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MEMORANDUM OF LAW

DATE: 4/12/2017

RE: Parkland College Board Trustee/Concurrent Employment Issue

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Issue

Can a duly elected member of a public community college board of trustees maintain concurrent employment with the same public community college?

Facts

- At the Consolidated Election, held on April 4, 2017, Rochelle Harden was elected to a six-year term as a member of the Parkland College Board of Trustees.
- Ms. Harden is currently employed by Parkland College as a full-time, tenured associate professor of English.
- Ms. Harden is also a union member of the Parkland Academic Employees' Association, and therefore, her employment with Parkland College is subject to the Collective Bargaining Agreement between the Parkland College Board of Trustees and the Parkland Academic Employees (AY 16 – AY 18).

- The employment relationship is governed by the law of contract. Existence of an employment contract, express or implied, is essential to the employer-employee relationship." McInerney v Charter Golf, Inc. 176 Ill 2d 482, 680 NE 2d 1347 (1997).

Relevant Illinois Law

1. Relevant Illinois Statutes

Public Officer Prohibited Activities Act

Section 3(a) of the Public Officer Prohibited Activities Act (*formerly known as the "Corrupt Practices Act"*), 50 ILCS 105/3(a), provides, in relevant part, that:

> (a) No person holding any office, either by election or appointment under the laws or Constitution of this State, may be in any manner financially interested directly in his own name or indirectly in the name of any other person, association, trust, or corporation, in any contract or the performance of any work in the making or letting of which such officer may be called upon to act or vote. No such officer may represent, either as agent or otherwise, any person, association, trust, or corporation, with respect to any application or bid for any contract or work in regard to which such officer may be called upon to vote. Nor may any such officer take or receive, or offer to take or receive, either directly or indirectly, any money or other thing of value as a gift or bribe or means of influencing his vote or action in his official character. Any contract made and procured in violation hereof is void. . .

Sections 3(b) and 3(b-5) provide exceptions to the prohibitions contained in Section 3(a).

Exceptions to Prohibitions under Public Officer Prohibited Activities Act

1. Section 3(b)(1) provides that an elected member of a governing body may provide "materials, merchandise, property, services, or labor," if all of the following conditions are met:

A. the contract is with a person, firm, partnership, association, corporation, or cooperative association in which such interested member of the governing body of the municipality has less than a 7 1/2% share in the ownership; and

B. such interested member publicly discloses the nature and extent of his interest prior to or during deliberations concerning the proposed award of the contract; and

C. such interested member abstains from voting on the award of the contract, though he shall be considered present for the purposes of establishing a quorum; and

D. such contract is approved by a majority vote of those members presently holding office; and

E. the contract is awarded after sealed bids to the lowest responsible bidder if the amount of the contract exceeds $1500, or awarded without bidding if the amount of the contract is less than $1500; and

F. the award of the contract would not cause the aggregate amount of all such contracts so awarded to the same person, firm, association, partnership, corporation, or cooperative association in the same fiscal year to exceed $25,000.

2. The exception in Section 3(b)(2) provides that an elected member of a governing body may provide "materials, merchandise, property, services, or labor," if all of the following conditions are met:

A. the award of the contract is approved by a majority vote of the governing body of the municipality provided that any such interested member shall abstain from voting; and

B. the amount of the contract does not exceed $2,000; and

C. the award of the contract would not cause the aggregate amount of all such contracts so awarded to the same person, firm, association, partnership, corporation, or cooperative association in the same fiscal year to exceed $4,000; and

D. such interested member publicly discloses the nature and extent of his interest prior to or during deliberations concerning the proposed award of the contract; and

E. such interested member abstains from voting on the award of the contract, though he shall be considered present for the purposes of establishing a quorum.

3. The exception in Section 3(b-5) provides that an elected member of a governing body may provide "materials, merchandise, property, services, or labor," if all of the following conditions are met:

A. the contract is with a person, firm, partnership, association, corporation, or cooperative association in which the interested member of the governing body of the municipality, advisory panel, or commission has less than a 1% share in the ownership; and

B. the award of the contract is approved by a majority vote of the governing body of the municipality provided that any such interested member shall abstain from voting; and

C. such interested member publicly discloses the nature and extent of his interest before or during deliberations concerning the proposed award of the contract; and

D. such interested member abstains from voting on the award of the contract, though he shall be considered present for the purposes of establishing a quorum.

Exceptions under Public Officer Prohibited Activities Act Do Not Apply

While there are exceptions provided by Subsections 3(b)(1), 3(B)(2) and 3(b-5), these exceptions will not apply to Ms. Harden's employment, to the extent that her employment as an associate professor prevents her from satisfying **all** the conditions required for each exception. Specifically, Ms. Harden cannot meet all the requirements of Section 3(b)(1), because:

- if the contract is her individual employment contract, her ownership interest is 100%

- the contract, whether it was her individual employment contract or the PAE contract, was not publicly disclosed "prior to or during deliberations concerning the proposed award of the contract," (Section 3(b)(1)(B));
- the contract, whether it was her individual employment contract or the PAE contract, was not "awarded after sealed bids to the lowest responsible bidder," and the amount of her employment contract is greater than $1500, (Section 3(b)(1)(E)); and,
- the contract, whether it was her individual employment contract or the PAE contract, exceeds $25,000 per fiscal year (Section 3(b)(1)(E)).

Likewise, Ms. Harden cannot meet all the requirements of Section 3(b)(2), because:

- her employment as an associate professor was not publicly disclosed "prior to or during deliberations concerning the proposed award of the contract," (Section 3(b)(2)(D));
- the value of the contract, whether it was her individual employment contract or the PAE contract, exceeds $2,000 (Section 3(b)(2)(B)); and,
- the aggregate value the contract, whether it was her individual employment contract or the PAE contract, exceeds $4,000 per fiscal year (Section 3(b)(2)(C)).

Finally, Ms. Harden cannot meet all the requirements of Section 3(b-5), because:

- The exception provided by Section 3(b-5) only applies when a trustee's interests are disclosed "before or during deliberations concerning the proposed award of the contract."

Public Community College Act

Section 3-48 of the Public Community College Act, 110 ILCS 805/3-48, contains a prohibition which is specific to community college trustees, and which was modelled after the prohibition contained in Section 3 of the Corrupt Practices Act. The prohibition in Section 3-48 of the Public Community College Act, states, in relevant part:

> No community college board member shall be interested, directly or indirectly, in his own name or in the name of any other person, association, trust or corporation, in any contract, work, or business of the district or in the sale of any article, whenever the expense, price, or consideration of the contract, work, business, or sale is paid either from the treasury or by any assessment levied by any statute or ordinance.

Section 3-48 contains two exceptions which are similar to the exceptions provided by Section 3(b) of the Corrupt Practices Act, and each of the exceptions provided by Section 3-48 enumerate multiple conditions which must be satisfied.

Exception under the Public Community College Act

1. The first exception in Section 3-48, provides that any board member may provide materials, merchandise, property, services, or labor, if:

A. the contract is with a person, firm, partnership, association, corporation, or cooperative association in which the board member has less than a 7 ½ % share in the ownership; and

B. such interested board member publicly discloses the nature and extent of his interest prior to or during deliberations concerning the proposed award of the contract; and

C. such interested board member abstains from voting on the award of the contract, though he shall be considered present for the purposes of establishing a quorum; and

D. such contract is approved by a majority vote of those board members presently holding office; and

E. the contract is awarded after sealed bids to the lowest responsible bidder if the amount of the contract exceeds $1500, or awarded without bidding if the amount of the contract is less than $1500; and

F. the award of the contract would not cause the aggregate amount of all such contracts so awarded to the same person, firm, association, partnership, corporation, or cooperative association in the same fiscal year to exceed $25,000.

2. The second exception in Section 3-48, provides that any board member may provide materials, merchandise, property, services, or labor, if:

A. the award of the contract is approved by a majority vote of the board provided that any such interested member shall abstain from voting; and

B. the amount of the contract does not exceed $250; and

C. the award of the contract would not cause the aggregate amount of all such contracts so awarded to the same person, firm, association, partnership, corporation, or cooperative association in the same fiscal year to exceed $500; and

D. such interested member publicly discloses the nature and extent of his interest prior to or during deliberations concerning the proposed award of the contract; and

E. such interested member abstains from voting on the award of the contract, though he shall be considered present for the purposes of establishing a quorum.

Similar to the exceptions in the Corrupt Practices Act, these exceptions will not apply to Ms. Harden's employment, to the extent that her employment as an associate professor prevents her from satisfying all the conditions required for each exception. Specifically, Ms. Harden cannot meet all the requirements of the first exception in Section 3-48, because:

- the contract, whether it was her individual employment contract or the PAE contract, was not publicly disclosed "prior to or during deliberations concerning the proposed award of the contract," (Section 3-48(B));
- the contract, whether it was her individual employment contract or the PAE contract, was not "awarded after sealed bids to the lowest responsible bidder," and the amount of her either contract is greater than $1500, (Section 3-48(E)); and,
- the value the contract, whether it was her individual employment contract or the PAE contract, exceeds $25,000 per fiscal year (Section 3-48(E)).

Likewise, Ms. Harden cannot meet all the requirements of the second exception contained in Section 3-48, because:

- her employment as an associate professor was not publicly disclosed "prior to or during deliberations concerning the proposed award of the contract," (Section 3-48(D));
- the value of the contract, whether it was her individual employment contract or the PAE contract, exceeds $250 (Section 3-48(B)); and,
- the aggregate value of the contract, whether it was her individual employment contract or the PAE contract, exceeds $500 per fiscal year (Section 3-48(C)).

Penalties

Section 3-48 concludes by stating that, "Any board member who violates this Section is guilty of a Class 4 felony and in addition thereto any office held by such person so convicted shall become vacant and shall be so declared as part of the judgment of the court."

Finally, Section 3-7(e) of the Public Community College Act, 110 ILCS 805/3-7(e), provides that members of a community college board of trustees "shall serve without compensation." However, as discussed below, the court in *Solomon v. Scholefield*, 2015 IL App (1st) 150685, held that compensation received by an individual from teaching at the same community college did not violate the provisions of Section 3-7(e).

2. Relevant Illinois Cases

A. *Solomon v. Scholefield*

In *Solomon v. Scholefield*, 2015 IL App (1st) 150685, 30 N.E.3d 480, *reh'g denied* (Apr. 3, 2015), the appellate court reversed a decision of the Education Officers Electoral Board.

In this case, Solomon was an attorney and an adjunct professor who taught part-time at South Suburban Community College. Solomon was also a member of the "South Suburban College Adjunct Faculty Association, a union comprised of adjunct faculty at the college." *Id.* at ¶ 5. Solomon filed nominating papers for the office of trustee of South Suburban Community College, and Scholefield filed objections to Solomon's nominating papers. *Id.* at ¶¶ 3 & 4.

The Electoral Board invalidated Solomon's nominating papers, holding that, among other reasons, Solomon's compensation as an adjunct professor would violate Section 3-7(e) of the Public Community College Act's provision that trustees "shall serve without compensation." *Id.* at ¶ 11.

The appellate court reversed, finding that "Solomon's receipt of compensation for his services as an adjunct professor is legally irrelevant to his qualification to serve as a trustee." However, reading this holding in context reveals that the appellate court was only holding that

Solomon's compensation as an adjunct professor would not violate Section 3-7(e) of the Public Community College Act. *Id.* at ¶ 20.

Continuing its analysis, the court in *Solomon*, held that the Electoral Board exceeded its authority by considering whether Solomon's adjunct professor position could potentially conflict with his service as a trustee. *Id.* at ¶ 21-25. In its holding, the court reasoned that "nothing in the record proves, nor could it prove, that Solomon would choose to continue in either his professional or union roles if elected to serve as a trustee." *Id.* at ¶ 23.

Ultimately, the court in *Solomon* held that "the [Electoral] Board's ruling here imposed a new eligibility requirement for trustee candidates: their outside employment or sources of income must never pose the possibility of a conflict with their service on the board. This was beyond the Board's authority and we, therefore, reject it as a basis for invalidating Solomon's certificate of candidacy." *Id.* at ¶ 25.

B. ***Rogers v. Village of Tinley Park***

In *Rogers v. Village of Tinley Park*, 116 Ill. App. 3d 437, 451 N.E.2d 1324 (1st Dist. 1983), the court held that an elected village trustee could not maintain concurrent employment as a police officer for the same village. Specifically, the appellate court reversed the trial court's entry of a declaratory judgment finding that Rogers could serve both as a trustee and a police officer employed by the same village.

In holding that Rogers could not serve both as a trustee and a police officer employed by the same village, the appellate court applied the common law doctrine of incompatibility. Describing this doctrine, the court explained:

> The common law doctrine of incompatibility has developed as a matter of sound public policy. It is calculated to insure that there

> be the appearance as well as the actuality of impartiality and undivided loyalty. Incompatibility is generally understood to mean a conflict or inconsistency in the functions of an office. It may be said to exist where in the established governmental scheme one office is subordinate to another, or subject to its supervision or control, or the duties clash, inviting the incumbent to prefer one obligation to another. If the duties of the two offices are such that when placed in one person they might disserve the public interests, or if the respective offices might or will conflict even on rare occasions, it is sufficient to declare them legally incompatible.
> *Id.* at 116 Ill. App. 3d at 443. [Citations and internal quotation marks omitted.]

Applying the doctrine of incompatibility, and finding that Rogers could not maintain his employment as a police officer while serving as a village trustee, the appellate court reasoned that village trustees must: determine the salaries and fringe benefits of all village employees, including police officers; establish an operating budget for the police department; annually levy taxes for police purposes; authorize police department expenditures; determine the numerical strength of the police department; and, negotiate with the police officer's collective bargaining unit. *Id.* at 116 Ill. App. 3d at 445.

The court in *Rogers* found that a conflict arose where an individual acting as a trustee "would be statutorily charged with detecting and punishing misconduct within the police department and would in effect sit in judgment of his supervisor within the department. Such a conflict renders the offices incompatible." *Id.* at 116 Ill. App. 3d at 444.

The court in *Rogers* also rejected the argument that any conflict could be avoided by abstaining from any action involving the police department. The appellate court explained that "[w]here incompatibility has been shown to exist, it is no answer to say that, should there be a conflict in duty, an incumbent may omit to perform one of his incompatible roles." *Id.* at 116 Ill.

App. 3d at 445-446. Further, the court noted that "the need of the community for continuing exercise of judgment and the making of decisions on the basis of give-and-take discussion of independent minds is not served best where one of the board must at frequent intervals take no part because of conflict." *Id.* at 116 Ill. App. 3d at 447.

Further, the court considered that if one police officer was allowed to serve as a trustee, although abstaining from participation in police department matters, that other officers could also serve, leading to a situation where the village board could not conduct any business dealings pertaining to the police department. *Id.*

Finally, it should be noted that the court in *Rogers* also recognized that:

> 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 inquiries 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.
> *Id.* at 116 Ill. App. 3d at 446.

B. ***People ex rel. Teros v. Verbeck***

In *People ex rel. Teros v. Verbeck*, 155 Ill. App. 3d 81, 506 N.E.2d 464 (3rd Dist. 1987), the Illinois Appellate Court considered whether an individual could simultaneously hold the office of a county board member and deputy coroner.

The court observed that "it is undisputed that the county board is charged with the duty to fix the compensation of the county coroner within statutory limitations and to provide for reasonable and necessary operating expenses for the coroner's office." *Id.* at 155 Ill. App. 3d at 83. [Citation omitted.]

Continuing on, the court held that:

> It is further undisputed that the deputy county coroner's compensation is fixed by the coroner, subject to budgetary limitations established by the county board. Thus, under the statutory scheme, defendant's two offices are fiscally incompatible since defendant as a member of the county board has authority to act upon the salary and budget of the county coroner who, in turn, determines defendant's salary as deputy county coroner. The potential for influencing his superior's salary and budget and, ultimately, his own salary, without more, renders defendant's offices incompatible.
> *Id.* at 155 Ill. App. 3d at 83-84.

Furthermore, the court rejected the argument that any conflict could be avoided by refraining from participation in matters involving the coroner's office, explaining that, "[t]his solution is not, however, a satisfactory response to legally incompatible offices." *Id.* at 155 Ill. App. 3d at 84.

3. Relevant Illinois Attorney General Opinions

On many occasions the Illinois Attorney General has rendered opinions regarding the doctrine of incompatibility. The Attorney General's Office has compiled an Index of Opinions on Compatibility of Offices.

A. Ill. Atty. Gen. Op. 14-002

Illinois Attorney General Opinion 14-002 is an official opinion.

In Opinion 14-002, the Attorney General considered whether a member of the Illinois House of Representatives could simultaneously be employed as a police officer by the City of Rockford. Ultimately, the Attorney General concluded that the individual could maintain his employment as a police officer, "however, he may not be compensated for his city employment for the time during which the General Assembly is in session and not in recess."

However, Attorney General Opinion 14-002 was based primarily on an application of Article IV, Section 2(e) of the Illinois Constitution of 1970, which is not applicable to Ms. Harden's employment as a Parkland associate professor.

B. Ill. Atty. Gen. Op. I-88-026

Illinois Attorney General Opinion I-88-026 is an unofficial non-binding opinion, although it is considered to be persuasive. (*See*, *Strat-O-Seal Mfg. Co. v. Scott*, 72 Ill. App. 2d 480, 485, 218 N.E.2d 227 (4th Dist. 1966) (". . .these opinions of the Attorney General as Chief Law Officer of the State of Illinois 'will be accorded considerable weight.'"))

In Opinion I-88-026, the Attorney General considered whether a county board member could "simultaneously serve as a full-time, salaried employee of the sheriff of his county."

After quoting Section 3(a) of the Corrupt Practices Act, the Attorney General noted that it is the duty of the county board to fix compensation and other expenses of the sheriff's office.

Reasoning that such a situation would require the county board member to vote on funds from which his or her salary would be paid, the Attorney General concluded that "it would appear that a county board member may not simultaneously be employed by the sheriff of his county without violating section 3 of the Corrupt Practices Act." *Id.*

In support of his opinion in Opinion I-88-026, the Attorney General pointed out that a conflict would arise because the board member would be voting on matters involving, not only his or her own salary, but also voting on the salary of their superior – the sheriff.

C. Ill. Atty. Gen. Op. I-88-034

Illinois Attorney General Opinion I-88-034 is an unofficial non-binding opinion, although it is considered to be persuasive.

In Opinion I-88-034, the Attorney General considered whether an individual may "hold employment as a salaried dispatcher in the sheriff's office after being elected to the county board." *Id.*

After quoting Section 3(a) of the Corrupt Practices Act, the Attorney General explained that, "Clearly, this provision applies to employment." *Id.* Further, the Attorney General explained that an employee of the sheriff's office has a direct pecuniary interest in his employment with the department, while at the same time, a county board member would be in a position to act upon claims or vote on appropriations for the sheriff's office.

Ultimately, the Attorney General concluded that an individual could not continue to serve as an employee after election to the county board, reasoning that this would "constitute a personal pecuniary interest of the nature which section 3 of the Corrupt Practices Act is intended to prohibit." *Id.*

D. Ill. Atty. Gen. Op. I-90-018

Illinois Attorney General Opinion I-90-018 is an unofficial non-binding opinion, although it is considered to be persuasive.

In Opinion I-90-018, the Attorney General considered whether "a member of a township board of trustees may simultaneously serve as a part-time, paid employee of the township road district." *Id.*

The Attorney General, once again, quoted Section 3(a) of the Corrupt Practices Act. The Attorney General also noted that the township board of trustees would be required to vote on appropriations for the township road district, which would include funds used to pay the salary of road district employees.

The Attorney General concluded that a "township trustee may not ordinarily be employed as a paid, part-time general laborer by the road district for the township which he or she serves." *Id.*

The Attorney General also consider whether abstention from voting on appropriations for the road district would avoid a conflict, and concluded that "abstention from voting does not absolve the officer from any conflict," unless a statutory exception applied. *Id.*

E. Ill. Atty. Gen. Op. I-96-028

Illinois Attorney General Opinion I-96-028 is an unofficial non-binding opinion, although it is considered to be persuasive.

In Opinion I-96-028, the Attorney General considered whether, "one person may serve simultaneously as a county board member and a deputy coroner" without compensation.

Addressing this issue, the Attorney General quoted from *People ex rel. Teros v. Verbeck*, noting that the "potential for influencing his superior's salary and budget and, ultimately, his own salary, without more, renders defendant's offices incompatible." (Opinion I-96-028 at page 3.)

The Attorney General concluded that, "it does not appear that a county board member may serve as a deputy coroner," even when he or she receives no compensation.

In Opinion I-96-028, the Attorney General also considered whether, "one person may serve simultaneously as a county board member and a deputy sheriff" without compensation.

Regarding this issue, the Attorney General primarily relied on the holding in *Rogers*. In so doing, the Attorney General noted that as a county board member the individual would be called upon to determine whether his position with the sheriff's office was necessary, and that

this would create "competing interests and divided loyalties which could hamper a county board member in the full and faithful performance of his duties." *Id.* at page 5.

Likewise, the Attorney General considered that county board members have a duty to determine the number of deputies to employ, and fix the sheriff's compensation. This led the Attorney General to conclude that a county board member simultaneously serving as a deputy sheriff "could create the appearance as well as the actuality of competing interests and divided loyalties which could hamper a county board member in the full and faithful performance of his duties." *Id.* at pages 5-6.

