DUAL OFFICE-HOLDING

Article II, section 5(a), Florida Constitution

Updated April 2018

An informational pamphlet on
Florida's Dual Office-Holding Prohibition
prepared by the
Office of the Attorney General

TABLE OF CONTENTS

Click section titles to go to that page

DUAL OFFICE-HOLDING

What is dual office-holding? Article II, section 5(a), of the Florida Constitution, provides:

> No person holding any office of emolument under any foreign government, or civil office of emolument under the United States or any other state, shall hold any office of honor or of emolument under the government of this state. 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 constitutional provision addresses the accumulation of offices by a single individual and was fashioned to ensure that the same person would not simultaneously hold multiple offices. Underlying this objective was the concern that a conflict of interest would arise if one person simultaneously serves in two offices.[1]

While the first sentence of this constitutional provision addresses interstate dual office-holding (*see* s. VII., *infra*), it is primarily the second sentence that has been the subject of interpretation. This provision prohibits a person from simultaneously holding more than one "office" under the governments of the state, counties and municipalities.[2] The prohibition applies to both elected and appointed offices.[3] 1t is not necessary that the two offices be within the same governmental unit. Thus, for example, a municipal officer is precluded from simultaneously holding not only another municipal office but also a state or county office.

I. What is an "office" for purposes of the dual office-holding prohibition?

The Constitution does not define the terms "office" or "officer" for purposes of the dual office-holding prohibition and the Legislature has not attempted to define the term to clarify the parameters of this constitutional provision. Absent such clarification, the courts and the Attorney General's Office have referred to several early decisions of the Supreme Court of Florida in determining what constitutes an "office" as opposed to an "employment." The Supreme Court of Florida has stated:

> The term "office" implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office, while an "employment" does not comprehend a delegation of any part of the sovereign authority. The 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. An employment does not

> authorize the exercise in one's own right of any sovereign power or any prescribed independent authority of a governmental nature; and this constitutes, perhaps, the most decisive difference between an employment and an office . . . .[4]

It is, therefore, the nature of the powers and duties of a particular position which determines whether it is an "office" or an "employment."

Membership on the governing body of a governmental entity, such as a municipality or county, clearly constitutes an office.[5] In considering other positions, the courts have stated that the following are officers: members of the former Board of Regents,[6] a Hotel and Restaurant Commissioner,[7] the Miami City Clerk whose office and duties are provided for in the charter,[8] and a director of animal control.[9]

Over the years, the Attorney General's Office has issued numerous opinions regarding when a position may be considered an "office." Based upon its review of the particular powers of a position and the language of the statute, charter, or ordinance creating the position, the following opinions discuss positions which this office considered to be "offices" for purposes of Article II, section 5(a): Attorney General Opinions 86-11 (chief of police); 90-15 (police officer); 77-89 (deputy sheriff) [see more on law enforcement, Part II]; 70-13 (city attorney); 72-101 (Florida Barbers' Sanitary Commission member); 76-241 (Florida Human Relations Commission); 80-97 (city manager, chief of a municipal fire department, architectural review board member, and city inspection superintendent); 94-83 (school board); 81-61, 97-37, 2005-29 and 2009-48 (code enforcement board member); 84-25, 85-21, and 2006-13 (board of adjustment board member); 86-11 (city administrator); 86-105 (member of a municipal building board of appeals); 91-79 (State Board of Community Colleges); 90-45, 02-49, 2003-27, 2004-05 and 2005-15 (pension board); 93-27 (commissioner of the Southeast Interstate Low- Level Radioactive Waste Management Compact); 96-95 (governing board of Alternative Education Institute, a nonprofit corporation within the Department of Education); 96-48 (city clerk in charge of elections); 98-36 (city water resources advisory board); 97-04, and 98-36 (community redevelopment agency board); 99-34 (state fair authority); 2000-72 (community alliance members); 2004-07 (building official); 2005-29 (value adjustment board special magistrate); 2006-13 (city planning board); 2008-45 (Florida New Motor Vehicle Arbitration Board; Workforce Florida); and 2009-48 (housing finance board; city downtown development board); 2010-19 (member of planning and zoning commission, and regional planning commission, and hearing officer for code enforcement); 2012-28 (director of county emergency management agency); 2012-35 (commissioner of municipal housing authority, member of county housing finance authority); 2013-18 (local hearing officer); 2016-15 (zoning and planning board, and historic preservation board).

The constitutional prohibition against dual office-holding does not generally apply to persons who are not vested with official powers in their own right, but rather merely exercise certain powers as agents of governmental officers. Thus, in determining whether a deputy clerk was an officer or employee, this office considered the nature of the duties performed. Finding that the deputy clerk performed largely the ministerial duties of an assistant to the clerk rather than the substitute duties of a true deputy, this office concluded in Attorney General Opinion 88- 56 that the position of deputy clerk under those circumstances constituted an employment rather than an office.

