Dual Officeholding Guide

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Overview

Who should read this Guide?

Public officials who may be considering a second public service position should read this Guide with their attorneys. Under Indiana law, some government officials may not legally serve in more than one public service position at any given time. The holding of two lucrative offices may result in the constitutional violation commonly referred to as “dual office holding.” Further, even if serving in two positions does not result in a constitutional dual office violation, it may violate the constitutional doctrine of separation of powers, create a conflict of interest or public policy concern, or be prohibited by another federal, state or local law.

All public officials should seek legal advice from an attorney before accepting a second public service position. State officials considering a second position should discuss the matter with their agency attorney before seeking an opinion from the Indiana Attorney General.

Why is an understanding and thorough analysis of dual office holding important?

A violation of the constitutional and statutory prohibitions against dual office holding may result in the loss of or removal from an official position, the commission of the Class D felony of conflict of interest, or loss of federal funding.

How should I use the Guide?

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 also offers a list of citations to Indiana cases and Attorney General Opinions discussing specific public service positions and potential dual office conflicts.

How do I determine whether holding a second public service position violates law?

The following four-part analysis may be used to determine whether holding a second public service position violates the law:

I. Are both positions lucrative offices within the meaning of Indiana Constitution Article II, Section 9?

II. Would holding both positions violate the constitutional doctrine of "separation of powers" under Indiana Constitution Article III, Section 1?

III. Are the positions incompatible and would holding both create a conflict of interest or a public policy concern?

IV. Does a federal, state or local law or regulation prohibit the simultaneous holding of both offices?
Analysis

I. Are both positions lucrative offices within the meaning of Indiana Constitution Article II, Section 9?

Article II, Section 9 of the Indiana Constitution states:

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; and no person may hold more than one lucrative office at the same time, except as expressly permitted in this Constitution. Offices in the militia to which there is attached no annual salary shall not be deemed lucrative.

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).

What should be considered when determining whether a position is a "lucrative office"?

Does the position constitute an office or employment? The dual office prohibition does not prohibit a person from maintaining an office while also serving as an employee of a governmental entity. An employee is one who is "in the service of another under any 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 detail of how the work is to be performed." Common Council of Peru v. Peru Daily Tribune, Ind., 440 N.E.2d 726, 729 (Ind. Ct. App. 1982) (citations omitted).

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." Gaskin v. Beier, 622 N.E.2d 524, 528 (Ind. Ct. App. 1993). More specifically, holders of public offices are described as being "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 or her power of supervision and control, and liability as a public offender in cases of malfeasance in office. Gaskin, 622 N.E.2d at 528. An officer maintains "greater importance, dignity and independence of his position" and is usually required to take an official oath and give an official bond. Common Council of Peru, 440 N.E.2d at 730. Additionally, the duration of the officer's position is usually defined by statute. Id. at 731.

Is the position in question lucrative? An office is considered "lucrative" when there is attached compensation for services rendered. Book v. State Office Bldg. Comm'n, 149 N.E.2d 273, 289 (Ind. 1958). Lucrativeness does not depend on the amount of compensation affixed to the office. Id. Compensation may be in the form of a salary or may be a per diem payment. A "per diem is not a fee, salary or wages. It is a compensation for a service given the government for a day or a part of a day." 70 Ind. Op. Att'y Gen. 260 (1954). Even if the officer chooses not
to accept compensation, as long as he or she is entitled to the pay affixed to the performance of the office's duties, the office is considered lucrative. *Dailey v. State*, 8 Blackf. 329 (Ind. 1846). Only pure reimbursement for expenses actually incurred in connection with the officer's duties (such as travel expenses) does not constitute compensation. 45 Ind. Op. Att'y Gen. 259 (1960) (explaining *Book*, 149 N.E.2d at 289).

**Are city and county officials affected?** City and county officials whose duties are conferred by statute for a public purpose are generally considered officeholders for purposes of Article II, Section 9. However, if the duties of a local city or county 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. *See Platt v. Kirk*, 44 Ind. 401 (Ind. 1873).

