



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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I - 05-007

COMPATIBILITY OF OFFICES:
City Alderman and County
Jail Administrator

The Honorable Patrick Windhorst
State's Attorney, Massac County
Massac County Courthouse
Metropolis, Illinois 62960

Dear Mr. Windhorst:

I have your letter inquiring whether one person may simultaneously hold the positions of city alderman and county jail administrator. Because of the nature of your inquiry, I do not believe that an official opinion is necessary. I will, however, comment informally on your question.

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 such that the holder of one cannot, in every instance, properly and faithfully perform all the duties of the other. *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 Illinois, the common law doctrine of incompatibility of offices has been applied only to offices, and not to positions of employment (1975 Ill. Att'y Gen. Op. 278). It is clear that the position of city alderman is a public office (65 ILCS 5/1-1-2, 3.1-15-5 (West 2004)); *see*

generally *Nelson v. Crystal Lake Park District*, 342 Ill. App. 3d 917, 921-22 (2003)). We must determine, however, whether the position of county jail administrator is a public office.

In *Midwest Television, Inc. v. Champaign-Urbana Communications, Inc.*, 37 Ill. App. 3d 926, 931 (1976), the appellate court delineated the criteria to be used when 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 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.

The court further indicated 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. *People ex rel. Brundage v. Brady*, 302 Ill. 576, 582 (1922).

Applying the several indicia of public office to the position of county jail administrator, the position does not qualify as a public office. The position of county jail administrator is authorized in section 3 of the County Jail Act (730 ILCS 125/3 (West 2004)), which provides:

The Sheriff may appoint a superintendent of the jail, and remove him at his pleasure, for whose conduct and training, he shall be responsible. The Sheriff shall also be responsible for the hiring and training of all personnel necessary to operate and maintain the jail.

A review of the provisions of the County Jail Act (730 ILCS 125/0.01 *et seq.* (West 2004)) indicates that the sheriff is the warden of the county jail and has custody of all prisoners in the jail. 730 ILCS 125/2 (West 2004). To assist the sheriff in carrying out his duties, section 3 authorizes, but does not require, the appointment of a jail superintendent. This superintendent, or jail administrator, oversees the day-to-day operations of the jail and serves at the pleasure of the sheriff. Thus, the superintendent position has neither a fixed tenure nor continuous existence, and the superintendent is not required to subscribe an oath. The sheriff is responsible for the conduct and training of his appointee, and continues to be responsible for the

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hiring of other personnel. Consequently, the superintendent exercises no sovereign power, and the sheriff remains liable for any misfeasance. Based on the foregoing, the position of jail superintendent or jail administrator is one of public employment, not a public office. As a result, the doctrine of incompatibility of offices does not apply to the position, and there is no legal impediment to one person serving in the position of jail administrator and holding the office of city alderman.

You have also asked a separate question concerning whether a prohibited conflict of interest exists based on the fact that the city in which the alderman holds office receives money from a riverboat casino, and shares that money with the county which, in turn, is responsible for operating the county jail. Pursuant to sections 12 and 13 of the Riverboat Gambling Act (230 ILCS 10/12, 13 (West 2004)), a municipality designated as the home dock of a riverboat receives a portion of the fees and taxes collected by a riverboat and is authorized by section 13 to enter into agreements to share those funds with other units of local government.

An alderman, as an officer of a city, is prohibited from having any interest in a contract upon which he or she may be called upon to act or vote (50 ILCS 105/3 (West 2004)) or which is funded by the city (65 ILCS 5/3.1-55-10 (West 2004)). Public employees, however, are not generally deemed to have an interest in the contracts of their governmental employers unless it appears that the particular position is funded by or otherwise dependent upon the contract in question. Ill. Att'y Gen. Op. No. 96-011, issued January 31, 1996. As previously discussed, a county jail administrator is an employee of the sheriff. As such, the administrator's salary would ordinarily be appropriated from the county's general corporate fund. Unless it is funded pursuant to a contract or grant from the city, that position is not likely to depend on gaming tax revenues provided by the city. This is, however, a factual question that you must determine based on the specific circumstances presented.

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

~~Very truly yours,~~

A large black rectangular redaction box covering the signature of Lynne E. Patton.

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

LEP:KJS:an