



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

July 1, 2008

I - 08-020

COMPATIBILITY OF OFFICES:
County Board Members and City
Alderman Serving on County Housing
Authority Board Simultaneously

The Honorable John T. Pepmeyer
State's Attorney, Knox County
Knox County Courthouse
200 South Cherry Street
Galesburg, Illinois 61401

Dear Mr. Pepmeyer:

I have your office's letter inquiring whether two members of the Knox County Board and an alderman for the City of Galesburg may serve simultaneously on the Knox County Housing Authority Board. Under section 3 of the Housing Authorities Act (310 ILCS 10/3 (West 2006)), only two "public officers" may serve on the same housing authority board simultaneously. Because the county board members and the city alderman who are the focus of your office's inquiry are all "public officers," as that term is defined in section 3 of the Housing Authorities Act, only two of them may serve on the county housing authority board simultaneously.

BACKGROUND

According to the information your office provided, in 2006 the Knox County Board appointed two Knox County board members to serve as county housing authority commissioners. At the time of the county board members' appointment, an alderman for the City of Galesburg was already serving on the Knox County Housing Authority Board. Your office inquired whether section 3 of the Housing Authorities Act prohibited all three of those individuals from serving on the county housing authority board simultaneously.

ANALYSIS

Housing Authorities Act

Section 3 of the Housing Authorities Act authorizes the creation of a county housing authority, upon the issuance of a certificate by the Department of Commerce and Economic Opportunity, and provides for the appointment of an authority's commissioners. With regard to the qualifications of the commissioners, section 3 provides, in pertinent part:

Any public officer shall be eligible to serve as a commissioner, and the acceptance of appointment as such shall not terminate nor impair his public office, the provision of any statute to the contrary notwithstanding; but no member of the Department shall be eligible to serve as a commissioner, nor shall more than two public officers be commissioners of the same Authority at one time; Provided [sic], that membership on any Authority at the same time of more than two public officers shall not affect or impair the validity of any Act undertaken or power exercised by the Authority pursuant to Law. The term "public officer" as herein used means a person holding a state or local governmental office required to be filled by the vote of electors, and for which provision is made by law for the payment of annual compensation from public funds. (Emphasis added.)

The primary purpose of statutory construction is to ascertain and give effect to the intent of the General Assembly. *In re M.T.*, 221 Ill. 2d 517, 524 (2006). Where statutory language is clear and unambiguous, it must be given effect as written. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006).

Section 3 permits a "public officer" to serve as a county housing authority commissioner, so long as no more than one other "public officer" is simultaneously serving as a commissioner. A "public officer" is defined to include only those individuals: (1) holding a State or local governmental office that is required to be filled by the vote of electors; and (2) "for which provision is made by law for the payment of annual compensation from public funds." The issue, therefore, is whether county board members and city aldermen are "public officers" within the Housing Authorities Act's definition.

County Board Member

Counties are "units of local government." Ill. Const. 1970, art. VII, §1. The powers of a county as a body corporate or politic are exercised by the county board (55 ILCS 5/5-1004 (West 2006)), the members of which are elected by the voters of the county. *See generally* Ill. Const. 1970, art. VII, §3(a); 10 ILCS 5/2A-1.2(a)(5) (West 2006); 55 ILCS 5/2-3009 (West 2006).¹ Accordingly, county board members are persons holding a local governmental office (*see generally* Ill. Att'y Gen. Op. No. 03-008, issued September 8, 2003; 1972 Ill. Att'y Gen. Op. 45, 47) required to be filled by the vote of the county's electors.

Further, section 2-3008 of the Counties Code (55 ILCS 5/2-3008 (West 2006)) expressly provides for county board members to be compensated for their services as such. Pursuant to section 2-3008, at the time of the decennial reapportionment, the county board "shall determine whether the salary to be paid the members to be elected shall be computed on a *per diem* basis, on an annual basis or on a combined *per diem* and annual basis."²

According to the information your office provided, the Knox County board members are compensated on a *per diem* basis. Because Knox County board members are not paid an annual salary, it has been suggested that these county board members may not be considered "public officers," as that term is used in the Housing Authorities Act. A close review of the language of section 3, however, leads to a contrary conclusion.

Under section 3, the term "public officer" refers to a person holding a "local governmental office * * * for which provision is made *by law* for the payment of annual compensation from public funds." (Emphasis added.) Section 3 does not require the actual award of compensation on an annual basis to the officer, but rather simply contemplates that the payment of annual compensation is authorized by law. The term "law" includes the constitution (*see People v. Howard*, No. 104553 (Illinois Supreme Court, April 17, 2008)) and civil or penal statutes, supreme court rules, administrative rules or regulations, and tenets of professional responsibility (*People v. Weber*, 133 Ill. App. 3d 686 (1985)). The term "law" does not

¹Knox County is under township organization. *See* Illinois Secretary of State, Illinois State Archives, Knox County Fact Sheet, <http://www.cyberdriveillinois.com/departments/archives/irad/knox.html>. As a result, it is subject to the provisions of divisions 2-1 and 2-3 of the Counties Code (55 ILCS 5/2-1001 *et seq.*, 2-3001 *et seq.* (West 2006)).

²Section 2-3008 does not define the term "*per diem*." A statutory term which is not defined, however, must be given its ordinary and popularly understood meaning. *Union Electric Co. v. Department of Revenue*, 136 Ill. 2d 385, 397 (1990). The term "*per diem*" commonly refers to compensation or allowance for expenses which is intended to cover twenty-four hours in a day. *County of Christian v. Merrigan*, 191 Ill. 484, 488 (1901); *see also* Ill. Att'y Gen. Inf. Op. No. 1-93-049, issued October 8, 1993.

ordinarily include local ordinances. 1982 Ill. Att'y Gen. Op. 165, 169. Accordingly, although Knox County may elect to compensate its county board members on a *per diem* basis pursuant to county ordinance, under section 2-3008 "provision is made by law for the payment of annual compensation from public funds."

A county board member holds a local government office that is elected by the voters of the county. In addition, provision is made in section 2-3008 for the payment of annual compensation to county board members, and such compensation is paid from the county fisc. *See generally* 55 ILCS 5/6-1002 (West 2006). Therefore, a county board member is a "public officer," as that term is used in the Housing Authorities Act.

City Alderman

Turning to the issue of whether a city alderman is a "public officer," under article VII, section 1, of the Illinois Constitution of 1970, municipalities are "units of local government." Further, under Illinois law, city aldermen are city officers elected by the city's voters. 65 ILCS 5/3.1-15-5 (West 2006); *see also* 10 ILCS 5/2A-1.2(b)(3), (c)(1) (West 2006). Pursuant to section 3.1-50-15 of the Illinois Municipal Code (65 ILCS 5/3.1-50-15 (West 2006)), aldermen are authorized to receive an annual salary for their service. Based on the foregoing, a person holding the position of city alderman is a public officer, for purposes of section 3 of the Housing Authorities Act, because: (1) he or she holds a local government office that is required to be filled by the vote of the electors; and (2) provision is made by statute for the payment of annual compensation.

Because all three of the persons who are the subject of your office's inquiry fall within the statutory definition of "public officer," under the limitations of section 3 of the Act, no more than two of them may serve on the county housing authority board simultaneously.

Public Officer Prohibited Activities Act

I also note that your office's inquiry raises a potential issue under section 1 of the Public Officer Prohibited Activities Act (the Prohibited Activities Act) (50 ILCS 105/1 (West 2006)), which specifically addresses the ability of county board members to hold other public offices. Section 1 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 other than (i) chairman of the county board or member of the regional planning commission by appointment or election of the board of which he or she is a member, (ii) alderman of a city or

member of the board of trustees of a village or incorporated town if the city, village, or incorporated town has fewer than 1,000 inhabitants and is located in a county having fewer than 50,000 inhabitants, or (iii) trustee of a forest preserve district created under Section 18.5 of the Conservation District Act, 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.* (Emphasis added.)

Pursuant to section 1 of the Prohibited Activities Act, no county board member may be elected or appointed, during the term of office for which he or she is elected, to any other office other than those specified in section 1 or elsewhere in the law.³ *People v. Wilson*, 357 Ill. App. 3d 204 (2005); see Ill. Att'y Gen. Inf. Op. No. I-08-008, issued March 25, 2008; Ill. Att'y Gen. Inf. Op. No. I-03-012, issued December 19, 2003. Section 1 does not expressly permit one person to serve as both a county board member and a county housing authority commissioner. Section 3 of the Housing Authorities Act, however, provides that "[a]ny public officer shall be eligible to serve as a commissioner, and the acceptance of appointment as such shall not terminate nor impair his public office, the provision of any statute to the contrary notwithstanding[.]" (Emphasis added.) This language expressly authorizes any public officer to serve simultaneously as a housing authority commissioner. Having previously concluded that a county board member is a "public officer" within the Housing Authorities Act's definition, the specific language of section 3 permits county board members to serve as county housing authority commissioners simultaneously, the provisions of section 1 of the Prohibited Activities Act to the contrary notwithstanding.

CONCLUSION

Pursuant to section 3 of the Housing Authorities Act, only two "public officers" may serve on a county housing authority board simultaneously. Because county board members are persons holding local governmental offices required to be filled by the county's electors and because section 2-3008 of the Counties Code authorizes the compensation of county board members on an annual basis, county board members are "public officers," as that term is defined in the Housing Authorities Act. Applying the same analysis, city aldermen are "public officers" within the Housing Authorities Act's provisions. Consequently, only two of the three persons who are the focus of your office's inquiry may serve on the county housing authority board simultaneously.

³For example, in the Public Officer Simultaneous Tenure Act (50 ILCS 110/0.01 *et seq.* (West 2006)), the General Assembly has specifically declared that it is lawful for one person to hold the offices of county board member and township supervisor simultaneously and, in certain counties, for a county board member to also serve as a township trustee, township assessor, or township clerk. See 50 ILCS 110/2 (West 2006).

The Honorable John T. Pepmeyer - 6 .

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
Senior Assistant Attorney General
Chief, Opinions Bureau

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OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

August 30, 2010

I - 10-010

**COMPATIBILITY OF OFFICES:
County Board Member and
Assistant Public Defender**

The Honorable Stewart J. Umholtz
State's Attorney, Tazewell County
Tazewell County Courthouse
342 Court Street, Suite 6
Pekin, Illinois 61554-3298

Dear Mr. Umholtz:

I have your letter inquiring whether one person may serve simultaneously in the positions of county board member and assistant public defender in the same county. For the reasons stated below, an assistant public defender may not hold the office of county board member simultaneously.

BACKGROUND

Your letter states that a Tazewell County assistant public defender is currently an uncontested candidate on the November 2, 2010, general election ballot for election to the Tazewell County Board. You inquire whether, if elected, the candidate may serve simultaneously as an assistant public defender and as a county board member.

ANALYSIS

Section 1 of the Public Officer Prohibited Activities Act (the Prohibited Activities Act) (50 ILCS 105/1 (West 2008)) 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 other than (i) chairman of the county board or member of the regional planning commission by appointment or election of the board of which he or she is a member, (ii) alderman of a city or member of the board of trustees of a village or incorporated town if the city, village, or incorporated town has fewer than 1,000 inhabitants and is located in a county having fewer than 50,000 inhabitants, or (iii) trustee of a forest preserve district created under Section 18.5 of the Conservation District Act, 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. * * * Nothing in this Act shall be construed to prohibit an elected county official from holding elected office in another unit of local government so long as there is no contractual relationship between the county and the other unit of local government. This amendatory Act of 1995 is declarative of existing law and is not a new enactment. (Emphasis added.)*

In *People v. Wilson*, 357 Ill. App. 3d 204 (2005), the appellate court concluded that the offices of county board member and school board member were incompatible under section 1 of the Prohibited Activities Act. The court held that, under the plain language of section 1, and except to the extent specifically authorized by law, a county board member is prohibited from simultaneously holding another public office. *Wilson*, 357 Ill. App. 3d at 206. Section 1 makes no distinction between election to an office and appointment to an office.

The position of assistant public defender is a public office. *People ex rel. Cook County v. Majewski*, 28 Ill. App. 3d 269, 272 (1975). Accordingly, pursuant to section 1 of the Prohibited Activities Act, as construed by the court in *Wilson*, a county board member may not hold the office of assistant public defender simultaneously. If the assistant public defender is elected to the county board, then, under section 1, he may not continue to serve as an assistant public defender.

Conflict of Interests

Assuming, *arguendo*, that section 1 of the Prohibited Activities Act did not prohibit simultaneous tenure in these offices, a county board member who also serves as an assistant public defender would necessarily violate section 3 of the Prohibited Activities Act (50 ILCS 105/3 (West 2009 Supp.), as amended by Public Act 96-1058, effective July 14, 2010). Section 3 provides:

(a) No person holding any office, either by election or appointment under the laws or Constitution of this State, may be in any manner financially interested directly in his own name or indirectly in the name of any other person, association, trust, or corporation, in any contract or the performance of any work in the making or letting of which such officer may be called upon to act or vote. * * * Any contract made and procured in violation hereof is void.

Under section 3, county board members are precluded from possessing a financial interest in county contracts or county work. A county board member who also serves as an assistant public defender would have a direct pecuniary interest in the county's tax levy and the appropriation of money to the public defender's office from which his or her compensation as an assistant public defender would be paid. Ill. Att'y Gen. Inf. Op. No. I-02-046, issued September 18, 2002. This would create a pecuniary interest that section 3 of the Prohibited Activities Act is intended to prohibit.¹

Any person who violates section 3 is guilty of a Class 4 felony and, on conviction, his or her office becomes vacant. 50 ILCS 105/4 (West 2008). As a general principle, mere abstention from voting on a matter in which a public official is financially interested does not avoid a violation of section 3. *People v. Savaiano*, 66 Ill. 2d 7, 15 (1976); Ill. Att'y Gen. Op. No. 92-026, issued October 27, 1992; 1976 Ill. Att'y Gen. Op. 56; Ill. Att'y Gen. Inf. Op. No. I-06-039, issued September 1, 2006. Accordingly, because one person could not serve as both a county board member and an assistant public defender without violating section 3, simultaneous tenure in those offices is precluded by necessary implication.

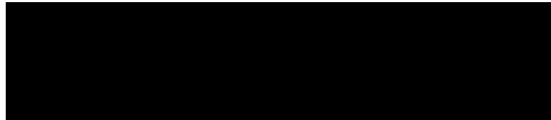
¹Subsection 3(b) of the Prohibited Activities Act (50 ILCS 105/3(b) (West 2009 Supp.), as amended by Public Act 96-1058, effective July 14, 2010) does set out certain *de minimus* exceptions to the general prohibition. Based on discussions between representatives of the Attorney General's office and you, it is our understanding that the *de minimus* exceptions are inapplicable to the circumstances that form the basis of your inquiry.

CONCLUSION

Because the position of assistant public defender is a public office, pursuant to section 1 of the Public Officer Prohibited Activities Act, a county board member may not serve simultaneously as an assistant public defender. If an assistant public defender is elected to the office of county board member, he may not continue to hold the office of assistant public defender under section 1 of the Prohibited Activities Act. Further, holding the positions of county board member and assistant public defender simultaneously is impermissible under section 3 of the 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,



LYNNE E. PATTON
Senior Assistant Attorney General
Chief, Opinions Bureau

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OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

March 25, 2008

I - 08-008

COMPATIBILITY OF OFFICES:
County Board Member and
Assistant State's Attorney
in Neighboring County

The Honorable James P. Hursh
State's Attorney, Boone County
601 North Main Street
Suite 302
Belvidere, Illinois 61008-2609

Dear Mr. Hursh:

I have your letter inquiring: (1) whether a county board member may simultaneously serve as an Assistant State's Attorney of a neighboring county; and (2) if so, whether that county board member may vote on a zoning matter while handling litigation against the applicant in her capacity as the Chief of the Civil Division of the neighboring county's State's Attorney's office. For the reasons stated below, a county board member, during his or her term of office, may not be appointed to serve as an Assistant State's Attorney in a neighboring county. Because simultaneous tenure in the offices of county board member and Assistant State's Attorney is prohibited, we do not need to address your second question.

BACKGROUND

Your letter states that a member of the Boone County Board currently serves as an Assistant State's Attorney and Chief of the Civil Division of the State's Attorney's office of McHenry County, which borders Boone County. Your letter raises concerns regarding potential conflicts in duties arising from the simultaneous tenure. Accordingly, you inquire whether one person may simultaneously serve in both positions.

The common law doctrine of incompatibility of offices 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 (1984); *People ex rel. Smith v. Brown*, 356 Ill. App. 3d 1096, 1098 (2005); *People ex rel. Myers v. Haas*, 145 Ill. App. 283, 286 (1908). In addition to the common law, section 1 of the Public Officer Prohibited Activities Act (the Prohibited Activities Act) (50 ILCS 105/1 (West 2006)) specifically addresses the ability of county board members to hold other public offices. Section 1 provides:

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 other than (i) chairman of the county board or member of the regional planning commission by appointment or election of the board of which he or she is a member, (ii) alderman of a city or member of the board of trustees of a village or incorporated town if the city, village, or incorporated town has fewer than 1,000 inhabitants and is located in a county having fewer than 50,000 inhabitants, or (iii) trustee of a forest preserve district created under Section 18.5 of the Conservation District Act, 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 Section shall not preclude a member of the county board from being selected or from serving as a member of a County Extension Board as provided in Section 7 of the County Cooperative Extension Law, as a member of an Emergency Telephone System Board as provided in Section 15.4 of the Emergency Telephone System Act, or as appointed members of the board of review as provided in Section 6-30 of the Property Tax Code. Nothing in this Act shall be construed to prohibit an elected county official from holding elected office in another unit of local government so long as there is no contractual relationship between the county and the other unit of local government. This amendatory Act of 1995 is declarative of existing law and is not a new enactment. (Emphasis added.)

