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1993 Iowa AG LEXIS 15, \*

## OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF IOWA

93-4-8(L)

1993 Iowa AG LEXIS 15

**April 28, 1993**

**CORE TERMS:** county supervisor, incompatibility, incompatible, board of supervisors, supervisor, conflict of interest, public policy, conference board, public office, veteran, assessor, voting, board of review, county board of supervisors, procurement, competitive, bid, common law doctrine, business dealings, statutory duties, sovereign power, revisory power, independently, subordinate, enumerated, inherently, repugnant, dual, subject to approval, immediate family

**SYLLABUS:**

[\*1]

CONFLICT OF INTEREST; INCOMPATIBILITY OF OFFICES: Business between City Officer and City; County Supervisor and Mayor; County Supervisor and Veteran's Affairs Commission. [Iowa Code §§ 35B.4, 35B.6\(1\)\(a\), 35B.7, 35B.10, 35B.14; 362.5\(4\), \(5\), \(7\), \(9\), \(10\); 441.2, 441.6, 441.9, 441.16, 441.31 \(1993\)](#). It is permitted for a city officer to do business with that city if an enumerated exception in section 362.5 is satisfied. The offices of county supervisor and mayor are incompatible. A position on the Veteran's Affairs Commission is not an office, and is therefore not incompatible with the office of county supervisor.

**REQUESTBY:**

Mr. Thomas Ferguson  
Black Hawk County Attorney  
B-1 Courthouse Bldg.  
Waterloo, IA 50703

**OPINIONBY:**

Joseph Condo, Assistant Attorney General

**OPINION:**

You have requested an opinion of this office addressing conflict of interest and incompatibility issues concerning the position of county supervisor. You point out that a Black Hawk county supervisor is interested in running for the position of mayor of Waterloo. You further state that the supervisor owns a significant interest in several plumbing-related businesses that do business with the city of Waterloo. Also, you state that the [\*2] Director of the Black Hawk County Veteran's Affairs Commission is interested in running for a position on the Black Hawk County Board of Supervisors. Specifically, you inquire:

- 1) Is it a conflict of interest for a mayor of a city to do business with the city through his plumbing business?
- 2) Are the offices of mayor and county supervisor incompatible?

3) Are the offices of county supervisor and director of the Veteran's Affairs Commission incompatible?

It is our opinion that the question of conflict of interest is answered by Iowa Code section 362.5. To the extent that the mayor's business dealings comply with the statute, those dealings do not create a conflict of interest. The offices of mayor and county supervisor are incompatible, due to conflicting statutory duties. The position of director of Veteran's Affairs, however, is not a "public office" to which the doctrine of incompatibility applies, and, therefore, is not incompatible with the office of county supervisor.

I

The question of a city officer's ability to do business with the city is governed by Iowa Code section 362.5, which states, in relevant part:

A city officer or employee shall not have an interest, direct [\*3] or indirect, in any contract or job of work or material or the profits thereof or services to be furnished or performed for the officer's or employee's city. A contract entered into in violation of this section is void. The provisions of this section do not apply to. . . .

4. Contracts made by a city, upon competitive bid in writing, publicly invited and opened.

5. Contracts in which a city officer or employee has an interest solely by reason of employment, or a stock interest of the kind described in subsection 9, or both, if the contract is for professional services not customarily awarded by competitive bid, if the remuneration of employment will not be directly affected as a result of the contract, and if the duties of employment do not directly involve the procurement or preparation of any part of the contract. . . .

7. A contract in which a city officer or employee has an interest if the contract was made before the time the officer or employee was elected or appointed, but the contract may not be renewed. . . .

9. A contract with a corporation in which a city officer or employee has an interest by reason of stockholdings when less than five percent of the outstanding [\*4] stock of the corporation is owned or controlled directly or indirectly by the officer or employee or the spouse or immediate family of such officer or employee.

10. Contracts not otherwise permitted by this section, for the purchase of goods or services by a city having a population of more than two thousand five hundred, which benefit a city officer or employee, if the purchases benefiting that officer or employee do not exceed a cumulative total purchase price of one thousand five hundred dollars in a fiscal year.

Several of the enumerated exceptions could apply to a mayor who is the owner or part-owner of a business. Section 362.5(4) allows contracts with a city officer or employee where competitive bidding is used. If the mayor's business were awarded a contract in this manner, the contract would be permissible. Section 362.5(7) allows contracts that are awarded prior to the election or appointment of the official to continue, but the contract may not be renewed. Section 362.5(9) allows a city officer or employee to maintain an interest in a contract between the city and a corporation if the officer or employee (or immediate family) do not hold over five percent of the [\*5] stock of the corporation. The type of stock held is not addressed in the statute. Section 362.5(10) allows contracts with a city of a population over 2,500, if the benefit to the officer or employee does not exceed \$ 1,500 in a fiscal year.

