



ROBERT B. BERLIN
STATE'S ATTORNEY
DUPAGE COUNTY, ILLINOIS
March 22, 2016

Kirk Allen
Kirk@illinoisleaks.com

Re: *Freedom of Information Act (FOIA)* Request

Mr. Allen,

This letter is in response to your request dated Saturday March 19, 2016 which you transmitted via email to a general email account for our office. Your request was for "a copy of any inquiry sent to the States [sic] Attorney regarding the existence of a possible conflict of interest with COD Trustee Olsen serving in his capacity as a COD trustee as well as a Downers grove council member." You request is granted. Attached please find the documents responsive to your request.

Please direct any future FOIA requests to the State's Attorney's designated FOIA e-mail address, FOIAStatesAttorney@dupageco.org as indicated on our website rather than to our general account. Our FOIA-specific address is monitored by personnel familiar with the Act and who have been trained to process, track, and prepare responses to FOIA requests in the manner required by law. Though your direction of FOIA requests to the general account has not impacted our ability to provide you with responses, your use of the designated FOIA account does allow us to respond more efficiently. Thank you for your cooperation.

Very Truly Yours,

Gregory Vaci,
Chief of Civil Bureau
FOIA Officer

Sowinski, Lynn

From: Bob Barnett <rtbarnett@downers.us>
Sent: Thursday, March 10, 2016 8:33 PM
To: State's Attorney
Cc: Enza Petrarca
Subject: College of DuPage - Village of Downers Grove: Elected/Appointed Office Compatibility
Attachments: Incompatibility of Office-Subordinate Office.pdf; IL ATTY GEN OP 85-019.pdf

Mr. Berlin,

I was recently made aware (<http://bit.ly/1U5UzNu>) of questions being asked by College of DuPage Board of Trustees members as to the compatibility of the office of Village of Downers Grove Commissioner and College of DuPage Trustee.

There are certain Intergovernmental Agreements, TIF Agreements and the like, already in place and others which may be under consideration that place into question the ability of an individual serving in both capacities to provide assurance to the public that they are serving each board appropriately. In reading the attached, it would seem there may be a question as to the compatibility of these two offices. Furthermore, did Mr. Olsen effectively resign his position on the Village Council as a function of being sworn in to the Board of Trustees?

Please review the situation and provide an opinion, to me and the balance of my colleagues, as to the legal compatibility of the two offices and to the status of Mr. Olsen's position on the Downers Grove Village Council. The Downers Grove Village Council, the COD Board of Trustees and the public we serve deserve certainty.

Call or email with any questions.

Sincerely,

Bob Barnett

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Robert T. Barnett, Commissioner
Village of Downers Grove
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NEIL F. HARTIGAN
ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD



November 19, 1985

File No. 85-019

COMPATIBILITY OF OFFICES:
The Offices of City Council
Member and School Board Member
are Incompatible

Honorable Gerald G. Dehner
Logan County State's Attorney
Logan County Courthouse, Room 13
Lincoln, Illinois 62656

Dear Mr. Dehner:

I have your letter of September 9, 1985, wherein you inquire concerning the compatibility of the offices of school board member and city council member. For the reasons hereinafter stated, it is my opinion that the offices in question are incompatible.

Incompatibility arises where the Constitution or a statute specifically prohibits the occupant of one office from holding another, or where the duties of the two offices are

such that the holder of one cannot, in every instance, fully and faithfully discharge the duties of the other. (People ex rel. Myers v. Haas (1908), 145 Ill. App. 283, 286.) There is no constitutional or statutory provision prohibiting one person from holding the offices of school board member and city council member. Therefore, it must be determined whether the duties of either office are such that the holder of one cannot, in every instance, fully and faithfully discharge all of the duties of the other.

Under section 3 of "AN ACT in relation to State revenue sharing with local government entities" (Ill. Rev. Stat. 1983, ch. 85, par. 613) a city council may allocate all or part of its revenue sharing funds to a school district which lies at least partly within the municipality. As a school board member, one has a duty to provide for the revenue necessary to maintain the schools in his or her district. (Ill. Rev. Stat. 1983, ch. 122, par. 10-20.3.) A conflict could arise, therefore, between a dual officeholder's duty as a city council member to determine how municipal revenue sharing funds should be spent to best serve the needs of the citizens of the municipality and his or her duty as a school board member to provide for the revenue necessary to maintain the district's schools.

