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February 4, 1975

FILE NO. NP-870

COUNTIES:
Conflict of Interest -
County Board Chairman as
Member and Director of
Central Illinois Agency on
Aging, Inc.

Honorable Robert A. Barnes, Jr.
State's Attorney
Marshall County
Lacon, Illinois 61540

Dear Mr. Barnes:

I have your letter in which you state:

"From time to time the chairman and members of our County Board are asked to serve as directors for various agencies providing services in our region. The most recent request has been by the Central Illinois Agency on Ageing, which, as I understand it, is an agency established under Title III of the Older Americans Act of 1965, as amended, which provides, among other things, interrelated services for the aged over a service area of Fulton, Marshall, Stark, Tazewell and Woodford Counties. A representative of this

> agency has requested the chairman of our County Board to serve as a director on said agency. There would be no compensation for the appointment other than perhaps mileage expenses. This agency is funded by Federal and State funds.
>
> My specific question is whether or not the chairman of our County Board or a member of said County Board may serve as a director of this agency without being in violation of Section 1, Chapter 102 of the Illinois Revised Statutes. I would appreciate an opinion on this question."

The specific agency to which you refer, the Central Illinois Agency on Aging, Inc., (hereinafter C.I.A.A., Inc.), is a general not-for-profit corporation formulated pursuant to the General Not For Profit Corporation Act. Ill. Rev. Stat. 1973, ch. 32, pars. 163a et seq.

In People v. Haas, 145 Ill. App. 283, it was held that incompatibility between offices arises where the Constitution of 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.

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:

> "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.)

First, by the plain meaning of the statute, the limitations imposed by section 1 apply only to those offices over which the county board has the power of "appointment or election". The position that is cited in the instant situation, that of a director of the Central Illinois Agency on Aging, Inc., is not an office over which the county board exercises either powers of appointment or election. Rather, the directors of C.I.A.A., Inc. are chosen on an independent

voluntary basis as concerned citizens who have shown a special interest in, or qualification for, coordinating the delivery of existing services affecting the elderly. Thus, in response to your specific question, the chairman or a member of your county board may serve as a director of C.I.A.A., Inc. without being in violation of section 1 of "AN ACT to prevent fraudulent and corrupt practices", supra.

Second, in order for a compatibility question to be raised at all, it is necessary to decide if the position of director, C.I.A.A., Inc., is a public office. Over the years the Illinois Supreme Court and courts of other jurisdictions have outlined the ingredients that comprise a public office.

An indispensable requirement of a public office is that the duties of the incumbent of an office involves an exercise of some portion of the sovereign power. 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.

In People v. Brady, 302 Ill. 576, the Illinois Supreme Court held that committeemen of political parties were not public officers. The court placed strong emphasis on the notion that a person must exercise some portion of State sovereignty to be a public officer. At page 582, the court states:

> "* * * The most important characteristic of an office is that it involves a delegation to the officer of some of the solemn functions of government to be exercised by him for the benefit of the public. Some portion of the sovereignty of the State, either legislative, executive or judicial, attaches for the time being to the officer, to be exercised for the public benefit. Unless the powers conferred by the act creating the office are of this nature the individual filling the office is not a public officer."

An office is a public position created by the Constitution or by law, continuing 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. Rep. 430, 82 P. 2d 324; 140 A.L.R. 1076, 1080.

Section 24 of article V of the Illinois Constitution of 1870 read as follows:

> "An office is a public position created by the constitution or law, continuing during the pleasure of the appointing power, or for a fixed time, with a successor elected or appointed."

This constitutional definition of public office applied only to State officers. (People v. Loeffler, 175 Ill. 585.) The definition was broad enough to embrace within its terms all officers of units of local government, but it had no reference to them. It served as a guide to the General Assembly in making its appropriations, so that it could determine who were officers of the State and who were employees, and thereby comply with the constitutional provision prohibiting an increase in the salaries of State officers during their present term of office. Ill. Const.,

art. V, sec. 23 [1870]; People v. Brady, 302 Ill. 576; Fergus v. Russel, 270 Ill. 304, 322.

In Fergus v. Russel, 270 Ill. 304, at page 322, the Illinois Supreme Court construed section 24 of article V as follows:

> "* * * This is an explicit definition and must serve as the only guide of the legislature in making appropriations for the salaries of the officers of the State government. This definition contains two essential elements, both of which must be present in determining any given position to be an office: (1) The position must be a public one, created either by the constitution or by law; and (2) it must be a permanent position with continuing duties. To determine whether the first element is present we have but to look to our constitution and our statutes to see whether the particular position under consideration has been created by the constitution or by law. An office is created by law only as a result of an act passed for that purpose. The mere appropriation by the General Assembly of money for the payment of compensation to the incumbent of a specified position does not have the effect of creating an office or of giving such incumbent the character of an officer, (People v. McCullough, 254 Ill. 9,) as an office cannot be created by an appropriation bill. To ascertain whether the second element is present it is necessary to determine the character of the position. This is not determined by the method in which the occupant of holder of the position is selected, - whether

> by appointment or election. If the duties of the office are continuing and it is necessary to elect or appoint a successor to the several incumbents, then the second element is present whether the incumbent be selected by appointment or by election, and whether the incumbent be appointed during the pleasure of the appointing power or be elected for a fixed term. * * *"

It should be noted that section 24 of article V of the Illinois Constitution of 1870 has no counterpart in the Illinois Constitution of 1970.