The Attorney General concluded the analysis by reiterated that the conflict could not be avoided through abstention, explaining that Illinois "courts have consistently held that abstention will not avoid application of the doctrine of incompatibility of offices. (*Id.* at page 6.)

Conclusion

The authorities discussed above lead to a conclusion that Ms. Harden cannot maintaining employment by the College while simultaneously serving as a member of the Parkland College Board of Trustees. Similar to the cases and Attorney General Opinions cited above, as a member of the Board of Trustees, Ms. Harden will be called on to vote on matters related to the College's budget and governance, including matters related to her own salary and the salaries of her superiors.

In her capacity as a member of the Board of Trustees, Ms. Harden has a duty to:

- Prepare and adopt the budget for the College (110 ILCS 805/3-20);
- Annually audit the College (110 ILCS 805/3-22.1);
- Publish financial statements for the College (110 ILCS 805/3-22.2);

- Provide for the revenue necessary to maintain the College (110 ILCS 805/3-23);
- Adopt and enforce rules for the management and government of the College (110 ILCS 805/3-25);
- Make appointments and fix salaries for a chief administrative officer, other administrative personnel and all teachers (110 ILCS 805/3-26);
- Levy the property tax (110 ILCS 805/7-8 and 7-9);
- Award Contracts (110 ILCS 805/3-27.1); and,
- Determine sick leave for full time teachers (110 ILCS 805/3-29.1);

Additionally, in her capacity as a member of the Board of Trustees, Ms. Harden would vote on matter related to:

- Insurance for employees and dependents (110 ILCS 805/3-31);
- Provision of auxiliary services to employees (110 ILCS 805/3-31.1);
- Establishing policies for tenure and cause for removal (110 ILCS 805/3-32);
- Entering into contracts for educational services (110 ILCS 805/3-40); and,
- Employing personnel, and establishing policies governing employment and dismissal (110 ILCS 805/3-42).

Under the provisions of the Public Community College Act, as a member of the Board of Trustee's, Ms. Harden would be called upon to vote on matters concerning the collective bargaining agreement between the Board of Trustees and the Parkland Academic Employees.

Pursuant to the authorities states above, all of these matters create conflicts and incompatibilities that cannot be avoided via abstention. Accordingly, under Illinois law, it is

clear that Ms. Harden cannot maintain employment by the College while simultaneously serving as a member of the Parkland College Board of Trustees.

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176 Ill.2d 482
Supreme Court of Illinois.

Dennis McINERNEY, Appellant,
v.
CHARTER GOLF, INC., Appellee.

No. 80248.
|
May 22, 1997.

Former employee brought suit against employer alleging breach of employment contract allegedly formed when employee agreed to forgo another job opportunity in exchange for a guarantee of lifetime employment. The Circuit Court, Cook County, Patrick E. McGann, J., granted employer's motion for summary judgment and former employee appealed. The Appellate Court affirmed, plaintiff petitioned for leave to appeal. The Supreme Court, Heiple, J., held that: (1) employee's promise to forgo another job opportunity in exchange for guarantee of lifetime employment may be sufficient consideration to modify existing employment-at-will relationship; (2) sufficient consideration existed for creation of employment contract when employee gave up lucrative job offer in exchange for a guarantee of lifetime employment; (3) statute of frauds requires that contract for lifetime employment be in writing, because contract is not capable of being performed within one year of its making; (4) employee's part performance of lifetime employment contract did not take contract out of the statute of frauds; and (5) promissory estoppel does not bar application of the statute of frauds in Illinois.

Affirmed.

Nickels, J., filed opinion dissenting in part in which Miller and McMorrow joined.

West Headnotes (18)

[1] **Labor and Employment**
⇦ Definite or Indefinite Term; Employment At-Will

Employment contracts in Illinois are presumed to be at–will and are terminable by either party; rule is one of construction which may be overcome by showing that the parties agreed otherwise.

24 Cases that cite this headnote

[2] **Labor and Employment**
⇦ Formation;Requisites and Validity

Terms of an employment contract must be clear and definite, and contract must be supported by consideration.

6 Cases that cite this headnote

[3] **Contracts**
⇦ Nature and Elements

"Consideration" is the bargained–for exchange of promises or performances, and may consist of a promise, an act or a forbearance. Restatement (Second) of Contracts § 71.

15 Cases that cite this headnote

[4] **Contracts**
⇦ Mutual Promises

Promise for a promise is, without more, enforceable. Restatement (Second) of Contracts § 79 comment.

1 Cases that cite this headnote

[5] **Contracts**
⇦ Mutual Promises

Mutual assent and an exchange of promises provides "consideration" to support formation of a contract.

7 Cases that cite this headnote

[6] **Labor and Employment**
⇦ Contracts

Labor and Employment
⇦ Implied contracts

Employment relationship is governed by the law of contract, and existence of an

employment contract, express or implied, is essential to employer–employee relationship.

4 Cases that cite this headnote

[7] **Labor and Employment**
⇐ Formation;Requisites and Validity

As with any contract, it is not possible for contract of employment to exist without consent of the parties.

Cases that cite this headnote

[8] **Labor and Employment**
⇐ Lifetime or permanent employment

Employee's promise to forgo another job opportunity in exchange for a guarantee of lifetime employment may be sufficient consideration to modify existing employment–at–will relationship.

7 Cases that cite this headnote

[9] **Labor and Employment**
⇐ Particular cases

Sufficient consideration existed for creation of employment contract when employee gave up lucrative job offer in exchange for a guarantee of lifetime employment; in exchange for giving up its right to terminate employee at will, employer retained a valued employee, and thus both parties exchanged bargained–for benefits.

9 Cases that cite this headnote

[10] **Contracts**
⇐ Mutuality of Obligation

Where there is any other consideration for the contract mutuality of obligation is not essential.

5 Cases that cite this headnote

[11] **Labor and Employment**
⇐ Formation;Requisites and Validity

When employee relinquishes something of value in a bargained–for exchange for employer's guarantee of permanent employment, contract is formed.

1 Cases that cite this headnote

[12] **Frauds, Statute Of**
⇐ Frauds, Statute Of

Frauds, Statute Of
⇐ Purpose

Statute of frauds proceeds from legislature's sound conclusion that while technical elements of a contract may exist, certain contracts should not be enforced absent a writing; it functions more as an evidentiary safeguard than as a substantive rule of contract, and, as such, the statute exists to protect not just parties to a contract, but also to protect fact finder from charlatans, perjurers and the problems of proof accompanying oral contracts. S.H.A. 740 ILCS 80/1.

9 Cases that cite this headnote

[13] **Frauds, Statute Of**
⇐ Contracts continuing for life or terminating at death

Statute of frauds requires that a contract for lifetime employment be in writing, because contract is not capable of being performed within one year of its making. S.H.A. 740 ILCS 80/1.

18 Cases that cite this headnote

[14] **Frauds, Statute Of**
⇐ Contracts Completely Performed

Party who has fully performed an oral contract within the one–year provision of statute of frauds may nonetheless have the contract enforced. S.H.A. 740 ILCS 80/1.

11 Cases that cite this headnote

[15] **Frauds, Statute Of**

Part Performance in General

Party's partial performance generally does not bar application of the statute of frauds, unless it would otherwise be impossible or impractical to place the parties in status quo or restore or compensate performing party for the value of his performance. S.H.A. 740 ILCS 80/1.

11 Cases that cite this headnote

[16] **Frauds, Statute Of**

Agreements not to be performed within one year

Employee's part performance of lifetime employment contract did not take contract out of the statute of frauds. S.H.A. 740 ILCS 80/1.

12 Cases that cite this headnote

[17] **Estoppel**

Nature and Application of Estoppel in Pais

Equitable estoppel is available if one party has relied upon another party's misrepresentation or concealment of a material fact; absent such misrepresentation or fraud, the defense is not available.

11 Cases that cite this headnote

[18] **Frauds, Statute Of**

Waiver of bar of statute;estoppel

Promissory estoppel does not bar application of the statute of frauds in Illinois. S.H.A. 740 ILCS 80/1.

15 Cases that cite this headnote

Attorneys and Law Firms

**1348 ***912 *483 Robert P. Sheridan, Chicago, for Dennis J. McInerney.

F. Thomas Hecht, Hopkins & Sutter, Chicago, for Charter Golf, Inc.

Opinion

Justice HEIPLE delivered the opinion of the court:

Is an employee's promise to forgo another job opportunity in exchange for a guarantee of lifetime employment sufficient consideration to modify an existing employment-at-will relationship? If "yes," must such an agreement be in writing to satisfy the requirements of the statute of frauds? These questions, among others, must be answered in plaintiff Dennis McInerney's appeal from an order of the appellate court affirming a grant of summary judgment in favor of the defendant, *484 Charter Golf, Inc. Although we conclude that a promise for a promise is sufficient consideration to modify a contract-even an employment contract-we further conclude that the statute of frauds requires that a contract for lifetime employment be in writing.

The facts are uncomplicated. This case comes to us on a grant of summary judgment, so our review is *de novo* (*Barnett v. Zion Park District,* 171 Ill.2d 378, 385, 216 Ill.Dec. 550, 665 N.E.2d 808 (1996)), and we will consider "the pleadings, depositions, and admissions on file, together with the affidavits, if any," to determine whether a genuine issue of material fact exists (735 ILCS 5/2–1005(c) (West 1994)). From 1988 through 1992, Dennis McInerney worked as a sales representative for Charter Golf, Inc., a company which manufactures and sells golf apparel and supplies. Initially, McInerney's territory included Illinois but was later expanded to include Indiana and Wisconsin. In **1349 ***913 1989, McInerney allegedly was offered a position as an exclusive sales representative for Hickey–Freeman, an elite clothier which manufactured a competing line of golf apparel. Hickey–Freeman purportedly offered McInerney an 8% commission.

Intending to inform Charter Golf of his decision to accept the Hickey–Freeman offer of employment, McInerney called Jerry Montiel, Charter Golf's president. Montiel wanted McInerney to continue to work for Charter Golf and urged McInerney to turn down the Hickey–Freeman offer. Montiel promised to guarantee McInerney a 10% commission on sales in Illinois and Wisconsin "for the remainder of his life," in a position where he would be

subject to discharge only for dishonesty or disability. McInerney allegedly accepted Charter Golf's offer and, in exchange for the guarantee of lifetime employment, gave up the Hickey–Freeman offer. McInerney then continued to work for Charter Golf.

In 1992, the relationship between Charter Golf and *485 McInerney soured: Charter Golf fired McInerney. McInerney then filed a complaint in the circuit court of Cook County, alleging breach of contract. The trial court granted Charter Golf's motion for summary judgment after concluding that the alleged oral contract was unenforceable under the statute of frauds because the contract amounted to an agreement which could not be performed within a year from its making. The appellate court affirmed, but on a wholly different ground. No. 1–94–1764 (unpublished order under Supreme Court Rule 23). The appellate court held that the putative contract between McInerney and Charter Golf suffered from a more fundamental flaw, namely, that no contract for lifetime employment even existed because a promise to forbear another job opportunity was insufficient consideration to convert an existing employment-at-will relationship into a contract for lifetime employment.

This court accepted McInerney's petition for leave to appeal (155 Ill.2d R. 315), and for the reasons set forth below, we affirm on other grounds.

ANALYSIS

[1] [2] Employment contracts in Illinois are presumed to be at-will and are terminable by either party; this rule, of course, is one of construction which may be overcome by showing that the parties agreed otherwise. *Duldulao v. St. Mary of Nazareth Hospital Center,* 115 Ill.2d 482, 489, 106 Ill.Dec. 8, 505 N.E.2d 314 (1987). As with any contract, the terms of an employment contract must be clear and definite (*Duldulao,* 115 Ill.2d at 490, 106 Ill.Dec. 8, 505 N.E.2d 314) and the contract must be supported by consideration (*Ladesic v. Servomation Corp.,* 140 Ill.App.3d 489, 491, 95 Ill.Dec. 12, 488 N.E.2d 1355 (1986); *Martin v. Federal Life Insurance Co.,* 109 Ill.App.3d 596, 602, 65 Ill.Dec. 143, 440 N.E.2d 998 (1982); *Heuvelman v. Triplett Electrical Instrument Co.,* 23 Ill.App.2d 231, 235, 161 N.E.2d 875 (1959)).

A. Consideration

Although the rules of contract law are well-established *486 and straightforward, a conflict has emerged in the appellate court decisions on the subject of consideration in the context of a lifetime employment contract. Several decisions have held that a promise of lifetime employment, which by its terms purports to alter an employment-at-will contract, must be supported by "additional" consideration beyond the standard employment duties. *Heuvelman,* 23 Ill.App.2d at 235–36, 161 N.E.2d 875; *Koch v. Illinois Power Co.,* 175 Ill.App.3d 248, 252, 124 Ill.Dec. 461, 529 N.E.2d 281 (1988); *Ladesic,* 140 Ill.App.3d at 492–93, 95 Ill.Dec. 12, 488 N.E.2d 1355. These cases have held that an employee's rejecting an outside job offer in exchange for a promised guarantee of lifetime employment is not sufficient consideration to alter an employment-at-will relationship. *Heuvelman,* 23 Ill.App.2d at 236, 161 N.E.2d 875; *Koch,* 175 Ill.App.3d at 252, 124 Ill.Dec. 461, 529 N.E.2d 281; *Ladesic,* 140 Ill.App.3d at 492–93, 95 Ill.Dec. 12, 488 N.E.2d 1355. The premise underlying these cases is that the employee simply weighs the benefits of the two positions, and by accepting one offer the employee necessarily rejects the other. As such, these cases have reasoned that the employee has not given up anything of value, and thus there is no consideration to support **1350 ***914 the promise of lifetime employment. *Koch,* 175 Ill.App.3d at 252, 124 Ill.Dec. 461, 529 N.E.2d 281; *Ladesic,* 140 Ill.App.3d at 492–93, 95 Ill.Dec. 12, 488 N.E.2d 1355.

One case, however, has taken issue with this analysis. In *Martin v. Federal Life Insurance Co.,* the appellate court held that an enforceable contract for lifetime employment was formed when an employee relinquished a job offer in exchange for a promise of permanent employment from his current employer. *Martin v. Federal Life Insurance Co.,* 109 Ill.App.3d 596, 601, 65 Ill.Dec. 143, 440 N.E.2d 998 (1982). The *Martin* court recognized that there was consideration in an exchange of promises: the employer promised to give up his right to terminate the employee at-will, and in exchange the employee agreed to continue working for his current employer and to forgo a lucrative opportunity with a competitor. *Martin,* 109 Ill.App.3d at 601, 65 Ill.Dec. 143, 440 N.E.2d 998.

[3] [4] [5] *487 What is consideration? Under the prevailing view, embodied in the Restatement (Second)

of Contracts, consideration is the bargained-for exchange of promises or performances, and may consist of a promise, an act or a forbearance. Restatement (Second) of Contracts § 71 (1981). Thus, a promise for a promise is, without more, enforceable. Restatement (Second) of Contracts § 79, Comment a, at 200 (1981). In past cases, this court has recognized this basic precept, i.e., mutual assent and an exchange of promises provides consideration to support the formation of a contract. See, *e.g., Patton v. Carbondale Clinic,* 161 Ill.2d 357, 372, 204 Ill.Dec. 203, 641 N.E.2d 427 (1994); *Steinberg v. Chicago Medical School,* 69 Ill.2d 320, 13 Ill.Dec. 699, 371 N.E.2d 634 (1977) (holding that any act or promise which is of benefit to one party or disadvantage to the other is sufficient "consideration" to support a contract).

[6] [7] While this court has never directly addressed the specific requirements to establish a permanent employment contract, it has held more generally that the employment relationship is governed by the law of contract. Existence of an employment contract, express or implied, is essential to the employer-employee relationship. *A.J. Johnson Paving Co. v. Industrial Comm'n,* 82 Ill.2d 341, 350, 45 Ill.Dec. 126, 412 N.E.2d 477 (1980). As with any contract, it is not possible for a contract of employment to exist without consent of the parties. *M & M Electric Co. v. Industrial Comm'n,* 57 Ill.2d 113, 119, 311 N.E.2d 161 (1974). Indeed, this court held in *Duldulao,* 115 Ill.2d at 490, 106 Ill.Dec. 8, 505 N.E.2d 314, that an employee handbook or other policy statement creates enforceable contractual rights governed by the traditional requirements for contract formation.

[8] [9] In the instant case, Charter Golf argues that an employee's promise to forgo another employment offer in exchange for an employer's promise of lifetime employment is not sufficient consideration. But why not? The defendant has failed to articulate any principled ***488** reason why this court should depart from traditional notions of contract law in deciding this case. While we recognize that some cases have indeed held that such an exchange is "inadequate" or "insufficient" consideration to modify an employment-at-will relationship, we believe that those cases have confused the conceptual element of consideration with more practical problems of proof. As we discussed above, this court has held that a promise for a promise constitutes consideration to support the existence of a contract. To hold otherwise in the instant case would ignore the economic realities underlying the case. Here McInerney gave up a lucrative job offer in exchange for a guarantee of lifetime employment; and in exchange for giving up its right to terminate McInerney at will, Charter Golf retained a valued employee. Clearly both parties exchanged bargained-for benefits in what appears to be a near textbook illustration of consideration.

[10] [11] Of course, not every relinquishment of a job offer will necessarily constitute consideration to support a contract. On the related issue of mutuality of obligation, Charter Golf complains that McInerney's promise to continue working was somehow illusory, because it alleges that McInerney had the power to terminate the employment relationship ****1351** *****915** at his discretion while it lacked any corresponding right. The court's decision in *Armstrong Paint & Varnish Works v. Continental Can Co.,* 301 Ill. 102, 108, 133 N.E. 711 (1922), teaches that "where there is any other consideration for the contract mutuality of obligation is not essential." Charter Golf's argument on this point fails because McInerney continued working for Charter Golf *and* relinquished his right to accept another job opportunity. When, as here, the employee relinquishes something of value in a bargained-for exchange for the employer's guarantee of permanent employment, a contract is formed.

***489** B. Statute of Frauds

So there is a contract, but should we enforce it? Charter Golf argues that the oral contract at issue in this case violates the statute of frauds and is unenforceable because it is not capable of being performed within one year of its making. By statute in Illinois, "[n]o action shall be brought * * * upon any agreement that is not to be performed within the space of one year from the making thereof, unless * * * in writing and signed by the party to be charged." 740 ILCS 80/1 (West 1994). Our statute tracks the language of the original English Statute of Frauds and Perjuries. 29 Charles II ch. 3 (1676). The English statute enacted by Parliament had as its stated purpose the prohibition of those "many fraudulent practices, which are commonly endeavored to be upheld by perjury and subordination of perjury." 29 Charles II ch. 3, introductory clause (1676). Illinois' statute of frauds seeks to do the same by barring actions based upon nothing more than loose verbal statements.

[12] The period of one year, although arbitrary, recognizes that with the passage of time evidence becomes stale and memories fade. The statute proceeds from the legislature's sound conclusion that while the technical elements of a contract may exist, certain contracts should not be enforced absent a writing. It functions more as an evidentiary safeguard than as a substantive rule of contract. As such, the statute exists to protect not just the parties to a contract, but also-perhaps more importantly-to protect the fact finder from charlatans, perjurers and the problems of proof accompanying oral contracts.

[13] There are, of course, exceptions to the statute of frauds' writing requirement which permit the enforcement of certain oral contracts required by the statute to be in writing. One such exception is the judicially created exclusion for contracts of uncertain duration. In an effort to significantly narrow the application of the statute, ***490** many courts have construed the words "not to be performed" to mean "not capable of being performed" within one year. See Restatement (Second) of Contracts § 130 (1981). These cases hold that if performance is possible by its terms within one year, the contract is not within the statute regardless of how unlikely it is that it will actually be performed within one year. Under this interpretation, the actual course of subsequent events and the expectations of the parties are entirely irrelevant. Restatement (Second) of Contracts § 130, Comment a (1981). A contract for lifetime employment would then be excluded from the operation of the statute because the employee could, in theory, die within one year, and thus the contract would be "capable of being performed." [1]

We find such an interpretation hollow and unpersuasive. A "lifetime" employment contract is, in essence, a permanent employment ****1352** *****916** contract. Inherently, it anticipates a relationship of long duration-certainly longer than one year. In the context of an employment-for-life contract, we believe that the better view is to ***491** treat the contract as one "not to be performed within the space of one year from the making thereof." To hold otherwise would eviscerate the policy underlying the statute of frauds and would invite confusion, uncertainty and outright fraud. Accordingly, we hold that a writing is required for the fair enforcement of lifetime employment contracts.

[14] The plaintiff argues that the statute of frauds' writing requirement is nonetheless excused because he performed, either fully or partially, according to the terms of the oral contract. Illinois courts have held that a party who has fully performed an oral contract within the one-year provision may nonetheless have the contract enforced. *American College of Surgeons v. Lumbermens Mutual Casualty Co.*, 142 Ill.App.3d 680, 700, 96 Ill.Dec. 719, 491 N.E.2d 1179 (1986); *Meyer v. Logue*, 100 Ill.App.3d 1039, 1043, 56 Ill.Dec. 707, 427 N.E.2d 1253 (1981); *Noesges v. Servicemaster Co.*, 233 Ill.App.3d 158, 163, 174 Ill.Dec. 240, 598 N.E.2d 437 (1992). Full or complete performance of the instant contract, by its terms, would have required the plaintiff to work until his death, but our plaintiff lives.