The Illinois Appellate Court interpreted this section in *People v. Wilson*, 357 Ill. App. 3d 204 (2005), and concluded that the offices of county board member and school board member were incompatible under the Prohibited Activities Act. The case arose because,

approximately five months after becoming a county board member, the defendant was elected to the local school board. *Wilson*, 357 Ill. App. 3d at 205. The court held that, under the plain language of section 1 of the Prohibited Activities Act and except to the extent specifically authorized by law, a county board member is prohibited from simultaneously holding another public office. *Wilson*, 357 Ill. App. 3d at 206. The court further concluded that, except in the limited circumstances specifically authorized by law, if a county board member is elected to another office, the election is void. *Wilson*, 357 Ill. App. 3d at 206. Under the language of section 1, no distinction is made between election to an office and appointment to an office. See Ill. Att'y Gen. Inf. Op. No. I-03-012, issued December 19, 2003.

ANALYSIS

Pursuant to section 1 of the Prohibited Activities Act, as applied by the court in *Wilson*, no county board member may be elected or appointed, during the term of office for which he or she is elected, to any office other than those specified in section 1 or elsewhere in law.¹ Neither section 1 nor any other statute expressly permits one person to serve as a county board member and an Assistant State's Attorney simultaneously. Therefore, if the position of Assistant State's Attorney constitutes a public office, the law would prohibit a county board member of one county from serving simultaneously as an Assistant State's Attorney of another county.

In *Midwest Television, Inc. v. Champaign-Urbana Communications, Inc.*, 37 Ill. App. 3d 926, 931 (1976), the appellate court specifically delineated the criteria to be used in determining whether a position constitutes a public office, stating:

The characteristics of a public office are generally agreed upon, although the distinction between an office and employment may be vague in particular fact situations. The characteristics of a public office include: (1) creation by statute or constitution; (2) exercise of some portion of the sovereign power; (3) a continuing position

¹For example, in the Public Officer Simultaneous Tenure Act (50 ILCS 110/0.01 *et seq.* (West 2006)), the General Assembly has specifically declared that it is lawful for one person to hold the offices of county board member and township supervisor simultaneously and, in certain counties, for a county board member to also serve as a township trustee, township assessor, or township clerk. See 50 ILCS 110/2 (West 2006).

not occasional or contractual; (4) fixed tenure; (5) an oath is required; (6) liability for misfeasance or nonfeasance; and (7) the official has an independence beyond that of employees.²

The court further explained that "[n]ot all [of] these factors are required in order to determine that a position is an office." *Midwest Television, Inc.*, 37 Ill. App. 3d at 932. The most important of the factors, however, is the exercise of some portion of the sovereignty of the State. *Hall v. County of Cook*, 359 Ill. 528, 539-40 (1935); *People ex rel. Brundage v. Brady*, 302 Ill. 576, 582 (1922).

An analysis of these factors compels the conclusion that the position of Assistant State's Attorney constitutes a public office. The appointment of Assistant State's Attorneys is governed by a statute (55 ILCS 5/4-2003 (West 2006)) which requires Assistant State's Attorneys to "take the oath of office in the same manner as State's Attorneys[.]" More importantly, Assistant State's Attorneys exercise a portion of the powers of the sovereign. Indeed, the Supreme Court of Illinois has stated that "Assistant State's Attorneys are in essence surrogates for the State's Attorney" and "possess the power [of the State's Attorney] in the same manner and to the same effect as the State's Attorney." (Brackets in original.) *Office of the Cook County State's Attorney v. Illinois Local Labor Relations Board*, 166 Ill. 2d 296, 303 (1995).³ Moreover,

²See also *Wargo v. Industrial Comm'n*, 58 Ill. 2d 234, 237 (1974); *People ex rel. Brundage v. Brady*, 302 Ill. 576, 582 (1922); Ill. Att'y Gen. Inf. Op. No. I-06-021, issued March 13, 2006; Ill. Att'y Gen. Inf. Op. No. I-05-007, issued September 23, 2005.

³Section 3-9005 of the Counties Code (55 ILCS 5/3-9005 (West 2006)) sets out the powers and duties of the State's Attorney and provides, in relevant part:

(a) The duty of each State's attorney shall be:

(1) To commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in the circuit court for his county, in which the people of the State or county may be concerned.

* * *

(3) To commence and prosecute all actions and proceedings brought by any county officer in his official capacity.

(4) To defend all actions and proceedings brought against his county, or against any county or State officer, in his official capacity, within his county.

* * *

(7) To give his opinion, without fee or reward, to any county officer in his county, upon any question or law relating to any criminal or other matter, in which the people or the county may be concerned.

Assistant State's Attorneys have previously been classified as officers by the Illinois Appellate Court,⁴ as well as in prior Attorney General opinions addressing compatibility of office issues.⁵

CONCLUSION

Based on the foregoing, the position of Assistant State's Attorney is a public office. Therefore, pursuant to section 1 of the Public Officer Prohibited Activities Act, a county board member may not be appointed to or hold the office of Assistant State's Attorney simultaneously. If a county board member, during his or her term of office, is appointed to the office of Assistant State's Attorney in another county, the appointment is void under section 1 of the Prohibited Activities Act.

You have additionally inquired whether a member of the county board may vote on a zoning matter while handling litigation against the applicant as the Chief of the Civil Division of the neighboring county's State's Attorney's office. Because we have concluded that the offices of county board member and Assistant State's Attorney in a neighboring county are incompatible, we do not need to address this question.


⁴Relying in part on Illinois Supreme Court cases which determined that State's Attorneys are State officers (*Ingemunson v. Hedges*, 133 Ill. 2d 364, 369 (1990); *Hoyne v. Danisch*, 264 Ill. 467 (1914)), the court held that Assistant State's Attorneys are State officers for purposes of negligence actions brought under the *respondeat superior* doctrine. *Biggerstaff v. Moran*, 284 Ill. App. 3d 196, 200 (1996). See also *People ex rel. Landers v. Toledo, St. Louis & Western R.R. Co.*, 267 Ill. 142, 145-46 (1915) (Assistant State's Attorneys are officers, not employee-agents, for purposes of tax levies to pay county officers' salaries).

⁵See 1979 Ill. Att'y Gen. Op. 21; Ill. Att'y Gen. Inf. Op. No. I-97-010, issued April 16, 1997; Ill. Att'y Gen. Inf. Op. No. I-89-020, issued March 21, 1989. It is our understanding that the individual currently serving as a county board member and Assistant State's Attorney may have relied on informal opinion No. I-97-010 as support for holding both positions simultaneously. Informal opinion No. I-97-010 concluded that a State's Attorney's office could avoid the potential conflict of duties between an Assistant State's Attorney and a park board commissioner if the State's Attorney authorized the Assistant State's Attorney to handle only criminal matters involving non-park district defendants and crimes or provided the Assistant State's Attorney with no authority to advise the county board or perform other civil functions with regard to a park district. In the absence of such a limitation of authority, however, it was determined that the potential conflict of duties would preclude an Assistant State's Attorney from simultaneously serving as a park board commissioner. Unlike the present situation, however, there was no statutory prohibition against serving simultaneously in the offices of Assistant State's Attorney and park board commissioner. Here, section 1 of the Prohibited Activities Act specifically limits the ability of a county board member to hold another office.

The Honorable James P. Hursh - 6

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

Very truly yours,



LYNNE E. PATTON
Senior Assistant Attorney General
Chief, Opinions Bureau

LEP:LAS:lk



OFFICE OF THE ATTORNEY GENERAL

STATE OF ILLINOIS

May 18, 1999

Jim Ryan

ATTORNEY GENERAL

I - 99-024

COMPATIBILITY OF OFFICES:
County Board Member and Circuit Clerk

The Honorable Michael T. James
State's Attorney, LaSalle County
707 Etna Road, Room 251
Ottawa, Illinois 61350

Dear Mr. James:

I have your letter wherein you inquire whether one person may be nominated for, and, if elected, hold both the office of county board member and the office of circuit clerk in the same county. Because of the nature of your inquiry, I do not believe that the issuance of an official opinion is necessary. I will, however, comment informally upon the question you have raised.

Offices are deemed to be incompatible where the constitution or a statute specifically prohibits the occupant of either one of the offices from holding the other, or where, because of the duties of either office a conflict of interest may arise, or the duties of either office are such that the holder of one cannot, in every instance, properly and faithfully perform all the duties of the other. (People ex rel. Myers v. Haas (1908), 145 Ill. App. 283, 286; People ex rel. Fitzsimmons v. Swailes (1984), 101 Ill. 2d 458, 465.) There is no constitutional or statutory provision which prohibits one person from simultaneously serving as both a county board member and circuit clerk. Therefore, the issue is whether the duties of the offices are such that the holder of one cannot, in every instance, fully and faithfully discharge the duties of the other.

The Honorable Michael T. James - 2.

The election and duties of circuit clerks are governed by the Clerks of Courts Act (705 ILCS 105/0.01 et seq. (West 1996)). Each clerk of the circuit court is required to keep office hours as ordered by the court (705 ILCS 105/6 (West 1996)), to attend personally to the duties of the office (705 ILCS 105/8 (West 1996)), including attendance at sessions of the court (705 ILCS 105/13 (West 1996)), and to keep the records of the court (705 ILCS 105/14, 16, 24, 25, 26 (West 1996)). Further, the clerk is responsible for collecting and disbursing various fees, fines, costs, penalties and other amounts. (705 ILCS 105/27.1-27.6 (West 1996).)

A clerk of a circuit court is an officer of the court who has charge of its clerical functions. As such, he or she is an officer of the judicial department of the State. (People ex rel. Vanderburg v. Brady (1916), 275 Ill. 261, 262.) The clerk is a ministerial officer of the court. (People ex rel. Patdridge v. Windes (1916), 275 Ill. 108, 113.) Therefore, the circuit clerk is not an officer of the county, and, apart from the administration of the internal affairs of his or her office, the circuit clerk has no discretionary duties.

Although the circuit clerk is not a county officer, section 27.3 of the Clerks of Courts Act (705 ILCS 105/27.3 (West 1996)) provides that the county board is responsible for fixing and funding the compensation of the clerk, together with the amounts necessary for clerk hire, stationery, fuel and other expenses. The section sets forth minimum salary levels, but otherwise leaves the amount of salary and expense appropriations to the discretion of the board. Therefore, if one person served as both a member of the county board and as circuit clerk, that person would be placed in the position of acting upon his own salary and the appropriations for his office's operations. This potential for influencing one's own salary and budget in a second office renders the two offices incompatible. See People ex rel. Teros v. Verbeck (1987), 155 Ill. App. 3d 81.

Moreover, this conflict of duties could not be resolved by the county board member refraining from participation in matters relating to the circuit clerk's salary and budget. Our courts have consistently held that abstention will not avoid application of the doctrine of incompatibility of offices. (People ex rel. Teros v. Verbeck (1987), 155 Ill. App. 3d 81, 84; Rogers v. Village of Tinley Park (1983), 116 Ill. App. 3d 437.) The common law doctrine of incompatibility insures impartiality

The Honorable Michael T. James - 3.

and the undivided loyalty of public officers, as well as preventing the appearance of impropriety. Rogers v. Village of Tinley Park (1983), 116 Ill. App. 3d 437.

You have also inquired whether one person may run for election to these two offices simultaneously. Sections 7-12 and 10-7 of the Election Code (10 ILCS 5/7-12(9), 10-7 (West 1996)) provide that if one person is nominated for election to two or more offices which are incompatible, that person must withdraw as a candidate from all but one of such offices within the five business days following the last day for filing petitions. If he or she fails to withdraw as a candidate for all but one of the offices within that time, his or her name is not to be certified, or printed on the ballot, for any of the offices. Therefore, it appears that one person is prohibited from running for the offices of circuit clerk and county board member at the same election.

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

Sincerely,



MICHAEL J. LUKE
Senior Assistant Attorney General
Chief, Opinions Bureau

MJL:KJS



WILLIAM J. SCOTT

ATTORNEY GENERAL
STATE OF ILLINOIS
500 SOUTH SECOND STREET
SPRINGFIELD

November 9, 1972

FILE NO. NP-532

COUNTIES:
Compatibility

Honorable William V. Hopf
State's Attorney
DuPage County
Wheaton, Illinois 60187

Dear Mr. Hopf:

I have your recent letter wherein you state:

"One of our County Board members has requested me to request your opinion regarding the following question. The facts in this situation are as follows:

"A member of our DuPage County Board also is appointed by a municipality (city) as legal counsel. That same municipality has, under statutory authority, appointed a City attorney. The County Board member of whom we speak has been appointed by this municipality as an 'additional' attorney. This 'additional' attorney's compensation is on a regular retainer plus hourly rate basis.

NP 532

Honorable William V. Hopf - 2.

"The County Board member is of the opinion that since he is not the statutory City Attorney that the case does not come within your opinion that the office of City Attorney is not compatible with the office of County Board member.

"May we please have your opinion as to whether a County Board member is compatible with the office of an 'additional' attorney on the basis described above."

From the general rules laid down in People v. Haas, 145 Ill. App. 283, it appears that incompatibility between offices arises where the constitution, or a statute, specifically prohibits the occupant of either one of the offices from holding the other, or where, because of the duties of either office a conflict in interest may arise, or where the duties of either office are such that the holder of one can not, in every instance, properly and faithfully perform all the duties of the other.

There are no constitutional or statutory provisions which expressly prohibit an individual from simultaneously holding the two offices you have mentioned in your letter. Therefore, the question arises whether or not a conflict of interest exists in simultaneously holding the two offices.

Honorable William V. Hopf - 3.

One example of an area where a conflict could arise is in contracts for garbage disposal. Section 25.11b of "An Act to revise the law in relation to counties," (Ill. Rev. Stat., 1971, ch. 34, par. 418) which states as follows:

"To contract with any city, village, incorporated town, or any other county in relation to the collection and final disposition or to the collection alone or final disposition alone of garbage, refuse, and ashes. The governing body shall authorize the execution of the contract by resolution, and shall appoint a committee of no more than three of its own members to serve with committees from the other contracting parties as a joint subcommittee on garbage and refuse disposal, or collection, or collection and disposal, as the case may be."

Another example can be found in the provisions of Section 11 of "An Act in relation to water supply, drainage, sewage, pollution and flood control in certain counties," (Ill. Rev. Stat., 1971, ch. 34, par. 3111) which provides:

"* * * * *

The county is hereby authorized to construct or purchase and operate a waterworks system or a sewerage system or a combined waterworks and sewerage system and to improve or extend any such system so acquired from time to time, as provided in this Act. The county may furnish water or sewerage service or combined

Honorable William V. Hopf - 4.

water and sewerage service to individuals, municipal corporations or other corporations and may impose and collect charges or rates for furnishing water or sewerage service or combined water and sewerage service, as provided in this Act. Any county which owns and operates or which may hereafter own and operate a waterworks system or a sewerage system or a combined waterworks and sewerage system may enter into and perform contracts, whether long-term or short-term, with any municipal, public utility or other corporation, or any person or firm, for the furnishing by the county of water or sewerage service or combined water and sewerage service. Such contracts may provide for periodic payments to the county of a share of the amounts necessary to pay or provide for the expenses of operation and maintenance of the waterworks system or sewerage system or the combined waterworks and sewerage system (including insurance), to pay the principal of and interest on any revenue bonds issued hereunder, and to provide an adequate depreciation fund as hereinafter provided and to maintain such other reserves and sinking funds as may be deemed necessary or desirable by the county for the payment of the bonds or the extension or improvement of the waterworks properties or sewerage facilities or a combination thereof, as the case may be. Any county may also enter into and perform contracts, whether long-term or short-term, with any such corporation, person or firm for the leasing, management or operation of a waterworks system or a sewerage system or a combined waterworks and sewerage system."

If the "additional" attorney representing the city were to

Honorable William V. Hopf - 5.

prepare a contract, he would necessarily be in a position where a conflict could arise since as a county board member he represents the county.

Furthermore, a county is authorized to contract with the city for the use of the city workhouse; for a joint program of air contamination control; for joint plans and construction of projects for the control of floods and the conservation or development of water, waterways and water resources; for leasing space in the city courthouse.

(Ill. Rev. Stat., 1971, ch. 34, pars. 405, 421.2, 3115, 3551.)

Finally, I am cognizant of the provisions of Section 10(a) of Article VII of the Illinois Constitution of 1970 which reads as follows:

"(a) Units of local government and school districts may contract or otherwise associate among themselves, with the State, with other states and their units of local government and school districts, and with the United States to obtain or share services and to exercise, combine, or transfer any power or function, in any manner not prohibited by law or by ordinance. Units of local government and school districts may contract and otherwise associate with individuals associations, and corporations in any manner not

Honorable William V. Hopf - 6.

prohibited by law or by ordinance. Participating units of government may use their credit, revenues, and other resources to pay costs and to service debt related to intergovernmental activities."

It is not necessary for me to pass upon the question whether this constitutional provision standing alone is sufficient to create a conflict of interest as the above referenced statutory provisions are sufficient to hold the offices incompatible.

Your request refers to the position of "additional" city attorney as an office and I have, therefore, done the same in this opinion. This opinion is not to be construed as a determination as to whether such attorney is an officer or an employee. Whichever designation might apply, the result in this case would be the same.

I am therefore of the opinion that an "additional" city attorney, who is on a regular retainer plus hourly rate basis, is a position which is incompatible with that of county board member.

