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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

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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.

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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.

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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

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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

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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

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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

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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

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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