[15] [16] A party's partial performance generally does not bar application of the statute of frauds, unless it would otherwise be "impossible or impractical to place the parties in status quo or restore or compensate" the performing party for the value of his performance. *Mapes v. Kalva Corp.*, 68 Ill.App.3d 362, 368, 24 Ill.Dec. 944, 386 N.E.2d 148 (1979); see also *Payne v. Mill Race Inn*, 152 Ill.App.3d 269, 278, 105 Ill.Dec. 324, 504 N.E.2d 193 (1987). This so-called exception resembles the doctrines of restitution, estoppel and fraud, and exists to avoid a "virtual fraud" from being perpetrated on the performing party. *Barrett v. Geisinger*, 148 Ill. 98, 35 N.E. 354 (1893); see also Restatement (Second) of Contracts § 130, Comment *e* (1981). In any event, our plaintiff has been fully compensated for the work that he performed. Accordingly, part performance-on these facts-will not take the case out of the statute of frauds.

[17] ***492** Finally, the plaintiff argues that the defendant should be estopped from asserting the defense of statute of frauds. Traditionally, a party's reliance estopped the other party from asserting the statute only under the doctrine of equitable estoppel. *Ozier v. Haines*, 411 Ill. 160, 163–65, 103 N.E.2d 485 (1952); *Sinclair v. Sullivan Chevrolet Co.*, 45 Ill.App.2d 10, 17–19, 195 N.E.2d 250 (1964), *aff'd*, 31 Ill.2d 507, 202 N.E.2d 516 (1964). Equitable estoppel is available if one party has relied upon another party's misrepresentation or concealment of a material fact. Absent such misrepresentation or fraud, the defense is not available. *Ozier*, 411 Ill. at 165, 103 N.E.2d 485; *Ceres Illinois, Inc. v. Illinois Scrap Processing, Inc.*, 114 Ill.2d 133, 148, 102 Ill.Dec. 379, 500 N.E.2d 1 (1986). No misrepresentation has been alleged here.

[18] Rather, the plaintiff complains that he relied upon the oral promises of his employer and makes much of the injustice done him-indeed, too much. While agreeing to work for an employer and giving up other employment opportunities can clearly be described as reliance on the employer's oral promises concerning the terms of employment, promissory estoppel does not bar the application of the statute of frauds in Illinois. See *Ozier,* 411 Ill. 160, 103 N.E.2d 485; *Sinclair,* 31 Ill.2d 507, 202 N.E.2d 516 (rejecting, at least implicitly, the suggestion that promissory estoppel bars the application of the statute of frauds). In the context of an employment relationship, reasonable reliance is insufficient to bar the application of the statute of frauds. Some authorities-reflected in the view of the Second Restatement-have used promissory estoppel to bar the application of the statute of frauds in a narrow class of cases in which a performing party would otherwise be without an adequate remedy and there is some element of unjust enrichment. Restatement (Second) of Contracts § 139, Comment *c,* at 355–56 (1981). We do not believe that this case is one which requires us to adopt such a rule. As we have observed, McInerney ***493** has been compensated ****1353** *****917** for his services, and the sole injustice of which he complains is his employer's failure to honor its promise of lifetime employment. Our plaintiff, however, is a salesman-a sophisticated man of commerce-and arguably should have realized that his employer's oral promise was unenforceable under the statute of frauds and that his reliance on that promise was misplaced. Our parties entered into this disputed oral contract freely and without any hint of coercion, fraud or misrepresentation, and thus we adhere to the rule of *Ozier* and *Sinclair* and hold that the statute of frauds operates even where there has been reliance on a promise.

In sum, though an employee's promise to forgo another job opportunity in exchange for a guarantee of lifetime employment is consideration to support the formation of a contract, the statute of frauds requires that contracts for lifetime employment be in writing. Accordingly, we affirm the judgment of the appellate court.

Appellate court judgment affirmed.

Justice NICKELS, dissenting:

I agree with the majority's conclusion that plaintiff's promise to forgo another job opportunity is sufficient consideration in return for defendant's promise of lifetime employment to plaintiff. However, I disagree with the majority's holding that the employment contract in the case at bar must be in writing because it falls within the requirements of the statute of frauds.

The writing requirement applies to "any agreement that is not to be performed within the space of one year from the making thereof." 740 ILCS 80/1 (West 1994). Commenting on this language, the Restatement (Second) of Contracts observes:

> "[T]he enforceability of a contract under the one-year provision does not turn on the actual course of subsequent ***494** events, nor on the expectations of the parties as to the probabilities. Contracts of uncertain duration are simply excluded; the provision covers only those contracts whose performance cannot possibly be completed within a year." Restatement (Second) of Contracts § 130, Comment a, at 328 (1981).

A contract of employment for life is necessarily one of uncertain duration. Since the employee's life may end within one year, and, as the majority acknowledges, the contract would be fully performed upon the employee's death (176 Ill.2d at 490 n. 1, 223 Ill.Dec. at 915 n. 1, 680 N.E.2d at 1351 n. 1), the contract is not subject to the statute of frauds' one-year provision. See Restatement (Second) of Contracts § 130, Illustration 2, at 328 (1981); see also 72 Am.Jur.2d *Statute of Frauds* § 14, at 578 (1974) ("The rule generally accepted by the authorities is that an agreement or promise the performance or duration of which is contingent on the duration of human life is not within the statute"); J. Calamari & J. Perillo, The Law of Contracts § 19–20 (3d ed.1987) ("if A promises * * * to employ X for life, the promise is not within the Statute because it is not for a fixed term and the contract by its terms is conditioned upon the continued life of X and the condition may cease to exist within a year because X may die within a year"). It is irrelevant whether the parties anticipate that the employee will live for more than a year or whether the employee actually does so.

The majority acknowledges that "many courts" subscribe to this view. More accurately, the Restatement rule represents "the prevailing interpretation" of the statute of frauds' one-year provision. Restatement (Second) of Contracts § 130, Comment a, at 328 (1981). Only a "distinct minority" of cases have ascribed significance to whether the parties expected that a contract would take

more than a year to perform. J. Calamari & J. Perillo, The Law of Contracts § 19–18, at 808 (3d ed.1987). According to Williston on Contracts:

> ***495** "It is well settled that the oral contracts invalidated by the Statute because not to be performed within a year include only those which cannot be performed within that period. A promise which is not likely to be performed within a year, and which in fact is not performed within a year, is not within the Statute if at the time the contract is made there is a possibility in law and in fact that full performance such as the parties intended may be completed before the expiration of a year.
>
> ****1354 ***918** In the leading case on this section of the Statute the Supreme Court of the United States said: 'The parties may well have expected that the contract would continue in force for more than one year; it may have been very improbable that it would not do so; and it did in fact continue in force for a much longer time. But they made no stipulation which in terms, or by reasonable inference, required that result. The question is not what the probable, or expected, or actual performance of the contract was; but whether the contract, according to the reasonable interpretation of its terms, required that it should not be performed within the year.' " 3 W. Jaeger, Williston on Contracts § 495 at 575–79 (3d ed.1960), quoting *Warner v. Texas & Pacific Ry. Co.*, 164 U.S. 418, 434, 17 S.Ct. 147, 153, 41 L.Ed. 495, 504 (1896).

Although the majority brands this interpretation "hollow and unpersuasive" (176 Ill.2d at 490, 223 Ill.Dec. at 915, 680 N.E.2d at 1351), it has a sound basis in the plain language of the statute. Corbin notes:

> "[Courts] have observed the exact words of [the one-year] provision and have interpreted them literally and very narrowly. The words are 'agreement that is not to be performed.' They are not 'agreement that is not in fact performed' or 'agreement that may not be performed' or 'agreement that is not at all likely to be performed.' To fall within the words of the provision, therefore, the agreement must be one of which it can truly be said at the very moment that it is made, 'This agreement is not to be performed within one year'; in general, the cases indicate that there must not be the slightest possibility that it can be fully performed within one year." 2 A. Corbin, Corbin on Contracts § 444, at 535 (1950).

***496** See also 3 W. Jaeger, Williston on Contracts § 495, at 585 n. 7 (3d ed.1960) (criticizing *Marshall v. Lowd*, 154 Me. 296, 147 A.2d 667 (1958)).

It is well established that where the words of a statutory provision are unambiguous, there is no need to resort to external aids of interpretation in order to glean the legislature's purpose. *People v. Hicks*, 164 Ill.2d 218, 222, 207 Ill.Dec. 295, 647 N.E.2d 257 (1995). Although the statutory language at issue in this case is clear and unambiguous, the majority improperly relies upon policies identified in the introductory clause to the original English statute of frauds (176 Ill.2d at 489, 223 Ill.Dec. at 914–915, 680 N.E.2d at 1350–1351) in order to significantly expand the scope of the one-year provision. Even assuming, *arguendo*, that it is proper to look beyond the language of the statute in order to determine its meaning, I do not find the majority's policy analysis to be persuasive justification for the broad construction it gives the statute.

The majority notes the dangers of stale evidence and faded memories. 176 Ill.2d at 489, 223 Ill.Dec. at 915, 680 N.E.2d at 1351. But the one-year provision does not effectively guard against these dangers because " '[t]here is no necessary relationship between the time of the making of the contract, the time within which its performance is required and the time when it might come to court to be proven.' " J. Calamari & J. Perillo, The Law of Contracts § 19–17, at 807 (3d ed.1987), quoting *D & N Boening, Inc. v. Kirsch Beverages, Inc.*, 63 N.Y.2d 449, 454, 483 N.Y.S.2d 164, 165, 472 N.E.2d 992, 993 (1984); see also E. Farnsworth, Contracts § 6.4, at 391 (1982).

Courts have tended to give the one-year provision a narrow construction precisely because of the lack of a discernable rationale for it. J. Calamari & J. Perillo, The Law of Contracts § 19–17, at 807 (3d ed.1987); see also Restatement (Second) of Contracts § 130, Comment *a*, at 328 (1981) ("The design was said to be not to trust to the memory of witnesses for a longer time than one ***497** year, but the statutory language was not appropriate to carry out that purpose. The result has been a tendency to construction narrowing the application of the statute"). I am inclined to do likewise. Since the one-year provision is so poorly suited to the aims it was ostensibly designed to accomplish, I see no compelling reason to expand the

provision's scope beyond the class of contracts to which it applies by its terms. The narrow and literal interpretation that most courts have given to the language of the one-year **1355 ***919 provision is entirely appropriate under these circumstances.

Lacking any reasoned basis for its holding, the majority resorts to nearly tautological wordplay, declaring that because a "lifetime" employment contract is essentially a "permanent" employment contract, it inherently anticipates a relationship of long duration. 176 Ill.2d at 490, 223 Ill.Dec. at 915, 680 N.E.2d at 1351. Merely labelling a lifetime employment contract "permanent" should not change the result that the statute of frauds is inapplicable. See 2 A. Corbin, Corbin on Contracts § 446, at 549–50 (1950) ("A contract for 'permanent' employment is not within the one-year clause for the reason that such a contract will be fully performed, according to its terms, upon the death of the employee. The word 'permanent' has, in this connection, no more extended meaning than 'for life' "); 3 W. Jaeger, Williston on Contracts § 495, at 582 (3d ed. 1960) ("A promise of permanent personal performance is on a fair interpretation a promise of performance for life, and therefore not within the Statute"). The parties in this case allegedly agreed to plaintiff's employment for life. But with suitable modesty befitting mere mortals, the parties did not stipulate how long plaintiff's life should be. They left that matter-and hence the duration of the contract-to a higher power (I do not refer to this court).

The majority also suggests that its holding is necessary *498 to avoid confusion and uncertainty. 176 Ill.2d at 491, 223 Ill.Dec. at 916, 680 N.E.2d at 1352. I fail to see how the generally accepted rule that lifetime employment contracts need not be in writing is any more confusing or uncertain than the contrary rule adopted by the majority. Indeed, the majority's reasoning is likely to cause greater confusion and uncertainty. A lifetime employment contract is only one example of a broader general category of contracts of uncertain duration. While the majority has declared that lifetime employment contracts anticipate a relationship of longer than one year, the decision in this case supplies no guidance as to other types of contracts that do not, by their terms, set forth a specific time frame for performance. Contracting parties can no longer simply look to the actual terms of their agreement to ascertain whether it must be in writing. Instead, they are left to guess whether the type of contract they have entered into will be viewed by a court as inherently anticipating a relationship of more than one year.

In summary, the majority's holding: (1) is contrary to the relevant statutory language and the great weight of authority; (2) finds no justification in the policy considerations ostensibly underlying the statute of frauds; and (3) is likely to increase, rather than reduce, uncertainty regarding the application of the one-year provision. I would hold that the statute of frauds does not require the contract in this case to be in writing, and I would reverse the judgments of the courts below. Accordingly, I respectfully dissent.

MILLER and McMORROW, JJ., join in this dissent.

All Citations

176 Ill.2d 482, 680 N.E.2d 1347, 223 Ill.Dec. 911, 65 USLW 2762, 12 IER Cases 1478

Footnotes

1 In attempting to rein in this exception to the statute of frauds, some courts have made a distinction-at times quite attenuated-between death as full performance and death operating to terminate or excuse the contract. See, *e.g., Sinclair v. Sullivan Chevrolet Co.,* 45 Ill.App.2d 10, 15, 195 N.E.2d 250 (1964); *Martin,* 109 Ill.App.3d 596, 65 Ill.Dec. 143, 440 N.E.2d 998; *Gilliland v. Allstate Insurance Co.,* 69 Ill.App.3d 630, 26 Ill.Dec. 444, 388 N.E.2d 68 (1979). Under this view, an oral contract for employment for a stated period longer than one year will not be enforced because, although the employee could die within one year of the making of the contact, these courts elect to treat that contingency as an excuse or termination of the contract and not as performance. This distinction, while perhaps logical in other contexts, is meaningless in our case where the complete performance contemplated by the parties, *i.e.,* employment for life, is identical to the event giving rise to termination or excuse. Under the terms of the oral contract alleged in this case, the employee's death would have resulted in full performance.

End of Document

2

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 50. Local Government
Officers and Employees
Act 105. Public Officer Prohibited Activities Act (Refs & Annos)
Interest in Contracts

50 ILCS 105/3
Formerly cited as IL ST CH 102 ¶3

105/3. Prohibited interest in contracts

Effective: January 1, 2015
Currentness

§ 3. Prohibited interest in contracts.

(a) No person holding any office, either by election or appointment under the laws or Constitution of this State, may be in any manner financially interested directly in his own name or indirectly in the name of any other person, association, trust, or corporation, in any contract or the performance of any work in the making or letting of which such officer may be called upon to act or vote. No such officer may represent, either as agent or otherwise, any person, association, trust, or corporation, with respect to any application or bid for any contract or work in regard to which such officer may be called upon to vote. Nor may any such officer take or receive, or offer to take or receive, either directly or indirectly, any money or other thing of value as a gift or bribe or means of influencing his vote or action in his official character. Any contract made and procured in violation hereof is void. This Section shall not apply to any person serving on an advisory panel or commission, to any director serving on a hospital district board as provided under subsection (a-5) of Section 13 of the Hospital District Law, [1] or to any person serving as both a contractual employee and as a member of a public hospital board as provided under Article 11 of the Illinois Municipal Code in a municipality with a population between 13,000 and 16,000 that is located in a county with a population between 50,000 and 70,000.

(b) However, any elected or appointed member of the governing body may provide materials, merchandise, property, services, or labor, subject to the following provisions under either paragraph (1) or (2):

(1) If:

A. the contract is with a person, firm, partnership, association, corporation, or cooperative association in which such interested member of the governing body of the municipality has less than a 7 1/2% share in the ownership; and

B. such interested member publicly discloses the nature and extent of his interest prior to or during deliberations concerning the proposed award of the contract; and

C. such interested member abstains from voting on the award of the contract, though he shall be considered present for the purposes of establishing a quorum; and

D. such contract is approved by a majority vote of those members presently holding office; and

E. the contract is awarded after sealed bids to the lowest responsible bidder if the amount of the contract exceeds $1500, or awarded without bidding if the amount of the contract is less than $1500; and

F. the award of the contract would not cause the aggregate amount of all such contracts so awarded to the same person, firm, association, partnership, corporation, or cooperative association in the same fiscal year to exceed $25,000.

(2) If:

A. the award of the contract is approved by a majority vote of the governing body of the municipality provided that any such interested member shall abstain from voting; and

B. the amount of the contract does not exceed $2,000; and

C. the award of the contract would not cause the aggregate amount of all such contracts so awarded to the same person, firm, association, partnership, corporation, or cooperative association in the same fiscal year to exceed $4,000; and

D. such interested member publicly discloses the nature and extent of his interest prior to or during deliberations concerning the proposed award of the contract; and

E. such interested member abstains from voting on the award of the contract, though he shall be considered present for the purposes of establishing a quorum.

(b-5) In addition to the above exemptions, any elected or appointed member of the governing body may provide materials, merchandise, property, services, or labor if:

A. the contract is with a person, firm, partnership, association, corporation, or cooperative association in which the interested member of the governing body of the municipality, advisory panel, or commission has less than a 1% share in the ownership; and

B. the award of the contract is approved by a majority vote of the governing body of the municipality provided that any such interested member shall abstain from voting; and

C. such interested member publicly discloses the nature and extent of his interest before or during deliberations concerning the proposed award of the contract; and

D. such interested member abstains from voting on the award of the contract, though he shall be considered present for the purposes of establishing a quorum.

(c) A contract for the procurement of public utility services by a public entity with a public utility company is not barred by this Section by one or more members of the governing body of the public entity being an officer or employee of the public utility company or holding an ownership interest of no more than 7 1/2% in the public utility company, or holding an ownership interest of any size if the public entity is a municipality with a population of less than 7,500 and the public utility's rates are approved by the Illinois Commerce Commission. An elected or appointed member of the governing body of the public entity having such an interest shall be deemed not to have a prohibited interest under this Section.

(d) Notwithstanding any other provision of this Section or any other law to the contrary, until January 1, 1994, a member of the city council of a municipality with a population under 20,000 may purchase real estate from the municipality, at a price of not less than 100% of the value of the real estate as determined by a written MAI certified appraisal or by a written certified appraisal of a State certified or licensed real estate appraiser, if the purchase is approved by a unanimous vote of the city council members then holding office (except for the member desiring to purchase the real estate, who shall not vote on the question).

(e) For the purposes of this Section only, a municipal officer shall not be deemed interested if the officer is an employee of a company or owns or holds an interest of 1% or less in the municipal officer's individual name in a company, or both, that company is involved in the transaction of business with the municipality, and that company's stock is traded on a nationally recognized securities market, provided the interested member: (i) publicly discloses the fact that he or she is an employee or holds an interest of 1% or less in a company before deliberation of the proposed award of the contract; (ii) refrains from evaluating, recommending, approving, deliberating, or otherwise participating in negotiation, approval, or both, of the contract, work, or business; (iii) abstains from voting on the award of the contract though he or she shall be considered present for purposes of establishing a quorum; and (iv) the contract is approved by a majority vote of those members currently holding office.

A municipal officer shall not be deemed interested if the officer owns or holds an interest of 1% or less, not in the officer's individual name but through a mutual fund or exchange-traded fund, in a company, that company is involved in the transaction of business with the municipality, and that company's stock is traded on a nationally recognized securities market.

(f) Under either of the following circumstances, a municipal or county officer may hold a position on the board of a not-for-profit corporation that is interested in a contract, work, or business of the municipality or county:

(1) If the municipal or county officer is appointed by the governing body of the municipality or county to represent the interests of the municipality or county on a not-for-profit corporation's board, then the municipal or county officer may actively vote on matters involving either that board or the municipality or county, at any time, so long as the membership on the not-for-profit board is not a paid position, except that the municipal or county officer may be reimbursed by the non-for-profit board for expenses incurred as the result of membership on the non-for-profit board.

(2) If the municipal or county officer is not appointed to the governing body of a not-for-profit corporation by the governing body of the municipality or county, then the municipal or county officer may continue to serve; however, the municipal or county officer shall abstain from voting on any proposition before the municipal or county governing

body directly involving the not-for-profit corporation and, for those matters, shall not be counted as present for the purposes of a quorum of the municipal or county governing body.

Credits

Laws 1871-72, p. 612, § 3, eff. July 1, 1872. Amended by Laws 1949, p. 1162, § 1, eff. July 1, 1949; P.A. 80-938, § 2, eff. July 1, 1978; P.A. 80-1086, § 2, eff. July 1, 1978; P.A. 81-291, § 2, eff. Aug. 28, 1979; P.A. 82-399, § 2, eff. Sept. 4, 1981; P.A. 87-855, § 4, eff. July 1, 1992; P.A. 87-1197, Art. 1, § 2, eff. Sept. 25, 1992; P.A. 90-197, § 5, eff. Jan. 1, 1998; P.A. 90-364, § 5, eff. Jan. 1, 1998; P.A. 90-655, § 50, eff. July 30, 1998; P.A. 96-277, § 5, eff. Jan. 1, 2010; P.A. 96-1058, § 5, eff. July 14, 2010; P.A. 97-520, § 5, eff. Aug. 23, 2011; P.A. 98-1083, § 5, eff. Jan. 1, 2015.

Formerly Ill.Rev.Stat.1991, ch. 102, ¶ 3.

Notes of Decisions (78)

Footnotes

1 70 ILCS 910/13.