Very truly yours,

A T T O R N E Y G E N E R A L



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

June 10, 2010

I - 10-006

COMPATIBILITY OF OFFICES:
County Board Member
and City Clerk

The Honorable John B. Roe
State's Attorney, Ogle County
106 South 5th Street, Suite 110
Oregon, Illinois 61061

Dear Mr. Roe:

I have your letter inquiring whether one person may simultaneously serve in the offices of county board member and city clerk. For the reasons stated below, a county board member, during his or her term of office, may not be elected to serve as a city clerk. The election of an incumbent county board member to the office of city clerk is void under section 1 of the Public Officer Prohibited Activities Act (the Prohibited Activities Act) (50 ILCS 105/1 (West 2008)).

BACKGROUND

Your letter states that a member of the Ogle County Board was elected to the office of city clerk for the City of Byron, and currently serves in both offices simultaneously. In light of *People v. Wilson*, 357 Ill. App. 3d 204 (2005), you inquire whether one person may serve simultaneously in the offices of county board member and city clerk.

ANALYSIS

The common law doctrine of incompatibility of offices 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 (1984); *People ex rel. Smith v. Brown*, 356 Ill. App. 3d 1096, 1098 (2005); *People ex rel. Myers v. Haas*, 145 Ill. App. 283, 286 (1908). There is no constitutional or statutory provision which expressly permits one person to serve simultaneously as a county board member and a city clerk.¹ However, the provisions of section 1 of the Prohibited Activities Act, which address the ability of county board members to hold other public offices, necessarily preclude a county board member from simultaneously holding the office of city clerk in these circumstances.

¹Prior to the court's opinion in *Wilson*, in opinion No. NP-546, issued December 12, 1972, Attorney General Scott was asked to determine whether a village clerk could also run for and simultaneously serve on the county board of supervisors. Although the Attorney General recognized that the interests of the village and the county may be conflicting, because the village clerk's duties were primarily ministerial, Attorney General Scott concluded that the duties of village clerk did not conflict with the duties of a county board member.

At the time that opinion No. NP-546 was issued, section 1 of "AN ACT to prevent fraudulent and corrupt practices in the making or accepting of official appointments and contracts by public officers" (Ill. Rev. Stat. 1971, ch. 102, par. 1), the precursor to section 1 of the Prohibited Activities Act (*see* Public Act 86-1324, effective September 6, 1990; Ill. Rev. Stat. 1991, ch. 102, par.1), only prohibited county board members from holding other public offices by appointment or election of the county board itself and provided:

No member of a county board, during the term of office for which he is elected, may be appointed to, accept or hold any office other than chairman of the county board or member of the regional planning commission by appointment or election of the board of which he is a member. Any such prohibited appointment or election is void. This Section shall not preclude a member of the county board from being selected or from serving as a member of the County Personnel Advisory Board as provided in Section 12-17.2 of "The Illinois Public Aid Code", approved April 11, 1967, as amended, or as a member of a County Extension Board as provided in Section 7 of the "County Cooperative Extension Law", approved August 2, 1963, as amended.

Public Act 88-623, effective January 1, 1995, amended section 1 to prohibit county board members from holding other public offices.

Section 1 of the Prohibited Activities Act 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 other than (i) chairman of the county board or member of the regional planning commission by appointment or election of the board of which he or she is a member, (ii) alderman of a city or member of the board of trustees of a village or incorporated town if the city, village, or incorporated town has fewer than 1,000 inhabitants and is located in a county having fewer than 50,000 inhabitants, or (iii) trustee of a forest preserve district created under Section 18.5 of the Conservation District Act, 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. * * * Nothing in this Act shall be construed to prohibit an elected county official from holding elected office in another unit of local government so long as there is no contractual relationship between the county and the other unit of local government. This amendatory Act of 1995 is declarative of existing law and is not a new enactment. (Emphasis added.)*

The Illinois Appellate Court construed section 1 in *Wilson* and concluded that the offices of county board member and school board member were incompatible under the Prohibited Activities Act. The case arose because, approximately five months after becoming a county board member, the defendant was elected to the local school board. *Wilson*, 357 Ill. App. 3d at 205. The court held that, under the plain language of section 1 of the Prohibited Activities Act and except to the extent specifically authorized by law, a county board member is prohibited from simultaneously holding another public office. *Wilson*, 357 Ill. App. 3d at 206. The court further concluded that, except in the limited circumstances specifically authorized by law, if a county board member is elected to another office, the election is void. *Wilson*, 357 Ill. App. 3d at 206.

Pursuant to section 1 of the Prohibited Activities Act, as construed by the court in *Wilson*, no county board member may be elected or appointed, during the term of office for which he or she is elected, to any office other than those specified in section 1 or elsewhere in

The Honorable John B. Roe - 4

Illinois law.² Neither section 1 nor any other statute expressly permits one person to serve simultaneously as a county board member and a city clerk. Therefore, pursuant to section 1 of the Prohibited Activities Act, an Ogle County Board member may not be appointed or elected to the office of city clerk. If an Ogle County Board member, during his or her term of office, is elected to the office of city clerk, the election is void under section 1 of the Prohibited Activities Act.

CONCLUSION

Pursuant to section 1 of the Public Officer Prohibited Activities Act, a county board member may not be elected to hold the office of city clerk simultaneously unless specifically authorized to do so by statute. If a county board member, during his or her term of office, is elected to the office of city clerk, that election is void under section 1 of the 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
Senior Assistant Attorney General
Chief, Opinions Bureau

LEP:LAS:lk

²For example, in the Public Officer Simultaneous Tenure Act (50 ILCS 110/0.01 *et seq.* (West 2008)), the General Assembly has specifically declared that it is lawful for one person to hold the offices of county board member and township supervisor simultaneously and, in certain counties, for a county board member to also serve as a township trustee, township assessor, or township clerk. *See* 50 ILCS 110/2 (West 2008).



WILLIAM J. SCOTT

ATTORNEY GENERAL
STATE OF ILLINOIS
500 SOUTH SECOND STREET
SPRINGFIELD

62706



May 28, 1976

FILE NO. NP-1104

COMPATIBILITY OF OFFICES:
County Board Member and
Chief of Police of a City.

Honorable Richard S. Simpson
State's Attorney
Lawrence County
Lawrenceville, Illinois 62439

Dear Mr. Simpson:

I have your letter wherein you ask whether the office of county board member is compatible with the offices of chief of police of a city and city police officer.

Incompatibility between offices arises where the Constitution or a statute specifically prohibits the occupants of either one of the offices from holding the other or where because of the duties of either office a conflict in interest may arise, or where the duties of either office are such that the holder of one cannot in every instance properly and faithfully perform all the duties of the other.

Honorable Richard S. Simpson - 2.

(People v. Haas, 145 Ill. App. 283.) There is no constitutional or statutory provision that prohibits a county board member from serving as either chief of police or city police officer, and there is no conflict between a county board member's duties and the duties of a chief of police and a city police officer. Therefore, it is my opinion that the office of county board member is compatible with the offices of chief of police and city police officer.

Very truly yours,

A T T O R N E Y G E N E R A L



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

January 7, 2010

I - 10-001

COMPATIBILITY OF OFFICES:
County Board Member and
Community College District Trustee

The Honorable Justin Hood
State's Attorney, Hamilton County
100 South Jackson Street
McLeansboro, Illinois 62859

Dear Mr. Hood:

I have your letter inquiring whether one person may simultaneously serve in the offices of county board member and community college district trustee in a county with fewer than 40,000 inhabitants. For the reasons stated below, an incumbent county board member may not hold the office of community college district trustee simultaneously. The election of an incumbent county board member to the board of trustees of a community college district is void under section 1 of the Public Officer Prohibited Activities Act (the Prohibited Activities Act) (50 ILCS 105/1 (West 2008)).

BACKGROUND

Your letter states that a member of the Hamilton County Board currently serves as a community college district trustee for Rend Lake Community College District No. 521, which includes portions of Hamilton County within its territory. We understand that the individual who is the focus of your inquiry was elected to the office of county board member in 2006 and was

serving on the county board when he was elected to the office of community college district trustee at the consolidated election held on April 7, 2009. Accordingly, you inquire whether one person may serve in both offices simultaneously.

ANALYSIS

The common law doctrine of incompatibility of offices 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 (1984); *People ex rel. Smith v. Brown*, 356 Ill. App. 3d 1096, 1098 (2005); *People ex rel. Myers v. Haas*, 145 Ill. App. 283, 286 (1908). There is no constitutional or statutory provision which expressly permits one person to serve simultaneously as a county board member and a community college district trustee.¹ However, the provisions of section 1 of the Prohibited Activities Act, which address the ability of county board members to hold other public offices, necessarily preclude a county board member from simultaneously holding the office of community college district trustee in these circumstances.

Section 1 of the Prohibited Activities Act 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 other than (i) chairman of the county board or member of the regional planning commission by appointment or election of the board of which he or she is a member, (ii) alderman of a city or member of the board of trustees of a village or incorporated town if the city, village, or incorporated town has fewer than 1,000 inhabitants and is located in a county having fewer than 50,000 inhabitants, or (iii) trustee of a forest preserve district created under Section 18.5 of the Conservation District Act, 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

¹In opinion No. 94-021, issued October 25, 1994, Attorney General Burriss was asked to determine whether one person may simultaneously serve as both a county board member and a trustee of a community college, part of the territory of which is located within the county. Because of potential conflicts in duties, Attorney General Burriss concluded that the office of county board member was incompatible with that of trustee for a community college located within the county.

prohibited appointment or election is void. * * * Nothing in this Act shall be construed to prohibit an elected county official from holding elected office in another unit of local government so long as there is no contractual relationship between the county and the other unit of local government. This amendatory Act of 1995 is declarative of existing law and is not a new enactment. (Emphasis added.)

The Illinois Appellate Court construed section 1 in *People v. Wilson*, 357 Ill. App. 3d 204 (2005), and concluded that the offices of county board member and school board member were incompatible under the Prohibited Activities Act. The case arose because, approximately five months after becoming a county board member, the defendant was elected to the local school board. *Wilson*, 357 Ill. App. 3d at 205. The court held that, under the plain language of section 1 of the Prohibited Activities Act and except to the extent specifically authorized by law, a county board member is prohibited from simultaneously holding another public office. *Wilson*, 357 Ill. App. 3d at 206. The court further concluded that, except in the limited circumstances specifically authorized by law, if a county board member is elected to another office, the election is void. *Wilson*, 357 Ill. App. 3d at 206.

Pursuant to section 1 of the Prohibited Activities Act, as construed by the court in *Wilson*, no county board member may be elected or appointed, during the term of office for which he or she is elected, to any office other than those specified in section 1 or elsewhere in Illinois law.² Neither section 1 nor any other statute expressly permits one person to serve simultaneously as a county board member and a community college district trustee. Therefore, pursuant to section 1 of the Prohibited Activities Act, a Hamilton County Board member may not be appointed or elected to the office of community college district trustee. If a Hamilton County Board member, during his or her term of office, is elected to the office of community college district trustee, the election is void under section 1 of the Prohibited Activities Act.

CONCLUSION

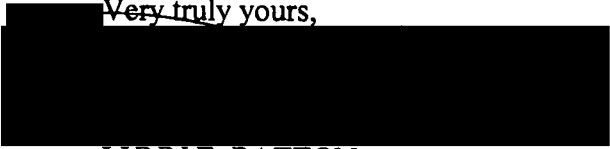
Pursuant to section 1 of the Public Officer Prohibited Activities Act, a county board member may not be elected to hold the office of community college district trustee

²For example, section 2 of the Public Officer Simultaneous Tenure Act (50 ILCS 110/2 (West 2008)) authorizes county board members to serve simultaneously as township supervisors. Further, section 3-9006 of the Counties Code (55 ILCS 5/3-9006 (West 2008)) authorizes county board members to serve as Assistant State's Attorneys, if the office of county board member is located outside of the jurisdiction of the State's Attorney's office that he or she serves.

simultaneously unless specifically authorized to do so by statute. If a county board member, during his or her term of office, is elected to the office of community college district trustee, that election is void under section 1 of the Prohibited Activities Act.³

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

Very truly yours,


LYNNE E. PATTON
Senior Assistant Attorney General
Chief, Opinions Bureau

LEP:LAS:lk

³Your letter indicates that the Hamilton County Board Chairman believes that section 1.2 of the Prohibited Activities Act (50 ILCS 105/1.2 (West 2008)), which authorizes county board members "in a county having fewer than 40,000 inhabitants" to hold the offices of "member of the board of education, regional board of school trustees, board of school directors, or board of school inspectors," also permits a county board member to serve simultaneously as a community college district trustee in those counties with a population under 40,000 inhabitants. Based on 2000 Federal census figures, Hamilton County's population is 8,621 inhabitants. Illinois Blue Book 504 (2007-2008).

Although section 1.2 of the Prohibited Activities Act expressly permits a member of the county board to hold the indicated offices, if the county has fewer than 40,000 inhabitants, section 1.2 contains no corresponding exception expressly allowing a member of the county board to serve as a community college district trustee in such circumstances. The offices of member of board of education (105 ILCS 5/9-5, 9-10 (West 2008)), regional board of school trustees (105 ILCS 5/6-2 (West 2008)), board of school directors (105 ILCS 5/10-1 (West 2008)), or board of school inspectors (105 ILCS 5/32-2.1, 32-2.11 (West 2008)) are established under the School Code (*see* 105 ILCS 5/1-1 *et seq.* (West 2008)), while the office of community college district trustee is governed by the Public Community College Act. *See* 110 ILCS 805/3-1 *et seq.* (West 2008). Further, when the General Assembly has authorized a public officer to serve simultaneously on a board of trustees of a community college district, it has done so by express statutory provision. *See* 110 ILCS 805/3-7 (West 2008) (permitting member of common school board elected or appointed to a board of trustees of a community college district to serve the remainder of his or her term of office as a member of the common school board). Thus, it is clear that the office of community college district trustee is not among the public offices enumerated in section 1.2 of the Prohibited Activities Act in which a county board member may serve simultaneously. *Cf.* 50 ILCS 105/3.2 (West 2008) (expressly addressing contracts of deposit, loans, or other financial services by "a unit of local government [or] community college district"). Accordingly, the language of section 1.2 of the Prohibited Activities Act authorizing a county board member to also hold the offices of member of the board of education, regional board of school trustees, board of school directors, or board of school inspectors, does not authorize a county board member to serve simultaneously as a community college district trustee, regardless of the county's population.



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

March 29, 2012

I - 12-005

COMPATIBILITY OF OFFICES:
County Board Member and
Community College District Trustee

The Honorable Joseph P. Bruscato
State's Attorney, Winnebago County
400 West State Street, Suite 619
Rockford, Illinois 61101

Dear Mr. Bruscato:

I have your letter inquiring whether one person may serve simultaneously as a county board member and a community college district trustee in a county with a population of more than 40,000 inhabitants. If the offices are incompatible, you inquire which office must be vacated when the person was serving as a community college district trustee at the time that he was elected to the office of county board member. For the reasons discussed below, the offices of county board member and community college district trustee in a county with more than 40,000 inhabitants are incompatible, and therefore, one person cannot hold both offices simultaneously. Further, as a matter of law, the acceptance of a second, incompatible office by the incumbent of another office constitutes an *ipso facto* resignation of the first office.

BACKGROUND

Your letter states that the individual who is the focus of your inquiry was first elected to the office of community college district trustee, and then was elected to the office of county board member. He continues to serve in both capacities. According to the 2010 Federal decennial census data, the population of Winnebago County is 295,266 inhabitants.¹

¹Illinois Blue Book 451 (2011-2012).

ANALYSIS

The common law doctrine of incompatibility of offices 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 (1984); *People ex rel. Smith v. Brown*, 356 Ill. App. 3d 1096, 1098 (2005); *People ex rel. Myers v. Haas*, 145 Ill. App. 283, 286 (1908). In these circumstances, the provisions of section 1 of the Public Officer Prohibited Activities Act (the Prohibited Activities Act) (50 ILCS 105/1 (West 2010)), which address the ability of county board members to hold other public office, necessarily preclude a county board member from simultaneously holding the office of community college district trustee.

Section 1 of the Prohibited Activities Act 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 other than (i) chairman of the county board or member of the regional planning commission by appointment or election of the board of which he or she is a member, (ii) alderman of a city or member of the board of trustees of a village or incorporated town if the city, village, or incorporated town has fewer than 1,000 inhabitants and is located in a county having fewer than 50,000 inhabitants, or (iii) trustee of a forest preserve district created under Section 18.5 of the Conservation District Act, 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. * * * Nothing in this Act shall be construed to prohibit an elected county official from holding elected office in another unit of local government so long as there is no contractual relationship between the county and the other unit of local government. This amendatory Act of 1995 is declarative of existing law and is not a new enactment. (Emphasis added.)*

In *People v. Wilson*, 357 Ill. App. 3d 204 (2005), the Illinois Appellate Court addressed the issue of whether the offices of county board member and school board member in a county of over 40,000 inhabitants were incompatible under section 1 of the Prohibited Activities Act. The court held that, under the plain language of section 1, and except to the extent expressly authorized by law, a county board member is prohibited from simultaneously holding another

public office during his or her term of office. *Wilson*, 357 Ill. App. 3d at 206. Community college district trustees and county board members are officers of their respective units of government. Accordingly, unless simultaneous tenure in these offices is expressly permitted by statute, the *Wilson* decision is dispositive of the issue of whether the offices of community college district trustee and county board member are incompatible as a matter of law.²

With respect to simultaneous tenure, the office of community college district trustee is not one of the offices specifically excepted by section 1 of the Prohibited Activities Act. Moreover, the General Assembly recently enacted Public Act 97-460, effective August 19, 2011, which amended section 1.2 of the Prohibited Activities Act (50 ILCS 105/1.2 (West 2010)) to expressly authorize county board members in a county having fewer than 40,000 inhabitants to simultaneously hold the office of member of the "board of a community college district[.]"³ As previously noted, Winnebago County's population significantly exceeds 40,000 inhabitants. Therefore, section 1.2 of the Prohibited Activities Act is inapplicable to Winnebago County, and that provision does not permit a member of the Winnebago County Board to simultaneously serve as a community college district trustee.⁴

Having concluded that the indicated offices are incompatible in the circumstances underlying your inquiry, it must next be determined which office must be vacated. You have advised that the dual officeholder in question was first elected to the position of community college district trustee, and then was subsequently elected to the office of county board member. Under the common law, the acceptance of a second, incompatible office by the incumbent of another office constitutes an *ipso facto* resignation of the first office held. *Brown*, 356 Ill. App. 3d at 1101; Ill. Att'y Gen. Inf. Op. No. I-11-003, issued March 31, 2011. Consequently, if an incumbent community college district trustee is elected to and qualifies for the office of county

²Moreover, prior to the decision in *Wilson*, Attorney General Burriss determined that, because of potential conflicts in duties, the office of county board member was incompatible with that of trustee of a community college located within the county. Opinion No. 94-021, issued October 25, 1994. A review of the relevant statutory provisions confirms that the analysis in opinion No. 94-021 is still valid.

