WILLIAM J. SCOTT
ATTORNEY GENERAL
STATE OF ILLINOIS
500 SOUTH SECOND STREET
SPRINGFIELD
62706

September 24, 1975

FILE NO. NP-962

OFFICERS:
Township Auditor and Township
Supervisor are Incompatible with
City Commissioner

-

Honorable Daniel Dougherty
Chairman
Committee on Local Government
Room 317 State House
Springfield, Illinois

Dear Senator Dougherty:

I have your letter wherein you state in pertinent part:

> "Can a township auditor or a township supervisor also serve in the capacity of an elected city commissioner?"

It is my understanding that your inquiry does not involve officers of a township organized pursuant to "AN ACT to authorize county boards in counties under township organization, to organize certain territory situated therein as a town, and to provide for annexation of territory to and the disconnecting of territory from said town". (Ill. Rev. Stat.

NP 962

1973, ch. 139, pars. 127 et seq.) It is my further understanding that none of the townships with which you are concerned are subject to the provisions of "AN ACT concerning townships lying wholly within cities of more than 50,000 population." Ill. Rev. Stat. 1973, ch. 139, pars. 134 et seq.

The common law doctrine of incompatibility of public offices precludes one person from simultaneously holding two incompatible public offices. (Dyer's Case, 1 Dyer Rep. 158.b, 73 Eng. Rep. 344 (K.B. 1557); Milward v. Thatcher, 2 Term Rep. 81, 100 Eng. Rep. 45 (K.B. 1787); Eddy v. County Commissioners of Peoria, 15 Ill.376 (1854); People v. Hanifan, 96 Ill. 420; People ex rel. Myers v. Haas, 145 Ill. App. 283.) In case of common law incompatibility, acceptance of the second office is ipso facto a resignation of the first. (Eddy v. County Commissioners of Peoria, 15 Ill. 376 (1854); People v. Hanifan, 96 Ill. 420; Packingham v. Harper, 66 Ill. App. 96; People ex rel. Myers v. Haas, 145 Ill. App. 283.) This doctrine does not forbid plural office holding per se but applies only to holding incompatible offices.

As indicated above, this doctrine has its roots

in the common law of England, which, unless altered by the General Assembly, is in force in Illinois pursuant to "AN ACT to revise the law in relation to the common law". (Ill. Rev. Stat. 1973, ch. 28, par. 1.) Presently, there are no constitutional or statutory provisions declaring the offices that are the subject of your inquiry to be compatible or incompatible.

The principal public policy consideration that is promoted by the doctrine of incompatibility of public offices is the insurance of the undivided loyalty and impartiality of the incumbent officeholder. (People ex rel. Ryan v. Green, 58 N.Y. 295, 304 (1874); Regell v. Worcester County, (Mass. 1949) 84 N.E. 2d 123, 134; People ex rel. Myers v. Haas, 145 Ill. App. 283.) A conflict in the duties of the offices would cause the incumbent to choose one office over the other. Also, if one office is superior to the other, the incumbent may be in a position of supervising himself. In Reilly v. Ozzard, 166 A. 2d 360 (N.J. 1960) at page 367, the New Jersey Supreme Court described the doctrine of incompatibility as follows:

> "* * * Incompatibility is usually understood to mean a conflict or inconsistency in the functions of an office. It is found where in the established governmental scheme one office is subordinate to another, or subject to its supervision or control, or the duties clash, inviting the incumbent to prefer one obligation to another."

Plural office holding in Illinois has a long history. There have been several constitutional provisions restricting plural office holding. (Ill. Const., art. II, secs. 19 and 25 [1818]; Ill. Const., art. III, sec. 29 and art. V, sec. 10 [1848]; Ill. Const., art. IV, sec. 3, art. V, sec. 5, art. VI, sec. 16 [1870]; Ill. Const., art. VI, sec. 13 [1970].) My predecessors and I have published over 250 opinions upon the subject of plural office holding.

