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Dual Office Holders - Incompatible Offices

Dear Reader:

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We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with county government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other CTAS website material.

Sincerely,

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Dual Office Holders - Incompatible Offices

Reference Number: CTAS-633

Several state statutes prohibit a person from holding more than one county office. Pursuant to T.C.A. § 5-5-102(c)(2), no person elected or appointed to fill the office of county mayor, sheriff, trustee, register, county clerk, assessor of property, or any other county-wide office filled by vote of the people or the county legislative body, shall also be nominated for or elected to membership in the county legislative body.

No member of the county legislative body nor any other county official shall be eligible for election as a member of the county board of education. T.C.A. § 49-2-202(a)(2). This statute prevents one person from holding an elected county office and being a member of the school board. Op. Tenn. Atty. Gen. 01-144 (September 4, 2001). Note also that pursuant to T.C.A. § 5-5-102(c)(2) a director of schools cannot serve as a member of the county legislative body. Pursuant to T.C.A. § 7-53-301, a county commissioner cannot serve on the board of a county industrial development board. Pursuant to T.C.A. § 67-1-401, a county commissioner cannot serve on the county board of equalization. See also Op. Tenn. Atty. Gen. 90-106 (December 27, 1990) (it is an inherent and unlawful conflict of interest for a county trustee or municipal tax collector or employee thereof to sit on a county board of equalization).

INCOMPATIBLE OFFICES

In addition to statutory provisions regarding dual office-holding, there is a well recognized common law prohibition against a public officer holding two incompatible offices at the same time. *State ex rel. Little v. Slagle*, 89 S.W. 316, 326-327 (Tenn. 1905). Moreover, another aspect of the same common law principle dictates that the acceptance of a second office which is incompatible with one already held automatically terminates the first office “without judicial proceedings of any kind.” *State v. Thompson*, 193 Tenn. 395, 399, 246 S.W.2d 59, 61 (1952), citing, *State ex rel. Little v. Slagle*, supra.

The question of incompatibility depends on the circumstances of each individual case, and the issue is whether the occupancy of both offices by the same person is detrimental to the public interest, or whether the performance of the duties of one interferes with the performance of those of the other. 67 C.J.S. Officers § 38 (2008). Tennessee courts have recognized that an inherent inconsistency exists where one office is subject to the supervision or control of the other. *State ex rel. v. Thompson*, 193 Tenn. 395, 246 S.W.2d 59 (1952). In *Thompson*, the Tennessee Supreme Court concluded that the offices of city manager and member of the city council were incompatible because the council had the authority to appoint, remove, and supervise the city manager, and no statute then in effect permitted the same individual to hold these offices. The Court found, therefore, that the common law principle of incompatible offices prohibited the same individual from acting as city manager and city council member.

The question often arises whether a county commissioner can simultaneously hold the office of city alderman or city councilman. Conceivably, circumstances could develop such as would make the offices so incompatible that one could not continue to hold them simultaneously. A court could conclude that it is a conflict of interest under the common law prohibition against a public officer holding two incompatible offices at the same time because the occupancy of both offices by the same person is detrimental to the public interest.

Counties and cities can, and often do, enter into contracts and other agreements with one another with respect to many subjects. Accordingly, the offices of county commissioner and city alderman/councilman can quickly become incompatible.

The Attorney General has noted that:

In all of these matters the terms upon which the project is to be pursued are left to the agreement of the public bodies. In the negotiations the county board is bound to consider the interests of all of its citizens while the local governing body has a like obligation to the citizenry of the municipality alone. No man, much less a public fiduciary, can sit on both sides of a bargaining table. He cannot in one

capacity pass with undivided loyalty upon proposals he advances in his other role.

McDonough v. Roach, 35 N.J. 153, 171 A.2d 307, 309 (N.J. 1961).

Op. Tenn. Atty. Gen. 08-129 (August 8, 2008).

See also Op. Tenn. Atty. Gen. 08-177 (November 20, 2008) (constable and county commissioner); Op. Tenn. Atty. Gen. 08-107 (May 9, 2008) (county board of education member also serving as city council member and city board of education member); Op. Tenn. Atty. Gen. 07-159 (December 6, 2007) (deputy sheriff and county bus driver); Op. Tenn. Atty. Gen. 02-109 (October 2, 2002) (constable and judicial commissioner); Op. Tenn. Atty. Gen. 02-012 (January 18, 2002) (offices of sheriff and constable incompatible under the common law); Op. Tenn. Atty. Gen. 00-050 (March 20, 2000) (constable serving as a full-time or part-time deputy sheriff); Op. Tenn. Atty. Gen. 99-160 (August 19, 1999) (constable serving as deputy sheriff); Op. Tenn. Atty. Gen. U86-77 (April 30, 1986) (city commissioner and county commissioner); Op. Tenn. Atty. Gen. 84-209 (June 27, 1984) (county commissioner and city alderman).

Notably, Public Chapter 763, effective 2024, enacts a new subdivision at 5-5-102(c) and a new section at Title 6, Chapter 54, Part 1, to provide that a member of a county governing body shall not simultaneously serve as a member of the governing body of a municipality within the county for whom the member is a commissioner during the member's term of office if the member's county adopts this subdivision by a 2/3 vote of the county legislative body. Only counties with a population of more than 200,000, according to the 2020 or a subsequent federal census, may vote to adopt this subdivision. Provides that a member of a county governing body simultaneously serving on the governing body of a municipality on the effective date of this act may serve out the remainder of the member's term of office.

POWER TO APPOINT

Courts in this state have indicated that it is contrary to public policy to permit an officer having an appointing power to use such powers and means of conferring an office upon himself or to permit an appointing body to appoint one of its own members to an office. State ex rel. v. Thompson, 193 Tenn. 395, 246 S.W.2d 59 (1952). Based on that opinion, the Attorney General has concluded that a local legislative body cannot elect or appoint one of its own members to an office over which it has the power of election or appointment. Op. Tenn. Att'y Gen. 98-004 (January 5, 1998); Op. Tenn. Att'y Gen. U92-129 (December 14, 1992); Op. Tenn. Att'y Gen. 88-166 (September 9, 1986).

A county commissioner cannot serve on the board of workhouse commissioners because the board of workhouse commissioners are elected locally by the county legislative body. See State ex rel. v. Thompson, 395, 246 S.W.2d 59 (Tenn. 1952) (Under the common law it is a violation of public policy for an appointing body to confer office upon one of its own members.).

A county commissioner cannot hold the office of judicial commissioner. Op. Tenn. Att'y Gen. 78-435 (December 28, 1978) (An individual cannot hold the office and perform the duties of county commissioner while simultaneously holding the office and performing the duties of judicial commissioner.).

A county commissioner cannot hold the office of county service officer. Op. Tenn. Att'y Gen. 86-042 (February 24, 1986) (a county commissioner may not legally be appointed county service officer and serve in both capacities).

A county commissioner cannot serve as a county jail inspector. Op. Tenn. Att'y Gen. 04-070 (April 21, 2004) (the county commission may not appoint commission members as jail inspectors).

A county commissioner cannot hold the office of county coroner. Op. Tenn. Att'y Gen. 11-74 (October 17, 2011) (A medical examiner carrying out the duties of the county coroner may not serve as a county commissioner.).

A county commissioner cannot serve on the county board of zoning appeals created under T.C.A. § 13-7-106. See State ex rel. v. Thompson, 395, 246 S.W.2d 59 (Tenn. 1952) (Under the common law it is a violation of public policy for an appointing body to confer office upon one of its own members.).

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