For examples of when this office has stated that the position constituted an employment and thus was not subject to the dual office-holding prohibition, see Attorney General Opinions 69-5 (assistant public defender); 71-263 and 71-296 (assistant state attorney); 73-332 (county commission attorney); 74-73 (deputy tax assessor); 77-31 (community college district comptroller); 78-36 and 2003-12 (public health trust); 80-97 and 86-105 (city engineer); 84-93 and 91-13 (code enforcement board attorney); 93-39 (firefighters); 94-40 (code enforcement officer under Chapter 162, Florida Statutes); 94-88 (charter review commission attorney); 96-24 (assistant city attorney); 98-48 (charter school board member); 2002-72 (assistant U.S. attorney); 2003-12 (county public trust); 2011-05 (deputy clerk of court); 2013-02 (governing board of special district); and Informal Opinion to John Russi, dated November 16, 1995 (division director within Department of State). This office has also stated in AGO 2008-10 that an unopposed candidate who has not taken office is not an officer for purposes of the constitutional prohibition against dual office-holding.

The courts have held that the following positions constituted employments: public works inspector,[10] member of a board of highway secondary funds trustees,[11] official court reporter,[12] and supervisor of nurses to a public hospital.[13]

In determining whether a particular position is an employment or office, careful consideration must be given to the powers and responsibilities imposed upon such a position. The above opinions were based upon a consideration of the particular language used in the statute, charter, or ordinance creating the position and establishing its powers.

II. Are law enforcement officers or correctional officers "officers" for purposes of the dual office-holding prohibition?

Based upon existing case law, this office has stated that a law enforcement officer is an "officer" within the scope of the constitutional dual office-holding prohibition. For examples, see Attorney General Opinions 57-165 (deputy sheriff), 71-167 (deputy sheriff), 72-348 (chief of police), 76-92 (town marshal), 90-15 (police officer).[14]

The Supreme Court of Florida has stated:

> It can hardly be questioned that a patrolman on a city police force is clothed with sovereign power of the city while discharging his duty. . . . True, he is an employee of the city but he is also an officer. 1t is the character of duty performed that must determine his status.[15]

It is the powers that a law enforcement officer may exercise, particularly the authority to arrest without a warrant and to carry firearms in carrying out his or her duties, not the salary or certification requirements, that characterize the law enforcement officer as an "officer."[16] Thus, this office has stated that part-time auxiliary or certified reserve police officers, based upon the powers exercised by such individuals, are "officers" for purposes of Article II, section 5(a), Florida Constitution.[17]

While the constitution, therefore, would generally prohibit a law enforcement officer from simultaneously serving in another office, the Supreme Court of Florida recognized a limited exception in *Vinales v. State*,[18] when municipal police officers

were appointed pursuant to statute as state attorney investigators. Since the police officers' appointment was temporary and no additional remuneration was paid to the officers for performing the additional criminal investigative duties, the Court held that they were not holding two offices and thus the constitutional dual office-holding prohibition did not apply. The following year, the Second District Court of Appeal in *Rampil v. State*,[19] followed the *Vinales* exception and concluded that it was not a violation of Article II, section 5(a) of the Florida Constitution for a city police officer to act in the capacity of deputy sheriff since that officer received no remuneration for such duties.

The *Vinales* case dealt with the performance of additional law enforcement functions and duties in a police capacity and not the exercise of governmental power or performance of official duties on a disparate municipal board exercising and performing quasi-judicial powers and duties. Similarly, *Rampil* concerned the performance of additional law enforcement functions without additional remuneration. In considering the *Vinales* and *Rampil* exception, therefore, this office has stated that the exception is limited and does not apply, for example, to a member of a municipal board of adjustment serving as a part-time law enforcement officer or to a police officer who also serves as a law enforcement officer in another municipality, receiving remuneration for both positions.[20]

The Attorney General's Office followed *Vinales* and *Rampil* in Attorney General Opinion 2012-10 when it concluded that a special officer for a railway carrier, appointed by the Governor under chapter 354, was not barred from simultaneously serving as a volunteer reserve deputy sheriff.

In contrast, the Attorney General's Office has determined that correctional officers are not "officers" for purposes of Article II, section 5(a), Florida Constitution. In Attorney General Opinion 98-31, this office noted that unlike law enforcement officers, correctional officers do not have the broad authority to make arrests without a warrant:

> Rather, correctional officers have only been authorized to arrest any convict who has escaped or any person who, without authority, interferes with or interrupts the work of a prisoner or the discipline or good conduct of a prisoner, or who by illicit means attempts to gain admission to a state correctional institution.