The earliest Illinois case applying the doctrine of incompatibility appears to be Eddy v. County Commissioners of Peoria, 15 Ill. 376 (1854). In Eddy, it was held that a precinct justice of the peace impliedly resigned that office when he accepted the incompatible office of township justice of the peace.

In People v. Hanifan, 96 Ill. 420, the common law doctrine of incompatibility operated to effect an implied resignation of an alderman from his office under a special charter when he was elected to and accepted the same office under a general incorporation act.

In People ex rel. Myers v. Haas, 145 Ill. App. 283, it was held that a State senator who was elected to a court clerkship resigned the office of senator when he accepted the court clerkship. In that case the Constitution of 1870 prohibited a judge or court clerk from holding a seat in the General Assembly. (Ill. Const., art. IV, sec. 3 [1870].) The court stated:

> "If there be incompatibility in the holding of the two offices, then Mr. Galpin must be held to have resigned the senatorship. Incompatibility, in this connection, is present when the written law of a state specifically prohibits the occupant of either one of the offices in question from holding the other and, also, where the duties of either office are such that the holder of the office cannot in every instance, properly and fully, faithfully perform all the duties of the other office. This incompatibility may arise

> from multiplicity of business in the one office or the other, considerations of public policy or otherwise. Bacon's Abridgement Vol. 7, Tit. 'Officers', K.; Rex v. Tizzard, 9 B. & C., 418; 1 Dillon on Mun. Corp., p. 308-9, secs. 225-7 and note 4; McCrary on Elec., secs. 336 et seq. 4th Ed.; Mechem on Publ Off., sec. 429; Dickson v. People, 17 Ill. 191, People ex rel v. Hanifan, 96 Ill. 420; Packingham v. Harper, 66 Ill. App. 96." (145 Ill. App. 283, 286-87.)

The mere possibility of a conflict in the duties of offices is sufficient to make them incompatible. It is no answer to say that a conflict in duties does not now exist or may never arise or even that the occurrence of a conflict could only occur on a rare occasion. (McDonough v. Roach, 171 A. 2d 307, 309 (N.J. 1961).) The New Jersey Supreme Court in Jones v. MacDonald, 162 A. 2d 817 (N.J. 1960) eloquently states that it is the existence of the potential for a conflict in duties that renders the offices incompatible. At page 820, the New Jersey Supreme Court states:

> "It is no answer to say that the conflict in duties outlined above may never in fact arise. It is enough that it may in the regular operation of the statutory plan. 'If the duties are such that placed in one person they might disserve the public interests, or if the respective offices might or will conflict even on rare occasions, it is sufficient to declare them legally incompati-

> ble.' DeFeo, supra (17 N.J. at p. 189, 110 A. 2d at p. 556). See Wescott v. Scull, supra (87 N.J.L. at p. 418, 96 A. at p. 411). Nor is it an answer to say that if a conflict should arise, the incumbent may omit to perform one of the incompatible roles. The doctrine was designed to avoid the necessity for that choice. 'It is immaterial on the question of incompatibility that the party need not and probably will not undertake to act in both offices at the same time. The admitted necessity of such a course is the strongest proof of the incompatibility of the two offices.' 42 Am. Jur., Public Officers, § 70, p. 936."

You inquire as to whether a township supervisor or township auditor may simultaneously serve as a city commissioner. A township supervisor and township auditor are elected pursuant to section 1 of article 7 of "AN ACT to revise the law in relation to township organization". (Ill. Rev. Stat. 1974 Supp., ch. 139, par. 60.) The duties of township supervisor are stated generally in article 11 of "AN ACT to revise the law in relation to township organization". (Ill. Rev. Stat. 1973, ch. 139, par. 100 et seq.) The township supervisor is an ex officio member of the board of town auditors. (Ill. Rev. Stat. 1973, ch. 139, par. 117.) The duties of the board of town auditors are generally set forth

in article 12 of "AN ACT to revise the law in relation to township organization". Ill. Rev. Stat. 1973, ch. 139, pars. 117 et seq.

