



The Florida House of Representatives

Office of the General Counsel

Dean Cannon, Speaker
Office of the General Counsel

George T. Levesque
General Counsel

Teresa Cooper Ward
Deputy General Counsel

MEMORANDUM

OPINION 11 - 11

To: The Honorable Representative ~~District~~
From: George Levesque, House General Counsel
Date: November 4, 2011
Re: Dual Office Holding; Conflicts of Interest

You have requested an advisory opinion as to whether there is a prohibited conflict of interest between your uncompensated service on the Diabetes Advisory Council as an appointee of the Governor and your duties as a member of the Florida House of Representatives. Additionally, this opinion will address whether Fla. Const., Art. II, § 5, governing dual office holding, and Fla. Const., Art. II, § 8, prohibit a member of the Florida House of Representatives from serving on such an advisory board, pursuing appropriations requests on behalf of the Council, and introducing legislation that would further the Council's goals.

For the reasons stated below, I do not believe there is a prohibited conflict of interest with your uncompensated service as a board member of the advisory council, nor does your uncompensated service as a gubernatorial appointee to an advisory board offend the dual office holding prohibition contained in the Florida Constitution. Because your activities on its behalf are uncompensated and narrowly focused, you may advocate positions for the Council with the Legislature.

STATEMENT OF FACTS:

You are an elected member of the House of Representatives. You have recently accepted an appointment from the Governor to serve in an uncompensated position on the Diabetes Advisory Council ("Council"). This position is not compensated, and the Council is a gubernatorial-appointed group that advises the Governor and the Secretary of the Department of Health and others "on emerging diabetes issues effecting care, treatment, and quality of life for those with this illness. The guidance of and recommendations made by the Council improve policy and

legislation efforts as well as influence the strategic planning of the Diabetes Control Program,” according to the website for the Council.¹ The Council is statutorily directed to:

- (a) Provide statewide leadership to continuously improve the lives of Floridians with diabetes and reduce the burden of diabetes.
- (b) Serve as a forum for the discussion and study of issues related to the public health approach for the delivery of health care services to persons with diabetes.
- (c) By June 30 of each year, meet with the State Surgeon General or designee to make specific recommendations regarding the public health aspects of the prevention and control of diabetes.

Section 385.203(1), Fla. Stat. The Council members receive no remuneration for their services but may receive per diem expenses to the extent resources are available. *See* § 385.203(5). Neither the Governor’s authority nor the powers vested in the Department of Health are delegated to you, and you possess no authority independent of the Council, acting in your capacity as a Council member.

ANALYSIS:

It is my opinion that no prohibited conflict of interest would be created if an elected representative were to serve in an uncompensated position on the Diabetes Advisory Council.

Although §112.313(7)(a), Fla. Stat. prohibits a public officer from having any employment or contractual relationship with an agency subject to the regulation of his public agency, your position with the Council is as an uncompensated board member. There is no employment or contractual relationship with a state agency or the Legislature. Likewise, Art. II, § 8(e) of the Florida Constitution, which precludes you as a public officer from personally representing an entity during your term of office, does not apply because your position on the Council is not compensated.

In CEO 09-4, the Commission receded from prior opinions, specifically CEO 00-7 and 00-18, that found former state legislators were permitted to be employed by state agencies and lobby the Legislature. The Commission reasoned that such prohibitions applied even in the context of public service as “prophylactic measures” designed to protect the integrity of the legislative process by ensuring that decisions of legislators are not motivated by possible lobbying opportunities, whether in the public or private sectors. Similarly, the Commission found that a prospective representative could not serve as the President of the Florida Association of Realtors, an uncompensated position, because of the conflicts created by the positions taken by the association on a wide range of issues and the potential public confusion that might arise in distinguishing whether the individual was advocating as a state representative on behalf of her constituents or as president of the association. *See* CEO 06-12. Therefore, this opinion is narrowly drafted to the facts presented, where your position with the Council is uncompensated,

¹ <http://www.doh.state.fl.us/Family/DCP/DAC/dacinfo.html>.

you receive no financial gain, and the subject matter is limited to advisory matters related to diabetes.²

The second question presented is whether or not membership on the Council is prohibited as a dual office under the Florida Constitution.

It is my opinion the dual office holding prohibitions of Art. II, § 5 of the Florida Constitution do not apply because your position on the Council is not an “office” within the meaning of that provision. Article II, § 5 provides:

. . . . 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, taxation and budget reform commission, constitutional convention, or statutory body having only advisory powers.

The position you have described is that of an uncompensated member, not that of an officer. You have no authority independent of the Council nor does your association with the Council afford you the privilege of exercising the sovereign powers of the State. According to statute, the Council “serves as the advisory unit to the Department of Health, other governmental agencies, professional and other organizations, and the general public.” Section 385.203(1), Fla. Stat.

Relying on *State ex rel. Clyatt v. Hocker*, 22 So. 721 (Fla. 1897), that “[e]very ‘office,’ as that term is used in the constitution, implies an authority to exercise some portion of the sovereign power, either in making, executing, or administering the laws,” the Attorney General has expressed his opinion that the distinction between an office and an employment is whether any part of the authority of the sovereign is delegated to the position. See AGO2005-29 (2005). This principle is echoed in House Policy 1.20: “The term ‘office’ implies a delegation of a portion of the sovereign power, while ‘employment’ does not. (*State ex rel Holloway v. Sheats*, 83 So. 508, 509 (Fla. 1919)).”

A similar issue was addressed in AGO 77-159 looking at the Florida Advisory Council on Intergovernmental Relations. The Attorney General concluded that positions on advisory bodies that do not exercise powers of the State are not public offices within the meaning of the prohibition. See AGO 77-159.

Accordingly, your service to the Diabetes Advisory Council would not appear to constitute an office within the meaning of the Florida Constitution, and it is my opinion that you are not prohibited from serving on the Council by the dual office holding prohibition of the Florida Constitution.

² The reimbursement of expenses does not constitute “compensation.” See generally CEO 00-23, fn. 2, and CEO 90-4, question 4.

The last question concerns your activities as a Member of the House: pursuing appropriations on behalf of the Council, introducing legislation that would further the Council's goals, and advocating for diabetes-related issues. Because you serve on the Council without compensation, there are no express ethical prohibitions on such activities. *See* CEO 98-07, 85-70, and CEO 10-02.

Concerning voting conflicts, it is impossible to assess whether conflicts exist at this time. Such an analysis requires an examination of the matter pending and the facts potentially giving rise to the conflict.

The above opinion is based upon facts which you have provided. If the situation outlined is materially different than the facts offered, or if there are additional relevant facts that have been omitted, I would need to review the new information, and my opinion may change accordingly.

I would be remiss if I did not provide some additional cautionary advice.

The Code of Ethics further provides that no member "shall corruptly use or attempt to use his official position or any property or resource which may be within his trust, or perform his official duties to secure a special privilege, benefit, or exemption for himself or others." *See* § 112.313(6), Fla. Stat. Moreover, no member "shall disclose or use information not available to members of the general public and gained by reason of his official position for his personal gain or benefit or for the personal gain or benefit of any other person or business entity." *See* § 112.313(8), Fla. Stat. While I am not aware of any facts which would indicate that these provisions are applicable to your situation, it would be prudent to keep these in mind. The law grants latitude to members based upon the recognition that they are part-time legislators that require outside employment and have lives outside their public office. That concept sometimes may get lost in public discourse, and what may be a legally tolerated conflict of interest may be viewed as inappropriate or corrupt in the court of public opinion.