 110, 112 (Fla. 1981).

[5] *See, e.g.,* s. 30.15(1)(l), Fla. Stat. (sheriff *ex officio* timber agent); s. 39.001(7)(b)1., Fla. Stat. (representatives of Department of Law Enforcement and Department of Education *ex officio* members of task force); s. 153.60, Fla. Stat. (county commissioners *ex officio* governing body of water and sewer district); and s. 161.25, Fla. Stat. (county commissioners *ex officio* beach and shore preservation authority). *And see* Op. Att'y Gen. Fla. 81-72 (1981) (city council, as the legislative body for the municipality, may by ordinance impose the additional or *ex officio* duties of the office of city manager on the city clerk).

[6] *And see* Inf. Op. to Ms. Joni Goodman, dated May 4, 2001.