

# Legal Q & A

## Incompatibility of Office

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This monthly column examines issues of general concern to municipal officers. It is not meant to provide legal advice and is not a substitute for consulting with your municipal attorney. As always, when confronted with a legal question, contact your municipal attorney as certain unique circumstances may alter any conclusions reached herein.

Within the last several months, newly elected local public officials throughout the state of Illinois have been sworn-in and are settling in to their new positions. Most elected officials maintain their occupational position while holding the office for which they were elected. Many elected officials, for various reasons however, may be offered and tempted to accept other appointed or elected positions. Unfortunately, with the array of appointed and elected offices, a “conflict of duties” (as opposed to a “conflict of interest”) may arise when an elected official holds two or more of these offices simultaneously.

NOTE: This is an update to a column we published in the July 1999 issue of the *Illinois Municipal Review* on Incompatibility of Office.

*Q: Under Illinois law, what constitutes an incompatibility of office?*

A: An incompatibility of office may occur in a variety of combinations. However, incompatibility arises where the Constitution or a statute specifically prohibits the occupant of one office from holding another, or where the duties of either office are such that the holder of one cannot, in every instance, properly and fully, faithfully discharge all the duties of the other.<sup>1</sup> Furthermore, the acceptance of an incompatible office by the incumbent of another office constitutes an *ipso facto* (by the fact itself) resignation of the first office.<sup>2</sup>

Section 2 of the Public Officer Prohibited Activities Act provides:

No alderman of any city, or member of the board of trustees of any village, during the term of office for which he or she is elected, may accept, be appointed to, or hold any office by the appointment of the mayor or president of the board of trustees, unless the alderman or board member is granted a leave of absence from such office, or unless he or she first resigns from the office of alderman or member of the board of trustees, or unless the holding of another office is authorized by law. . . Any appointment in violation of this Section is void.<sup>3</sup>

The Illinois Municipal Code also prohibits all elected and appointed officials from holding other offices. Section 3.1-15-15 provides

A mayor, president, alderman, trustee, clerk, or treasurer shall not hold any other office under the municipal government during the term of that office, except when the officer is granted a leave of absence from that office or except as otherwise provided . . .<sup>4</sup>

The doctrine of incompatibility of office was first developed in the First Illinois Appellate District in People ex rel. Myers v. Haas.<sup>5</sup> In Haas, a sitting state senator ran for and won the election as clerk of the Municipal Court of the City of Chicago. The court held that not only did the Illinois Constitution expressly forbid a member of the General Assembly from holding another office, but the duties of each office are such that the holder of one cannot, in every instance, fully and faithfully discharge all the duties of the other. Therefore, the office of clerk of the Municipal Court of the City of Chicago was incompatible with the office of state senator. As a result, he resigned as state senator through implication when he accepted the office as the municipal court clerk.

Since Haas, there have been many questions regarding the incompatibility of office doctrine. This is evidenced by the numerous Attorney General opinions offering a variety of examples of offices that are incompatible with one another. For example, the Attorney General has opined that the office of city alderman (or a village trustee) is incompatible with the offices of park district president,<sup>6</sup> school board member,<sup>7</sup> and county zoning administrator.<sup>8</sup> Other offices that would be considered incompatible with the office of alderman/trustee are board of review member,<sup>9</sup> county board member,<sup>10</sup> and library district trustee.<sup>11</sup> The list is rather long, and there are offices that are incompatible with that of a mayor/village president and other offices. According to the Attorney General the vested interest of each office causes a conflict with the other by directly or indirectly affecting the vested interests of the other which makes them incompatible with one another.

For example, in People ex rel. Fitzsimmons v. Swailes,<sup>12</sup> the Illinois Supreme Court examined the compatibility of the offices of county board member and township assessor. In Swailes, the defendant held both of these elected offices simultaneously for a number of years. The Court noted that the defendant had the authority, as a county board member, to act on the salary and budget of the supervisor of assessments. The Court further noted that the duties of the assessor are subject to the approval of the board of review, and as county board member, the defendant had the authority to act on the appointments to the board of review. Thus, the Court determined that the office of township assessor was subordinate to the office of county board member. Therefore, the Court held that as a result of the duties of the assessor, the two offices were incompatible.