Additionally, there are a number of statutes which expressly or impliedly authorize a municipality and a school district to contract with one another. For example, a municipality and a school district may, in accordance with statute, contract with one another for the transfer, lease or sale of real property. (See, e.g., Ill. Rev. Stat. 1983, ch. 24, pars. 11-45-15, 11-74.2-12; ch. 30, par. 156 et seq.; ch. 122, pars. 10-22.11, 16-9.) A school district may contract with a municipality in order to provide for traffic regulation in parking areas, and to agree to the expense and method of payment for municipal fire protection for school buildings. (Ill. Rev. Stat. 1983, ch. 24, par. 11-6-2; ch. 122, pars. 10-22.42, 16-10.) A school district is also authorized to provide a water supply for its facilities, which in many cases will require contracting with a municipality for municipal services. (Ill. Rev. Stat. 1983, ch. 122, par. 10-20.17.) Moreover, under the Intergovernmental Cooperation section of the 1970 Illinois Constitution (Ill. Const. 1970, art. VII, § 10) and the Intergovernmental Cooperation Act (Ill. Rev. Stat. 1983, ch. 127, par. 741 et seq.), municipalities and school districts are authorized to enter into contracts to obtain or share services, and to exercise, combine or transfer powers or functions.

Honorable Gerald G. Dehner - 4

If an individual were to serve as both a city council member and a school board member, and those units were to contract, he or she would be required to protect and represent the interests of both the city and the school district. It is clear that a person cannot represent the interests of both governmental units when these units contract with each other. (1975 Ill. Att'y Gen. Op. 37; 1976 Ill. Att'y Gen. Op. 116.)

Therefore, because one who holds the offices of school board member and city council member cannot, in every instance, fully and faithfully discharge the duties of both offices, it is my opinion that the offices are incompatible. See also 1980 Ill. Att'y Gen. Op. 81, in which it was advised that the offices of school board member and village mayor are incompatible.

It is well settled in Illinois that the acceptance of an incompatible office by the incumbent of another office constitutes an ipso facto resignation of the first office. (People v. Bott (1931), 261 Ill. App. 261, 265.) Formal resignation or ouster by legal proceedings is not required. Packingham v. Harper (1896), 66 Ill. App. 96, 100; 1981 Ill. Att'y Gen. Op. 47, 48.

Very truly yours,


ATTORNEY GENERAL

Legal Q & A

Incompatibility of Office/Subordinate Office

By Roger Huebner, General Counsel, IML
Jerry Zarley, Paralegal, IML

(July 1999)

This monthly column examines issues of general concern to municipal officers. It is not meant to provide legal advice and is not a substitute for consulting with your municipal attorney. As always, when confronted with a legal question, contact your municipal attorney as certain unique circumstances may alter any conclusions reached herein.

Within the last few months newly elected officials throughout the state of Illinois have been sworn-in and are settling in to their new positions. Most elected officials maintain their occupational position while holding the office for which they were elected. Many elected officials, for various reasons however, may be offered and tempted to accept other appointed or elected positions. Unfortunately, with the array of appointed and elected offices, a conflict of interest may arise when an elected official combines two or more of these offices simultaneously.

Q: Under Illinois law, what constitutes an incompatibility of office?

A: An incompatibility of office may occur in a variety of combinations. However, incompatibility arises where the Constitution or a statute specifically prohibits the occupant of one office from holding another, or where the duties of either office are such that the holder of one cannot, in every instance, properly and fully, faithfully discharge all the duties of the other.¹ Furthermore, the acceptance of an incompatible office by the incumbent of another office constitutes an ipso facto (by the fact itself) resignation of the first office.²

Section 2 of the Public Officer Prohibited Activities Act provides:

No alderman of any city, or member of the board of trustees of any village, during the term of office for which he or she is elected, may accept, be appointed to, or hold any office by the appointment of the mayor or president of the board of trustees, unless the alderman or board member is granted a leave of absence from such office, or unless he or she first resigns from the office of alderman or member of the board of trustees, or unless the holding of another office is authorized by law. . . Any appointment in violation of this Section is void.³

The Illinois Municipal Code also prohibits all elected and appointed officials from holding other offices. Section 3.1-15-15 provides

A mayor, president, alderman, trustee, clerk, or treasurer shall not hold any other office under the municipal government during the term of that office, except when the officer is granted a leave of absence from that office or except as otherwise provided . . .⁴

The doctrine of incompatibility of office was first developed in the First Illinois Appellate District in People ex rel. Myers v. Haas.⁵ In Haas, a sitting state senator ran for and won the election as clerk of the Municipal Court of the City of Chicago. The court held that not only did the Illinois Constitution expressly forbid a member of the General Assembly from holding another office, but the duties of each office are such that the holder of one cannot, in every instance, fully and faithfully discharge all the duties of the other. Therefore, the office of clerk of the Municipal Court of the City of Chicago was incompatible with the office of state senator. As a result, he resigned as state senator through implication when he accepted the office as the municipal court clerk.