50 I.L.C.S. 105/3, IL ST CH 50 § 105/3

Current through P.A. 99-983 of the 2016 Reg. Sess.

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West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 110. Higher Education (Refs & Annos)
Public Community Colleges
Act 805. Public Community College Act (Refs & Annos)
Article III. Community College Districts; Organization; Powers and Duties; Elections (Refs & Annos)

110 ILCS 805/3-48
Formerly cited as IL ST CH 122 ¶103-48

805/3-48. Interest in contracts and business prohibited; exceptions

Currentness

§ 3-48. No community college board member shall be interested, directly or indirectly, in his own name or in the name of any other person, association, trust or corporation, in any contract, work, or business of the district or in the sale of any article, whenever the expense, price, or consideration of the contract, work, business, or sale is paid either from the treasury or by any assessment levied by any statute or ordinance. No community college board member shall be interested, directly or indirectly, in the purchase of any property which (1) belongs to the district, or (2) is sold for taxes or assessments, or (3) is sold by virtue of legal process at the suit of the district.

However, any board member may provide materials, merchandise, property, services, or labor, if:

A. the contract is with a person, firm, partnership, association, corporation, or cooperative association in which the board member has less than a 7 ½ % share in the ownership; and

B. such interested board member publicly discloses the nature and extent of his interest prior to or during deliberations concerning the proposed award of the contract; and

C. such interested board member abstains from voting on the award of the contract, though he shall be considered present for the purposes of establishing a quorum; and

D. such contract is approved by a majority vote of those board members presently holding office; and

E. the contract is awarded after sealed bids to the lowest responsible bidder if the amount of the contract exceeds $1500, or awarded without bidding if the amount of the contract is less than $1500; and

F. the award of the contract would not cause the aggregate amount of all such contracts so awarded to the same person, firm, association, partnership, corporation, or cooperative association in the same fiscal year to exceed $25,000.

In addition to the above exemption, any board member may provide materials, merchandise, property, services or labor if:

A. the award of the contract is approved by a majority vote of the board provided that any such interested member shall abstain from voting; and

B. the amount of the contract does not exceed $250; and

C. the award of the contract would not cause the aggregate amount of all such contracts so awarded to the same person, firm, association, partnership, corporation, or cooperative association in the same fiscal year to exceed $500; and

D. such interested member publicly discloses the nature and extent of his interest prior to or during deliberations concerning the proposed award of the contract; and

E. such interested member abstains from voting on the award of the contract, though he shall be considered present for the purposes of establishing a quorum.

A contract for the procurement of public utility services by a district with a public utility company is not barred by this Section by one or more members of the board being an officer or employee of the public utility company or holding an ownership interest of no more than 7 ½ % in the public utility company. An elected or appointed member of the board having such an interest shall be deemed not to have a prohibited interest under this Section.

This Section does not prohibit a student member of the board from maintaining official status as an enrolled student, from maintaining normal student employment at the college or from receiving scholarships or grants when the eligibility for the scholarships or grants is not determined by the board.

Nothing contained in this Section shall preclude a contract of deposit of monies, loans or other financial services by a district with a local bank or local savings and loan association, regardless of whether a member or members of the community college board are interested in such bank or savings and loan association as a director, as an officer or employee or as a holder of less than 7 ½ % of the total ownership interest. A member or members holding such an interest in such a contract shall not be deemed to be holding a prohibited interest for purposes of this Act. Such interested member or members of the community college board must publicly state the nature and extent of their interest during deliberations concerning the proposed award of such a contract, but shall not participate in any further deliberations concerning the proposed award. Such interested member or members shall not vote on such a proposed award. Any member or members abstaining from participation in deliberations and voting under this Section may be considered present for purposes of establishing a quorum. Award of such a contract shall require approval by a majority vote of those members presently holding office. Consideration and award of any such contract in which a member or members are interested may only be made at a regularly scheduled public meeting of the community college board.

Any board member who violates this Section is guilty of a Class 4 felony and in addition thereto any office held by such person so convicted shall become vacant and shall be so declared as part of the judgment of the court.

Credits

Laws 1965, p. 1529, § 3-48, added by P.A. 80-938, § 4, eff. July 1, 1978. Amended by P.A. 85-1047, § 1, eff. July 14, 1988; P.A. 86-930, § 1, eff. Oct. 31, 1989.

Formerly Ill.Rev.Stat.1991, ch. 122, ¶ 103-48.

110 I.L.C.S. 805/3-48, IL ST CH 110 § 805/3-48
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West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 110. Higher Education (Refs & Annos)
Public Community Colleges
Act 805. Public Community College Act (Refs & Annos)
Article III. Community College Districts; Organization; Powers and Duties; Elections (Refs & Annos)

110 ILCS 805/3-7
Formerly cited as IL ST CH 122 ¶103-7

805/3-7. District board; time and manner of election; tenure; qualification; vacancies; compensation; ballot; trustee districts

Effective: August 23, 2011
Currentness

§ 3-7. (a) The election of the members of the board of trustees shall be nonpartisan and shall be held at the time and in the manner provided in the general election law. [1]

(b) Unless otherwise provided in this Act, members shall be elected to serve 6 year terms. The term of members elected in 1985 and thereafter shall be from the date the member is officially determined to be elected to the board by a canvass conducted pursuant to the Election Code, to the date that the winner of the seat is officially determined by the canvass conducted pursuant to the Election Code the next time the seat on the board is to be filled by election.

(c) Each member must on the date of his election be a citizen of the United States, of the age of 18 years or over, and a resident of the State and the territory which on the date of the election is included in the community college district for at least one year immediately preceding his election. In Community College District No. 526, each member elected at the consolidated election in 2005 or thereafter must also be a resident of the trustee district he or she represents for at least one year immediately preceding his or her election, except that in the first consolidated election for each trustee district following reapportionment, a candidate for the board may be elected from any trustee district that contains a part of the trustee district in which he or she resided at the time of the reapportionment and may be reelected if a resident of the new trustee district he or she represents for one year prior to reelection. In the event a person who is a member of a common school board is elected or appointed to a board of trustees of a community college district, that person shall be permitted to serve the remainder of his or her term of office as a member of the common school board. Upon the expiration of the common school board term, that person shall not be eligible for election or appointment to a common school board during the term of office with the community college district board of trustees.

(d) Whenever a vacancy occurs, the remaining members shall fill the vacancy, and the person so appointed shall serve until a successor is elected at the next regular election for board members and is certified in accordance with Sections 22-17 and 22-18 of the Election Code. [2] If the remaining members fail so to act within 60 days after the vacancy occurs, the chairman of the State Board shall fill that vacancy, and the person so appointed shall serve until a successor is elected at the next regular election for board members and is certified in accordance with Sections 22-17 and 22-18 of the Election Code. The person appointed to fill the vacancy shall have the same residential qualifications as his predecessor in office was required to have. In either instance, if the vacancy occurs with less than 4 months remaining before the next scheduled consolidated election, and the term of office of the board member vacating the position is not scheduled to expire at that election, then the term of the person so appointed shall extend through that election and until the

succeeding consolidated election. If the term of office of the board member vacating the position is scheduled to expire at the upcoming consolidated election, the appointed member shall serve only until a successor is elected and qualified at that election.

(e) Members of the board shall serve without compensation but shall be reimbursed for their reasonable expenses incurred in connection with their service as members. Compensation, for purposes of this Section, means any salary or other benefits not expressly authorized by this Act to be provided or paid to, for or on behalf of members of the board. The board of each community college district may adopt a policy providing for the issuance of bank credit cards, for use by any board member who requests the same in writing and agrees to use the card only for the reasonable expenses which he or she incurs in connection with his or her service as a board member. Expenses charged to such credit cards shall be accounted for separately and shall be submitted to the chief financial officer of the district for review prior to being reported to the board at its next regular meeting.

(f) Except in an election of the initial board for a new community college district created pursuant to Section 6-6.1, the ballot for the election of members of the board for a community college district shall indicate the length of term for each office to be filled. In the election of a board for any community college district, the ballot shall not contain any political party designation.

Credits

Laws 1965, p. 1529, § 3-7, eff. July 15, 1965. Amended by Laws 1967, p. 1229, § 1, eff. July 7, 1967; P.A. 76-1354, § 1, eff. Sept. 16, 1969; P.A. 77-724, § 1, eff. Aug. 12, 1971; P.A. 78-669, § 1, eff. Oct. 1, 1973; P.A. 79-975, § 2, eff. Oct. 1, 1975; P.A. 79-1057, § 6, eff. Oct. 1, 1975; P.A. 79-1454, § 1[61], eff. Aug. 31, 1976; P.A. 80-1469, § 10, eff. Dec. 1, 1980; P.A. 81-1433, Art. I, § 3, eff. Dec. 1, 1980; P.A. 81-1490, § 22, eff. Dec. 1, 1980; P.A. 81-1550, Art. I, § 39, eff. Jan. 8, 1981; P.A. 82-992, § 3, eff. Sept. 10, 1982; P.A. 82-1014, Art. I, § 5, eff. Jan. 1, 1983; P.A. 82-1037, § 2, eff. Dec. 22, 1982; P.A. 82-1057, Art. II, § 19, eff. Feb. 11, 1983; P.A. 85-243, § 1, eff. Sept. 2, 1987; P.A. 85-765, § 1, eff. Sept. 24, 1987; P.A. 85-1209, Art. II, § 2-97, eff. Aug. 30, 1988; P.A. 86-469, § 1, eff. Sept. 1, 1989; P.A. 86-481, § 1, eff. Sept. 1, 1989; P.A. 86-550, § 1, eff. Jan. 1, 1990; P.A. 86-1028, Art. II, § 2-84, eff. Feb. 5, 1990; P.A. 86-1032, § 2, eff. March 2, 1990; P.A. 86-1245, § 1, eff. Sept. 6, 1990; P.A. 86-1264, § 1, eff. Sept. 6, 1990; P.A. 86-1475, Art. 2, § 2-40, eff. Jan. 10, 1991; P.A. 87-707, § 1, eff. Sept. 23, 1991; P.A. 87-776, § 1, eff. Nov. 8, 1991; P.A. 87-895, Art. 2, § 2-75, eff. Aug. 14, 1992; P.A. 88-686, § 10, eff. Jan. 24, 1995; P.A. 90-358, § 15, eff. Jan. 1, 1998; P.A. 92-1, § 5, eff. March 30, 2001; P.A. 93-582, § 5, eff. Jan. 1, 2004; P.A. 95-100, § 5, eff. Aug. 13, 2007. Resectioned §§ 3-7 to 3-7b and amended by P.A. 97-539, § 5, eff. Aug. 23, 2011.

Formerly Ill.Rev.Stat.1991, ch. 122, ¶ 103-7.

Notes of Decisions (6)

Footnotes

1 10 ILCS 5/1-1 et seq.

2 10 ILCS 5/22-17 and 5/22-18.

110 I.L.C.S. 805/3-7, IL ST CH 110 § 805/3-7

Current through P.A. 99-983 of the 2016 Reg. Sess.

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2015 IL App (1st) 150685
Appellate Court of Illinois,
First District, Third Division.

McStephen O.A. "Max"
SOLOMON, Plaintiff–Appellant,
v.
Michael SCHOLEFIELD, Objector, Education Officers Electoral Board, South Suburban Community College of Cook County, Frank M. Zuccarelli, Anothony DeFilippo, and Terry Wells, in Their Individual Capacities as Members, Defendants–Appellees.

No. 1–15–0685.
|
March 27, 2015.
|
Rehearing Denied April 3, 2015.

Synopsis

Background: Candidate for office of trustee on board of community college sought judicial review of a decision of the education officers electoral board invalidating candidate's nominating papers. The Circuit Court, Cook County, Maureen Ward Kirby, J., affirmed, and candidate appealed.

Holdings: The Appellate Court, Mason, J., held that:

[1] compensation received by candidate from his employment as an adjunct professor at community college did not constitute a valid basis to invalidate his nominating papers;

[2] the board exceeded its authority in invalidating candidate's statement of candidacy on the ground his service as adjunct professor and active union member might conflict with his duties as a board member; and

[3] evidence was insufficient to invalidate nominating petitions of candidate for the office of trustee on community college board of trustees on the basis the petition circulators failed to sign their petition sheets in the presence of a notary public.

Reversed.

West Headnotes (18)

[1] **Election Law**
⇐ Powers and proceedings of board of elections

Electoral boards are considered to be administrative agencies.

Cases that cite this headnote

[2] **Election Law**
⇐ Powers and proceedings of board of elections

The standards governing judicial review of a final decision of an election board are substantially the same as those governing review of other agency decisions; in particular, the standards of review for questions of fact, questions of law and mixed questions of fact and law are the same.

1 Cases that cite this headnote

[3] **Election Law**
⇐ Powers and proceedings of board of elections

An electoral board's findings and conclusions on questions of fact are deemed to be prima facie true and correct, and will not be overturned on appeal unless they are against the manifest weight of the evidence; a determination is against the "manifest weight of the evidence" when the opposite conclusion is clearly evident.

Cases that cite this headnote

[4] **Administrative Law and Procedure**
⇐ Clear error

An administrative agency's decision is deemed "clearly erroneous" when the reviewing court is left with the definite and firm conviction that a mistake has been committed.

Cases that cite this headnote

[5] **Administrative Law and Procedure**
Law questions in general

Where the historical facts are established, but there is a question about whether the governing legal provisions were interpreted correctly by the administrative body, the case presents a purely legal question for which the court's review is de novo.

Cases that cite this headnote

[6] **Election Law**
Powers and proceedings of board of elections

Where a circuit court reviews an electoral board's decision, an appellate court reviews the decision of the board, not the circuit court.

1 Cases that cite this headnote

[7] **Election Law**
Power to regulate

As in any election dispute, ballot access is a substantial right and not to be lightly denied.

Cases that cite this headnote

[8] **Election Law**
Liberal or strict construction

Courts must tread cautiously when construing statutory language which restricts the people's right to endorse and nominate the candidate of their choice.

Cases that cite this headnote

[9] **Education**
College districts

Compensation received by candidate from his employment as an adjunct professor at community college did not constitute a valid basis to invalidate his nominating papers to serve as a member of the community college board of trustees; the statutory provision governing a candidate's qualifications that required trustees to serve without compensation related to compensation for services as members of the board, and nothing in the statute conditioned a candidate's eligibility for the office of trustee on his or her sources of income. S.H.A. 110 ILCS 805/3–7(c)(e).

Cases that cite this headnote

[10] **Education**
College districts

Education officers electoral board exceeded its authority in invalidating community college board of trustees candidate's statement of candidacy on the ground his service as a community college adjunct professor and active union member might conflict with his duties as a board member; the party objecting to candidate's statement of candidacy did not raise any conflict issue, nothing in the record proved, or could prove, that candidate would choose to continue in either his professional or union roles if elected to serve as a trustee, and the issue of a potential conflict bore no relationship to the board's essential function, i.e., protection of the electoral process. S.H.A. 10 ILCS 5/10–8.

Cases that cite this headnote

[11] **Election Law**
Amendment

The Election Code does not permit amendments to objections. S.H.A. 10 ILCS 5/10–8.

Cases that cite this headnote

[12] **Election Law**
Determination by public officers

When evidence beyond specific objections is introduced during the hearing before the electoral board, that evidence must at least bear on some general objection that the candidate was called upon to answer in the objector's petition.

1 Cases that cite this headnote

[13] **Election Law**
Determination by public officers

It is improper for an electoral board to raise its own objections to a nominating petition sua sponte. S.H.A. 10 ILCS 5/10–8.

2 Cases that cite this headnote

[14] **Election Law**
Determination by public officers

The scope of an electoral board's authority in resolving an objection to nominating papers is to determine whether those papers are in compliance with governing provisions of the Election Code.

1 Cases that cite this headnote

[15] **Election Law**
Effect of irregularities or defects

Evidence was insufficient to invalidate nominating petitions of candidate for the office of trustee on community college board of trustees on the basis that petition circulators failed to sign their petition sheets in the presence of a notary public; notary consistently testified that all three circulators signed their petition sheets in her presence, refuting the precise objection raised by objector, and even if notary mistakenly wrote the wrong date when she notarized the signatures, it would not invalidate the petition sheets assuming the circulators appeared personally to sign the sheets in notary's presence. S.H.A. 10 ILCS 5/10–8.

Cases that cite this headnote

[16] **Election Law**
Presumptions and burden of proof in general

In a proceeding to contest a nominating petition, the objector bears the burden of proof.

Cases that cite this headnote

[17] **Election Law**
Scope of Inquiry and Powers of Court or Board

Review of an electoral board's factual findings in a proceeding contesting a nominating petition is under the manifest weight of the evidence standard.

Cases that cite this headnote

[18] **Election Law**
Effect of irregularities or defects

A circulator's failure to appear before a notary public to have his or her signature notarized on a petition sheets is a violation of the Election Code and requires, at a minimum, that those petition sheets be invalidated. S.H.A. 10 ILCS 5/7–10.

Cases that cite this headnote

Attorneys and Law Firms

*482 McStephen O.A. Solomon, of Hazel Crest, appellant pro se.

Laduzinsky & Associates, P.C., of Chicago (Steven M. Laduzinsky and Aisling S. O'Laoire, of counsel), for appellees.

OPINION

Justice MASON delivered the judgment of the court, with opinion.

**212 ¶ 1 Petitioner-appellant, McStephen O.A. "Max" Solomon, appeals an order of the circuit court of Cook County affirming a decision of the Education Officers Electoral Board (Board) invalidating Solomon's nominating papers for the office of trustee of the board of South Suburban Community College of Cook County District 510 (District 510) and removing him from the ballot. The Board invalidated Solomon's petition on

two grounds: first, it determined that Solomon was not "qualified for the office" within the meaning of section 10–5 of the Election Code (10 ILCS 5/10–5 (West 2012)) (Code); and, second, the Board concluded that the failure of certain circulators to personally appear before the notary public who notarized their signatures on the petition sheets constituted a "pattern of fraud" that required invalidation of all the sheets supporting the petition as well as Solomon's statement of candidacy. We reverse.

¶ 2 BACKGROUND

¶ 3 On December 15, 2014, Solomon filed nomination papers for the office of trustee of District 510, a position on the ballot for the April 7, 2015 consolidated election. Solomon's papers included a statement of candidacy representing that he was "legally **213 *483 qualified to hold such office" and nine pages of supporting signatures, seven of which were signed by Solomon as the circulator and two that were signed by other individuals. The signatures of the circulators on each petition sheet were notarized by a notary public, Maria Barlow, who swore that the circulators appeared before her on December 15, 2014, and affixed their signatures to the petition sheets.

¶ 4 Objector Michael Scholefield filed his objections to Solomon's petition on December 30, 2014. The bases for Scholefield's objections were that (i) Solomon's statement of candidacy was false because at the time he signed it, Solomon was receiving compensation from District 510, which meant that his service as a trustee would not be "without compensation" as required under section 3–7(e) of the Public Community College Act (110 ILCS 805/3–7(e) (West 2012)) and (ii) circulators of Solomon's petition sheets did not personally appear before the notary who notarized their signatures, demonstrating a pattern of fraud and disregard of the Code. Scholefield also raised line-by-line objections to the 119 signatures on the petition sheets. (A records examination later determined that 78 of those signatures were presumptively valid—28 more than the minimum 50 signatures required. No issue is raised on appeal regarding Solomon's compliance with the valid signature requirement.)

¶ 5 The Board conducted a hearing on Scholefield's objections. Solomon is an attorney and an adjunct professor who teaches part-time at South Suburban College and who lives in Hazel Crest within District 510's boundaries. He taught and received compensation for the fall 2014 semester and is currently teaching classes during the spring semester. Solomon is also a member of the South Suburban College Adjunct Faculty Association, a union comprised of adjunct faculty at the college.

¶ 6 Solomon personally circulated and signed seven of the nine sheets containing signatures supporting his nomination. Two other individuals, Anthony Brown and Gytara Brooks, each circulated and signed one sheet. Barlow is an attorney, a notary public and Solomon's girlfriend. Barlow lives in Chicago and she and Solomon have a law office at 1718 E. 89th Street in Chicago. Solomon signed and Barlow notarized his signature on the petition sheets circulated by him sometime after midnight on December 15 while Solomon and Barlow were at Barlow's residence in Chicago. According to Solomon, the sheets circulated by Brooks and Brown were notarized the day before—Sunday, December 14—at the office. But those two petition sheets likewise bear a notarization date of December 15. Solomon was asked, "And when [Barlow] notarized the petition sheets of Mr. Brown and Ms. Brooks, it's fair to say they were not present, correct?" Solomon replied, "They were because they were notarized the day before at the office." Solomon admitted that Brown and Brooks did not come to Barlow's house in the early morning hours of December 15.

¶ 7 Following this testimony, counsel for Scholefield informed the Board that he was "gravely concerned" about proceeding with the hearing and that he interpreted Solomon's testimony as conceding that Barlow notarized the signatures of circulators who were not physically present. Counsel for the Board informed Solomon that "we have an obligation to seriously consider whether or not we should file a complaint with the Attorney Registration and Disciplinary Commission" and urged Solomon not to say anything further, informing him of his "right to remain silent."

¶ 8 Despite this dire admonition, Solomon proceeded to explain that he arranged **214 *484 for both Brown and Brooks to come to the law office on Sunday, December 14, so that Barlow could notarize their signatures. Solomon did not recall whether he was present in the office at the time, but had no reason to believe that Brown and Brooks had not personally appeared

before Barlow to have their signatures on the petitions notarized. Solomon conceded that the date Barlow placed on each sheet was incorrect, but argued that such a mistake would not invalidate the notary's certification that the signer appeared before her or affect the validity of his nominating papers.

