



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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Jim Ryan

ATTORNEY GENERAL

I - 01-025

COMPATIBILITY OF OFFICES:

Fire Protection District Trustee and
Fire Chief of Fire Protection District;
Drainage District Commissioner and
Township Highway Commissioner

The Honorable John C. Piland
State's Attorney, Champaign County
101 East Main Street
Post Office Box 785
Urbana, Illinois 61803-0785

Dear Mr. Piland:

I have Assistant State's Attorney Joel D. Fletcher's letter wherein he inquired, on your behalf, whether the following positions are incompatible: fire protection district trustee and fire chief of the fire protection district; and drainage district commissioner and road district commissioner. Because of the nature of this inquiry, I will comment informally upon the questions that have been raised.

The common law doctrine of incompatibility of offices precludes simultaneous tenure in two public 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; People ex rel. Myers v. Haas (1908), 145 Ill. App. 283, 286.) The doctrine of incompatibility generally extends only to public offices, and not to employment relationships (1975 Ill. Att'y Gen. Op. 278). Indicia of public office include the creation of the position by law, the requirement of an oath or a bond, duties prescribed by law rather than by

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contract or agreement and the continuous nature of the duties of the position without regard to the particular person who holds the position. Wargo v. Industrial Comm'n (1974), 58 Ill. 2d 234, 237; People v. Brady (1922), 302 Ill. 576, 582.

With respect to the first part of this inquiry, it is clear that a fire protection district trustee holds a public office. The determination of whether the fire chief of a fire protection district is a public officer, however, requires an examination of the statutory provisions relating to that position. Section 6 of the Fire Protection District Act (70 ILCS 705/6 (West 1998)) provides, in pertinent part:

"The trustees shall constitute a board of trustees for the district for which they are appointed, which board of trustees is declared to be the corporate authority of the fire protection district, and shall exercise all of the powers and control all the affairs and property of such district. The board of trustees at their initial meeting and at their first meeting following the commencement of the term of any trustee shall elect one of their number as president and one of their number as secretary and shall elect a treasurer for the district, who may be one of the trustees or may be any other citizen of the district and who shall hold office during the pleasure of the board and who shall give such bond as may be required by the board. Except as otherwise provided in Sections 16.01 through 16.18, the board may appoint a fire chief and such firemen as may be necessary for the district who shall hold office during the pleasure of the board and who shall give such bond as the board may require. The board may prescribe the duties and fix the compensation of all the officers and employees of the fire protection district. * * *" (Emphasis added.)

Section 16.04a of that Act (70 ILCS 705/16.04a (West 1998)) additionally provides, in relevant part:

"The board of fire commissioners shall appoint all officers and members of the fire departments of the district, except the Chief of the fire department. The Chief of the fire department shall be appointed by the trustees.

* * *

(Emphasis added.)

Sections 6 and 16.04a of the Fire Protection District Act authorize the board of trustees of the fire protection district to appoint a fire chief. Section 6 provides that the fire chief shall "hold office" during the pleasure of the board and shall give such bond as the board may require. The board of trustees is authorized to prescribe the duties and fix the compensation of all of the officers and employees of the fire protection district. (70 ILCS 705/6 (West 1998).) In addition to the duties which may be established by the board of trustees, section 16.13b of the Act (70 ILCS 705/16.13b (West 1998)) provides that the chief of the fire department has the burden of proving the guilt of an officer or member of the department at a hearing on removal or discharge, and that the chief also has the authority to suspend members of his department without pay for a period of up to five consecutive calendar days. (70 ILCS 705/16.13b (West 1998).) Pursuant to section 6 of the Fire Investigation Act, the fire chief is required to investigate the cause, origin and circumstances of every fire within the fire protection district or upon any area or property which is furnished fire protection by the fire protection district.

Several factors support the conclusion that a fire chief is a public officer. Significantly, a fire chief is required to give a bond in the amount required by the board of trustees and "hold[s] office" at the pleasure of the board. The position of fire chief is created by statute and is a continuous position. Although the majority of a fire chief's duties are not fixed by statute, but by the trustees of the fire protection district, it appears, on balance, that a fire chief is an officer of the Fire Protection District, and that the doctrine of incompatibility would therefore be applicable to the offices of trustee and fire chief. There is no constitutional or statutory provision which prohibits one person from simultaneously serving in these two capacities. The issue, therefore, is whether the duties of either office are such that the holder of one cannot,

in every instance, fully and faithfully discharge the duties of the other.

