



ROLAND W. BURRIS
ATTORNEY GENERAL
STATE OF ILLINOIS

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FILE NO. 94-008

COMPATIBILITY OF OFFICES:
County Board Member and
Township Trustee

Honorable Thomas J. Difanis
State's Attorney, Champaign County
Courthouse
101 East Main
Urbana, Illinois 61801-2773

Dear Mr. Difanis:

I have your letter wherein you inquire whether one person may simultaneously hold the offices of county board member and township trustee in a county with a population of 100,000 inhabitants or more. For the reasons hereinafter stated, it is my opinion that these offices are incompatible, and that one person, therefore, may not hold both offices simultaneously.

The common law doctrine of incompatibility of offices has been summarized as follows:

" * * *

* * * Incompatibility * * * is present when the written law of a state specifically prohibits the occupant of either one of the offices in question from holding the other and, also, where the duties of either office

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are such that the holder of the office cannot in every instance, properly and fully, faithfully perform all the duties of the other office. This incompatibility may arise from multiplicity of business in the office or the other, considerations of public policy or otherwise. * * *

* * * " "

(People ex rel. Myers v. Haas (1908), 145 Ill. App. 283, 286.)

It has also been stated that:

" * * *

'Incompatibility of offices exists where there is a conflict in the duties of the offices, so that the performance of the duties of the one interferes with the performance of the duties of the other. They are generally considered incompatible where such duties and functions are inherently inconsistent and repugnant, so that because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both.'

* * * " "

63 Am. Jur. 2d Public Officers and Employees sec. 73 (1972) quoted in Rogers v. Village of Tinley Park (1983), 116 Ill. App. 3d 437, 441 and Stephens v. Education Officers Electoral Board (1992), 236 Ill. App. 3d 159, 163.

There is no constitutional provision which prohibits the holder of one of the offices in question from also holding the other. Section 2 of the Public Officer Simultaneous Tenure Act (Ill. Rev. Stat. 1991, ch. 102, par. 4.11; 50 ILCS 110/2 (West 1992)) however, provides:

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"Simultaneous tenure declared to be lawful. It is lawful for any person to hold the office of county board member and township supervisor, and in counties of less than 100,000 population the office of county board member and township trustee, simultaneously. It is lawful for any person to hold the office of county board member and the office of township assessor, township highway commissioner, or town clerk, simultaneously, in counties of less than 300,000 population." (Emphasis added.)

Since section 2 of the Act authorizes the simultaneous holding of the offices of county board member and township trustee only in counties of less than 100,000 population, it is inapplicable to the circumstances you have described. Consequently, the issue of the validity of the statute does not need to be addressed to respond to your inquiry, and it is necessary only to determine whether the offices are incompatible at common law. See People ex rel. Fitzsimmons v. Swailes (1984), 101 Ill. 2d 458 (the offices of township assessor and county board member are incompatible in counties of more than 300,000 population; the issue of the constitutionality of the population limit need not be addressed since the court was not presented with the question of incompatibility in counties of less than 300,000 population).

Prior to the enactment of section 2 of the Public Officers Simultaneous Tenure Act, Attorney General Scott advised, in opinion No. S-877, issued March 17, 1975 (1975 Ill. Att'y Gen.

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Op. 37), that the offices of county board member and township supervisor were incompatible, stating:

"Specifically, the chief area of movement in the development of the law since 1970, and the chief reason for my concern with respect to possible conflicts of interest, involves the increased powers of counties and townships to contract with each other, and the expanded subjects and purposes of such contracts. These additional powers and overlapping functions assigned to townships and counties of recent date invite a clash of obligations each unit of government owes to its respective citizens which is far greater intensity and scope than that which existed under the prior statutory scheme. My concern is focused on the fact that a person acting in the dual capacity of county board member and township supervisor cannot fully nor fairly represent the interests of both governments with respect to contracts between such governmental units.

* * *

"

(1975 Ill. Att'y Gen. Op. 37, 43.)