¶ 9 After Solomon's testimony, Scholefield rested. In colloquy with the Board, counsel for Scholefield stated his belief that Solomon had admitted that Brown and Brooks were not present on December 15 when Barlow notarized their signatures and that this evidence satisfied his burden of proof regarding the allegation of fraud. With respect to Solomon's eligibility for office, counsel for the Board clarified that the allegation related to compensation received by Solomon as an adjunct professor and Scholefield rested with respect to that objection as well.

¶ 10 Solomon then called Barlow to testify. Barlow attested that Solomon personally appeared before her to sign the sheets he circulated, although at one point she stated Solomon's sheets were notarized in the office and not at her residence. She could not recall whether she affixed her notary seal to Solomon's sheets before or after midnight on December 14. She further testified that Brown and Brooks came to her office on the "weekend" and, after she checked both individuals' identification, both signed their sheets in her presence. On cross-examination, Scholefield's counsel asked Barlow whether Brown and Brooks "spent any time" with her on Monday, December 15 and Barlow reiterated her recollection that they came to the office on the "weekend." No further evidence was presented at the hearing. Specifically, Barlow was not asked, either by Solomon or by counsel for Scholefield, whether the date of her notarization on Brooks' and Brown's signatures was correct.

¶ 11 On March 4, 2015, the Board issued its decision invalidating Solomon's nomination papers and removing his name from the ballot. The Board found that the compensation Solomon received as an adjunct faculty member violated section 3–7(e) of the Public Community College Act, which provides, with respect to board members:

> "Members of the board shall serve without compensation but shall be reimbursed for their reasonable expenses incurred in connection with their service as members. Compensation, for purposes of this Section, means any salary or other benefits not expressly authorized by this Act to be provided or paid to, for or on behalf of members of the board." 110 ILCS 805/3–7(e).

The Board reasoned that the "compensation" referred to in section 3–7(e) was not "limited to that earned specifically as a Member of the Board" and that because Solomon received compensation from District 510 in his capacity as an adjunct professor, he was not qualified for the office of trustee. The Board further determined that Solomon's position as an adjunct faculty member potentially conflicted with his duties as a member of District 510's board since it was conceivable that as a member of District 510's board, he could be called on to pass on matters relating to salary or other benefits for adjunct faculty. For this additional reason, the Board determined that Solomon was not qualified for the position.

¶ 12 Separately, the Board determined that the evidence adduced at the hearing supported the finding that the circulators ****215** ***485** other than Solomon did not appear before Barlow at the time she notarized their signatures. Specifically, the Board found that Solomon "admitted that the petition sheets of Brooks and Brown were not properly notarized because they never personally appeared before Barlow, the notary public." This admission, according to the Board, constituted a "total disregard for the mandatory requirements of the Election Code," which required invalidation not only of the sheets circulated by Brooks and Brown, but also of any other documents notarized by Barlow, including the sheets circulated by Solomon and his statement of candidacy. Based on its findings, the Board invalidated Solomon's nominating papers and ordered that his name be stricken from the ballot.

¶ 13 Solomon timely sought review of the Board's decision in the circuit court and on March 17, 2015, the circuit court affirmed the Board decision. Solomon filed his notice of appeal on March 18, 2015, and we granted his motion to accelerate this appeal and to accept memoranda in lieu of formal briefs.

¶ 14 ANALYSIS

[1] [2] [3] [4] [5] [6] ¶ 15 Electoral boards are considered to be administrative agencies. *Jackson v. Board*

of Election Commissioners, 2012 IL 111928, ¶ 46, 363 Ill.Dec. 557, 975 N.E.2d 583; *Cinkus v. Village of Stickney Municipal Officers Electoral Board,* 228 Ill.2d 200, 209, 319 Ill.Dec. 887, 886 N.E.2d 1011 (2008). Under section 10–10.1 of the Code, a candidate or objector aggrieved by the final decision of an electoral board may obtain judicial review of the board's decision in the circuit court. 10 ILCS 5/10–10.1 (West 2012). Although the Code does not specifically adopt the Administrative Review Law (735 ILCS 5/3–101 *et seq.* (West 2012)), the standards governing judicial review of a final decision of an election board are substantially the same as those governing review of other agency decisions. *Cinkus,* 228 Ill.2d at 209, 319 Ill.Dec. 887, 886 N.E.2d 1011. In particular, the standards of review for questions of fact, questions of law and mixed questions of fact and law are the same. As we recently reiterated in *Cunningham v. Schaeflein:*

> "This court deems an electoral board's findings and conclusions on questions of fact to be *prima facie* true and correct, and we will not overturn such findings on appeal unless they are against the manifest weight of the evidence. [Citations.] A determination is against the manifest weight of the evidence when the opposite conclusion is clearly evident. [Citation.] Our supreme court has explained that where the historical facts are admitted or established, the controlling rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, the case presents a mixed question of fact and law for which the standard of review is ' "clearly erroneous." ' [Citation.] An administrative agency's decision is deemed clearly erroneous 'when the reviewing court is left with the definite and firm conviction that a mistake has been committed.' (Internal quotation marks omitted.) [Citation.] Pure questions of law, including questions of statutory interpretation, are reviewed *de novo.* [Citation.] Additionally, where the historical facts are established, but there is a question about 'whether the governing legal provisions were interpreted correctly by the administrative body, the case presents a purely legal question for which [the court's] review is *de novo.*' [Citation.]" *Cunningham v. Schaeflein,* 2012 IL App (1st) 120529, ¶ 19, 360 Ill.Dec. 816, 969 N.E.2d 861.

Where a circuit court reviews an electoral board's decision, we review the decision of ****216** ***486** the board, not the circuit court. *Jackson,* 2012 IL 111928, ¶ 46, 363 Ill.Dec. 557, 975 N.E.2d 583; *Cinkus,* 228 Ill.2d at 212, 319 Ill.Dec. 887, 886 N.E.2d 1011.

[7] [8] ¶ 16 As in any election dispute, we are mindful of that fact that "ballot [access] is a substantial right and not to be lightly denied." *Siegel v. Lake County Officers Electoral Board,* 385 Ill.App.3d 452, 460–61, 324 Ill.Dec. 69, 895 N.E.2d 69 (2008). We must "tread cautiously when construing statutory language which restricts the people's right to endorse and nominate the candidate of their choice." *Lucas v. Lakin,* 175 Ill.2d 166, 176, 221 Ill.Dec. 834, 676 N.E.2d 637 (1997).

¶ 17 Solomon's Qualification for Office

[9] ¶ 18 The qualifications necessary for a candidate for the office of trustee on the board of an Illinois community college are set forth in section 3–7(c) of the Public Community College Act:

> "Each member must on the date of his election be a citizen of the United States, of the age of 18 years or over, and a resident of the State and the territory which on the date of the election is included in the community college district for at least one year immediately preceding his election." 110 ILCS 805/3–7(c) (West 2012).

There is no dispute that Solomon satisfies the foregoing requirements. Scholefield contended and the Board found, however, that the provisions of section 3–7(e) regarding the requirement that board members serve "without compensation" impose an additional requirement and that Solomon's admitted receipt of "compensation" as an adjunct professor in District 510 disqualified him from serving on the board. We disagree.

¶ 19 As in any case involving the construction of a statute, "[o]ur primary objective is to ascertain and give effect to the intent of the legislature. The best indication of legislative intent is the language employed by the General Assembly, which must be given its plain and ordinary meaning." *Goodman v. Ward,* 241 Ill.2d 398, 408, 350 Ill.Dec. 300, 948 N.E.2d 580 (2011).

¶ 20 Whether we view this issue as the application of a statutory standard ("serve without compensation") to admitted facts (Solomon's status as an adjunct professor) under the clearly erroneous standard or as a question concerning whether the governing standard was properly interpreted by the Board, which we review *de novo* (see

Goodman, 241 Ill.2d at 404, 350 Ill.Dec. 300, 948 N.E.2d 580 (candidate admitted that at the time of filing his petition he was not a resident of the judicial subcircuit from which he sought election; question presented was whether the electoral board properly interpreted residency requirement in Illinois constitution; *de novo* review applied)), we come to the same result: Solomon's receipt of compensation for his services as an adjunct professor is legally irrelevant to his qualification to serve as a trustee. Section 3–7(e) means, in its plain and unambiguous language, that trustees shall serve without compensation for their services as members of the board. Compensation received by trustees from employment or other endeavors unrelated to their board service does not disqualify them from serving. Further, nothing in section 3–7(c) conditions a candidate's eligibility for the office of trustee on his or her sources of income. Thus, Solomon's receipt of compensation from District 510 did not constitute a valid basis upon which to invalidate his nominating papers.

[10] [11] [12] [13] ¶ 21 The Board further considered whether Solomon's adjunct professor position could potentially conflict with his service as a trustee and, concluding that it ****217 *487** could, determined that this was an additional ground on which the objection should be sustained. This was error. As a creature of statute, an electoral board "may exercise only those powers conferred upon it by the legislature." *Delay v. Board of Election Commissioners,* 312 Ill.App.3d 206, 209, 244 Ill.Dec. 780, 726 N.E.2d 755 (2000) (citing *Kozel v. State Board of Elections,* 126 Ill.2d 58, 68, 127 Ill.Dec. 714, 533 N.E.2d 796 (1988)). It is "the unique province of the objector" to "raise issues [and] objections" to a candidate's petition and supporting papers. *Mitchell v. Cook County Officers Electoral Board,* 399 Ill.App.3d 18, 27, 338 Ill.Dec. 379, 924 N.E.2d 585 (2010). Under section 10–8 of the Code, an objector's petition "shall state fully the nature of the objections to the certificate of nomination or nomination papers." 10 ILCS 5/ 10–8 (West 2012). The Code does not permit amendments to objections. *Siegel,* 385 Ill.App.3d at 456, 324 Ill.Dec. 69, 895 N.E.2d 69. "[W]hen 'evidence beyond specific objections' is introduced during the [hearing before the electoral board], that evidence must at least bear on some 'general objection that the candidate was called upon to answer' in the objector's petition." *Cunningham,* 2012 IL App (1st) 120529,¶ 33, 360 Ill.Dec. 816, 969 N.E.2d 861 (quoting *Delay,* 312 Ill.App.3d at 209, 244 Ill.Dec. 780, 726 N.E.2d 755). It is improper for an electoral board to raise its own objections to a nominating petition *sua sponte. Delay,* 312 Ill.App.3d at 210, 244 Ill.Dec. 780, 726 N.E.2d 755; *Mitchell,* 399 Ill.App.3d at 27, 338 Ill.Dec. 379, 924 N.E.2d 585.

¶ 22 Examination of Scholefield's objection reveals that, as it pertains to Solomon's qualifications for office, Scholefield claimed only that Solomon's receipt of "compensation" within the meaning of section 3–7(e) disqualified him from serving as a trustee. Nothing in the objection called upon Solomon to address whether his adjunct professor status could conflict with his service as a trustee because at some point he might be called upon to vote on salaries or other matters relating to District 510's adjunct professors. Thus, the Board exceeded its authority in invalidating Solomon's statement of candidacy on a ground never raised by Scholefield in his objections. Further, as the focus of this issue is a potential future conflict that may or may not arise in the future should Solomon be elected, it bears no relationship to the Board's essential function, *i.e.,* protection of the electoral process. See *Fortas v. Dixon,* 122 Ill.App.3d 697, 701, 78 Ill.Dec. 496, 462 N.E.2d 615 (1984) (" 'when in the course of hearing objections to nominating papers, evidence beyond specific objections comes to the electoral board's attention, it cannot close its eyes and ears if evidence is relevant to the protection of the electoral process.' ").

¶ 23 Moreover, even if Scholefield's objection focusing on Solomon's receipt of "compensation" as disqualifying him from office could be construed to encompass this issue, we would nevertheless reject it as a basis for sustaining the objection. The Board concluded that "[i]f elected, [Solomon's] active union membership in the South Suburban College Adjunct Faculty Association would render him unable to fulfill his duties of office with full and impartial loyalty." But nothing in the record proves, nor could it prove, that Solomon would choose to continue in either his professional or union roles if elected to serve as a trustee.

¶ 24 As support for its finding on this point, the Board cited *People ex rel. Teros v. Verbeck,* 155 Ill.App.3d 81, 106 Ill.Dec. 757, 506 N.E.2d 464 (1987). In *Verbeck,* the defendant was elected as a member of the Rock Island County Board and later accepted a position as deputy coroner of ****218 *488** Rock Island County. Given that (i) one of the duties of the county board was to fix the salary of the county coroner and provide

a budget for the coroner's office, and (ii) the deputy coroner's salary was determined by the coroner subject to budgetary limitations established by the county board, the court found that the two offices were incompatible. "The potential for influencing [defendant's] superior's salary and budget and, ultimately, [defendant's] own salary, without more, renders defendant's offices incompatible." 155 Ill.App.3d at 83–84, 106 Ill.Dec. 757, 506 N.E.2d 464. Further, the court found that because the offices were legally incompatible, defendant's offer to refrain from participating as a county board member in matters involving the coroner's office was not a satisfactory solution. "[T]he common law doctrine of incompatibility * * * insure[s] that there be the appearance as well as the actuality of impartiality and undivided loyalty." (Internal quotation marks omitted.) *Id.* The remedy was defendant's ouster from his elected position.

[14] ¶ 25 *Verbeck* does not apply here. First, as Solomon points out, the common law doctrine of incompatibility applies in the context of an individual who holds two public offices. See *People ex rel. Fitzsimmons v. Swailes,* 101 Ill.2d 458, 79 Ill.Dec. 90, 463 N.E.2d 431 (1984) (county board member and township assessor); *Verbeck* (county board member and deputy county coroner). An adjunct professor is not elected or appointed to that position, but is a part-time employee or independent contractor for an institution of higher learning. Second, while a circuit court in an action in *quo warranto* has the authority to order forfeiture of an elected position, the legislature has conferred no such authority on an electoral board. Rather, the scope of an electoral board's authority in resolving an objection to nominating papers is to determine whether those papers are in compliance with governing provisions of the Code. *Goodman,* 241 Ill.2d at 411, 350 Ill.Dec. 300, 948 N.E.2d 580. In effect, the Board's ruling here imposed a new eligibility requirement for trustee candidates: their outside employment or sources of income must never pose the possibility of a conflict with their service on the board. This was beyond the Board's authority and we, therefore, reject it as a basis for invalidating Solomon's certificate of candidacy.

¶ 26 The Challenge to Circulators' Signatures

[15] ¶ 27 As noted above, Scholefield's second objection related to his claim that the circulators of Solomon's petitions failed to appear personally before a notary to have their signatures on the petition sheets notarized as required by section 7–10 of the Code. 10 ILCS 5/7–10 (West 2012) (requiring that a circulator's affidavit "shall be sworn to before some officer authorized to administer oaths in this State"). Scholefield argued and the Board found that Solomon "admitted" that two of his circulators did not appear personally before Barlow to sign their sheets. "[T]he evidence shows that the Candidate himself, admitted that the petition sheets of Brooks and Brown were not properly notarized because they never personally appeared before Barlow, the notary public." No other factual findings are included in the Board's decision. We find no such admission in the record and our review of the evidence presented at the hearing reveals no other basis upon which we can affirm the Board's decision on this point.

[16] **[17]** ¶ 28 In a proceeding to contest a nominating petition, the objector bears the burden of proof. ****219** ***489** *Carlasare v. Will County Officers Electoral Board,* 2012 IL App (3d) 120699, ¶ 15, 364 Ill.Dec. 809, 977 N.E.2d 298; *Hagen v. Stone,* 277 Ill.App.3d 388, 390, 213 Ill.Dec. 932, 660 N.E.2d 189 (1995). We review the Board's factual findings on this issue under the manifest weight of the evidence standard. *Cinkus,* 228 Ill.2d at 210, 319 Ill.Dec. 887, 886 N.E.2d 1011.

[18] ¶ 29 A circulator's failure to appear before a notary public to have his or her signature notarized on petition sheets is a violation of section 7–10 of the Code and requires, at a minimum, that those petition sheets be invalidated. *Bowe v. Chicago Electoral Board,* 79 Ill.2d 469, 470, 38 Ill.Dec. 756, 404 N.E.2d 180 (1980) ("the failure of the circulator to personally appear before the notary public invalidates the petition"). If an objector demonstrates a pattern of improper swearing, all sheets signed by the circulator and sworn to by the notary will be invalidated. *Cunningham,* 2012 IL App (1st) 120529, ¶ 39, 360 Ill.Dec. 816, 969 N.E.2d 861 ("This court has recognized that where the sheets of a nominating petition submitted by a circulator evidence a pattern of fraud, false swearing, and total disregard for the requirements of the Election Code, the sheets circulated by that individual should be stricken in their entirety." *Canter* [*v. Cook County Officers Electoral Board*], 170 Ill.App.3d [364] at 368 [120 Ill.Dec. 388, 523 N.E.2d 1299 (1988)] * * *). We have also recognized that the requirement that a circulator appear personally before a notary public "ensures the integrity of the circulation process, and in

turn, the political process." *Id.* ¶ 40 (citing *Williams v. Butler,* 35 Ill.App.3d 532, 537, 341 N.E.2d 394 (1976)).

¶ 30 Both Solomon, who testified in Scholefield's case-in-chief, and Barlow, who was called by Solomon, testified that Brooks and Brown came to the law office on the "weekend" before Monday, December 15 and signed their sheets in Barlow's presence. Other than the date of December 15 appearing on those sheets, no one ever suggested and, importantly, Scholefield failed to present any proof that Barlow notarized these sheets on December 15 outside the circulators' presence and after the circulators had earlier signed them. Solomon, on the other hand, signed his sheets in Barlow's presence during the late evening of December 14 or the early morning of December 15. We find no equivocation in Barlow's testimony on this point; she consistently testified all three circulators signed their petition sheets in her presence, refuting the precise objection raised by Scholefield.

¶ 31 Although Scholefield criticized Solomon for not establishing that the December 15 date on Brooks' and Brown's sheets was a mistake on Barlow's part, that contention overlooks Scholefield's burden to establish any impropriety in Solomon's nominating papers. Scholefield chose not to subpoena the circulators to testify at the hearing. In any event, if Barlow actually notarized the circulators' signatures on December 14, but mistakenly wrote December 15, such mistake would not invalidate the petition sheets assuming the circulators appeared personally to sign the sheets in her presence. The essential act required under the Code is the personal appearance of the circulator before a notary; the fact that the date on the notarization is off by one day does not impugn the integrity of the oath-taking process. "Substantial compliance can satisfy a mandatory provision of the Election Code, however, as even a mandatory provision does not require strict compliance." *Cunningham,* 2012 IL App (1st) 120529, ¶ 23, 360 Ill.Dec. 816, 969 N.E.2d 861 (transposing numbers of circulator's address did not require invalidation of petitions).

¶ 32 Scholefield failed in his burden to establish that the circulators did not sign **220 *490 the petition sheets in the presence of the notary public as he claimed in his objection. The Board's contrary finding is not supported by the manifest weight of the evidence. Finding no support for the Board's conclusion that the evidence at the hearing established a pattern of fraud in "total disregard for the requirements" of the Code, we hold the Board erred in invalidating the sheets signed by Brooks and Brown and, further, in invalidating all of the petition sheets on the ground that such a result was necessary to vindicate the integrity of the electoral process.

¶ 33 CONCLUSION

¶ 34 We reverse the Board's decision sustaining the objections to Solomon's candidacy and nominating papers and its determination that Solomon's name shall not appear on the ballot for the consolidated election to be held on April 7, 2015. Due to the proximity of the Board's decision to the election date, and the fact that ballots had already been printed, the circuit court ordered the county clerk to issue a notice to voters in District 510 that Solomon had been removed from the ballot. In order to counter the effects of this notice, we further direct the clerk of Cook County to withdraw that notice from circulation. The mandate shall issue immediately. Ill. S.Ct. R. 368(a) (eff. July 1, 2006).

¶ 35 Reversed; mandate issued immediately.

Justices LAVIN and HYMAN concurred in the judgment and opinion.

All Citations

2015 IL App (1st) 150685, 30 N.E.3d 480, 391 Ill.Dec. 210, 317 Ed. Law Rep. 1036

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116 Ill.App.3d 437
Appellate Court of Illinois,
First District, First Division.

David F. ROGERS, Plaintiff-Appellee,
v.
The VILLAGE OF TINLEY PARK, a municipal corporation; Dennis A. Kallsen, individually and as Village Manager of the Village of Tinley Park; the Civil Service Commission of Tinley Park, a duly authorized administrative agency; Robert J. Long, individually and as Chief of the Tinley Park Police Department; James Beatty, individually and as Chairman of the Civil Service Commission; Paula Czupek, individually and as a commissioner for the Civil Service Commission; Ronald Otto, individually and as commissioner for the Civil Service Commission; Arlene Bak, individually and as secretary of the Civil Service Commission; and the Police Department of Tinley Park, Defendants-Appellants.

No. 82–0385.
|
June 30, 1983.

