

Opinion No. 2012-018

June 18, 2012

The Honorable Reginald Murdock  
State Representative  
Post Office Box 1071  
Marianna, Arkansas 72360-1071

Dear Representative Murdock:

I am writing in response to your request for my opinion on two questions I will paraphrase as follows:

1. May an individual serve simultaneously as a county judge and as the mayor of a city within the same county?
2. If so, would the individual face a conflict of interests by serving on the county intergovernmental cooperation council and participating in decision making with respect to the distribution of premium tax funds to the fire department of the city he serves as mayor?

By way of background, you have provided the following factual summary and question submitted by a constituent:

In St. Francis County we currently have an issue where the Intergovernmental Council is determining how to split funds for area fire departments. County Judge Gary Hughes sits as both Judge and Mayor of Caldwell on that council and his fire department, in my opinion has a vested interest in the matter. He has publicly said that if the city council doesn't accept the offer that is on the table then each department will be required to submit a needs list from which

he will determine what funding will go to each department. As Mayor and County Judge how can he decide on funds for the Caldwell Fire Department without a conflict of interest[?]

## **RESPONSE**

In my opinion, based both upon the apparent conflict generated by such dual service with respect to the distribution of premium tax funds and further upon possible conflicts in other contexts, a reviewing court might conclude that holding both offices would offend public policy and hence be precluded under the common-law doctrine of incompatibility. A court might alternatively conclude that the dual office holder in this instance should abstain from participating in decisions relating to the distribution of premium tax funds, although, as discussed below, such abstention might result in significant practical complications that would render this remedy ineffectual. A court faced with either or both alternatives would be obliged to consider the particular factual circumstances attending the challenge – a fact that precludes me, not being a finder of fact, from opining what course would be appropriate in this instance.

*Question 1: May an individual serve simultaneously as a county judge and as the mayor of a city within the same county?*

*Question 2: If so, would the individual face a conflict of interests by serving on the county intergovernmental cooperation council and participating in decision making with respect to the distribution of premium tax funds to the fire department of the city he serves as mayor?*

I have listed these questions together because I consider it impossible to analyze the one without in the process considering the other. In the ensuing discussion, I will first set forth the legal principles that bear on the related issues of dual office holding and abstention. I will then discuss how these issues bear on the specific circumstances giving rise to your questions.

### **The legal standard relating to the prohibition against dual office holding**

The Arkansas Supreme Court has indicated that there are three possible types of legal prohibitions to the concurrent holding of two offices: constitutional prohibitions, statutory prohibitions, and the common-law prohibition known as the

“doctrine of incompatibility.”<sup>1</sup> No constitutional or statutory prohibitions apply to this type of dual service. In my opinion, however, a reviewing court would be obliged to consider whether the dual service would be barred under the doctrine of incompatibility.

The Arkansas Supreme Court has declared that “[t]he inconsistency, which at common law makes offices incompatible” exists in situations when “one is subordinate to the other, and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one office has the power to remove the incumbent of the other or to audit the accounts of the other.”<sup>2</sup> The court has elaborated and somewhat extended this relatively straightforward standard as follows:

***“Incompatibility arises . . . from the nature of the duties of the offices, when there is an inconsistency in the functions of the two, where the functions of the two are inherently inconsistent or repugnant, as where the antagonism would result in the attempt by one person to discharge the duties of both offices, or where the nature and duties of the two offices are such as to render it improper from considerations of public policy for one person to retain both.”***<sup>3</sup>

This formulation is elaborated as follows in the just quoted treatise relied upon by the Arkansas Supreme Court:

***Public policy demands that an officeholder discharge his or her duties with undivided loyalty.*** The doctrine of incompatibility is intended to assure performance of that quality. . . .

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<sup>1</sup> *Byrd v. State*, 240 Ark. 743, 744-45, 402 S.W.2d 121 (1966).

<sup>2</sup> *Tappan v. Helena Fed. Savings & Loan Assn.*, 193 Ark. 1023, 1025, 103 S.W.2d 458 (1937), quoting 46 C.J. at 942; accord *Thompson v. Roberts*, 333 Ark. 544, 970 S.W.2d 239 (1998).

