



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

August 27, 2019

The Honorable James Rowe
State's Attorney, Kankakee County
189 East Court Street
Kankakee, Illinois 60901

Dear Mr. Rowe:

I have your letter wherein you inquire whether, pursuant to section 3.4 of the Intergovernmental Cooperation Act (the Act) (5 ILCS 220/3.4 (West 2018)), a city alderman may serve simultaneously on the board of directors of a municipal joint sewage treatment agency. If the answer to this question is in the affirmative, then you also inquire whether the intergovernmental agreement establishing the agency must specifically provide that a city alderman may be appointed to serve on the sewage treatment agency's board of directors. For the reasons stated below, filing a declaratory judgment action may be appropriate to resolve your questions.

BACKGROUND

Intergovernmental Cooperation Act

Subsection 3.4(a) of the Act (5 ILCS 220/3.4(a) (West 2018)) authorizes any two or more municipalities or counties, or any combination thereof, to establish, by intergovernmental agreement, a municipal joint sewage treatment agency. The governing body of such an agency is a board of directors, the composition and manner of appointment of which shall be determined pursuant to the intergovernmental agreement creating the agency. 5 ILCS 220/3.4(b) (West 2018).

Kankakee County Joint Sewage Treatment Agreement

According to the information that you have provided, the Kankakee River Metropolitan Agency (KRMA) is a municipal joint sewage treatment agency established pursuant to section 3.4 of the Act and includes the City of Kankakee, the Village of Aroma Park, the Village of Bourbonnais, and the Village of Bradley as its member parties. The intergovernmental agreement under which KRMA was created indicates that the agency "shall function through and be governed by a * * * seven-person Board of Directors consisting of four persons appointed by the

The Honorable James Rowe
August 27, 2019
Page 2

Mayor of the City of Kankakee, and one person from each of the Villages * * * appointed by the respective Mayors of said Villages." KRMA Amended and Restated Municipal Joint Sewage Treatment Agency Intergovernmental Agreement, Article II(A), (C), March 8, 1999 (Agreement). Under the Agreement, each director shall serve a one-year term of office. The Agreement, however, is silent regarding who may be appointed to the board of directors. You have indicated that two of the members of the KRMA board of directors also serve as aldermen for the City of Kankakee. As a result of their service in two public offices simultaneously, you have been asked to file a *quo warranto* action against the two City of Kankakee aldermen serving on KRMA's board of directors based on the provisions of section 2 of the Public Officer Prohibited Activities Act (the Prohibited Activities Act) (50 ILCS 105/2 (West 2018)).

ANALYSIS

In Illinois, when questions arise regarding whether one person may serve in two public offices simultaneously, the resolution of the issue starts with a review of the common law doctrine of incompatibility of offices. That doctrine precludes simultaneous tenure in two public offices if the constitution or a statute specifically prohibits the occupant of either office from holding the other, or if the duties of the two offices conflict so that the holder of one cannot, in every instance, fully and faithfully discharge all of the duties of the other office. *People ex rel. Fitzsimmons v. Swailes*, 101 Ill. 2d 458, 465, 463 N.E.2d 431, 434 (1984); *People ex rel. Smith v. Brown*, 356 Ill. App. 3d 1096, 1098, 828 N.E.2d 306, 308 (2005); *People ex rel. Myers v. Haas*, 145 Ill. App. 283, 286 (1908). In Illinois, the common law doctrine of incompatibility of offices has been applied only to offices, and not to positions of employment. *Solomon v. Scholefield*, 2015 IL App (1st) 150685, ¶25, 30 N.E.3d 480, 488 (2015); Ill. Att'y Gen. Op. No. 14-002, issued December 23, 2014, at 2-3; 1975 Ill. Att'y Gen. Op. 278, 280-81.

It is clear that the position of city alderman is a public office. 65 ILCS 5/1-1-2, 3.1-15-5 (West 2018); Ill. Att'y Gen. Inf. Op. No. I-05-007, issued September 23, 2005, at 1-2; see generally *Nelson v. Crystal Lake Park District*, 342 Ill. App. 3d 917, 921-22, 796 N.E.2d 646, 651 (2003). Additionally, based upon our review of the criteria set out by the court in *Midwest Television, Inc. v. Champaign-Urbana Communications, Inc.*, 37 Ill. App. 3d 926, 931-32, 347 N.E.2d 34, 38 (1976), for determining whether a position constitutes a public office, as well as the statutory powers and duties of a municipal joint sewage treatment agency, it appears that the position of member of a board of directors for a municipal joint sewage treatment agency is also a public office. Consequently, the common law doctrine of incompatibility of offices applies to your inquiry.