Article 4 of The Illinois Municipal Code pertains to the commission form of municipal government. Generally speaking, the commission form of municipal government provides for the election of a mayor and four commissioners. (Ill. Rev. Stat. 1973, ch. 24, par. 4-3-1.) Every municipality which has the commission form of government is governed by a council consisting of the mayor and four commissioners. (Ill. Rev. Stat. 1973, ch. 34, par. 4-5-1.) The powers and duties of the council are provided for in section 4-5-2 of the Illinois Municipal Code. (Ill. Rev. Stat. 1973, ch. 24, par. 4-5-2.) Section 4-5-2 reads:

> "§ 4-5-2. The council and its members shall possess and exercise all executive, administrative, and legislative powers and duties now possessed and exercised by the executive, legislative, and administrative officers in municipalities which are treated as properly incorporated under this Code or which hereafter incorporate under this Code, except that in municipalities under the commission form of municipal government, the board of local improvements provided

> for by Article 9 shall remain a separate and distinct body, with all the rights, powers, and duties contained in Article 9.
>
> The executive and administrative powers and duties in municipalities under the commission form of municipal government shall be distributed among 5 departments, as follows:
>
> 1. Department of public affairs.
> 2. Department of accounts and finances.
> 3. Department of public health and safety.
> 4. Department of streets and public improvements.
> 5. Department of public property.
>
> The council, by ordinance, (1) shall determine the powers of and duties to be performed by each department and shall assign them to the appropriate departments; (2) shall prescribe the powers and duties of officers and employees, and may assign officers and employees to one or more of the departments; (3) may require an officer or employee to perform duties in 2 or more departments; and (4) may make such rules and regulations as may be necessary or proper for the efficient and economical conduct of the business of the municipality."

I am of the opinion that township supervisor, township auditor and city commissioner are all public offices.

The section on Intergovernmental Cooperation in the Illinois Constitution of 1970 (Ill. Const., art. VII, sec. 10) and the Intergovernmental Cooperation Act (Ill. Rev. Stat. 1973, ch. 127, pars. 741 et seq.) greatly expanded the power of the township and the city to contract with each other. Section 2

of that Act (Ill. Rev. Stat. 1973, ch. 127, par. 742) provides:

> "For the purpose of this Act:
>
> (1) The term 'public agency' shall mean any unit of local government as defined in the Illinois Constitution of 1970, * * *"

Section 3 of the Intergovernmental Cooperation Act (Ill. Rev. Stat. 1973, ch. 127, par. 743) provides:

> "Any power or powers, privileges or authority exercised or which may be exercised by a public agency of this State may be exercised and enjoyed jointly with any other public agency of this State and jointly with any public agency of any other state or of the United States to the extent that laws of such other state or of the United States do not prohibit joint exercise or enjoyment."

Section 5 of the same Act (Ill. Rev. Stat. 1973, ch. 127, par. 745) provides:

> "Any one or more public agencies may contract with any one or more other public agencies to perform any governmental service, activity or undertaking which any of the public agencies entering into the contract is authorized by law to perform, provided that such contract shall be authorized by the governing body of each party to the contract. Such contract shall set forth fully the purposes, powers, rights, objectives and responsibilities of the contracting parties."

Prior to the adoption of the new Constitution and the enactment of the Intergovernmental Cooperation Act, the

power of a municipality and a township to enter into contracts was restricted to limited purposes in narrowly specified areas. Now the two units of government may contract in extremely broad areas of activity not permitted prior to July 1, 1971, the effective date of the 1970 Constitution.

The governing body of a city under the commission form of government is the council. (Ill. Rev. Stat. 1973, ch. 24, par. 1-1-2(2).) Thus, the intergovernmental cooperation provisions of the new Constitution and the Intergovernmental Cooperation Act grant broad powers to the council and, therefore, to a council member to vote upon contracts that might be entered into with a township of which he is the supervisor or auditor.

