

OFFICE OF THE ATTORNEY GENERAL

Official Opinion No. 2009-1

June 1, 2009

OFFICIAL OPINION 2009-1

The Honorable Frank Mrvan
Indiana Senate
200 West Washington Street
Indianapolis, Indiana 46204

Re: Dual Office Holding (Hammond City Council/Hammond Port Authority)

Dear Senator Mrvan:

You requested a legal opinion on the issue of whether the appointment of a Hammond City Council member to the Board of Directors of the Hammond Port Authority would violate the prohibition against dual office holding found at Article 2, Section 9 of the Indiana Constitution.

Brief Answer

A member of a city council and a member of a board of directors of a local government port authority are both lucrative officeholders for purposes of Article 2, Section 9 of the Indiana Constitution. Simultaneously holding both offices would violate the constitutional prohibition against dual office holding.

Analysis

1. "Officeholder"

Article 2, Section 9 of the Indiana Constitution states, in pertinent part, "... no person may hold more than one lucrative office at the same time...." The dual office prohibition was adopted by the framers of the Indiana Constitution in order to prevent the consolidation of power in a small number of government officials. See generally, Gregory Zoeller, *Dual Office Analysis: Can the Legislature Carve out Exceptions*, 37 Ind. L. Rev. 733, 736-37 (2004).

An "office," for purposes of Article 2, Section 9, means "a position for which the duties include the performance of some sovereign power for the public's benefit, are continuing, and are created by law instead of contract." *Thompson v. Hays*, 867 N.E.2d 654, 657 (Ind. Ct. App. 2007) (citations omitted). A person is generally considered a public officer if the person holds an elective or appointive position with duties that are prescribed by statute. *Mosby v. Bd. of Com'rs of Vanderburgh Co.*, 186 N.E.2d 18, 20 (Ind. Ct. App. 1962). Officers are "charged with duties delegated to them under the state government, with duties imposed upon them by statute, and are subject to legislative control." *Wells v. Peden*, 94 N.E. 321, 322 (Ind. 1911). "An officer is also distinguished by his power of supervision and control and by his liability to be called to account as a public offender in case of malfeasance in office." *Mosby*, 186 N.E.2d at 21.

City and county officials whose duties are conferred by statute for a public purpose are generally considered officeholders for purposes of Article 2, Section 9. See *Howard v. Shoemaker*, 35 Ind. 111 (Ind. 1871) (mayor of a city is a lucrative office); *Gaskin v. Beier*, 622 N.E.2d 524, 528 (Ind. Ct. App. 1993) (trustee of town board is a lucrative office); *Pipe Creek School Tp. v. Hawkins*, 97 N.E. 936 (Ind. Ct. App. 1912) (township advisory board members are lucrative officeholders); *Dailey v. State*, 8 Blackf. 329 (Ind. 1846) (county recorder and county commissioner are lucrative offices).

However, if the duties of a local officer are purely municipal in nature and the officer has no duties to perform under the laws of the state, such offices are not lucrative offices within the meaning of Article 2, Section 9. See *Platt v. Kirk*, 44 Ind. 401 (Ind. 1873) (local office is not a lucrative office for purposes of Art. 2, Sec. 9 when the officer derives power from a city charter and not state law); *Kiser v. Millspaugh*, 175 N.E.2d 13, 15 (Ind. 1961) (county chairman of political party does not perform any of the functions of the legislative, judicial or executive branches of state government and is not a public officeholder).

2. "Lucrative Office"

"Lucrative," for purposes of Article 2, Section 9, means "an office to which there is attached a compensation for services rendered." *Book v. State Office Bldg. Commission*, 149 N.E.2d 273, 289 (Ind. 1958). Lucrativeness does not depend on the amount of compensation affixed to the office. *Id.* As long as compensation is affixed to the performance of the office's duties, the office is considered lucrative. *Dailey*, 8 Blackf. 329. Only pure reimbursement for actual expenses incurred in connection with the office holder's duties does not constitute compensation. *Book*, 149 N.E. 2d at 289.

3. Common Council Members

The legislature has provided for the establishment of a common council as the legislative body of second and third class cities. Ind. Code § 36-4-6. Members of the common council are elected under Indiana Code chapter 3-10-6 for a term of four (4) years. The legislative power of a city is vested in its legislative body. Ind. Code § 36-4-4-4. The statute requires that the common council adopt an ordinance to divide the city into six (6) districts and specifies the boundaries and other criteria for establishing the required districts. Ind. Code § 36-4-6-3.² The legislative body is composed of six (6) members elected from the established districts and three (3) at-large members. Ind. Code § 36-4-6-3(h). Each member is entitled to receive compensation for performing the duties of office. Ind. Code § 36-4-7-2.

