

# RESCINDED

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## Resign-To-Run Law Section 99.012, F.S.

*To: Mr. Richard Kibbey, Assistant State Attorney, Nineteenth Judicial Circuit, Post Office Box 1968, Stuart, Florida*

*Prepared by: Division of Elections*

This is in response to your request for an opinion pursuant to Section 106.23(2), Florida Statutes (1979). Your question is:

MUST AN ASSISTANT STATE ATTORNEY RESIGN HIS EMPLOYMENT OR TAKE A LEAVE OF ABSENCE WITHOUT PAY IN ORDER TO QUALIFY AND RUN FOR A CITY COMMISSION SEAT?

Section 99.012(2) and (3), Florida Statutes (1979), the resign-to-run law, applies to elected or appointed officers. The law prohibits an officer from qualifying for other public office if any part of the term he seeks runs concurrently with the office he holds. Therefore, the first consideration here is to determine whether an assistant state attorney is an officer within the meaning of the resign-to-run law.

The test to determine whether an individual is an officer is set forth in Op. Atty. Gen. 80-1 (January 7, 1980), State ex. Rel. Clyatt v. Hocker, 22 So. 721 (Fla. 1897), State v. Sheats, 83 So. 508 (Fla. 1919). In these cases, the term office implies a delegation of a portion of the sovereign powers to one who derives his position from a duly and legally authorized election or appointment, whose duties are continuous in nature and defined by law not contract. In the constitutional sense "office" means an exercise of some portion of the sovereign power in making, executing, interpreting or administering the law.

The duties of an assistant state attorney are defined by Section 27.181(3), Florida Statutes (1979):

(3) Each assistant state attorney appointed by a state attorney under the authorization of this act shall have all of the powers and discharge all of the duties of the state attorney appointing him, under the direction of said state attorney, except, however, that due to constitutional limitations, no such assistant may sign informations. He shall sign indictments and other official documents, except informations, as assistant state attorney, and when so signed, the same shall have the same force and effect as if signed by the state attorney.

In addition, an assistant state attorney must take a written oath to faithfully perform the duties of assistant state attorney which is recorded with the Clerk of the Circuit Court. The assistant state attorney serves at the pleasure of the state attorney. Section 27.181(2), Florida Statutes

(1979).

Thus, the assistant state attorney is an appointive position having all the powers and discharging all the duties of the state attorney yet serving under the overall supervision and control of the state attorney. It is clear that the assistant exercises a portion of the sovereign power by signing indictments and other official court papers and by prosecuting violations of Florida criminal law. In performing these duties the assistant state attorney holds a public trust which is defined by law and is continuous even if the incumbent is changed. Therefore, the assistant state attorney exercises sufficient sovereign power to be termed an "officer" for purposes of the resign-to-run law.

The second consideration is whether an assistant state attorney is a subordinate personnel under Section 99.012(7), Florida Statutes (1979), which states:

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)

A subordinate personnel need not resign to run unless he is seeking to qualify for a public office which is currently held by an individual who has the authority to appoint or otherwise supervise that subordinate and who has qualified as a candidate for reelection to that public office.

There has been no judicial construction of the term "subordinate personnel". The term is generally construed to mean one who is subject to the control and supervision of another and who does not act entirely pursuant to his own power. An examination of Section 27.181(3), Florida Statutes (1979), reveals that an assistant state attorney is such a subordinate personnel who carries out his official duties under the overall supervision and control of the state attorney.

Therefore, an assistant state attorney is a subordinate personnel who need not resign to run unless he is running against an individual who has the authority to appoint or supervise an assistant and who has qualified for reelection to that office. If an assistant state attorney is not running against such a person, he must still take a leave of absence without pay during the period in which he is seeking election to public office.

This opinion is not inconsistent with the result reached in Op. Atty. Gen. 071-264 (August 31, 1971). In that opinion, the Attorney General found that an assistant state attorney was not a constitutional officer for purposes of the prohibition against holding dual offices of Article II, Section 5(a), Florida Constitution of 1968. This rationale was used so as not to curtail the right

of an individual to hold public office absent a clear provision of law. Similarly, the Division's opinion that an assistant state attorney is a subordinate officer does not curtail the right of an individual to remain employed as an assistant state attorney and at the same time hold public office.

It must also be emphasized that this opinion is a construction of Chapter 99, Florida Statutes (1979), and does not consider the impact of Section 110.233, Florida Statutes (1979), upon the right of an assistant state attorney, as a state employee, to seek and hold public office.

### **SUMMARY**

An assistant state attorney is an officer who is subordinate to the state attorney. An assistant state attorney who is seeking to run for a city commission seat need not resign to run unless he is seeking to qualify for an office which is currently held by an individual who has the power to appoint or supervise him and who has qualified as a candidate for reelection to that public office. However, an assistant state attorney shall take a leave of absence without pay from his employment during the period which he is seeking public office.