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**OFFICIAL OPINION 2017-2**

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**RE: Dual Office Holding Inquiry**

Dear Mr. Harrison:

**QUESTION PRESENTED**

You recently asked, in your capacity as county attorney, whether a person may be a member of both the Vanderburgh County Board of Commissioners and the Vanderburgh County Convention and Visitor Commission without violating the prohibition against “dual office-holding” found in Art. 2, § 9 of the Indiana Constitution.

**BRIEF ANSWER**

Yes. While a member of the Vanderburgh County Board of Commissioners holds a “lucrative office,” a member of the Vanderburgh County Convention and Visitor Commission 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.”<sup>1</sup> This prohibition

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<sup>1</sup> Ind. Const. Art. 2, § 9.

was adopted by the framers of the Constitution to prevent the consolidation of power in a small number of government officials.<sup>2</sup>

### ***“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.”<sup>3</sup> 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.”<sup>4</sup> An employee has no sovereign power of the state entrusted to him.<sup>5</sup> An employee’s compensation is generally agreed upon by the contract of hiring.<sup>6</sup> 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.”<sup>7</sup>

### ***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.”<sup>8</sup> Lucrativeness is not dependent on the amount of compensation received.<sup>9</sup> 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.<sup>10</sup>

### ***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.<sup>11</sup> For

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

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

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

<sup>5</sup> *Id.* at 730.

<sup>6</sup> *Id.* at 731.

<sup>7</sup> *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).

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

<sup>9</sup> *Id.*

<sup>10</sup> *Dailey v. State*, 8 Blackf. 329 (Ind. 1846).

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

instance, the legislature has exempted county police officers;<sup>12</sup> members of safety boards;<sup>13</sup> appointed deputies;<sup>14</sup> members of any township, town or city police department;<sup>15</sup> city employees;<sup>16</sup> and a long list of state board members.<sup>17</sup> A review of Indiana's laws, cases, and past opinions of this office revealed no exemption that would apply to either the Vanderburgh County Board of Commissioners or the Vanderburgh County Convention and Visitor Commission.

### *Vanderburgh County Board of Commissioners*

The Vanderburgh County Board of Commissioners ("Board") is the county executive and is established by statute.<sup>18</sup> The Board consists of three (3) members<sup>19</sup> elected by the voters of the county.<sup>20</sup> Board members serve four (4) year terms,<sup>21</sup> and their compensation is fixed by the county fiscal body.<sup>22</sup> The Board is empowered to administer oaths,<sup>23</sup> to punish contempt by a nominal fine or brief imprisonment,<sup>24</sup> and to direct a county sheriff or police officer to execute its orders.<sup>25</sup> The Board may approve accounts chargeable against the county, direct the raising of money necessary for county expenses,<sup>26</sup> and audit officers who deal with county monies.<sup>27</sup> The Board may direct the sale of county buildings and the acquisition of land for public purposes.<sup>28</sup> The Board may grant licenses, permits, or franchises for the use of county property.<sup>29</sup>

The Board is created by statute rather than by contract. Board members are elected by the voters of the county rather than hired as contract employees. They serve limited four-year terms rather than working 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 all Board members will be considered "officers." Additionally, the Board has powers set forth by statute which include administering oaths, punishing contempt, directing police to execute orders, approving county accounts, raising money for county expenses, auditing county fiscal officers, ordering the sale or purchase of buildings and property, and granting licenses, permits, or franchises—all sovereign powers of the State. Membership on the Board is clearly an "office." Furthermore, because compensation of Board members is fixed by the county fiscal body, the office is "lucrative." There is no legislative or other exception making this position a non-office.

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<sup>12</sup> Ind. Code § 36-8-10-11(c).

<sup>13</sup> Ind. Code § 36-8-3-12.

<sup>14</sup> Ind. Code § 5-6-4-3.

<sup>15</sup> Ind. Code § 36-8-3-12.

<sup>16</sup> Ind. Code § 36-4-4-2(b).

<sup>17</sup> Ind. Code §§ 25-1-5-3.5, 25-1-6-3.5.

<sup>18</sup> Ind. Code § 36-2-2-2.

<sup>19</sup> *Id.*

<sup>20</sup> Ind. Code § 36-2-2-3(a).

<sup>21</sup> Ind. Code § 36-2-2-3(b).

<sup>22</sup> Ind. Code § 36-2-5-3(a).