The general corporate powers of the township to make contracts are exercised by the town electors at the town meeting. (Ill. Rev. Stat. 1973, ch. 139, pars. 38 and 39; Gregg v. Town of Bourbonnais, 327 Ill. App. 253.) Since township officers and boards have only those powers which are conferred on them by statute (Ill. Const., art. VII, sec. 8; Anders v. Town of

Danville, 45 Ill. App. 2d 104), it would appear that the board of township auditors do not have the power to enter into intergovernmental agreements pursuant to the Intergovernmental Cooperation Act.

However, recent statutory amendments have granted broad contract powers directly to the board of town auditors. Specifically, Public Act 78-1189, effective September 5, 1974, amended section 20 of article 13 of "AN ACT to revise the law in relation to township organization". (Ill. Rev. Stat. 1974 Supp., ch. 139, par. 126.10.) As amended, that section reads as follows:

> "The board of town auditors may enter into any cooperative agreement or contract with any other governmental entity, not-for-profit corporation, or non-profit community service association with respect to the expenditure of township funds, or funds made available to the township under the federal State and Local Fiscal Assistance Act of 1972, to provide any of the following services to the residents of the township:
>
> 1. Ordinary and necessary maintenance and operating expenses for:
> (a) public safety (including law enforcement, fire protection, and building code enforcement),
> (b) environmental protection (including sewage

disposal, sanitation, and pollution abatement),
(c) public transportation, (including transit systems and streets and roads),
(d) health,
(e) recreation,
(f) libraries, and
(g) social services for the poor and aged; and

2. Ordinary and necessary capital expenditures authorized by law.

In order to be eligible to receive funds from the township under this Section any private not-for-profit corporation or community service association shall have been in existence at least one year prior to the receipt of the funds."

It should be pointed out that the above amendment has granted the power to the board of town auditors to expend not only Federal revenue sharing funds, but also its own township funds in areas where previously the township had no such power. (See, Ill. Att'y. Gen. Op. S-693, February 7, 1974; Ill. Att'y. Gen. Op. S-838, November 26, 1974.) Note also that the board of town auditors rather than the town electors are given power to enter into the spedified agreements.

Both city and township can each now contract in many of the same areas. Compare the township contract powers listed

in Public Act 78-1189 above with the following functions of the city:

(1) Public safety: Police Protection and Public Order (Ill. Rev. Stat. 1973, ch. 24, pars. 11-1-1 et seq.); Fire Protection (Ill. Rev. Stat. 1973, ch. 24, pars. 11-6-1 et seq.)

(2) Environmental Protection: Disposal of refuse, garbage and ashes (Ill. Rev. Stat. 1973, ch. 24, par. 11-19-1 et seq.); Air Contamination Control (Ill. Rev. Stat. 1973, ch. 24, par. 11-19.1-11); Sewage Treatment and Disposal (Ill. Rev. Stat. 1973, ch. 24, pars. 11-142-1 et seq.; Ill. Rev. Stat. 1973, ch. 24, pars. 11-146-1 and 11-147-1 et seq.)

(3) Public Transportation: Local Transportation System (Ill. Rev. Stat. 1973, ch. 24, pars. 11-120-1 et seq.)

(4) Health: Tuberculosis Sanitariums (Ill. Rev. Stat. 1973, ch. 24, pars. 11-29-1 et seq.); Community Mental Health Boards (Ill. Rev. Stat. 1973, ch. 24, pars. 11-29.1 et seq.); Health Boards (Ill. Rev. Stat. 1973, ch. 24, pars. 11-16-1 and 11-17-1 et seq.)

(5) Recreation: Harbors for recreational use (Ill. Rev. Stat. 1973, ch. 24, par. 11-92-1 et seq.); Swimming Pools, artificial ice skating rinks and golf courses (Ill. Rev. Stat. 1973, ch. 24, par. 11-94-1 et seq.); Playground and Recreation Centers (Ill. Rev. Stat. 1973, ch. 24, par. 11-95-1 et seq.)