Unlike a law enforcement officer, a correctional officer does not have a legal duty to provide aid to ill, injured, and distressed persons who are not under his or her supervision.[21] Moreover, while a number of statutes treat "law enforcement officers" and "correctional officers" similarly, the Legislature has generally deemed it necessary to specifically include correctional officers within such provisions to ensure their inclusion.[22]

III. Are special masters or magistrates "officers" for purposes of the dual office-holding prohibition?

The Attorney General's Office has addressed the status of special masters or magistrates on several occasions. In Attorney General Opinion 96-91, this office concluded that a special master of a value adjustment board was an officer for purposes of Article II, section 5(a), Florida Constitution, and could not, therefore, serve in this

position at the same time he or she was serving as a traffic infraction hearing officer without violating the dual office-holding provision of the Constitution. Such a conclusion was based on the duties of the special master which included hearing appeals initiated by taxpayers contesting the denial of tax exemptions and agricultural classifications for their properties by the county property appraiser. Similarly, in Attorney General Opinion 2005- 29, this office stated that a special magistrate for a value adjustment board was an officer for purposes of Article II, section 5(a), Florida Constitution.

In Attorney General Opinion 2012-17, a special magistrate appointed for a year to the Hillsborough County value adjustment board could not serve as a hearing officer for a city in a different county during different times of the year. The special magistrate retains the authority to conduct hearings for the value adjustment board at all times during the year, even when not actively hearing a case, and is thus an officer at all times, and could not hold dual offices.

In an informal opinion to Susan Bingham, dated April 12, 1999, this office stated that hearing masters for the City of St. Petersburg, Florida, who conduct administrative hearings to determine whether probable cause exists to impound vehicles used in the perpetration of crimes, constitute "officers" for purposes of Article II, section 5(a), Florida Constitution, since the hearing master weighs evidence, makes determinations of probable cause, and issues orders for the payment of penalties or the continued impoundment of personal property.

Attorney General Opinion 2002-78 concluded that a special master under Chapter 162, Florida Statutes, constituted an "officer" for purposes of the dual office-holding prohibition. Section 162.03(2), Florida Statutes, provides that "[a] special magistrate shall have the same status as an enforcement board under this chapter" and this office had previously concluded that code enforcement board members are "officers."[23] As noted in the opinion, a special master under Chapter 162 may issue orders that have the force of law and may command whatever steps are necessary to bring a violation into compliance; he or she may subpoena violators and witnesses to attend hearings, subpoena evidence, and take testimony under oath.

IV. Are officers of special districts included within the dual office-holding prohibition?

Article II, section 5(a), Florida Constitution, refers only to state, county, and municipal offices. It is not applicable to independent special district offices. A special district is a governmental entity created by law to perform a special and limited governmental function.

For examples where the Attorney General's Office has stated that there was no violation of the dual office-holding prohibition when the state, county, or municipal officer also served as an officer of a special district, *see* Attorney General Opinions 71-324 (hospital district's governing body); 73-47 (junior college district); 75-153, 78-74, and 80-16 (community college district board of trustees); 85-24 (community redevelopment district established by general law); 86-55 (member of Big Cypress Basin's governing board); 94-42 (local multi-agency career service authority); 94-83 (airport and industrial district); 99-49 (community redevelopment agency); 2001-14 (water control district); 2000-17 (fire control and rescue district); 2002-22 (fire protection district); 2002-49 and 2002-83 (water control district); and 2008-06 (mosquito control district).

1n a 1994 advisory opinion, the Supreme Court of Florida reiterated that special district officers are not included within the dual office-holding prohibition. 1n *In re Advisory Opinion to the Governor*,[24] the Court concluded that a member of a community college district board of trustees is an officer of a special district created to perform the special governmental function of operating a community college and is not a state, municipal, or county officer within the meaning of Article II, section 5(a). Thus, the dual office-holding prohibition does not keep a state, county, or municipal officer from serving on a community college board of trustees.

While the Court considered membership on the board of trustees of a community college district to constitute a special district office and thus to be outside of the parameters of Article 11, section 5(a), Florida Constitution, the Supreme Court in *In re Advisory Opinion to the Governor--School Board Member--Suspension Authority*,[25] rejected the designation of school board members as district officers. The Governor had asked the Court whether school board members could be suspended under the constitutional provisions governing county officers or whether a suspension should be accomplished under the statutory provisions governing district officers. The Court concluded that school board members are county officers who have equivalent powers and authority to that of the county commission although their power is exercised in different local governmental spheres. As county officers, however, school board members are precluded from simultaneously holding another state, county, or municipal office.[26]

Care must, therefore, be taken in determining the nature and character of a district or authority to determine whether the governmental entity is an agency of the state, county, or municipality such that its officers may be considered state, county, or municipal officers for purposes of dual office-holding.

