INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION



Work Session: Concurrent Panel Discussion 2
Tuesday, October 20, 2009

Title: Offices and Some of their Peculiarities

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Public Offices and Some of their Peculiarities

The work of local governments is carried on by at least three distinct groups—elected office-holders who make policy and see to its implementation; appointed office-holders and other employees who actually handle most of the day to day work of the governmental unit; and independent contractors hired by the local government to perform specific tasks on its behalf. This paper focuses on local elected and appointed public offices—both their characteristics and some of their distinguishing features or peculiarities.

What is An Office?

How does one define public offices and differentiate them from other positions? In general, determining whether a particular position is a public office involves looking at several issues. Does the position in question involve the exercise of independent decision-making power on behalf of the state or a duly constituted state subdivision such as a city or county, rather than being merely advisory? Is that power given by constitution or statute and does its exercise involve the carrying out of an important part of the executive, legislative, or judicial functions of government? Does the occupier of the position have significant legal power to make enforceable decisions concerning people's life, liberty, or property? Affirmative answers to one or more of these questions are a good indication that the position under consideration may indeed be a public office.[1]

Much of the law dealing with public offices developed a good while ago. Indeed, as we will see, English courts were wrestling with some of the issues in this area as early as the 1500's. However, once it was developed, most of the principles of office-holding have generally stayed stable through the years, meaning that case law from the nineteenth and early twentieth century is still relevant today, as are early treatises on the subject.

Early cases from North Carolina can provide an instructive example. That state's very restrictive dual office-holding provisions forced the North Carolina Supreme Court to decide a wide variety of cases about public offices in the last half of the nineteenth and the first half of the twentieth century. Significantly, one important reason that the court's decisions are helpful is because they relied on definitions of "office" from various early treatises on the subject.

One of the earliest attempts by the North Carolina Supreme Court to define the term "public office" is found in the 1872 case of *State ex rel. Clark v.*

[1] The Internal Revenue Service has taken a very different approach to the term "public official" in distinguishing among government employees, office-holders, and general contractors for federal income tax purposes. Please see the brief discussion of the status of contract local government attorneys in the last section of the paper.

Stanley.[2] The definition used there is cited with approval in several cases decided the next year.[3]

In *Clark*, North Carolina's chief justice explains that a public office "in its original, broad sense" is "an agency for the State, and the person whose duty it is to perform this agency is a public officer. . . . The essence of it is the duty of performing an agency, that is, of doing some act or acts or series of acts for the State."[4] Thus, for example, the executive, judicial, and legislative departments are agencies for the state, and the governor and other executive officials, the judges, and the members of the Senate and the House of Representatives are public officers.[5]

Another early definition of public office from North Carolina is found in *Eliason v. Cooper*, decided in 1882.[6] The *Eliason* court borrows from a legal treatise of the period, High on *Extraordinary Legal Remedies*, [7] and defines a public office "as a public position to which a portion of the sovereignty of the country, either legislative, executive or judicial, attaches for the time being, and which is exercised for the benefit of the public."[8] Relying on High, the court lists three tests to be applied in determining whether a position is a public office. The position's source should be "from the *crown or sovereign authority*, either by charter or legislative enactment." "[I]ts tenure should be fixed and permanent," and "its duties should be of a *public nature*."[9]

Does Permanency of Tenure or Exercise of the Office's Powers Matter?

The *Eliason* court's requirement of a fixed and permanent tenure is probably meant to suggest that the office-holder's tenure should last as long as the position or the office-holder's term in the position lasts. Thus the tenure of someone who holds an office that is set up to perform only one act would last until that act is performed; the tenure of someone who serves at the pleasure of a board lasts as long as the board is pleased; and the tenure of someone who holds an office with a four-year term lasts until that term is completed or until his or her successor is chosen and qualifies, whichever is later.[10]

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[2] State *ex rel.* Clark v. Stanley, 66 N.C. 60 (1872)
[3] In those cases, the court struck down several legislative attempts shortly after Reconstruction to remove various public office-holders by eliminating and immediately recreating their positions. *See*, *e.g.*, People *ex rel.* Welker v. Bledsoe, 68 N.C. 457 (1873) (board of directors of state penitentiary); People *ex rel.* Badger v. Johnson, 68 N.C. 471) (1873) (directors of state lunatic asylum); and People *ex rel.* Rogers v. McGowan, 68 N.C. 520 (1873) (keeper of the Capitol).
[4] State *ex rel.* Clark, 66 N.C. at 63.
[5] *Id.* at 64.
[6] Eliason v. Cooper, 86 N.C. 236 (1882).
[7] James Lambert High, *A Treatise on Extraordinary Legal Remedies, Embracing Mandamus, Quo Warranto, and Prohibition* (Chicago: Callaghan and Company, 1874).
[8] *Eliason*, 86 N.C. at 239-40, quoting High, *Treatise on Extraordinary Legal Remedies*, § 620.
[9] *Id.* at 240 (emphasis in original).
[10] "Hold-over" provisions are fairly common. They serve a useful purpose by helping to prevent