Under section 362.5(5), a contract involving stock ownership of the kind described in section 362.5(9), but not satisfying the five percent cutoff of that subsection, may still be valid if certain

procedural requirements are followed. The requirements of section 362.5(5) are stated in the conjunctive so that each of them must be satisfied. 1980 Op.Att'yGen. 580, 583. First, the contract must be one for professional services not customarily awarded by competitive bid. Second, the remuneration of employment must not be directly affected as a result of the contract. An example of this would be a case where the city officer or employee received a raise or bonus from the corporation for procurement of the contract with the city. See 1980 Op.Att'yGen. 580, 583. Third, the duties of employment must not directly involve the procurement or preparation of the contract. This provision prevents the officer/owner from becoming involved in the [\*6] negotiations leading to the formation of the contract.

The exceptions listed in section 362.5 are the only lawful means by which a city officer or employee may do business with that city. If a particular transaction does not fall under one of the exceptions, it is not permitted.

## II

In Iowa, there is no constitutional or statutory provision that directly prohibits a person from serving concurrently as mayor of a city and as a county supervisor. Therefore, the common law doctrine of incompatibility of offices must be applied. "If a person, while occupying one office, accept[s] another incompatible with the first, he ipso facto vacates the first office, and his title thereto is thereby terminated without any other act or proceeding." State ex rel. LeBuhn v. White, 257 Iowa 606, 609, 133 N.W.2d 903, 904 (1965), quoting State ex rel. Crawford v. Anderson, 155 Iowa 271, 272, 136 N.W. 128, 129 (1912). For incompatibility of offices to exist, both positions in question must be considered "offices." 1982 Op.Att'yGen. 220, 224. Our office has determined that a mayor and a county supervisor are both public offices for purposes of an incompatibility analysis. Op.Att'yGen. [\*7] #84-8-7(L) (county supervisor is an office); 1982 Op.Att'yGen. 188 (#81-7-31(L)) (city council member is an office).

The Iowa Supreme Court has articulated the common law principles of incompatibility of offices:

[T]he test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other and subject in some degree to revisory power, or where the duties of the two offices are inherently inconsistent and repugnant. A still different definition has been adopted by several courts. It is held that incompatibility in office exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both.

White, 257 Iowa at 609, 133 N.W.2d at 905, quoting Anderson, 155 Iowa at 273, 136 N.W. at 129 (citations omitted).

In a 1920 opinion, this office declared the offices of mayor and county supervisor to be incompatible. 1920 Op.Att'yGen. 639, 640. The opinion stated that, while most of the duties of mayor are not incompatible with the duties of a county supervisor, a few duties do render the offices incompatible. Two grounds stated [\*8] in the opinion are: 1) the mayor, as justice of the peace, files bills for services with the board of supervisors, and 2) a mayor's actions as a member of the board of review are subject to review by supervisors. In modern times, a mayor is no longer automatically a justice of the peace. However, the dual role of a mayor/supervisor on the board of review remains troublesome.

Iowa Code section 441.2 states that every county in the state must maintain a conference board. Pursuant to section 441.1, cities with a population over 125,000 must have an assessor, and smaller cities have discretion to appoint one. Each city in Iowa that has a city assessor must maintain a conference board. Among the conference board's duties are hiring and removing the assessor (§§ 441.6 and 441.9), establishing the budget and salaries for the assessor's office (§ 441.16), and appointing the board of review (§ 441.31).

In both county and city conference boards, mayors and supervisors participate as members of

separate voting units. Pursuant to section 441.2, the mayors of all the cities in the county, the board of supervisors, and a representative of each school district sit on the county conference [\*9] board. Each group votes as a unit. In city conference boards, the city council, the county board of supervisors, and the city school board have positions on the conference board, and comprise the three voting units. A mayor who is also a supervisor, therefore, would have a place on two separate units in both the county and city conference boards. Furthermore, the mayor of a city is the chairperson of the city conference board. Chapter 441 does not provide for an alternate representative to be selected.

The entire assessment process demands participants who represent the best interests of their constituents. Whether on a county or a city conference board, a mayor who is also a supervisor would be forced to represent two separate voting units.