<sup>3</sup> *Thompson*, 333 Ark. at 549, quoting Eugene McQuillin, 3 *The Law of Municipal Corporations* § 12.67 (3d ed.) (emphasis added).

[I]t is not simply a physical impossibility to discharge the duties of both offices at the same time, ***it is an inconsistency in the functions of the two offices, as*** where one is subordinate to the other, or ***where a contrariety and antagonism would result in the attempt by one person to discharge faithfully and impartially the duties of both.***

. . . Two offices are said to be incompatible when the holder cannot in every instance discharge the duties of each[,] ***although the fact that incompatibility may from time to time exist is insufficient to warrant disqualification where the duties of each office are inherently dissimilar.*** . . . Incompatibility arises, therefore, . . . where the nature and duties of the two offices are such as to render it improper from considerations of public policy for one person to retain both. The true test is whether the two offices are incompatible in their natures, in the rights, duties or obligations connected with or flowing from them.

\* \* \*

. . . Although the conflict in duties may never arise, it is enough that it may, in the regular operation of the statutory plan. ***It is not an answer to say that if a conflict should arise, the incumbent may omit to perform one of the incompatible roles. The doctrine of incompatibility was designed to avoid the necessity for that choice. Further, an admitted necessity to avoid acting in both offices at the same time is the strongest proof of the incompatibility of the two offices.***<sup>4</sup>

A certain tension inheres in the highlighted portions of the passage just quoted, insofar as it declares, on the one hand, that an occasional incompatibility in duties “is insufficient to warrant disqualification” when the duties of the two offices are “inherently dissimilar” and, on the other, that the doctrine of incompatibility exists precisely to avoid the situation in which a dual officeholder might be forced to perform only “one of the incompatible roles.” In my opinion, for reasons discussed below, this tension bears directly on your request, rendering it uncertain

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<sup>4</sup> McQuillin, *supra* at *id.* (emphases added; footnotes omitted).

how a court would resolve the question of dual service and abstention in this particular case.<sup>5</sup>

### **The legal standard relating to conflicts of interests**

As noted above, “the fact that incompatibility may from time to time exist is insufficient to warrant disqualification where the duties of each office are inherently dissimilar.”<sup>6</sup> In such instances, the appropriate course might be for the dual office holder to abstain from participating in a particular matter based upon the fact or the reasonable perception of his having divided loyalties.

In considering an individual’s serving both as a county judge and as a board member of an irrigation district, for instance, one of my predecessors offered the following analysis:

[E]ven if the county judge’s service on the board is not prohibited by the dual office-holding principles, his service on the board could give rise to isolated situations in which he would have a common law conflict of interest. Such instances would arise when the particular facts of a situation would divide the judge’s allegiance between the county and the irrigation district. In such instances, the judge should abstain from participating in any decision-making or other acts of the board that would require him to act in the interest of one at the expense of the interest of the other.<sup>7</sup>

In explaining what might constitute a “common law conflict of interest,” my predecessor began with the standard formulation providing that such a conflict will exist if a transaction involves an officer’s self-interest:

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<sup>5</sup> I have referred to “a court” in my immediately preceding sentence because the issue of incompatibility, like that of abstention, will involve a factual inquiry in each instance. As McQuillin points out in his treatise, “[w]hether the offices involved are incompatible is a judicial question.” *Id.* (footnote omitted). Part of my difficulty in addressing your request consequently arises from the following unavoidable condition: “There is no yardstick by which the rule prohibiting the holding of incompatible offices may be applied; each case must be judged on its own particular facts.” *Id.* (footnote omitted).

<sup>6</sup> *Id.*

<sup>7</sup> Op. Att’y Gen. 2001-042 (footnote omitted).