(6) Libraries: (Ill. Rev. Stat. 1973, ch. 81, par. 1-1 et seq.)

In all of the above areas the city council, under the commission form of municipal government, and the board of township auditors may enter into contracts with each other to provide a particular service to the people of the township and the city. In addition, the contractual scheme may allow more township funds, including Federal revenue sharing, to be funneled to city projects, or vice versa. A conflict in duties may arise by the simultaneous holding of the office of member of the board of township auditors and member of the council of a city under the commission form of government. A person holding both offices might have to consider and vote upon: What services shall be provided to the people of the city and the township? Which governmental entity should provide the service? What terms shall be contained in a contract between the city and the township?

In attempting to make decisions in each of the above areas, the dual officeholder cannot fairly represent both units of government. In particular, where the service

is to be provided pursuant to a contract entered into between the city and the township, the dual officer would be called on to negotiate a contract which is most advantageous to both parties to the bargain.

In McDonough v. Roach, (N.J. 1961) 171 A. 2d 307, the Supreme Court of New Jersey held that the offices of mayor of a town and member of a board of chosen freeholders of a county were incompatible. After discussing the various statutory provisions which authorize the county to contract with the town, the court stated at page 309:

> "In all of these matters the terms upon which the project is to be pursued are left to the agreement of the public bodies. In the negotiations the county board is bound to consider the interests of all of its citizens while the local governing body has a like obligation to the citizenry of the municipality alone. No man, much less a public fiduciary, can sit on both sides of a bargaining table. He cannot in one capacity pass with undivided loyalty upon proposals he advances in his other role. * * *" (See, also, People ex rel. Kraemer v. Bagshaw, 130 P. 2d 243 (Cal. App. 1942).)

From the foregoing, I must conclude that the offices of township supervisor and township auditor are incompatible with the office of city commissioner.

It is well settled in Illinois that the acceptance of an incompatible office by the incumbent of another office will be regarded as a resignation or vacation of the first office. (People v. Bott, 261 Ill. App. 261; People ex rel. Myers v. Haas, 145 Ill. App. 283.) Formal resignation, or ouster by legal proceeding, is not required. Packingham v. Parker, 66 Ill. App. 96, 100.

As I have stated, my opinion that the offices in question must now be considered incompatible is based upon the cumulative development of the law with regard to townships and cities since 1970. The combination of these developments, particularly the enactment of Public Act 78-1189 granting additional and broader powers and functions to townships in areas which overlap the already existing powers and functions of cities, requires the conclusion that on the effective date of Public Act 78-1189 (September 5, 1974) the offices became incompatible.

Statutes should be construed so as to give them prospective operation unless legislative intention to give them retrospective operation is clear and undoubtable.

(Quincy Training Post, Inc. v. The Dept. of Revenue, 12 Ill. App. 3d 725; Kersten v. Voight, 164 Ill. 314; Capone v. The U.S., 51 F. 2d 609.) It has been held that if a person holding an office is not ineligible for another office at the time he is elected to the latter, he is not rendered ineligible by a subsequent statute which makes the holding of the other office grounds for ineligibility. The statute must not be given the drastic effect of retroactively removing an officer who was competent to serve in an office at the time of the election or appointment under the previous statute. Tucker v. The State, (Miss. 1907) 42 So. 798; accord, Baillie v. The Town of Medley, (Fla. 1972) 262 So. 2d 693, 697; State v. Mucci, (Ohio 1967) 225 N.E. 2d 238, 241.

Therefore, it is my opinion that anyone who performed the duties of township supervisor or township auditor and the duties of city council member in a commission form of government prior to September 5, 1974, may retain both offices until the term of one of the offices expires or until actual vacation of either office, whichever first occurs. It is my further opinion

that any township supervisor or township auditor who has assumed the office of city commissioner, or any city commissioner who has assumed the office of township supervisor or township auditor, by election or appointment, after September 5, 1974, has ipso facto resigned and vacated the prior held office.

Very truly yours,

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