

This opinion responds to a question concerning eligibility to serve in the Oregon Legislative Assembly presented by The Honorable Brady Adams, President of the Senate; The Honorable Cliff Trow, Senate Democratic Leader; The Honorable Lynn Lundquist, Speaker of the House; and The Honorable Kitty Piercy, House Democratic Leader.

### QUESTION PRESENTED

Is a deputy district attorney, actively employed as such, eligible to serve as a member of the Oregon Legislative Assembly? If not, would he or she be eligible while on a leave of absence during the legislative session?

### ANSWER GIVEN

A deputy district attorney may not serve in the Oregon Legislative Assembly, either while actively employed or on a leave of absence.

### DISCUSSION

Two provisions of the Oregon Constitution present obstacles to a deputy district attorney who would like to serve in the Oregon Legislative Assembly: Article III, section 1, requiring separation of powers, and Article II, section 10, prohibiting the simultaneous holding of more than one lucrative office. Because we conclude that the first of these provisions disposes of the issue, we address the second only briefly.

#### I. Separation of Powers

Unlike the Federal Constitution, which establishes separation of powers only by implication, the Oregon Constitution contains a specific requirement:

The powers of the Government shall be divided into three separate [sic] departments, the Legislative, the Executive, including the administrative, and the Judicial; *and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in the Constitution expressly provided.*

Or Const Art III, § 1 (emphasis added). The emphasized clause prohibits members of one branch from undertaking a duty or function that belongs in another branch; it prohibits members of one branch, in performing a duty appropriate to that branch, from doing so in a way that unduly interferes with the operation of another branch's function; and, most relevant here, it prevents the same person from simultaneously performing duties as a member of more than one branch. *See, e.g., In the Matter of Sawyer*, 286 Or 369, 594 P2d 805 (1979) (same person may not simultaneously work in State System of Higher Education, an executive agency, and serve as a judge, within the Judicial Branch). In construing this provision, the Oregon courts have imposed a "strict prohibitory interpretation." 43 Op Atty Gen 205, 208 (1983).

In order for simultaneous tenure in two positions to violate the "dual function" provision, each position must (1) involve the exercise of a state government function, and (2) occur in a different branch of state government. *Monaghan v. School District No. 1*, 211 Or 360, 370, 373, 315 P2d 797 (1957); 37 Op Atty Gen 554, 563-64 (1975) (dual function prohibition reaches only to state government positions). Since service as a representative or senator in the Legislative Assembly is obviously the exercise of a government function in the legislative branch, the only issues presented here focus on employment as a deputy district attorney. If such employment is a function of either the executive or judicial branch of state government, then simultaneous tenure in that job and the Legislative Assembly violates Article III, section 1, of the Constitution.

#### A. "Executive" Function

While some government functions do not lend themselves readily to classification within one or another branch, the prosecutorial function of the district attorney is not among them. The prosecution of crimes is, in fact, the archetypal executive function. As the Court of Appeals has recently noted, "[T]hroughout Oregon's history, district attorneys have been regarded as \* \* \* prosecutors for the executive branch." *State v. Coleman*, 131 Or App 386, 390, 886 P2d 28 (1994) (citing cases).

District attorneys appoint their deputies to whom they may delegate some of their functions, ORS 8.780,<sup>(1)</sup> including prosecution of crimes, ORS 8.660(1).<sup>(2)</sup> Therefore, deputy district attorneys clearly perform executive functions.

## B. "State" Function

Less clear is whether deputy district attorneys perform a state government function. In a sense, deputy district attorneys are county employees. They are appointed under

authority that lies not in the state, but in the county of their employment. ORS 8.760. That county also fixes their salary, which comes principally from county funds. *Id.*

Nonetheless, we believe that a deputy district attorney performs functions within the executive branch of *state* government. In *Monaghan v. School District*, the Oregon Supreme Court examined whether a public school teacher could serve as a legislator. In holding that he could not, the court concluded that a teacher employed by a school district, a self-contained political entity, was nonetheless performing state functions for purposes of Article III, section 1.<sup>(3)</sup> The court cited several factors leading to this conclusion.

