

Dual Office-holding, law enforcement officer

Number: INFORMAL

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Mr. David S. Ginsberg
9883 Agnello Street
Lake Worth, Florida 33467

Dear Mr. Ginsberg:

You have asked whether this office may have changed its position on the question of whether a reserve officer for the Florida Game and Fish Commission would be in violation of the constitutional dual office-holding prohibition contained in Article II, section 5(a), Florida Constitution, if he or she is simultaneously serving as a sworn law enforcement officer with a municipality. Attorney General McCollum has asked me to respond to your letter.

According to information you have submitted, you have been an unpaid, volunteer reserve officer with the Florida Fish and Wildlife Conservation Commission for more than 19 years. Twelve years ago, you also became a full-time law enforcement officer with the Gulf Stream Police Department in Palm Beach County. You have recently been advised that service in both positions may violate the Florida constitutional prohibition against dual office-holding.

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]

The Supreme Court of Florida, however, has recognized a limited exception to the constitutional dual office-holding prohibition in *Vinales v. State*, [5] 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*,^[6] following the *Vinales* opinion, 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, for instance, to a member of a municipal board of adjustment serving as a part-time law enforcement officer.^[7]

This office continues to rely on the *Vinales* and *Rampil* exception to resolve questions of dual office-holding when both offices relate to criminal investigation or prosecution. I am enclosing copies of two recent Attorney General Opinions discussing the *Vinales* and *Rampil* exception that you may find helpful. However, I would note that opinions of this office are advisory only and while this office attempts to provide the best possible legal advice to its clients, that advice is not binding.

Finally, discussions with the General Counsel's Office at the Florida Fish and Wildlife Conservation Commission indicate that the Commission has promulgated a general order, General Order 20 entitled "Division Reserve Program," which states that "FWC Reserve Officers may not be sworn members with another law enforcement agency."^[8] It appears that this policy became effective July 21, 2008. I am enclosing a copy of this General Order for your review.

I trust that these informal comments will be helpful to you in resolving these questions.

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

GH/srh

Enclosures: AGO 2006-27 and Inf. Op. to Hinds dated 11/20/08
General Order 20, Florida Fish and Wildlife Conservation Commission

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

[6] 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.

[7] 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).

[8] Florida Fish and Wildlife Conservation Commission General Order 20 s. 3P(1).