The court's concern with permanency of tenure may be related at least partly to the historical era during which the case was decided. At the time that *Eliason* was decided, North Carolina's courts still recognized a property interest or "vested estate" in public offices—an office-holder could not be summarily deprived of whatever emoluments and fees attached to his or her public office.[11] (This rule was not changed until the 1903 case of *Mial v. Ellington*, and it partly explains the *Eliason* court's concern with permanent tenure as a necessary attribute of public offices.) Nowadays, the creator of a public office, such as the legislature, can generally remove an office-holder from his or her position without worrying about a property rights claim from that individual, and the issue of tenure is not as important in defining public offices.[12]

In determining whether a position is an office, the key question is whether the powers attached to the position are those of a public office, not at whether those powers are actually being exercised. That is, if the position has the powers of an office, it is an office. As the North Carolina Supreme Court explained it, "[t]he extent to which the power may be exercised is not material. It is the fact that the power exists which is determinative."[13] Similarly, the term of the position is unimportant. "The test as to whether a position created by statute is an office is not the term of one holding the position, but the power conferred upon him while he is lawfully holding the position."[14]

Do Salaries and Oaths of Office Matter?

What about salaries and oaths of office? According to a North Carolina court, although most public officers are required to take oaths and most receive a salary or fees, these items "are mere incidents and constitute no part of the office." If no salary or fees are involved, "it is a naked office—honorary—and is supposed to be accepted merely for the public good." Further, a public office does not have to be continuing in nature. An office could involve doing only one act or it could be held for several years.[15]

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unnecessary vacancies in offices. *See, e.g.*, N.C. Const. art. VI, § 10. Under the rule announced in that section, office-holders in North Carolina generally continue to hold office until their successors are chosen and take whatever steps are needed to qualify for the office (e.g., taking and signing an oath or giving a bond).

[11] *See* Hoke v. Henderson, 15 N.C. 1 (1833), *overruled by* Mial v. Ellington, 134 N.C. 131, 162, 46 N.C. 961, 971 (1903). In Hoke, North Carolina Chief Justice Ruffin announced and eloquently explained the reasons for treating public offices as property that the legislature was not free in its discretion to take away. North Carolina was probably the last state to abandon this old English principle of public offices constituting vested estates.

[12] Interestingly, modern courts have revived the notion of property rights in public positions in deciding whether a dismissed public employee has been deprived of property without due process of law. Ironically, the modern day "property right" is generally found in public employments that are not themselves public offices.

[13] State *ex rel.* Att'y-General v. Knight, 169 N.C. 333, 341, 85 S.E. 418, 422 (1915), citing Midgett v. Gray, 159 N.C. 443, 74 S.E. 1050 (1912).

[14] State *ex rel.* Harris v. Watson, 201 N.C. 661, 667, 161 S.E. 215, 218 (1931).

[15] State *ex rel.* Clark v. Stanley, 66 N.C. 60, 63-64.

Public Offices versus Public Employment

How does a public office differ from public employment generally? Unfortunately, this line is hard to draw with precision. The *Eliason* court made an early attempt to do so with respect to public offices, explaining that "[t]he true test of a public office seems to be that it is parcel of the administration of government, civil or military, or is itself created by the law-making power."[16] And a later court decided that a person could serve on a city council (clearly a public office) at the same time that he was employed as the night watchman for the federal courthouse, under an appointment from the United States Treasury department. The court explained that the plaintiff in the case "by whomsoever appointed, and at whatever compensation, who is employed mainly to guard a public building at night, to prevent its destruction or injury from fire or other cause, is in no sense occupying a place of trust and profit, *but is employed in a specific service having none of the attributes to raise it to the dignity of the constitutional disqualification.*"[17]

Another variation on these ideas is found in *State ex rel. Barnhill v. Thompson*,[18] decided in 1898. Citing Mechem's treatise on public offices and officers, a United States Supreme Court case, and *Eliason*, the court states that an office involves "a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public, by which it is distinguished from employment or contract." [19]

A later court explained that a particular city government position (sinking fund commissioner) was an office, rather than a "mere public employment," due to several characteristics of the position. It "was not of a temporary character, and the duties were continuous and not intermittent. The incumbent was required to perform continuous public service for a definite period and of a very responsible character."[20]

Applying the Definitions

Unfortunately, most parts of these definitions are not particularly helpful. A great many public jobs are concerned in some way with the administration of government. Most are permanent rather than temporary, with continuous, non-intermittent duties. All public positions by their very nature involve public

