



ROLAND W. BURRIS

ATTORNEY GENERAL
STATE OF ILLINOIS



January 7, 1994

I - 94-003

COMPATIBILITY OF OFFICES:
School Board Member and
County Engineer

Honorable Sherri L. E. Tungate
State's Attorney, Clay County
Clay County Courthouse
Louisville, Illinois 62858

Dear Ms. Tungate:

I have your letter wherein you inquire whether one person may serve simultaneously in the offices of school board member and county engineer. 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.

Incompatibility between offices arises when a statute or the constitution prohibits the holder of one office from also holding the other, or where the duties of either office are such that the holder of the one office cannot fully, properly and faithfully perform all of the duties of the other office. (People ex rel. Myers v. Haas (1908), 145 Ill. App. 283.) There is no statutory or constitutional prohibition regarding simultaneous tenure as a county engineer and a school board member. Therefore, the issue presented is whether the duties of the offices in question may conflict.

The office of county engineer (formerly county superintendent of highways) is provided for in section 5-201 of the Illinois Highway Code (Ill. Rev. Stat. 1991, ch. 121, par. 5-201;

605 ILCS 5/5-201 (West 1992)). Subsequent sections of the Code set forth the term of office and the duties thereof. There are no statutory duties of the office of county engineer which expressly relate to school districts.

The office of school board member is created by, and the duties thereof are set forth in, article 10 of the School Code (Ill. Rev. Stat. 1991, ch. 122, par. 10-1 et seq.; 105 ILCS 5/10-1 et seq. (West 1992)). In connection with the construction of schools, school boards are required to lay out and provide for the construction of access roads. (Ill. Rev. Stat. 1991, ch. 122, par. 10-22.36A; 105 ILCS 5/10-22.36A (West 1992).) However, such roads are to be constructed as part of general school construction projects, and there is no provision in the School Code which requires the county to undertake any act with respect to the construction or maintenance of roads for schools.

You have stated that the county highway department does assist the school district in minor highway maintenance work, at the county's established rates for such work. The county board, and not the county engineer, is responsible for entering into intergovernmental agreements regarding the use of county personnel and equipment. The county board is responsible for providing all of the equipment and personnel reasonably required by the county engineer in the discharge of the duties of his office. (Ill. Rev. Stat. 1991, ch. 121, par. 5-202; 605 ILCS 5/5-202 (West 1992).) The recommendations of the county engineer do not become official until they are adopted by the county board. (Moffett v. Hicks (1923), 229 Ill. App. 296, 308-09.) Although he occupies a distinct office, the county engineer is subordinate to the county board. (1978 Ill. Att'y Gen. Op. 75, 76.) Therefore, the county engineer is not a party to any contract which may be entered into between the county and the school district.

Despite the fact that the county engineer would not be a party to a contract between the county and the school district, he may nonetheless influence that contract. In Peabody v. Sanitary District of Chicago (1928), 330 Ill. 250, the supreme court held that a contract between the board of trustees of a sanitary district and a contractor was void because the treasurer of the district had an interest in the contract. The court noted that since the duties of the treasurer included serving as financial advisor to the trustees, he might have been called upon to act on the letting of the contract by advising the board as to the financial status of the bidders. For that reason, the court held that the conflict of interest statute (see Cahill's Statutes 1927, ch. 102, par. 3) was violated.

Honorable Sherri L. E. Tungate - 3.

Based upon the Peabody case, Attorney General Scott concluded in opinion No. S-1120, issued July 1, 1976 (1976 Ill. Att'y Gen. Op. 232) that the offices of county superintendent of highways (now county engineer) and alderman were incompatible. Attorney General Scott stated therein:

" * * *

Like the treasurer in Peabody, the county superintendent of highways in the present situation might naturally be called upon by the county board for advice in these situations in which the interests of the county and those of the municipality might be opposed to each other. The maintenance which is the subject of the agreement authorized in section 5-410 would come under the supervision of the county superintendent of highways. Similarly, the improvements contracted for pursuant to section 5-502 are to be planned by the county superintendent of highways. With regard to the deletion of highways from the county system it should be noted that the county superintendent of highways is responsible for supervising the construction and maintenance of all county highways within the county. (Ill. Rev. Stat. 1975, ch. 121, par. 205.5.) In each of these situations there is the possibility that the county board might ask for the advice of the county superintendent of highways. In that case, the county superintendent's duty to advise the county board as to the best interest of the county might conflict with his duty as alderman to act for the best interest of the city.