My predecessor noted that a county board member would take part in the formulation, acceptance and ratification of the county's contracts, and that a township supervisor, as a member of the board of auditors (now known as the board of trustees), would participate in the exercise of the powers vested in that board. (1975 Ill. Att'y Gen. Op. 37, 43.) Among the powers noted were those granted by the amendment of section 20 of article XIII of "An Act to revise the law in relation to township organization" (see Ill. Rev. Stat. 1973, ch. 139, par. 126.10; now see 60 ILCS 1185-13, added by Public Act 88-62, effective January 1, 1994; formerly section 13-20 of the Township Law of

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1874 (60 ILCS 5/13-20 (West 1992)) (repealed); further references to the provisions of the recodified Township Code herein will be by citation to the new code section only). That amendment authorized the township board to contract with any other governmental entity for the provision of services for public safety, environmental protection, public transportation, health, recreation and libraries and social services for the poor and aged. (1975 Ill. Att'y Gen. Op. 37, 44-45.) The degree of overlap in the functions of counties and towns was further emphasized by an extensive listing of the statutory powers of counties corresponding to the types of services for which towns had been given the authority to contract. (1975 Ill. Att'y Gen. Op. 37, 45.) A person who held both offices would be required to consider and vote upon issues such as what services would be provided to the people of the county and the township, which unit of government would provide the services, where the services would be provided, and what specific terms should be included in a contract between the units of government. Attorney General Scott concluded that a dual officeholder could not fairly represent the potentially conflicting interests of the two units of government. (1975 Ill. Att'y Gen. Op. 37, 46.) This reasoning was reiterated in opinion No. NP-1108, issued June 15, 1976, wherein it was concluded that the offices of township trustee and county board member were incompatible.

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The case for incompatibility of the offices in question is only stronger today than it was two decades ago. Pursuant to section 85-13 of the Township Code (60 ILCS 1/85-13) boards of town trustees now may not only contract to provide services similar in nature to those that a county may provide, but they may also provide those services directly. Section 85-13 has also been amended to allow the board of town trustees to contract or expend funds directly for the development and retention of business, industrial, manufacturing, and tourist facilities within the township; and counties now have similar powers in conjunction with the establishment of economic development project areas under the County Economic Development Project Area Tax Investment Allocation Act of 1991 (Ill. Rev. Stat. 1991, ch. 34, par. 8001 et seq.; 55 ILCS 90/1 et seq. (West 1992)). Town electors may authorize the board of trustees to exercise zoning powers (60 ILCS 1/30-75), but those powers cannot be exercised in a county in which a county zoning ordinance or resolution is in effect (60 ILCS 5/110-5). Moreover, town boards of trustees in counties of less than 1,000,000 population are expressly authorized to protest proposed county zoning in unincorporated township territory. (Ill. Rev. Stat. 1991, ch. 34, par. 5-12007; 55 ILCS 5/5-12007 (West 1992).) Townships and counties are each authorized to establish youth service bureaus, and town boards are specifically authorized to contract with counties for their

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establishment. (Ill. Rev. Stat. 1991, ch. 34, par. 5-1089; 55 ILCS 5/5-1089 (West 1992); 60 ILCS 1/215-10.)

Clearly, the duties of the offices of township trustee and county board member are such that no person can, in every instance, fully, faithfully and impartially perform the duties of both offices; the areas of potential conflict are far too numerous. Thus, at common law the offices are incompatible. Section 2 of the Public Officer Simultaneous Tenure Act does authorize the simultaneous holding of these two offices in counties of less than 100,000 population, and the legislative authorization of dual office holding overrides the common law rule of incompatibility in those counties. (E & E Hauling, Inc. v. Pollution Control Board (1983), 116 Ill. App. 3d 586, 594, aff'd 107 Ill. 2d 33.) Since the statute is not applicable to those officers in counties of 100,000 or more population, however, the common law rule applies therein. It is, therefore, my opinion that the offices of county board member and township trustee are incompatible in counties with population of 100,000 or more, and that one person may not hold both offices simultaneously in those counties.

Respectfully yours,



ROLAND W. BURRIS
Attorney General