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[16] Eliason v. Cooper, 86 N.C. 236, 240-41 (1882). The court also admitted that "it is no easy task to run the discriminating line which separates such offices and places from employments in the public service which are not embraced in those terms."
[17] Doyle v. Aldermen of Raleigh, 89 N.C. 133, 136 (1883) (emphasis added).
[18] State *ex rel.* Barnhill v. Thompson, 122 N.C. 493, 29 S.E. 720 (1898).
[19] State *ex rel.* Barnhill, 122 N.C. at 495-96, 29 S.E. at 721. *See* Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* (Chicago: Callaghan and Company, 1890), §§ 1, 4, and United States v. Hartwell, 73 U.S. (6 Wallace) 385, 393 (1867) ("An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties.")
[20] Borden v. City of Goldsboro, 173 N.C. 661, 662, 92 S.E. 694, 695 (1917).

service, and are exercised for the benefit of the public. And what specific attributes raise a public position to the "dignity" of a public office? Do not all public positions derive their legitimacy from the sovereign and hence involve "sovereign functions"?

The one characteristic in these lists that might provide a useful distinction is the last one mentioned: public offices involve public service of "a very responsible character." This trait of great responsibility may well be what the *Eliason* court had in mind when it explained that a portion of a country's (or state's) sovereignty attaches for the time being to a public office.[21] Perhaps another way to state the same idea is to say that public officers have a good deal of independent decision-making power involving the exercise of discretion.

Thus the fact that someone holds a public job does not alone make that person a public officer. But the more discretion, responsibility, and power to make decisions that a position involves, the more likely that courts will see that position as a public office rather than as "mere employment." And this may be particularly true if the position involves the relatively direct exercise of the State's authority.

A 1965 North Carolina Supreme Court case is consistent with this view. In *State v. Hord*,[22] the court examined the question of whether police chiefs and officers are public officers or public employees for purposes of a statute dealing with willful failure to discharge official duties.[23] The court pointed out that what determines a police officer's status is "the nature and extent of his duties and responsibilities with which he is charged under the law," and it referred to the position's creation by the sovereign power and the position's exercise of part of that power as distinguishing an office from employment.[24] The court held that duly appointed chiefs of police, as well as police officers, are public officers rather than mere employees within the meaning of the statute.[25]

In determining whether a position is an office, one should generally look at whether the powers attached to the position are those of a public office, not at whether those powers are actually being exercised. If the position has the powers of an office, it is an office. "The extent to which the power may be exercised is not material. It is the fact that the power exists which is determinative."[26]

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[21] *Eliason*, 86 N.C. at 239-40.
[22] State v. Hord, 264 N.C. 149, 141 S.E.2d 241 (1965).
[23] N.C.G.S. § 14-230.
[24] *State v. Hord*, 264 N.C. at 155, 141 S.E.2d at 245 (citation omitted). Specifically, "to constitute an office, as distinguished from employment, it is essential that the position must have been created by the constitution or statutes of the sovereignty, or that the sovereign power shall have delegated to an inferior body the right to create the position in question. An essential difference between a public office and mere employment is the fact that the duties of the incumbent of an office shall involve the exercise of some portion of the sovereign power." *Id.* (citations omitted).
[25] *Id.*
[26] State *ex rel*. Atty-General v. Knight, 169 N.C. 333, 341, 85 S.E. 418, 422 (1915), citing Midgett v. Gray, 159 N.C. 443, 74 S.E. 1050 (1912).

Similarly, the term of the position is unimportant. "The test as to whether a position created by statute is an office is not the term of one holding the position, but the power conferred upon him while he is lawfully holding the position."[27]

Advisory Positions versus Offices

Another distinction that must be made is between positions that actually involve the exercise of sovereign power and those that are merely advisory. No matter how wise or extensive one's advice may be, nor how much it is listened to by others, a position is not a public office if one can only advise and not decide. Thus, for example, the members of a local planning board are not public officers if they only make recommendations to the governing body concerning re-zonings and subdivision plats. But if the planning board is given the responsibility of approving subdivision plats, so that a plat cannot be recorded in the jurisdiction's land records office without that approval, the position of planning board member is probably an office. Decisions about governmental recognition of a particular scheme for dividing land involve discretion and the exercise of a fair amount of sovereign governmental power.

These examples suggest one other important, albeit rough, test for public offices. Simply put, does the person holding the position have the legal standing to "make other people jump" because of his or her governmental role? As noted above, if I want to record a subdivision plat, I may be required by law to go to the planning board for its approval. Similarly, if a police officer decides to arrest me for violating a law, I must obey his or her orders, and I may suffer severe sanctions at the hands of the state if I choose not to do so. As another example, certain types of transactions will not be recognized in a court of law unless the parties' signatures are notarized. The police officer and the notary public are most likely public officers[28] just as the members of a planning board with plat approval authority probably are, and they may have received that designation as much because of the legal power that they wield over people's lives as because of the amount of independent discretion that they exercise.

The "jump test," while useful, should not be relied on alone to answer all the questions concerning what an officer is. Consider, for example, the position of city or county manager. Managers can be characterized as public officers, due to the amount of independent discretion that they exercise. Yet they do not generally have the amount of legal power over ordinary citizens' lives that the jump test involves.

