

# INCOMPATIBLE OFFICES

By Patrick Cronan

Municipal offices are subject to three moral guides: their personal Code of Ethics, a statutory prohibition (that is, created by the legislature) against conflicts of interest, and a common law doctrine (that is, judge made law) prohibiting an individual from holding incompatible municipal offices.<sup>1</sup> When this doctrine is invoked, an officer may be prohibited from holding two offices in the same municipal corporation, two different corporations, or in rare instances, a municipal corporation and a private corporation.

## What Is A Public Office?

In determining whether two offices are incompatible, it is necessary to first determine whether both are public offices. The doctrine of incompatibility does not apply where one position is “employment” and the other is a “public office.” The Washington Supreme Court defined the elements of a public office in *State ex rel. Brown v. Blew*,<sup>2</sup> quoting from the earlier decision in *State ex rel. McIntosh v. Hutchinson*,<sup>3</sup> as follows:

“...(1) It must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred and the duties to be discharged must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office created or authorized by the legislature and by it placed under the general control of a superior office or body; (5) it must have some permanency and continuity and not be only temporary or occasional. In addition, in this state an officer must take an official oath, hold a commission or other written authority, and give an official bond, if the latter be required by proper authority.”

## What Is Incompatibility?

The public policy rationale for the incompatibility doctrine is set forth in *McQuillan on Municipal Corporations* as follows:

“...Public policy demands that an office holder discharge his duties with undivided loyalty. The doctrine of incompatibility is intended to assure performance of that quality. Its applicability does not turn upon the integrity of the person concerned or his individual capacity to achieve impartiality, for inquiring of that kind would be too subtle to be rewarding. The doctrine applies inexorably, if the offices come within it, no matter how worthy the officer’s purpose or extraordinary his talent...”<sup>4</sup>

Under the common law, holding one office does not, in and of itself, disqualify the officer from holding another public office, provided that the offices are not incompatible. Certain rules and tests have been laid down by the courts for determining incompatibility. It does not matter whether the officer’s services in one or both offices are not compensated. The doctrine does not apply to prohibit a husband and wife from holding separate public offices but only to one person holding two public offices. The primary test of incompatibility is whether one office is subordinate to the other in some aspect of

performing its functions and duties.<sup>5</sup> This would exist where one has the power of supervision over the other, or the power of appointment or removal over the other, or the power to audit the accounts of the other office. Incompatibility might be identified in the statutory duties of the offices or might be found in overlapping policy-making powers of the offices. Mere physical inability to perform the duties of both offices does not constitute incompatibility, rather, it is found in the character and functions of the offices and in considerations of public policy.<sup>6</sup> There is no one test that can be applied in all situations. The courts are inclined to base their decision on the particular facts rather than to develop generalized tests to determine incompatibility.

### **Analysis Of Incompatibility**

The question of incompatibility generally arises in two contexts:

1. Between two public offices in the same municipal corporation, or
2. Between two public offices in two different corporations.<sup>7</sup>

The critical determination is whether it is against the public interest to allow one person to hold two public offices. The courts have examined the subordination of one office to the other, or a conflict between statutory duties with overlapping policy making functions. Also, an express statutory prohibition against holding two offices makes the offices incompatible.<sup>8</sup>

The following municipal offices are thought to be incompatible when held by the same individual in the same municipality:

City alderman and city collector,<sup>9</sup> city councilman and city assessor,<sup>10</sup> city clerk and city collector,<sup>11</sup> city clerk and city treasurer,<sup>12</sup> alderman and special policyman,<sup>13</sup> county deputy collector and county treasurer.<sup>14</sup>

The following municipal offices are thought to be compatible when held by the same person in the same municipality:

City counselor and city judge,<sup>15</sup> city assessor and city clerk,<sup>16</sup> marshal and deputy constable,<sup>17</sup> city collector and city assessor,<sup>18</sup> city marshal and commissioner of water and sewer department.<sup>19</sup>

The following offices are thought to be incompatible when held by one person, even though the offices are in two different corporations:

County court judge and mayor,<sup>20</sup> police judge and deputy sheriff.<sup>21</sup>

The following offices in different municipal corporations have been thought to be compatible:

Member of board of education and deputy sheriff,<sup>22</sup> circuit clerk and county clerk,<sup>23</sup> clerk of board of public works and deputy sheriff,<sup>24</sup> township and city collector,<sup>25</sup> mayor of third class city and county collector,<sup>26</sup> mayor and trustee of county hospital,<sup>27</sup> city clerk and trustee of county hospital,<sup>28</sup> county clerk and director of school district,<sup>29</sup> city assessor and township clerk.<sup>30</sup>

The reader may wish to examine McQuillan on Municipal Corporations for an exhaustive catalog of decisions from other states.<sup>31</sup>

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<sup>1</sup> 3 McQuillan on Municipal Corporations, Section 12.67.

<sup>2</sup> *State ex rel. Brown v. Blew*, 145 P. 2d 554, 20 Wash. 47 (1944).

<sup>3</sup> *State ex rel. McIntosh v. Hutchinson*, 59 P. 2d 1117, 187 Wash. 61 (1936).

<sup>4</sup> 3 McQuillan, Section 12.67.

<sup>5</sup> *State ex rel. Langford v. Kansas City*, 261 S.W. 115 (Mo. 1924).

<sup>6</sup> *State ex rel. Walker v. Bus*, 36 S.W. 636, 135 Mo. 325 (1896).

<sup>7</sup> An alternative is suggested by *Kennett v. Levine*, 310 P. 2d 244, 50 Wash. 2d 212 (1957) in which the court sustained the removal of an attorney/member from the city transit authority on the theory that he might use his office to gain an advantage in damage suit his law firm had pending against the authority. The court felt the same principles that make it necessary for a public office to surrender one of two incompatible offices extends to a private business.

<sup>8</sup> *State ex rel. Walker v. Bus*, supra, note 32.

<sup>9</sup> Op. Attorney General No. 167, 1963.

<sup>10</sup> Op. Attorney General No. 188, 1963.

<sup>11</sup> Op. Attorney General No. 24, 1955.

<sup>12</sup> *Id.*

<sup>13</sup> Op. Attorney General No. 404, 1967.

<sup>14</sup> *State ex rel. McAllister v. Dunn*, 209 S.W. 110, 277 Mo. 38 (1919).

<sup>15</sup> Op. Attorney General No. 85, 1977.

<sup>16</sup> Op. Attorney General No. 38, 1960.

<sup>17</sup> Op. Attorney General No. 349, 1967.

<sup>18</sup> Op. Attorney General No. 323, 1970.

<sup>19</sup> Op. Attorney General No. 241, 1973.

<sup>20</sup> Op. Attorney General No. 65, 1976.

<sup>21</sup> Op. Attorney General No. 46, 1955.

<sup>22</sup> *State ex rel. Walker v. Bus*, supra note 32.

<sup>23</sup> *State ex rel. Moore v. Lusk*, 48 Mo. 242 (1871).

<sup>24</sup> *State ex rel. Langford v. Kansas City*, supra, note 31.

<sup>25</sup> Op. Attorney General No. 53, 1957.

<sup>26</sup> Op. Attorney General No. 33, 1958.

<sup>27</sup> Op. Attorney General No. 2, 1961.

<sup>28</sup> *Id.*

<sup>29</sup> Op. Attorney General No. 87, 1954 withdrawn, 9/19/72.

<sup>30</sup> Op. Attorney General No. 188, 1963.

<sup>31</sup> 3 McQuillan Sections 12.67a, 12.67b.