**What if state law requires an officer also serve on another board?** "[A]n office is not necessarily created by a statute that imposes additional duties and powers upon an officer." *Book*, 149 N.E.2d at 290. No dual office holding violation occurs where state law simply requires an officer to perform additional duties by serving on another board or commission. *Id.* (discussing the Governor's duty to also serve on the State Office Building Commission).

**In summary:** If state law grants any of the State’s sovereign power (i.e., eminent domain, prosecution, taxation) to a public service position and the officeholder is entitled to any monetary compensation for service, then the public service position is considered a lucrative office for purposes of Article II, Section 9.

**What are examples of lucrative and non-lucrative offices?**

Appendix A to this Guide provides a list of public service positions that have been determined to be either lucrative or non-lucrative offices. Be advised that laws forming the basis for earlier decisions by courts or the Attorney General may have been amended or repealed since the publication of this Guide. Therefore, your attorney should assist you in determining whether a particular court or Attorney General opinion is still applicable. Appendix B contains a list of Attorney General Opinions and court decisions that have been overruled or are no longer based on current law. Appendix C includes additional resources that may be of assistance in your analysis.

**What is the correct procedure to determine the right to an office?**

Indiana Code section 34-17-1-1 provides that an information may be filed against a person unlawfully holding a public office. The information may be filed by the prosecuting attorney or by any other person who claims an interest in the office. Ind. Code § 34-17-2-1. In such a case, the plaintiff must demonstrate personal interest in right or title to the office. *Brenner v. Powers*, 584 N.E.2d 569, 576 (Ind. Ct. App. 1992).

**If a person holds two lucrative offices in violation of Article II, Section 9, what are the consequences?**

A lucrative officeholder who accepts a second lucrative office thereby surrenders or vacates the first office. *Chambers v. State ex rel. Barnard*, 26 N.E. 893, 894 (Ind. 1891); *Bishop v. State ex rel. Griner*, 48 N.E. 1038, 1041 (Ind. 1898); *Wells*, 94 N.E. at 323. A successor must
be appointed or elected, depending on the law applicable to the office. *Gosman v. State*, 6 N.E. 349, 353 (Ind. 1886). The acts of a de facto officer performed before being ousted from office are typically held to be valid as a matter of public policy. Courts have determined that the public should not suffer from the acts of an officer who may have had defective title or no title at all. *State ex rel. Bishop v. Crowe*, 50 N.E. 471, 473-74 (Ind. 1898); *State v. Sutherlin*, 75 N.E. 642, 646 (Ind. 1905).

A person holding both a lucrative state office and a lucrative federal office may be expelled from the state office by order of a state court. *Foltz v. Kerlin*, 4 N.E. 439, 440-41 (Ind. 1886); 1987-88 Op. Att’y Gen. No. 87-17.

**Under the four-part analysis, what if both public service positions are lucrative offices?**

If both public service positions are lucrative offices, then holding both offices simultaneously infringes on Article II, Section 9’s prohibition against dual office holding. Because one may not hold two lucrative offices at the same time, no further inquiry is necessary under the four-part analysis set out above. If, on the other hand, you have determined that one or both public service positions is not a lucrative office, you should continue your analysis by considering questions 2 through 4 of the inquiry.

**II. Would holding both positions violate the constitutional doctrine of "separation of powers" under Indiana Constitution Article III, Section 1?**

The Indiana Constitution divides the powers of state government into three separate departments: Legislative, Executive (including Administrative), and Judicial. It prohibits a person charged with official duties under one of the departments from exercising the functions of another department. Article III, Section 1 of the Indiana Constitution provides:

> The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.


**Must one be an office holder in both departments for a separation of powers violation to occur?**

The separation of powers prohibition is not a law against dual office holding and therefore, the simultaneous holding of public offices is not necessary for a violation to occur. *See Book*, 149 N.E.2d at 296. Thus, even if a person is not a dual officeholder, 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. *Id.* See 1983-84 Op. Att’y Gen. No. 83-5. 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. *Black*, 80 N.E.2d at 302.

**Is Article III, Section 1 applicable to municipal positions?**

"[Article III, Section 1] relates only to the state government and officers charged with duties under one of the separate departments of the state and not to municipal governments and officers." *Gaskin*, 622 N.E.2d at 529; *State v. Monfort*, 723 N.E.2d 407, 414 (Ind. 2000). However, Indiana Code chapter 36-4-4 sets out the separation of powers for city branches of government.

