



STATE OF INDIANA

OFFICE OF THE ATTORNEY GENERAL
302 WEST WASHINGTON STREET, IGCS 5TH FLOOR
INDIANAPOLIS, INDIANA 46204

CURTIS T. HILL, JR.
ATTORNEY GENERAL

September 25, 2018

OFFICIAL OPINION 2018-9

Timothy A. Schultz, General Counsel
Indiana State Board of Education
143 West Market Street, Suite 500
Indianapolis, Indiana 46204

RE: Dual Office Holding Inquiry

Dear Mr. Schultz:

REQUESTOR STANDING

Ind. Code § 4-6-2-5 contemplates that a state officer may request an official advisory opinion from the Attorney General regarding matters touching upon any question or point of law concerning the duties of the officer. The question presented involves the issue of possible dual-office holding by a member of the Indiana State Board of Education, at whose request this opinion is being rendered. This matter is a proper one to be addressed by the Office of the Attorney General according to the statute.

QUESTION PRESENTED

You recently asked, in your capacity as General Counsel for the Indiana State Board of Education, whether a person may be a member of both the Indiana State Board of Education and of the Ivy Tech Community College Regional Board of Trustees without violating the prohibition against dual office holding found in Art. 2, § 9 of the Indiana Constitution.

BRIEF ANSWER

Yes, an individual who holds these positions does not violate Art. 2, § 9 of the Indiana Constitution relating to dual office holding. While a member of the Indiana State Board of Education holds a "lucrative office," a member of an Ivy Tech Community College Regional Board of Trustees does not. Thus, a person may hold both positions simultaneously without violating Art. 2, § 9 of the Indiana Constitution. Notwithstanding this conclusion, individuals who do not violate Art. 2, § 9 must also consider the separation of powers doctrine, possible conflicts of interest, and potential incompatibility of positions.

ANALYSIS

The Indiana Constitution states in pertinent part: “No person holding a lucrative office or appointment under the United States or under this State . . . may hold more than one lucrative office at the same time, except as expressly permitted in this Constitution.”¹ This prohibition was adopted by the framers of the Constitution to prevent the consolidation of power in a small number of government officials.²

“Office” vs. Employment

An “office” is “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.”³ An officer is appointed or elected, and the duration of an officer’s position is typically defined by statute. However, an office is not the same thing as mere employment, for which there is no Constitutional prohibition. An individual having only an employment relationship works “under [a] contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed.”⁴ An employee has no sovereign power of the state entrusted to him.⁵ An employee’s compensation is generally agreed upon by the contract of hiring.⁶ Finally, “[t]he most important characteristic which may be said to distinguish an office from an employment is that the duties of the incumbent of an office must involve an exercise of some portion of the sovereign power.”⁷

When is an office “lucrative”?

Compensation or payment of some kind is generally required for an office to be considered lucrative. Under Art. 2, § 9, a “lucrative office” is an “office to which there is attached a compensation for services rendered.”⁸ Lucrativeness is not dependent on the amount of compensation received.⁹ Compensation may be in the form of a salary or even a per diem. The officer may choose not to accept the compensation, but as long as he or she *is entitled* to the compensation the office is considered lucrative.¹⁰

¹ *Ind. Const.* Art. 2, § 9.

² See Gregory Zoeller, *Dual Office Analysis: Can the Legislature Carve Out Exceptions?*, 37 *Ind. L. Rev.* 733, 736-37 (2004).

³ *Thompson v. Hays*, 867 N.E.2d 654, 657 (Ind. Ct. App. 2007) (internal citations omitted).

⁴ *Common Council of Peru v. Peru Daily Tribune, Inc.*, 440 N.E.2d 726, 729 (Ind. Ct. App. 1982) (internal citations omitted).

⁵ *Id.* at 730.

⁶ *Id.* at 731.

⁷ *Shelmadine v. City of Elkhart*, 129 N.E. 878 (Ind. Ct. App. 1921); see *Platt v. Kirk*, 44 Ind. 401 (Ind. 1873) (holding that, in determining whether a position is an “office,” it is appropriate to consider the nature of the duties associated with the position).

⁸ *Book v. State Office Bldg. Comm.*, 149 N.E.2d 273, 289 (Ind. 1958).

⁹ *Id.*

¹⁰ *Dailey v. State*, 8 Blackf. 329 (Ind. 1846).