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[27] State *ex rel*. Harris v. Watson, 201 N.C. 661, 667, 161 S.E. 215, 218 (1931).

[28] *See Hord*, 264 N.C. at 155, 141 S.E.2d at 245 (1965) (chief of police and policeman; case distinguishes office from employment for purposes of N.C.G.S. § 14-230, a statute dealing with willful failure to discharge official duties), and *Knight*, 169 N.C. at 353, 85 S.E. at 428 (1915) (notary public).

Who Decides?

While courts defer to legislatures whenever possible, a state's courts will generally reserve for themselves the last word on what constitutes an office, This is particularly the case if the state's office-holding rules are based in its constitution, since courts, and not legislatures, are the ultimate interpreter of constitutional provisions. For example, the North Carolina General Assembly has declared on several occasions that a particular position is not an office, and the state supreme court has disagreed, holding that it is.[29]

There is no logical reason why the same principle should not work in the other direction as well. That is, a legislative declaration that a particular position is an office does not necessarily make it one.

Incompatibility of Offices: General Principles

In addition to defining offices, one must also determine what offices may be held at the same time by the same person. Indeed, early English jurisprudence on public offices focused particularly on whether or not particular positions could be held at the same time; that is, whether they were incompatible.

Early English law dealing with offices. The idea that certain offices are incompatible seems to have developed gradually in English common-law from the 1500s to the 1800s as the courts came to see the potential for conflict between certain public positions. In cases from the late-sixteenth and early-seventeenth centuries, for example, a person who was mayor and judge was allowed also to be the sheriff who kept the jail,[30] and the bailiff who executed process was allowed "by custom" to sit as a judge in the same case.[31] But by the mid-to-late 1700s, English courts were suggesting that some positions were compatible and others were not.[32]

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[29] "Declaring [a certain position] not a public office does not make it so, or render the incumbent immune from the ordinary requirements of public office holding. [*State ex rel.*] Clark v. Stanley, 66 N.C. 59 [1872]." Vance S. Harrington & Co. v. Renner, 236 N.C. 321, 327, 72 S.E.2d 838, 842 (1952). "[Certain positions] have been held to be offices, as we have declared in this opinion, and the Legislature by simply declaring that they shall not be offices does not change the nature of the thing. . . . It is idle, under the decisions of this court, to say that [a certain position] is not an office, as it would be to say that a horse is not a horse because one may choose to call him some other animal." Wood v. Bellamy, 120 N.C. 212, 223, 27 S.E. 113, 116 (1897), quoted with approval in State *ex rel.* Attorney General v. Knight, 169 N.C. 333, 350, 85 S.E. 418, 426 (1915). *See also* the cases cited in note 3.

[30] Gabriel Widow v. Clerke, 78 Eng. Rep. 336 (c. 1586).

[31] Crane v. Holland, 79 Eng. Rep. 721 (c. 1628).

[32] For examples of incompatibility questions in English law, *see* King v. Gayer, 97 Eng. Rep.296 (1757) (argument made that justice of the peace and overseer of the poor are incompatible; case decided on other grounds although Lord Kenyon suggests in King v. Pateman, 100 Eng. Rep. 419 (1788), that incompatibility was found); King v. Trelawney, 97 Eng. Rep. 1010 (1765) (steward and capital burgess were compatible; mayor and steward might not be); and Milward v. Thatcher, 100 Eng. Rep. 45 (1787) (suggestion by at least one judge that offices of jurat and town clerk are incompatible; case decided on other grounds).

To the English judges, compatibility depended on the relationship between the two offices involved in the particular case. Thus if one position was subject to the supervision or control of the other, the positions were incompatible. In a 1788 case, Chief Justice Lord Kenyon explained that the offices of alderman and town clerk were not necessarily incompatible, but could be in certain instances. If an alderman was also a judicial officer (a magistrate) and if the town clerk performed ministerial functions under him, the two offices of alderman and clerk could not be held by the same person. Similarly, if the accounts of a town clerk were audited by the aldermen of the town, the two offices of alderman and clerk would be incompatible.[33]

In an 1829 case, one of the judges explained that "two offices are incompatible where the holder cannot, in every instance, discharge the duties of clerk from office one could not be both an alderman and clerk.[34] On the other hand, in a case where the aldermen apparently did not have power to remove the clerk or set his fees and did not directly audit his books, the positions of alderman and clerk were held to be compatible.[35]

The English idea of incompatibility was retained in early-American case law,[36] as well as being incorporated in statutory and constitutional provisions dealing with multiple office-holding. The prohibitions that arose focused both on worries about conflicting interests[37] and on a separate, related concern—that when one person plays several public roles at once, the concentration of power and the potential for abuse increase.[38]

Why incompatibility matters. Concerns about incompatibility in public positions and other conflicts of interest are related closely to fundamental principles and values central to a democracy, such as impartiality, fairness, and acting in the public's interest rather than doing what is best for oneself. These principles in turn underlie the public trust on which our democratic governmental structure is built. When one tries to play multiple or conflicting roles, these fundamental principles can be threatened by the conflicting demands of the different positions.