For example, in Attorney General Opinion 84-90, this office considered whether a member of the Volusia County Health Facilities Authority was an officer of the county. While the authority was created and organized under Part lll, Chapter 154, Florida Statutes, as a public body corporate and politic, it was created by the county by ordinance or resolution. The governing body of the county appointed the authority members, was empowered to remove the members, and was authorized to abolish the authority at any time. This office, therefore, concluded that the authority was an instrumentality of the county and its officers were county officers. Thus, the constitutional prohibition against dual office-holding prohibited the mayor from also serving on the governing body of the county health facilities authority.

Subsequently, in Attorney General Opinion 94-42, this office concluded that membership on the Monroe County Career Service Council was in the nature of a district office and thus not subject to the constitutional prohibition. The council was created by law to perform a limited function and its members were appointed by a diverse group of governmental agencies that had no oversight or control over the functions or actions of the council. Similarly, Attorney General Opinion 94-83 concluded that the Panama City-Bay County Airport Authority was a special district and thus membership on its governing board was not an office for purposes of Article 11, section 5(a), Florida Constitution.[27]

Based on a district court opinion concluding that regional planning council members were officers within the meaning of the resign-to-run law, which at that time

applied only to state, county, or municipal offices, this office concluded in Attorney General Opinion 2001-28 that regional planning council members are state officers for purposes of the dual office-holding prohibition. This office suggested, however, that the Legislature clarify the status of these regional planning councils.

V. May an officer perform *ex officio* the duties of another office without violating Article II, section 5(a), Florida Constitution?

While the constitution does not expressly provide an exception for *ex officio* service, it has long been settled in this state that the legislative designation of an officer to perform *ex officio* the functions of another office does not violate the dual office-holding prohibition, provided that the duties imposed are consistent with those already being exercised.[28]

The purpose of the constitutional prohibition against dual office-holding is "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."[29] When, however, additional or *ex officio* duties are assigned to a particular office, regardless of who may be occupying that office, by the legislative body and there is no inconsistency between the new and the preexisting duties, the dual office-holding prohibition does not preclude such an assignment. The newly assigned duties are viewed as an addition to the existing duties of the officer.

For example, this office has stated that the 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.[30] In Attorney General Opinion 93-42, this office 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* the duties of the other office. Similarly, in Attorney General Opinion 94-66, this office opined that a county ordinance designating the Board of County Commissioners to perform the functions of the Board of Adjustment appeared to be an *ex officio* designation and, therefore, would not violate the dual office-holding prohibition contained in Article II, section 5(a), Florida Constitution. Thus, this office in Attorney General Opinion 94-98 concluded that the imposition of additional or *ex officio* 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 Article II, section 5(a), Florida Constitution.[31]

Attorney General Opinion 98-16 concluded that a city commission may legislatively designate itself as the governing body of a community redevelopment agency and such designation constitutes an *ex officio* designation of the agency's duties. Although the community redevelopment agency is a separate entity from the city commission, the city commission's service as the governing body of the agency is viewed as an addition to the existing duties of the city commission.

In Attorney General Opinion 2002-44, this office considered the use of the term "members" rather than "person " in the statute prescribing the membership of the board of directors of Florida Healthy Kids to indicate a legislative intent that nominees from the Florida Association of Counties would come from the association's membership, *i.e.*, county commissioners. Thus, this office concluded that the statute constituted a

legislative designation for such officials to be nominated by the association to perform *ex officio* the function of serving on the corporation's board of directors. Similarly, Attorney General Opinion 2003-20 concluded that a school board member could serve in an *ex officio* capacity on a planning and zoning board where the statute required a representative of the school board to serve on the planning and zoning board.[32] According to Attorney General Opinion 2013-26, however, a statute that authorizes a code enforcement board or special magistrate ex officio to serve as a local hearing officer in hearings related to red-light camera infractions without violating the prohibition against dual office-holding (2013-18), does not authorize such local hearing officers to serve in that capacity in other municipalities or counties at the same time.

The courts have also recognized the distinction between dual office-holding and an officer serving in an *ex officio* capacity on another board. In *City of Riviera Beach v. Palm Beach County Solid Waste Authority,*[33] the district court stated that a special act authorizing county commissioners to sit as members of the county solid waste authority did not violate Article II, section 5(a), Florida Constitution, but merely imposed additional duties upon an existing office. In addition, in *City of Orlando v. State Department of Insurance*,[34] the court concluded that 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. Similarly, according to Attorney General Opinion 2013-25, a municipality could enter into an agreement in which the county would provide joint building code inspection services to both the town and the county under section 163.01, the Florida Interlocal Cooperation Act, without running afoul of the dual office-holding prohibition.

