Police pension board, ex officio designation

Number: INFORMAL

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Mr. Lonnie N. Groot
Attorney for the City of Sanford
1001 Heathrow Park Lane
Suite 4001
Lake Mary, Florida 32746

Dear Mr. Groot:

You have asked this office to comment on the appointment of a city's police chief to the city's police pension board as an *ex officio* duty of the chief's office. You relate that the City of Sanford by ordinance made the appointment, but that the Florida Department of Management Services (DMS) objected to the appointment by ordinance, citing to the state statute providing for the composition of the police pension board. DMS has stated that the composition may not be changed by local ordinance. As DMS is the agency charged with implementing the provisions of Chapter 185, Florida Statutes, this office will defer to that agency's interpretation of the chapter's requirements.[1]

You question, however, whether the appointment of the police chief to the police pension board would violate the constitutional prohibition against dual office-holding and, if so, would the matter be resolved by making such service *ex officio*, should the police chief be appointed to the board.

In Attorney General Opinion 2000-38, this office considered whether a police officer elected by his peers to serve as an *ex officio* member of the board of trustees of the city's police pension plan created pursuant to Chapter 185, Florida Statutes, could continue to serve as an *ex officio* member of the board after being appointed police chief. The opinion noted that section 185.05, Florida Statutes (2000), allows the election of a peer officer as follows:

"The membership of the board of trustees for chapter plans [and for local law plans for police officers only] shall consist of five members, two of whom, unless otherwise prohibited by law, shall be legal residents of the municipality, who shall be appointed by the legislative body of the municipality, and *two of whom shall be police officers as defined in s.185.02 who shall be elected by a majority of the active police officers who are members of such plan*. . . ."[2] (e.s.)

Finding that a police chief falls within the definition of a "police officer" for purposes of the act, this office concluded that the police officer elected by his fellow officers to serve on the pension board could continue to do so under the *ex officio* exception to the dual office-holding prohibition in Section 5(a), Article II of the Florida Constitution. While section 185.05, Florida Statutes, has been amended subsequently to the issuance of Attorney General Opinion 2000-38, the requirements for the election of two police officers to a pension plan serving only police officers remains the same.

The *ex officio* exception exists when the enabling legislation authorizing the creation of a board designates a public officer to serve as a member of the board and thereby imposes additional or *ex officio* duties upon that officer.[3] The courts have held that the Legislature may constitutionally impose additional or *ex officio* duties and responsibilities upon a public officer. Such legislative designation of public officers to perform *ex officio* the functions of another or second office does not violate the constitutional dual office-holding prohibition.[4] Generally, when the Legislature intends to place additional or *ex officio* duties upon an officeholder, that officer is mentioned or designated as serving on the governing body of the newly created governmental entity.[5]

In the situation you propose, however, the enabling legislation for a police pension board does not designate the police chief or a police officer as a required appointee of the legislative body of the city. Rather, the only requirement is that the appointee be a legal resident of the city. Thus, there is no *ex officio* designation in the enabling legislation that would apply to police chief, other than as the police officer elected by a majority of the active police officers who are members of the plan.

You may also wish to review Attorney General Opinion 2004-05 for further discussion of dual office-holding and municipal pension boards.

I trust that these informal comments will be of assistance to you.

Sincerely,

Lagran Saunders
Assistant Attorney General

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[1] *See* s. 185.23(2), Fla. Stat., recognizing DMS's authority to adopt rules to implement the provisions of the chapter. *See also AmeriSteel Corporation v. Clark*, 691 So. 2d 473 (Fla. 1997) (interpretation by agency charged with administration of a statute is entitled to great weight); Op. Att'y Gen. Fla. 74-71 (1974) (construction of a statute by the administrative agency charged with its enforcement and interpretation is entitled to great weight and a court generally will not depart therefrom except for the most cogent reasons and unless the construction is clearly erroneous), *citing Daniel v. Florida State Turnpike Authority*, 213 So. 2d 585 (Fla. 1968); *Miller v. Brewer Co. of Florida*, 122 So. 2d 565 (Fla. 1960).

[2] Section 185.05(1)(a), Fla. Stat. *And see* s. 185.05(1)(b)1., Fla. Stat., providing that the membership of boards of trustees of local law plans for police officers only shall be the same as in paragraph (a).

[3] *See, e.g.,* s. 30.15(1)(i), Fla. Stat. (sheriff *ex officio* timber agent); s. 39.001(7)(b)1., Fla. Stat. (2000) (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).

[4] *See Bath Club, Inc. v. Dade County*, 394 So. 2d 110, 112 (Fla. 1981); *State v. Florida State Turnpike Authority*, 80 So. 2d 337 (Fla. 1955); *State ex rel. Gibbs v. Gordon*, 189 So. 437 (Fla. 1939); *Amos v. Mathews*, 126 So. 308 (Fla. 1930).

[5] *Accord* Op. Att'y Gen. Fla. 81-61 (1981) (concluding that members of the city council could not serve on a code enforcement board). *Cf*. Op. Att'y Gen. Fla. 80-12 (1980) and the discussion contained therein regarding s. 334.215, Fla. Stat.