



WILLIAM J. SCOTT
ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD

July 1, 1976

FILE NO. S-1120

COMPATIBILITY OF OFFICES:
County Superintendent of
Highways and Alderman

Honorable E.H. Flesner
State's Attorney
Ford County
Paxton, Illinois 60957

Dear Mr. Flesner:

I have your letter in which you ask whether the appointive office of county superintendent of highways is compatible with the elective office of alderman in a municipality within the county. For the reasons which follow I am of the opinion that the two offices about which you inquire are incompatible.

Incompatibility between public offices arises where the constitution or a statute specifically prohibits the

Honorable E.H. Flesner - 2.

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 the duties of the other. People v. Haas, 145 Ill. App. 283.

There appear to be no constitutional or statutory provisions prohibiting one person from holding the two offices involved here and you state in your letter that no actual conflict of duties appears to exist between the two offices. The question which you raise is whether the fact that there is a potential conflict between the duties of the two offices makes the offices incompatible.

In answer to your question, I refer you to my Opinion No. S-877, in which I held that a potential conflict between the duties of two offices rendered the offices incompatible. Again in Opinion No. NP-962 I took the position that a potential conflict is sufficient to render the offices incompatible, stating:

"

* * *

The mere possibility of a conflict in the duties of offices is sufficient to make them

Honorable E.H. Fleener - 3.

incompatible. It is no answer to say that a conflict in duties does not now exist or may never arise or even that the occurrence of a conflict could only occur on a rare occasion. (McDonough v. Roach, 171 A. 2d 307, 309 (N.J. 1961).) The New Jersey Supreme Court in Jones v. MacDonald, 162 A. 2d 817 (N.J. 1960) eloquently states that it is the existence of the potential for a conflict in duties that renders the offices incompatible. At page 820, the New Jersey Supreme Court states:

'It is no answer to say that the conflict in duties outlined above may never in fact arise. It is enough that it may in the regular operation of the statutory plan. 'If the duties are such that 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.' DeFeo, supra (17 N.J. at p. 189, 110 A. 2d at p. 556). See Wescott v. Scull, supra (87 N.J.L. at p. 418, 96 A. at p. 411). 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. 'It is immaterial on the question of incompatibility that the party need not and probably will not undertake to act in both offices at the same time. The admitted necessity of such a course is the strongest proof of the incompatibility of the two offices.' 42 Am. Jur., Public Officers, § 70, p. 936.'

* * *

With regard to the duties of city alderman and county superintendent of highways, there are in my opinion at least two

Honorable E.H. Flesner - 4.

situations in which the possibility of conflict may arise, and as a result I am of the opinion that the two offices are incompatible.

First, the section on intergovernmental cooperation in the Illinois Constitution (Ill. Const. of 1970, article VII, section 10) and the Intergovernmental Cooperation Act (Ill. Rev. Stat. 1975, ch. 127, par. 741 et seq.) empower counties and municipalities to contract and make agreements with each other under a broad range of subjects, which could include matters relating to streets, roads and highways. In addition, counties have been specifically authorized to contract with municipalities on certain highway matters. Section 5-410 of The Highway Code (Ill. Rev. Stat. 1975, ch. 121, par. 5-410) provides in relevant part:

"The county board is authorized to enter into agreements with any municipal corporation, terminable in the discretion of the county board, for the municipal corporation to maintain any county highway, or any part thereof, located within the municipal corporation, such maintenance to be under the supervision of the county superintendent of highways. * * *"

Section 5-502 of The Code (Ill. Rev. Stat. 1975, ch. 121, par. 5-502) provides that the county board and city council of a

Honorable E.H. Flesner - 5.

municipality may enter a contract fixing the proportion of expenses each shall pay for the joint construction or repair of a bridge, culvert, drainage structure or grade separation on a road located within the municipality. The county superintendent of highways is designated as the person who shall prepare or direct the preparation of the plans and specifications for such improvements.

Second, section 5-105 of The Highway Code (Ill. Rev. Stat. 1975, ch. 121, par. 5-105) authorizes the county board to make deletions from the county highway system by resolution. Highways removed from the county highway system become part of the street system of a municipality if they are located therein. A deletion that might be advantageous to the county might not be advantageous to the municipality receiving jurisdiction of the deleted highway.

In each of the situations outlined above the county board and not the county superintendent of highways is the acting entity. In Peabody v. Sanitary District of Chicago, 330 Ill. 250, however, the Supreme Court held that a contract between the board of trustees of a sanitary district and a

Honorable E.H. Flesner - 6.

contractor was void where the treasurer of the district had an interest in the contract. The court stated that since the duties of the treasurer included serving as financial advisor to the trustees he might therefore have been called upon to act on the letting of the contract by advising the board of trustees as to the financial status of the bidders. For that reason the court held that the conflict of interest statute (Cahill's Statutes 1927, ch. 102, par. 3) was violated.

Like the treasurer in Peabody, the county superintendent of highways in the present situation might naturally be called upon by the county board for advice in these situations in which the interests of the county and those of the municipality might be opposed to each other. The maintenance which is the subject of the agreement authorized in section 5-410 would come under the supervision of the county superintendent of highways. Similarly, the improvements contracted for pursuant to 5-502 are to be planned by the county superintendent of highways. With regard to the deletion of highways from the county system it should be noted that the

Honorable E.H. Flesner - 7.

county superintendent of highways is responsible for supervising the construction and maintenance of all county highways within the county. (Ill. Rev. Stat. 1975, ch. 121, par. 205.5.) In each of these situations there is the possibility that the county board might ask for the advice of the county superintendent of highways. In that case, the county superintendent's duty to advise the county board as to the best interest of the county might conflict with his duty as alderman to act for the best interest of the city.

In my opinion these potential conflicts render the offices of county superintendent of highways and alderman of a city within the county incompatible.

Very truly yours,

A T T O R N E Y G E N E R A L