

Conflict Of Interest, Dual Officeholding And Nepotism

by Gary S. Markenson

“One of our councilmen owns the lumber yard, and he sells lumber to the city. Is this a conflict of interest?” “Our Board is considering appointing the mayor’s son-in-law as public works director. Does this violate the nepotism provisions?” “Someone told me I cannot serve as city clerk and collector. Is there a law against this?”

These are samples of the questions we frequently are asked by city officials. This article will explain the statutory provisions, Attorney General opinions and court decisions on conflict of interest, nepotism and incompatibility of office.

Conflict Of Interest

The law in Chapter 105 provides that no elected official, appointed official or administrative employee may:

1. Perform any service for the political subdivision in which he is an officer or employee or over which he has supervisory power for receipt or payment of any compensation, other than of the compensation provided for the performance of his official duties, in excess of \$500 per transaction or ~~\$1,500~~ per annum, except on transactions made pursuant to an award on a contract let or sale made after public notice and competitive bidding provided that the bid or offer is the lowest received;

2. Sell, rent or lease any property to the political subdivision in which he is an officer or employee or over which he has supervisory power and received consideration therefor in excess of \$500 per transaction or ~~\$1,500~~ per year unless the transaction is made pursuant to an award on a contract let or sale made after public notice and

in the case of property other than real property, competitive bidding provided that the bid or offer accepted is the lowest received;

3. Participate in any matter, directly or indirectly, in which he attempts to influence any decision of the political subdivision in which he is an officer or employee, or over which he has supervisory power when he knows the result of such decision may be the acceptance of

the performance of a service or the sale, rental, or lease of any property to that agency for consideration in excess of \$500 per transaction or ~~\$1,500~~ per annum to him, to his spouse, to a dependent child in his custody or to any business with which he is associated unless the transaction is made pursuant to an award on a contract let or sale made after public notice and in the case of property other than real

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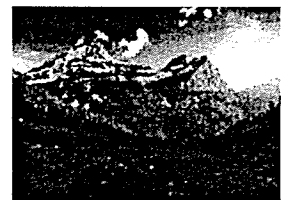


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property, competitive bidding provided that the bid or offer accepted is the lowest received;

4. Perform any services during the time of his office or employment for any consideration from any person, firm or corporation, other than the compensation provided for the performance of his official duties, by which service he attempts to influence a decision of the political subdivision in which he is an officer or employee or over which he has supervisory power;

5. Perform any service for consideration, during one year after termination of his office or employment, by which performance he attempts to influence a decision of the political subdivision in which he was an officer or employee or over which he had supervisory power, except that this provision shall not be construed to prohibit any person from performing such service and receiving compensation therefor, in any adversary proceeding or in the preparation or filing of any public document;

6. Perform any service for any consideration for any person, firm or corporation after termination of his office or employment in relation to any case, decision, proceeding or application with respect to which he was directly concerned or in

which he personally participated during the period of his service or employment.

Restrictions On Governing Bodies

Also, the law provides that no member of the municipal governing body may:

1. Perform any service for the political subdivision or any agency of the political subdivision for any consideration other than the compensation provided for the performance of his official duties;

2. Sell, rent or lease any property to the political subdivision or any agency of the political subdivision for consideration in excess of \$500 per transaction or ~~\$1,500~~ per annum unless the transaction is made pursuant to an award on a contract let or a sale made after public notice and in the case of property other than real property, competitive bidding provided that the bid or offer accepted is the lowest received;

3. Attempt for any compensation other than the compensation provided for the performance of his official duties, to influence the decision of any agency of the political subdivision on any matter.

Finally, the law provides that no sole proprietorship, partnership,

joint venture, or corporation in which any member of any legislative body of any political subdivision is the sole proprietor, partner, coparticipant or owner of in excess of ten percent of the outstanding shares of any class of stock, shall:

1. Perform any service for the political subdivision or any agency of the political subdivision for any consideration in excess of \$500 per transaction or \$1,500 per annum unless the transaction is made pursuant to an award on a contract let after public notice and competitive bidding, provided that the bid or offer accepted is the lowest received;

2. Sell, rent or lease any property to the political subdivision or any agency of the political subdivision where the consideration is in excess of \$500 per transaction or ~~\$1,500~~ per annum unless the transaction is made pursuant to an award on a contract let or a sale made after public notice and in the case of property other than real property, competitive bidding provided that the bid or offer accepted is the lowest received.