The fact that one occupying a position is compelled by law to give a bond for the faithful performance of his duties is some indicia that the position is a public office. People v. Brady, 302 Ill. 576, 582; Martin v. Smith, 293 Wisc. 314, 332, 1 N.W. 2d 163, 172; State ex rel. Barney v. Hawkins, 79 Mont. 506, 528, 257 P. 411, 418; 53 A.L.R. 595, 608; 140 A.L.R. 1076, 1091.

In addition, the fact that one occupying a position must subscribe to the oath required by the Constitution may betoken a public office. People v. Brady, 302 Ill. 576, 582; Martin v. Smith, 293 Wisc. 314, 332, 1 N.W. 2d 163, 172; Kingston Associates v. LaGuardia, 156 Misc. 116, 281 N.Y.S. 390, aff'd 246 App. Div. 803; 285 N.Y.S. 19; 53 A.L.R. 595,

608; 140 A.L.R. 1076, 1092.

To summarize, there are two indispensable requirements of a public office. First, a position must possess a delegation of a portion of the sovereign power of the government. Second, the position must be created by the Constitution or by law and must be of an enduring nature and not subject to abolition by whim of superior officials. Other evidence that a position is a public office include whether the individual occupying the position must give bond or take an oath.

As I have indicated, supra, C.I.A.A., Inc. is a not-for-profit corporation. It is not a statutorily created governmental unit; nor is it a body politic. A director of C.I.A.A., Inc. is not required to post a bond; nor need he subscribe to any oath. The position of directorship is abolished upon dissolution of the corporation.

Funding support for C.I.A.A., Inc. comes directly from the Illinois Department on Aging, which is the single State agency for receiving and dispensing Federal funds made available under the "Older Americans Act of 1965". (42 U.S.C.A.

sec. 3001 et seq.) (See, "Area Plan for Programs on Aging Under Title III of The Older Americans Act of 1965, as Amended for the Central Illinois Agency on Aging, Inc.", October 1973, an official government document on file with the Illinois Administration on Aging, Exhibit C-1.) However, C.I.A.A., Inc. is not delegated any of the statutory powers conferred upon the Illinois Department on Aging with regard to the service area of the subject counties (Fulton, Marshall, Stark, Tazewell, Woodford and Peoria). Therefore, it is my conclusion that the position of director C.I.A.A., Inc. is not a public office, and no question of incompatibility exists.

It is, therefore, my opinion that an individual who serves as both a county board member and as director of C.I.A.A., Inc., a not-for-profit corporation, would not be in violation of section 1 of "AN ACT to prevent fraudulent and corrupt practices * * *", supra, because first, the position of director of C.I.A.A., Inc. is not elected or appointed by the county board, and second, there can be no

incompatibility of office because the position of director of C.I.A.A., Inc. is not a public office.

Very truly yours,

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

NEIL F. HARTIGAN
ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD
62706

July 28, 1989

I - 89-035

COMPATIBILITY:
Village Board Member and Director
of Not For Profit Corporation
Promoting Economic Development

Honorable Millard S. Everhart
State's Attorney, Cumberland County
Post Office Box 387
Toledo, Illinois 62468

Dear Mr. Everhart:

I have your letter wherein you inquire whether the office of village board member is compatible with service as a director of a private, not for profit organization engaged in attracting new businesses to the village. Because of the nature of your inquiry, I will respond informally.

Your particular inquiry concerns the Greenup village board and Greenup Industries, a not for profit corporation. In People ex rel. Myers v. Haas (1908), 145 Ill. App. 283, it was held 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 of the duties of the other.

The doctrine of incompatibility applies only to public offices (1975 Ill. Att'y Gen. Op. 287). A public office is a public position created by the constitution or by law, continuing during the pleasure of the appointing power or for a fixed time, with a successor necessarily being elected or appointed. (Bunn v. Illinois (1867), 45 Ill. 397; Fergus v. Russell (1915), 270 Ill. 304.) An indispensable requirement of a public office is that the duties of the incumbent involve an exercise of some portion of the sovereign power. People v. Brady (1922), 302 Ill. 576; Olson v. Scully (1921), 296 Ill. 418.

It is clear that village trustees are public officers. From the information you have provided, it appears that Greenup Industries is a private, not for profit corporation which exercises no part of the sovereign power, and which was not created by the constitution or by law. Therefore, it is clear that a director of the non-profit organization is not a public office, and, consequently, that the doctrine of incompatibility is not applicable to the positions in question.

Moreover, it appears that section 3-14-4 of the Illinois Municipal Code (Ill. Rev. Stat. 1987, ch. 24, par. 3-14-4), which prohibits a municipal officer from having a pecuniary interest in any contract or work for which payment from the treasury or by special assessment will be made, will not be violated in this circumstance. This provision does not apply to proscribe a public officer from membership in a not for profit association organized for the public welfare, with which the public entity may have dealings. (Furlong v. South Park Commissioners (1930), 340 Ill. 363, 370.) In the Furlong case, the court noted that park commissioners who were also trustees of a not for profit corporation received no compensation for their services to the not for profit corporation, and that the corporation had no capital stock and paid no dividends, implying that the trustees therefore had no pecuniary interest in its receipt of funds from the park commission. Members of the Greenup village board who are also directors of Greenup Industries would appear to be in an analogous position.

I would suggest, however, that there may be instances in which board members holding positions as directors of Greenup Industries might wish to refrain from voting on village matters relating to Greenup Industries or its activities, in order to avoid an appearance of impropriety to the public. Notwithstanding this suggestion, it does not appear that one

person would be prohibited by law from holding these positions simultaneously.

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
Chief, Opinions Division