Is there any legislated exemption from the dual officeholder proscription that would apply in this case?

In some cases where both positions are considered to be lucrative offices, one of the positions may be specifically exempted by statute from the lucrative office restriction.¹¹ For instance, the legislature has exempted county police officers;¹² members of safety boards;¹³ appointed deputies of local officers;¹⁴ members of any township, town or city police department;¹⁵ city employees;¹⁶ and a long list of state board members.¹⁷ A review of Indiana's laws, cases, and past opinions of this office revealed no exemption that would apply to either the Indiana State Board of Education or the Ivy Tech Community College Regional Board of Trustees.

Indiana State Board of Education

The Indiana State Board of Education ("Board") is established by statute.¹⁸ The Board consists of eleven (11) members comprised of the superintendent of public instruction, an elected official; eight (8) appointments made by the Governor; one (1) appointment made by the speaker of the house; and one (1) appointment made by the president pro tempore of the senate.¹⁹ In general, appointed Board members serve four (4) year terms²⁰ and receive an annual salary of two thousand dollars (\$2,000.00).²¹ The Board is empowered to:

- (1) Establish the educational goals of the state, developing standards and objectives for local school corporations.
- (2) Assess the attainment of the established goals.
- (3) Assure compliance with established standards and objectives.
- (4) Coordinate with the commission for higher education (IC 21-18-1) and the department of workforce development (IC 22-4.1-2) to develop entrepreneurship education programs for elementary and secondary education, higher education, and individuals in the work force.

¹¹ See Gregory Zoeller, *Dual Office Analysis: Can the Legislature Carve Out Exceptions?*, 37 *Ind. L. Rev.* 733, 746-47 (2004).

¹² Ind. Code § 36-8-10-11(c).

¹³ Ind. Code § 36-8-3-12.

¹⁴ Ind. Code § 5-6-4-3.

¹⁵ Ind. Code § 36-8-3-12.

¹⁶ Ind. Code § 36-4-4-2(b).

¹⁷ Ind. Code §§ 25-1-5-3.5, 25-1-6-3.5.

¹⁸ Ind. Code § 20-19-2-2.1(b).

¹⁹ Ind. Code § 20-19-2-2.2(a).

²⁰ Ind. Code § 20-19-2-2.2(f).

²¹ Ind. Code § 20-19-2-7(a).

- (5) Make recommendations to the governor and general assembly concerning the educational needs of the state, including financial needs.
- (6) Provide for reviews to ensure the validity and reliability of the ISTEP program.²²

Additionally, the Board is empowered to adopt rules regarding, among other things, distribution of state educational funds;²³ implementation of a system of recognition of the educational programs of nonpublic schools;²⁴ establishment of guidelines for the selection of school sites and school construction;²⁵ adoption of Indiana college and career readiness educational standards;²⁶ establishment of a freeway school corporation and a freeway school;²⁷ acceptance of federal funds appropriated to aid in the education of children with disabilities;²⁸ and receipt, distribution, and accounting for federal funds received for career and technical education.²⁹

The Board is created by statute rather than by contract. Board members are elected or appointed rather than hired as contract employees. In general, they serve limited four-year terms rather than work with open-ended employment. Board members have no employer who directs how their work is to be performed. All these elements appear to indicate that Board members will be considered “officers.” Additionally, the Board has powers set forth by statute which include establishing and assessing educational goals for the State, promulgating Board rules, overseeing school instruction, and accepting and accounting for state and federal educational funds—all sovereign executive powers of the State. Membership on the Board is clearly an “office.” Furthermore, because Board members are entitled to compensation by law, the office is “lucrative.” There is no legislative or other exception making this position a non-office. Based on the above analysis, a member of the Indiana State Board of Education would be deemed a holder of a “lucrative office” under Art. 2, § 9 of the Indiana Constitution.

²² Ind. Code § 20-19-2-14.

²³ Ind. Code § 20-19-2-8(a)(5).

²⁴ Ind. Code § 20-19-2-10(b).

²⁵ Ind. Code § 20-19-2-12(a).

²⁶ Ind. Code § 20-19-2-14.5(b).

²⁷ Ind. Code § 20-19-2-15.

²⁸ Ind. Code § 20-19-2-16(b).

²⁹ Ind. Code § 20-19-2-19(a).