³Subsection 1-2(g) of the Public Community College Act (110 ILCS 805/1-2(g) (West 2010), as amended by Public Act 97-539, effective August 23, 2011) defines the term "board" to mean "[t]he board of trustees of a community college district, whether elected or appointed."

⁴Subsequent to the receipt of your opinion request, legislation was introduced in the 97th General Assembly. House Bill 5515 (Tracy) and Senate Bill 3182 (Syverson), among other things, amend section 1.2 of the Prohibited Activities Act to authorize a member of the county board in any county (rather than a county having fewer than 40,000 inhabitants) to hold the office of member of the board of education, regional board of school trustees, board of school directors, board of a community college district, or board of school inspectors. House Bill 5515 was referred to the House Rules Committee, and as of March 28, 2012, remains there. Senate Bill 3182 passed the Senate, and as of March 28, 2012, was on First Reading in the House and referred to the House Rules Committee.

The Honorable Joseph P. Bruscato - 4

board member in a county with a population that exceeds 40,000 inhabitants, the acceptance of the office of county board member constitutes a resignation from the office of community college district trustee. Therefore, by operation of law, the office of community college district trustee has been vacated.

CONCLUSION

Section 1 of the Public Officer Prohibited Activities Act prohibits a county board member in a county having more than 40,000 inhabitants from simultaneously serving as a community college district trustee. Consequently, one person may not hold both offices simultaneously in Winnebago County. Further, because the dual officeholder in question was elected to the office of county board member while serving as a community college district trustee, his or her qualification for the office of county board member constituted an *ipso facto* resignation from the office of community college district trustee.

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

 Very truly yours,

LYNNE E. PATTON
Senior Assistant Attorney General
Chief, Public Access and Opinions Division

LEP:LAS:cj



WILLIAM J. SCOTT

ATTORNEY GENERAL

STATE OF ILLINOIS

500 SOUTH SECOND STREET

SPRINGFIELD

62706



May 5, 1975

FILE NO. NP-899

COUNTIES:

County Board Members may Serve
on Mental Health Board

Honorable William J. Cowlin
State's Attorney, McHenry County
2200 North Seminary Avenue
Woodstock, Illinois 60098

Dear Mr. Cowlin:

I have your letter wherein you state:

"Would you please furnish your opinion concerning a conflict of Illinois Revised Statutes, Chapter 102, Section 1 concerning county officers holding office by appointment, and Illinois Revised Statutes, Chapter 91 1/2, Section 303a wherein the statute directs that one member of the Community Health Board shall be a member of the governing body and, in our instance, it would be a member of the County Board. I therefore ask whether a member of the County Board can serve as a member of the Mental Health Board under the Community Mental Health Act."

REPLY

NP 899

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Section 1 of "AN ACT to prevent fraudulent and corrupt practices in the making or accepting of official appointments and contracts by public officers" (Ill. Rev. Stat. 1973, ch. 102, par. 1.), states:

"No member of a county board, during the term of office for which he is elected, may be appointed to, accept or hold any office other than chairman of the county board or member of the regional planning commission by appointment or election of the board of which he is a member. Any such prohibited appointment or election is void. This Section shall not preclude a member of the county board from being selected or from serving as a member of the County Personnel Advisory Board as provided in Section 12--17.2 of 'The Illinois Public Aid Code', approved April 11, 1967, as amended, or as a member of a County Extension Board as provided in Section 7 of the 'County Cooperative Extension Law', approved August 2, 1963, as amended."

Section 3a of the "Community Mental Health Act" (Ill. Rev. Stat. 1973, ch. 91 1/2, par. 303a.), provides that:

"Every governmental unit authorized to levy an annual tax under any of the provisions of this Act shall, before it may levy such tax, establish a 7 member community mental health board who shall administer this Act. Such board shall be appointed by the chairman of the governing body of a county, the mayor of a city, the president of a village, the president of an incorporated town, or the supervisor of a township, as the case may be, with the advice and consent of the governing body of

Honorable William J. Cowlin - 3.

such county, city, village, incorporated town or the town board of auditors of any township. Members of the community mental health board shall be residents of the government unit and, as nearly as possible, be representative of interested groups of the community such as local health departments, medical societies, local comprehensive health planning agencies, hospital boards, lay associations concerned with mental health and alcoholism, controlled substances addiction or use of cannabis and mental retardation, as well as the general public. One member shall be a member of the governing body. No member of the community mental health board may be a full-time or part time employee of the Illinois Department of Mental Health or any facility or service operating under contract to the board."

It is apparent from an examination of the foregoing statutes that they are inconsistent inasmuch as section 1 of "AN ACT to prevent fraudulent and corrupt practices * * *" (Ill. Rev. Stat. 1973, ch. 102, par. 1.), precludes a member of the county board from being appointed to another office by appointment of the county board except for those specific offices mentioned. A member of the Mental Health Board is not mentioned. Where, as in this situation, the passage of a series of legislative acts results in confusion and consequences which the legislature may not have contemplated, the conflicting statutes must

Honorable William J. Cowlin - 4.

be construed in such a way as to reflect the obvious intent of the legislature and to permit practical application of the statutes. (People ex rel. High School Dist. 231 v. Hupe, 2 Ill. 2d 434; Scotfield v. Board of Education, 411 Ill. 11; Moyer v. Board of Education, 391 Ill. 156.) Acts which appear to be inconsistent are not to be so construed if it is possible to construe them otherwise. (People ex rel. Little v. Peoria & Eastern Railway Co., 383 Ill. 79; People ex rel. English v. Atchison, Topeka and Santa Fe Railway Co., 370 Ill. 420.) If there is an irreconcilable conflict between the new provision and the prior statutes relating to the same subject matter, the new provision will control as it is the later expression of the legislature. See, 2A Sutherland, Statutes and Statutory Construction, 4th ed. 1973, sec. 51.02, and cases cited therein.

Reviewing the legislative history of the Mental Health Code and applying the aforementioned rules of statutory construction it is clear that section 3a of the Mental Health Code must be construed as an exception to section 1 of "AN ACT to prevent fraudulent and corrupt practices * * *". Section 3a of the Mental Health Code was amended in 1971 to provide that not more

Honorable William J. Cowlin - 5.

than one member of the mental health board shall be a member of the governing body that selects the board. In 1972 the Mental Health Code was amended further to provide that one member of the mental health board shall be a member of the governing body. Both of these amendments were enacted despite the language of section 1 of "AN ACT to prevent fraudulent and corrupt practices * * *", which prohibited a member of the county board from being appointed to or holding certain other offices during his incumbency. In light of this history it is logical to assume that the legislature enacted section 3a of the Mental Health Code as an exception to the prohibition against county board members serving in more than one office. In a similar situation, I recently stated in opinion S-877, that a specific statute which allows a county board member to simultaneously hold the office of member of the board of review provides an exception to the general, earlier enacted provisions of section 1 of "AN ACT to prevent fraudulent and corrupt practices * * *", which prohibits such dual office holding.

Therefore, I am of the opinion that a member of the county board can serve as a member of the mental health board

Honorable William J. Cowlin - 6.

and in so doing does not violate section 1 of "AN ACT to prevent
fraudulent and corrupt practices * * *".

Very truly yours,

A T T O R N E Y G E N E R A L



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

March 15, 2007

I - 07-008

COUNTIES:

Composition of County Emergency
Telephone System Boards

Mary Stephenson-Schroeder
General Counsel
Illinois Commerce Commission
160 North LaSalle Street, Suite C-800
Chicago, Illinois 60601-3104

Dear Ms. Stephenson-Schroeder:

I have your office's letter regarding the proper composition of county emergency telephone system boards (CETS boards) appointed by county boards under subsection 15.4(a) of the Emergency Telephone System Act (the Act) (50 ILCS 750/15.4(a) (West 2004)). Specifically, your office asked: (1) in counties with a population of less than 100,000 inhabitants, whether more than one public member and more than one county board member may serve simultaneously on a five-member CETS board; (2) in such counties, whether a second county board member may be appointed to serve on a five-member CETS board as an "elected official," if one county board member has already been appointed to the CETS board; (3) in counties with a population of less than 100,000 inhabitants, whether more than one public member or more than one county board member may serve on a CETS board if the board is comprised of more than five members; and (4) in counties with a population of 100,000 or more, whether a county board member may simultaneously serve as a member of the CETS board.

For the reasons set out below: (1) in counties with a population of less than 100,000, no more than one public member and one county board member may serve simultaneously on a five-member CETS board; (2) in such counties, a second county board member may not be appointed as an "elected official" to serve on a five-member CETS board; (3) if the CETS board is comprised of more than five members, then more than one public member may serve on the board, but only one county board member may serve on the board; and (4) in counties with a population of 100,000 or more, a county board member may not simultaneously serve as a CETS board member.

BACKGROUND

The General Assembly enacted the Act to provide "a simplified means of procuring emergency services * * * [by] establish[ing] the number '911' as the primary emergency telephone number for use in this State and to encourage units of local government and combinations of such units to develop and improve emergency communication procedures and facilities[.]" Ill. Rev. Stat. 1975, ch. 134, par. 31. As originally enacted, the Act made no provision for the creation of emergency telephone system boards (ETS boards) to administer emergency telephone systems.

In 1987, the General Assembly granted certain units of local government the authority to impose a surcharge on telecommunication subscribers to assist in funding effective emergency telephone systems. Units of local government electing to impose a surcharge were required to create an ETS board to administer the monies derived from the surcharge. Ill. Rev. Stat. 1987, ch. 134, par. 45.4. The ETS board was to "consist of not fewer than 5 members, all of whom shall be appointed on the basis of their ability or experience." Ill. Rev. Stat. 1987, ch. 134, par. 45.4.

Section 15.4 of the Act was subsequently amended to provide that the ETS board should "consist of not fewer than 5 members, all of whom shall be representative of the public safety agency 9-1-1 users and appointed on the basis of their ability or experience" (Ill. Rev. Stat. 1989, ch. 134, par. 45.4), and then to provide that an ETS board:

shall consist of not fewer than 5 members, one of whom may be a public member who is a resident of the local exchange service territory included in the 9-1-1 coverage area and others who shall be representative of the public safety agency 9-1-1 users and appointed on the basis of their ability or experience. (Emphasis added.) Ill. Rev. Stat. 1990 Supp., ch. 134, par. 45.4.

In opinion No. 91-028, issued July 26, 1991 (1991 Ill. Att'y Gen. Op. 63), Attorney General Burris considered the issue of whether one person could simultaneously hold the offices of county board member and member of a CETS board under the provisions of subsection 15.4(a) quoted immediately above. Attorney General Burris concluded that the provisions of section 1 of the Public Officer Prohibited Activities Act (Prohibited Activities Act) in effect at that time (*see* Ill. Rev. Stat. 1989, ch. 102, par. 1, now codified at 50 ILCS 105/1 (West 2005 Supp.))¹ clearly prohibited a county board member from serving on a CETS board, if the appointment to the CETS board was made by the county board of which he or she was a member. Further, under the common law doctrine of incompatibility of offices, Attorney General Burris determined that the offices of county board member and CETS board member were incompatible because of a conflict in duties.

Subsequent to the issuance of opinion No. 91-028, the General Assembly amended section 1 of the Prohibited Activities Act (*see* Public Act 87-146, effective August 20, 1991) to provide that "[t]his Section shall not preclude a member of the county board from being selected or from serving * * * as a member of an Emergency Telephone System Board as provided in Section 15.4 of the Emergency Telephone System Act". Subsection 15.4(a) of the Act was concomitantly amended to provide that ETS boards:

shall consist of not fewer than 5 members, one of whom may be a public member * * *, *one of whom (in counties with a population less than 100,000) may be a member of the county board*, and at least 3 of whom shall be representative of the 9-1-1 public safety agencies[.] (Emphasis added.)

Language was later added to provide that "[e]lected officials are also eligible to serve on the board." *See* Ill. Rev. Stat. 1991, ch. 134, par. 45.4.

¹At the time of the issuance of opinion No. 91-028, section 1 of the Public Officer Prohibited Activities Act provided:

No member of a county board, during the term of office for which he is elected, may be appointed to, accept or hold any office other than chairman of the county board or member of the regional planning commission by appointment or election of the board of which he is a member. Any such prohibited appointment or election is void. This Section shall not preclude a member of the county board from being selected or from serving as a member of the County Personnel Advisory Board as provided in Section 12-17.2 of "The Illinois Public Aid Code", approved April 11, 1967, as amended, or as a member of a County Extension Board as provided in Section 7 of the "County Cooperative Extension Law", approved August 2, 1963, as amended. (Emphasis added.) Ill. Rev. Stat. 1989, ch. 102, par. 1.

Following these statutory changes, Attorney General Ryan was asked to determine the number of county board members who could serve simultaneously on a CETS board in counties with a population of less than 100,000 inhabitants. In opinion No. 96-041, issued December 4, 1996, Attorney General Ryan advised that, in counties with fewer than 100,000 inhabitants, section 15.4 permitted only one county board member to serve on a CETS board. He also concluded that nothing in the plain language of section 15.4 as amended either expressly or impliedly suggested that additional county board members could be appointed to serve on a CETS board if the board was comprised of more than five members.

Subsection 15.4(a) was thereafter amended (*see* Public Act 92-202, effective January 1, 2002) and currently provides:

(a) The corporate authorities of any county or municipality that imposes a surcharge under Section 15.3 shall establish an Emergency Telephone System Board. The corporate authorities shall provide for the manner of appointment and the number of members of the Board, provided that *the board shall consist of not fewer than 5 members, one of whom must be a public member who is a resident of the local exchange service territory included in the 9-1-1 coverage area, one of whom (in counties with a population less than 100,000) must be a member of the county board, and at least 3 of whom shall be representative of the 9-1-1 public safety agencies, including but not limited to police departments, fire departments, emergency medical services providers, and emergency services and disaster agencies, and appointed on the basis of their ability or experience. Elected officials are also eligible to serve on the board. (Emphasis added.)* 50 ILCS 750/15.4 (West 2004).

ANALYSIS

Public Members and County Board Members on a Five-Member CETS Board

Your office's first question is whether, in counties with a population of less than 100,000, more than one public member and more than one county board member may serve simultaneously on a five-member CETS board.

Under the rules of statutory construction, the use of the words "must" and "shall" is generally regarded as mandatory. *In re Parentage of M.J.*, 203 Ill. 2d 526, 535 (2003); *Andrews v. Foxworthy*, 71 Ill. 2d 13, 21 (1978). Thus, under subsection 15.4(a) of the Act, CETS boards, as well as all other ETS boards, are to consist of a minimum of five members, at least three of whom are required to be representative of public safety agencies such as police departments, fire departments, emergency medical service providers, and emergency services and disaster agencies. The remaining two positions are now required to be filled by one public member and, in counties with less than 100,000 inhabitants, by one county board member. See Remarks of Rep. Myers, May 9, 2001, House Debate on Senate Bill No. 530, at 97-98 (noting that in counties of less than 100,000 population, one member of the ETS board must, rather than may, be a county board member and one must be a public member); Remarks of Sen. Burzynski, March 29, 2001, Senate Debate on Senate Bill No. 530, at 150-51. Clearly, appointing a second public member to the exclusion of a county board member or a public safety agency representative would not be in accord with the plain language of subsection 15.4(a). It must be determined, however, whether a second county board member may be appointed as either a public member or as a public safety agency representative.

As discussed above, in opinion No. 91-028, Attorney General Burriss concluded, on the basis of the provisions of section 1 of the Prohibited Activities Act then in effect, and with due regard for potential conflicts in duties under the common law, that one person could not simultaneously hold the offices of county board member and CETS board member. Subsequently, Public Act 87-146 amended both section 1 of the Prohibited Activities Act and subsection 15.4(a) of the Act to permit *one* county board member to serve simultaneously on an ETS board in counties with fewer than 100,000 inhabitants. Ill. Att'y Gen. Op. No. 96-041, issued December 4, 1996. It is within the power of the General Assembly to permit two offices to be held by the same individual, even though such offices would be incompatible at common law. See Ill. Att'y Gen. Op. No. NP-1099, issued May 28, 1976. The clear intention of the amendment to section 1 of the Prohibited Activities Act was to abrogate the statutory conflict and the common law doctrine insofar as it prohibited simultaneous tenure in the offices of county board member and ETS board member.

The General Assembly's action, however, was limited. The amendment authorized only one county board member to serve on an ETS board and only in those counties with a population of less than 100,000; in all other circumstances the common law doctrine remains in effect and the offices are incompatible.² Therefore, not more than one county board member is permitted to serve simultaneously on a five-member CETS board in counties with a

²See generally *People v. Wilson*, 357 Ill. App. 3d 204 (2005) (section 1 of the Prohibited Activities Act prohibits a member of the county board from holding any other office, except for several specifically enumerated circumstances).

population of fewer than 100,000 inhabitants, regardless of whether the county board member is designated as a county board member, a public member, or a public safety agency representative. To conclude otherwise would ignore the obvious intent of the statute. See Ill. Att'y Gen. Op. No. 96-041, issued December 4, 1996.

