Dual Office, magistrate/traffic infraction officer

Number: INFORMAL

Date: November 20, 2008

Ms. Maria M. Hinds
General Magistrate
Ninth Judicial Circuit of Florida
Orange County Courthouse
425 North Orange Avenue
Orlando, Florida 32801

Dear Ms. Hinds:

You ask whether a general magistrate may also serve as a civil traffic infraction hearing officer without violating the dual office-holding provision of the Florida Constitution.

According to the information attached to your letter, the Chief Judge of the Ninth Judicial Circuit has issued an administrative order that designates general magistrates, "as an extension of their current duties" to serve as Civil Traffic Infraction Officers, due to recent budget cuts. You state that you are currently serving as a general magistrate and that you and other general magistrates in your circuit have been trained to hear traffic infractions. You will not receive any additional compensation in sitting as a traffic infraction hearing officer, but are concerned that the provisions of Article II, section 5(a), Florida Constitution, may be implicated.

Initially, I must note that this office must presume the validity of the chief judge's administrative order and may not comment upon such order unless requested by the chief judge. In an effort to be of assistance, however, the following informal comments are offered.

Article II, section 5(a), Florida Constitution, provides in 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 holding more than one "office" under the state, county, or municipal governments. The prohibition applies to both elected and appointed offices.[1] While the Constitution contains no definition for the terms "office" or "officer" for purposes of the dual office-holding prohibition, Florida courts and this office have advised that it is the nature of the powers and duties of a particular position that determines whether it is an "office" within the scope of the dual office-holding prohibition or an "employment" outside the scope of the provision.[2] As the Florida Supreme Court has stated, an office "implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office[.]"[3] The term "office" embraces the idea of tenure, duration, and duties in exercising a

portion of the sovereign power, conferred or defined by law and not by contract, whereas an "employment" does not "comprehend a delegation of any part of the sovereign authority."[4]

This office and the courts have previously concluded that quasi-judicial officers such as special magistrates are officers within the scope of the constitutional dual office-holding prohibition. For example, in Attorney General Opinion 05-29, this office stated that a special magistrate of value adjustment board was an officer for purposes of Article II, section 5(a), Florida Constitution.[5] You state that your authority is by way of referrals from circuit judges pursuant to court rule and statute. For example, Florida Rule of Civil Procedure 1.490 provides in subsection (a):

"Judges of the circuit court may appoint as many general magistrates from among the members of the Bar in the circuit as the judges find necessary, and the general magistrates shall continue in office until removed by the court. The order making an appointment shall be recorded. Every person appointed as a general magistrate shall take the oath required of officers by the Constitution and the oath shall be recorded before the magistrate discharges any duties of that office."[6]

Rule 1.490(d) sets forth the general powers and duties of such magistrates, stating:

"Every magistrate shall perform all of the duties that pertain to the office according to the practice in chancery and under the direction of the court. Process issued by a magistrate shall be directed as provided by law. Hearings before any magistrate, examiner, or commissioner shall be held in the county where the action is pending, but hearings may be held at any place by order of the court within or without the state to meet the con-venience of the witnesses or the parties. All grounds of disqualification of a judge shall apply to magistrates."[7]

The above rules refer to an office and require the magistrate to take the oath of office provided by the Constitution.[8] Such magistrates may issue process as provided by law. In light of the above, it appears that such magistrates exercise the sovereign power of the state and would constitute officers for purposes of the constitutional dual office-holding prohibition.

You note that a traffic infraction hearing officer’s authority is derived from Article V, section 1, Florida Constitution, which provides that "[t]he legislature may establish by general law a civil traffic hearing officer system for the purpose of hearing civil traffic infractions." The Legislature has provided for such a system in sections 318.30-318.38, Florida Statutes.[9] This office has previously determined that civil traffic infraction hearing officers serving pursuant to section 318.30, Florida Statutes, are officers for purposes of the constitutional provision.[10] Civil traffic infraction hearing officers are specifically authorized to accept pleas of guilty or not guilty, adjudicate or withhold adjudication of guilt and assess fines and costs.[11]

The Supreme Court of Florida, however, recognized a limited exception to the constitutional dual office-holding prohibition in *Vinales v. State*,[12] 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*,[13] 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 even though such assignment was not temporary.

The above exception, however, has been applied only when both offices have related to similar functions, for example, 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.[14]

In the instant inquiry, both positions appear to be carrying out similar functions as both relate to the judicial or quasi-judicial enforcement of the laws of this state and you state that you will receive no additional compensation for performing the duties of a traffic infraction hearing officer.