Ivy Tech Community College Regional Board of Trustees

The Ivy Tech Community College State Board of Trustees may divide Indiana into appropriate regions for providing a comprehensive program of post-high school general, liberal arts, occupational, and technical education.³⁰ Because Ivy Tech has established such administrative regions, it shall appoint in each a regional board of trustees (“regional trustees”).³¹ Regional trustees consist of seven (7) members, each serving a staggered three (3) year term.³² Regional trustees serve without pay, but shall receive reimbursement for necessary expenses.³³ Regional trustees are empowered to:

- (1) Make a careful analysis of the educational needs and opportunities of the region.
- (2) Develop and recommend to the state board of trustees a plan for providing postsecondary:
 - (A) general education;
 - (B) liberal arts education; and
 - (C) occupational and technical education;programs and appropriate workforce development, assessment, and training services for the residents of that region.
- (3) Develop and recommend a budget for regional programs and operations.
- (4) Identify and recommend alternative methods of acquiring or securing facilities and equipment necessary for the delivery of effective regional programs.
- (5) Facilitate and develop regional cooperation with employers, community leaders, economic development efforts, area career and technical education centers, and other public and private education and training entities in order to provide postsecondary general, liberal arts, and occupational and technical education and training in an efficient and cost effective manner and to avoid duplication of services.
- (6) Determine through evaluation, studies, or assessments the degree to which the established training needs of the region are being met.
- (7) Make recommendations to the state board of trustees concerning policies that appear to substantially affect the regional board's capacity to deliver effective and efficient programming.³⁴

Additionally, a regional board may make recommendations to the state board of trustees concerning amendments to the charter of the region; and may adopt, amend, or repeal bylaws for the region, *subject to the approval of the state board of trustees.*³⁵

³⁰ Ind. Code § 21-22-6-1.

³¹ Ind. Code § 21-22-6-2.

³² Ind. Code § 21-22-6-3.

³³ Ind. Code § 21-38-2-4.

³⁴ Ind. Code § 21-22-6-8.

³⁵ Ind. Code § 21-22-6-9.

A regional board is established by statute rather than by contract. Regional board members are appointed rather than hired as contract employees. They serve limited terms rather than working with open-ended employment. Regional board members must answer to the state board of trustees: This element in particular casts doubt on whether members are “officers.” Although a regional board has powers and duties set forth by law, they consist almost entirely of research and recommendations to the state board of trustees. Even a regional board’s power to adopt, amend, or repeal regional bylaws is subject to the approval of the state board of trustees. Thus, a regional board does not wield any of the sovereign power of the State. Membership on a regional board is clearly not an “office.” Additionally, regional board members may not receive a salary but shall receive reimbursement for their necessary expenses, which makes their work “non-lucrative.” Their positions most closely resemble unpaid volunteers. Based on the above analysis, a member of an Ivy Tech Community College Regional Board of Trustees would not hold an “office” under Art. 2, § 9 of the Indiana Constitution.

Even if there is no violation of the dual office holding prohibition, an individual must also be aware of the doctrine of “separation of powers” and how it may affect the ability to hold both positions simultaneously.

Separation of Powers

The Indiana Constitution divides the powers of state government into three separate departments: Legislative, Executive (including Administrative), and Judicial.³⁶ It prohibits a person charged with official duties under one of the departments from exercising the functions of another department.³⁷ “Under our form of government, it is essential that the three separate branches of government recognize the sphere of authority enjoyed by the others.”³⁸ The doctrine of separation of powers is not a matter of governmental convenience. “Its object is basic and vital . . . namely, to preclude a commingling of these essentially different powers of government in the same hands.”³⁹ The acts of each branch of government “shall never be controlled by, or subjected, directly or indirectly, to the coercive influence of either of the other departments.”⁴⁰

The separation of powers prohibition is distinct from the dual office holding prohibition, so the simultaneous holding of public offices is not necessary for a violation to occur.⁴¹ Even if a person is not a dual office holder, he or she may be in violation of the separation of powers prohibition by being an officer in one department and also performing functions in another department.⁴² If a person charged with official duties in one state government department is employed to perform duties, official or otherwise, in another department, the door is opened to influence and control by the employing department.⁴³

³⁶ *Ind. Const.* Art. 3, § 1.

³⁷ *Id.*

³⁸ 1971 *Op. Ind. Att’y Gen.* No. 6.