Appointment of a Second County Board Member to a Five-Member CETS Board

Your office has also asked whether a second county board member may be appointed to serve on a five-member CETS board as an "elected official" if one county board member has already been appointed to the CETS board. The revisions to section 1 of the Prohibited Activities Act and subsection 15.4(a) permitting one county board member to serve on a CETS board were specific, limited responses to opinion No. 91-028. Except to the very limited extent that the common law principle of incompatibility has been abrogated by statute, the offices of county board member and CETS board member remain incompatible. The language added by Public Act 87-146 referring to "elected officials" being eligible to serve on the board was no doubt intended only to clarify that elected officials, other than county board members, may serve on an ETS board as the public member or as representatives of public safety agencies without jeopardizing their positions as such. Consequently, a second county board member may not be appointed to serve on a five-member CETS board by virtue of being an "elected official."

Public Members and County Board Members on a CETS Board of More Than Five Members

Your office's third question is whether more than one public member or more than one county board member may serve on a CETS board, if the board is comprised of more than five members appointed by the county board. The language of subsection 15.4(a) regarding the number of public members and county board members who may serve on a CETS board is clear: *one* member of the CETS board "must be a public member[.]" and *one* member of the board, in counties with a population of less than 100,000, "must be a member of the county board[.]" Nothing in the plain language of subsection 15.4(a) expressly or impliedly suggests, however, that additional public members cannot be appointed to a CETS board if the board consists of more than five members. Consequently, more than one public member may serve on a CETS board that is comprised of more than five members.

Although the language regarding county board members and members of the public serving on a CETS board is identical, as previously discussed, county board members are generally precluded from serving on a CETS board due to the doctrine of incompatibility of offices. The conflict has been abrogated by the General Assembly with regard to one county board member per CETS board. To conclude that more than one county board member may serve simultaneously on a CETS board comprised of more than five members would be

inconsistent with the provisions of section 1 of the Prohibited Activities Act and section 15.4 of the Act. Consequently, in counties with a population of less than 100,000, only one county board member may be appointed by a county board to serve on a CETS board at any one time, regardless of the size of the CETS board.

**County Board Members on a CETS Board
in Counties With a Population of More Than 100,000**

Your office's last question is whether, in counties with a population of 100,000 or more, one county board member may serve on a CETS board pursuant to subsection 15.4(a). Subsection 15.4(a) requires the appointment of one county board member to ETS boards "in counties with a population less than 100,000[.]" The language is silent with respect to the appointment of county board members in larger counties.

Under section 1 of the Prohibited Activities Act, the offices of county board member and CETS board member are incompatible, except to the extent that the General Assembly has acted to permit simultaneous tenure. It is a well established principle of statutory construction that the enumeration of one exception in a statute implies the exclusion of all other exceptions. *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 286 (2003), *cert. denied*, 540 U.S. 818, 124 S. Ct. 83 (2003). By expressly authorizing one county board member to serve on CETS boards "in counties with a population less than 100,000[.]" the General Assembly has, by implication, continued the exclusion of county board members from service on a CETS board in all other instances. Consequently, under section 1 of the Prohibited Activities Act, it is not permissible for a county board member to serve on a CETS board in counties with a population over 100,000. *See generally Wilson*, 357 Ill. App. 3d 204.

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

[REDACTED]
Very truly yours,
[REDACTED]

LYNNE E. PATTON
Senior Assistant Attorney General
Chief, Opinions Bureau

LEP:CIE:an



WILLIAM J. SCOTT

ATTORNEY GENERAL
STATE OF ILLINOIS
500 SOUTH SECOND STREET
SPRINGFIELD
62706



October 23, 1975

FILE NO. NP-985

COUNTIES:

County Board - Compatibility
of Member of County Board and
County Board of Public Health

Honorable Jack Hoogasian
State's Attorney, Lake County
County Building
Waukegan, Illinois 60085

Dear Mr. Hoogasian:

This responds to your request for an opinion as to whether section 1 of "AN ACT to prevent fraudulent and corrupt practices, etc." (Ill. Rev. Stat. 1973, ch. 102, par. 1) precludes the appointment of a county board member as a voting member of a county board of health. Section 1 provides in part:

"No member of a county board, during the term of office for which he is elected, may be appointed to, accept or hold any office other than chairman of the county board or member of the regional planning commission by appointment or election of the board of which he is a member. Any such prohibited appointment or election is void. This Section shall not preclude a member of the county

NP 985

Honorable Jack Hoogasian - 2.

board from being selected or from serving as
a member of the County Personnel Advisory
Board * * * "

Section 13 of "AN ACT in relation to the establishment
and maintenance of county and multiple-county health departments"
(Ill. Rev. Stat. 1973, ch. 111 1/2, par. 20c12), provides in
part as follows:

"§ 13. Except in those cases where a board
of 12 members is provided for as authorized in
this Section, each county health department shall
be managed by a board of health consisting of 8
members appointed by the president or chairman
of the county board, with the approval of the
county board, for a 3 year term, except that of
the first appointees 2 shall serve for one year,
2 for 2 years, 3 for 3 years and the term of the
member appointed from the county board, as pro-
vided in this Section, shall be one year and shall
continue until reappointment or until a successor
is appointed.

* * * At least two members of each county board
of health shall be physicians licensed in Illinois
to practice medicine in all of its branches, at
least one member shall be a dentist licensed in
Illinois and one member shall be chosen from the
county board of supervisors or commissioners as
the case may be. At least one member from each
county on each multiple-county board of health
shall be a physician licensed in Illinois to
practice medicine in all of its branches, one
member from each county on each multiple-county
board of health shall be chosen from the county
board of supervisors or commissioners, as the
case may be, and at least one member of the board
of health shall be a dentist licensed in Illinois.
* * * "

There is a conflict between the provisions of this

Honorable Jack Hoogasian - 3.

section and those of section 1 of the Corrupt Practices Act. This conflict may be resolved by reference to the applicable rules of statutory construction. It is the rule in Illinois that where a conflict exists between two statutes, one general and one specific, the specific statute will prevail. East Maine Township, Community Assoc. v. Pioneer Trust and Savings Bank, 15 Ill. App. 250; People v. Hale, 55 Ill. App. 2d 260; Jansen v. Illinois Municipal Retirement Fund, 58 Ill. 2d 97.

It is, therefore, my opinion that the provisions of section 13 of "AN ACT in relation to the establishment and maintenance of county and multiple-county health departments", supra, being specific, must prevail over those of section 1 of the Corrupt Practices Act to the extent of any conflict. It is clear that the General Assembly intended by adoption of section 13 to require that a county board of health include one member from each county board.

In response to your other questions, I refer you to opinions No. S-419, issued March 13, 1972; No. NP-866, issued February 4, 1975; and No. S-877, issued March 17, 1975; Public Acts 79-457 and 79-458. I am unable to advise you specifically on your questions concerning "other committees", youth service bureaus and criminal justice councils without more detailed

Honorable Jack Hoogasian - 4.

information, other than to note that the prohibition of section 1 of the Corrupt Practices Act is broad and generally prohibits the county board from appointing or electing its own members to other offices. If you have additional questions, I will advise you further.

Very truly yours,

A T T O R N E Y G E N E R A L



WILLIAM J. SCOTT

ATTORNEY GENERAL
STATE OF ILLINOIS
500 SOUTH SECOND STREET
SPRINGFIELD

August 20, 1973

FILE NO. NP-609

COUNTIES:

Conflict of interest-
County Board Member and County
Hospital Board Member-
Medical Service Facility

Honorable Richard S. Simpson
State's Attorney
Lawrence County
Court House
Lawrenceville, Illinois 62439

Dear Mr. Simpson:

I have your letter wherein you state:

"Two questions have been presented to me of late from our County Board, for which I am requesting your opinion as soon as possible.

First, the question arises, may the Lawrence County Board members serve as members of the Lawrence County Hospital Board. Part of the funds of the hospital are derived through taxation as granted through the Lawrence County Board, which information may be of some use to you.

Secondly, a greater question has arisen as to whether the Lawrence County Board or the Hospital Board or one of the governmental units

NP 609

Honorable Richard S. Simpson - 2.

of the County, may legally issue bonds for the purpose of building a structure and rent the space out to others?

I would appreciate your reply as soon as possible, and in relation to the last question, the present proposal seems to be to issue bonds by the Lawrence County Memorial Hospital to build a medical center and pay the interest and bonds off from proposed rentals from doctors who might rent said building."

It is my understanding that the Lawrence County Memorial Hospital is owned and operated by Lawrence County.

Turning to your first question, from the general rules laid down in People v. Haas, 145 Ill. App. 283, it appears that incompatibility between offices arises where the constitution or a statute specifically prohibits the occupant of either one of the offices from holding the other, or where, because of the duties of either office, a conflict of interest may arise, or where the duties of either office are such that the holder of one cannot, in every instance, properly and faithfully perform all the duties of the other.

Section 1 of AN ACT to prevent fraudulent and corrupt practices in the making or accepting of official appointments and contracts by public officers (Ill. Rev. Stat., 1971, ch.

Honorable Richard S. Simpson - 3.

102, par. 1) provides as follows:

"No member of a county board, during the term of office for which he is elected, may be appointed to, accept or hold any office other than chairman of the county board or member of the regional planning commission by appointment or election of the board of which he is a member. Any such prohibited appointment or election is void. This Section shall not preclude a member of the county board from being selected or from serving as a member of the County Personnel Advisory Board as provided in Section 12-17.2 of 'The Illinois Public Aid Code', approved April 11, 1967, as amended, or as a member of a County Extension Board as provided in Section 7 of the 'County Cooperative Extension Law', approved August 2, 1963, as amended."

It should be noted that two criteria must be present before a violation of section 1 may be said to have occurred. First, the county board must make an appointment or election of one of their own members during his term of office and, secondly, the county board member must be elected or appointed to an "office."

You must ascertain whether or not the Lawrence County Board elects or appoints the members of the Lawrence County Hospital Board.

Honorable Richard S. Simpson - 4.

There are two indispensable requirements of a public office. One, to be a public office, a position must be created by the constitution, statute or ordinance and continue during the pleasure of the appointing power or for a fixed time, with a successor necessarily being elected or appointed. (Bunn v. Illinois, 45 Ill. 397; Fergus v. Russel, 270 Ill. 304; State v. Sowards, 64 Okl. Cr. R., 430, 82 P. 2d 324; 140 A.L.R. 1076, 1080; see, also, Ill. Const., art. V, sec. 24 [1870]; Ill. Const., art. VII, sec. 4(c)). Secondly, to be a public office, a position must possess a delegation of a portion of the sovereign power of the government. In other words, the position must be vested with some discretionary powers and duties. People v. Brady, 302 Ill. 576, 582; Olson v. Scully, 296 Ill. 418, 421; Martin v. Smith, 239 Wisc. 314, 332, 1 N.W. 2d 163, 172; Parker v. Riley, 18 Cal. 2d 83, 87, 113 P. 2d 873, 875; State ex rel. Green v. Glenn, 39 Del. 584, 587, 4 A. 2d 366, 367; State ex rel. Barney v. Hawkins, 79 Mont. 506, 528, 257 P. 411, 418; 53 A.L.R. 595, 602; 140 A.L.R. 1076, 1081.

I can find no statutory provision creating the position of County Hospital Board Member that would be applicable

Honorable Richard S. Simpson - 5.

to your situation nor can I find any statute authorizing the creation of a position.

Section 24 of AN ACT to revise the law in relation to counties (Ill. Rev. Stat., 1971, ch. 34, par. 303) provides, in part, as follows:

"Seventh - To cause to be erected, or otherwise provided, suitable buildings for, and maintain a county hospital and necessary branch hospitals and/or a county sheltered care home or county nursing home for the care of such sick, chronically ill or infirm persons as may by law be proper charges upon the county, or upon other governmental units, and to provide for the management of the same. The county board may establish rates to be paid by persons seeking care and treatment in such hospital or home in accordance with their financial ability to meet such charges, either personally or through a hospital plan or hospital insurance, and the rates to be paid by governmental units, including the State, for the care of sick, chronically ill or infirm persons admitted therein upon the request of such governmental units."

Clearly, this provision, on its face, does not create any position of County Hospital Board Member.

Lawrence County is not a home rule unit. Therefore, it has only those powers expressly granted to it by the constitution

Honorable Richard S. Simpson - 6.

or statute plus those powers that can be necessarily implied from these express powers. Ill. Const., art. VII, sec. 7; Goodwine v. County of Vermilion, 271 Ill. 126.

Section 4(c) of article VII of the Illinois Constitution of 1970 grants to all counties the power to create county offices. The first sentence of section 4(c) is pertinent to our discussion:

"(c) Each county shall elect a sheriff, county clerk and treasurer and may elect or appoint a coroner, recorder, assessor, auditor and such other officers as provided by law or by county ordinance. * * *"
(Emphasis added)

Specifically, we must discern the object and purpose of that portion of the first sentence of section 4(c) which reads:

"Each county ... may elect or appoint ... such other officers as provided ... by county ordinance."

Section 4(c) had its origin in section 7.1 of the Majority Proposal of the Committee on Local Government of the Sixth Illinois Constitutional Convention. (VII, 6th

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Ill. Const. Con., Comm. Proposals, p. 128). The Committee Report, at p. 132, states as follows:

"The proposed section would also permit the selection of other county officers by ordinance. This is a new power for counties, but it is comparable to the existing statutory power of municipalities to create additional officers without specific legislative authorization. (See Ill. Rev. Stat., ch. 24, secs. 3-4-19, 3-7-1 [1969])."

It was the intent of the framers of section 4(c) to grant to the counties the same powers that municipalities had been granted by statute. Section 3-4-19 of the Illinois Municipal Code (Ill. Rev. Stat., 1971, ch. 24, par. 3-4-19) reads, in part, as follows:

"Instead of providing for the appointment of the following officers as provided in Section 3-7-1, the city council, in its discretion, may provide by ordinance passed by a two-thirds vote of all the aldermen elected for the election by the electors of the city of a city collector, a city marshal, a city superintendent of streets, a corporation counsel, a city comptroller, or any of them, and any other officers which the city council considers necessary or expedient. * * *"
(Emphasis added)

The intent behind section 4(c) was to equate counties with the authority of municipalities, as expressed in the above

Honorable Richard S. Simpson - 8.

statutory provisions, to declare by ordinance for the selection of an officer, by election or appointment or to add whatever officers they want to those that are provided for them by law.

IV, 6th Ill. Const. Con., verbatim tr., p. 3269.

"They [counties] could have an air pollution control inspector, even though the statute didn't provide for one. They could have an ombudsman even though the statute didn't provide for one. By ordinance of the county board, they could have any officers they now or in the future want to have, elected or appointed, by county ordinance."

IV, 6th Ill. Const. Con.,
verbatim tr., pp. 3269-3270.

Further evidence of the delegates' intent is found in the following:

"MR. PARKHURST: Well, all I can say is that the County Code, Section 34 of the Illinois Revised Statutes does not now permit counties to create ancillary, innovative, necessary local officers. The only officers that can be created by counties are those which are spelled out and made permissive by state law.

This is not like the situation ---

MR. SCOTT: What you are doing, if I may break in and save time, what you are doing really, is giving to the local level as far as any

Honorable Richard S. Simpson - 9.

future offices that may be created, leave it up to the county whether they want to create them or terminate them, where now it is up to the Legislature.

MR. PARKHURST: Exactly right. The same as the cities now have, we're trying to make analogous the power of the County Board, the same thing the City Councils can now do."

V, 6th Ill. Const. Con.,
verbatim tr., p. 4159.

I am of the opinion that Lawrence County can create a county office. (Ill. Const., art. VII, sec. 4(c)). However, an office is meaningless unless it has powers and duties. Section 4(d) of article VII of the Illinois Constitution of 1970 authorizes any county to vest an office with powers and duties. Said section 4(d) reads as follows:

"(d) County officers shall have those duties, powers and functions provided by law and those provided by county ordinance. County officers shall have the duties, powers or functions derived from common law or historical precedent unless altered by law or county ordinance."

It must be emphasized that section 4(c) and 4(d) delegate to the counties only the power to create a county office and the power to vest said county offices with duties

Honorable Richard S. Simpson - 10.

and responsibilities. These sections do not grant a county any substantive powers. To reiterate, Lawrence County is not a home rule unit, therefore, it can act only pursuant to those constitutional and statutory powers that have been expressly granted to it or pursuant to those powers that can be implied from such an express grant of powers.

Section 24 of AN ACT to revise the law in relation to counties (Ill. Rev. Stat., 1971, ch. 34, par. 303) authorizes Lawrence County to maintain and manage a county hospital. Pursuant to this statutory authority, the Lawrence County Board can by ordinance create the office of Lawrence County Hospital Board Member and vest it with duties.

Therefore, you must determine whether or not the position of Lawrence County Board Member has been created by ordinance and is enduring and continuous in nature. A specific term of office would be strong indicia that the position is continuous in nature and not merely temporary. Secondly, you must determine if the position of Lawrence County Memorial Hospital Board Member has been delegated discretionary powers

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and duties. If these two indispensable elements of an office adhere in the position of Lawrence County Memorial Hospital Board Member, then, pursuant to the proscription of section 1 of AN ACT to prevent fraudulent and corrupt practices in the making or accepting of official appointments and contracts by public officers (Ill. Rev. Stat., 1971, ch. 102, par. 1) a county board member may not be appointed or elected by the county board to serve on the hospital board. Additionally, the county board member may not serve on the hospital board if, because of the duties of either office, a conflict of interest may arise, or where the duties of either office are such that the holder of one cannot, in every instance, properly and faithfully perform all the duties of the other. People v. Haas, 145 Ill. App. 283.

