Dual Office Holding, temporary service

Number: INFORMAL

Date: June 29, 2010

The Honorable Trudy Block
Vice Mayor, City of Polk City
123 Broadway Boulevard Southeast
Polk City, Florida 33868

Dear Ms. Block:

You have requested this office's assistance in determining whether, as Vice Mayor of the City of Polk City, you may serve simultaneously as the Acting Town Manager of the city. Attorney General McCollum has asked me to respond to your request for assistance.

According to your letter, the Town Manager of Polk City unexpectedly resigned that position on June 16th. This resignation was unanimously accepted by the Polk City Council. The City Council thereafter unanimously appointed you to serve temporarily as the Acting Town Manager based on provisions of the Polk City Charter. You, and the Polk City Council, have requested this office's comment on any possible dual office-holding implications of this temporary appointment.

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 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.[1] 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."[2]

It has long been a settled rule in this state, however, that, assuming a particular officeholder is subject to the constitutional dual office-holding prohibition, a legislative designation of that officer to perform *ex officio* the function of another or additional office does not constitute holding two offices at the same time in violation of the Constitution, provided the duties imposed are consistent with those being exercised.[3] Rather, the newly assigned duties are viewed as an addition to the existing duties of the officer.[4]

For example, in *Advisory Opinion to Governor*,[5] the Florida Supreme Court determined that the chairman of the State Road Department could serve as an *ex officio* member of the State Planning Board. The Court pointed out, however, that while additional duties may be validly imposed by the Legislature on a state office *ex officio*, a legislative attempt to authorize the Governor to appoint a state official to another separate and distinct office would be ineffectual under the constitutional dual office-holding prohibition. Thus, there is a distinction between a statute or code provision imposing an *ex officio* position on the holder of another office and one authorizing the appointment of one officeholder to another distinct office.

This office has also recognized that when *ex officio* duties are imposed, Article II, section 5(a), Florida Constitution, is not violated. For example, in Attorney General Opinion 81-72, this office stated that a city council, as the legislative body of a municipality, could impose by ordinance the *ex officio* duties of the office of the city manager on the office of the city clerk. Similarly, this office, in Attorney General Opinion 91-48, concluded that while the city commission could not appoint the city manager to simultaneously serve as the city clerk, the charter could impose the duties of the clerk as additional *ex officio* duties on the office of the city manager. Attorney General Opinion 93-42 concluded that a municipality could legislatively merge the offices of fire chief and community redevelopment director into one office and have the one officer perform *ex officio* duties of the other office.[6] However, as this office noted in Attorney General Opinion 70-46, it is doubtful that a city commissioner could also be a municipal judge where the charter created the office of municipal judge as a separate and distinct office and did not designate that office as an *ex officio* office to be performed by a city commissioner.

A review of the City of Polk City Charter reveals that the Vice Mayor is selected by the members of the city council from among those members at the first regular meeting in April of each year.[7] As provided in the code:

"D. A Vice Mayor shall have equal power with other Council Members. He/she shall perform the functions and duties of the Mayor-Council Member in the event that the Mayor Council Member in [sic] unable to do so for any reason.

E. The Mayor and Vice Mayor shall have primary signatory authority on the city checking account. All checks will require two (2) signatures. If the Mayor or Vice Mayor is not available to sign checks, the first alternate will be a designated Council Member and the second alternate will be the City Manager."[8]

Thus, there is no question that the Vice Mayor, as an elected member of the city council and in performing the duties and responsibilities of vice mayor, is an officer for purposes of the constitutional dual office-holding prohibition.

The Town Manager is the chief administrative officer of the City of Polk City. The Town Manager is appointed for a term pursuant to an employment contract and may be removed by the city council. Pursuant to the city charter:

"The Town Manager shall:
(1) Appoint and, when he deems it necessary for the good of the town, suspend or remove all town employees and appointive administrative officers provided for by or under this Charter,

except as otherwise provided by law, this Charter or personnel rules adopted pursuant to this Charter. He may authorize any administrative officer who is subject to his direction and supervision to exercise these powers with respect to subordinates in that officer's department, office or agency.
(2) Direct and supervise the administration of all other departments, offices and agencies of the town, except as otherwise provided by this Charter or by law.
(3) Attend all Council meetings and shall have the right to take part in discussion but may not vote.
(4) See that all laws, provisions of this Charter and acts of the Council, subject to enforcement by him or by officers subject to his direction and supervision, are faithfully executed.
(5) Prepare and submit the annual budget, budget message and capital program to the Council in a form provided by ordinance.
(6) Submit to the Council and make available to the public a complete report on the finances and administrative activities of the town as of the end of each fiscal year.
(7) Make such other reports as the Council may require concerning the operations of town departments, offices and agencies subject to his direction and supervision.
(8) Keep the Council fully and continuously advised as to the financial condition and future needs of the town and make such recommendations to the Council concerning the affairs of the town as he deems desirable.
(9) Sign contracts on behalf of the town pursuant to the provisions of appropriations ordinances.
(10) Perform such other duties as are specified in this Charter or may be required by the Council."[9]

The city charter also makes provision for appointment of an Acting Town Manager. Section C-20 of the city charter states that:

"B. In the event that, by reason of death, sickness, resignation, absence or discharge of the City Manager, the office of City Manager shall be temporarily vacant, the City Council shall appoint an Acting Manager to act pending the filling of the vacancy, and such Acting Manager shall have temporarily the powers hereby vested in a City Manager for a period of thirty (30) days. The initial thirty-day vacancy may be renewable for additional thirty (30) day periods as necessary to fill the vacancy of Town Manager. Any member of the City Council may serve, temporarily, as Acting City Manager while serving as a Council Member."

Thus, the City of Polk City has legislatively designated the responsibilities of Acting City Manager to be an *ex officio* duty of members of the city council.[10]

Therefore, it would appear that the City of Polk City charter reflects the designation of a member of the city council to serve *ex officio* as Acting Town Manager in the event of the resignation of the Town Manager. Such an *ex officio* designation imposing the duties of one office on another office would not violate the provisions of Article II, section 5(a), Florida Constitution.

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). *And see 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) (where the statutes had been amended to authorize municipal officials to serve on the board of trustees of municipal police and firefighters' pensions trust funds, such provision did not violate the constitutional dual office-holding prohibition).

[4] *See* Webster's Third New International Dictionary *Ex officio*, p. 797 (unabridged ed. 1981) ("ex officio" means "by virtue or because of an office").

[5] 1 So. 2d 636 (Fla. 1941).

[6] *And see* Ops. 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.); 94-66 (1994) (designation by county ordinance that county commissioners would perform the functions of the board of adjustment appeared to be an ex officio designation and did not violate the dual office-holding prohibition); 94-98 (1994) (imposition of additional duties on the mayor or other city council members under the city code to serve on the board of trustees of the police officers' and firefighters' pension trust fund would not violate Art. II, s. 5(a), Fla. Const); and 00-72 (2000) (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 constituted an *ex officio* designation of officers from the enumerated governmental entities). *Cf.* Op. Att'y Gen. Fla. 90-45 (1990), in which this office concluded that a member of the civil service board could not be appointed to the board of trustees of the general pension trust board since there was no *ex officio* designation imposing the duties of one office on the other.

[7] *See* s. C-7, Charter of the City of Polk City.

[8] Section C-7. D. and E., *id*.

[9] Section C-21 A., supra n.7.

[10] *And see* s. C-20 of the city charter which allows the council to "appoint an elected official of the town to serve until the Manager shall return or his disability shall cease."