³⁹ *Id.*, citing *State ex rel. Black v. Burch*, 80 N.E.2d 294, 300 (Ind. 1948). See also *O’Donoghue v. United States*, 289 U.S. 516, 530, 53 S. Ct. 740 (1933).

⁴⁰ *Id.* (emphasis removed).

⁴¹ See *Book*, 149 N.E.2d at 296.

⁴² *Id.* See 1983-84 *Op. Ind. Att’y Gen.* No. 5 (March 10, 1983).

⁴³ *Black*, 80 N.E.2d at 302.

Here, the separation of powers determination would hinge on which department of government each of the positions falls under—legislative, executive, or judicial. If both positions fall under the same department, there is no violation of Art. 3, § 1. But if each position falls under a different department, the door would be opened for the individual to simultaneously perform the functions of two separate government departments in violation of Art. 3, § 1. A careful review of the individual's functions under both departments would be required.

The State Board of Education is clearly executive in nature since it is tasked with overseeing the education of Indiana's K-12 students. As already discussed, an Ivy Tech Community College Regional Board of Trustees wields no sovereign power, yet it is still concerned with the faithful execution of the laws that created it. Since both entities fall within the executive department of state government, there should be no violation of the separation of powers doctrine. Still, we suggest a careful review of an individual member's duties.

Even if there is no violation of the constitutional prohibitions against dual office holding or the separation of powers, the individual must still consider incompatibility or potential conflicts of interest between the two positions.

Incompatible Offices and Conflicts of Interest

Generally, a public officer is prohibited from holding two incompatible offices. Offices are incompatible when there are potential conflicting interests between the two positions. Conflicts of interest arise when one office is subordinate to the other or where the functions of the two offices are "inherently inconsistent and repugnant."⁴⁴ When one person cannot "discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both."⁴⁵ The public servant's appointing authority determines whether such positions are incompatible.⁴⁶ When such incompatibility is found to exist, the acceptance of the latter office vacates the first office.⁴⁷ Past Attorneys General have declined to render an opinion as to the question of incompatibility for the appointing authority absent blatant conflicts of interest or violations of public policy.⁴⁸

As noted above, our office has traditionally deferred ultimate conclusions regarding incompatibility and possible conflicts of interest to the agencies themselves since they are best positioned to know the specific job duties that are key to making such determinations.⁴⁹

⁴⁴ See Gregory Zoeller, *Dual Office Analysis: Can the Legislature Carve Out Exceptions?*, 37 *Ind. L. Rev.* 733, 763 (2004) (citing *Metcalf v. Goff*, 9 A. 226, 227 (R.I. 1887)).

⁴⁵ 63C Am. Jur. 2d *Public Officers and Employees* § 58 (2012).

⁴⁶ See *Gaskin v. Beier*, 622 N.E.2d 524, 530 (Ind. Ct. App. 1993).

⁴⁷ 1954 *Op. Ind. Att'y Gen.* No. 70.

⁴⁸ See 1961 *Op. Ind. Att'y Gen.* No. 4; 1967 *Op. Ind. Att'y Gen.* No. 11; 1989 *Op. Ind. Att'y Gen.* No. 3.

⁴⁹ For further guidance regarding applicable public policy, conflict of interest, and related considerations, as well as an explanation of the consequences of dual office holding or accepting incompatible positions, you may wish to consult the Indiana Attorney General's *Dual Office Holding Guide*, available at www.in.gov/attorneygeneral/files/DOH%20Guide%202016%20Update.pdf.

CONCLUSION

It is the opinion of this office that members of the Indiana State Board of Education are “lucrative officers” because they are established by state law, elected or appointed to serve limited terms, empowered to direct their own work, charged with specific powers and duties normally reserved to the State, and entitled to compensation. Using the same criteria, members of an Ivy Tech Community College Regional Board of Trustees are not “officers” nor are their positions “lucrative.” Therefore, a person may simultaneously be a member of the Indiana State Board of Education and a member of an Ivy Tech Community College Regional Board of Trustees without violating the prohibition against dual office holding found in Art. 2, § 9 of the Indiana Constitution. However, individuals should also consider the separation of powers doctrine, possible conflicts of interest, and potential incompatibility of positions.

SUBMITTED, and
ENDORSED FOR PUBLICATION:



Curtis T. Hill, Jr.
Attorney General

Scott C. Newman, Chief Counsel
Kevin McDowell, Assistant Chief Counsel
Donald Hannah, Deputy Attorney General