First, education is "not regarded as a local matter. It is a governmental obligation of the state" required by a constitutional mandate to the legislature to provide a system of public education. *Monaghan*, 211 Or at 373 (citing Or Const Art VIII, § 3). Likewise, law enforcement is a matter of statewide concern. Deputy district attorneys are sworn to conduct prosecutions "on behalf of the state," ORS 8.660(1), and are constitutionally designated as "the law officers of the State" who "shall perform" their law enforcement duties "as the Legislative Assembly may direct." Or Const Art VII, § 17.

Second, school districts are created by the legislature and are "civil division[s] of the state." *Monaghan*, at 374. Likewise, counties are political subdivisions of the state.

Third, a teacher, although employed by a school district, is nonetheless disseminating the state's educational standards and, when so engaged, is "exercising one of the functions of the executive department of our state government." *Monaghan*, at 376. Likewise, the district attorney and his or her deputies are charged with enforcing state laws and conducting prosecutions for violations of state law "on behalf of the state." ORS 8.660(1).

Thus, *Monaghan* establishes a functional test for determining whether a particular public employee performs state functions for purposes of Article III, section 1. If an employee or officer performs functions of statewide importance, that emanate from the state government, on behalf of the state government, as part of a governmental unit created by state government, that employee will be deemed to perform functions that may be within one of the branches of state government so as to trigger separation of powers concerns. Under that test, deputy district attorneys perform functions of the executive branch of state government. *Accord State v. Coleman*, 131 Or App at 390 (district attorneys historically regarded as "state officers who act as prosecutors for the executive branch"); *see also Gibson v. Kay*, 68 Or 589, 137 P 864 (1914) (dicta; appointee of corporation commissioner exercising functions of district attorney would be member of state executive branch).

This conclusion is consistent with our earlier advice. Although we did conclude in one opinion that Article III, section 1, did not reach to county government employees, 37 Op Atty Gen 554, 564 (1975), that opinion deals with county employees performing county functions, or employees such as commissioners or members of county courts who perform "commingl[ed]" functions that cannot be identified with a particular branch. *Id.* Two years later, we clarified our earlier opinion by concluding that Article III, section 1, *does* apply to a county court judge with jurisdiction over state law matters because such a judge "exercises functions of the judicial branch of state government, whether or not actually deemed to be a state judicial officer." 38 Op Atty Gen 1288, 1291 (1977). By this clarified logic, a deputy district attorney, performing state-mandated functions and executing state criminal laws, is a member of the executive branch of state government despite the fact that he or she is technically employed by a county. *See also* 26 Op Atty Gen 185 (1953) (Article III, section 1, dictates that school district board member cannot serve in legislature); 25 Op Atty Gen 201 (1951) (county dog control board member); 23 Op Atty Gen 334 (1947) (county public welfare commissioners).

We therefore conclude that, under Article III, section 1, of the Oregon Constitution, a person actively employed as a deputy district attorney may not simultaneously serve in the Oregon Legislative Assembly.

## C. Effect of "Leave of Absence"

The conclusion does not change if the deputy district attorney takes a leave of absence from that position for the duration

of the legislative session. We have previously concluded that a state employee on a leave of absence is nonetheless still a state employee for purposes of the Article III, section 1, "dual function" analysis. 33 Op Atty Gen 537, 539 (1968). We quote from that prior opinion at some length, because we continue to find the reasoning persuasive:

A person on a leave of absence is generally considered to be continuing in his employment. The term "leave of absence" has been held to signify nothing more than an authorized temporary absence from work for other than vacation purposes. \* \* \*

It could be argued that a state employe on leave of absence does not "exercise any of the functions" of the executive department and that by serving in the legislature he would not violate the provisions of Article III, § 1 \* \* \* .

However, the court's opinion in *Monaghan v. School District No. I*, supra, compels the conclusion that the prohibition of Article III, § 1, would apply in such a case because the entire purpose of this constitutional provision would be violated where a person continuing in employment as a state employe were simultaneously serving in the legislature. \* \* \* [T]he Oregon court [in *Monaghan*] explained the reason why Article III, § 1, was included in the constitution and indicated the scope of its application:

The constitutional prohibition is designed to avoid the opportunity for abuse arising out of such dual service whether it exists or not. \* \* \*

\* \* \* Conceivably the school board could say to its employee who is serving in the legislature, "You must vote in favor of certain bills that are advantageous to us \* \* \* . If you do we will increase your salary and if you do not you will be penalized in your position in certain respects." \* \* \* *Monaghan v. School District No. 1*, (1957) 211 Or at 360, 376, 377 \* \* \* .