The Third Appellate District followed the reasoning of Swailes in People ex rel. Teros v. Verbeck.<sup>13</sup> The appellate court in Verbeck examined whether the appointed position of deputy county coroner was incompatible with the elected office of county board member. In Verbeck, the defendant was appointed to the position of deputy county coroner following his election as county board member and held both positions simultaneously. The appellate court noted that common law incompatibility may be established where the defendant in one position has the authority to act upon the appointment, salary, and budget of his superior in the second position.<sup>14</sup>

The facts of the case showed that one of the many duties of the county board was to provide the county coroner's office with the funds necessary for compensation and operating expenses. Furthermore, the county coroner, subject to budgetary limitations established by the county board, determines the salary of the deputy coroner. Therefore, the appellate court determined that the two offices were fiscally incompatible.

Later, however, the Third Appellate District upheld the compatibility of an elected municipal office when held simultaneously with an appointed state office in People v. Claar.<sup>15</sup> In Claar, the defendant was appointed to the Board of Directors of the Illinois Toll Highway Authority after first being elected Mayor of the Village of Bolingbrook. The appellate court in this case noted that, under the language of Haas, it is necessary to establish a "conflict of duties" to show the incompatibility of simultaneous offices. Although the duties of each office had the potential to present a "conflict of interest," this was not sufficient to establish incompatibility of offices, the court noted. Furthermore, the court determined that neither office was subordinate to the other. Therefore, the court held that the elected municipal office of Mayor was not incompatible with the appointed state office of the Board of Directors of the Authority.

In conclusion, when statutory or Constitutional authority does not exist, an incompatibility of office arises when the duties of each office are such that the holder of one cannot, in every instance, fully and faithfully discharge all the duties of the other. Once an incompatible office is accepted, the first office or position is automatically relinquished. An incompatibility of office can be determined by examining whether the vested interests of one office directly or indirectly affect the vested interests of the other office. If one office is subordinate to the other, an incompatibility exists. Therefore, all elected or appointed municipal officials should carefully examine any other elected or appointed office, and consult with the municipal attorney, to ensure an incompatibility does not exist, or an official may find him or herself resigning an office without realizing it.

(NOTE: Pursuant to statutory authority, city aldermen or village trustees may be volunteer firefighters and receive compensation for that service,<sup>16</sup> and firefighters can run for and serve in public office simultaneously<sup>17</sup>).

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<sup>1</sup> 177 Ill. Att'y. Gen. Op. 653 (1985); and People ex rel. Myers v. Haas, 145 Ill. App. 283, 286 (1st Dist. 1908).

<sup>2</sup> Id.; and People v. Bott, 261 Ill. App. 261, 265 (2nd Dist. 1931).

<sup>3</sup> 50 ILCS 105/2

<sup>4</sup> 65 ILCS 5/3.1-15-15

<sup>5</sup> 145 Ill. App. 283 (1st Dist. 1908).

<sup>6</sup> Ill. Att'y. Op. No. 85-015 (1985).

<sup>7</sup> Ill. Att'y. Op. No. 85-019 (1985).

<sup>8</sup> Ill. Att'y. Op. No. 82-020 (1982).

<sup>9</sup> Ill. Att'y. Op. No. I-95-014 (1995).

<sup>10</sup> Ill. Att'y. Op. No. S-419 (1972).

<sup>11</sup> Ill. Att'y. Op. No. I-05-003 (2005).

<sup>12</sup> 101 Ill. 2d 458, 463 N.E.2d 431, 79 Ill. Dec. 90 (1984).

<sup>13</sup> 155 Ill. App. 3d 81, 506 N.E.2d 464, 106 Ill. Dec. 757 (3rd Dist. 1987).

<sup>14</sup> Swailles, 101 Ill. 2d at 469, 463 N.E.2d at 436, 79 Ill. Dec. at 95.

<sup>15</sup> 293 Ill. App. 3d 211, 687 N.E.2d 557, 227 Ill. Dec. 307 (3rd Dist. 1997).

<sup>16</sup> 50 ILCS 105/2

<sup>17</sup> 50 ILCS 135/12.