“Officers are not permitted to place themselves in a position in which personal interest may come into conflict with the duty which they owe to the public, and where a conflict of interest arises, the office holder is disqualified to act in the particular matter and must withdraw.”<sup>8</sup>

Notwithstanding the focus in this passage on “personal interest” as anathema, my predecessor rightly applied the proscription to the analogous situation in which purely official interests might conflict. The goal, he observed, is “to avoid the temptation of placing a conflicting interest above the interest of those he was chosen to represent” – a principle that prompted him to conclude that the county judge at issue in that opinion might on occasion be obliged to abstain from participating in a decision whose resolution, even though not implicating self-interest, “would divide the judge’s allegiance between the county and the irrigation district.”<sup>9</sup>

Applying a similar analysis, another of my predecessors opined that a nominally paid volunteer fire chief who also served as a city alderman might “be occasionally faced with situations in which he is required to participate in decisions that will directly impact the fire department,” thus resulting in a “conflict of interest” that, while not barring the dual service, would oblige him to “abstain from participating in any decision-making that might divide his allegiance

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<sup>8</sup> *Id.*, quoting 67 C.J.S. *Officers* § 204; further citing *Acme Brick Co. v. Missouri Pacific R.R.*, 307 Ark. 363, 821 S.W.2d 7 (1991); *Van Hovenberg v. Holman*, 201 Ark. 370, 144 S.W.2d 719 (1940); *Madden v. United States Associates*, 40 Ark. App. 143, 844 S.W.2d 374 (1992); Ops. Att’y Gen. 2000-072; 99-349; 98-275; 94-283; and 94-446; and 63A Am. Jur. 2d, *Public Officers and Employees* § 321.

<sup>9</sup> *Id.* My predecessor instructively distinguished as follows between the related concepts of incompatibility of offices and conflict of interests requiring abstention in particular matters:

The common law doctrine of incompatibility, which would prohibit the dual service altogether, arises out of a similar concern. It would prohibit the dual service if, as a general matter, the duties of one of the offices would conflict with the duties of the other. In my opinion, the doctrine of incompatibility does not apply in the situation involving the service of a county judge on the board of an irrigation district, because in most instances, the interest of the county will be compatible with the interest of the district.

between the interests that are at stake, so as to avoid the temptation of placing conflicting interest above the interest of those he was chosen to represent.”<sup>10</sup>

## **Discussion**

Underlying both of your questions is a specific concern that the individual serving simultaneously as county judge and as mayor may be unable to exercise what the above passage terms “undivided loyalty” in the task of apportioning state-generated premium tax funds to local fire departments. With regard to the nature of premium tax funds, the Arkansas Code provides in pertinent part:

(a)(1) It is found and determined by the General Assembly that additional funding is needed to improve the fire protection services in this state.

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(b) In addition to the premium taxes collected from insurers under other provisions of Arkansas law, each authorized insurer and each formerly authorized insurer shall pay to the Fire Protection Premium Tax Fund a tax at the rate of one-half of one percent (1/2%) on net direct written premiums for coverages upon real and personal property, including, but not limited to, fire, allied lines, farm owner and homeowner multiple peril, vehicle physical damage, and vehicle collision, or any combination thereof.<sup>11</sup>

The Code provides as follows regarding the distribution of these tax proceeds:

The moneys shall be apportioned by each quorum court to the districts and municipalities within the county based upon population ***unless the county intergovernmental cooperation council notifies the quorum court of the fire protection needs of the districts and***

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<sup>10</sup> Op. Att’y Gen. 2004-249. For further illustration and discussion of this issue, *see* Ops. Att’y Gen. 2004-160; 2004-106; 2001-042; and 67 C.J.S. *Officers* § 204.

<sup>11</sup> A.C.A. § 26-57-614 (Repl. 2008).

***municipalities, in which case the moneys shall be apportioned by the quorum court based on those needs.***<sup>12</sup>

These two statutorily mandated procedural alternatives are difficult to square with the impasse your constituent has described in his statement of facts. Your constituent reports that the dual office holder has publicly declared that unless the Caldwell City Council approves an “offer” regarding the disposition of premium tax revenues to fire departments, he (the mayor) will himself “determine what funding will go to each department.” Your request contains no information regarding who or what entity extended this “offer.” Under the statutory scheme just recited, the quorum court acting alone will normally distribute the funds based solely upon population, varying from this formula only if the full intergovernmental cooperation council directs an alternative disposition of funds based upon the needs of the various districts and municipalities. Nowhere in either procedure does the city council play any role.

Whatever the background giving rise to your constituent’s request, his underlying concern appears to be that the dual office holder, by virtue of his two positions, might wield a controlling influence on the decision-making of the intergovernmental cooperation council. As regards the composition and functioning of a “county intergovernmental cooperation council,” the Code provides as follows:

a) There is established within each county of this state a county intergovernmental cooperation council to facilitate cooperation among all the local government subdivisions of each county, to encourage the efficient use of local government resources, and to eliminate the duplication of services by local governments.

