

DE 80-28 - August 25, 1980

Resign-To-Run Special District Office

To: Mr. Hugo H. de Beaubien, Drage and de Beaubien, 118 South Orange Avenue, Orlando, Florida 32801

Prepared by: Division of Elections

This is in response to your request for advisory opinion pursuant to Section 106.23(2), F.S. (1979). Your question can be restated in two parts:

1. May a Deputy Sheriff serve in an elected special district office of Commissioner of the Pinecastle Fire Department without violating Article II, Section 5(a), Florida Constitution of 1968?
2. Must a Deputy Sheriff seeking election to special district office take a leave of a absence without pay during the period in which he is unopposed for reelection to a special district office?

Article II, Section 5(a) of the Constitution states in pertinent 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 that a notary public or military officer may hold another office, and any officer may be a member of a constitution revision commission, constitutional convention, or statutory body having only advisory powers."

The prevailing view is that deputy sheriffs are officers rather than employees. See Blackburn v. Brorein 70 So. 2d 293 (Fla. 1954); CF Murphy v. Mack. Therefore, a deputy sheriff, as an officer, is constitutionally precluded from holding municipal, state or county office while a deputy sheriff. See OP. ATTY. GEN. 077-89 (August 30, 1977). However, the Supreme Court has held that special district office is not the same as municipal, county and state office. Town of Palm Beach v. City of West Palm Beach 55 So. 2d 566 (Fla. 1951). In view of this decision, express mention of state, county and municipal office in the State Constitution cannot be extended to include special district office. OP. ATTY. GEN. 069-49 (July 8, 1969). Therefore, it is our opinion that neither constitution or statute prohibits a deputy sheriff from simultaneously holding special district office.

As to resign to run question, we are confronted with an interpretation of Section 99.012(7), F.S. (1979), which states in pertinent part:

"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, police officer, or other such individual shall take a leave of absence without pay from his employment during the period in which he is seeking election to public office." (emphasis added)

An unopposed candidate does not appear on the ballot. He is deemed to have voted for himself. Section 101.27(3), F.S. (1979). However, should a write-in candidate qualify as a candidate at least 45 days before the election, the candidate would no longer be unopposed. Section 99.023, F.S. (1975).

Taking into consideration the fact that a deputy sheriff who is unopposed need not actively campaign for office, we conclude that the Deputy need not take a leave of absence without pay. To put it simply a candidate who is unopposed need not seek election. However, if and when a write-in candidate is certified for the special district office, the deputy sheriff would have to take a leave of absence without pay.

This result conforms to the main purpose of the Resign-to-Run Law, which is to prevent those who hold public office from using their position to obtain other public office. Holley v. Adams, 238 So. 2d 401 (Fla. 1970). Since, the deputy sheriff's election is at this point, a foregone conclusion we believe that his continued employment does not raise a potential for abuse of office which necessitates operation of the leave of absence provision.