Elected village trustee brought action for declaratory judgment that he had not voluntarily or automatically resigned from his position as police officer merely by reason of qualifying for and assuming office of trustee. The Circuit Court, Cook County, James C. Murray, J., granted summary judgment in favor of trustee, holding that application of incompatibility of offices rule would result in unconstitutional "chill" on trustee's First Amendment right to seek and hold elective public office. Village appealed. The Appellate Court, O'Connor, J., held that: (1) incompatibility existed between offices of elected village trustee and police officer for same village, even though on leave-of-absence status with respect to police officer position, so that the qualifying for and assuming of office of trustee effected automatic resignation from employment as police officer, in view of potential conflict, whether or not ever manifested, arising out of decision-making responsibility of the board of trustees with respect to police department matters, and (2) application of the common-law doctrine of incompatability of offices to prevent same individual from holding offices both of elected village trustee and police officer did not result in unconstitutional "chill" on individual's First Amendment right to seek and hold elective public office.

Reversed and remanded with directions.

West Headnotes (2)

[1] **Municipal Corporations**
Holding other office or employment

Municipal Corporations
Resignation and abandonment

Public Employment
Resignation or other removal of conflict

Incompatibility existed between offices of elected village trustee and police officer for same village, even though on leave-of-absence status with respect to police officer position, so that the qualifying for and assuming of office of trustee effected automatic resignation from employment as police officer, in view of potential conflict, whether or not ever manifested, arising out of fact that village trustees had decision-making responsibility over salaries and fringe benefits of all village employees, including police officers, police department budget, labor relations, and personnel decisions, as well as appointment of police chief; abstention from voting in areas of conflict would not avoid incompatibility doctrine, in that trustee would then be failing to discharge his public duties.

8 Cases that cite this headnote

[2] **Constitutional Law**
Right to run for public office;candidacy

Application of common-law doctrine of incompatibility of offices to prevent same individual from holding offices both of elected village trustee and police officer on leave-of-absence status did not result in unconstitutional "chill" on individual's First Amendment right to seek and hold elective public office. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

Attorneys and Law Firms

*438 **1325 ***2 John B. Murphey and Ancel, Glink, Diamond, Murphy & Cope, P.C., Chicago, for defendants-appellants.

Murphy, Preston & Jaffe, Chicago (James P. Flannery, Jr. and Lee Preston, Chicago, of counsel), for plaintiff-appellee.

Opinion

O'CONNOR, Justice:

Plaintiff, David F. Rogers, filed an action for declaratory judgment to determine his right to serve as an elected village trustee of defendant Village of Tinley Park, while also serving as a police officer on leave of absence status with the same municipality. Rogers and the Village filed cross-motions for summary judgment. Although Rogers named other parties as defendants in his action, the only parties before this court are the plaintiff Rogers and the defendant Village. The trial court granted plaintiff's motion and denied that of the Village, holding that plaintiff had the right to serve in both capacities. The Village appeals, contending that the positions of village trustee and police officer are incompatible and that plaintiff's acceptance of the position of village trustee automatically resulted in his resignation as a police officer.

The Village of Tinley Park is a home rule municipality, governed by a legislative body consisting of an elected Village President and six elected individual trustees, known collectively as the Board of Trustees. The Board has the legislative responsibility for governing the Village, including regulation of all village officers and employees.

Plaintiff has been a village police officer since 1973. In March *439 1981 his rank was patrol officer. On January 12, 1981, Rogers requested a leave of absence from the police department from February 15 through March 31, 1981, for the reason that he intended to run for public office in the April 1981 election. The police chief orally approved his request the next day.

On January 20, 1981, plaintiff met with the village manager, Dennis Kallsen, who told him that because of a lack of consistent application of the department's rule relating to "political utilization of official positions" it would not be necessary for Rogers actually to take a leave of absence during his candidacy. On that date Rogers withdrew his request for a leave of absence and the village manager formally approved that withdrawal. He advised Rogers that an employee could run for political office as long as no campaigning was done on duty and any campaigning done had to be done out of uniform. He also advised Rogers as to the mechanics of a request for leave of absence and that, if an extended leave were granted, it would be without pay, but that the employee would be allowed to remain under the village's group insurance policy if the employee paid the premium, and that the extended leave time would be viewed as creditable service for seniority purposes.

Rogers was elected village trustee at the April 7, 1981, election. On April 21, 1981, the village attorney answered an inquiry from the President and Board of Trustees as to whether Rogers may continue to be employed as a village police officer subsequent to the time he qualifies to hold the office of village trustee:

> "In my opinion, Trustee-elect Rogers may not continue to be employed as a Village police officer after he qualifies to hold the office of Village Trustee. Further, Trustee-elect Rogers' act of qualification, *ipso facto,* operates as a resignation from his employment as a police officer."

On April 28, 1981, approximately one week prior to his qualification and assumption of duties as trustee on May 5, 1981, Rogers requested that the chief of police grant him a one-year leave of absence effective May 5, 1981, through May 4, 1982, to assume his trustee duties. The chief of police responded by letter dated April 29, **1326 ***3 1981. Based on the village attorney's opinion, the chief concluded that a leave of absence could not be granted to a person who had resigned from the police department.

On May 5, 1981, Rogers was sworn in as village trustee and assumed the duties of that office. On May 6, 1981, the

chief of police wrote Rogers and formally acknowledged his automatic resignation.

Rogers filed a complaint for a declaratory judgment that he had *440 not voluntarily or automatically resigned from his position as a police officer and that he could lawfully serve as village trustee while a police officer on leave of absence. The Village's answer alleged facts demonstrating the incompatibility between the two positions. Based on these facts, the Village moved for summary judgment. Rogers filed a cross-motion for summary judgment, contending that (1) the common law doctrine of incompatibility affects only officers and has no application to municipal employees such as Rogers; (2) there is no statute or constitutional provision prohibiting the holding of both the office of trustee and the status of an employee on leave of absence; and (3) there are insufficient conflicts between the positions of trustee and policeman on leave to invoke the doctrine of incompatibility.

The trial court granted plaintiff's motion and denied defendant's motion. It based its judgment on a ground neither raised nor argued by either party, holding that the application of the incompatibility rule would result in an unconstitutional "chill" on Rogers' First Amendment right to seek and hold elective public office. On appeal, Rogers makes no attempt to uphold the trial court's judgment on that ground, stating that while he agrees with the trial court's decision, he would reach it for different reasons.

[1] The Village argues that (1) the positions of police officer and village trustee are incompatible; (2) a police officer is an "officer" within the proscription of sections 3–4–3 and 3–14–1 of the Illinois Municipal Code (Ill.Rev.Stat.1979, ch. 24, pars. 3–4–3, 3–14–1); and (3) section 3 of the Illinois Corrupt Practices Act (Ill.Rev.Stat.1979, ch. 102, par. 3) prohibits plaintiff from holding both positions. We find it necessary to consider only the first argument.

The doctrine of incompatibility is succinctly stated in *People v. Haas* (1908), 145 Ill.App. 283, at 286–87:

> " * * * 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 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 one office or the other, considerations of public policy or otherwise. Bacon's Abridgement Vol. 7, Tit. 'Officers', K.; Rex v. Tizzard, 9 B. & C. 418; 1 Dillon on Mun.Corp., p. 308–9, secs. 225–7 and note 4; McCrary on Elec., secs. 336 *et seq.* 4th Ed.; Mechem on Pub. Off., sec. 429; *Dickson v. People,* 17 Ill. 191; *People ex rel. v. Hanifan,* 96 Ill. 420; *Packingham v. Harper,* 66 Ill.App. 96. From these authorities *441 it also appears that in case of incompatibility the acceptance of the second office is *ipso facto* a resignation of the first office. By his own action the officer expresses his voluntary resignation."

See also *People ex rel. Petka v. Bingle* (1983), 112 Ill.App.3d 73, 68 Ill.Dec. 297, 445 N.E.2d 941.

The elements of the doctrine of common law incompatibility are stated in 63 Am.Jur.2d *Public Officers and Employees,* sec. 73:

> " * * * It is to be found in the character of the offices and their relation to each other, in the subordination of the one to the other, and in the nature of the **1327 ***4 duties and functions which attach to them.
>
> "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.

"At common law, it is not an essential element of incompatibility of offices that the clash of duty should exist in all or in the greater part of the official functions. If one office is superior to the other in some of its principal or important duties, so that the exercise of such duties may conflict, to the public detriment, with the exercise of other important duties in the subordinate office, then the offices are incompatible. * * *."

and in sec. 74:

> "One of the most important tests as to whether offices are incompatible is found in the principle that the incompatibility is recognized whenever one is subordinate to the other in some of its important and principal duties, and subject in some degree to the other's revisory power. Thus, two offices are incompatible where the incumbent of the one has the power of appointment to the other office or the power to remove its incumbent, even though the contingency on which the power may be exercised is remote."

While the question of the incompatibility of the positions of police ***442** officer and member of the municipal legislative body has not been considered in Illinois, it has been decided adversely to plaintiff's contentions in three cases arising in New Jersey.

In *O'Connor v. Calandrillo* (1971), 117 N.J.Super. 586, 285 A.2d 275, *affirmed* 121 N.J.Super. 135, 296 A.2d 326, *cert. denied,* 62 N.J. 193, 299 A.2d 727, *cert. denied,* 412 U.S. 940, 93 S.Ct. 2775, 37 L.Ed.2d 399, the court held that the positions of police sergeant and city commissioner held by Calandrillo were incompatible, as were the positions of two other city commissioners (Lombardo, secretary to the Board of Assessors, and Lagomarsino, advisor of veterans' affairs). The court said (285 A.2d at 277, 278):

> "Regardless of the existence of specific statutory prohibitions, the common law doctrine of incompatibility has developed as a matter of public policy in order to insure that there be the appearance as well as the actuality of impartiality and undivided loyalty. [Citation.] Incompatibility exists 'where in the established governmental scheme one office is subordinate to another, or subject to its supervision and control, or the duties clash, inviting the incumbent to prefer one obligation to another.' [Citations.] If the duties of the two offices are such that when 'placed in one person they might disserve the public interests, or if the respective offices might or will conflict even on rare occasions, it is sufficient to declare them legally incompatible.' [Citation.]

"As observed by our Supreme Court in *Jones v. MacDonald, supra:*

> It is no answer to say that the conflict in duties outlined above may never in fact arise. * * * Nor is it an answer to say that if a conflict should arise, the incumbent may omit to perform one of the incompatible roles. The doctrine was designed to avoid the necessity for that choice. [33 N.J. 132 at 138, 162 A.2d 817 at 820.]

"Although the particular offices or positions to which these three commissioners were assigned are not incompatible with their offices as commissioners in the sense of function, nevertheless they are clearly incompatible within the broad ****1328** *****5** sense of the evil sought to be avoided by the salutary rule invoked in the interest of the public.

"Each of the additional posts assumed by these commissioners is subordinate to the board of commissioners of which they are ***443** members, and each of them is subject to the control of that board. This control is real and meaningful, for it affects the very existence of their positions and the emoluments received by them. For them to continue in these dual positions would deprive the citizens of the municipality of the independent judgment of these elected officials whenever an issue might arise affecting their respective jobs. * * *

"It is therefore determined on the basis of the applicable common law doctrine that the dual posts held by Calandrillo, Lombardo and Lagomarsino are legally incompatible and that they cannot continue to hold the same."

In *Kaufman v. Pannuccio* (1972), 121 N.J.Super. 27, 295 A.2d 639, the positions of police lieutenant and member

of the city council were held to be incompatible. The court said (295 A.2d at 640–41):

"Russo raises but one point, that his position as a lieutenant in the Passaic Police Department was not incompatible with his holding office as a member of the council. We disagree, and affirm the judgment of the Law Division.

"The common law doctrine of incompatibility has developed as a matter of sound public policy. [Citation.] It is calculated to insure that there be the appearance as well as the actuality of impartiality and undivided loyalty. Incompatibility is generally understood to mean a conflict or inconsistency in the functions of an office. It may be said to exist 'where in the established governmental scheme one office is subordinate to another, or subject to its supervision or control, or the duties clash, inviting the incumbent to prefer one obligation to another.' *Reilly v. Ozzard,* 33 N.J. 529, 543, 166 A.2d 360, 367 (1960). See also * * * *O'Connor v. Calandrillo, supra,* 117 N.J.Super. [586] at 589, 285 A.2d 275. If the duties of the two offices are such that when 'placed in one person they might disserve the public interests, or if the respective offices might or will conflict even on rare occasions, it is sufficient to declare them legally incompatible.' *De Feo v. Smith, supra,* 17 N.J. [183] at 189, 110 A.2d [553] at 556.

"Here we are clear that Russo's position as a lieutenant in the police department is incompatible with his position as a member of the municipal council. *O'Connor v. Calandrillo, supra,* 117 N.J.Super. at 590–591, 285 A.2d 275. As a member of the council he would be empowered and called upon to pass upon ***444** matters involving salary, tenure and promotion of members of the police department, including himself. The fact that the council is required to deal with the administrative service of the city through the city manager, N.J.S.A. 40:69A–91, does not cure the incompatibility. Indeed, it may be noted that the manager is appointed by the council, N.J.S.A. 40:69A–89, and his tenure is at all times subject to termination by a majority of the council, N.J.S.A. 40:69A–93."

In *Dunn v. Froehlich* (1978), 155 N.J.Super. 249, 382 A.2d 686, the court held that the positions of lieutenant and councilman were incompatible (382 A.2d at 687–88):

"Defendant also argues that no incompatibility exists between these two offices. The doctrine of incompatibility of offices is a common law creation, arising out of the public policy that an officeholder's performance not be influenced by divided loyalties. *Schear v. Elizabeth,* 41 N.J. 321, 325, 196 A.2d 774 (1964). An incompatibility exists whenever the statutory functions and duties of the offices conflict, as when one is subordinate to the other, subject to its control, or requires the officer to choose one obligation over another. *Schear, supra;* [citations].

****1329** *****6** "An examination of the statutory duties of the offices compels the conclusion that they result in an incompatibility. Elizabeth is organized under Mayor-Council Plan F of the Faulkner Act, N.J.S.A. 40:69A–74 to 80. Under N.J.S.A. 40:69A–74, providing for the Mayor-Council Plan F, the provisions of N.J.S.A. 40:69A–2 to 30 and 40:69A–36 to 48, are incorporated as governing any municipality adopting that form of government.

"Thus, the council is empowered to investigate municipal departments and officers and to remove any municipal officer, other than the mayor or a member of the council. N.J.S.A. 40–69A–37. As a councilman and a policeman defendant would be statutorily charged with detecting and punishing misconduct within the police department and would in effect sit in judgment of his supervisor within the department. Such a conflict renders the offices incompatible. *Jones v. MacDonald, supra,* 33 N.J. at 137–138, 162 A.2d 817. In addition, N.J.S.A. 40:69A–46 confers upon the council budget approval powers, creating the potential for defendant to influence his own salary and departmental allocations. Moreover, N.J.S.A. 40:69A–43(b), (c), (d) and (e) invest a councilman with a role in appointing ***445** and removing department heads and in creating and abolishing offices. Defendant might thus have to decide on the continuance of his own job, as well as that of his supervisor."

The same considerations found to make the positions incompatible in those cases apply here with equal force.

The Board of Trustees of the Village of Tinley Park must determine the salaries and fringe benefits of all village employees, including police officers. It must annually establish an operating budget for the village's police department and for all village departments and must annually levy taxes for various police purposes. It must authorize expenditures for various equipment and supply purchases for the police department and approve of officers attending seminars, conventions and supplemental training.

The Civil Service Commission of the village is responsible for the hiring and firing of police officers, but the Board of Trustees has extensive and wide-ranging responsibilities in the field of police department labor relations and personnel decisions.

The Board has the duty and responsibility of increasing or decreasing the numerical strength of the police department. Recently it voted to reduce the number of officers in the department. The Village President and Board of Trustees, not the Civil Service Commission, has the authority to appoint and remove the Chief of Police, the head of the department of police to which Rogers belongs. The Board also has the authority, by ordinance, to appoint and remove the Civil Service Commissioners or change the composition of the Commission.

Rogers is a member of the Tinley Park Patrolmen's Association, a collective bargaining unit representing many members of the police department. There have been labor disagreements and serious negotiations between the Board of Trustees and the Association. The village has entered into a collective bargaining agreement with the Association as the exclusive bargaining agent for all village patrol officers. This agreement is subject to implementation and negotiation between the Board and the Association and expires during Rogers' present term of office as trustee.

Plaintiff contends, however, that any conflict between the positions of police officer and village trustee can be avoided by his not participating in any action involving the police department. We disagree.

In *Kaufman v. Pannuccio* (1972), 121 N.J.Super. 27, 295 A.2d 639, the court expressly rejected this argument (295 A.2d at 641):

"Where incompatibility has been shown to exist, it is no answer to say that, should there be a conflict in duty, an incumbent ***446** may omit to perform one of his incompatible roles. *Jones v. MacDonald, supra,* 33 N.J. at 138, 162 A.2d 817. And as was pointed out in the latter case:

> ****1330** *****7** '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 inquiries 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. (at 135, 162 A.2d at 818)' "

Similarly, in *Dunn v. Froehlich* (1978), 155 N.J.Super. 249, 382 A.2d 686, the court said (382 A.2d at 687):

> "When such a statutory conflict of duties exists, it is not enough (as suggested by defendant) for the officeholder to disqualify himself when the conflict arises or to decline to act in the areas of conflict. The doctrine was designed to avoid the necessity for such an option, and the admitted need for such inaction is the most compelling proof that an incompatibility exists. *Jones v. MacDonald, supra,* 33 N.J. at 137–138, 162 A.2d 817; *Kaufman, supra,* 121 N.J.Super. at 31, 295 A.2d 639."

In *Dykeman v. Symonds* (1976), 54 A.D.2d 159, 388 N.Y.S.2d 422, the court, in holding incompatible the positions of county legislator and motor vehicle supervisor, stated (388 N.Y.S.2d at 425–26):

> " * * * The fact that respondent Symonds may indeed be able to resist temptation to act in a manner incompatible with the best interests of the County and that she may actually refrain from her duty of participating in the fixation

> of the salary of Motor Vehicle Supervisor is not enough to permit her to hold both positions. It is the possibility of wrongdoing and the principle involved which bars her from holding these incompatible offices (*People ex rel. Schenectady Illuminating Co. v. Board of Supervisors of County of Schenectady,* 166 App.Div. 758, 761, 151 N.Y.S. 1012, 1014; and see *People v. Freres,* 5 A.D.2d 868, 171 N.Y.S.2d 274; *Matter of County of Warren v. Levitt,* 20 Misc.2d 598, 198 N.Y.S.2d 777; 27 Opinions, State Comptroller 125, 71–545)."

The New Jersey decisions in *O'Connor* and *Kaufman* were approved and followed in *Haskins v. State ex rel. Harrington* (1973) (Wyo.), 516 P.2d 1171, where the court found incompatible the positions of teacher and trustee of a school district. In that case, the ***447** court pertinently observed, at page 1179, with reference to abstention from action to avoid a conflict of interest:

> " * * * We also note that the need of the community for continuing exercise of judgment and the making of decisions on the basis of give-and-take discussion of independent minds is not served best where one of the board must at frequent intervals take no part because of conflict. * * * "

During oral argument, plaintiff relied on *People ex rel. Black v. Dukes* (1982), 108 Ill.App.3d 965, 64 Ill.Dec. 497, 439 N.E.2d 1305. Subsequently, the supreme court granted leave to appeal, held the issues moot and vacated the judgments of the appellate and circuit courts to prevent the appellate court's resolution of the issues from standing as precedent for future cases. *People ex rel. Black v. Dukes* (1983), 96 Ill.2d 273, 70 Ill.Dec. 509, 449 N.E.2d 856.

Moreover, there is no limit as to the number of police officers who could serve on the Village Board of Tinley Park, thus making pertinent the observation of the concurring justices in *Haskins v. State ex rel. Harrington* (1973) (Wyo.), 516 P.2d at 1181:

> " * * * The statute which he contended permitted him to serve on the board made no mention of teachers as board members and therefore no limitation as to the number of teacher board members was stated, and I fail to see how a limit could be implied. Therefore, if Haskins as a teacher could serve other teachers could also become members.
>
> "If teachers constituted all or a majority of the members of the board of trustees the board could not transact any ****1331** *****8** business dealing with teachers, including salary negotiations, because teacher members would have to absent themselves and there could be no majority action. If a school board could not set teachers' salaries and other contract terms it could not function. No reasonable argument could be made that the legislature intended to create a situation wherein a school board would be unable to perform its duties as the governing body of the school district."

Plaintiff argues that Rule VII, section 3, of the Village of Tinley Park Civil Service Commission Rules gives him the right to serve as a village trustee while on leave of absence. That rule provides in part: " * * * no leave of absence shall exceed one year, except to enable an officer or employee to accept any elective or appointive position in the public service * * *." We disagree, because, even if on leave of absence, his seniority and pension and insurance rights are not jeopardized; in fact, his seniority rights are enhanced by the mere passage of ***448** time. Thus, a leave of absence does not remove the incompatibility.

[2] Finally, we find that the application of the common law incompatibility rule does not result in an unconstitutional "chill" on Rogers' First Amendment rights.

In *Haskins v. State ex rel. Harrington* (1973) (Wyo.), 516 P.2d 1171, at 1173–74, the court held that the common law incompatibility rule prohibiting a school teacher from serving as a school board member of the district where he was employed did not violate the teacher's First Amendment rights.