There is, however, a distinction between a statute imposing an *ex officio* position on the holder of another office and one authorizing the appointment of one officeholder to another distinct office. For example, the Supreme Court of Florida has pointed out 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.[35] In that case, the legislature passed an act making the chairman of the state road department a member of the state planning board. The Court held that the act simply placed additional duties on the chairman and, therefore, was constitutional. The act, however, also permitted the Governor to appoint state officials or employees to the board. The Court held that "[t]his provision [did] not impose additional duties on any particular State officer," but rather created a separate position, and thus violated the dual office-holding prohibition.[36]

Similarly, in Attorney General Opinion 91-48 this office 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.

VI. What are the exceptions to the constitutional prohibition against dual office-holding?

Article II, section 5(a), Florida Constitution, contains several exceptions to its prohibition against dual office-holding. The constitutional provision expressly states that a notary public or military officer may hold another office. In addition, any officer may

also serve as a member of a constitutional revision commission, taxation and budget reform commission, or constitutional convention.[37]

Statutory bodies having only advisory powers are also exempted from the constitutional dual office-holding prohibition. It is this exception that has been the subject of interpretation both by the courts and by the Attorney General's Office. For example, in Attorney General Opinion 2005-59, this office stated that a municipal committee that merely makes non-binding recommendations and has not otherwise been delegated any powers to make factual determinations or exercise any portion of the municipality's sovereign power did not appear to be an office. In Attorney General Opinion 2008-15, this office concluded that a county advisory board could be considered a "statutory body having only advisory powers" within the constitutional exception if it has been created by legislative enactment of the governing body.

The Supreme Court of Florida in considering similar language in the 1885 constitution held that a member of the State Planning Board was a state "officer" within the dual office-holding prohibition even though the members of the board were authorized to act only in an advisory capacity.[38] The Court noted that the members of the board were appointed by the Governor, served a fixed term of office, performed duties imposed upon them by statute and were authorized to "expend public funds appropriated for that purpose in the discharge of [their] duties, exercising [their] own discretion in that regard."[39] Thus, the Court concluded that powers and attributes of sovereignty had been "delegated to or reposed in the State Planning Board."[40]

Similarly, the Attorney General in Attorney General Opinion 76-241 concluded that membership on the Florida Human Relations Commission was an office rather than service on a statutory body possessing only advisory powers. The opinion was based upon an examination of the powers of the commission which included, among other things, the right to accept money, both public and private, to help finance its activities; to recommend measures to eliminate discrimination; to receive, initiate, investigate, hold hearings on, and pass upon complaints alleging discrimination; to render, at least annually, a comprehensive written report to the Governor and Legislature; and to adopt, amend, and rescind rules to effectuate the purposes of the act. Since the commission was authorized to exercise powers associated with those of an office, it could not be characterized as purely an advisory body.

Subsequently, in Attorney General Opinion 91-79, this office concluded that the State Board of Community Colleges of the Department of Education did not constitute an advisory board since the state board was responsible for establishing rules and policies for the operation and maintenance of the state community college system and for adopting guidelines relating to salary and fringe benefits for community college administrators. In addition, the board was responsible for reviewing and administering the state program of support for the community college system and in this capacity, reviewed and approved all budgets and recommended budget amendments in the system.

Relying on the above opinions, Attorney General Opinion 2006-46 concluded that membership on the Commission for the Transportation Disadvantaged which possessed the authority to develop policy for state and local governmental units; to set standards for the coordination, operation, costs, and utilization of transportation disadvantaged services; to monitor and coordinate local, state, and federal

transportation disadvantaged funding; and to apply for and accept such funding, would be an office for purposes of the constitutional dual office-holding prohibition.

Local planning and zoning commissions possessing the power to grant variances without review or which are final unless appealed to the county commission do not fall within the exception for advisory bodies. As this office noted in Attorney General Opinions 89-25 and 90-33, only those statutory bodies possessing advisory powers are excepted; Article II, section 5(a), Florida Constitution, does not provide for or recognize an exception for statutory bodies whose powers are substantially or predominately advisory.[41]

In contrast, however, Attorney General Opinion 71-43 concluded that members of a state park advisory council, who served without compensation at the pleasure of the Division of Recreation and Parks in purely an advisory capacity and who had no authority to expend public funds or to exercise in any manner the "sovereign power" of the state, fell within the exception for advisory bodies contained in Article II, section 5(a), Florida Constitution.

For other examples where this exception has been applied, *see* Attorney General Opinions 72-179 (ad hoc municipal charter revision commission); 73-288 (municipal zoning board having only advisory powers); 74-232 (advisory county planning commission); 77-74 (Florida Advisory Council); 78-36 (county public health trust); 86-105 (local planning agency whose function is information gathering and advising local government entity); 96-59 (county charter commission); 99-16 (advisory planning commission); 2005-59 (city advisory committee responsible only for making nonbinding recommendations); 2008-15 (county investment committee; airport advisory board); and 2013-31 (dependent special district; public library advisory board).

