



MEC  
OPINION NO.

1996.07.140

**STATE OF MISSOURI**

**MISSOURI ETHICS COMMISSION**  
P. O. BOX 1254  
JEFFERSON CITY, MISSOURI 65102

573/751-2020  
1-800/392-8660

July 31, 1996

COPY

At the July 16, 1996 meeting of the Missouri Ethics Commission, your request for an opinion was discussed. The following is in response to your question:

*May a person be an appointed member of the Board of Directors of the Callaway County Special Services and the elected mayor of a city simultaneously?*

From the facts presented in your letter, the Commission stated that there appears to be no violation of the conflict of interest laws of the State of Missouri found in Chapter 105, RSMo for the mayor to be appointed a member of the Board of Directors of the Callaway County Special Services. However, you may wish to assess with your own county whether the dual services would violate the common law conflicts of interest. For your assistance, I have enclosed copies of Attorney General Opinions numbered 42-90 and 121-88.

The Commission further stated that a conflict of interest may arise when the city official, acting in his official capacity, would enter into a contract between the city and the Callaway County Special Services.

If you have any further questions, please feel free to contact this office.

Sincerely,

  
Charles G. Lamb  
(Acting) Administrative Secretary

MCR:bd  
Enclosures

**NOTICE**

**Anyone examining this advisory opinion should be careful to note that an opinion of the Missouri Ethics Commission deals only with the specific request to which the opinion responded and only as to the law as it existed at the date of the response and cannot be relied upon for any other purpose or in any other manner.**



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prohibits a public official from holding two incompatible offices is based on the following principles:

At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two, -- some conflict in the duties required of the officers, as where one has some supervision of the others, is required to deal with, control, or assist him. It was said by Judge Folger (People v. Green, 58 N.Y. 295): "Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that 'incompatibility' from which the law declares that the acceptance of the one is the vacation of the other. The force of the word in its application to this matter is that, from the nature and relations to each other of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one towards the incumbent of the other. . . ."

State ex rel. Walker v. Bus, 135 Mo. 325, 36 S.W. 636, 639 (1896).

Applying these principles, this office has previously opined that a person may not simultaneously hold both the office of presiding commissioner of a third class county and the office of alderman of a fourth class city within that county. See Opinion No. 121-88, a copy of which is enclosed. In that opinion, it was observed that statutes might bring the two offices into conflicts of authority.

Section 80.090, RSMo 1986, sets forth powers given to the board of trustees of a village. These include power:

(11) To organize and maintain fire companies;

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(12) To prevent and extinguish fires;

(13) To establish fire limits and to define the limits within which wooden buildings, stables, manufactories and other structures which may increase the danger of calamities from fires shall not be erected;

Section 321.220, RSMo, sets forth powers of the board of directors of a fire protection district. These include power:

(12) To adopt and amend bylaws, fire protection and fire prevention ordinances, and any other rules and regulations not in conflict with the constitution and laws of this state, necessary for the carrying on of the business, objects and affairs of the board and of the district. . . .

It is possible that conflict would arise in carrying out the responsibilities of both offices. In light of these areas of potential conflict between the offices, we conclude that there is an incompatibility between the office of trustee of a village and director of a fire protection district in which such village is located. As a result of such incompatibility and conflict, the same person may not hold these offices simultaneously. There is no authority that holds an election creates an exception to the doctrine of incompatibility.

Having concluded a person may not hold both offices simultaneously, we turn to your remaining question asking whether a person may be a candidate for the office of trustee of a village while a member of the board of directors of a fire protection district which includes the village. There are no constitutional or statutory provisions prohibiting a member of the board of directors of a fire protection district from being a candidate for the office of trustee of a village located within the district. However, should he be successful in his candidacy, the general rule is that "[t]he acceptance of an incompatible office by the incumbent of another office is generally regarded as a resignation or vacation of the first office. . . ." 67 C.J.S. Officers, § 32a.

#### CONCLUSION

It is the opinion of this office that the same person may not simultaneously serve as a director of a fire protection district and as trustee of a village located within that fire protection district; however, an incumbent director of a fire

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protection district can be a candidate for the office of trustee of a village located within that fire protection district.

Very truly yours,

  
WILLIAM L. WEBSTER  
Attorney General

Enclosure: Opinion No. 121-88

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<sup>1</sup>Section 321.015, RSMo 1986 was amended in 1990 by House Bill No. 1149, 85th General Assembly, Second Regular Session (1990) to provide that such section "shall not apply . . . to fire protection districts . . . located within first class counties without a charter form of government having a population of more than one hundred ninety-eight thousand and not adjoining any other first class county." Because of this 1990 amendment to Section 321.015 eliminating Greene County from its provisions, we need not consider this statutory section.

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CITIES, TOWNS AND VILLAGES:	The same person may not
CITY OFFICERS-OFFICIALS:	simultaneously hold both the
CONFLICT OF INTEREST:	office of presiding commis-
COUNTIES:	sioner of a third class county
COUNTY COMMISSIONS:	and the office of alderman of
COUNTY COMMISSIONERS:	a fourth class city within
INCOMPATIBILITY OF OFFICES:	that county.

June 7, 1988

OPINION NO. 121-88

The Honorable Norman L. Merrell  
Senator, District 18  
State Capitol Building, Room 423  
Jefferson City, Missouri 65101

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Dear Senator Merrell:

This opinion is in response to your question asking:

May the Presiding Commissioner of Scotland County  
simultaneously hold the office of alderman of Memphis,  
Missouri?