While there are no constitutional or statutory provisions that expressly prohibit one person from serving simultaneously as both a city alderman and a member of a municipal joint sewage treatment agency's board of directors, **section 2 of the Prohibited Activities Act generally prohibits a city alderman from holding any office during his or her elected term, if the appointment to the other office is made by the city's mayor:**

*No alderman of any city, * * * 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 * * *, unless the alderman * * * is granted a leave of absence from such office, or unless he or she first resigns from the office of alderman * * *, or unless the holding of another office is authorized by law. * * * Any appointment in violation of this Section is void. (Emphasis added.)*

Pursuant to the plain and unambiguous language of section 2, no city alderman may accept, be appointed to, or hold any office by appointment of the city's mayor during the term of office for which the alderman was elected. As noted above, pursuant to the authorizing intergovernmental agreement, four of the board members of KRMA are appointed by the mayor of the City of Kankakee. **Thus, it appears that the two Kankakee city aldermen that are the subject of your inquiry fall squarely within section 2's prohibition.**

Section 2 also provides several exceptions to the prohibition, only one of which potentially applies to the circumstances that underlie your questions – **where simultaneous tenure as city alderman and member of the board of directors of a municipal joint sewage treatment agency "is authorized by law."**¹

¹Similar to section 2 of the Prohibited Activities Act, section 1 of the Prohibited Activities Act (50 ILCS 105/1 (West 2018)) limits the appointment of county board members to certain public offices and provides, in pertinent part:

No member of a county board, during the term of office for which he or she is elected, may be appointed to, accept, or hold any office * * *, unless he or she first resigns from the office of county board member or unless the holding of another office is authorized by law. Any such prohibited appointment or election is void.

This office has issued several opinions concluding that, pursuant to section 1 of the Prohibited Activities Act as construed by the Illinois Appellate Court in *People v. Wilson*, 357 Ill. App. 3d 204, 206, 828 N.E.2d 1214, 1215-16 (2005), a county board member is prohibited from simultaneously holding another public office unless such simultaneous tenure is specifically authorized by statute. See Ill. Att'y Gen. Inf. Op. No. 1-14-005, issued May 7, 2014, at 2-3 (county board member and village trustee); Ill. Att'y Gen. Inf. Op. No. 1-12-001, issued February 17, 2012, at 2-3 (county board member and fire protection district trustee); Ill. Att'y Gen. Inf. Op. No. 1-10-006, issued June 10, 2010, at 3-4 (county board member and city clerk).

Subsection 3.4(b) of the Act (5 ILCS 220/3.4(b) (West 2018)) addresses the appointment of a board of directors of a municipal joint sewage treatment agency and provides, in pertinent part:

(b) The governing body of any Municipal Joint Sewage Treatment Agency shall be a Board of Directors. The composition and manner of appointment of the Board of Directors shall be determined pursuant to the intergovernmental agreement. However, *for any Municipal Joint Sewage Treatment Agency established after the effective date of this amendatory Act of the 100th General Assembly,¹²¹ a Director sitting on the Board of Directors shall not be required to be an elected official of a member municipality or county, but may be an appointed official of a member municipality or county. (Emphasis added.)*

The primary purpose of statutory construction is to ascertain and give effect to the intent of the General Assembly, the best indicator of which is the language of the statute, given its plain and ordinary meaning. *Blum v. Koster*, 235 Ill. 2d 21, 29, 919 N.E.2d 333, 338 (2009). Where statutory language is clear and unambiguous, it must be given effect as written. *Klaine v. Southern Illinois Hospital Services*, 2016 IL 118217, ¶14, 47 N.E.3d 966, 970 (2016). However, where statutory language is ambiguous, it is appropriate to examine the legislative history to ascertain legislative intent. *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶38, 6 N.E.3d 162, 170 (2014).

The plain language of subsection 3.4(b) provides that for any municipal joint sewage treatment agency established *after* the effective date of Public Act 100-1076 (or after August 24, 2018), "a Director sitting on the Board of Directors shall not be required to be an elected official of a member municipality or county, but may be an appointed official of a member municipality or county." Notwithstanding the quoted language, section 3.4 has never expressly required that a director of a municipal joint sewage treatment agency be an elected official.³ Further, the current language of subsection 3.4(b) implies that the members of the boards of

²The effective date for "this amendatory Act of the 100th General Assembly[.]" or Public Act 100-1076, is August 24, 2018.