***(b) The membership of each cooperation council shall consist of the county judge, the county clerk, and the mayor of each city and incorporated town within each county.***

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<sup>12</sup> A.C.A. § 14-284-403(a)(2)(A) (Supp. 2011) (emphasis added). For a discussion of this process of division and apportionment of premium tax revenues, *see* Op. Att’y Gen. 2012-007.

(1)(A) The county judge of each county shall serve as chairman of the cooperation council.

(B) The county judge shall have full voting power and shall have veto power over any action taken by the council.

(C) It shall require a two-thirds (2/3) majority vote of all council members to override a veto.<sup>13</sup>

Your constituent indicates that the individual referenced in your question, by virtue of his holding two of the offices listed in the statute just quoted, is apparently exercising two votes on the intergovernmental cooperation council – one as county judge and the other as mayor of Caldwell. This individual consequently serves two distinct interests on the council. Specifically with regard to the division of premium tax funds by the council to serve “the needs of the districts and municipalities,” this dual office holder thus appears to face a conflict of interests in that, in voting to divide the available premium tax revenues, he would be under dueling fiduciary obligations to his two constituencies.<sup>14</sup> Applying a stringent interpretation of the dual office holder’s duty of undivided loyalty, one might plausibly argue that it would mark a breach of this individual’s fiduciary duties to either of the political subdivisions he represents for him to vote to direct premium tax funds to the other. Although a court faced with this issue might deem this reading of fiduciary duty too draconian,<sup>15</sup> it remains the case that

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<sup>13</sup> A.C.A. § 14-27-102 (Repl. 1998) (emphasis added).

<sup>14</sup> This office has previously discussed conflicts of the sort at issue in terms of competing fiduciary duties owed to the various entities an individual represents. On at least two occasions, my predecessors have recited as pertinent the following definition of the term “fiduciary capacity”:

One is said to act in a “fiduciary capacity” . . . when the business which he transacts, or the money or property which he handles, is not his own or for his own benefit, but for the benefit of another person, as to whom he stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part. *The term* is not restricted to technical or express trusts, but *includes* also *such offices or relations as those of . . . a public officer.*

Ops. Att’y Gen. Nos. 2004-230 and 2000-178, quoting *Black’s Law Dictionary* (6th ed. 1990) (emphasis added). This definition further characterizes a “fiduciary duty” as “the highest standard of duty implied by law.”

<sup>15</sup> To extend this punctilious reading of fiduciary duty, one might further argue that it would amount to a fiduciary breach for *any* mayor or county judge, even though he holds only one public office, to participate

an apparent conflict of interests inheres in a single individual's representing competing claimants in the process of apportioning available premium tax revenues. It might consequently be argued that an individual faced with this conflict should at the very least abstain from participating in the vote distributing the available revenues.

The appropriate course in a roughly comparable instance was discussed both with respect to incompatibility and abstention in the Illinois case of *Black v. Dukes*,<sup>16</sup> which involved an individual who served simultaneously on both a village grade school board of education and on the village's board of trustees. Under the Illinois Constitution, "officers and employees of units of local government and school districts" were authorized to "participate in intergovernmental activities authorized by their units of government without relinquishing their offices or positions."<sup>17</sup> Notwithstanding this provision, the state's attorney maintained that because the village board of trustees had the authority to channel "state revenue sharing funds" as financial aid to the school district (much as the quorum court in the present case may direct premium tax revenues to the city fire department), the dual office holder in each instance could not, as the court paraphrased it, "properly and fully perform all the duties of each office without experiencing an incompatible conflict of interest."<sup>18</sup>

In rejecting this challenge by reversing the circuit court's ruling, the court noted both that "intergovernmental cooperation" of the sort at issue was constitutionally sanctioned and that the dual office holder could recuse in any instance, as yet unrealized, of an actual conflict.<sup>19</sup> In a trenchant dissent, one justice noted that as a representative of both the recipient and the grantor of state revenue sharing funds, the dual office holder had "placed himself in the position where he may

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in apportioning available funds to another political subdivision. In the present context, however, this could not be considered a conflict inasmuch as the legislature has expressly condoned the practice.