The potential for damage to our system of government from these types of conflicts has led courts and legislatures to require a high standard of behavior for public officials. Courts may reason that the relationship of public officers to the

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[33] *Pateman*, 100 Eng. Rep. at 420.
[34] King v. Tizzard, 109 Eng. Rep. 155, 157 (1829).
[35] King v. Jones, 109 Eng. Rep. 938, 940-41 (1831).
[36] *See, e.g.*, State *ex rel.* Clawson v. Thompson, 20 N.J.L. 689 (1846), State *ex rel.* Metcalf v. Goff, 9 A. 226 (R.I. 1887), and State v. Buttz, 9 S.C. 156 (1877).
[37] *See, e.g.*, the Kentucky Constitution, which refers to its multiple office-holding prohibitions as bans on incompatible office-holding. KEN. CONST. §§ 165 and 237.
[38] For example, as the language of the present North Carolina Constitution recognizes, there is a "potential abuse of authority inherent in the holding of multiple offices by an individual." N.C. CONST art. VI, § 9(1).

people they serve is one of trust,[39] or "involving trust and confidence."[40] Those who serve the public are expected to behave as fiduciaries, mindful of the trust that has been placed in them to act on behalf of others besides themselves.[41] Since "public office is a public trust,"[42] public officials "are required to exercise a high degree of fidelity, care and caution, in the public interest."[43]

Public officers must remember the key principle of fiduciary responsibility that an agent or trustee must act in a way that protects the interests of the principal or the beneficiary (in this case, the governmental unit) and must avoid profiting personally from the fiduciary relationship, even if his or her actions also benefit the principal or beneficiary. At the heart of rules about incompatibility and other conflicts of interest is this idea that public officials must carefully separate their public responsibilities from their other roles in order to protect the public trust.

Survival of the incompatibility doctrine. American constitutional and statutory provisions dealing with holding more than one office simultaneously date at least to the Revolutionary Era. Given the existence of such rules in many states, the first question that must be addressed concerning common-law incompatible office-holding concerns its current status in a particular jurisdiction. That is, do the constitutional and statutory rules of a state effectively preempt the common law in the area of office-holding, or do common-law incompatibility rules continue to apply, at least in some instances? For example, may the common law operate to prevent the holding of two offices simultaneously if they are judged to be incompatible, even if holding the two positions would be permitted under other multiple office-holding rules of that jurisdiction?

Although the answer is not completely clear, it is probably safe to assume that the common-law doctrine of incompatible office-holding survives in some form in many localities. It may, for example, exist alongside the constitution and statutes, as in North Carolina.[44] or it may itself have assumed the status of constitutional doctrine, as in Kentucky.[45]

One of the more thorough and helpful examinations of the relationship between common-law incompatibility rules and constitutional provisions on office-holding is found in a nineteenth-century incompatibility case from South Carolina, *State v. Buttz*.[46] South Carolina's constitution had provisions declaring

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[39] *See* Lexington Insulation Co. v. Davidson County, 243 N.C. 252, 255, 90 S.E.2d 496, 498 (1955).
[40] *See, e.g.*, Stone v. Bevans, 92 N.W. 520, 520 (Minn. 1902).
[41] See the discussion of types of trust in Bernard Barber, THE LOGIC AND LIMITS OF TRUST ((New Brunswick, N.J.: Rutgers University Press, 1983), 14.
42 Lexington Insulation Co., 243 N.C. at 255, 90 S.E.2d at 448, quoted in CHESTER J. ANTIEAU, LOCAL GOVERNMENT LAW § 39.02 (Release 72, 1995).
[43] EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 29.97 (3d ed. rev. vol. 1990).
[44] See note 37 above.
[45] See note 36 above.
[46] State v. Buttz, 9 S.C. 156 (1877).

that qualified persons were eligible to vote and voters were eligible to hold office, and it contained various provisions prohibiting multiple office-holding and imposing other office-holding restrictions. It was contended in the case that the common law had been abrogated by these constitutional provisions on the subject of office-holding.