Whether or not the duties of either office are such that the holder of one cannot, in every instance, properly and faithfully perform all the duties of the other is, however, basically a factual determination which must be made locally. A determination of this question involves the amount of time required to adequately fulfill the duties of both offices and

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other facts pertinent are whether or not it is possible to simultaneously fulfill the duties of both offices.

Turning to your second question, your attention is directed to the Medical Service Facility Act (Ill. Rev. Stat., 1971, ch. 85, par. 921, et seq.). Section 3 (Ill. Rev. Stat., 1971, ch. 85, par. 923) delineates the legislative object and purpose of the Act as follows:

"The purpose of this Act is to enable local governmental units to serve the needs of the public more effectively in the several communities of this State in which the health and welfare of the people are endangered by the lack of adequate medical service by providing medical service facilities for lease in order to make settlement in the community more attractive to doctors."

Thus, it is clear that Lawrence County does have the power to build a medical facility and to rent the facility to doctors. Details as to the methods of financing the building of such a structure are contained in the remaining sections of the Act. These sections should, of course, be studied in detail before any decision is made with regard to building a medical service facility.

Very truly yours,

A T T O R N E Y G E N E R A L



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

July 1, 2008

I - 08-020

COMPATIBILITY OF OFFICES:
County Board Members and City
Alderman Serving on County Housing
Authority Board Simultaneously

The Honorable John T. Pepmeyer
State's Attorney, Knox County
Knox County Courthouse
200 South Cherry Street
Galesburg, Illinois 61401

Dear Mr. Pepmeyer:

I have your office's letter inquiring whether two members of the Knox County Board and an alderman for the City of Galesburg may serve simultaneously on the Knox County Housing Authority Board. Under section 3 of the Housing Authorities Act (310 ILCS 10/3 (West 2006)), only two "public officers" may serve on the same housing authority board simultaneously. Because the county board members and the city alderman who are the focus of your office's inquiry are all "public officers," as that term is defined in section 3 of the Housing Authorities Act, only two of them may serve on the county housing authority board simultaneously.

BACKGROUND

According to the information your office provided, in 2006 the Knox County Board appointed two Knox County board members to serve as county housing authority commissioners. At the time of the county board members' appointment, an alderman for the City of Galesburg was already serving on the Knox County Housing Authority Board. Your office inquired whether section 3 of the Housing Authorities Act prohibited all three of those individuals from serving on the county housing authority board simultaneously.

ANALYSIS

Housing Authorities Act

Section 3 of the Housing Authorities Act authorizes the creation of a county housing authority, upon the issuance of a certificate by the Department of Commerce and Economic Opportunity, and provides for the appointment of an authority's commissioners. With regard to the qualifications of the commissioners, section 3 provides, in pertinent part:

Any public officer shall be eligible to serve as a commissioner, and the acceptance of appointment as such shall not terminate nor impair his public office, the provision of any statute to the contrary notwithstanding; but no member of the Department shall be eligible to serve as a commissioner, nor shall more than two public officers be commissioners of the same Authority at one time; Provided [sic], that membership on any Authority at the same time of more than two public officers shall not affect or impair the validity of any Act undertaken or power exercised by the Authority pursuant to Law. The term "public officer" as herein used means a person holding a state or local governmental office required to be filled by the vote of electors, and for which provision is made by law for the payment of annual compensation from public funds.
(Emphasis added.)

The primary purpose of statutory construction is to ascertain and give effect to the intent of the General Assembly. *In re M.T.*, 221 Ill. 2d 517, 524 (2006). Where statutory language is clear and unambiguous, it must be given effect as written. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006).

Section 3 permits a "public officer" to serve as a county housing authority commissioner, so long as no more than one other "public officer" is simultaneously serving as a commissioner. A "public officer" is defined to include only those individuals: (1) holding a State or local governmental office that is required to be filled by the vote of electors; and (2) "for which provision is made by law for the payment of annual compensation from public funds." The issue, therefore, is whether county board members and city aldermen are "public officers" within the Housing Authorities Act's definition.

County Board Member

Counties are "units of local government." Ill. Const. 1970, art. VII, §1. The powers of a county as a body corporate or politic are exercised by the county board (55 ILCS 5/5-1004 (West 2006)), the members of which are elected by the voters of the county. *See generally* Ill. Const. 1970, art. VII, §3(a); 10 ILCS 5/2A-1.2(a)(5) (West 2006); 55 ILCS 5/2-3009 (West 2006).¹ Accordingly, county board members are persons holding a local governmental office (*see generally* Ill. Att'y Gen. Op. No. 03-008, issued September 8, 2003; 1972 Ill. Att'y Gen. Op. 45, 47) required to be filled by the vote of the county's electors.

Further, section 2-3008 of the Counties Code (55 ILCS 5/2-3008 (West 2006)) expressly provides for county board members to be compensated for their services as such. Pursuant to section 2-3008, at the time of the decennial reapportionment, the county board "shall determine whether the salary to be paid the members to be elected shall be computed on a *per diem* basis, on an annual basis or on a combined *per diem* and annual basis."²

According to the information your office provided, the Knox County board members are compensated on a *per diem* basis. Because Knox County board members are not paid an annual salary, it has been suggested that these county board members may not be considered "public officers," as that term is used in the Housing Authorities Act. A close review of the language of section 3, however, leads to a contrary conclusion.

Under section 3, the term "public officer" refers to a person holding a "local governmental office * * * for which provision is made *by law* for the payment of annual compensation from public funds." (Emphasis added.) Section 3 does not require the actual award of compensation on an annual basis to the officer, but rather simply contemplates that the payment of annual compensation is authorized by law. The term "law" includes the constitution (*see People v. Howard*, No. 104553 (Illinois Supreme Court, April 17, 2008)) and civil or penal statutes, supreme court rules, administrative rules or regulations, and tenets of professional responsibility (*People v. Weber*, 133 Ill. App. 3d 686 (1985)). The term "law" does not

¹Knox County is under township organization. *See* Illinois Secretary of State, Illinois State Archives, Knox County Fact Sheet, <http://www.cyberdriveillinois.com/departments/archives/irad/knox.html>. As a result, it is subject to the provisions of divisions 2-1 and 2-3 of the Counties Code (55 ILCS 5/2-1001 *et seq.*, 2-3001 *et seq.* (West 2006)).

²Section 2-3008 does not define the term "*per diem*." A statutory term which is not defined, however, must be given its ordinary and popularly understood meaning. *Union Electric Co. v. Department of Revenue*, 136 Ill. 2d 385, 397 (1990). The term "*per diem*" commonly refers to compensation or allowance for expenses which is intended to cover twenty-four hours in a day. *County of Christian v. Merrigan*, 191 Ill. 484, 488 (1901); *see also* Ill. Att'y Gen. Inf. Op. No. 1-93-049, issued October 8, 1993.

ordinarily include local ordinances. 1982 Ill. Att'y Gen. Op. 165, 169. Accordingly, although Knox County may elect to compensate its county board members on a *per diem* basis pursuant to county ordinance, under section 2-3008 "provision is made by law for the payment of annual compensation from public funds."

A county board member holds a local government office that is elected by the voters of the county. In addition, provision is made in section 2-3008 for the payment of annual compensation to county board members, and such compensation is paid from the county fisc. *See generally* 55 ILCS 5/6-1002 (West 2006). Therefore, a county board member is a "public officer," as that term is used in the Housing Authorities Act.

City Alderman

Turning to the issue of whether a city alderman is a "public officer," under article VII, section 1, of the Illinois Constitution of 1970, municipalities are "units of local government." Further, under Illinois law, city aldermen are city officers elected by the city's voters. 65 ILCS 5/3.1-15-5 (West 2006); *see also* 10 ILCS 5/2A-1.2(b)(3), (c)(1) (West 2006). Pursuant to section 3.1-50-15 of the Illinois Municipal Code (65 ILCS 5/3.1-50-15 (West 2006)), aldermen are authorized to receive an annual salary for their service. Based on the foregoing, a person holding the position of city alderman is a public officer, for purposes of section 3 of the Housing Authorities Act, because: (1) he or she holds a local government office that is required to be filled by the vote of the electors; and (2) provision is made by statute for the payment of annual compensation.

Because all three of the persons who are the subject of your office's inquiry fall within the statutory definition of "public officer," under the limitations of section 3 of the Act, no more than two of them may serve on the county housing authority board simultaneously.

Public Officer Prohibited Activities Act

I also note that your office's inquiry raises a potential issue under section 1 of the Public Officer Prohibited Activities Act (the Prohibited Activities Act) (50 ILCS 105/1 (West 2006)), which specifically addresses the ability of county board members to hold other public offices. Section 1 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 other than (i) chairman of the county board or member of the regional planning commission by appointment or election of the board of which he or she is a member, (ii) alderman of a city or

member of the board of trustees of a village or incorporated town if the city, village, or incorporated town has fewer than 1,000 inhabitants and is located in a county having fewer than 50,000 inhabitants, or (iii) trustee of a forest preserve district created under Section 18.5 of the Conservation District Act, 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.* (Emphasis added.)

Pursuant to section 1 of the Prohibited Activities Act, no county board member may be elected or appointed, during the term of office for which he or she is elected, to any other office other than those specified in section 1 or elsewhere in the law.³ *People v. Wilson*, 357 Ill. App. 3d 204 (2005); see Ill. Att'y Gen. Inf. Op. No. I-08-008, issued March 25, 2008; Ill. Att'y Gen. Inf. Op. No. I-03-012, issued December 19, 2003. Section 1 does not expressly permit one person to serve as both a county board member and a county housing authority commissioner. Section 3 of the Housing Authorities Act, however, provides that "[a]ny public officer shall be eligible to serve as a commissioner, and the acceptance of appointment as such shall not terminate nor impair his public office, the provision of any statute to the contrary notwithstanding[.]" (Emphasis added.) This language expressly authorizes any public officer to serve simultaneously as a housing authority commissioner. Having previously concluded that a county board member is a "public officer" within the Housing Authorities Act's definition, the specific language of section 3 permits county board members to serve as county housing authority commissioners simultaneously, the provisions of section 1 of the Prohibited Activities Act to the contrary notwithstanding.

CONCLUSION

Pursuant to section 3 of the Housing Authorities Act, only two "public officers" may serve on a county housing authority board simultaneously. Because county board members are persons holding local governmental offices required to be filled by the county's electors and because section 2-3008 of the Counties Code authorizes the compensation of county board members on an annual basis, county board members are "public officers," as that term is defined in the Housing Authorities Act. Applying the same analysis, city aldermen are "public officers" within the Housing Authorities Act's provisions. Consequently, only two of the three persons who are the focus of your office's inquiry may serve on the county housing authority board simultaneously.

³For example, in the Public Officer Simultaneous Tenure Act (50 ILCS 110/0.01 *et seq.* (West 2006)), the General Assembly has specifically declared that it is lawful for one person to hold the offices of county board member and township supervisor simultaneously and, in certain counties, for a county board member to also serve as a township trustee, township assessor, or township clerk. See 50 ILCS 110/2 (West 2006).

The Honorable John T. Pepmeyer - 6

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

 Very truly yours,


LYNNE E. PATTON
Senior Assistant Attorney General
Chief, Opinions Bureau

LEP:KMC:lk



WILLIAM J. SCOTT
ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD

September 24, 1971

NP-343

FILE NO. NP-343

COUNTY OFFICERS:

Compatibility of County Board Member
and Member of Zoning Commission

Honorable Lawrence E. Johnson
State's Attorney
Champaign County
Court House
Urbana, Illinois 61801

Dear Mr. Johnson:

I have your recent letter wherein you state:

"At the request of the Executive Director of the Champaign County Regional Planning Commission, I am respectfully requesting your opinion on the following question.

"In Chapter 102, Section 1 of the Illinois Revised Statutes, 1969, it is stated that

No supervisor or county commissioner, during the term of office for which he is elected, may be appointed to, accept or hold any office other than chairman of the county board or member of the regional planning commission by

appointment or election of the board of which he is a member.

"Chapter 34, Section 3152 of the Illinois Revised Statutes, 1969, provides that

The county board in counties which desire to exercise the powers conferred by this Act shall provide for a zoning commission of not less than 3 nor more than 9 members whose duty it shall be to recommend the boundaries of districts and appropriate regulations to be enforced therein, such commission to be appointed by the chairman or president of the county board, subject to confirmation by the county board.

"My question is whether members of the County Board of Supervisors may be appointed to serve on the zoning commission or whether such appointment violates Chapter 102, Section 1?"

"I note that your opinion No. 273, April 11, 1962, considered only the membership of the County Zoning Board of Appeals, and not the County Zoning Commission."

From the general rules laid down in People v. Haas, 145 Ill. App. 283, it appears that incompatibility between offices arises where the Constitution, or a statute, specifically prohibits the occupant of either one of the offices from holding the other, or where, because of the duties of either office a conflict in interest may arise, or where the duties of either office are such that the holder of one

cannot, in every instance, properly and faithfully perform all the duties of the other.

Section 2 of "An Act in relation to county zoning" (Ill. Rev. Stat. 1969, ch. 34, par. 3152) provides that members of the zoning commission are appointed by the chairman or president of a county board, subject to confirmation by the county board. There is no constitutional provision which makes said offices incompatible.

I direct your attention to Section 1 of "An Act to prevent fraudulent and corrupt practices, etc." (Ill. Rev. Stat. 1969, ch. 102, par. 1) which reads:

"§ 1. No supervisor or county commissioner, during the term of office for which he is elected, may be appointed to, accept or hold any office other than chairman of the county board or member of the regional planning commission by appointment or election of the board of which he is a member. Any such prohibited appointment or election is void. This Section shall not preclude a member of the county board from being selected or from serving as a member of the County Personnel Advisory Board as provided in Section 12--17.2 of 'The Illinois Public Aid Code', approved April 11, 1967, as amended, or as a member of a County Extension Board as provided in Section 7 of the 'County Cooperative Extension Law', approved August 2, 1963, as amended."

Under the above provision, a member of the Board of Supervisors during the term for which he is elected cannot

Honorable Lawrence E. Johnson - 4

be appointed to any office other than those offices specifically excepted by the county board of which he is a member. The expression of one thing in a statute impliedly excludes others (Savings Assn. v. International Ins. Co., 17 Ill. 2d 609, 612) and where a statute contains certain exceptions, other or different exceptions cannot be read into it. People ex rel Cadwell v. Board of Fire & Police Com'rs., 345 Ill. App. 415, 419.

Since the County Board of Supervisors can appoint one of its members only to the offices excepted in said Section 1, a member of the Board of Supervisors is prohibited by statute from being appointed as a member of the Zoning Commission.

Very truly yours,

A T T O R N E Y G E N E R A L



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS
May 28, 1996

Jim Ryan
ATTORNEY GENERAL

I - 96-028

COMPATIBILITY OF OFFICES:
County Board Member and
School Board Member;
County Board Member and
Deputy Coroner; County
Board Member and Deputy Sheriff

Honorable Terry C. Kaid
State's Attorney, Wabash County
Wabash County Courthouse
401 Market Street
Mt. Carmel, Illinois 62863

Dear Mr. Kaid:

I have your letter wherein you inquire whether one person may serve simultaneously in the offices of: 1) county board member and school board member; 2) county board member and deputy coroner; and 3) county board member and deputy sheriff. Because of the nature of your inquiry, I do not believe that the issuance of an official opinion of the Attorney General is necessary. I will, however, comment informally upon the questions you have raised.

Your first inquiry concerns potential incompatibility in the offices of county board member and school board member. The common law doctrine of incompatibility of offices precludes simultaneous tenure in two offices where the constitution or a statute specifically prohibits the occupant of either office from holding the other, or where the duties of the two offices conflict so that the holder of one cannot, in every instance, properly and faithfully perform all of the duties of the other. (People ex rel. Fitzsimmons v. Swailes (1984), 101 Ill. 2nd 458, 465; Rogers v. Village of Tinley Park (1983), 116 Ill. App. 3d 437, 440-41; People ex rel. Myers v. Haas (1908), 145 Ill. App.

Honorable Terry Kaid - 2.

283, 286.) There are no constitutional or statutory provisions which expressly prohibit simultaneous tenure in the offices of county board member and school board member. Therefore, the issue is whether a conflict in duties could arise if one person were to occupy both offices simultaneously.

In opinion No. 93-011 (Ill. Att'y Gen. Op. No. 93-011, issued May 25, 1993), a copy of which I have enclosed for your review, Attorney General Burris concluded that the office of county board member is incompatible with that of school board member. He noted therein that one potential area of conflict relates to the several instances in which contracts or agreements are authorized between a county and a school district. (See, e.g., 55 ILCS 5/3-6036, 5/5-1060 (West 1994); 55 ILCS 90/10 (West 1994); 105 ILCS 5/29-16 (West 1994).) Another potential conflict in duties arises with respect to the allocation of revenue sharing funds under section 3 of the State Revenue Sharing Act (30 ILCS 115/3 (West 1994)). These potential conflicts were deemed sufficient to render the offices of county board member and school board member incompatible.

In reviewing the provisions of the Counties Code (55 ILCS 5/1-1001 et seq. (West 1994)) and the School Code (105 ILCS 5/1-1 et seq. (West 1994)), and the pertinent cases decided thereunder, it appears that the reasoning of opinion No. 93-011 is still valid. Consequently, the offices of county board member and school board member are incompatible under the common law doctrine of incompatibility of offices.

