

DE 80-2—January 15, 1980

DECLARATORY STATEMENT

To: Lucille Williams, City Clerk, Post Office Box 4748, Clearwater, Florida 33518

Prepared by: Division of Elections

This declaratory statement is issued by the Department of State, Division of Elections, pursuant to Section 1C-7.01, Florida Administrative Code, and in response to a petition received from the City Clerk of Clearwater, Florida, and noticed in the Florida Administrative Weekly on December 14, 1979.

The petition requests an interpretation of subsections 99.012(2), F.S., and 99.012(3), F.S., regarding the need for a public employee to resign when that person seeks to qualify in a city election and when that person is a firefighter for another municipality, president of that other city's firefighter union, and a member of a regional union council of firefighters.

Florida's resign-to-run law is said to serve two purposes: to prevent an officeholder from using the power and prestige of one office to seek another, and to spare the taxpayer the expense of having to finance a special election when an incumbent officeholder is elected to another office and is, therefore, compelled to resign from the one he or she currently holds. See the preamble to Chapter 70-80, Laws of Florida. It accomplishes these purposes by requiring any person who holds an elective or appointive office and who seeks to be elected to another public office, the term of which overlaps or runs concurrently with the term of the office which he currently holds, to submit an irrevocable letter of prospective resignation prior to qualifying for election, which resignation shall be effective regardless of whether the candidate is elected to such office. Sections 99.012(2) and 99.012(3), F.S.

The resign-to-run law, Section 99.012, F.S., applies to an individual who holds a state, county or municipal "elective or appointive office". (emphasis supplied) Thus, if the positions held by the candidate are ones that can be distinguished from offices, the resign-to-run law would not apply.

In addition to the statutory language of Section 99.012, F.S., Section 5(a), Art. II, State Const., prohibits a person from simultaneously holding "more than one office under government of the state and counties and municipalities therein . . ." Although the term "office" has not been constitutionally defined, the Florida Supreme Court 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 . . . 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. [*State ex rel. Holloway v. Sheats*, 83 So. 508, 509 (Fla. 1919)]

In *Advisory Opinion to the Governor*, 1 So. 2d 636 (Fla. 1941), the Supreme Court held that a member of the State Planning Board was a state "officer" within the dual-office prohibition, even though the members of the board were authorized to act only in an advisory capacity. In so holding, 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." The court concluded that "powers and attributes of sovereignty are delegated to or reposed in the State Planning Board by the statute."

A city council member is clearly a municipal officer within the purview of Section 5(a), Art. II, State Const., and Section 99.012, F.S. Previous opinions of the Attorney General have indicated that a municipal policeman is an officer within the scope of this constitutional provision. AGO's 057-165, 058-26, 069-2, 071-167, 072-348, 076-92, and 077-63.

The important consideration in the instant petition is whether a "firefighter", who is a union official, is an "officer" within the scope of Section 99.012, F.S. There is a generally accepted principle that the right to hold office is a valuable one which should not be curtailed except by plain provisions of the law. As stated in a leading text authority, 42 Am. Jur., Public Officers, Section 61, p. 928:

. . . the rule that provisions imposing disqualifications should be strictly construed is applicable to those which prohibit dual office holding. They should not be extended by implication beyond the office or offices expressed, or to persons not clearly within their meaning. In other words, they should be construed in favor of eligibility.

Applying the above-noted principle and the substantive law and opinions set forth earlier in this statement, the Department of State concludes that this petition's "firefighter" who is also a union official is not an "officer" within the scope of Section 99.012, F.S.

Initially, it should be noted that firefighters have never been held to be officers subject to the resign-to-run law. Secondly, the above-mentioned two purposes of Florida's resign-to-run law would not be served by designating a firefighter as an officer who is subject to Section 99.012, F.S. In particular, it is highly unlikely that a firefighter could use any power of his position to assist him in seeking public office. Furthermore, since a firefighter is not elected, the public would not have to finance a special election in the event the firefighter won an election. Hence, the spirit of Florida's resign-to-run law will not be mitigated by the department's interpretation that Section 99.012, F.S., does not apply in the instance of a firefighter seeking election.

Finally, the letter of the law is not offended either by the department's position. Firefighters are employees, not state officers. A firefighter does not serve for a fixed term of office. Furthermore, a firefighter's duties do not include his directly spending public funds appropriated for the purpose of discharging his duties or exercising any discretion in that regard. In addition, firefighters are employed to prevent and extinguish fires and otherwise enforce applicable fire codes. Such functions imply only an indirect, if any, delegation of a portion of a sovereign power. This is in contrast to a policeman's delegated responsibility which directly and regularly causes him to exercise sovereign powers (e.g., authority to arrest without a warrant).

The fact that a firefighter or any other individual is a union member or a union official has no bearing in the applicability of Section 99.012, F.S.

For the above-stated reasons, the department declares that this petition's "firefighter" who is also a union official is not an "officer" within the scope of Section 99.012, F.S., and therefore he is not required to resign from his employment in order to qualify as a candidate.