The South Carolina Supreme Court rejected this argument. Among its reasons, it noted that constitutional provisions establishing requirements for *holding office at all* were different from rules dealing with *which offices may be held at the same time*.[47] The latter sorts of rules were included in the common law but not in the constitution, and the court was unwilling to abrogate the common law merely by implication.[48]

Types of Incompatibility and Related Issues

Assuming that the common-law incompatibility doctrine survives in a number of American jurisdictions,[49] we will next examine what types of office-holding it prohibits.[50] Common-law incompatibility involves a conflict between the *functions* or *duties* of two offices, as opposed to a conflict between the personal and public interests of a particular public official.[51] Whether or not the individual holding the two positions has the capacity to act impartially is immaterial.[52] *It is*

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[47] *Id.* at 177. Another more recent case that reaches the same conclusion is Reilly v. Ozzard, 166 A.2d 360 (N.J. 1960). It was argued in *Reilly* that the existence of state constitutional qualifications for serving in the state legislature precluded adding other requirements for such service such as common-law incompatibility rules. The New Jersey Supreme Court disagreed, reasoning that "Prohibiting a legislator to hold another office neither denies eligibility for legislative membership nor frustrates the discharge of the duties f a legislator. *Eligibility for office is one thing; the right to pursue governmental activities extraneous to the office of legislator is something else.*" Reilly, 166 A.2d at 363 (emphasis added). The *Reilly* court also refused to apply the *expressio unius* doctrine to exclude the application of common-law incompatibility principles, even though the New Jersey constitution, like North Carolina's, included dual-holding provisions. *Reilly*, 166 A.2d at 364-65.

[48] Buttz, 9 S.C. at 182. Accord, Reilly, 166 A.2d at 364–66 (neither state constitution nor a specific legislative enactment abolishes common law by implication); State *ex rel.* Thomas v. Wysong, 24 S.E.2d 463, 466 (W. Va. 1943) (constitution supplements but does not replace common law).

[49] See the incompatibility and multiple office-holding cases from various jurisdictions cited in the next sections of the paper.

[50] There are several North Carolina attorney general opinions that deal directly with incompatible office-holding. Others involve public positions that might be seen as incompatible, though the opinions themselves speak primarily of contractual or other conflicts of interest. Some examples include 60 Op. N.C. Att'y Gen. 50 (1990), 57 Op. N.C. Att'y Gen. 33 (1987), 55 Op. N.C. Att'y Gen. 28 (1985), 52 Op. N.C. Att'y Gen. 102 (1983), 41 Op. N.C. Att'y Gen. 577 (1971), 40 Op. N.C. Att'y Gen. 560 (1969), 40 Op. N.C. Att'y Gen. 563 (1969), and 40 Op. N.C. Att'y Gen. 566 (1969). These opinions are not legally authoritative, but they are instructive.

[51] A helpful comparison of conflict of duties and conflict of interests is found in Reilly, 166 A.2d at 370.

[52] EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 12.67 (3d ed. rev. vol. 1990).

the potential for conflict between the positions that is important, rather than whether or how frequently a conflict actually arises in practice.[53]

Incompatibility cases require a fact-specific examination of the responsibilities of the positions involved, in order to determine whether those duties clash.[54] This inquiry is very different from that in multiple office-holding cases in states that impose limits on the number of offices that may be held simultaneously. There, once the positions in question are determined to be public offices, the only remaining questions relate to the number of offices actually being held. Determining whether the duties of the multiple offices conflict is irrelevant.[55]

Subservience as a measure. Commentators and courts have identified several types of common-law incompatibility. First, under the common law one generally cannot hold two positions when one of them is subservient to the other. This is the most widely applied aspect of the doctrine, and has been recognized as part of American common law since at least the second half of the nineteenth century. Indeed, some jurists and commentators in the nineteenth century insisted that this was the *only* kind of incompatibility that was legally recognized. See the next section "Is Incompatibility Based on Subservience the Only Kind?" for a more detailed analysis of this issue.

One of the earlier American cases that explicitly recognizes this aspect of the incompatibility doctrine was decided in 1846 in New Jersey.[56] The prosecutor of the pleas of the county of Salem (criminal prosecutor) was appointed as state attorney general, but continued to act as the county prosecutor at the same time. Another person was appointed as prosecutor, and he challenged the attorney general's actions. After citing a number of English incompatibility references, the New Jersey Supreme Court held that the positions of county prosecutor and state attorney general were incompatible. The court noted that the prosecutor was to some extent under the attorney general's control, even though the attorney general did not appoint the prosecutor. Thus, both positions could not be held by the same individual.[57]

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[53] *See, e.g.*, Otradovec v. City of Green Bay, 347 N.W.2d 614, 616 (Wisc. App. 1984) (potential conflicts are enough to establish incompatibility; "[i]t is sufficient that substantial conflicts might arise that would be detrimental to the public"); and State v. Brown, 5 R.I. 1, 7 (1857). ["The question of incompatibility is to be determined from the nature of the duties of the two offices, and not from a possibility, or even a probability, that the defendant might duly perform the duties of both." Quoted in State *ex rel.* Metcalf v. Goff, 9 A. 226, 228 (R.I. 1887).]

[54] *See* State of North Dakota v. Lee, 50 N.W.2d 124, 126 (N.D. 1951): "It is hard, and the courts have hesitated to form a general definition of what constitutes incompatibility. Each case is discussed and decided upon its particular facts. The functions and duties of the offices are determinative of whether they are incompatible or not."