Since Haas, there have been many questions regarding the incompatibility of office doctrine. This is evidenced by the numerous Attorney General opinions offering a variety of examples of offices that are incompatible with one another. For example, the Attorney General has opined that the office of city alderman (or a village trustee) is incompatible with the offices of park district president,⁶ school board member,⁷ and county zoning administrator.⁸ According to the Attorney General the vested interest of each office causes a conflict with the other by directly or indirectly affecting the vested interests of the other which makes them incompatible with one another.⁹

For example, in People ex rel. Fitzsimmons v. Swailes,¹⁰ the Illinois Supreme Court examined the compatibility of the offices of county board member and township assessor. In Swailes, the defendant held both of these elected offices simultaneously for a number of years. The Court noted that the defendant had the authority, as a county board member, to act on the salary and budget of the supervisor of assessments. The Court further noted that the duties of the assessor are subject to the approval of the board of review, and as county board member, the defendant had the authority to act on the appointments to the board of review. Thus, the Court determined that the office of township assessor was subordinate to the office of county board member. Therefore, the Court held that as a result of the duties of the assessor, the two offices were incompatible.

The Third Appellate District followed the reasoning of Swailes in People ex rel. Teros v. Verbeck.¹¹ The appellate court in Verbeck was compelled to determine whether the appointed position of deputy county coroner was incompatible with the elected office of county board member. In Verbeck, the defendant was appointed to the position of deputy county coroner following his election as county board member and held both positions simultaneously. The appellate court noted that common law incompatibility may be established where the defendant in one position has the authority to act upon the appointment, salary, and budget of his superior in the second position.¹² The facts of the case showed that one of the many duties of the county board was to provide the county coroner's office with the funds necessary for compensation and operating expenses. Furthermore, the county coroner, subject to budgetary limitations established by the county board, determines the salary of the deputy coroner. Therefore, the appellate court determined that the two offices were fiscally incompatible.

More recently, however, the Third Appellate District upheld the compatibility of an elected municipal office when held simultaneously with an appointed state office in People v. Claar.¹³ In Claar, the defendant was appointed to the Board of Directors of the Illinois Toll Highway Authority after first being elected Mayor of the Village of Bolingbrook. The appellate court in this case noted that, under the language of Haas, it is necessary to establish a “conflict of duties” to show the incompatibility of simultaneous offices. Although the duties of each office had the potential to present a conflict of interest, this was not sufficient to establish incompatibility of offices, the court noted. Furthermore, the court determined that neither office was subordinate to the other. Therefore, the court held that the elected municipal office of Mayor was not incompatible with the appointed state office of the Board of Directors of the Authority.

In conclusion, when statutory or Constitutional authority do not exist, an incompatibility of office arises when the duties of each office are such that the holder of one cannot, in every instance, fully and faithfully discharge all the duties of the other. Once an incompatible office is accepted, the first office or position is automatically relinquished. An incompatibility of office can be determined by examining whether the vested interests of one office directly or indirectly effects the vested interests of the other office. If one office is subordinate to the other, an incompatibility exists. Therefore, all elected or appointed municipal officials should carefully examine any other elected or appointed office, and consult with the municipal attorney, to ensure an incompatibility does not exist, or an official may find him or herself resigning an office without realizing it.

1. 177 Ill. Att’y. Gen. Op. 653 (1985); and People ex rel. Myers v. Haas, 145 Ill. App. 283, 286 (1st Dist. 1908).

2. Id.; and People v. Bott, 261 Ill. App. 261, 265 (2nd Dist. 1931).

3. 50 ILCS 105/2 (West 1996 & Supp.).

4. 65 ILCS 5/3.1-15-15 (West 1996 & Supp.).

5. 145 Ill. App. 283 (1st Dist. 1908).

6. 177 Ill. Att’y. Op. 653 (1985).

7. 188 Ill. Att’y. Op. 634 (1985).

8. 53 Ill. Att’y. Op. 918 (1982).

9. SB0820, which amends the Public Officer Prohibited Activities Act, provides that in a municipality with fewer than 2,500 inhabitants, a municipal board member may also hold certain education offices, has passed both houses of the General Assembly and is awaiting the Governor’s signature.

10. 101 Ill. 2d 458, 463 N.E.2d 431, 79 Ill. Dec. 90 (1984).

11. 155 Ill. App. 3d 81, 506 N.E.2d 464, 106 Ill. Dec. 757 (3rd Dist. 1987).

12. Swales, 101 Ill. 2d at 469, 463 N.E.2d at 436, 79 Ill. Dec. at 95.

13. 293 Ill. App. 3d 211, 687 N.E.2d 557, 227 Ill. Dec. 307 (3rd Dist. 1997).

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