Penalties

The statute provides that all complaints against officials or employees of a political subdivision concerning violations of the conflict of interest provisions must be made in writing to the Missouri Ethics Commission. The complaint must name the person allegedly violating the law, the nature and date of the violation, and must be signed by the complainant with an oath attesting that he believes, to the best of his knowledge, the truthfulness of the complaint.

Any person found guilty of purposefully violating any of the provisions of the law would be punished by imprisonment for up to six months.

Conflicts In Breaking Tie Votes

One frequently asked question is: "May the mayor break a tie vote to confirm his appointee to public office or discharge an employee from office, or is this a conflict of interest?"

In third, fourth and some home rule charter cities, the mayor may



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vote to break a tie, except when he is an "interested party." In the case of *Ciaramitaro v. Charlack*, the Missouri Court of Appeals, Eastern District, held that the mayor could vote to break a tie to discharge an employee unless the mayor's vote resulted from deep personal enmity for the individual or the mayor desired to appoint a friend to the position. This 1984 case overturned several earlier Missouri Attorney General opinions that had stated the mayor could not vote to break a tie under these circumstances. Municipal officials may obtain a copy of the *Ciaramitaro* decision and the most recent Attorney General's opinion from League headquarters.

Incompatibility Of Office (Dual Officeholding)

Many Missouri municipalities, especially smaller ones, have combined offices in order to be more efficient and effective. Usually, someone will pose the question, "Is it legal to combine these offices under one officeholder?"

Under common law, an individual may hold more than one office only if the offices are compatible. The test for incompatibility of offices has four standards:

1. one office is subordinate to the other;
2. one office has supervisory powers over the other;
3. one office audits the other's accounts; or
4. one office has power of appointment or removal over the other.

The Missouri Attorney General has issued a number of formal opinions on the compatibility of various municipal offices but each combination must be evaluated separately.

Although many municipalities have combined offices for efficiency and economy and have found the arrangement satisfactory from a practical point of view, this practice might be criticized under the doctrine of incompatibility of office. In particular, the common practice of combining the offices of clerk, collector and treasurer would seem to be a technical violation of the doctrine of incompatibility of office.

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Nepotism

The Missouri Constitution, Article VII, Section 6, states that:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

Although this provision seems clear, numerous questions on nepotism arise from municipal operations. For example, the Board of Aldermen appoints an Alderman's relative to city employment, but the Alderman does not participate in the discussion or vote on the appointment. Is this nepotism? In *McKittrick v. Becker*, the Missouri Supreme Court held that the nepotism provision was not violated when a relative of one of the members of the Court of Appeals was appointed as an employee of the Court of Appeals by the other two members of the Court. Because the relative did not vote or participate in the discussion, either directly or indirectly, no violation occurred. We assume the same reasoning would apply to municipal officials.

What happens when a relative is employed by a municipality prior to the election of a related member of

the city council? The Missouri Attorney General (Opinion Letter 354, Hazel, 1975) held that the above circumstances do not violate the nepotism provision. The opinion states that the councilman should abstain from future votes on salary increases for the relative and must not participate in any decision or vote to promote the relative to a new position.

Other Considerations

In addition to the conflict of interest provisions in Chapter 105 and the nepotism provisions in the Missouri Constitution, some municipal officials are covered by local charter provisions and ordinances pertaining to conflict of interest and nepotism.

Municipal officials should always be aware that the appearance of an impropriety may be as embarrassing and politically damaging as an actual violation of the conflict of interest law. Although some municipal officials may legally do business with the city, municipal officials are encouraged to carefully analyze the probable public perception of such activities. □

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