[55] See the discussion of the effects of violating North Carolina's multiple office-holding rules in A. Fleming Bell, II, ETHICS, CONFLICTS, AND OFFICES: A GUIDE FOR LOCAL OFFICIALS, 2d ed. (Chapel Hill, N.C.: School of Government), forthcoming, Chapter 6.

[56] State *ex rel.* Clawson v. Thompson, 20 N.J.L. 689 (1846).

[57] *Id.* at 690–91. Another early case to the same effect is Attorney General v. Common Council, 70

More recent cases recognize the same rule. For example, the Michigan Supreme Court concluded in a 1941 decision that one person could not hold the positions of county school commissioner and state legislator at the same time.[58] The court decided that the two offices were incompatible because the school commissioner position was subordinate to the legislature and subject to its control. The legislature established the school commissioner position and set its powers and duties, eligibility requirements, and minimum salary.

Some other examples of incompatibility involving the existence of supervisory or review power of one office over another include cases from Arkansas and Ohio (county board of education with supervisory responsibility over district school board, so that one person could not serve on both boards at the same time);[59] Massachusetts (offices of county commissioner and clerk of district court are considered incompatible, because under Massachusetts law the commissioners control the clerk's expenses, the town in which the clerk's office is to be located, and other matters related to the clerk's office);[60] Montana (alderman and city purchasing agent are incompatible, since the purchasing agent is an employee of the city);[61] and North Dakota and Wyoming (school board member and teacher are incompatible).[62]

Is incompatibility based on subservience the only kind? There was some dispute in the late nineteenth century over whether there actually *were* any other types of incompatibility besides that based on subservience. On the one hand, it is true that English statements concerning the doctrine include other types of incompatibility besides that based on subservience of one position to another. See, for example, the early English sources mentioned in Chapter 4 and another early definition provided in Matthew Bacon, "Offices and Officers," Section (K) in *A New Abridgement of the Law* (Philadelphia: Farrand and Nicholas, 1811), which cites as authority Lord Coke and lists at least two types of incompatibility.

This first American edition of Bacon's *Abridgement* states: "Offices are said to be incompatible and inconsistent, so as to be executed by the same person, when, from the multiplicity of business in them, they cannot be executed with care and ability, or when their being subordinate and interfering with each other it

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N.W. 450 (Mich. 1897), in which the court held that a person could not be a mayor of Detroit and governor of Michigan at the same time. One of the grounds on which the court relied was common-law incompatibility, since in some limited instances the governor could remove the mayor from office. The court refers to English incompatibility precedents, among other sources, in reaching its decision.

[58] Weza v. Auditor Gen., 298 N.W. 368 (Mich. 1941).

[59] Byrd v. State, 402 S.W.2d 121 (Ark. 1966); State *ex rel.* Hover v. Wolven, 191 N.E.2d 723 (Ohio 1963).

[60] Russell v. Worcester County, 84 N.E.2d 123 (Mass. 1949).

[61] State *ex rel.* Klick v. Wittmer, 50 Mont. 22, 144 P. 648 (1914).

[62] Tarpo v. Bowman Pub. Sch. Dist. No. 1, 232 N.W.2d 67 (N.D. 1975); Haskins v. State *ex rel.* Harrington, 516 P.2d 1171 (Wyo. 1973). For other examples, see the cases cited in EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 12.67, n.19 (3d ed. rev. vol. 1990).

induces a presumption they cannot be executed with impartiality and honesty." [Quoted in State v. Buttz, 9 S.C. 156, 183–84 (1877) (edition quoted not specified).] See also the definition of incompatibility in State *ex rel*. Metcalf v. Goff, 9 A. 226, 227 (R.I. 1887): "The test of incompatibility is the character and relation of the offices, as, where one is subordinate to the other, and subject in some degree, to its revisory power; or where the functions of the two offices are inherently inconsistent and repugnant. In such cases it has uniformly been held that the same person cannot hold both offices." (Interestingly, the *Metcalf* court also cites People *ex rel*. Ryan v. Green, 58 N.Y. 295 (1874), discussed below, with approval for the proposition that "incompatibility does not depend upon the incidents of the offices, as upon physical inability to be engaged in the duties of both at the same time." *Metcalf*, 9 A. at 226.) See also Attorney General *ex rel*. Attorney General v. Common Council of City of Detroit, 70 N.W. 450, 458 (Mich. 1897), which quotes the first *Metcalf* excerpt above and cites Bacon indirectly through a quotation from another case. The *Detroit* court also quotes a definition stating that incompatibility exists "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." *Id*. (quoting Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* (Chicago: Callaghan and Company, 1890), § 429).