An additional constitutional exception to Article II, section 5(a), Florida Constitution, has been recognized. Under Article IV, section 6, Florida Constitution, certain designated state officials are specifically authorized to serve as the heads of state departments.[42] In Attorney General Opinion 75-115, this office concluded that this express constitutional mandate constituted an exception to Article II, section 5(a), Florida Constitution. Thus, the opinion states that the Lieutenant Governor may also serve as the Secretary of the Department of Administration.

VII. How does the constitutional prohibition against dual office-holding apply when one of the offices is a federal office or an office in another state or under a foreign government?

The first clause of Article II, section 5(a), Florida Constitution, provides:

> No person holding any office of emolument under any foreign government, or civil office of emolument under the United States or any other state, shall hold any office of honor or of emolument under the government of this state. . . .

The bifurcation in Article II, section 5(a), Florida Constitution, of the dual office-holding prohibition into interstate and intrastate segments does not mean that the interstate segment applies only to state officers, but also includes local government officers.[43] A position that is temporary only and without remuneration would not appear to constitute an "office of emolument." For example, one court rejected claims of a dual office-holding violation where a state prosecutor had been appointed as a Special Assistant United States Attorney for one case arising out of a local criminal investigation when it appeared that he received no remuneration for serving in that position.[44]

Similarly, in Attorney General Opinion 2003-59 this office concluded that membership on a local selective service board whose members did not receive a salary, did not appear to constitute an "office of emolument." In addition, this office in Attorney General Opinion 72-244 stated that the position of executive director of a private nonprofit corporation that serves a public purpose and is financed largely from federal funds is not a "civil office of emolument under the United States" within the dual office-holding prohibition.

VIII. What are the consequences of a public officer accepting a second office in violation of the constitutional dual office-holding prohibition?

The Supreme Court of Florida in a 1970 decision set forth the general rule that "[t]he acceptance of an incompatible office by one already holding office operates as a resignation of the first."[45] Under the rationale of that decision, the action of an officer accepting another office in violation of the dual office-holding prohibition creates a vacancy in the first office. While Florida recognizes the rule that acceptance of one office while holding another office results in vacancy of first office, the court in *Gryzik v. State*,[46] stated that Florida also recognizes that in such a situation, the officer becomes *de facto* officer as to first office:

> Ordinarily, acceptance of one office while holding another office results in a vacancy of the first office. . . . The constitutional prohibition provides no sanction for its violation and it is apparent that the general rule was adopted from the generally accepted common law rule that by the

acceptance of an incompatible office, the officeholder had made a binding election which ipso facto vacated the first office. . . . Although Florida recognizes this rule, it appears Florida also recognizes that in such a situation the officer becomes a de facto officer as to the first office. (citations omitted)

IX. Do common law principles prohibit a public agency from appointing one of its members to a position over which it has appointment power?

The Supreme Court of Florida in *State ex rel. Clayton v. Board of Regents*,[47] considered whether common law principles precluded a governmental body from appointing one of its own members to a position over which it has appointment power. The Court concluded that "conduct involving public officers, such as dual office-holding, financial benefit from office, and abuse of public trust, are issues directly addressed by" the Florida Constitution[48] and thus are not governed by the common law. Thus, no common law principle precluded a member of a governmental body from appointing one of its own members to a position over which it had appointment power.

FOOTNOTES

[1] *See Bath Club, Inc. v. Dade County,* 394 So. 2d 110, 112 (Fla. 1981).

[2] Earlier state Constitutions contained limited prohibitions against dual office-holding. *See, e.g.*, Art. VI, s. 18, Fla. Const. 1838; Art. V1, s. 14, Fla. Const. 1861; and Art. VI, s. 14, Fla. Const. 1865. Article 11, section 5(a), of the 1968 Constitution substantially reproduces Article XVI, section 15, of the 1885 Constitution except that the 1968 constitution includes municipal officers. Court decisions under the 1885 Constitution had excluded municipal officers from its coverage. *See, e.g., Attorney General ex rel. Wilkins v. Connors,* 9 So. 7, 8 (Fla. 1891).

[3] *See Blackburn v. Brorein,* 70 So. 2d 293, 296 (Fla. 1954), noting that "election by the people or appointment by the Governor is not the true test in determining whether . .. an office exists and the individual filling the position is an officer [rather than] an employee"; Ops. Att'y Gen. Fla. 94-66 (1994), 80-97 (1980), and 69-2 (1969).

[4] *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).

[5] *See* Ops. Att'y Gen. Fla. 72-348 (1972) and 74-73 (1974), respectively.

[6] *In re Advisory Opinion to the Governor,* 171 So. 2d 539, 541 (Fla. 1965).

[7] *In re Advisory Opinion to the Governor,* 63 So. 2d 321, 325 (Fla. 1953).

[8] *State ex rel. Gibbs v. Bloodworth,* 184 So. 1, 6 (Fla. 1938).

