



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2015-074

August 28, 2015

The Honorable Bryan B. King
State Senator
871 County Road 814
Green Forest, AR 72638-2657

Dear Senator King:

This is in response to your request for an opinion on the following questions concerning a city council member's simultaneous service as fire chief for the city's volunteer fire department:

1. Can a city council member simultaneously serve in the position of fire chief?
 - a. If the answer is "yes," are there any circumstances in which that member would have to recuse himself from city council proceedings or matters?
2. Would the common law doctrine of incompatibility forbid one from serving as both a city council member and the fire chief?
3. Does it matter if the fire chief role is a paid or unpaid position?

RESPONSE

With the exception of Question 1(a), it is my opinion as explained below that the answers to these questions depend upon whether the particular fire chief position at issue is a "volunteer firefighter" position as contemplated by Ark. Code Ann. § 14-42-115. With regard to Question 1(a), the circumstances would be those isolated situations in which decision making might divide the individual's

allegiance between the interests at stake. Prudence would dictate abstention in those circumstances.

DISCUSSION

Question 1 - Can a city council member simultaneously serve in the position of fire chief?

(a) If the answer is “yes,” are there any circumstances in which that member would have to recuse himself from city council proceedings or matters?

The answer to the question whether a city council member can also serve as fire chief is governed by Ark. Code Ann. § 14-42-115, which expressly sanctions a city council member’s service as a “volunteer fire fighter”:

(a)(1) It is lawful for a volunteer firefighter ... in any city of the first class, city of the second class, or incorporated town in this state to seek election to, and if elected, to serve as a member of the city council or other governing body of the city or town.

(2) This service shall not be deemed a conflict of interest and shall not be prohibited by the civil service regulations of any city or town.

(b) A person may serve and receive compensation as a member of the governing body of any city of the first class, city of the second class, or incorporated town and simultaneously serve as a volunteer firefighter ... and receive compensation as a firefighter....¹

The statute does not define “volunteer firefighter” or “compensation,” or otherwise explain what is meant by “compensation” in the context of a “volunteer” firefighter. The statute is consequently ambiguous as to its intended application, given that there is no certain manner of compensation accorded to “volunteer” firefighters. When a statute is ambiguous, it is appropriate to consider the emergency clause in order to determine the legislative intent.² The emergency

¹ Ark. Code Ann. § 14-42-115 (Repl. 2013). This statute does not apply to cities with the city administrator form of government. *Id.* at subsection (c) (codification of Act 476 of 1993, stating that “[t]he provisions of this section shall not apply after August 13, 1993, to any city having a city administrator form of government.”).

² See *Heath v. Westark Poultry Processing Corp.*, 259 Ark. 141, 531 S.W.2d 953 (1976).

clause in this case indicates that the statute is intended to apply to firefighters who receive a “small amount of pay” only when “called upon to render fire service duties”:

[I]t is the consensus of the General Assembly that *the small amount of pay received by volunteer firemen only when they are called upon to render fire service duties does not constitute a conflict of interest* within any statutory or constitutional limitation, and that the immediate passage of this Act is necessary to clarify the authority of volunteer firemen to serve on the governing body of the municipality wherein the firemen serve.³

This emergency clause indicates that the question whether § 14-42-115 sanctions one’s simultaneous service as city council member and fire chief for the city’s volunteer fire department depends upon whether the fire chief is either unpaid or receives “compensation” within the intended meaning of the statute, i.e., a small amount when rendering fire service duties.⁴ If the fire chief is either unpaid or receives the small amount of “compensation” within the intended meaning of the statute, then § 14-42-115 sanctions simultaneous service.

I consequently cannot provide a clear “yes” or “no” answer to Question 1 above. I will nevertheless address Question 1(a) regarding a possible need to recuse under some circumstances, in the event § 14-42-115 sanctions the dual service as city council member and fire chief under the particular facts.