<sup>23</sup> Ind. Code § 36-2-2-15(a).

<sup>24</sup> Ind. Code § 36-2-2-15(b).

<sup>25</sup> Ind. Code § 36-2-2-15(d).

<sup>26</sup> Ind. Code § 36-2-2-16.

<sup>27</sup> Ind. Code § 36-2-2-17.

<sup>28</sup> Ind. Code § 36-2-2-20.

<sup>29</sup> Ind. Code § 36-2-2-23.

Past decisions of the appellate courts and opinions of this office have held that Board members are lucrative officers.<sup>30</sup> Based on the above analysis, a member of the Vanderburgh County Board of Commissioners would be deemed a lucrative office holder under Art. 2, § 9 of the Indiana Constitution.

### *Vanderburgh County Convention and Visitor Commission*

The Vanderburgh County Convention and Visitor Commission (“Commission”) is established by statute.<sup>31</sup> The Commission consists of seven (7) appointed members. Two (2) of the members are appointed by the county council, two (2) by the county commissioners, and three (3) by the mayor of the municipality with the largest population.<sup>32</sup> Members appointed by the county council or the mayor serve two (2) year terms, while members appointed by the county commissioners serve one (1) year terms.<sup>33</sup> Members may not receive a salary, but shall receive reimbursement for necessary expenses if they are incurred in the performance of their respective duties.<sup>34</sup> The Commission is empowered to do the following:

- (1) accept and use gifts, grants, and contributions from any public or private source, under terms and conditions which the commission deems necessary and desirable;
- (2) sue and be sued;
- (3) enter into contracts and agreements;
- (4) make rules and regulations necessary for the conduct of its business and the accomplishment of its purposes;
- (5) receive and approve, alter, or reject requests and proposals for funding by [nonprofit] corporations [for promotion of conventions, trade shows, visitors, or special events];
- (6) transfer money received under this chapter [for promotion of conventions, trade shows, visitors, or special events];
- (7) require financial or other reports from any corporation that receives funds under this chapter.<sup>35</sup>

To carry out these actions, Commission members are also empowered to transfer money out of the convention and visitor promotion fund<sup>36</sup> and the tourism capital improvement fund.<sup>37</sup>

The Commission is established by statute rather than by contract. Commission members are appointed rather than hired as contract employees. They serve limited terms rather than working with open-ended employment. Commission members have no employer who directs how their work is to be performed. All these elements indicate Commission members are

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<sup>30</sup> *Dailey v. State*, 8 Blackf. 329, 330 (Ind. 1846); *Thompson v. Hays*, 867 N.E.2d 654, 657 (Ind. Ct. App. 2007); 1957 *Op. Ind. Att’y Gen.* No. 13; 1962 *Op. Ind. Att’y Gen.* No. 67.

<sup>31</sup> Ind. Code § 6-9-2.5-2(a).

<sup>32</sup> Ind. Code § 6-9-2.5-2(b).

<sup>33</sup> Ind. Code § 6-9-2.5-2(c).

<sup>34</sup> Ind. Code § 6-9-2.5-2(e).

<sup>35</sup> Ind. Code § 6-9-2.5-3(a).

<sup>36</sup> Ind. Code § 6-9-2.5-7.

<sup>37</sup> Ind. Code § 6-9-2.5-7.5.

officers. Additionally, the Commission has powers and duties set forth by law which include accepting gifts, bringing suit, making rules and regulations, administering requests for funding, transferring monies from county convention and tourism funds, and requiring progress reports—all sovereign powers of the State. Membership on the Commission is clearly an “office.” However, Commission members may not receive a salary but shall receive reimbursement for their necessary expenses. There is no legislative or other exception or exemption making this position a non-office. Based on the above analysis, a member of the Vanderburgh County Convention and Visitor Commission would hold an “office” but not a “lucrative office” under Art. 2, § 9 of the Indiana Constitution because such member would not be entitled to compensation.

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.<sup>38</sup> It prohibits a person charged with official duties under one of the departments from exercising the functions of another department.<sup>39</sup> “Under our form of government, it is essential that the three separate branches of government recognize the sphere of authority enjoyed by the others.”<sup>40</sup> 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.”<sup>41</sup> 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.”<sup>42</sup>

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.<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup>

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

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<sup>38</sup> Ind. Const. Art. 3, § 1.

<sup>39</sup> *Id.*

<sup>40</sup> 1971 *Op. Ind. Att’y Gen.* No. 6.