[9] *Demby v. English,* 667 So. 2d 350, 354 (Fla. 1st DCA 1995).

[10] *Lewis v. Evans*, 406 So. 2d 489, 491 n.1 (Fla. 2d DCA 1981).

[11] *State v. State Road Department*, 173 So. 2d 693, 695 (Fla. 1965).

[12] *See In re Opinion of the Justices,* 163 So. 76, 77-78 (Fla. 1935) ("official court reporters are not state officers, but are officially employed court functionaries"); *Robbin v. Brewer,* 236 So. 2d 448, 451 (Fla. 4th DCA 1970) (noting that the "logic of a court reporter being an employee rather than an officer is more impressive"). *But see In re Advisory Opinion to the Governor,* 154 So. 154, 156 (Fla. 1934) (finding that a court reporter is an officer).

[13] *Glendinning v. Curry,* 14 So. 2d 794, 799 (Fla. 1943) (supervisor of nurses of is not an officer).

[14] Additional opinions include Op. Att'y Gen. Fla. 77-89 (deputy sheriff), 86-11 (chief of police), 89-10 (police officer).

[15] *Curry v. Hammond*, 16 So. 2d 523, 524 (Fla. 1944). *And see Blackburn v. Brorein*, 70 So. 2d 293, 299 (Fla. 1954) (deputy sheriff is an officer); *State ex rel. Watson v. Hurlbert*, 20 So. 2d 693 (Fla. 1945) (county detectives are officers).

[16] *Maudsley v. City of North Lauderdale*, 300 So. 2d 304 (Fla. 4th DCA 1974). *See State ex rel. Gibbs v. Martens*, 193 So. 835, 837 (Fla. 1940), in which the Supreme Court of Florida held that a probation officer was an "officer" since he had the right to arrest without a warrant because "no right is more sacred or more jealously guarded than the one that liberty shall not be infringed except by due process of law."

[17] Attorney General Opinion 77-63. *And see* Op. Att'y Gen. Fla. 86-105 (1986), concluding that auxiliary police officers who did not have the authority to make arrests but who were certified, carried firearms, and assisted regular police officers in carrying out their duties were "officers." *Compare* Op. Att'y Gen. Fla. 89-10 (1989), concluding that an administrative law enforcement position, having no law enforcement certification requirements or arrest powers and no authority to independently exercise the sovereign powers of the state, was not an office but an employment for purposes of dual office-holding.

[18] 394 So. 2d 993 (Fla. 1981).

[19] 422 So. 2d 867 (Fla. 2d DCA 1982). *And see* Inf. Op. to David S. Ginsberg, dated October 1, 2010, stating that the Attorney General's 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.

[20] *See* Ops. Att'y Gen. Fla. 84-25 (1984) and 90-15 (1990), respectively. *See also* Ops. Att'y Gen. Fla. 86-84 (1986) (city council member may not simultaneously serve as a certified auxiliary law enforcement officer); 2006-27 (police chief may not serve as temporary city manager where city code does not impose such duties on office of police chief); 2013-08 (law enforcement officer may not serve as temporary acting city manager).

[21] *See* Op. Att'y Gen. Fla. 89-62 (1989).

[22] *Id.*

[23] *See* Ops. Att'y Gen. Fla. 97-37 (1997) and 81-61 (1981). *And see* Op. Att'y Gen. Fla. 01-28 (2001) (code enforcement hearing officer is an officer for purposes of Art. II, s. 5, Fla. Const.); 2010-19 (planning and zoning commissioner and regional planning commissioner are officers and thus cannot hold dual office as special magistrate, hearing officer, or magistrate).

[24] 630 So. 2d 1055, 1058 (Fla. 1994).

[25] 626 So. 2d 684 (Fla. 1993).

[26] The Supreme Court was advised that the Attorney General had previously considered school board members to be special district officers and outside the scope of Article II, section 5(a), of the Florida Constitution. Thus, there could have been school board members who were in fact holding dual offices. In response, the Court held that "[w]ith regard to those individuals who may be holding dual offices because of the attorney general's opinion 84-72, we conclude that [the Court's] opinion should be prospective in application. This prospective application should apply only until such time as the term of one of the dual offices expires." 626 So. 2d at 690.

[27] *And see* Ops. Att'y Gen. Fla. 2008-61 (members of Volusia Growth Management Commission, a dependent district of the county, subject to dual office- holding prohibition); and 2009-48 (members of downtown development board, designated as a dependent special district, are municipal officers).

[28] *See, e.g., Bath Club, Inc. v. Dade County*, 394 So. 2d 110 (Fla. 1981).

[29] *Id.* at 112.