Article 36-4 sets out various duties and powers of the common council. Examples of common council powers and duties include: all powers and duties that are legislative in nature (Ind. Code § 36-4-4-4(a)); managing the finances of the city (Ind. Code § 36-4-4-4(b)); expelling a council member for violation of an official duty or declaring a member's seat vacant (Ind. Code § 36-4-6-6(1) & (2)); adopting rules to govern proceedings (Ind. Code § 36-4-6-6(3)); holding regular meetings (Ind. Code § 36-4-6-7); passing ordinances, orders, resolutions and motions for the government of the city, control of the city's property and finances, and the appropriation of money (Ind. Code § 36-4-6-18); making loans of money and issuing bonds (Ind. Code § 36-4-6-19); exercising investigative powers (Ind. Code § 36-4-6-21); hiring attorneys and legal research assistants (Ind. Code § 36-4-6-24); fixing the annual compensation of all elected city officers (Ind. Code § 36-4-7-2); approving the compensation of appointive officers, deputies and other city employees (Ind. Code § 36-4-7-3); making additional appropriations or decreasing appropriations (Ind. Code § 36-4-7-8).

The decision in *Platt*, cited above, addressed whether a city council member was an officer and found, based on the law at that time, that the position was not an "office" for purposes of Article 2, Section 9 because it was purely and wholly municipal in character. While the reasoning in *Platt* still holds today with respect to offices that are purely and wholly municipal in character, the office of city council member has evolved since *Platt* was decided in 1873. Many state laws have been passed since then relating to the powers and duties of city councils. The holding in *Platt* was also narrowly construed in *Chambers v. State ex rel. Barnard*:

It must therefore be regarded as the settled law of this state that if an office is purely municipal, the officer not being charged with any duties under the laws of the state, he is not an officer within the meaning of the constitution; but if the officer be charged with any duties under the laws of the state for which he is entitled to compensation, the office is a lucrative office within the meaning of the constitution.

26 N.E. 893, 894 (1891) (emphasis added). The powers and duties imposed upon the office of city council member are prescribed by state statute and clearly the office is vested with official powers to serve a public purpose. We cannot conclude that the office is purely municipal in character as it may have once been.³ For similar reasons as set forth in this opinion, a prior opinion from this office, Official Opinion No. 91-14, distinguished the *Platt* decision and determined that a member of the city council should be considered an officeholder under Article 2 section 9 of the Indiana Constitution.

The duties performed by a member of the common council are pursuant to authority derived from state law and the powers and duties conferred by state law involve the performance of state sovereign power for the public's benefit. As such, council members are officeholders for purposes of Article 2, Section 9. Further, council members are entitled to compensation and, therefore, are lucrative officeholders.

4. Port Authority Members

The legislature has provided for the creation of port authorities by local governments. Indiana Code § 8-10-5-2 sets out the statutory scheme under which a port authority may be created by a municipal corporation, county, or any combination of a municipal corporation, municipal corporations, county or counties. A port authority

created under the statute is a body corporate and politic. The port authority's exercise of the powers conferred upon it under the statute is deemed to be an essential governmental function of the State of Indiana. *Id.* A port authority is governed by a board of directors consisting of the number of members set out in the statute. (Ind. Code § 8-10-5-5). Board members receive compensation for their service. *Id.*

Chapter 8-10-5 contains a lengthy and detailed description of the duties and powers of a port authority. Examples of these powers and duties include: purchasing, constructing, selling, leasing and operating docks, wharves, piers and other port facilities (Ind. Code § 8-10-5-8(1)); regulating the uses and activities of the port area (Ind. Code § 8-10-5-8(4)); acquiring property (Ind. Code § 8-10-5-8(5)); exercising the right of eminent domain (Ind. Code § 8-10-5-8(8)); and entering into contracts (Ind. Code § 8-10-5-20).

A member of a port authority board of directors owes his or her authority solely to state law. Board member duties involve the performance of state sovereign power for the public's benefit and are essential governmental functions. As such, board members are officeholders for purposes of Article 2, Section 9. Further, members of the board of directors are entitled to compensation and, therefore, are lucrative officeholders.

Conclusion

It is my opinion that it would constitute a violation of Article 2, Section 9 of the Constitution of Indiana for a member of the Hammond City Council to simultaneously hold the office of member of the Board of Directors of the Hammond Port Authority.

Sincerely,

Gregory F. Zoeller
Attorney General

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Deputy Attorney General

¹ The Office of the Attorney General has created the *Dual Office Holding Guide* as a reference for public officials. This guide provides a four-part legal analysis that public officials may use in order to determine whether accepting a second public service position violates the law. The guide can be found on the Attorney General website at: http://www.in.gov/attorneygeneral/legal/advisory/dual_office.html

² Section 36-4-6-3 applies to second class cities. Based on the 2000 federal census, Hammond is classified as a second class city under Ind. Code § 36-4-1-1.

³ Since the 1980 adoption of Home Rule, Ind. Code § 36-1-3, it is doubtful that any office can be deemed "purely municipal." See 1991 Ind. OAG No. 14 (Ind. A.G.), noting that "[u]nder Home Rule, the State has delegated to cities many powers and duties concerning the sovereign powers of the State in relation to health, welfare and safety."

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