* * *

"

You have noted that the county does provide certain roadway maintenance services to the school district. The county board may naturally call upon the county engineer to advise it concerning such work. In these circumstances, the interests of the county and those of the school district may conflict, and a county engineer who also served as a school board member could be placed in a position in which his loyalties would be divided. Therefore, because of the potential conflicts in the duties of

Honorable Sherri L. E. Tungate - 4.

these offices, it appears that the offices of county engineer and school board member are incompatible.

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

Very truly yours,

A solid black rectangular redaction box covering the signature of Michael J. Luke.

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

MJL:KJS:cj



OFFICE OF THE ATTORNEY GENERAL

STATE OF ILLINOIS

April 7, 1995

Jim Ryan

ATTORNEY GENERAL

I - 95 - 012

COMPATIBILITY OF OFFICES:

Village President and County
Engineer; Spouse of Village
President Serving as Village Clerk

Honorable Michael P. Bald
State's Attorney, Stephenson County
County Courthouse
Freeport, Illinois 61032

Dear Mr. Bald:

I have your letter wherein you inquire whether one person may serve simultaneously in the offices of village president and county engineer. You have also asked whether a conflict of interest would arise if the spouse of a village president is elected village clerk. Because of the nature of your inquiries, I do not believe that the issuance of an official opinion is necessary. I will, however, comment informally upon the questions you have raised.

With respect to your first question, 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. 2d 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. 283, 286.) There is no constitutional or statutory provision which prohibits one person from simultaneously serving as village president and as county engineer. Therefore, the issue is whether the

Honorable Michael P. Bald - 2.

duties of either office are such that the holder of one cannot, in every instance, fully and faithfully discharge the duties of the other.

The office of county engineer (formerly county superintendent of highways) is provided for in section 5-201 of the Illinois Highway Code (605 ILCS 5/5-201 (West 1992)). Subsequent sections of the Code set forth the terms of office and the duties thereof. Sections 5-410 and 5-502 of the Illinois Highway Code (605 ILCS 5/5-410, 5/5-502 (West 1992)) respectively provide, in pertinent part:

"The county board is authorized to enter into agreements with any municipal corporation, terminable in the discretion of the county board, for the municipal corporation to maintain any county highway, or any part thereof, located within the municipal corporation, such maintenance to be under the supervision of the county superintendent of highways. * * *"

"In case the county board deems it expedient to construct or repair a bridge, culvert, drainage structure, drainage facility or grade separation, including approaches thereto, on, across or along any highway, in the county, the county board may order the same constructed or repaired at the entire expense of the county; or the county and any other highway authority may jointly construct or repair any such bridge, culvert, drainage structure, drainage facility or grade separation, including approaches thereto, provided that the Department's participating authority shall be limited to the State highway system.

If it is decided to pay the cost of such construction or repair jointly, the county board and any other highway authority shall enter into a contract as to the proportion of the expense of such construction or repair to be borne by each. Such contracts, except as against the Department, shall be judicially enforceable.

Such improvement shall be made according to plans and specifications prepared by or

under the direction of the county superintendent of highways, and the county board may undertake such work either by letting a contract for the same or may authorize the work to be performed directly by the county through and by its officers, agents and employees.

* * *

(Emphasis added.)

Each of the statutory provisions set forth above authorizes a county and a municipality to enter into agreements for joint highway projects. In each instance, however, the county board, and not the county engineer; is responsible for entering into intergovernmental agreements regarding the use of county personnel and equipment, and for providing all of the equipment and personnel reasonably required by the county engineer in the discharge of the duties of his office. (605 ILCS 5/5-202 (West 1992).) The recommendations of the county engineer do not become official until they are adopted by the county board. (Moffett v. Hicks (1923), 229 Ill. App. 296, 308-09.) Although he occupies a distinct office, the county engineer is subordinate to the county board. (1978 Ill. Att'y Gen. Op. 75, 76.) Therefore, the county engineer is not a party to any contract which may be entered into between the county and the village.

Although the county engineer would not be a party to a contract between the county and the village, he may nonetheless influence that contract. In Peabody v. Sanitary District of Chicago (1928), 330 Ill. 250, the supreme court held that a contract between the board of trustees of a sanitary district and a contractor was void because the treasurer of the district had an interest in the contract. The court noted that since the duties of the treasurer included serving as financial advisor to the trustees, he might have been called upon to act on the letting of the contract by advising the board as to the financial status of the bidders. For that reason, the court held that the conflict of interest statute (see Cahill's Statutes 1927, ch. 102, par. 3) was violated.