In addition, it has long been a settled rule in this state 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 is not a holding of two offices at the same time in violation of the Constitution, provided the duties imposed are consistent with those being exercised.[15] The newly assigned duties are viewed as an addition to the existing duties of the officer.

For example, in *Advisory Opinion to Governor*,[16] the Florida Supreme Court held that the chairman of the State Road Department could serve as an *ex officio* member of the State Planning Board. 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 city manager on the city clerk.[17] In the instant inquiry, the Chief Judge for the Ninth Judicial Circuit has issued an administrative order designating the general magistrates to serve, "as an extension of their current duties," as civil traffic infraction hearing officers.

As noted above, while this office is precluded from commenting upon the validity of the court’s administrative order, I hope that the above informal comments may be of assistance.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/t

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[1] *See, e.g.*, Ops. Att'y Gen. Fla. 69-2 (1969), 80-97 (1980), and 94-66 (1994).

[2] *See State ex rel. Holloway v. Sheats*, 83 So. 508 (Fla. 1919); Ops. Att'y Gen. Fla. 99-34 (1999) (membership on the Florida State Fair Authority constitutes an office for purposes of Art. II, s. 5(a), Fla. Const.), and 91-80 (1991) (insurance fraud investigator is "office" for purposes of

dual office-holding prohibition).

[3] *State ex rel. Holloway v. Sheats, supra* (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; and employment does not authorize the exercise in one's own right of any sovereign power or any prescribed independent authority of a governmental nature). *See also State ex rel. Clyatt v. Hocker*, 22 So. 721 (Fla. 1897).

[4] *Id.*

[5] *And see* Ops. Att'y Gen. Fla. 02-78 (2002) (special master for code enforcement constitutes an office), and 96-91 (1996) (special master of a value adjustment board is an officer). *And see Rodriguez v. Tax Adjustment Experts of Florida, Inc.*, 551 So. 2d 537 (Fla. 3d DCA 1989).

[6] You specifically refer to Fla. R. Civ. P. 1.490 and to Fla. Fam. L. R. P. 12.490 and Fla. R. Juv. P. 8.257 which contain similar provisions, and to ss. 394.4655(6)(a)2. (court may appoint a master to preside at the hearing on involuntary outpatient placement), and 394.467(6)(a)2., Fla. Stat. (court may appoint a general or special magistrate to preside at the hearing on involuntary inpatient placement).

[7] *And see* Fla. Fam. L. R. P. 12.490(c) and Fla. R. Juv. P. 8.257(c).

[8] *See* Art. II, s. 5(b), Fla. Stat., setting forth the oath of office for state and county officers.

[9] *And see* Fla. R. Traf. Ct. 6.630 adopting rules and procedures for the Civil Traffic Infraction Hearing Officer Program under the authority of ss. 318.30–318.38, Fla. Stat., and Art. V, s. 2, Fla. Const.; and Fla. R. Traf. Ct. 6.010(a) stating that the rules govern practice and procedure in any traffic case and specifically apply to practice and procedure in county courts and before civil traffic infraction hearing officers.

[10] *See* Op. Att'y Gen. Fla. 96-91 (1996); Inf. to Susan H. Bingham, dated April 12, 1999.

[11] *See* s. 318.32, Fla. Stat. *Cf.* Op. Att'y Gen. Fla. 02-78 (2002), in which this office recognized that the fact that a special master had an employment contract with the city to perform code enforcement duties, did not necessarily change the nature of that service to an employment.

[12] 394 So. 2d 993 (Fla. 1981).

[13] 422 So. 2d 867 (Fla. 2d DCA 1982). *And see Grant v. State*, 474 So. 2d 259 (Fla. 1st DCA 1985) in which the court concluded that a prosecutor who had been appointed Special Assistant United States Attorney for one case arising out of a local criminal investigation was not subject to the dual office-holding prohibition.

[14] See Op. Att'y Gen. Fla. 84-25 (1984). *And see* Ops. 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); 06-27 (2006) (*Vinales* and *Rampil* exception does not permit the police chief to simultaneously serve as acting city manager). *Cf.* Op. Att'y Gen. Fla.

90-15 (1990) (part-time municipal police officers may not simultaneously serve as full-time police officer in another municipality when he receives compensation for both positions).

[15] *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).

[16] 1 So. 2d 636 (Fla. 1941).

[17] *And see* Ops. Att'y Gen. Fla. 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); 80-97 (1980) (membership of elected municipal officer on metropolitan planning organization as prescribed by statute does not violate Art. II, s. 5, Fla. Const.), 02-44 (2002), and 03-20 (2003).