**III. Are the positions incompatible and does holding both create a conflict of interest or a public policy concern?**

The fact that a proposed dual office holding does not violate constitutional provisions does not determine finally whether dual office holding is permissible. It is necessary to review potential conflicts of interest between the two offices and also public policy concerns.

**When are two positions incompatible?**

Generally, a public officer is prohibited from simultaneously holding two incompatible offices. Offices are incompatible when there are potential conflicting or adverse 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." *Metcalf v. Goff*, 9 A.226, 227 (R.I. 1887). 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." 63C Am. Jur. 2d Public Officers and Employees §58 (2007). Public policy is determined by considering the Indiana Constitution, state law, the practice of the state's administrative officers, and the decisions of the Indiana Supreme Court. *See Hogston v. Bell*, 112 N.E. 883, 886 (Ind. 1916).

When is a conflict of interest a crime?

In certain circumstances, Indiana Code section 35-44-1-3 prohibits a public servant who knowingly or intentionally has a pecuniary interest in, or derives a profit from, a contract or purchase connected with an action by the governmental entity served by the public. Such activity may result in a Class D felony charge. Further, even if there is no injury or actual benefit from the conflict of interest, the law does not permit public servants to place themselves in a situation where they may be tempted to do wrong. Cheney v. Unroe, 77 N.E. 1041, 1042 (Ind. 1906); 1989 Op. Att’y Gen. No. 89-3. To deter conflicts of interest, the courts hold all such conflicting employment void. Cheney, 77 N.E. at 1042.

Who determines when holding both positions creates a conflict of interest or violates public policy?


IV. Does a federal, state or local law or regulation prohibit the simultaneous holding of both offices?

What are the prohibitions under the federal Hatch Act?

Since 1939, the federal Hatch Act, at 5 U.S.C. §§ 1501-1508, has limited the political activity of individuals employed by state, county, or municipal executive agencies that are affiliated with programs financed in whole or in part by federal loans or grants. The Hatch Act prohibits certain state or local employees from the following: 1) using official authority or influence to affect the result of an election or nomination for office; 2) coercing a state or local officer to pay, lend or contribute to a party, committee, etc. for political purposes; or 3) being candidates for elective office. 5 U.S.C. §1502(a).

The Hatch Act's limitations do not apply to: 1) the Governor or Lieutenant Governor; 2) the mayor of a city; 3) a duly elected head of an executive department of a state or municipality who is not classified under a State or municipal merit or civil-service system; or 4) an individual holding elective office. 5 U.S.C. § 1502(c).

If an officer or employee violates the Hatch Act, the U.S. Merit Systems Protection Board may determine that the violation requires the officer or employee be dismissed from employment. The employing governmental entity must either remove the employee or forfeit a portion of the federal assistance equal to two years salary of the employee.
Employees may obtain answers to specific questions regarding political activity by calling the U.S. Office of Special Counsel at 1-800-85-HATCH. Further information is available at http://www.osc.gov/ha_state.htm.

**Do other laws affect dual office holding?**

Appendix A includes a list of additional state statutory restrictions on officers. Local officers should also consult local laws for any additional restrictions.
Appendix A

Lucrative and Non-Lucrative Office Examples

Examples of officers determined to be lucrative or non-lucrative are organized in the following manner:

Section 1: Lucrative officers as determined by Indiana courts and Indiana Attorney General opinion.
Section 2: State laws restricting dual office holding.
Section 3: Non-lucrative offices as determined by Indiana courts and Indiana Attorney General opinion.
Section 4: Offices made non-lucrative under Indiana law.

1. Lucrative Offices as Determined by Indiana Courts and Indiana Attorney General Opinion:

- **Armed forces officer (federal)**: 1942 Op. Att’y Gen. 76.
- **City Police Chief**: *Felder v. Oliverio*, 934 F.Supp. 1032, 1038 (U.S. Dist. Ct. 1996) (using the same analysis for determining who is an officer for purposes of Art. II, § 9, the court determined a city police chief is an officer under Art. XV, § 2).
- **Colonel of volunteers**: *Kerr v. Jones*, 19 Ind. 351 (Ind. 1862); 1942 Op. Att’y Gen. 76.
- **County auditor**: *State ex rel. Cornwell v. Allen*, 21 Ind. 516 (Ind. 1863).