³While the "composition and manner of appointment" of the board of directors must be determined pursuant to an intergovernmental agreement, nothing in subsection 3.4(b) authorizes the parties to an intergovernmental agreement to establish the qualifications of the members of the board of directors as a part of the intergovernmental agreement, nor do the statutory provisions authorize municipal joint sewage treatment agencies themselves to establish the qualifications of the members of the board of directors.

directors of municipal joint sewage treatment agencies created *prior* to August 24, 2018,⁴ should have been elected officials, which, if true, would authorize city aldermen to serve on a sewage treatment agency's board of directors.

Because of this ambiguity in the language of section 3.4, it is appropriate to review the section's legislative history. Section 3.4 was originally added to the Act by Public Act 83-1423, effective September 15, 1984; the section was not amended until Public Act 100-1076, effective August 24, 2018. Public Act 100-1076 did not delete any of the original language in section 3.4, but rather simply added the sentence in subsection 3.4(b) quoted in the paragraph immediately above.

Public Act 100-1076 also amended subsection 3.1(b) of the Act (5 ILCS 220/3.1(b) (West 2018)), which governs the organization of municipal joint action water agencies. Unlike subsection 3.4(b), subsection 3.1(b) lists the specific public officers who qualify to serve as directors of municipal joint action water agencies and includes "an elected member of the corporate authorities of [the] municipality," or, in other words, a city alderman. 65 ILCS 5/1-1-2 (West 2018).

A review of the legislative debates for Senate Bill 3086, which as enacted became Public Act 100-1076, effective August 24, 2018, indicates that the General Assembly intended to give municipalities more flexibility in composing the board of directors of municipal joint action water agencies and municipal joint sewage treatment agencies. Remarks of Rep. Halpin, May 28, 2018, House Debate on Senate Bill No. 3086, at 11. The debates also recognize that for municipal joint action water agencies there are statutory qualifications for serving on the board of directors that specifically include, among other things, being an elected official of an appointing municipality. Remarks of Sen. Holmes, April 25, 2018, Senate Debate on Senate Bill No. 3086, at 146-47. The debates, however, suggest that there was not a clear understanding among the members of the General Assembly on the qualifications for serving on the board of directors of a municipal joint sewage treatment agency. See generally Remarks of Rep. Halpin, Rep. Breen, and Rep. Wehrli, May 28, 2018, House Debate on Senate Bill No. 3086, at 11-16. Thus, the debates provide little guidance on the issue of whether it was the intent of the General Assembly to permit city aldermen to serve on the board of directors of municipal joint sewage treatment agencies simultaneously.

⁴The KRMA has existed since at least May 1, 1996. Agreement, Article IX(B), March 8, 1999 (please note that we believe that a scrivener's error exists in the Agreement and that the article on page 18 designated as "IX" should actually be a reference to article "XIV").

The Honorable James Rowe
August 27, 2019
Page 6

In addition to the statutory provisions, article VII, section 10(b), of the Illinois Constitution of 1970 provides that "[o]fficers and employees of units of local government * * * may participate in intergovernmental activities authorized by their units of government without relinquishing their offices or positions." This language would appear to authorize a city alderman to serve simultaneously on the board of directors of a municipal joint sewage treatment agency.

Because of the ambiguity in the current language of section 3.4 of the Act, the discrepancy among the cited constitutional and statutory provisions, and the lack of certainty in the legislative debates, it cannot be said that simultaneous service in the offices of city alderman and member of the board of directors of a municipal joint sewage treatment agency is authorized by law. Therefore, your office may wish to consider filing a declaratory judgment action to resolve this matter. See Statement of Policy of the Attorney General Relating to Furnishing Written Opinions, <http://www.illinoisattorneygeneral.gov/opinions/opinionpolicy.pdf>. Alternatively, you may wish to contact your representatives in the General Assembly and seek the passage of amendatory legislation to clarify the ambiguity that exists within section 3.4 of the Act regarding the qualifications of a member of the board of directors of a municipal joint sewage treatment agency and to address the apparent inconsistency that exists between section 3.4 of the Act and section 2 of the Public Officer Prohibited Activities Act.

This is not an official opinion of the Attorney General. If we may be of further assistance, please advise.

Very truly yours,



LYNN E. PATTON
Chief, Public Access and Opinions Division
and Administrative Counsel

LEP:KMC:SRF:lh