The United States Supreme Court has upheld, against a claim of violation of First Amendment rights, more restrictive limitations on the right of a public officer or

employee to run for public office or to serve as an elected official. *United Public Workers of America (C.I.O.) v. Mitchell* (1947), 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754; *United States Civil Service Commission v. National Association of Letter Carriers, AFL–CIO* (1973), 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796; *Clements v. Fashings* (1982), 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508. See also *Magill v. Lynch* (1st Cir.1977), 560 F.2d 22.

The judgment of the circuit court of Cook County is reversed and the cause remanded with directions to grant defendant's motion for summary judgment and to deny plaintiff's.

REVERSED and REMANDED with directions.

GOLDBERG and CAMPBELL, JJ., concur.

All Citations

116 Ill.App.3d 437, 451 N.E.2d 1324, 72 Ill.Dec. 1

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155 Ill.App.3d 81
Appellate Court of Illinois,
Third District.

PEOPLE of the State of Illinois, ex rel.
James T. TEROS, State's Attorney of Rock Island County, Illinois, Plaintiff-Appellee,
v.
Richard P. VERBECK, Defendant-Appellant.

No. 3–86–0813.
|
April 3, 1987.

State's attorney for Rock Island County instituted in quo warranto complaint seeking ouster of county board member from his elected position. The Circuit Court, Fourteenth Judicial Circuit, Rock Island County, David DeDoncker, P.J., entered judgment for State's attorney, and appeal was taken. The Appellate Court, Barry, P.J., held that position of deputy county coroner was incompatible with elected position of county board member, and thus, board member's acceptance of position of deputy coroner required his ouster from county board.

Affirmed.

West Headnotes (1)

[1] **Public Employment**
⌲ Local-local conflicts

Position of deputy county coroner was incompatible with elected position of county board member, and thus, board member's acceptance of position of deputy coroner required his ouster from county board; county board is charged with duty to fix compensation of county coroner within statutory limits and to provide for reasonable and necessary operating expenses for coroner's office, and deputy coroner's compensation is fixed by coroner, subject to budgetary limitations established by county board. S.H.A. ch. 31, ¶ 1.2; ch. 34, ¶ 432; ch. 53, ¶ 37a.1.

3 Cases that cite this headnote

Attorneys and Law Firms

**464 *81 ***757 Douglas C. Scovil and Dorthea O'Dean (argued), Ruud & Scovil, Rock Island, for Richard Verbeck.

James T. Teros, State's Atty., Dennis M. Faust (argued), Rock Island, for the People.

Opinion

Presiding Justice BARRY delivered the opinion of the court:

The action before us was instituted on August 21, 1986 by Rock Island State's Attorney James Teros (the relator) in a *quo warranto* complaint seeking the ouster of defendant Richard Verbeck from his elected position as a member of the Rock Island County Board. The complaint alleges that Verbeck was elected to the Board in the general election of November 1982 and he continued to occupy his *82 position at the time the complaint was filed. On July 3, 1986, Verbeck was appointed to the position of deputy county coroner, also a position which he continued to occupy at the time the complaint was filed. The complaint further alleges that the two positions are legally incompatible and that Verbeck's acceptance of the position as deputy coroner constitutes a forfeiture of his elected position.

Verbeck answered the complaint, admitting the factual allegations, denying the legal conclusions and pleading as "affirmative defenses" that the two positions were not incompatible and, in the alternative, any incompatibility was "too attenuated ... to create any serious potential for conflicting interests." Verbeck filed requests for discovery; however, before any responses were made, the relator moved for judgment on the pleadings. The matter **465 ***758 was heard, and on October 16, 1986, the circuit court of Rock Island County granted judgment on the pleadings in favor of the relator, holding that Verbeck's acceptance of his position as deputy coroner on July 3, 1986 operated as an automatic resignation from the county board and declaring Verbeck's county board seat vacant as of July 3, 1986.

On November 4, 1986, Verbeck was reelected to his county board seat. This fact was brought to the trial court's attention in Verbeck's motion for reconsideration and/or a stay of enforcement pending further proceedings in the circuit court or on appeal. The post-judgment motion was denied, and this appeal ensued.

In his appeal, defendant contends that the matters alleged as affirmative defenses in his answer to the complaint raise the following issues of material fact, which should have precluded the granting of judgment on the pleadings:

"1) whether or not the appointment of the deputy coroner was made by or with the consent of the county board;

2) whether or not the position of deputy coroner has its salary determined by the county board;

3) whether or not the county board has anything to do with the approval of the hiring of the position of deputy coroner;

4) whether or not there were any facts that would show that the holding of either office, or the duties inherent in either office, would prohibit defendant from, in every instance, being able to faithfully perform all the duties of the other;

5) whether or not the county board has supervisory authority over the position of deputy coroner;

6) whether or not any incompatibility exists, and if it does, whether it is so attenuated as to alleviate any serious potential for conflict of interest; and

***83** 7) whether or not the defendant, during his term as a county board member, has been appointed to, accepts or holds an office by appointment or election of the county board of which he is a member."

The relator's position, which was adopted by the trial court, is that the two offices occupied by defendant are incompatible as a matter of law.

Inasmuch as the granting of judgment on the pleadings deprives a litigant of an opportunity to be heard on the merits, the remedy is considered extraordinary, and such motions are not lightly granted. As recently stated in *Triangle Sign Co. v. Weber, Cohn & Riley* (1st Dist.1986), 149 Ill.App.3d 839, 103 Ill.Dec. 294, 296, 501 N.E.2d 315, 317, "entry of judgment on the pleadings ... is proper only where the court can determine the relative rights of the parties solely from the pleadings (citations). In making its ruling, the trial court must examine all pleadings on file—taking as true the well-pleaded facts, and reasonable inferences to be drawn therefrom, set forth in the pleadings of the party opposing the motion (citations)—to determine whether there are any material issues of fact or whether the controversy can be resolved strictly as a matter of law (citations omitted); and where such an examination discloses the existence of issues of material fact, the motion for judgment on the pleadings must be denied (citations)."

In the case before us, the question on appeal is whether, taking as true all matters well-pleaded by the defendant, the issue of common law incompatibility of defendant's two offices may be resolved on the pleadings in favor of the relator as a matter of law. Common law incompatibility may be established where defendant in one position has authority to act upon the appointment, salary and budget of his superior in a second position. (*People ex rel. Fitzsimmons v. Swailes* (1984), 101 Ill.2d 458, 79 Ill.Dec. 90, 463 N.E.2d 431.) In the present case, it is undisputed that the county board is charged with the duty to fix the compensation of the county coroner within statutory limitations (Ill.Rev.Stat.1985, ch. 53, par. 37a.1.) and to provide for reasonable and necessary operating expenses for the coroner's office (Ill.Rev.Stat.1985, ch. 34, par. 432.). It is further undisputed that the deputy county coroner's compensation is fixed by the coroner, subject to budgetary limitations established by the county ****466** *****759** board. (Ill.Rev.Stat.1985, ch. 31, par. 1.2.) Thus, under the statutory scheme, defendant's two offices are fiscally incompatible since defendant as a member of the county board has authority to act upon the salary and budget of the county coroner who, in turn, determines defendant's salary as deputy county coroner. The potential for influencing ***84** his superior's salary and budget and, ultimately, his own salary, without more, renders defendant's offices incompatible.

Defendant suggests that he could resolve the inherent conflict between his two offices simply by refraining to participate in those matters brought before the county board which involve the coroner's office. This solution is not, however, a satisfactory response to legally incompatible offices. (*Rogers v. Village of Tinley Park*

(1st Dist.1983), 116 Ill.App.3d 437, 72 Ill.Dec. 1, 451 N.E.2d 1324.) As noted in *Rogers,* the public interest is not well served when a member of the county board declines to participate in areas of conflict. " '[T]he common law doctrine of incompatibility * * * insure[s] that there be the appearance as well as the actuality of impartiality and undivided loyalty.' " *Rogers,* 116 Ill.App.3d at 442, 72 Ill.Dec. at 4, 451 N.E.2d at 1327 (quoting *O'Connor v. Calandrillo* (1971), 117 N.J.Super. 586, 285 A.2d 275, *aff'd.* 121 N.J.Super. 135, 296 A.2d 326, *cert. den.,* 62 N.J. 193, 299 A.2d 727, *cert. den.,* 412 U.S. 940, 93 S.Ct. 2775, 37 L.Ed.2d 399).

Defendant's suggestion that the incompatibility is too attenuated to present any serious potential for conflicts of interest is similarly unpersuasive. In *People ex rel. Petka v. Bingle* (3rd Dist.1983), 112 Ill.App.3d 73, 68 Ill.Dec. 297, 300, 445 N.E.2d 941, 944, we reversed a judgment of the trial court ousting a county board member who simultaneously held the office of township assessor, finding that the common law incompatibility of the two offices was too attenuated. Subsequently, our supreme court reviewed the precise issue presented in *Bingle* when it decided *Swailes.* The Supreme Court in *Swailes* rejected our reasoning in *Bingle* and concluded that "since the township assessor's position is obviously subordinate to the position of supervisor of assessments, and as a county board member defendant Swailes votes on who will be his supervisor, there may be a possible conflict." Accordingly, the court held that defendant Swailes should have been ousted from his county board office on the ground of incompatibility. 79 Ill.Dec. at 95, 463 N.E.2d at 436. In this case, defendant's attenuation argument must fail as well. The possible and direct conflict inherent in defendant's county board duties of voting on his immediate supervisor's salary and the budget from which defendant's salary is fixed renders the two positions incompatible as a matter of law.

We have reviewed each of the "issues" alleged by defendant Verbeck in support of his position that he is entitled to a hearing on the facts stated in his pleadings, and we find that, even were we to resolve all of the factual allegations in his favor, defendant could not ***85** prevail as a matter of law. Defendant's factual allegations are not material—*i.e.,* they do not alter the legal conclusion that defendant's two offices are incompatible. Clearly, the integrity of the dual officeholder is not here at issue. Rather, as in *Swailes,* it is the statutory relationship between the duties and responsibilities of the two offices, as alleged and admitted in the pleadings before us, which warrants defendant's ouster from the county board.

For the foregoing reasons, we affirm the judgment of the circuit court of Rock Island County.

Affirmed.

WOMBACHER and HEIPLE, JJ., concur.

All Citations

155 Ill.App.3d 81, 506 N.E.2d 464, 106 Ill.Dec. 757

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2014 Ill. Atty. Gen. Op. 14-002 (Ill.A.G.), 2014 WL 7508083

Office of the Attorney General

State of Illinois
File No. 14-002
December 23, 2014

LEGISLATIVE BRANCH:
*1 State Representative Receiving Compensation as Police Detective

The Honorable Jack D. Franks
Chairman
State Government Administration Committee
State Representative, 63rd District
1193 South Eastwood Drive
Woodstock, Illinois 60098

Dear Representative Franks:
I have your letter inquiring whether a member of the Illinois House of Representative may simultaneously be employed as a city police detective and receive the salary and other fringe benefits of that position while performing his legislative duties. For the reasons set out below, it is my opinion that a legislator may be employed simultaneously as a police detective while serving in the General Assembly. Pursuant to article IV, section 2(e), of the Illinois Constitution of 1970, however, he may not be compensated for his city employment for the time during which the General Assembly is in session and not in recess.

BACKGROUND

The focus of your letter is on Representative John Cabello, who is employed as a police detective by the City of Rockford and was appointed to the Illinois House of Representatives in August 2012. Since assuming legislative office, the Representative has been on a continuous leave of absence from his city position. At the November 4, 2014, general election, Representative Cabello was elected to a two-year term of office. The Representative would like to resume his duties as a city police detective on a part-time basis. Questions have arisen as to whether such a part-time arrangement would be permissible under article IV, section 2(e), of the Illinois Constitution of 1970.

ANALYSIS

Incompatibility of Offices

When considering whether a public officer may hold two public positions simultaneously, the analysis begins with a review of the common law doctrine of incompatibility of offices. In the current circumstances, as discussed below, the doctrine does not apply. Offices are deemed incompatible, when: (1) a State statute specifically prohibits the occupant of either one of the offices in question from holding the other; or (2) the duties of either office are such that the holder of one office cannot in every instance fully and faithfully perform all of the duties of the other office. *People ex rel. Fitzsimmons* v. *Swailes*, 101 Ill. 2d 458, 465 (1984); *People ex rel. Smith* v. *Brown*, 356 Ill. App. 3d 1096, 1098 (2005); *People ex rel. Myers* v. *Haas*, 145 Ill. App. 283, 286 (1908). In Illinois, however, the doctrine of incompatibility of offices is applicable only to officers and not to employees. 1975 Ill. Att'y Gen. Op. 278. Because rank and file police officers are generally considered to be public employees, rather than officers of the municipality they serve (*see generally Midwest*

Television, Inc. v. *Champaign-Urbana Communications, Inc.*, 37 Ill. App. 3d 926, 931-32 (1976) (setting out the criteria to be used in determining whether a position constitutes a public office)), the doctrine would not be applicable in these circumstances. [1]

*2 Even assuming that the doctrine applied here, it would not bar simultaneous service in the positions of Illinois State Representative and city police detective. In this case, there is no statute that prohibits a city police detective from serving as a legislator. Moreover, the duties of the two positions do not appear to conflict. Consequently, even under the doctrine of incompatibility of offices, it does not appear that one person would be precluded from holding the positions of Illinois State Representative and city police detective simultaneously.

Constitutional Limitations

Article IV, section 2(e), of the Constitution provides, in pertinent part:

> (e) No member of the General Assembly shall receive compensation as a public officer or employee from any other governmental entity ***for time during which he is in attendance as a member of the General Assembly***. (Emphasis added.)

Section 2(e) does not prohibit a General Assembly member from simultaneously holding a local public office or from receiving compensation for services performed as an employee for a unit of local government. *See generally* 1980 Ill. Att'y Gen. Op. 116; 1976 Ill. Att'y Gen. Op. 49. Rather, section 2(e) prohibits a General Assembly member from "receiv[ing] compensation" for local government service "for time during which he is in attendance as a member of the General Assembly."

Because your question turns on the meaning of this constitutional language, my analysis follows the general principles of constitutional interpretation. The meaning of a constitutional provision is best determined by referring to the common understanding of the words used. *Committee for Educational Rights* v. *Edgar*, 174 Ill. 2d 1, 13 (1996); *League of Women Voters of Peoria v. County of Peoria*, 121 Ill. 2d 236, 243 (1987). Where the language of a constitutional provision is unambiguous, it will be given effect as written. *Committee for Educational Rights*, 174 Ill. 2d at 13. However, if, after reviewing the language of a provision, doubt remains as to its meaning, it is appropriate to consult the official documents related to the adoption of the Constitution, including the comments of the Constitutional Convention's delegates, to ascertain the meaning they attached to the provision. *Committee for Educational Rights*, 174 Ill. 2d at 13; *League of Women Voters*, 121 Ill. 2d at 243-44.

The precise meaning of the phrase "for time during which he is in attendance as a member of the General Assembly" in section 2(e), as it applies to legislators who are also employed as public employees, is not clear from the constitutional language alone. It could be interpreted to mean the entire two-year period during which the General Assembly is convened, [2] the period between the convening of an annual session and its adjournment, or only those periods in which the specific chamber is convened and conducting business. Accordingly, because the language of section 2(e) could be subject to differing interpretations, it is appropriate to refer to the official documents related to its adoption to discern the provision's meaning. [3]

Constitutional Debates

*3 Under the Illinois Constitution of 1870, members of the General Assembly were prohibited from holding any other lucrative office. Ill. Const. 1870, art. IV, § 3; *see also* Ill. Const. 1870, art. IV, § 15. The Committee on the Legislative Article of the Sixth Constitutional Convention (the Committee) redrafted the Constitution to clarify and combine all provisions concerning dual office-holding and to specifically address a member of the General Assembly serving as a

public employee. 6 Record of Proceedings, Sixth Illinois Constitutional Convention 1341-44. The Committee initially drafted section 2(e) so as to prohibit a member of the General Assembly from receiving "compensation and allowances as a public employee and as a member of the General Assembly" and from holding "any other elective or appointive public office." 6 Record of Proceedings, Sixth Illinois Constitutional Convention 1331. In explaining the intent behind the prohibition on receiving "compensation and allowances as a public employee and as a member of the General Assembly[,]" the Committee used as an example a legislator who was also a police officer:

> To be seated as a member of the General Assembly, a member who is a public employee would necessarily have to take a leave of absence, if possible, or resign from his position as a public employee. The intent of this language is to preclude dual or joint salaries at any time during a legislative session. ***For example, if the General Assembly were in session during January, February and March, a member who was a policeman could not receive any salary except his legislative salary. But when the session concluded at the end of March, he could resume his salaried position as a policeman while ceasing to receive his salary as a legislator.***[4] (Emphasis added.) (Underscore in original.) 6 Record of Proceedings, Sixth Illinois Constitutional Convention 1344.

Following extensive debate, the proposal was rejected and the pertinent language was replaced with what is now the first sentence of section 2(e). 4 Record of Proceedings, Sixth Illinois Constitutional Convention 2669-76, 2820-37. The debate concerning section 2(e), as introduced, focused primarily on whether a General Assembly member should be prohibited from receiving compensation as a public employee while also serving in the General Assembly. 4 Record of Proceedings, Sixth Illinois Constitutional Convention 2669-76, 2827-28.

Proponents of the language of section 2(e) clearly intended to prohibit a member of the General Assembly from receiving "dual compensation-payment from two public payrolls for the same time" (Remarks of Delegate Mathias, 4 Record of Proceedings, Sixth Illinois Constitutional Convention 2835), while still permitting a member to be compensated by a unit of local government "for days that were used actually performing his duties as a public employee notwithstanding the fact [that] the General Assembly may be in session but recessed." 6 Record of Proceedings, Sixth Illinois Constitutional Convention 1469.

*4 Accordingly, a General Assembly member could be paid "for the days where he is actually working for the governmental entity, such as would be on a per diem basis." Remarks of Delegate Kelley, 4 Record of Proceedings, Sixth Illinois Constitutional Convention 2671. As long as a General Assembly member was "not receiving dual salary- * * * getting paid twice for one day- * * * there would be no impropriety * * * and it would not interfere with his duties as a legislator nor * * * whatever governmental job that he h[eld]." Remarks of Delegate Kelley, 4 Record of Proceedings, Sixth Illinois Constitutional Convention 2671. The following colloquy between Delegates Kelley and Mathias illustrates this intent:

MR. KELLEY: * * * I would like to ask Mr. Mathias a question. When the language was [originally] drafted — when I drafted the language for the minority report, the reason was solely due to the fact that the majority report required a public employee to take a leave of absence during the time that he was to serve in the legislature. If the legislature was for a six-months' session, he would have to take a leave of absence or resign from his job for that six-month period.

The minority language intent is simply to mean that ***the individual can spend one day in the legislature and not get paid * * *for that day by the governmental entity he is employed by, but then he can go back to his employing agency and be paid for days during the time the legislature is in session but recessed.***

Is that your intent for the minority language now?

MR. MATHIAS: Yes. * * *

My understanding is as you stated it, yes, that this person could work part time in the days he is not attending legislative sessions. (Emphasis added.) Remarks of Delegates Kelley and Mathias, 4 Record of Proceedings, Sixth Illinois Constitutional Convention 2834.

The delegates subsequently considered and rejected a proposal to further amend section 2(e) to prohibit a member of the General Assembly from receiving compensation from another public entity for the time during which he was compensated as a General Assembly member. 5 Record of Proceedings, Sixth Illinois Constitutional Convention 4066-70. That amendment was defeated, with several delegates reiterating their intention to prohibit dual compensation from public funds only for the time the General Assembly is in session and not in recess, not to prohibit a General Assembly member from receiving compensation for actual days worked in other public employment when the General Assembly was not in session. *See, e.g.*, Remarks of Delegates Elward and Stemberk, 5 Record of Proceedings, Sixth Illinois Constitutional Convention 4067-70.

Thus, it is my opinion that the constitutional debates clearly reflect that it was the framers' intent to allow a General Assembly member to be employed by another governmental entity, as long as he or she does not receive compensation from that public employment for the time during which the General Assembly is in session and not in recess.

Fringe Benefits

*5 The issue also arises as to whether the prohibition on receiving compensation from another governmental entity while the General Assembly is in session applies to the accrual of fringe benefits, such as paid vacation and insurance coverage. As previously discussed, article IV, section 2(e), prohibits General Assembly members from receiving "compensation" as a public officer or employee for the time during which the General Assembly is in session and not in recess. The Illinois Constitution does not expressly define the term "compensation," however. It is a longstanding principle that unless otherwise defined, "compensation" includes both salary and fringe benefits. *See* 1978 Ill. Att'y Gen. Op. 179, 180 (paid vacation and sick leave are both forms of compensation). To permit members of the General Assembly to receive fringe benefits from their other public employment based on days when the General Assembly is in session would contravene the intent of article IV, section 2(e), of the Constitution.

Accordingly, it is my opinion that a General Assembly member may not receive fringe benefits from public employment, such as accruing vacation time, sick leave, or paid time off, if the benefits are calculated to include credit for time that the General Assembly was in session. Thus, if the police detective-legislator would ordinarily accrue one vacation day for The Honorable Jack D. Franks -10 every month that he is in active service for the city, for example, then either the accrual rate or the amount of the benefit earned must be adjusted to exclude credit for any time that the General Assembly was in session and not in recess. [5]

I would point out, however, that there may be certain fringe benefits that do not accrue or otherwise correlate to the number of days or weeks worked, such as dental plans that include semi-annual exams. In those instances, to the extent that there is a practical way to adjust the particular benefit, the public employer must do so. Whether a particular fringe benefit accrues based on the number of days or weeks worked will depend on an examination of the circumstances surrounding each case and is not an issue than can be resolved in a legal opinion of this office. *See* Statement of Policy of the Attorney General Relating to Furnishing Written Opinions, http://www. illinoisattorneygeneral.gov/opinions/ opinionpolicy.pdf.

