

CITY OF MIAMI
OFFICE OF THE CITY ATTORNEY
LEGAL OPINION – 13-001

TO: Luis Cabrera, Acting Assistant City Manager
FROM: Julie O. Bru, City Attorney
DATE: February 7, 2013
RE: Dual-Office Holding

You have requested a legal opinion on the following question:

1. **Section 15 of the Miami City Charter provides that the mayor, subject to the approval of the city commission, may designate a qualified administrative officer of the city to assume the duties and authority of the city manager during periods of temporary absence or disability of the city manager. You have indicated that while your permanent position is Deputy Chief of Police, you have for a period of approximately two (2) years been serving simultaneously as an Acting Assistant City Manager. The Mayor has indicated that he intends to appoint you to the position of Acting City Manager for a period of approximately 10 days during the absence of the City Manager. You ask whether a law enforcement officer may serve as Acting City Manager when such appointment is temporary and without additional remuneration without violating the dual office holding provisions of Article II, section 5(a), Florida Constitution.**
2. **You also ask whether a law enforcement officer may simultaneously serve as an Assistant City Manager and Deputy Chief of Police without violating the dual office holding provisions of Article II, section 5(a), Florida Constitution.**

For the reasons set forth below, your first question is answered in the negative and your second question is answered in the affirmative.

ANALYSIS
Question One

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 . . . any officer may be a member of a . . . statutory body having only advisory powers.”

This constitutional provision prohibits a person from simultaneously serving in more than one state, county, or municipal office, regardless of whether elected or appointed.

The Florida Attorney General has opined that, based upon existing case law, a law enforcement officer¹ is an “officer” within the scope of the constitutional dual office-holding prohibition.² In *Curry v. Hammond*, 16 So. 2d 523, 524 (Fla. 1944), the Florida Supreme Court stated:

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

It is the powers that a law enforcement officer may exercise, particularly the authority to arrest without a warrant and to carry firearms in performing his or her duties, not the salary or certification requirements, that characterize the law enforcement officer as an “officer.”(See *Maudsley v. City of North Lauderdale*, 300 So. 2d 304 (Fla. 4th DCA 1974).) The Attorney General has accordingly opined that even 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.

Under Section 16 of the Miami City Charter the powers and duties of the City Manager are prescribed as follows:

- (a) See that the laws and ordinances are enforced.
- (b) Appoint and remove, except as otherwise provided in this Charter, all directors of the departments and all subordinate officers and employees in the departments in both the classified and unclassified service; all appointments to be upon merit and fitness alone, and in the classified service all appointments and removals to be subject to the civil service provisions of this Charter.
- (c) Exercise control over all departments and divisions created herein or that may be hereafter created by the city commission.
- (d) Attend all meetings of the city commission with the right to take part in the discussion but having no vote.
- (e) Recommend to the mayor and city commission for adoption such measures as the city manager may deem necessary or expedient.
- (f) Keep the mayor and city commission fully advised as to the financial condition and needs of the city; and
- (g) Perform such other duties as may be prescribed by this Charter or be required by the mayor or ordinance or resolution of the city commission.

It is thus readily apparent that the City Charter delegates sovereign authority to the City Manager to exercise control over the affairs of the City. Thus it is without question that the City Manager is an “officer” for purposes of the dual office holding provisions in Article II, section

¹ The finding that a law enforcement officer is an officer for purposes of Article II, section 5(a), Florida Constitution applies whether the individual is a chief of police, deputy chief of police or patrol officer.

² See, e.g., Ops. Att’y Gen. Fla. 57-165 (1957), 58-26 (1958), 69-2 (1969), 71-167 (1971), 72-348 (1972), 76-92 (1976), 77-89 (1977), 86-11 (1986), and 89-10 (1989).

5(a), Florida Constitution. Consequently, Florida law prohibits you from holding both the office of City Manager, even in an acting capacity, and law enforcement officer simultaneously.

Notwithstanding the above, we believe that any such appointment must be considered on a case by case basis. In the particular circumstances underlying this opinion, the City Manager will be out of office for a period of approximately ten (10) days and the nature of the absence is one in which the City Manager may be incapacitated for a period of time. Thus the Acting City Manager will be delegated the sovereign power to exercise control over the affairs of the City. There may be instances in the future where the appointment may not rise to the level of a delegation of the sovereign authority to the Assistant City Manager. However, in this matter, and in an abundance of caution it would be prudent for you to not accept the temporary appointment of the position of City Manager or even in an acting capacity.

Question Two

A review of the Miami City Charter, relevant case law and attorney general opinions does not provide any indication that an acting assistant city manager, or even an assistant city manager, is an "officer" within the scope of the constitutional dual office-holding prohibition.

The Florida 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” *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).

We are in agreement with the Attorney General that it is the nature of the powers and duties of a particular position which determines whether it is an "office" or an "employment." Thus, the constitutional prohibition against dual office-holding does not apply generally to those persons who are not vested with official powers in their own right, but rather merely exercise certain powers as agents of governmental officers. A review of the functions of an assistant city manager reveals that the duties are largely ministerial rather than the substitute duties of a true city manager.

The powers and duties of the assistant city managers are simply described in Sec. 2-88 of the Code of the City of Miami, Florida (“City Code”) as:

“The duties and services to be performed by the assistant city manager and the administrative assistant to the city manager shall be such duties and services as may be assigned to them by the city manager.”

The Attorney General has indicated that one must give consideration to the particular language used in the statute, charter, or ordinance creating the position and establishing its powers when determining whether a particular position is an employment or office. It is clear from the above description of duties that the assistant city managers of the City of Miami are not vested with powers in their own right and consequently are not “officers”.

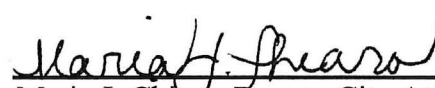
CONCLUSION

Accordingly, I am of the opinion under the facts and circumstances discussed herein and noted above, that the Deputy Chief of Police may not serve as Acting City Manager without violating the dual office holding provisions of Article II, section 5(a), Florida Constitution. The Deputy Chief of Police may simultaneously serve as an Acting Assistant City Manager and Deputy Chief of Police without violating the dual office holding provisions of Article II, section 5(a), Florida Constitution.

PREPARED BY:

REVIEWED BY:


George K. Wysong II, Assistant City
Attorney


Maria J. Chiaro, Deputy City Attorney

cc: Honorable Mayor and Members of the City Commission
Johnny Martinez, City Manager