

073-46—March 6, 1973

DUAL OFFICEHOLDING—DUAL COMPENSATION
EMPLOYMENT OF PUBLIC DEFENDER AS “ADJUNCT
ASSISTANT PROFESSOR” IN STATE LAW SCHOOL

To: Richard W. Ervin III, Public Defender, Tallahassee

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QUESTION:

May a public defender accept employment as an “adjunct assistant professor” whose responsibilities would be to teach an evening law course at a state university after the normal hours of his duties as public defender have terminated?

SUMMARY:

A public defender may teach an evening law course at a state university after the normal hours of his duties as public defender have terminated. However, §216.262(3), F. S., as amended by Ch. 71-354, Laws of Florida, prohibits the receipt of compensation from state funds regardless of any additional duties performed in any capacity or position by a public defender.

Article II, §5, State Const., specifically prohibits dual officeholding, but in that regard the prohibition attaches only to concurrent services in state, county, or municipal offices. Attorney General Opinion 072-101. In the case of *State v. Hocker*, 22 So. 721 (Fla. 1897), the court adopted the following comprehensive definition which has been frequently cited by Florida courts over the years:

The term “office” implies a delegation of a portion of the sovereign power to, and possession of it by, the person filling the office; a public office being an agency for the state, and the person whose duty it is to perform the agency being a public officer. The term embraces the idea of tenure, duration, and duties, and has respect to a public trust to be exercised in behalf of government, and not to a merely transient, occasional, or incidental employment. A person in the service of the government, who derives his position from a duly and legally authorized election or appointment, whose duties are continuous in their nature, and defined by rules prescribed by government, and not by contract, consisting of the exercise of important public powers, trusts, or duties, as a part of the regular administration of the government, the place and the duties remaining though the incumbent dies or is changed, is a public officer

It is clear that the position of “adjunct assistant professor” in the state university system is not an “office” as contemplated by Art. II, §5, State Const. Consequently, the dual office prohibition does not apply in this instance.

At common law, public policy prohibited a public employee from holding another position in the public service whose duties were incompatible with those of a position already held by him. As noted in AGO 070-46 this rule is still in full force and effect in this state. However, I find no incompatibility between the duties of a public defender and an “adjunct assistant professor” in a state educational institution.

The legislature has enacted §27.51(3), F. S., which provides:

All public defenders elected to office on or after November 1, 1972, shall be elected on a full-time basis and shall be prohibited from the private practice of law while holding office. . . .

My predecessor in office, in a letter dated November 5, 1969, ruled that a public defender who taught a night course in a junior college was not "engaged in the practice of law." Certainly, then, teaching an evening course at a college of law is not engaging in the "private practice of law" as prohibited by §27.51(3), *supra*.

Attorney General Opinion 071-322 concerned itself with whether or not a public defender could also be employed outside his normal working hours as an instructor in a private law school. In permitting the employment, I also stated that it was not my intention in AGO 071-162

... to hold in that opinion that a full-time state officer or employee whose salary is fixed or limited by law may not engage in *private* employment outside his normal working hours and receive compensation therefor, so long as such employment does not violate the Standards of Conduct Law, §112.313(6), F. S., prohibiting a public officer or employee from accepting other employment that might impair his independence or judgment in the performance of his official duties, or the common-law rule prohibiting the acceptance of other employment whose duties are incompatible with his official duties. And it is obvious that there is no conflict of interest nor incompatibility between the duties, respectively, of a public defender and a teacher of a law course. (Emphasis supplied.)

In *State v. Llopis*, 257 So.2d 17 (Fla. 1971), the Florida Supreme Court invalidated §112.313(6), F. S., as being unconstitutionally vague.

In the case before me for consideration, the employment sought is with a *state* university. I presume that the compensation of an "adjunct assistant professor" would be paid from state funds. If this is indeed the fact, §216.262(3), as amended by Ch. 71-354, Laws of Florida, must be considered. The subsection reads, in pertinent part, as follows:

Unless specifically authorized by law, an individual filling or performing the duties of a position the salary of which has been specifically fixed or limited by law shall not receive compensation from more than one appropriation, nor in excess of the amount so fixed or limited by law, regardless of any additional duties performed by him in any capacity or position.

"Position" as defined in §216.011(1)(s), F. S., as amended by Ch. 71-354, "means the work, consisting of duties and responsibilities, assigned to be performed by an officer or employee."

The salaries of public defenders are fixed in §27.5301(1)(b), F. S. And the language quoted above indicates that if an individual's salary has been fixed by law, he may not receive compensation from more than one appropriation. "Appropriation" as defined in §216.011(1)(j) F. S., "means a legal authorization to make expenditures for specific purposes, within the amounts authorized in the appropriations act."

I have found no specific authorization by the legislature that would permit a public defender to receive compensation from another appropriation for the teaching of a law course in a state university after the normal hours of his duties as a public defender have terminated. In the absence of such an authorization by law, §216.262(3), *supra*, would prohibit receiving compensation from more than one appropriation regardless of any additional duties performed in "any capacity or position."

For the reasons stated above, there would be no statutory or constitutional provision that would prohibit you from engaging in such outside activity. However, §216.262(3), *supra*, would prohibit you from receiving compensation from state funds.