CONCLUSION

Pursuant to article IV, section 2(e), of the Illinois Constitution of 1970, a General Assembly member may receive compensation for services performed for another governmental entity. However, section 2(e) prohibits the General

Assembly member from receiving compensation from the governmental employer for the time during which the General Assembly is in session and not in recess. The term "compensation" includes salary, as well as fringe benefits. Accordingly, it is my opinion that a legislator may be employed simultaneously as a city police detective while serving in the General Assembly. Pursuant to article IV, section 2(e), of the Illinois Constitution of 1970, however, it is my further opinion that he may not receive compensation, including the accrual of fringe benefits, from the city for the time during which the General Assembly is in session and not in recess.

Very truly yours,

*6 Lisa Madigan
Attorney General

Footnotes

1 *But see Rogers* v. *Village of Tinley Park*, 116 Ill. App. 3d 437 (1983), in which the court concluded that a village police officer could not simultaneously serve as a trustee of the village because the positions were incompatible. The court did not address or explain, however, its basis for departing from the well-established principle that the doctrine of incompatibility is applicable only to tenure in two or more public offices. The court did reference several conflicts that could arise when one person holds two positions under the same unit of local government, an issue which is not presented here.

2 *See* Ill. Const. 1970, art. IV, § 5 ("The General Assembly shall convene each year on the second Wednesday of January. The General Assembly shall be a continuous body during the term for which members of the House of Representatives are elected").

3 The information disseminated to the voters in anticipation of their vote to adopt the proposed Illinois Constitution of 1970 is silent with regard to the meaning of article IV, section 2(e). *See 1* Record of Proceedings, Sixth Illinois Constitutional Convention 2673-74, 2696.

4 Until 1897, General Assembly members were paid by the number of days in a legislative session. In 1897, their *per diem* was replaced by a biennial salary. 1895 Ill. Laws 176 (§ 1). At the time of the Constitutional Convention, General Assembly members were paid in annual lump sums, but could receive two years' salary at the start of the biennial session, on written request. Taran Ley, *History of Illinois Legislators' Compensation and Expense Allowances*, Legislative Research Unit File 11-112, May 21, 2010, *available at* http://www.ilga.gov/commission/lru/Compensation2010.pdf (stating that annual compensation began in 1941 and requests for biennial compensation began in 1943). Monthly payment was not required until 1977. *See* Public Act 79-1333, effective January 12, 1977. General Assembly members are currently paid in 12 equal monthly installments payable on the last working day of the month. 25 ILCS 115/1 (West 2013 Supp.), as amended by Public Act 98-682, effective June 30, 2014. However, the frequency of payment for General Assembly members is not relevant to the instant inquiry.

5 Similarly, a General Assembly member may not utilize accrued vacation time, personal time, or other paid time off as a city employee to avoid the application of article IV, section 2(e). When a city employee uses paid time off, generally, the employee is entitled to his or her usual and customary city salary and other compensation. To permit a police detective-legislator to use paid time off from the city during the time in which the General Assembly is in session and not in recess, would entitle the police detective-legislator to collect his full city salary and other compensation. That would contravene the intent of article IV, section 2(e).

2014 Ill. Atty. Gen. Op. 14-002 (Ill.A.G.), 2014 WL 7508083

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NEIL F. HARTIGAN
ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD
62706

July 22, 1988

I - 88-026

GOVERNMENTAL ETHICS AND
CONFLICT OF INTEREST
CORRUPT PRACTICES ACT

Honorable Kathleen Alling
State's Attorney
Jefferson County
Jefferson County Courthouse
Mt. Vernon, Illinois 62864

Dear Ms. Alling:

I have your letter wherein you inquire whether a county board member may simultaneously serve as a full-time, salaried employee of the sheriff of his county. Because of the nature of your question, I will comment informally on the question you have raised.

Section 3 of "AN ACT to prevent fraudulent and corrupt practices in the making or accepting of official appointments and contracts by public officers" [Corrupt Practices Act] (Ill. Rev. Stat. 1987, ch. 102, par. 3) provides in pertinent part:

> "(a) No person holding any office, either by election or appointment under the laws or constitution of this state, may be in any manner interested, either directly or indirectly, in his own name or in the name of any other person, association, trust or corporation, in any contract or the performance of any work in the making or letting of which such officer may be called upon to act or vote. * * *
>
> * * * "

Pursuant to section 1 of "AN ACT in relation to the compensation of Sheriffs, etc." (Ill. Rev. Stat. 1987, ch. 53, par. 37a), it is the duty of the county board, in all counties of less than 2,000,000 inhabitants, to fix the compensation, the necessary clerk hire and other expenses of the sheriff. Section 35 of "AN ACT to revise the law in relation to counties" (Ill. Rev. Stat. 1987, ch. 34, par. 605) requires the county board to audit and allow or disallow claims against the county, except where the county board has delegated its authority to do so pursuant to section 35.1 of that Act (Ill. Rev. Stat. 1987, ch. 34, par. 605.1).

Under these circumstances, the county board member in question would be required to vote upon the appropriation of funds from which his or her compensation as an employee of the sheriff would be paid. Moreover, it may be the responsibility of the board member to act upon the allowance or disallowance of his or her own claims for compensation as an employee of the sheriff. This appears to be a personal pecuniary interest of the nature which section 3 of the Corrupt Practices Act is intended to prohibit. (See Panozzo v. City of Rockford (1940), 306 Ill. App. 443, 456; see also Rogers v. Village of Tinley Park (1983), 116 Ill. App. 3d 437, 445.) Therefore, it would appear that a county board member may not simultaneously be employed by the sheriff of his county without violating section 3 of the Corrupt Practices Act.

This is not an official opinion of the Attorney General. If I may be of further assistance, please advise.

Very truly yours,

MICHAEL J. LUKE
Senior Assistant Attorney General
Chief, Opinions Division

MJL:cj

9

NEIL F. HARTIGAN
ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD
62706

September 6, 1988

I - 88-034

GOVERNMENTAL ETHICS AND
CONFLICTS OF INTEREST:
Corrupt Practices Act Violated
When County Board Member is Sheriff's Employee

Honorable John Knight
Bond County State's Attorney
Bond County Courthouse
Greenville, Illinois 62246

Dear Mr. Knight:

I have your letter of July 1, 1988, wherein you inquire whether an individual may hold employment as a salaried dispatcher in the sheriff's office after being elected to the county board. Due to the nature of your inquiry, I will comment informally on the question you have raised.

Section 3 of "AN ACT to prevent fraudulent and corrupt practices in the making or accepting of official appointments and contracts by public officers" [the Corrupt Practices Act] provides that, with certain de minimus exceptions:

> "(a) No person holding any office, either by election or appointment under the laws or constitution of this state, may be in any manner interested, either directly or indirectly, in his own name or in the name of any other person, association, trust or corporation, in any contract or the performance of any work in the making or letting of which such officer may be called upon to act or vote. * * *
>
> * * *"

(Ill. Rev. Stat. 1987, ch. 102, par. 3.)

Clearly, this provision applies to employment relationships. (Robertson v. Binno (1978), 56 Ill. App. 3d 390; Rogers v. Village of Tinley Park (1983), 116 Ill. App. 3d 437; People ex rel Teros v. Verbeck (1987), 155 Ill. App. 3d 81; 1975 Ill. Att'y Gen. 281; 1980 Ill. Att'y Gen. 136.)

An employee of the sheriff's office has a direct pecuniary interest in his employment with the department. In counties of fewer than 2,000,000 inhabitants, the county board fixes the compensation, the necessary clerk hire and other expenses of the sheriff. (Ill. Rev. Stat. 1987, ch. 53, par. 37a.) Further, unless its authority to do so has been delegated pursuant to statute, the county board has a duty to audit and allow or disallow claims against county funds. (Ill. Rev. Stat. 1987, ch. 34, par. 605.) A county board member, in this circumstance, would therefore be in a position to act upon claims or vote upon appropriation ordinances from which his compensation as a sheriff's employee would be paid. This would constitute a personal pecuniary interest of the nature which section 3 of the Corrupt Practices Act is intended to prohibit. Consequently, it appears that a person could not continue to serve as an employee of the sheriff's office after election to the county board.

This is not an official opinion of the Attorney General. If we may be of further assistance, please advise.

Very truly yours,

MICHAEL J. LUKE
Senior Assistant Attorney General
Chief, Opinions Division

10

NEIL F. HARTIGAN
ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD
62706

May 29, 1990

I - 90-018

GOVERNMENTAL ETHICS AND
CONFLICT OF INTEREST:
Township Trustee Employed
By Road District

Honorable John Knight
State's Attorney, Bond County
Bond County Courthouse
Greenville, Illinois 62246

Dear Mr. Knight:

I have your letter wherein you inquire whether a member of a township board of trustees may simultaneously serve as a part-time, paid employee of the township road district. In addition, you ask whether any existing conflict may be remedied by the particular trustee declining to vote on any action that directly impacts upon the road district. Because of the nature of your inquiry, I do not believe that the issuance of an official opinion is necessary. I will, however, comment informally upon the questions you have raised.

Section 3 of "AN ACT to prevent fraudulent and corrupt practices in the making or accepting of official appointments and contracts by public officers" (hereinafter referred to as the Corrupt Practices Act) (Ill. Rev. Stat. 1987, ch. 102, par. 3) provides, in pertinent part:

> "(a) No person holding any office, either by election or appointment under the laws or constitution of this state, may be in any manner interested, either directly or indirectly, in his own name or in the name of any other person, association, trust or corporation, in any contract or the performance of any work in the making or letting of which such officer may be called upon to act or vote. * * *
>
> * * * "

Section 6-501 of the Illinois Highway Code (hereinafter referred to as "the Code") (Ill. Rev. Stat. 1987, ch. 121, par. 6-501) requires approval by the township board of trustees of any levy or appropriation by a road district composed of a single township. Under these circumstances, the township trustee in question would be required to vote upon the appropriation of funds from which his or her compensation as an employee of the road district would be paid. This appears to be the kind of pecuniary interest which section 3 of the Corrupt Practices Act is intended to prohibit. (Rogers v. Village of Tinley Park (1983), 116 Ill. App. 3d 437, 445.) It would appear, therefore that a township trustee may not ordinarily be employed as a paid, part-time general laborer by the road district for the township which he or she serves.

I note, however, that subsections 3(b) and 3(c) of the Corrupt Practices Act do permit a member of the governing body of a public entity to furnish services or labor if certain procedures, including disclosure of the pecuniary interest and abstention from voting on the award of the contract, are complied with, and the amount of the contract does not exceed the limits set therein. In this case, the only action which the trustee would take upon the contract would be the approval of the highway commissioner's appropriation and budget. Consequently, if the trustee in question abstains from voting upon the budget and appropriation, and the other criteria of the applicable exception are met, it appears that there would be no violation of section 3.

In response to the second portion of your inquiry, section 3 of the Corrupt Practices Act is applicable to any contract upon which such officer may be called upon to vote. It would appear, therefore, that abstention from voting does not absolve the officer from any conflict, except to the extent permitted under subsections (b) and (c) thereof. 1976 Ill. Att'y Gen. Op. 57.

This is not an official opinion of the Attorney General. If we may be of further assistance, please advise.

Very truly yours,

MICHAEL J. LUKE
Senior Assistant Attorney General
Chief, Opinions Division

11

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS
May 28, 1996

Jim Ryan
ATTORNEY GENERAL

I - 96-028

COMPATIBILITY OF OFFICES:
County Board Member and
School Board Member;
County Board Member and
Deputy Coroner; County
Board Member and Deputy Sheriff

Honorable Terry C. Kaid
State's Attorney, Wabash County
Wabash County Courthouse
401 Market Street
Mt. Carmel, Illinois 62863

Dear Mr. Kaid:

I have your letter wherein you inquire whether one person may serve simultaneously in the offices of: 1) county board member and school board member; 2) county board member and deputy coroner; and 3) county board member and deputy sheriff. Because of the nature of your inquiry, I do not believe that the issuance of an official opinion of the Attorney General is necessary. I will, however, comment informally upon the questions you have raised.

Your first inquiry concerns potential incompatibility in the offices of county board member and school board member. The common law doctrine of incompatibility of offices precludes simultaneous tenure in two offices where the constitution or a statute specifically prohibits the occupant of either office from holding the other, or where the duties of the two offices conflict so that the holder of one cannot, in every instance, properly and faithfully perform all of the duties of the other. (People ex rel. Fitzsimmons v. Swailes (1984), 101 Ill. 2nd 458, 465; Rogers v. Village of Tinley Park (1983), 116 Ill. App. 3d 437, 440-41; People ex rel. Myers v. Haas (1908), 145 Ill. App.

283, 286.) There are no constitutional or statutory provisions which expressly prohibit simultaneous tenure in the offices of county board member and school board member. Therefore, the issue is whether a conflict in duties could arise if one person were to occupy both offices simultaneously.

In opinion No. 93-011 (Ill. Att'y Gen. Op. No. 93-011, issued May 25, 1993), a copy of which I have enclosed for your review, Attorney General Burris concluded that the office of county board member is incompatible with that of school board member. He noted therein that one potential area of conflict relates to the several instances in which contracts or agreements are authorized between a county and a school district. (See, e.g., 55 ILCS 5/3-6036, 5/5-1060 (West 1994); 55 ILCS 90/10 (West 1994); 105 ILCS 5/29-16 (West 1994).) Another potential conflict in duties arises with respect to the allocation of revenue sharing funds under section 3 of the State Revenue Sharing Act (30 ILCS 115/3 (West 1994)). These potential conflicts were deemed sufficient to render the offices of county board member and school board member incompatible.

In reviewing the provisions of the Counties Code (55 ILCS 5/1-1001 et seq. (West 1994)) and the School Code (105 ILCS 5/1-1 et seq. (West 1994)), and the pertinent cases decided thereunder, it appears that the reasoning of opinion No. 93-011 is still valid. Consequently, the offices of county board member and school board member are incompatible under the common law doctrine of incompatibility of offices.

This issue cannot be concluded at this point, however. Since incompatibility is a common law doctrine, it may be modified or superseded legislatively. Shortly after opinion No. 93-011 was issued, the General Assembly enacted Public Act 88-471, effective September 1, 1993, which added section 1.2 to the Public Officer Prohibited Activities Act (50 ILCS 105/1.2 (West 1994)). Under section 1.2 of the Act, persons in a county having fewer than 40,000 inhabitants are expressly permitted to hold the offices of county board member and school board member simultaneously. According to 1990 Federal census figures, the population of Wabash County is 13,111 inhabitants. (Illinois Blue Book 424 (1993-94).) Consequently, in this instance, it appears that one person may hold the offices of county board member and school board member in Wabash county simultaneously, notwithstanding that those offices may be incompatible at common law.

You have also asked whether one person may serve simultaneously as a county board member and a deputy coroner in circumstances in which the deputy coroner does not receive a

salary, but is reimbursed for mileage and other expenses. There are no constitutional or statutory provisions which expressly prohibit simultaneous tenure in the offices of county board member and deputy coroner. Therefore, the issue is whether a conflict in duties could arise if one person were to occupy both offices simultaneously.

In People ex rel. Teros v. Verbeck (1987), 155 Ill. App. 3d 81, the court was asked to determine whether one person could hold the offices of county board member and deputy coroner simultaneously. In reaching its conclusion that the offices of county board member and deputy coroner are incompatible, the court noted:

" * * *

> * * *Common law incompatibility may be established where defendant in one position has authority to act upon the appointment, salary and budget of his superior in a second position. (People ex rel. Fitzsimmons v. Swailes (1984), 101 Ill. 2d 458, 463 N.E.2d 431.) In the present case, it is undisputed that the county board is charged with the duty to fix the compensation of the county coroner within statutory limitations (Ill. Rev. Stat. 1985, ch. 53, par. 37a.1 [55 ILCS 5/4-6002 (West 1994)]) and to provide for reasonable and necessary operating expenses for the coroner's office (Ill. Rev. Stat. 1985, ch. 34, par. 432 [55 ILCS 5/5-1106 (West 1994)]). It is further undisputed that the deputy coroner's compensation is fixed by the coroner, subject to budgetary limitations established by the county board. (Ill. Rev. Stat. 1985, ch. 31, par. 1.2 [55 ILCS 5/3-3003 (West 1994)].) Thus, under the statutory scheme, defendant's two offices are fiscally incompatible since defendant as a member of the county board has authority to act upon the salary and budget of the county coroner who, in turn, determines defendant's salary as deputy coroner. The potential for influencing his superior's salary and budget and, ultimately, his own salary, without more, renders defendant's offices incompatible.
>
> * * * "

(People ex rel. Teros v. Verbeck (1987), 155 Ill. App. 3d at 83-4.)

Based upon the foregoing, it is clear that each fiscal year a county board must consider and provide that amount of funding which it considers to be reasonably necessary for the coroner to procure equipment, materials and services, which includes an appropriation for personal services. While you have indicated in your letter that the deputy coroner who is the focus of your inquiry does not currently receive any compensation for his services, there is no requirement that this policy must continue. Thus, a county board member who also serves as a deputy coroner would be called upon to vote upon the budget from which his compensation, if any, would be paid. This creates competing duties of loyalty. Consequently, it does not appear that a county board member may serve as a deputy coroner, even in those circumstances in which the deputy coroner does not receive compensation for carrying out his duties.

Lastly, you have inquired whether one person may serve simultaneously as a county board member and a deputy sheriff in those instances in which the deputy sheriff does not receive a salary for his services, but is reimbursed for mileage and other expenses. There are no constitutional or statutory provision which expressly prohibit simultaneous tenure in the offices of county board member and deputy county sheriff. Therefore, the issue again becomes whether a conflict in duties could arise if one person were to occupy both offices simultaneously.

In Rogers v. Village of Tinley Park (1983), 116 Ill. App. 3d 437, the court was asked to determine whether the offices of village trustee and municipal police officer were incompatible. In reaching its conclusion that one person could not serve simultaneously in those two offices, the court reviewed the elements of the doctrine of common law incompatibility:

" * * *

'It is to be found in the character of the offices and their relationship to each other, in the subordination of the one to the other, and in the nature of the duties and functions which attach to them.

Incompatibility of offices exist 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.
>
> At common law, it is not an essential element of incompatibility of offices that the clash of duty should exist in all or in the greater part of the official functions. If one office is superior to the other in some of its principal or important duties, so that the exercise of such duties may conflict, to the public detriment, with the exercise of other important duties in the subordinate office, then the offices are incompatible.'
>
> * * *
>
> (Rogers v. Village of Tinley Park (1983), 116 Ill. App. 3d at 441.)

A review of the provisions of the Counties Code (55 ILCS 5/1-1001 et seq. (West 1994)) indicates that the county board is authorized to establish the number of deputy sheriffs to be appointed. (55 ILCS 5/3-6008 (West 1994).) In this regard, a county board member who also serves as a deputy sheriff would be called upon to determine whether his position as a deputy sheriff was necessary for the proper functioning of county government. This creates competing interests and divided loyalties which could hamper a county board member in the full and faithful performance of his duties.

In addition to determining the number of deputy sheriffs the county will employ, the county board is also charged with the duty to fix the compensation of the county sheriff, within statutory limitations (55 ILCS 5/4-6003 (West 1994)), and to provide for reasonable and necessary operating expenses for the sheriff's office (55 ILCS 5/5-1106 (West 1994)). As discussed supra, a county board member who also serves as a deputy sheriff would be required, when voting upon the budget of the county sheriff, to act annually upon the budget from which the sheriff's personal service contracts are satisfied. Thus, a county board member simultaneously serving as a deputy sheriff could create the appearance as well as the actuality of competing

interests and divided loyalties which could hamper a county board member in the full and faithful performance of his duties. Consequently, it does not appear that one person may serve simultaneously as a county board member and a deputy county sheriff.

I would further note that you have inquired whether any potential conflict in duties which may exist could be resolved by the county board member in question refraining from participation in matters brought before the county board which involve the school district, the county coroner's office or the county sheriff's office, respectively. Our courts have consistently held that abstention will not avoid application of the doctrine of incompatibility of offices. (People ex rel. Teros v. Verbeck (1987), 155 Ill. App. 3d 81, 84; Rogers v. Village of Tinley Park (1983), 116 Ill. App. 3d 437.) Moreover, the court in Rogers v. Village of Tinley Park noted that "[t]he common law doctrine of incompatibility * * * insure[s] that there be the appearance as well as the actuality of impartiality and undivided loyalty." (116 Ill. App. 3d at 442 quoting O'Connor v. Calandrillo (1971), 285 A.2d 275, aff'd, 296 A.2d 326 (1972), cert. denied, 299 A.2d 727 (1973), cert. denied, 93 S.Ct. 2775 (1973).) Therefore, it does not appear that abstention from participation will resolve a conflict of interest or a conflict in duties.

This is not an official opinion of the Attorney General. If we may be of further assistance, please advise.

Very truly yours,

MICHAEL J. LUKE
Senior Assistant Attorney General
Bureau Chief, Opinions

MJL:LP:dn