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OFFICIAL OPINION 2017-6

Jerold A. Bonnet, General Counsel
Office of the Indiana Secretary of State
200 W. Washington Street
Indianapolis, Indiana 46204

RE: Lucrative Office Holder Inquiry

Dear Mr. Bonnet:

QUESTION PRESENTED

You recently asked, in your capacity as General Counsel to the Indiana Secretary of State, whether a member of the Motor Vehicle Sales Advisory Board (“MVSAB”), as established at Indiana Code § 9-32-10 *et seq.*, holds a lucrative office under Art. 2, § 9 of the Indiana Constitution.

BRIEF ANSWER

A member of the MVSAB does not hold a “lucrative office” for dual office-holding purposes even though such Board member receives reimbursement for expenses and a per diem. A position on the MVSAB is not an “office,” as the position is advisory in nature and does not involve the exercise of sovereign powers of the state.

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

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).

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. With “employment” an individual 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

What is lucrative?

Some type of compensation or payment 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 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

Is there a legislative exemption?

In some cases where both positions are considered to be lucrative offices, one of the positions may have been specifically exempted by statute from the lucrative office restriction.¹¹ The legislature has exempted a long list of state board members.¹²

Motor Vehicle Sales Advisory Board

As you detailed in your request, the MVSAB was created by the General Assembly in 2013 to advise the Secretary of State in the administration of Title 9, Article 32 of the Indiana

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).

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

¹² See, e.g., Ind. Code §§ 25-1-5-3.5, 25-1-6-3.5.

Code, which pertains to the licensing of motor vehicle manufacturers, distributors, and dealers.¹³ The Secretary of State's recommendation is appointed by the governor for a three-year term.¹⁴ MVSAB members are entitled to a per diem as determined by State law as well as reimbursement of expenses.¹⁵ The MVSAB is empowered to consult and advise the Secretary and to suggest rules on various topics.¹⁶

Although the receipt of a per diem would indicate that the position is "lucrative," all other elements appear to indicate that the members of the MVSAB do not hold an "office." By statute, the board is empowered to only advise the Secretary, and the board does not exercise any sovereign power. Moreover, the legislature expressed its intent that an MVSAB member not be considered to hold an office through inclusion of language that "[m]embership on the advisory board does not constitute the holding of a public office."¹⁷ As you referenced in your request, an MVSAB member is more accurately defined as a "special state appointee," which is neither a state officer nor employee but rather a person who is appointed to a board that is authorized by statute to function in a limited advisory role.¹⁸ Based on the above analysis, an MVSAB member would not be considered a lucrative office holder under Art. 2, § 9 of the Indiana Constitution.

In your request for an opinion, you indicated that two prospective members were current holders of lucrative offices: a school board member¹⁹ and a member of the General Assembly.²⁰ A member of the legislature has to be particularly vigilant since Art. 2, § 9 states in relevant part: "No person holding a lucrative office or appointment under the United States or under this State is eligible to a seat in the General Assembly[.]" The acceptance by a legislator of a position that constitutes a "lucrative office" results in vacation of that member's position in the General Assembly.²¹

Special Concerns for a Legislator-Member of the MVSAB

Even though under the circumstances involving the MVSAB, the Office of the Attorney General (OAG) has not determined that dual office-holding, as proscribed by Art. 2, § 9, is present, this is based on general principles. A legislator who accepts an appointment to the MVSAB should also consider the separation of powers doctrine, possible conflicts of interest, and potential incompatibility of positions, especially as Ind. Code § 9-32-10-2 does not require any MVSAB member to be from the legislature. A legislator-appointee may not presently have a

¹³ Ind. Code § 9-32-10 *et seq.*

¹⁴ Ind. Code §§ 9-32-10-2, 9-32-10-3.

¹⁵ Ind. Code § 9-32-10-4.

¹⁶ Ind. Code §§ 9-32-10-1, 9-32-10-8.

¹⁷ Ind. Code § 9-32-10-4.

¹⁸ Ind. Code § 4-2-6-1(a)(18) (defining special state appointee).

¹⁹ A school board member holds a lucrative office for Art. 2, § 9 purposes. 1967 *Op. Ind. Att'y Gen.* No. 29; 1991 *Op. Ind. Att'y Gen.* No. 14.

²⁰ It is well established that a member of the General Assembly is a holder of a "lucrative office." See, e.g., 1953 *Op. Ind. Att'y Gen.* No. 96, 1954 *Op. Ind. Att'y Gen.* No. 70, 1960 *Op. Ind. Att'y Gen.* No. 9, 1961 *Op. Ind. Att'y Gen.* No. 18.

