

Compatibility of Office

By James D. Cole

Introduction

Compatibility of office addresses the question of whether one may hold more than one office or position of employment. There are two sources of incompatibility—statutes that prohibit holding designated multiple offices, and application of the common law test for compatibility of office.



Generally, like ethics standards and the prohibition on interests in contracts detailed in Article 18 of the General Municipal Law, the compatibility doctrine is designed to maintain public confidence in the integrity of government. Underlying all three are standards to ensure that governmental responsibilities are exercised solely in the public interest, and to avoid even the appearance of impropriety.

Statutory Incompatibility

Scattered through the laws of the state are statutes prohibiting the holding by one person of specific offices and positions of employment. See, for example, section 411 of the County Law, prohibiting a county judge, family court judge, surrogate, district attorney, sheriff, county clerk or any other elective county officer from holding at the same time any other elective county or town office or the position of city supervisor; section 3-300(3) of the Village Law prohibiting the holding of an elective and an appointive village office; section 20(4) of the Town Law prohibiting holding more than one elective town office; and section 3 of the General City Law prohibiting any member of the common council of the city from holding certain other paid city offices. Therefore, it is prudent to review any body of law that relates to the positions in question to determine if there are any such provisions.

Common Law Incompatibility

The common law doctrine of compatibility of office is a long-standing one that continues to be applied by the courts and in administrative opinions of the Attorney General.¹ Under these authorities, two offices are incompatible if one is subordinate to the other or if there is an inherent inconsistency in

the duties of the two positions. The common law rule also applies to positions of employment.²

Incompatibility has been said to exist when there is a built-in right of the holder of one position to interfere with that of the other, as when the one is subordinate to, or subject to audit or review by, the second. Obviously, in such circumstances were both posts held by the same person, the design that one act as a check on the other would be frustrated.³

A preliminary test of compatibility is whether the duties of the two positions intersect. If they don't, there is no potential for incompatibility. If, however, they do, the question is whether one position is subordinate to the other or whether the duties of the two positions are inconsistent or in conflict.

Subordination

Subordination usually is easily detectable. Generally, it manifests itself in the public employer-employee context and where one office has supervisory authority over another position. In some instances, there are elements of both subordination and conflicts of duties. For example, in *Dupras v. County of Clinton*, the court decided that membership on the County Legislature is incompatible with employment as senior clerk in the county Board of Elections.

The court reasoned that the legislator votes on the budget and personnel of the Board of Elections and the salary of the commissioners, who supervise and may remove her at their pleasure. Also, the court found that recusal is not a viable remedy because the Board's budget is determined taking into consideration the needs of other county departments and the limited resources of the county.

[Thus, the legislator] would have to recuse herself from the entire budgetary process to remove any suggestion of conflict of interest or appearance of impropriety. This would be unacceptable since it would deprive Perry's constituents of a voice in a significant aspect of the Legislature's responsibilities.⁴

The Attorney General used the same reasoning in finding that membership on the town council is incompatible with working as a deputy highway superintendent or laborer in the highway department.⁵

The following are two more examples of subordination. The Attorney General has opined that one should not simultaneously hold the positions of county manager and county treasurer. The opinion found that the manager is responsible for coordinating and supervising administrative functions for the legislative body, which includes the functions of the county treasurer. Therefore, one position would be subordinate to the other.⁶ A person may not simultaneously hold the positions of town supervisor and town code enforcement officer. The town supervisor is a member of the town council and employees and officers of the town are under the direct supervision and control of the council.⁷

Conflicts of Duties

Conflicts of duties are sometimes difficult to determine because the duties of the positions may be set forth in several locations, including state law, local laws, charters or through local practice. Also, if the duties intersect and there is some conflict, the initial question is whether recusal is an appropriate remedy. Recusal is viable only when the holder of the offices can substantially perform the duties of the positions. The following are some examples of conflict questions.

In Op. Att’y Gen. (Inf.) 98-44, the Attorney General found that a county fire investigator should not also serve as a building inspector in the county. A fire inspector examines whether the cause of the fire is a violation of the fire or building code. If the fire inspector, when acting as building inspector, issued a permit authorizing occupancy, he may be reluctant to make the appropriate finding. Moreover, the opinion noted that even a proper finding that causation is unknown or unrelated to any code violation reasonably could be suspect in the view of the general public because of the appearance of a conflict of duties.

Another opinion concluded that one should not hold the positions of town clerk and confidential secretary to the town supervisor because this would erode the fiscal checks and balances built into the provisions of the Town Law.⁸ The Attorney General also found that the positions of coroner and part-time corrections officer are incompatible because the coroner is required to inquire into all deaths, whether natural or unnatural, occurring to an inmate of a correctional facility.⁹

Recusal

In some instances, it is foreseeable that the holding of two positions will result in conflicts of duties, but they are neither numerous nor significant. In other instances, conflicts may not be inevitable. In these situations, recusal is an appropriate remedy. The following are some examples of application of recusal.