<sup>41</sup> *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).

<sup>42</sup> *Id.* (emphasis removed).

<sup>43</sup> See *Book*, 149 N.E.2d at 296.

<sup>44</sup> *Id.* See 1983-84 *Op. Ind. Att’y Gen.* No. 83-5.

<sup>45</sup> *Black*, 80 N.E.2d at 302.

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.

A handful of Indiana appellate cases are instructive. In *Scholer v. Moran*, the court held that an individual could not serve as a city police officer in the executive branch of government and at the same time serve on a city council performing legislative duties without violating Art. 3, § 1 of the Indiana Constitution.<sup>46</sup> In *Harden v. Whipker*, the court held that an individual could serve as a county police officer and as a county council person without violating Art. 3, § 1.<sup>47</sup> However, some caution is warranted with the holding in *Harden*. The court's analysis was constrained by Ind. Code § 36-8-10-12, which permits a police officer to be a candidate for, and serve in, an elected or appointed office.<sup>48</sup> Absent that code section, this court would have followed *Rush v. Carter*, where a county police officer's contemporaneous service as a county councilman was found to violate Art. 3, § 1.<sup>49</sup> Again, we suggest a careful review of an individual's employment related 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."<sup>50</sup> 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."<sup>51</sup> The public servant's appointing authority determines whether such positions are incompatible.<sup>52</sup> When such incompatibility is found to exist, the acceptance of the latter office vacates the first office.<sup>53</sup> 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.<sup>54</sup>

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<sup>46</sup> *Scholer v. Moran*, 482 N.E.2d 460 (Ind. 1985).

<sup>47</sup> *Harden v. Whipker*, 646 N.E.2d 727 (Ind. Ct. App. 1995), *transfer granted*, 676 N.E.2d 19 (Ind. 1997), *dismissed as moot* 683 N.E.2d 579 (1997).

<sup>48</sup> As noted *supra*, the Indiana Supreme Court granted transfer in *Harden*, thus vacating the appellate court decision. Even though the Supreme Court eventually found the dispute to be moot and dismissed the appeal, the Supreme Court did not vacate the grant of transfer. Accordingly, the *Harden* decision has no precedential value. See *Thompson v. Hays*, 867 N.E.2d 654, 658 n. 6 (Ind. Ct. App. 2007).

<sup>49</sup> *Rush v. Carter*, 468 N.E.2d 236 (Ind. Ct. App. 1984).

<sup>50</sup> 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)).

<sup>51</sup> 63C Am. Jur. 2d *Public Officers and Employees* § 58 (2012).

<sup>52</sup> See *Gaskin v. Beier*, 622 N.E.2d 524, 530 (Ind. Ct. App. 1993).

<sup>53</sup> 1954 Op. Att'y Gen. No. 70.

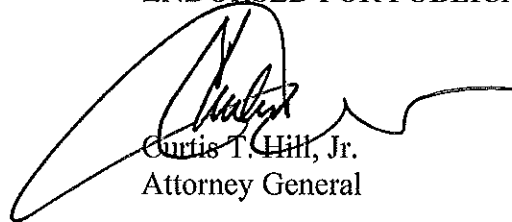
<sup>54</sup> See 1961 Op. Ind. Att'y Gen. No. 4; 1967 Op. Ind. Att'y Gen. No. 11; 1989 Op. Ind. Att'y Gen. No. 89-3.

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.<sup>55</sup>

### CONCLUSION

It is the opinion of this office that members of the Vanderburgh County Board of Commissioners are “lucrative officers” because they are established by state law, they are elected to serve limited terms, they are empowered to direct their own work, they are charged with specific powers and duties normally reserved to the State, and they are entitled to compensation. Using the same criteria, members of the Vanderburgh County Convention and Visitor Commission are “officers,” but their positions are not “lucrative” because they may not receive a salary. Therefore, a person may simultaneously be a member of the Vanderburgh County Board of Commissioners and the Vanderburgh County Convention and Visitor Commission without violating the prohibition against dual office holding found in Art. 2, § 9 of the Indiana Constitution. However, one should also consider the separation of powers doctrine, possible conflicts of interest, and potential incompatibility of positions.

SUBMITTED, and  
ENDORSED FOR PUBLICATION:



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<sup>55</sup> 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](http://www.in.gov/attorneygeneral/files/DOH%20Guide%202016%20Update.pdf).