Incompatibility of offices on this basis may arise because one of the offices is subordinate to the other. (See People ex rel. Fitzsimmons v. Swailes (1984), 101 Ill. 2d 458; Rogers v. Tinley Park (1983), 116 Ill. App. 3d 437; People ex rel. Teros v. Verbeck (1987), 155 Ill. App. 3d 81.) In these circumstances, the office of fire chief of a fire protection district is clearly subordinate to the office of fire protection district trustee. The board of trustees of a fire protection district appoints the fire chief, prescribes the fire chief's duties and fixes the compensation of the fire chief. (70 ILCS 705/6, 16.04a (West 1998).) It appears, therefore, that the offices of trustee of a fire protection district and fire chief of a fire protection district are incompatible, and, therefore, one person may not simultaneously hold both offices.

I would further note that even if the fire chief were determined to be merely an employee of the fire protection district, simultaneous tenure as a member of the fire protection district board of trustees might well violate applicable statutory prohibitions against the possession of financial interests in district contracts. Section 3 of the Public Officer Prohibited Activities Act (50 ILCS 105/3 (West 1998)) provides, in pertinent part:

" * * *

(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. * * *

* * *

(Emphasis added.)

Section 4 of the Fire Protection District Act (70 ILCS 705/4 (West 1998)) further provides, in relevant part:

" * * *

* * * No trustee or employee of such district shall be directly or indirectly interested financially in any contract work or business or the sale of any article, the expense, price or consideration of which is paid by the district; nor in the purchase of any real estate or other property, belonging to the district, or which shall be sold for taxes or assessments or by virtue of legal process at the suit of the district. Nothing in this Section prohibits the appointment or selection of any person or trustee or employee whose only interest in the district is as an owner of real estate in such fire protection district or of contributing to the payment of taxes levied by the district.

* * *

* * *

(Emphasis added.)

Section 3 of the Public Officer Prohibited Activities Act and section 4 of the Fire Protection District Act do not, per se, prohibit one person from serving a local government in two capacities. Those provisions, however, would be violated if a fire protection district trustee possessed a personal pecuniary interest in an employment contract entered into with the fire protection district board that was not exempted by compliance with the de minimis interest exceptions contained therein. (See 50 ILCS 105/3(b)(2); 70 ILCS 705/4(C).) Whether a violation would occur, therefore, would necessarily depend upon the amount of the fire chief's compensation. If the fire chief's compensation exceeded the amounts permitted pursuant to statute, he or she would necessarily be precluded from serving as a fire protection district trustee simultaneously.

With regard to the offices of township highway commissioner and drainage district commissioner, there is no constitutional or statutory provision which prohibits one person from simultaneously serving in both offices. The issue, therefore, is

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

Pursuant to section 73-5 of the Township Code (60 ILCS 1/73-5 (West 1998)), the highway commissioner of each road district comprised of a single township exercises the powers and duties provided for in article 6 of the Illinois Highway Code. (605 ILCS 5/6-101 et seq. (West 1998).) Pursuant thereto, the duties of the township highway commissioner include: having general charge of roads in his district (605 ILCS 5/6-201.8 (West 1998)); constructing, maintaining, and repairing roads within the district and letting contracts, employing labor and purchasing material and machinery therefor (605 ILCS 5/6-201.7 (West 1998)); determining the taxes necessary to be levied on property within his district for road purposes (605 ILCS 5/6-201.5 (West 1998)); placing, erecting and maintaining traffic-control devices and signs on township and road district roads, subject to the approval of the county superintendent of highways (605 ILCS 5/6-201.16 (West 1998)); making agreements with the highway commissioner of other road districts or with the corporate authorities of any municipality in the same or an adjoining county or with the county board of the same or an adjoining county for the lease or exchange of idle machinery, equipment or tools belonging to the district (605 ILCS 5/6-201.10 (West 1998)); and contracting with the highway commissioner of any other road district or with the corporate authorities of any municipality or county to furnish or obtain services and materials related to construction, maintenance or repair of roads. (605 ILCS 5/6-201.10-1 (West 1998).)