Based upon Peabody v. Sanitary District of Chicago, Attorney General Scott concluded in opinion No. S-1120, issued July 1, 1976 (1976 Ill. Att'y Gen. Op. 232), that the offices of county superintendent of highways (now county engineer) and city alderman were incompatible. Attorney General Scott stated therein:

" * * *

Like the treasurer in Peabody, the county superintendent of highways in the present situation might naturally be called upon by the county board for advice in these situations in which the interests of the county and those of the municipality might be opposed to each other. The maintenance which is the subject of the agreement authorized in section 5-410 would come under the supervision of the county superintendent of highways. Similarly, the improvements contracted for pursuant to section 5-502 are to be planned by the county superintendent of highways. With regard to the deletion of highways from the county system it should be noted that the county superintendent of highways is responsible for supervising the construction and maintenance of all county highways within the county. (Ill. Rev. Stat. 1975, ch. 121, par. [5-]205.5 [sic][605 ILCS 5/5-205.5 (West 1992)].) In each of these situations there is the possibility that the county board might ask for the advice of the county superintendent of highways. In that case, the county superintendent's duty to advise the county board as to the best interest of the county might conflict with his duty as alderman to act for the best interest of the city.

* * *

"

There are no functional differences between the duties of the offices of city alderman and village president sufficient to distinguish these circumstances from those addressed in opinion No. S-1120. Each officer is a member of the governing body of the municipality who may be called upon to vote or act on contracts entered into by the municipality. Thus, the reasoning relied upon by Attorney General Scott in opinion No. S-1120 would also extend to the office of village president. Therefore, it appears that the offices of village president and county engineer are incompatible, and, consequently, one person cannot simultaneously hold both offices.

You have also inquired whether a conflict of interest would arise if the spouse of a village president is elected to

the office of village clerk. Section 3 of the Public Officer Prohibited Activities Act (50 ILCS 105/3 (West 1993 Supp.)) prohibits a public officer from having any interest in any contract or work the making or letting of which he or she may be called upon to act or vote. It is well settled that the interest prohibited by section 3 is one which is pecuniary in nature. Panozzo v. City of Rockford (1940), 306 Ill. App. 443.

Under the provisions of the Illinois Municipal Code, village clerks, like other municipal officers, are entitled to compensation in that amount fixed by the corporate authorities for carrying out their official duties. (65 ILCS 5/3.1-50-5, 5/3.1-50-10, 5/3.1-50-25 (West 1993 Supp.)) In both Hollister v. North (1977), 50 Ill. App. 3d 56 and People v. Simpkins (1977), 45 Ill. App. 3d 202, however, it was held that it was not a per se violation of section 3 of the Act for the spouse of a member of the corporate authorities of a public body to be employed by the entity which the officeholder serves. As a matter of law, one spouse is not presumed to have a pecuniary interest in the contracts or earnings of his or her spouse. If facts can be shown which prove that an officer has an actual interest in a contract entered into by another person with the entity which the officer represents (including an interest in compensation), then a violation of section 3 will occur. No such interest is presumed, however, based solely upon familial relationships. Therefore, no violation of section 3 of the Public Officer Prohibited Activities Act would appear to be present merely because the spouse of a member of the corporate authorities of a municipality is appointed to the office of municipal clerk.

I would further note, however, that the common law recognizes that conflicts of interest other than those covered by such statutes may arise, and it is a well established rule that where a member of a governmental body has a personal interest in a matter coming before the body, he or she is disqualified from voting thereon. (In re Heirich (1956), 10 Ill. 2d 357; see also 10 ALR 3d 694.) If the village president were called upon to vote upon the compensation to be paid to his or her spouse as village clerk, for example, such an interest might arise. Generally, where an officer has a personal interest in a matter coming before the body he or she serves, but which is not prohibited by statute, that officer is responsible for disqualifying himself from voting or otherwise acting therein.

As a final matter, I would note that circumstances may arise which do not constitute either a violation of section 3 of the Public Officer Prohibited Activities Act or a common law

Honorable Michael P. Bald - 6.

conflict of interest, but which nonetheless present an appearance of impropriety to the public. In these circumstances, a public officer should consider abstention from action even though he or she may not technically be disqualified from acting, in order to preserve the public's confidence in the body which he or she serves. A perception of impropriety may be as damaging to public confidence as an actual conflict of interest. Therefore, a public official should take into consideration the appearance of which his or her action or vote may convey to the public in determining whether to abstain from acting or voting upon a specific matter.

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

Very truly yours,

A solid black rectangular redaction box covering the signature of Michael J. Luke.

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

MJL:LP:dn