[30] Attorney General Opinion 81-72. *Accord* Op. Att'y Gen. Fla. 80-97 (1980). *And see* Ops. Att'y Gen. Fla. 70-46 (1970) (statute imposing *ex officio* post on holder of another office must be distinguished from one authorizing appointment of one office holder to another separate and distinct office); 80-12 (1980) (membership of elected municipal officer on metropolitan planning organization as prescribed by statute does not violate dual office-holding prohibition); 82-92 (1982) (city may, by ordinance, designate members of code enforcement board as *ex officio* members of minimum housing and commercial property appeals board).

[31] *And see* Op. Att'y Gen. Fla. 07-43 (2007), concluding that while a city council would be precluded from appointing the city clerk to also serve as city manager, the city charter could be amended to provide that the city manager shall also perform the duties of the city clerk since such an *ex officio* designation imposing the duties of one office on another office, rather than on the specific individual who was serving in such office, would not violate the provisions of Art. II, s. 5(a), Fla. Const.; Op. Att'y Gen. 2014-3, determining that a city planning board could not be appointed to serve concurrently as the city's zoning board, but that an ordinance the town intended to pass, which would impose the zoning board's duties onto the planning board *ex officio*, would not violate Article II, Section 5(a). *Compare* 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. In that opinion, there was no *ex officio* designation imposing the duties of one office on the other.

[32] *And see* Op. Att'y Gen. Fla. 2007-06 (charter's designation that an elected official of a municipality be nominated to serve on the planning council would appear to constitute an *ex officio* designation); Inf. Op. to Trudy Block, dated June 23, 2010 (town charter that 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 would not violate Art. II, s. 5[a], Fla. Const.).

[33] 502 So. 2d 1335 (Fla. 4th DCA 1987).

[34] 528 So. 2d 468 (Fla. 1st DCA 1988).

[35] *Advisory Opinion to the Governor*, 1 So. 2d 636 (Fla. 1941). *And see* Op. Att'y Gen. Fla. 70-46 (1970) (doubtful that city commissioner could also be municipal judge where charter created office of municipal judge as a separate and distinct office and did not designate it as an *ex officio* office to be performed by the city commissioner).

[36] *Advisory Opinion to Governor*, 1 So. 2d 636 (Fla. 1941).

[37] *See* Art. XI, s. 2, Fla. Const., providing for the establishment of a constitutional revision commission every twenty years; Art. XI, s. 6, Fla. Const., providing for the establishment of a taxation and budget reform commission every twenty years; and Art. XI, s. 4, Fla. Const., reserving to the people the power to call a convention to consider a revision of the entire Constitution.

[38] *Advisory Opinion to Governor*, 1 So. 2d 636 (Fla. 1941).

[39] *Id.* at 638.

[40] 1 So. 2d at 637.

[41] *And see* Op. Att'y Gen. Fla. 98-36 (1998), concluding that membership on a city water resources advisory board which, despite its name, exercised substantive powers, constituted an "office."

[42] Article IV, s. 6, Fla. Const., provides in part that the administration of each department in the executive branch of state government, unless otherwise provided in the Constitution, "shall be placed by law under the direct supervision of the governor, the lieutenant governor, the governor and cabinet, a cabinet member, or an officer or board appointed by and serving at the pleasure of the governor" except as provided therein.

[43] Op. Att'y Gen. Fla. 2003-59.

[44] *Grant v. State*, 474 So. 2d 259 (Fla. 1st DCA 1985). *But see* Op. Att'y Gen. Fla. 02-72 (2002), concluding that the duties and responsibilities of an Assistant United States Attorney appeared to be in the nature of an employment rather than a "civil office of emolument under the United States."

[45] *Holley v. Adams*, 238 So. 2d 401, 407 (Fla. 1970). *And see In re Advisory Opinions to the Governor*, 79 So. 874, 875 (Fla. 1918) (construing a similar prohibition in Art. XVI, s. 15, 1885 Fla. Const., to conclude that if a state senator accepted another office, "such appointment and acceptance of the office vacates the person's right and status as a member of the state senate").

[46] 380 So. 2d 1102, 1104 (Fla. 1st DCA 1980), *petition for review denied*, 388 So. 2d 1113 (Fla. 1980).

[47] 635 So. 2d 937 (Fla. 1994). *And see* Ops. Att'y Gen. Fla. 11-05 (2011) and 96-84 (1996) (observing that in light of *Clayton*, the common law doctrine of incompatibility, precluding a person from serving in a governmental body and concurrently serving in a subordinate body, which could result in the officer favoring one entity over the other, is probably not viable).

[48] *See, e.g.,* Art. II, ss. 5 and 8, Fla. Const.

NOTE: Formal Attorney General Opinions issued since 1974 may be accessed on this office's searchable database at: http://myfloridalegal.com/ago.nsf/Opinions Informal opinions referenced in this pamphlet may be obtained by contacting the Opinions Division at: (850) 245-0158.