It is our understanding Scotland County is a third class  
county and Memphis, the county seat, is a third class  
city.

We have found no statute or common law  
prohibiting the same person from holding two  
simultaneously. However, we have found a common law  
doctrine prohibiting a public officer from holding two  
incompatible offices. The principles of that doctrine have been  
set forth by Missouri courts as follows:

At common law the only limit to the number of  
offices one person might hold was that they should  
be compatible and consistent. The incompatibility  
does not consist in a physical inability of one  
person to discharge the duties of the two offices,  
but there must be some inconsistency in the  
functions of the two, -- some conflict in the  
duties required of the officers, as where one has  
some supervision of the others, is required to  
deal with, control, or assist him. It was said by  
Judge Folger (People v. Green, 58 N.Y. 295):  
"Where one office is not subordinate to the other,  
nor the relations of the one to the other such as  
are inconsistent and repugnant, there is not that  
'incompatibility' from which the law declares that

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the acceptance of the one is the vacation of the other. The force of the word in its application to this matter is that, from the nature and relations to each other of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one towards the incumbent of the other. . . ." State ex rel. Walker v. Bus, 135 Mo. 325, 36 S.W. 636, 639 (1896).

The respective functions and duties of the particular offices and their exercise with a view to the public interest furnish the basis of determination in each case. Cases have turned on the question whether such duties are inconsistent, antagonistic, repugnant or conflicting as where, for example, one office is subordinate or accountable to the other. State ex rel. McGaughey v. Grayston, 349 Mo. 700, 163 S.W.2d 335, 339-340 (banc 1942).

Applying these principles, this office has previously opined that the offices of the presiding commissioner of a third class county and the mayor of a fourth class city are incompatible. Opinion Letter No. 64, Foley, 1976, a copy of which is enclosed. In that opinion, this office stated that there were many statutes which would bring the two offices into conflicts of authority and cited as examples Section 70.210, et seq., RSMo, permitting cooperative agreements between counties and cities; Section 71.300, RSMo, authorizing cooperation in the maintenance of jails between counties and cities; and Section 71.340, RSMo, authorizing cities to make certain appropriations for roads leading to and from such cities.

In regard to the offices presented in your question, we reach the same conclusion and for the same reasons. The board of aldermen participates in the governance of the city in such a manner and to such a degree that the potential for conflict with the county's governing body is as likely as in the case of the offices concerned in Opinion Letter No. 64, Foley, 1976. Besides the statutes cited in that opinion as presenting areas of conflict, see also Sections 71.012 and 79.020, RSMo 1986, concerning the annexation by a fourth class city of unincorporated land in the county and Section 88.703, RSMo 1986, concerning liability of county property within a fourth class city for its proportionate part of the city's public improvements.

In situations in which a public officer is holding two incompatible offices, the public may become concerned about the

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validity of his official acts. The courts have protected the public and third persons from the disruption which would be caused by his official acts being held invalid. As the court explained in In Re F. C., 484 S.W.2d 21, 24 (Mo.App. 1972):

"The rule at common law is well settled that where one, while occupying a public office, accepts another, which is incompatible with it, the first will ipso facto terminate without judicial proceeding or any other act of the incumbent. The acceptance of the second office operates as a resignation of the first . . . This rule it is said, is founded upon the plainest principles of public policy, and has obtained from very earliest times . . . (T)he law presumes the officer did not intend to commit the unlawful act of holding both offices, and a surrender of the first is implied." State ex rel. Walker v. Bus, Mo. banc, 135 Mo. 325, 36 S.W. 636, 637[1]; State ex rel. Owens v. Draper, 45 Mo. 355. This rule still obtains and "has never been questioned". State ex rel. McGaughey v. Grayston, Mo. banc, 349 Mo. 700, 163 S.W.2d 335, 339[10] . . . the surrender of the first office which is implied in the common law rule does not invalidate the acts of the occupant of the first office so far as third persons and the public are concerned, but that occupant becomes a de facto officer until ousted by proper process.

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<sup>3</sup>Habeas corpus is not the proper method to test the official conduct of a de facto public officer. "(T)itle to a public office or the right of a de facto officer to exercise the rights and duties of the office cannot be tested except by the state in a direct proceeding for that purpose and the authority to institute quo warranto proceedings rests within the discretion of the officers named in Sec. 531.010, RSMo VAMS." Boggess v. Pence, Mo. banc, 321 S.W.2d 667, 671[1]; Civil Rule 98.01, V.A.M.R.; State v. King, Mo., 379 S.W.2d 522, 525 [4,5]; State ex rel. McGaughey v. Grayston, Mo. banc, 349 Mo. 700, 163 S.W.2d 335, 340 [14,15].

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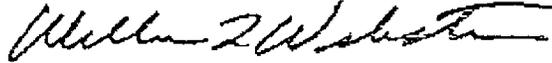
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Conclusion

It is the opinion of this office that the same person may not simultaneously hold both the office of presiding commissioner of a third class county and the office of alderman of a fourth class city within that county.

Very truly yours,



WILLIAM L. WEBSTER  
Attorney General

Enclosure:

Attorney General Opinion Letter No. 64, Foley, 1976