The offices of assistant county attorney and deputy town attorney are compatible but a person holding both positions would have to recuse himself from participating in any matter involving conflicting county and town duties.¹⁰ Occasionally, matters may affect the interests of both municipalities but the Attorney General did not foresee frequent conflicts between the duties of the offices that would make recusal an inappropriate remedy.

The Attorney General found that the positions of town planning board member and mayor of a village are compatible as are the positions of member of the town zoning board of appeals and of the legislative body of a village.¹¹ Although it is conceivable that zoning matters may affect the interests of both municipalities, recusal is an appropriate remedy to avoid divided loyalties. Because each municipality has its own zoning law, recusal would be infrequent.

Thus, recusal is an appropriate remedy where there are occasional conflicts between two positions. If, however, conflicts are frequent, necessitating many recusals, one would not be able to fully perform the duties of the offices and they would be incompatible. Also, recusal from a significant function is not a viable remedy.¹²

Code of Ethics

Section 806 of the General Municipal Law requires every municipality to adopt a code of ethics setting forth the standards of conduct reasonably expected of its officers and employees. A code of ethics can include in its provisions a prohibition on holding certain offices or positions of employment. Additional authority for such a prohibition is the grant of home rule authority in section 10 of the Municipal Home Rule Law, which permits local governments to enact local laws, consistent with the Constitution and general state laws, relating to their property affairs or government and the powers, duties, qualifications, and other terms and conditions of employment of their officers and employees.¹³

Impact of Incompatibility

Under the common law rule, the acceptance of a second office that is incompatible with the first results in the vacating of the first office by operation of law.¹⁴ In the case of statutory prohibitions, the wording of the statute will determine whether the prohibition is on “holding” the second office or on being a “candidate” for the second office.¹⁵

Local Law Exception

The Attorney General has concluded that in appropriate circumstances a local government may utilize its local law authority to supersede the common law doctrine of compatibility of office.¹⁶ In that the common law doctrine of compatibility of office is a statement of public policy by the courts, a local government may overcome the doctrine by utilizing its home rule authority to enact a local law.¹⁷ Such a local law should be enacted only where it serves the public interest, for example, in a small municipality where there are not enough residents willing to serve in governmental positions or who possess the required expertise.¹⁸ Also, in contemplating the enactment of such a local law, the legislative body should consider the severity of any conflict that would result.¹⁹

Conclusion

While the doctrine of compatibility of office is straightforward, its application can be difficult. Fact-finding is required to determine fully the powers and duties of the positions under review. They may be set forth in state law, local enactments and/or result from local practices. The preliminary question is

whether the duties of the positions intersect. If they do, are they compatible?

Endnotes

1. *People ex rel. Ryan v. Green*, 58 N.Y. 295, 304–05 (1874); *O'Malley v. Macejka*, 44 N.Y.2d 530, 535, 406 N.Y.S.2d 725, 727 (1978).
2. *Dupras v. County of Clinton*, 213 A.D.2d at 953, 624 N.Y.S. 2d at 309–310 (3d Dep't 1995).
3. *O'Malley v. Macejka*, 44 N.Y.2d at 535, 406 N.Y.S. 2d at 727.
4. *Dupras v. County of Clinton*, *supra* note 2.
5. Op. Att'y Gen. (Inf.) No. 96-12.
6. Op. Att'y Gen. (Inf.) No. 98-22.
7. Op. Att'y Gen. (Inf.) No. 87-82.
8. Op. Att'y Gen. (Inf.) No. 89-66.
9. Op. Att'y Gen. (Inf.) No. 92-35.
10. Op. Att'y Gen. (Inf.) No. 91-62.
11. Op. Att'y Gen. (Inf.) No. 86-68.
12. *Dupras v. County of Clinton*, *supra* note 2 (the budget).
13. Municipal Home Rule Law § 10(1)(i) and (ii)(a)(1); see Op. Att'y Gen. (Inf.) No. 97-50; *Golden v. Clark*, 76 N.Y.2d 618, 563 N.Y.S. 2d 1 (1990).
14. *People ex rel. Ryan v. Greene*, 58 N.Y. 295 at 304–305.
15. See *Hurowitz v. Board of Elections of the City of New York*, 53 N.Y.2d 531, 443 N.Y.S.3d 54 (1981); *People v. Purdy*, 154 N.Y. 439 (1897).
16. Op. Att'y Gen. (Inf.) No. 94-2; Op. Att'y Gen. (Inf.) No. 92-8.
17. Municipal Home Rule Law § 10(1)(i) and (ii)(a)(1).
18. Op. Att'y Gen. (Inf.) No. 94-2.
19. *Id.*

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