This issue cannot be concluded at this point, however. Since incompatibility is a common law doctrine, it may be modified or superseded legislatively. Shortly after opinion No. 93-011 was issued, the General Assembly enacted Public Act 88-471, effective September 1, 1993, which added section 1.2 to the Public Officer Prohibited Activities Act (50 ILCS 105/1.2 (West 1994)). Under section 1.2 of the Act, persons in a county having fewer than 40,000 inhabitants are expressly permitted to hold the offices of county board member and school board member simultaneously. According to 1990 Federal census figures, the population of Wabash County is 13,111 inhabitants. (Illinois Blue Book 424 (1993-94).) Consequently, in this instance, it appears that one person may hold the offices of county board member and school board member in Wabash county simultaneously, notwithstanding that those offices may be incompatible at common law.

You have also asked whether one person may serve simultaneously as a county board member and a deputy coroner in circumstances in which the deputy coroner does not receive a

Honorable Terry Kaid - 3.

salary, but is reimbursed for mileage and other expenses. There are no constitutional or statutory provisions which expressly prohibit simultaneous tenure in the offices of county board member and deputy coroner. Therefore, the issue is whether a conflict in duties could arise if one person were to occupy both offices simultaneously.

In People ex rel. Teros v. Verbeck (1987), 155 Ill. App. 3d 81, the court was asked to determine whether one person could hold the offices of county board member and deputy coroner simultaneously. In reaching its conclusion that the offices of county board member and deputy coroner are incompatible, the court noted:

" * * *

* * *Common law incompatibility may be established where defendant in one position has authority to act upon the appointment, salary and budget of his superior in a second position. (People ex rel. Fitzsimmons v. Swailes (1984), 101 Ill. 2d 458, 463 N.E.2d 431.) In the present case, it is undisputed that the county board is charged with the duty to fix the compensation of the county coroner within statutory limitations (Ill. Rev. Stat. 1985, ch. 53, par. 37a.1 [55 ILCS 5/4-6002 (West 1994)]) and to provide for reasonable and necessary operating expenses for the coroner's office (Ill. Rev. Stat. 1985, ch. 34, par. 432 [55 ILCS 5/5-1106 (West 1994)]). It is further undisputed that the deputy coroner's compensation is fixed by the coroner, subject to budgetary limitations established by the county board. (Ill. Rev. Stat. 1985, ch. 31, par. 1.2 [55 ILCS 5/3-3003 (West 1994)].) Thus, under the statutory scheme, defendant's two offices are fiscally incompatible since defendant as a member of the county board has authority to act upon the salary and budget of the county coroner who, in turn, determines defendant's salary as deputy coroner. The potential for influencing his superior's salary and budget and, ultimately, his own salary, without more, renders defendant's offices incompatible.

* * *

"

Honorable Terry Kaid - 4.

(People ex rel. Teros v. Verbeck (1987), 155
Ill. App. 3d at 83-4.)

Based upon the foregoing, it is clear that each fiscal year a county board must consider and provide that amount of funding which it considers to be reasonably necessary for the coroner to procure equipment, materials and services, which includes an appropriation for personal services. While you have indicated in your letter that the deputy coroner who is the focus of your inquiry does not currently receive any compensation for his services, there is no requirement that this policy must continue. Thus, a county board member who also serves as a deputy coroner would be called upon to vote upon the budget from which his compensation, if any, would be paid. This creates competing duties of loyalty. Consequently, it does not appear that a county board member may serve as a deputy coroner, even in those circumstances in which the deputy coroner does not receive compensation for carrying out his duties.

Lastly, you have inquired whether one person may serve simultaneously as a county board member and a deputy sheriff in those instances in which the deputy sheriff does not receive a salary for his services, but is reimbursed for mileage and other expenses. There are no constitutional or statutory provision which expressly prohibit simultaneous tenure in the offices of county board member and deputy county sheriff. Therefore, the issue again becomes whether a conflict in duties could arise if one person were to occupy both offices simultaneously.

In Rogers v. Village of Tinley Park (1983), 116 Ill. App. 3d 437, the court was asked to determine whether the offices of village trustee and municipal police officer were incompatible. In reaching its conclusion that one person could not serve simultaneously in those two offices, the court reviewed the elements of the doctrine of common law incompatibility:

" * * *

'It is to be found in the character of the offices and their relationship to each other, in the subordination of the one to the other, and in the nature of the duties and functions which attach to them.

Incompatibility of offices exist where there is a conflict in the duties of the offices, so that the performance of the duties of the one interferes with the performance of the duties of the other. They

Honorable Terry Kaid - 5.

are generally considered incompatible where such duties and functions are inherently inconsistent and repugnant, so that because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both.

At common law, it is not an essential element of incompatibility of offices that the clash of duty should exist in all or in the greater part of the official functions. If one office is superior to the other in some of its principal or important duties, so that the exercise of such duties may conflict, to the public detriment, with the exercise of other important duties in the subordinate office, then the offices are incompatible.'

* * *

"

(Rogers v. Village of Tinley Park (1983), 116 Ill. App. 3d at 441.)

A review of the provisions of the Counties Code (55 ILCS 5/1-1001 et seq. (West 1994)) indicates that the county board is authorized to establish the number of deputy sheriffs to be appointed. (55 ILCS 5/3-6008 (West 1994).) In this regard, a county board member who also serves as a deputy sheriff would be called upon to determine whether his position as a deputy sheriff was necessary for the proper functioning of county government. This creates competing interests and divided loyalties which could hamper a county board member in the full and faithful performance of his duties.

In addition to determining the number of deputy sheriffs the county will employ, the county board is also charged with the duty to fix the compensation of the county sheriff, within statutory limitations (55 ILCS 5/4-6003 (West 1994)), and to provide for reasonable and necessary operating expenses for the sheriff's office (55 ILCS 5/5-1106 (West 1994)). As discussed supra, a county board member who also serves as a deputy sheriff would be required, when voting upon the budget of the county sheriff, to act annually upon the budget from which the sheriff's personal service contracts are satisfied. Thus, a county board member simultaneously serving as a deputy sheriff could create the appearance as well as the actuality of competing

Honorable Terry Kaid - 6.

interests and divided loyalties which could hamper a county board member in the full and faithful performance of his duties. Consequently, it does not appear that one person may serve simultaneously as a county board member and a deputy county sheriff.

I would further note that you have inquired whether any potential conflict in duties which may exist could be resolved by the county board member in question refraining from participation in matters brought before the county board which involve the school district, the county coroner's office or the county sheriff's office, respectively. Our courts have consistently held that abstention will not avoid application of the doctrine of incompatibility of offices. (People ex rel. Teros v. Verbeck (1987), 155 Ill. App. 3d 81, 84; Rogers v. Village of Tinley Park (1983), 116 Ill. App. 3d 437.) Moreover, the court in Rogers v. Village of Tinley Park noted that "[t]he common law doctrine of incompatibility * * * insure[s] that there be the appearance as well as the actuality of impartiality and undivided loyalty." (116 Ill. App. 3d at 442 quoting O'Connor v. Calandrillo (1971), 285 A.2d 275, aff'd, 296 A.2d 326 (1972), cert. denied, 299 A.2d 727 (1973), cert. denied, 93 S.Ct. 2775 (1973).) Therefore, it does not appear that abstention from participation will resolve a conflict of interest or a conflict in duties.

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

Very truly yours,



MICHAEL J. LUKE
Senior Assistant Attorney General
Bureau Chief, Opinions

MJL:LP:dn



WILLIAM J. SCOTT

ATTORNEY GENERAL
STATE OF ILLINOIS
500 SOUTH SECOND STREET
SPRINGFIELD

May 28, 1974

NP-769

COUNTIES:

Compatibility - County Board
Member and Attorney for Fire
Protection District

Honorable John J. Bowman
State's Attorney
DuPage County
207 South Reber Street
Wheaton, Illinois 60187

Dear Mr. Bowman:

I have your letter wherein you state:

"Does a conflict exist when a County Board
Member who is an attorney serves contempor-
aneously as attorney for a County Fire
Protection District whose members are appoint-
ed by the County Board?"

From the general rule laid down in People v. Haas,
145 Ill. App. 285, it appears that incompatibility between
offices arises where the Constitution, or a statute, specifi-
cally prohibits the occupant of either one of the offices
from holding the other, or where, because of the duties of

NP 769

Honorable John J. Bowman - 2.

either office a conflict of interest may arise, or where the duties of either office are such that the holder of one cannot, in every instance, properly and faithfully perform all the duties of the other.

There are no constitutional or statutory provisions which expressly prohibit an individual from simultaneously holding the two positions referred to in your letter. Therefore, the question arises whether, because of the duties or powers of either office, a conflict of interest exists in simultaneously holding the two offices.

In opinion No. 1426, issued September 1, 1965, the question of compatibility between the offices of county board member and fire district trustee was considered. In that opinion, it was held that there were no conflicting duties between the respective offices and that consequently the offices were compatible. However, since that opinion was issued, county boards and fire protection districts have acquired additional powers and duties.

While your request raises the question of compatibility of the office of county board member in relation to the position of attorney rather than trustee of the fire protection district, this opinion is not to be construed as determining whether such attorney is an officer or an employee.

Honorable John J. Bowman - 3.

An attorney has a duty to protect his client's interests.

(Holmes v. Williamson, 33 Ill. App. 2d 458.) Consequently, an attorney for the fire protection district would be obligated to assist and advise the trustees in the execution of their statutory powers and duties. Thus, whether the attorney is viewed as an officer or employee, any conflict in regard to duties would exist in either case. Peabody v. Sanitary District, 330 Ill. 250.

There are several areas where, because of the nature of powers given to both county boards and fire protection districts, a person who simultaneously holds the positions of county board member and attorney for the fire protection district will have, in my opinion, a conflict of interest and be unable to properly and faithfully perform the duties of both offices.

One area where a conflict could arise is in the provision and operation of ambulance service. Under section 22 of "AN ACT in relation to fire protection districts" (Ill. Rev. Stat. 1973, ch. 127 1/2, par. 38.5(c)(2)), the trustees of a fire protection district have the power to contract with other governmental units for the provision and operation of ambulance service. Under section 25.12-1 of "AN ACT to revise the law in relation to counties" (Ill. Rev. Stat. 1973, ch. 34,

Honorable John J. Bowman - 4.

par. 419.1(c)(2)), county boards have the same power to contract with other governmental units for the provision and operation of ambulance service. Thus, it is conceivable that a county and a fire protection district might wish to contract as to ambulance service. In such an instance, a person who simultaneously is a county board member and attorney for the fire protection district would be in the untenable position of being a party to both sides of a contract. Since both as board member and attorney, such person would be attempting to negotiate a contract most advantageous to his side, it is my opinion that such person would be unable to properly and faithfully perform the duties of both offices.

Another area where a conflict could arise is in the regulation of ambulance service. The trustees of a fire protection district have the power to adopt rules and regulations relating to ambulance service. (Ill. Rev. Stat. 1973, ch. 127 1/2, par. 38.5.) County boards have the same power. Ill. Rev. Stat. 1973, ch. 34, par. 419.1.

A conflict could also arise in another area of regulation. The trustees of a fire protection district have the duty to prescribe necessary regulations for the prevention and control of fire in the district. (Ill. Rev. Stat. 1973, ch. 127 1/2, par. 31.) County boards have the power to prescribe reasonable

Honorable John J. Bowman - 5.

rules and regulations governing the construction, alteration, and maintenance of buildings and other structures in a condition reasonably safe from hazards of fire. (Ill. Rev. Stat. 1973, ch. 34, pars. 422 and 423.) It is conceivable that the regulations which the county board would adopt might conflict with the regulations of the fire protection district and that, in either position, the attorney would assist in drafting the regulations.

The trustees of a fire protection district have broad powers to further their main object which is the prevention and control of fire. (Ill. Rev. Stat. 1973, ch. 127 1/2, par. 21.) County boards have the specific duty to take all necessary measures to prevent forest fires. (Ill. Rev. Stat. 1973, ch. 127 1/2, par. 303.) It is conceivable that, in the execution of these duties, a conflict might arise.

The trustees of a fire protection district have the power to purchase personal property by contract for the purposes of the district. (Ill. Rev. Stat. 1973, ch. 127 1/2, par. 26.) County boards have the power to acquire and maintain a radio broadcasting station for fire protection purposes. (Ill. Rev. Stat. 1973, ch. 34, par. 416.) In regard to the radio broadcasting station, the county board has the power to furnish fire protection officers and employees with radio receiving sets and

Honorable John J. Bowman - 6.

equipment necessary for receiving messages from and sending messages to the broadcasting station. While the method by which such equipment would be furnished to fire protection officers is not clear, it is conceivable that some kind of contractual arrangement might be made. If this were to occur, then a person who is simultaneously a county board member and attorney for a fire protection district would be in the untenable position mentioned above in regard to contracts for ambulance service. Thus, it is my opinion that such person would be unable to properly and faithfully perform the duties of both offices.

Finally, a person who is simultaneously a county board member and attorney for the fire protection district is in a questionable position in regard to the trustees of the fire protection district. In the situation described in your request, such a person is in a position where he can appoint the trustees who in turn can employ him as counsel for the fire protection district. While it is not clear to what extent any one member of the county board could influence the appointments, it would be preferable to avoid such a situation.

Consequently, in answer to your question, it is my

Honorable John J. Bowman - 7.

opinion that the positions of county board member and attorney
for the fire protection district are incompatible.

Very truly yours,

A T T O R N E Y G E N E R A L



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

February 17, 2012

I - 12-001

COMPATIBILITY OF OFFICES:
County Board Member and
Fire Protection District Trustee

The Honorable Randall J. Brinegar
State's Attorney, Vermilion County
Court House
7 North Vermilion Street
Danville, Illinois 61832

Dear Mr. Brinegar:

I have your letter inquiring whether one person may serve simultaneously in the offices of county board member and fire protection district trustee. For the reasons stated below, a county board member, during his or her term of office, may not be appointed to serve as a fire protection district trustee. The appointment of an incumbent county board member to the office of fire protection district trustee is void under section 1 of the Public Officer Prohibited Activities Act (the Prohibited Activities Act) (50 ILCS 105/1 (West 2010)).

BACKGROUND

Your letter states that the Vermilion County Board is the appointing authority for a three-member board of trustees of a fire protection district that lies entirely within Vermilion County and that is organized under section 4 of the Fire Protection District Act (70 ILCS 705/4 (West 2010)), which provides, in pertinent part:

(a) A board of trustees consisting of 3 members for the government and control of the affairs and business of a fire protection district incorporated under this Act shall be created in the following manner:

* * *

(3) If the district is wholly contained within a single county but does not lie wholly within a single township or a single municipality, the trustees for the district shall be appointed by the presiding officer of the county board with the advice and consent of the county board[.] (Emphasis added.)

You inquire whether a county board member may be appointed to serve as a fire protection district trustee.

ANALYSIS

The common law doctrine of incompatibility of offices 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 (1984); *People ex rel. Smith v. Brown*, 356 Ill. App. 3d 1096, 1098 (2005); *People ex rel. Myers v. Haas*, 145 Ill. App. 283, 286 (1908). There is no constitutional or statutory provision which expressly prohibits one person from serving simultaneously as a county board member and a fire protection district trustee. However, the provisions of section 1 of the Prohibited Activities Act, which address the ability of county board members to hold other public offices, necessarily preclude a county board member from simultaneously holding the office of fire protection district trustee in these circumstances.

Section 1 of the Prohibited Activities Act 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 other than (i) chairman of the county board or member of the regional planning commission by appointment or election of the board of which he or she is a member, (ii) alderman of a city or member of the board of trustees of a village or incorporated town if the city, village, or incorporated town has fewer than 1,000 inhabitants and is located in a county having fewer than 50,000 inhabitants, or (iii) trustee of a forest preserve district created under Section 18.5 of the Conservation District Act, 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. (Emphasis added.)

The Illinois Appellate Court construed section 1 in *People v. Wilson*, 357 Ill. App. 3d 204 (2005), and concluded that the offices of county board member and school board member were incompatible under the Prohibited Activities Act. The court held that, under the plain language of section 1, and except to the extent specifically authorized by law, a county board member is prohibited from simultaneously holding another public office. *Wilson*, 357 Ill. App. 3d at 206. The court further concluded that, except in the limited circumstances specifically authorized by law, if a county board member is elected to another office, the election is void. *Wilson*, 357 Ill. App. 3d at 206. Section 1 makes no distinction between election to an office and appointment to an office.

CONCLUSION

Pursuant to section 1 of the Public Officer Prohibited Activities Act, as construed by the court in *Wilson*, no county board member may be elected or appointed, during the term of office for which he or she is elected, to any office other than those specified in section 1 or elsewhere in law.¹ Neither section 1 nor any other statute expressly permits one person to serve simultaneously as a county board member and a fire protection district trustee.² Therefore,

¹For example, the Public Officer Simultaneous Tenure Act (50 ILCS 110/0.01 *et seq.* (West 2010)) specifically authorizes one person to hold the offices of county board member and township supervisor simultaneously and, in certain counties, for a county board member to serve simultaneously as a township trustee, township assessor, or township clerk. *See* 50 ILCS 110/2 (West 2010).

²Your letter notes that section 4 of the Fire Protection District Act states that "no township official who is eligible to vote on the appointment shall be eligible for such appointment" but does not include similar language applicable to county board members. The legislative histories of section 4 of the Fire Protection District Act and section 1 of the Prohibited Activities Act, however, are instructive regarding this apparent disparity. Public Act 78-1128, effective October 1, 1974, initially added language to section 4 of "AN ACT in relation to fire protection districts" (Ill. Rev. Stat. 1973, ch. 127½, par. 24), the precursor to section 4 of the Fire Protection District Act, which provided that "no township official is eligible for such appointment[.]" Public Act 85-1178, effective August 13, 1988, amended the language to its current form. Public Act 89-588, effective January 1, 1997, included identical language in provisions which made township officials responsible for appointing the trustees for certain Cook County fire protection districts.