Other situations may raise incompatibility issues. An example of a situation in which it could be difficult for a mayor to serve as a county supervisor would be during annexation proceedings, under which a city may annex county territory. See Iowa Code § 368.5 (1993).

The concept of incompatibility is viewed in a less restrictive light today than it was in 1920. The modern tendency is to allow dual service, if at all possible. [\*10] This office has stated that "the common law doctrine of incompatibility should be construed narrowly and applied cautiously, which has not always been the practice in the past." Op.Att'yGen. #92-9-1, quoting 1982 Op.Att'yGen. 16 (#81-1-8(L)).

The duties of the two offices are generally not "inherently inconsistent and repugnant." Nor is one subordinate to the other, or subject to the revisory power of the other. Any incompatibility would have to be based on public policy. This office has in the past used principles associated with conflict of interest issues as public policy standards in an incompatibility analysis. "Allowing a person to occupy two public offices where impartiality is necessary but is jeopardized is contrary to public policy." 1982 Op.Att'yGen. 188 (#81-7-31(L)). Specifically, public policy demands that even the potential for conflict is to be avoided. Wilson v. Iowa City, 165 N.W.2d 813, 822 (Iowa 1969). While an opinion is not the proper place to speculate on the specifics of those issues, effective public policy dictates that each side be represented fairly and impartially. We, therefore, conclude that the office of mayor is incompatible with [\*11] the office of county supervisor.

### III

For incompatibility of offices to become an issue, both the positions of county supervisor and director of the Veteran's Affairs Commission must be considered "public offices." The doctrine of incompatibility is only applicable if both of the positions in question are "offices." 1982 Op.Att'yGen. 220, 224. The Iowa Supreme Court has addressed the factors that are necessary to make a position a "public office."

(1) The position must be created by the constitution or legislature or through authority conferred by the legislature. (2) A portion of the sovereign power of government must be delegated to that position. (3) The duties and powers must be defined, directly or impliedly, by the legislature or through legislative authority. (4) The duties must be performed independently and without control of a superior power other than the law. (5) The position must have some permanency and continuity, and not only be temporary and occasional.

State v. Taylor, 260 Iowa 634, 639, 144 N.W.2d 289, 292 (1966).

Applying the Taylor standards, the position of director of Veteran's Affairs is not an office and, therefore, cannot be incompatible [\*12] with the office of county supervisor. Specifically, it is clear that the fourth prong of the Taylor test is not met. The board of supervisors exercises control over the actions of the commission. Iowa Code chapter 35B authorizes the creation of county commissions of veteran's affairs. Section 35B.4 states that the board of supervisors

appoints the members of the commission. The commission then appoints the director of the commission, subject to approval of the board of supervisors, under section 35B.6(1)(a). Section 35B.7 states that the budget of the commission is subject to approval by the board of supervisors. Section 35B.10 states that any benefits that the commission awards must be approved by the county board of supervisors. The board of supervisors and the commission of veteran affairs have joint control of appropriations given to indigent veterans through section 35B.14.

It is the unsupervised exercise of sovereign power which is the hallmark of a public office. State v. Pinckney, 276 N.W.2d 433, 436 (Iowa 1979). The duties of the commission are not performed independently and, therefore, a position on the commission, whether director or not, does not qualify [\*13] as a public office.




Although the two positions are not incompatible, some conflicts of interest could arise. Conflict of interest issues are resolved through an evidentiary analysis of the facts surrounding the conduct of the office holder, which cannot be done in an opinion. 1982 Op.Att'yGen. 220, 223. However, due to the fact that chapter 35B mandates control over the commission by the board of supervisors, potential conflicts for a supervisor/commission member exist.

Despite these potential conflicts, issues related to the veteran's affairs commission make up a minute amount of the business of a county board of supervisors. Based on prior opinions of this office, a proper course of action for the supervisor/director of commission is to disclose to the board of supervisors the potential for conflict and abstain from discussion and voting on any issue that affects the veteran's affairs commission. Cf. Op.Att'yGen. #92-9-1; Op.Att'yGen. #91-4-4(L); 1982 Op.Att'yGen. 16 (#81-1-8(L)).

In conclusion, it is the opinion of this office that Iowa Code section 362.5 governs a city officer's business dealings with that particular city. The offices of mayor and county supervisor [\*14] are incompatible, due to conflicting statutory duties. The position of director of Veteran's Affairs is not a "public office" to which the doctrine of incompatibility applies and, therefore, cannot be incompatible with the office of county supervisor.

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