[A state employee on leave] remains, in a true sense, a state employe and could be under the potential pressure of the state agency employing him, as described in the *Monaghan* case. As such, it would violate the intended purpose of Article III, § 1, to consider that while on simple leave of absence from his state job he could serve as a member of the legislature.

33 Op Atty Gen at 539 (citations omitted).

For these reasons, the fact that a deputy district attorney is on a leave of absence from that position does not alter our conclusion that Article III, section 1, precludes him or her from serving in the Legislative Assembly.

## II. Multiple Lucrative Offices

Because we conclude that Article III, section 1, prohibits a deputy district attorney from serving in the Legislative Assembly, we need not consider at length whether Article II, section 10, has the same effect. That section provides:

No person holding a lucrative office, or appointment under the United States, or under this State, shall be eligible to a seat in the Legislative Assembly; nor shall any person hold more than one lucrative office at the same time, except as in this Constition [sic] expressly permitted. \* \* \*

Or Const Art II, § 10.

A position is a "lucrative office" under this provision if (1) a salary or other compensation beyond expenses is attached to it; (2) it is created by statute or constitution; (3) its holder exercises part of the sovereign power of government; (4) in a matter of public concern; and (5) the position is not temporary or intermittent. *Morris v. Parks*, 145 Or 481, 28 P2d 215 (1934); *Reising v. City of Portland*, 57 Or 295, 111 P 377 (1914). "[T]here is no doubt that the position of deputy district attorney is \* \* \* a lucrative public office." 11 Op Atty Gen 469, 472 (1923); 21 Op Atty Gen 226 (1943). The fact that a deputy district attorney is a county employee has no bearing on the analysis under Article II, section 10. *See id.*; 25 Op Atty Gen 237 (1951) (county school superintendent). Since "every legislator is the incumbent of a lucrative office," 23 Op Atty Gen 334, 335 (1947), it is apparent that a deputy district attorney on active duty may not serve in the legislature.

The effect of a leave of absence, however, is not clear. We have concluded on several occasions that the prohibition against dual lucrative employment operates even when the officer waives compensation for one of the positions. 21 Op Atty Gen 204, 205-6 (1943); 25 Op Atty Gen 36, 37 (1950); 32 Op Atty Gen 25 (1964). Further, if a leave of absence does not insulate an official from the dual function prohibition of Article III, section 1, it would seem logical that the same

result would apply under Article II, section 10.

These considerations, however, are not conclusive. Although foregoing compensation for one of the offices might not allow a dual office-holder to escape the constitutional prohibition, foregoing compensation and also foregoing performance of any duties for one office might be a different matter. In addition, because Article III, section 1, and Article II, section 10, are presumably designed to prevent different evils, the scope of one is not necessarily the same as the scope for the other. For example, while the separation of powers provisions in Article III are calculated to prevent the despotism that can result from the accumulation of too much power in one branch of government, the multiple employment prohibition of Article II may be calculated to discourage the abuses that result from "moonlighting." If that is the case, then serving in one lucrative office while on leave from another would not amount to a violation.

Because no appellate cases or Attorney General opinions provide any guidance on this issue, and because we can fully answer the questions presented without resolving whether serving in one lucrative office while on leave from another would violate Article II, section 10, we leave a full treatment to another occasion.

HARDY MYERS  
Attorney General

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1. ORS 8.780 provides:

A district attorney shall appoint deputies. A deputy district attorney shall have the same qualifications as the district attorney, and subject to the direction of the district attorney, has the same functions as the district attorney.

Return to [previous location](#).

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2. ORS 8.660(1) provides:

The district attorney shall attend the terms of all courts having jurisdiction of public offenses within the district attorney's county, and, except as otherwise provided in this section, conduct, on behalf of the state, all prosecutions for such offenses therein.

Return to [previous location](#).

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3. The Constitution has since been amended to permit school and university employees to serve in the Legislative Assembly. Or Const Art XV, § 8.

Return to [previous location](#).

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Go to:

[Top of page.](#)

[AG Opinions home page.](#)



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