

DE 88-03 - January 26, 1988

**Resign-to-Run Law
Section 99.012(2), (7), F.S.**

To: Honorable Katherine S. Odham, Supervisor of Elections, Volusia County, Post Office Box 1467, DeLand, Florida 32721-1467

Prepared by: Division of Elections

This is in reference to your request for an advisory opinion. You wrote on behalf of an investigator working for the state attorney who is considering becoming a candidate for sheriff of Volusia County. You asked the following question:

Whether an investigator employed full-time for a state attorney must resign or take a leave of absence to run for sheriff and, if so, when must he resign or take a leave of absence?

The Division of Elections has authority under Section 106.23(2), Florida Statutes, to issue advisory opinions relating to the Florida Election Code, Chapters 97-106, Florida Statutes, to certain categories of persons including candidates and supervisors of elections.

The Division addressed this issue in a recent opinion, DE 87-07, in which we stated that an investigator is not an officer within the meaning of the Resign-to-Run Law. Upon further review, and for the reasons set forth in this opinion, it has been determined that an investigator for the state attorney's office has arrest powers and is, in fact, an "officer." Therefore, we hereby recede from that portion of Opinion DE 87- 07 as it relates to the investigator for the state attorney's office and substitute this opinion.

The Resign-to-Run Law requires an elected or appointed public officer to irrevocably resign when seeking an elected office, the term of which runs concurrently with the term of the office he currently holds. Section 99.012(2), Fla. Stat.

There is no constitutional or statutory definition of the term "officer." The Supreme Court of Florida first defined "officer" in 1897.

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, and between an employee and an officer....

State v. Sheats, 78 Fla. 583, 83 So. 508, 509 (1897).

In Curry v. Hammond, the Court stated, "It can hardly be questioned that a patrolman on city police force is clothed with sovereign power of the city while discharging his duty...." 154 Fla. 63, 16 So.2d 523 (1944). The Court continued this reasoning in State v. Martens, when it pronounced, "The right, particularly to arrest without warrant, indicates the type of power delegated to officers in question and definitely places them in the category of "officers" rather than employees, for no right is more sacred and more jealously guarded than the one that liberty shall not be infringed except by due process of law." 141 Fla. 66, 193 So. 835, 837 (1940).

Review of the applicable statutes reveals that investigators for the state attorney's office exercise sovereign power so as to qualify as officers. Section 27.255(1), Florida Statutes, provides in pertinent part:

Each investigator employed on a full-time basis by a state attorney and each special investigator appointed by the state attorney pursuant to the provisions of s. 27.251 is hereby declared to be a law enforcement officer of the state and a conservator of the peace, under the direction and control of the state attorney who employs him, with full powers of arrest, in accordance with the laws of this state.

In addition, Section 27.255(3), Florida Statutes, states that investigators "shall have the same rights, protections, and immunities afforded other peace or law enforcement officers." These statutes provide ample support that an investigator for the state attorney's office is an officer within the scope of the Resign-to-Run Law.

In most instances the Resign-to-Run Law, requires an elected or appointed officer to resign irrevocably when seeking an elected office, the term of which runs concurrently with the term of office he or she currently holds. Section 99.012(2), Fla. Stat. (1985). However, Section 99.012(7), Florida Statutes, grants specific exemptions from the Resign-to-Run Law for three groups of persons. Section 99.012(7), Florida Statutes, provides:

For the purposes of this section, no individual who is a subordinate personnel, deputy sheriff, or police officer need resign pursuant to subsection (2) or subsection (3) unless such individual is seeking to qualify for a public office which is currently held by an individual who has the authority to appoint, employ, promote, or otherwise supervise that subordinate personnel, deputy sheriff, or police officer and who has qualified as a candidate for reelection to that public office. However, any such personnel, deputy sheriff, or police officer shall take a leave of absence without pay from his employment during the period in which he is seeking election to Public office.

An investigator for the state attorney comes within the category of subordinate personnel. The Division of Elections previously determined that subordinate personnel are officers who are subject to the control and supervision of another and are not acting pursuant to their own power. Op. Div. Elect.

86-01, 85-08, 83-02, 80-05; Op. Atty. Gen. 79-81. Such is the case with an investigator for the state attorney who is "under the direction and control of the state attorney...."

Therefore, an investigator for the state attorney is both an officer and a subordinate personnel for purposes of the Resign-to-Run Law. Consequently, if an investigator for the state attorney seeks to qualify as a candidate for another public office, the term of which runs concurrently with the term of office he currently holds, he need not resign from his office as an investigator for the state attorney unless he or she is running against an individual who has the authority to appoint, employ, promote, or otherwise supervise that investigator and if that individual has qualified as a candidate for reelection to that public office. In this instance, the investigator for the state attorney need not resign as the position for which he seeks to qualify as a candidate is that of sheriff, and the sheriff does not have any authority over the investigator. However, according to statute, the investigator must take a leave of absence without pay during the period in which he is seeking election to public office. Section 99.012 (7), Fla. Stat. (1985).

When a leave of absence must take place has been the subject of prior opinions. Op. Div. Elect. 86-04, 80-12; Op. Atty. Gen. 79-81. In Division of Elections' Opinion 80-12, we determined that an interpretation of the statutory language, "shall take a leave of absence...during the period in which he is seeking election to public office," means the leave of absence must begin no later than when the officer qualifies as a candidate, i.e., when he pays his qualifying fee and files his qualifying papers.

The First District Court of Appeals in Humphries v. Dept. of Highway Safety and Motor Vehicles, broadened the interpretation of that statutory language by holding that when a person hires a campaign manager and prepares and distributes leaflets, cards and other election paraphernalia, he is "seeking election" and, therefore, the leave of absence provision is triggered. 400 So.2d 1311 (Fla. 1st DCA 1981). Simply announcing one's candidacy, in our opinion does not meet the Humphries' standard.

SUMMARY

An investigator for the state attorney is both an officer and a subordinate personnel for the purpose of the Resign-to-Run Law. The investigator need not resign unless he is running against an individual who has the authority to appoint, employ, promote, or otherwise supervise him. He must, however, take a leave of absence when he seeks election to public office as manifested by campaign activities such as hiring a campaign manager and distributing campaign material.