

DE 88-40 - September 29, 1988

**Resign-to-Run
Section 99.012, F.S.**

To: Mr. William P. White, Chief Assistant Public Defender, Office of Public Defender, Duval County Courthouse, Jacksonville, Florida 32202

Prepared by: Division of Elections

This is in reference to your request for an advisory opinion on the Resign-to-Run Law. You are the Duval County Chief Assistant Public Defender and you are considering running for public office. 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. Therefore, the Division has authority to issue this opinion to you.

Your specific question is:

Does the Resign-to-Run Law apply to an assistant public defender?

The Resign-to-Run Law applies to elected or appointed officers and subordinate personnel who are officers. Therefore, we must determine whether an assistant public defender is an officer or subordinate personnel who is an officer to determine whether the Resign-to-Run Law applies to an assistant public defender.

An officer is defined as one who exercises some portion of the sovereign power, either in making, executing or administering the laws and 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. State ex rel. Clyatt v. Hocker, 39 Fla. 477, 22 So. 721 (1887), State ex rel. Holloway v. Sheats, 83 So. 508 (Fla. 1919), Op. Att'y Gen. Fla. 80-1.

Division of Elections' Opinion 80-18, found that an assistant public defender is an appointed officer who is subordinate personnel within the meaning of the Resign-to-Run Law. We hereby recede from that opinion and determine that in accord with Attorney General Opinion 69-5, assistant public defenders are not officers who are subordinate personnel for purposes of the Resign-to-Run Law.

As an elected official of each judicial circuit, a public defender is an officer within the meaning of the Resign-to-Run Law who exercises some portion of the sovereign power. Section 27.53(1), Florida Statutes, provides "The public defender of each judicial circuit is authorized to employ and establish, in such numbers as he shall determine, assistant public defenders...." (Emphasis added.)

This language sharply contrasts with the statutory language creating the position of assistant state attorney. Section 27.181(1), Florida Statutes, states "The state attorney ... shall appoint an assistant

state attorney to hold such position and shall thereafter fill by appointment such vacancies in such position as may from time to time occur." (Emphasis added.) The statute goes on to refer to the "term of office" of an assistant state attorney, stating that the appointment must be in writing, recorded in the office of the clerk of the relevant circuit court, and appointees must subscribe to a written oath which must also be recorded. Id. In addition, Section 27.181(3), Florida Statutes, provides:

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.... He shall sign indictments, informations, and other official documents, as assistant state attorney, and, when so signed, the same shall have the same force and effect as if signed by the state attorney.

This language gives assistant state attorneys the status of officers who exercise a portion of the sovereign power for purposes of the Resign-to-Run Law.

There is no parallel statutory language empowering the assistant public defenders with officer status. An assistant public defender does not exercise a portion of the sovereign power of the State of Florida as does an assistant state attorney. An assistant public defender represents persons who are determined by the court to be indigent and who are appearing before the court: (1) charged with felony, r other violation which is punishable by imprisonment; (2) charged with delinquent child support; or (3) whose involuntarily hospitalization is sought as being mentally ill or retarded. Section 27.51(1), Fla. Stat.

The answer to your question is no, the Resign-to-Run Law does not apply to assistant public defenders. We are of the opinion that unlike assistant state attorneys, assistant public defenders are "officially employed court functionaries in the nature of state employees...." Op. Atty. Gen. Fla. 69-5. Therefore, an assistant public defender need not resign, nor take a leave of absence, to run for public office.

SUMMARY

An assistant public defender is not an officer or subordinate personnel who is an officer within the meaning of the Resign-to-Run Law, and, therefore, an assistant public defender need not resign, nor take a leave of absence, to run for public office.