- **County council member**: 1951 Op. Att’y Gen. No. 78.


- **County recorder**: *Dailey v. State*, 8 Blackf. 329 (Ind. 1846).


• **Muscatatuck Colony trustees and superintendent**: 1938 Op. Att’y Gen. 270.

• **Northern Indiana Children’s Hospital board of trustees member**: 1949 Op. Att’y Gen. No. 98.


• **Prison director**: *Howard v. Shoemaker*, 35 Ind. 111 (Ind. 1871); *State ex rel. Platt v. Kirk*, 44 Ind. 401 (Ind. 1873).


• **Rural mail carrier**: 1907-1908 Op. Att’y Gen. 467.


• **State Board of Tax Commissioners member**: 1934 Op. Att’y Gen. 334.


• **Supreme Court reporter**: 1942 Op. Att’y Gen. 76.


2. State laws Restricting Dual Office Holding:

- **Auctioneering Commission, Indiana** - may not hold another elected or appointed office in either the state or federal government. Ind. Code § 25-6.1-2-1(d).

- **Board of Elections and Registration** - may not become a candidate for elected office or a member of a candidate’s committee. [Lake County] Ind. Code § 3-6-5.2-4.5, [Tippecanoe County] Ind. Code § 3-6-5.4-4.5.

- **Candidate’s Committee Member** -
  - may not be appointed county election board members, proxy of record, or alternate proxy of record. Ind. Code § 3-6-5-3.
  - may not be appointed a member of the Lake County board of elections and registration. Ind. Code § 3-6-5.2-4.5.
  - may not be appointed as a member of the Tippecanoe County Board of Elections and Registration. Ind. Code § 3-6-5.4-4.5.

- **Candidates for elected office** -
  - may not be appointed county election board members, proxy of record, or alternate proxy of record. Ind. Code § 3-6-5-3.
  - may not be appointed a member of the Lake County board of elections and registration. Ind. Code § 3-6-5.2-4.5.
  - may not be appointed deputy election commissioner or employed by county election board. Ind. Code § 3-6-5-24.
• may not be appointed as a member of the Tippecanoe County Board of Elections and Registration. Ind. Code § 3-6-5.4-4.5.

- Circuit Court Clerk - may not be a member of a candidate for elected office’s committee other than the clerk's own candidate's committee. Ind. Code § 3-6-5-3, Ind. Code § 3-6-5.2-4.5, Ind. Code § 3-6-5.4-4.5.

- Commission for Higher Education - except for the one full-time faculty member and one appointed student member, may not be an employee of or serve on the governing board of any state or private college or university in Indiana. Ind. Code § 21-18-3-2.

- Commission to Regulate Plumbers - except for the state department of health representative, may not hold another elective or appointive state or federal office. Ind. Code § 25-28.5-1-4.

- County Election Board employee - may not become a candidate for elected office. Ind. Code § 3-6-5-24.

- County Election Board member – may not hold elected office. Ind. Code § 3-6-5-3.

- Deputy Election Commissioner - may not become a candidate for elected office. Ind. Code § 3-6-5-24.

- Employee of political subdivision as candidate for or appointed to office - an employee of a political subdivision may be a candidate for any elected office and serve in that office if elected or be appointed to any office and serve in that office if appointed without having to resign as an employee of the political subdivision. Ind. Code § 36-1-8-10.5

- Health and Hospital Corp. of Marion County Governing Board - ineligible to hold an appointive office or employment under the corporation. Ind. Code § 16-22-8-13.

- IPS School Commissioners - may not serve in any elective or appointive office under the board of school commissioners or under the government of the civil city while serving on the board. Ind. Code § 20-25-3-3.

- Ivy Tech State College Board of Trustees - may not hold an elective or appointed office of the state. Ind. Code § 21-22-3-3.

- Judicial Nominating Commission - other than the Chief Justice or his designee, may not hold any other salaried public office or an office in a political party or organization; also no appointment to a judicial office so long as he is a member of the commission and for a period of three years thereafter. Ind. Const. art. VII, § 9.