The fire chief, in his position as city council member, might occasionally face situations in which he is required to participate in decisions that will directly impact the fire department. If the particular facts of a situation indicate that any decision making might divide his allegiance between the interests that are at stake,

³ Acts 1981, No. 124, § 3 (emphasis added).

⁴ *Accord* Op. Att’y Gen. Nos. 2008-184, 2002-023, and 95-178 (all specifically addressing dual service as fire chief and city council member and opining, based on the emergency clause of Act 124 of 1981, that the legality of such service depends upon whether the fire chief receives a regular salary or is otherwise highly compensated as compared to other volunteer firefighters who are only paid a small amount when rendering fire service duties). *See also* Op. Att’y Gen. Nos. 2004-249, 2004-070, 2001-296, 98-047 and 96-025 (all opining that Ark. Code Ann. § 14-42-115 is intended to apply to members of a city volunteer fire department who receive a “small amount of pay” only when called upon to “render fire service duties.”).

then prudence dictates that he abstain from participating in the particular matter based upon the fact or the reasonable perception of his having divided loyalties.⁵

Question 2 - Would the common law doctrine of incompatibility forbid one from serving as both a city council member and the fire chief?

The Supreme Court has defined this doctrine as follows:

‘The inconsistency, which at common law makes offices incompatible, ... lies ... in the conflict of interest, as where 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.’⁶

In my opinion, the positions of city council member and fire chief are incompatible because the position of city council member exercises some degree of authority over the fire chief. This authority arises out of Ark. Code Ann. § 14-53-101 (Repl. 2013), which grants city councils the power and duty to establish fire departments, to provide them with equipment, and to promulgate rules and regulations for their governance.

However, simply knowing that the positions of city council member and fire chief are incompatible does not decide the question whether the doctrine forbids one’s dual service in these positions. A common-law rule can be abrogated by statute.⁷ As explained above, Ark. Code Ann. § 14-42-115 might expressly sanction such dual service, in which case the common law “incompatibility” doctrine would be superseded.

It is therefore my opinion that the answer to Question 2 depends upon whether the particular fire chief position at issue is a volunteer fire fighter within the intended scope of § 14-42-115, discussed above. If that statute applies, then the answer to Question 2 is “no.” The common law doctrine of incompatibility would not forbid

⁵ See Op. Att’y Gen. Nos. 2012-018, 2004-249, and 2001-042.

⁶ *Tappan v. Helena Federal Sav. & Loan Ass’n of Helena*, 193 Ark. 1023, 104 S.W.2d 458, 459 (1937), quoting 46 C.J. 942. Accord *Thompson v. Roberts*, 333 Ark. 544, 970 S.W.2d 239 (1998). See also *Byrd v. State*, 240 Ark. 743, 402 S.W.2d 121 (1966).

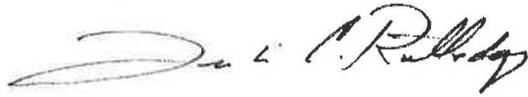
⁷ E.g., *Southwestern Bell Tel. Co. v. City of Fayetteville*, 271 Ark. 630, 634, 609 S.W.2d 914 (1980).

one from serving as both a city council member and fire chief, as long as the fire chief position is a volunteer fire fighter position under § 14-42-115. If § 14-42-115 does not apply, however, then I believe the doctrine of incompatibility would forbid the dual service.⁸

Question 3 - Does it matter if the fire chief role is a paid or unpaid position?

See response to Question 1 above.

Sincerely,



LESLIE RUTLEDGE
Attorney General

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⁸ If the particular fire chief's position does not fall within § 14-42-115, then I believe the dual service as city council member and fire chief would also be prohibited by Ark. Code Ann. § 14-42-107(a)(2) (Repl. 2013). This statute provides in relevant part that "[n]o alderman or council member shall be appointed to any municipal office, except in cases provided for in this subtitle, during the time for which he or she may have been elected." In my opinion, the position of fire chief is a "municipal office" for purposes of this prohibition. *Accord* Op. Att'y Gen. Nos. 2002-023 and 2001-296 (and opinions cited therein).