The duties of a drainage district commissioner are set out in the provisions of the Illinois Drainage Code. (70 ILCS 605/1-1 et seq. (West 1998).) Section 4-14 of the Code (70 ILCS 605/4-14 (West 1998)) provides, inter alia, that commissioners are empowered to:

"* * * (e) use any part of any public highway for the purposes of work to be done, provided such use will not permanently destroy or materially impair such public highway for public use; * * *"

In opinion No. 1854, issued March 19, 1929 (1929 Ill. Att'y Gen. Op. 123), Attorney General Carlstrom concluded that

the offices of drainage district commissioner and highway commissioner were incompatible based upon a statute which contained the language currently codified in subsection 4-14(e) of the Code. (See Ill. Rev. Stat. 1927, ch. 42, par. 123.) The statute in effect when opinion No. 1845 was issued, however, also contained additional language which authorized a drainage district commissioner to assess the public road to pay a portion of the benefits received if the public highway would be benefitted by the work performed by the drainage district commissioner. (See Ill. Rev. Stat. 1927, ch. 42, par. 123; 1929 Ill. Att'y Gen. Op. 123.) It appears that drainage district commissioners no longer have the authority to assess public highways, however. (See Public Act 83-726, effective September 23, 1983; 70 ILCS 605/4-14, 5-2, 5-3 (West 1998); In re East Lake Fork Special Drainage District v. Village of Ivesdale (1985), 137 Ill. App. 3d 473.) The authority of a drainage district commissioner to use any public highway for purposes of work to be done, standing alone, does not appear to create a conflict of duties with the office of highway commissioner. It appears, therefore, that the reasoning of opinion No. 1854 is no longer persuasive.

Section 6-4 of the Drainage Code (70 ILCS 605/6-4 (West 1998)), however, provides as follows:

"Contracts with Highway Authorities or Railroads for Construction, Maintenance and Use of Levees. The commissioners may contract with highway authorities or with any person, firm or corporation operating a railroad, to construct or maintain a levee or levees, or any portion thereof, upon such terms as may be for the best interests of the district, and may grant to such highway authorities or such person, firm or corporation operating a railroad the right to construct, operate and maintain a highway or railroad upon, along or across such levee or levees. The commissioners may also contract with highway authorities or with any person, firm or corporation operating a railroad to use any embankment, or any part thereof, constructed by such highway authority or by such person, firm or corporation as a district levee or as a part of the levee system of the district. Any such contract shall be subject

to approval by the court, after hearing, either without notice or upon such notice as the court may direct."

Pursuant to section 6-4 of the Code, drainage district commissioners may enter into contracts with highway authorities to construct or maintain levees, and may grant highway authorities the right to construct, operate or maintain a highway upon, along or across levees. The commissioners may also contract with highway authorities to use any embankment constructed by the highway authority as a district levee or as part of the levee system of the district. A township highway commissioner is the highway authority for a township or district road in a county unit road district. (605 ILCS 5/2-213 (West 1998).)

A drainage district commissioner, in exercising the powers granted to that office under the Illinois Drainage Code (70 ILCS 605/4-1 et seq. (West 1998)), has a duty to protect and represent the best interests of the drainage district. A township highway commissioner has a concomitant duty to represent and protect the interests of the road district. It has long been established that one person cannot adequately represent the interests of two governmental units when those units contract with one another. (1991 Ill. Att'y Gen. Op. 188; 1976 Ill. Att'y Gen. Op. 116; 1975 Ill. Att'y Gen. Op. 37.) Because of the potential conflict in duties which are present, a person who served simultaneously as a drainage district commissioner and as a township highway commissioner would not be able to represent the interests of both entities adequately, fully and faithfully. It appears, therefore, that the offices of drainage district commissioner and township highway commissioner are incompatible and that one person cannot simultaneously hold both offices.

It has apparently been suggested that such incompatibility of offices may be avoided by having a drainage district commissioner recuse himself from acting or participating in matters in which a conflict of duties might arise. Illinois courts, however, have concluded that recusal does not avoid the 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, 445-47.) Consequently, an agreement by a drainage district commissioner to recuse himself or herself from acting in any matter which might conflict with his or her duties as a township

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highway commissioner would be ineffective to cure the underlying incompatibility.

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

Sincerely,

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

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

MJL:LAS:cj