²¹ See, e.g., 1951 *Op. Ind. Att'y Gen.* No. 60 (it is contrary to the constitution for a member of legislature to serve on the State Fair Board); 1953 *Op. Ind. Att'y Gen.* No. 96 (a member of the legislature may not serve on the State Fair Board without first resigning from the legislature); and 1961 *Op. Ind. Att'y Gen.* No. 18 (a legislator who accepts a board position that is also a lucrative office automatically vacates membership in the legislature).

disqualifying circumstance, but this could change, depending upon legislative assignments or personal circumstances. Although these issues were not raised with OAG in the request for this opinion, the OAG would be remiss if it did not caution a legislator-member or potential legislator-member of these concerns so that, should such questions arise, the legislator-member could consult with legislative counsel on this matter.

Separation of Powers

The Indiana Constitution divides the powers of state government into three separate departments: Legislative, Executive (including Administrative), and Judicial.²² It prohibits a person charged with official duties under one of the departments from exercising the functions of another department.²³ The doctrine serves to protect a separate department of state government from any control or influence by either of the other state government departments.²⁴

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.²⁵ 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.²⁶ 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.²⁷

In this case, the separation of powers determination would hinge on which department of state 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 state government departments in violation of Art. 3, § 1. A careful review of the individual's functions under both departments would be required.

State ex rel. Black v. Burch, 80 N.E.2d 294 (Ind. 1948) is instructive. There, four members of the Indiana General Assembly were appointed to serve on various commissions.²⁸ While none were found to be office holders for purposes of the prohibition against dual office holding in their employment on the various commissions, all four were found to violate the separation of powers prohibition for being members of the General Assembly and being employed in the administrative department of government.²⁹

²² Ind. Const. Art. 3, § 1.

²³ *Id.*

²⁴ *State ex rel. Black v. Burch*, 80 N.E.2d 294, 300-03 (Ind. 1948); *Scholer v. Moran*, 482 N.E.2d 460, 463 (Ind. 1985); *Phelps v. Sybinsky*, 736 N.E.2d 809, 815 (Ind. Ct. App. 2000).

²⁵ *See Book*, 149 N.E.2d at 296.

²⁶ *Id.* *See also* 1983-84 *Op. Ind. Att'y Gen.* No. 83-5.

²⁷ *Black*, 80 N.E.2d at 302.

²⁸ *Id.* at 296-97.

²⁹ *Id.* at 302.

Your request identified one potential recommendation for the MVSAB in which a separation of powers issue may arise. A member of the Indiana General Assembly is a lucrative officer holder under the legislative branch, as noted *supra*.³⁰ Arguably, an appointment to the MVSAB would render him or her a special state appointee to the executive branch under the Secretary of State.³¹ The other potential recommendation for the MVSAB, a township school board member, is also a lucrative office holder; however, that individual would not be acting on behalf of any branch of *state* government in that capacity.³²

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.”³³ 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.”³⁴ The public servant’s appointing authority determines whether such positions are incompatible.³⁵ When such incompatibility is found to exist, the acceptance of the latter office vacates the first office.³⁶ Past Attorneys General have declined to opine on the question of incompatibility for the appointing authority absent blatant conflicts of interest or violations of public policy.³⁷

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.³⁸

³⁰ See also 1929-30 *Op. Ind. Att’y Gen.* 78.

³¹ *Black*, 80 N.E.2d at 302; Ind. Code § 4-2-6-1(a)(19) (defining secretary of state as a state officer).

³² 1967 *Op. Ind. Att’y Gen.* No. 29; 1991 *Op. Ind. Att’y Gen.* No. 91-14.

³³ See Gregory Zoeller, *Dual Office Analysis: Can the Legislature Carve Out Exceptions?*, 37 IND. L. REV. 733, 763 (2004) (citing *Metcalfe v. Goff*, 9 A. 226, 227 (R.I. 1887)).

³⁴ 63C Am. Jur. 2d *Public Officers and Employees* § 58 (2012).

³⁵ See *Gaskin v. Beier*, 622 N.E.2d 524, 530 (Ind. Ct. App. 1993).

³⁶ 1954 *Op. Ind. Att’y Gen.* No. 70.

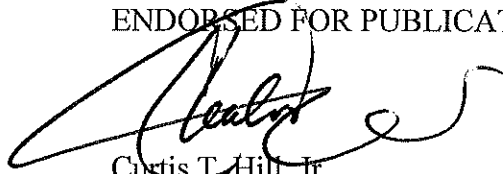
³⁷ See 1961 *Op. Ind. Att’y Gen.* No. 4; 1967 *Op. Ind. Att’y Gen.* No. 11; 1989 *Op. Ind. Att’y Gen.* No. 89-3.

³⁸ 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 MVSAB are not lucrative office holders for dual office-holding purposes because the Board is advisory in nature and does not exercise sovereign power of the State. However, a legislator appointed to a Board should also consider the separation of powers doctrine, possible conflicts of interest, and potential incompatibility of positions that may arise in the course of an appointment.

SUBMITTED and
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