- Municipal Electric Utility Joint Agency commissioner – eligible to receive compensation unless holding another lucrative office. Ind. Code § 8-1-2.2-8(g).

- Notary Public – no lucrative officeholder under the United States or the State of Indiana may serve as a notary public. Ind. Code § 33-42-2-7.

- Redevelopment Commissioner – eligible to receive compensation unless holding another lucrative office. Ind. Code § 36-7-14-7.
• **Worker’s Compensation Board** - shall not hold any other position of trust or profit or engage in any occupation or business interfering with or inconsistent with the discharge of his duties as such member. Ind. Code § 22-3-1-1.

• **Board of Zoning Appeals Member** - may not hold other elective or appointive office, except as permitted by section 36-7-4-902. Ind. Code § 36-7-4-905.

3. **Non-Lucrative Offices as Determined by Indiana Courts and Indiana Attorney General Opinion:**


• Committee membership: *Branham v. Lange*, 16 Ind. 497 (Ind. 1861).


• Deputy inspector under the direction of the state commissioner: Freyermuth v. State ex rel. Burns, 2 N.E.2d 399, 404 (Ind. 1936).


• Northern Indiana Children’s Hospital active staff member: 1949 Op. Att’y Gen. No. 98.


• **Senior judge of the Court of Appeals**: *McCullough v. McCullough*, 705 N.E.2d 190, 197 (Ind. Ct. App. 1999).


### 4. Offices Made Non-Lucrative Pursuant to State Law:

- **Appointed deputy of a judicial circuit officer**: Ind. Code § 5-6-4-3.
- **Appointed deputy of a political subdivision officer**: Ind. Code § 5-6-4-3.
- **Attorney employed by county fiscal body**: Ind. Code § 36-2-3-10.
- **City employee other than an elected/appointed public officer**: Ind. Code § 36-4-4-2 (2007).
- **Deputy clerk of the circuit court**: Ind. Code § 5-6-4-3.
- **Deputy county auditor**: Ind. Cod § 5-6-4-3.
- **Deputy mayor**: Ind. Cod § 5-6-4-3.
- **Deputy prosecuting attorney**: Ind. Cod § 5-6-4-3.
- **Deputy registration officer**: Ind. Cod § 5-6-4-3.
- **Deputy township assessor**: Ind. Cod § 5-6-4-3.
- **Deputy township trustee**: Ind. Cod § 5-6-4-3.
- **Fire department members, including volunteers**: Ind. Code § 36-8-3-12.
- **Indiana Criminal Justice Institute board of trustees**: membership does not constitute holding a public office. Ind. Code § 5-2-6-4.
- **Law Enforcement Training Board and Advisory Council**: membership on the law enforcement training board or the advisory council shall not constitute holding a public office; no member of the board or of the advisory council shall be disqualified from holding any public office or position by reason of his appointment or membership, nor shall any such person forfeit any office, position, or employment by reason of an appointment, notwithstanding the provisions of any statute, ordinance, or city charter. Ind. Code § 5-2-1-5.
• **Militia positions with no compensation**: offices in the militia to which there is attached no annual salary shall not be deemed lucrative. Ind. Const. art. II, § 9.

• **Motor Vehicle Sales Advisory Board**: membership does not constitute the holding of a public office. Ind. Code § 9-23-1-4.

• **Precinct election officer**: Ind. Code § 3-6-6-37.

• **Safety board members**: Ind. Code § 36-8-3-12.

• **Solid waste management district controller**: Ind. Code § 13-21-3-10(b).

• **Town police department members**: Ind. Code § 36-8-3-12.

• **Township police department members**: Ind. Code § 36-8-3-12.
Appendix B

Cases and Attorney General Opinions
No Longer Reflecting Current Law

• Health Facility Financing Authority, Indiana: notwithstanding the provisions of any other law, an officer or employee of the state may not be required to leave his office or employment solely because he is a member of the authority or has provided services to the authority. Ind. Code § 5-1-16-11 (1983) (Repealed by P.L.162-2007, SEC.42.)
Appendix C

Additional Resources


The website of Indiana Attorney General Steve Carter: [http://www.state.in.us/attorneygeneral/](http://www.state.in.us/attorneygeneral/).

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