When Public Act 78-1128 was enacted, section 1 of "AN ACT to prevent fraudulent and corrupt practices in the making or accepting of official appointments and contracts by public officers" (Ill. Rev. Stat. 1973, ch. 102, par. 1), the precursor to section 1 of the Prohibited Activities Act, already provided that "[n]o member of a county board, during the term of office for which he is elected, may be appointed to, accept or hold any office other than chairman of the county board or member of the regional planning commission by appointment or election of the board of which he is a member." Public Act 88-623, effective January 1, 1995, amended section 1 to prohibit county board members from holding other public offices. However, section 2a of the Prohibited Activities Act (50 ILCS 105/2a (West 2010)), which provides that "[n]o township supervisor or trustee, 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 board of township trustees unless he or she first resigns * * * or unless the appointment is specifically authorized by law" was not added to the Prohibited Activities Act until after the General Assembly enacted Public Act 86-717, effective January 1, 1990.

The Honorable Randall J. Brinegar - 4

pursuant to section 1 of the Prohibited Activities Act, a Vermilion County Board member may not be appointed to the office of fire protection district trustee during his or her term of office, and any such appointment would be void under section 1 of the Prohibited Activities Act.³

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
Senior Assistant Attorney General
Chief, Public Access and Opinions Division

LEP:LAS:cj

Enclosure

³This conclusion is also consistent with other analogous opinions of the Attorney General's office. In opinion No. NP-769, issued May 28, 1974, a copy of which is enclosed for your review, Attorney General Scott was asked to determine whether one person could serve simultaneously in the positions of county board member and attorney for a county fire protection district. Because of potential conflicts in exercising the powers granted to the county board and fire protection districts, Attorney General Scott concluded that the positions of county board member and attorney for a fire protection district were incompatible. Our review of the provisions of the Counties Code (55 ILCS 5/1-1001 *et seq.* (West 2010)) and the Fire Protection District Act (70 ILCS 705/0.01 *et seq.* (West 2010)) indicates that there have been no significant changes in the powers exercised by counties and fire protection districts, and that both still possess those powers cited in opinion No. NP-769 as creating potential conflicts in duties. The county board's authority to appoint the fire protection district trustees who could employ the attorney as counsel was among the potential conflict in duties identified in opinion No. NP-769. A potential conflict also arises from language added to subsection 5-1006.5(i) of the Counties Code (55 ILCS 5/5-1006.5(i) (West 2010)), by Public Act 96-124, effective August 4, 2009, which authorizes a county that imposes a special county retailers' occupation tax for public safety, public facilities, or transportation, to share the tax proceeds received for public safety purposes with any fire protection district. There is not a significant distinction between the duties of a fire protection district trustee and a fire protection district attorney that would compel a contrary conclusion. Accordingly, the reasoning previously relied upon in opinion No. NP-769 would apply equally to a fire protection district trustee.



WILLIAM J. SCOTT

ATTORNEY GENERAL
STATE OF ILLINOIS
500 SOUTH SECOND STREET
SPRINGFIELD

March 8, 1972

FILE NO. NP-407

COUNTIES:
Compatibility

Honorable Thomas P. Carmody
State's Attorney
Macoupin County
Carlinville, Illinois 62626

Dear Mr. Carmody:

I have your recent letter wherein you state:

"Your opinion is requested on the following question which has been asked of the undersigned:

'Can a Township Highway Commissioner run for and serve in the office of County Board Member; that is, are the offices of Township Highway Commissioner and County Board Member compatible?'

Nominations for County Board Members will be made by caucus in this County to be held on February 1, 1972. I need to know the answer to the above question prior to February 1, 1972, in order that I may advise the inquiring parties as to the Attorney General's opinion. Your early response to the above question would therefore be greatly appreciated.

Thanking you and awaiting your reply, I am"

NP 407

From the general rules laid down in People v. Haas, 145 Ill. App. 283, it appears that incompatibility between offices arises where the constitution or a statute specifically prohibits the occupant of either one of the offices from holding the other, or where, because of the duties of either office a conflict in interest may arise, or where the duties of either office are such that the holder of one cannot, in every instance, properly and faithfully perform all the duties of the other.

The general duties of a township highway commissioner are set forth in Sections 6-201.1 to 6-201.17 of "An Act to revise and codify the laws relating to public highways ****", (Ill. Rev. Stat., 1971, Ch. 121, pars. 6-201.1 to 6-201.17.) Your attention is called to the provisions of Section 6-201.10 which states:

"Have authority to make agreements with the highway commissioner of any other road district or with the corporate authorities of any municipality located in the same county or in an adjoining county or with the county board of the county in which such road district is located or of any adjoining county, for the lease or exchange of idle machinery, equipment or tools belonging to the district, upon such terms and conditions as may be mutually agreed upon."

It is apparent that a conflict in interest could easily arise because the township highway commissioner may desire to

contract with the county board. He would, in a sense, be making a contract with himself if he were also a member of the county board.

Your attention is also called to Section 5-101.4 of "An Act to revise and codify the laws relating to public highways ****", Ill. Rev. Stat., 1971, Ch. 121, par. 5-101.4 which states one of the powers of the county board to be:

"To appropriate funds to aid in the construction of township and district highways in any part of the county."

If a township highway commissioner were also a member of the county board he might tend to favor his township highways in the appropriation of funds.

Also, it should be noted that Section 5-502 of the aforesaid Act permits the county board to enter into certain joint construction and repair contracts with other highway authorities.

An examination of various provisions of "An Act to revise and codify the laws relating to public highways ****" indicates that in certain instances that the actions of the highway commissioner are under the supervision of the county superintendent of highways who in turn is subordinate to the

county board. An example of this is found in Section 6-401 of the aforesaid Act which states:

"****

If the county superintendent of highways determines as a result of such hearing that the road described in the petition is in need of repair, or is not properly maintained by the highway commissioner of the district, he shall order the highway commissioner of the district to make such repairs as appear to him to be proper or necessary, or to properly maintain such road or section of road.

****"

In conclusion, I am of the opinion that the office of township highway commissioner is incompatible with that of member of the county board because a conflict of interest may arise from the duties of these offices.

Very truly yours,

A T T O R N E Y G E N E R A L



WILLIAM J. SCOTT
ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD

June 23, 1972

FILE NO. NP-480

OFFICERS:
Compatibility

Honorable Richard S. Simpson
State's Attorney
Court House
Lawrenceville, Illinois 62439

Dear Mr. Simpson:

I have your recent letter wherein you state:

"The question has just been proposed to me to request of your office whether an enforcement officer of the Illinois Commerce Commission, whether this be a patronage or coded job, may be a candidate, and if successful, assume the office as a member of our County Board, and retain both the State employment and the County Board job, which, as you know, was formerly a member of the Board of Supervisors in counties of our size.

As far as this young man is concerned, this has become a political issue in our local County election, and would appreciate your opinion as

NP-480
Y

Q

soon as possible in regard to the above question as to whether the holder of the present job may properly be a candidate for the County Board."

From the general rules laid down in People v. Haas, 145 Ill. App. 283, it appears that incompatibility between offices arises where the Constitution or a statute specifically prohibits the occupant of either one of the offices from holding the other, or where, because of the duties of either office, a conflict of interest may arise, or where the duties of either office are such that the holder of one cannot, in every instance, properly and faithfully perform all the duties of the other.

There are no express constitutional or statutory restraints in simultaneously holding the county and state offices mentioned in your letter. Nor would there be any conflict of interest.

Since your letter does not specifically state what the duties of an enforcement officer of the Illinois Commerce Commission are, I assume that the duties of such an enforcement officer do not involve the investigation of matters in which the county is involved.

There is the question of whether an individual has sufficient time to properly carry out all the duties of

Honorable Richard S. Simpson

-3

each office. This is a factual question which I cannot determine.

Therefore, in my opinion, an individual can be an enforcement officer for the Illinois Commerce Commission and simultaneously serve as a member of a county board.

Very truly yours,

A T T O R N E Y G E N E R A L



WILLIAM J. SCOTT

ATTORNEY GENERAL
STATE OF ILLINOIS
500 SOUTH SECOND STREET
SPRINGFIELD

January 12, 1973

FILE NO. NP-549

COUNTY OFFICERS:

Compatibility of county board
member and member of junior
college board of trustees

Honorable Martin Rudman
State's Attorney of Will County
Courthouse
Joliet, Illinois 60431

Dear Mr. Rudman:

Your predecessor, Louis R. Bertani, inquired
about the compatibility of the offices of county board member
and member of a Joliet junior college board of trustees.

From the general rules laid down in People v.
Haas, 145 Ill. App. 283, it appears that incompatibility between
offices arises where the constitution, or a statute, specifically

Honorable Louis R. Bertani -2-

prohibits the occupant of either one of the offices from holding the other, or where, because of the duties of either office, a conflict in interest may arise, or where the duties of either office are such that the holder of one cannot, in every instance, properly and faithfully perform all the duties of the other.

I find no provision of the Illinois Constitution or of any statute which would prohibit a county board member from also serving as a member of a junior college district board of trustees. Also, I find nothing in the duties of these offices from which a conflict of interest could arise or which would prevent the proper performance of the duties of each office. I am, therefore, of the opinion that the offices of county board member and member of a junior college district board of trustees are compatible.

Very truly yours,

A T T O R N E Y G E N E R A L



WILLIAM J. SCOTT

ATTORNEY GENERAL
STATE OF ILLINOIS
500 SOUTH SECOND STREET
SPRINGFIELD
62706

August 13, 1974

No. NP-800

OFFICERS:
Compatibility - County
Board Member and Jury
Commissioner

Honorable Kelly D. Long
State's Attorney, Montgomery County
Courthouse
Hillsboro, Illinois 62049

Dear Mr. Long:

I have your letter wherein you state:

"Would you please render an opinion as to whether or not a County Board Member is prohibited by the Corrupt Practices Act (Ill. Rev. Stat. Ch. 102, Sec. 1) or any other law of the State of Illinois from also holding the position of a Jury Commissioner by appointment of the Circuit Court?"

From the general rule laid down in People v. Haas, 145 Ill. App. 283, it appears that incompatibility between offices arises where the Constitution, or a statute, specifically prohibits the occupant of either one of the offices

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Honorable Kelly D. Long - 2.

from holding the other, or where, because of the duties of either office a conflict of interest may arise, or where the duties of either office are such that the holder of one cannot, in every instance, properly and faithfully perform all the duties of the other.

There is no constitutional or statutory provision which specifically prohibits a county board member from holding the office of jury commissioner. In regard to statutory provisions, section 1 of "AN ACT to prevent fraudulent and corrupt practices in the making or accepting of official appointments and contracts by public officers" (Ill. Rev. Stat. 1973, ch. 102, par. 1) provides in pertinent part:

"§ 1. No member of a county board, during the term of office for which he is elected, may be appointed to, accept or hold any office other than chairman of the county board or member of the regional planning commission by appointment or election of the board of which he is a member. Any such prohibited appointment or election is void."

Section 1 of "AN ACT in relation to jury commissioners and authorizing judges to appoint such commissioners and to make rules concerning their powers and duties" (Ill. Rev. Stat. 1973, ch. 78, par. 24) provides in pertinent part:

"§ 1. In every county of this state now containing, or which may hereafter contain more than 40,000 inhabitants, and in any other county in which the county board by resolution determines that jury commissioners shall be appointed, the circuit judges in the circuit

Honorable Kelly D. Long - 3.

of which the county is a part, or a majority of them, shall choose 3 competent and discreet electors, who shall not be so chosen on account of party affiliations, who shall be known as jury commissioners. * * * The majority of the circuit judges herein referred to may remove either of such commissioners, assigning reasons therefor, and fill all vacancies occurring in the office of any such commissioners by death, resignation or removal."

Consequently, from the above cited language, it is clear that section 1 of "AN ACT to prevent fraudulent and corrupt practices in the making or accepting of official appointments and contracts by public officers", supra, would not be applicable since the circuit judges, not the county board, appoint the jury commissioners.

It is my opinion, however, that the offices of county board member and jury commissioner are incompatible due to a conflict of interest. Section 6 of "AN ACT in relation to jury commissioners and authorizing judges to appoint such commissioners and to make rules concerning their powers and duties", supra, provides in pertinent part:

"§ 6. The said jury commissioners, clerk and assistants, shall be paid for their services by the county treasurer of the several counties, such compensation as shall be fixed by the county board, upon warrants drawn by the clerk of the county board. * * * "

Since a county board member would be part of the body empowered to fix his compensation as jury commissioner, a direct conflict

Honorable Kelly D. Long - 4.

of interest would exist.

Since it has been determined that incompatibility would exist due to a conflict of interest, it is not necessary to express any opinion as to the applicability of section 3 of "AN ACT to prevent fraudulent and corrupt practices in the making or accepting of official appointments and contracts by public officers". (Ill. Rev. Stat. 1973, ch. 102, par. 3.) Thus, once again, it is my opinion that the offices of county board member and jury commissioner are incompatible.

Very truly yours,

A T T O R N E Y G E N E R A L



WILLIAM J. SCOTT

ATTORNEY GENERAL
STATE OF ILLINOIS
500 SOUTH SECOND STREET
SPRINGFIELD

June 23, 1972

FILE NO. NP-465

COUNTIES:

**Compatibility of County Board Member
and Member of Merit Commission**

Honorable Robert J. Bier
State's Attorney
Adams County
County Building
P.O. Box 66
Quincy, Illinois 62301

Dear Mr. Bier:

I have your recent letter wherein you state:

"In Chapter 102, Section 1 of Illinois Revised Statutes, 1971, it is stated:

1. County board. #1. No member of a county board, during the term of office for which he is elected, may be appointed to, accept or hold any office other than chairman of the county board or member of the regional planning commission by appointment or election of the board of which he is a member.'

MR. 465

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Chapter 34, Illinois Revised Statutes, 1971,
Section 859.1 provides that:

'***Such ordinance shall provide for the appointment of a merit commission consisting of three or five members appointed by the county sheriff and approved by the county board.***'

My question is whether a member of the county board may be appointed by the sheriff to serve as a member of the Merit Commission or whether such appointment violates Chapter 102, Section 1.

I note your opinion No. 343 applied to the County Zoning Commission and did not apply to the Merit Commission. I also note that the Merit Commission is appointed by the sheriff and approved by the county board whereas the Zoning Commission is appointed by the chairman of the county board."

Section 1 of "An Act to prevent fraudulent and corrupt practices in the making or accepting of official appointments and contracts by public officers," (Ill. Rev. Stats., 1971, ch. 102, par. 1) provides as follows:

"No member of a county board, during the term of office for which he is elected, may be appointed to, accept or hold any office other than chairman of the county board or member of the regional planning commission by appointment or election of the board of which he is a member. Any such prohibited appointment or election is void. This Section shall not preclude a member of the county board from being selected or from serving as a

member of the County Personnel Advisory Board as provided in Section 12-17.2 of 'The Illinois Public Aid Code', approved April 11, 1967, as amended, or as a member of a County Extension Board as provided in Section 7 of the 'County Cooperative Extension Law', approved August 2, 1963, as amended."

Section 58.1 of "An Act to revise the law in relation to counties," (Ill. Rev. Stats., 1971, ch. 34, par. 859.1) provides:

"The county board in any county having a population of less than 1,000,000 may, by ordinance, provide for all deputies other than special deputies, employed on a full time basis in the office of Sheriff to be appointed, promoted, disciplined and discharged pursuant to recognized merit principles of public employment and for such employees to be compensated according to a standard pay plan approved by the board.***"

The County Board may establish per diem compensation for members of the Merit Commission and may allow reimbursement for reasonable and necessary expenses.****"

You have asked my opinion as to whether a member of the county board may be appointed by the sheriff to serve as a member of the merit commission.

From the general rule laid down in People v. Haas, 145 Ill. App. 283, it appears that incompatibility between

offices arises where the constitution or a statute specifically prohibits the occupants of either one of the offices from holding the other or where because of the duties of either office a conflict in interest may arise or where the duties of either office are such that the holder of one cannot in every instance properly and faithfully perform all the duties of the other.

The statute, as you have pointed out, provides that the members of the merit commission are appointed by the sheriff and approved by the county board. In seeking to give effect to the intention of the General Assembly, the courts are not controlled by the literal meaning of the language used, but they must consider the spirit of the enactment and, if possible, construe the statute in accordance therewith, (People ex rel Jackson A. Morris v. Smuczynski, 345 Ill. App. 63; Hoynes v. Danisch, 264 Ill. 467). A situation or thing which is within the spirit, object and meaning of a statute, although it is not within the letter thereof, is regarded as within the statute, (Lincoln National Life Insurance Co. v. McCarthy, 10 Ill. 2d 489). Approval by the county board is required by the statute in order to complete the appointment of a member of the merit commission.

It would appear to be within the spirit and object of the statute to hold that a member of the county board is precluded from being appointed to the merit commission. The approval of the county board is essential to validate the appointment.

Furthermore, Section 1 of "An Act to prevent fraudulent and corrupt practices.....," (Ill. Rev. Stats., 1971, ch. 102, par. 1) permits a county board member to serve as chairman of the county board, member of the regional planning commission, member of the county personnel advisory board and member of a county extension board. Since the statute refers to four capacities in which county board members may serve, they are impliedly forbidden to serve in other capacities under the rule "expressio unius exclusio alterius". The enumeration of one or more certain things in a statute excludes all other things not mentioned in the statute.

It should also be noted that the county board sets the salary and expenses of the members of the merit commission. A member of the county board who is also a member of the merit commission, would, therefore, be fixing his own compensation and

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expenses. A person would be more than human if he could give his fair and impartial consideration to the duties of both offices as he could where he had no personal interest.

In view of the foregoing, it is my opinion that the offices of member of the county board and member of the merit commission for deputy sheriffs are incompatible.

Very truly yours,

A T T O R N E Y G E N E R A L