<sup>16</sup> 439 N.E.2d 1305 (Ill. App. 1982). This judgment was vacated as moot on appeal in *Black v. Dukes*, 449 N.E.2d (Ill. 1983), based upon the fact that the dual office holder had resigned one of his offices effective the day before the Court of Appeals' ruling. The legal analysis offered below is nevertheless instructive.

<sup>17</sup> *Id.* at 1306, quoting Ill. Const. 1970 art. 7, § 10(b).

<sup>18</sup> 439 N.E.2d at 1306.

<sup>19</sup> *Id.* at 1307.

well have to serve two masters” – an enterprise the dissenting justice characterized as having “never proved to be a successful venture.”<sup>20</sup>

The dual office holder in the present case likewise acts both to dispense and to receive money. Indeed, much of the apparent conflict he faces arises from the fact that he represents two potential recipients of money that he participates in allocating, thus potentially dividing his loyalties in the course both of demanding and dispensing available funds. To this extent, he might indeed be characterized as serving not two, but *three* masters – the council as the dispenser of funds and both the county and the city as a potential recipients. Under these circumstances, the need at least to abstain from the allocation of funds would appear stronger than was the case in *Black*.

It is questionable, however, whether the dual office holder in this instance could avoid significant difficulties by abstaining. One problem with abstention is that it would disenfranchise the citizens of both the county’s unincorporated areas and of the City of Caldwell.<sup>21</sup> Moreover, for the dual office holder to abstain might further have the practical consequence in many instances of undermining the significant functions of the county intergovernmental cooperation council, which is legislatively charged with coordinating cooperative efforts among the county and its political subdivisions. In theory, in a sparsely populated county that contains few incorporated cities, the functioning of the county intergovernmental cooperation council would be totally undermined if the county judge, who likewise served as mayor of the county’s most populous city, were compelled to abstain from voting on this or a range of other potential issues. Assuming an intergovernmental cooperation council even presumed to act under such

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<sup>20</sup> *Id.* at 1308 (Scott, J., dissenting). In support of his dissent, Justice Scott invoked 1979-1980 Ill. Op. Att’y Gen. 81, which opined that state revenue sharing rendered incompatible the holding by the same individual of the offices of village mayor and school board member.

<sup>21</sup> The significance of this disenfranchisement is reflected in the legislative history of A.C.A. § 14-27-102, which apportions power among the members of a county intergovernmental cooperation council. Prior to the enactment of Acts 1993, No. 232, the county judge had a vote only in the event of a tie. Section 1 of Act 232 noted that then current law “is heavily weighted in favor of cities and incorporated towns and due to this inequity has left the rural, unincorporated areas of the several counties of Arkansas in danger of under representation.” The legislature in this section further declared “full and equal representation” to be “the public policy of the state.” In accordance with this policy, it afforded the county judge not only a vote, but further the chairmanship of the council and a veto power that could only be overridden by a 2/3 vote of the remaining members.

circumstances, it might be that the remaining council member(s) would represent a miniscule fraction of the county's entire population. Any such consequence would appear to be totally unacceptable and directly contrary to the legislature's intent.

In light of the foregoing, it seems unlikely that the legislature even contemplated that a single individual might fill two positions on the council by serving both as a county judge and as mayor of a city lying within the county. Such dual service would appear to generate potential conflicts not only in the particular circumstances you have described but in others as well – including, purely by way of illustration, in the interjurisdictional allocation of ambulance services. The question arises, then, whether such conflicts might arise with sufficient frequency to warrant a court's determining that the doctrine of incompatibility might, after all, render such dual service categorically impermissible. However, I must reiterate in this regard that neither the Code nor the Arkansas Constitution contains any direct proscription against simultaneously holding both offices.

By the same token, the paucity of either case law or Attorney General opinions throughout the nation addressing the issue suggests that such dual service is exceedingly rare. Under the circumstances, I can do no more than point out what I consider the significant conflict of interests that has apparently generated your concern. As noted above, only a court fully apprised of the facts would be situated to determine what remedy, if any, is called for in this instance.

Assistant Attorney General Jack Druff prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL  
Attorney General

DM/JHD:cyh