On the other hand, Judge Charles J. Folger, in a widely cited New York case, People *ex rel*. Ryan v. Green, 58 N.Y. 295 (1874), asserted that for incompatibility to occur required that one position be subordinate to another. "The offices must subordinate, one [with] the other, and they must, *per se*, have the right to interfere, one with the other, before they are incompatible at common law." *Id*. at 305. Folger based this opinion on the research of a lower court judge in the same case, who reviewed a number of incompatibility cases. That judge claimed that despite broader statements of the common law, such as the one above attributed to Lord Coke, "there are no cases of adjudged incompatibility involving any other principle [than subservience]." People *ex rel*. Ryan v. Green, 46 How. Pr. 169 (1873), *rev'd on other grounds*, 58 N.Y. 295 (1874). An 1890 treatise, *A Treatise on the Law of Public Offices and Officers*, took a similar position, relying on the *Green* case (Mechem, *A Treatise on The Law of Public Offices and Officers*, § 422).

As we will see, the limited *Green* view of incompatibility is no longer correct, if it ever was. See, for example, dicta in Troy v. Wooten, 32 N.C. 377, 379 (1849), decided prior to *Green*, recognizing that the positions of judge and attorney general are incompatible because of the nature of the duties of the two positions, with no mention of the subservience idea.

Performance as a measure. A second type of common-law incompatibility involves the literal inability to perform adequately in both jobs at once, either because of the physical locations of the jobs or the time demands of each

position.[63] The result in *In re Martin*, in which the North Carolina Supreme Court advised the governor that the positions of brigadier general for the Confederate States of America and adjutant general of North Carolina were incompatible, illustrates this aspect of the rule, as does a later North Carolina advisory opinion, *In re Yelton: Advisory Opinion*, that cites *Martin*.[64]

Yelton arose when the comptroller of the state board of education accepted a temporary commission as a United States Army captain. The governor at the time, J. Melville Broughton, wished to know whether Mr. Yelton could be granted a leave of absence from the comptroller's position and still retain that position, during his temporary service in the army. The supreme court concluded that for multiple office-holding purposes, the army commission was equivalent to serving as an officer in the militia, which the constitution specifically exempted from the ban on holding more than one office.

The court then stated that the fact that Mr. Yelton's army service was temporary and not permanent "saves the case from incompatibility, *In re Martin*, *supra*, which would undoubtedly result, if the services contemplated were those of the professional, permanent soldier, as distinguished from those of the temporary citizen-soldier."[65] Although the court did not explain its reasoning in

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[63] Perkins v. Manning, 122 P.2d 857 (Ariz. 1942) (major in United States army and Arizona superintendent of public health); State v. Buttz, 9 S.C. 156 (1877) (state solicitor and member of Congress).

McQuillin's treatise on municipal corporations asserts that the fact that it is physically impossible to perform the duties of both offices does not in itself make them incompatible, that an inconsistency in their functions is required. MCQUILLIN, LAW OF MUNICIPAL CORPORATIONS § 12.67. There are cases from several jurisdictions, perhaps a majority, that support this view. *See, e.g.*, State *ex rel.* Thomas v. Wysong, 24 S.E.2d 463, 466 (W. Va. 1943) (state attorney general and United States army officer holding a temporary commission during wartime not incompatible; explicitly agrees with *Bryan v. Cattell*, cited later in this note, rather than with *Perkins*); People *ex rel.* Ryan v. Green, 58 N.Y. 295 (1874) (state legislator and clerk of the court of special session held not incompatible, even though court acknowledges that one could not simultaneously act in both positions); and Bryan v. Cattell, 15 Iowa 538 (1864) (district attorney and federal army officer not incompatible).

Such an argument ignores the fact that the physical requirements of a position (e.g., time and location) are basic "givens" underlying all of its functions and hence are the most basic criteria for judging incompatibility. It would have been nonsensical, for example, for the court in *Buttz* to assert that the functions of the positions of member of Congress and solicitor were compatible, if it was physically impossible for one person to do both jobs.

In *Perkins* the Arizona Supreme Court explained well the implications of such an assertion. "While the decided weight of authority supports the conclusion [in *Bryan*], we think the rule laid down [in that case] takes too narrow a view of the requirements of public policy. If it be correct, then it would be entirely possible for the governor of Arizona at the same time to be governor, United States Senator and mayor of Phoenix, for the duties of the different positions are in no way in conflict, in the sense referred to by the majority rule, yet it is obvious that it would be a physical impossibility for one person properly to perform the duties of all three positions. And we are sure it would shock the common sense of the ordinary man to hold that all of these positions were compatible and could be held at the same time by one individual." *Perkins*, 122 P.2d at 861.

[64] *In re* Yelton: Advisory Op., 223 N.C. 845, 28 S.E.2d 567 (1944).

[65] *Id.* at 852, 28 S.E.2d at 571 (citations omitted).

detail, it is logical to assume that permanent service in the army would be incompatible with service as comptroller because of time and distance concerns.

The reasoning behind this part of the ban is well stated in the South Carolina case, *State v. Buttz*,[66] discussed earlier. In *Buttz* the South Carolina Supreme Court held that the positions of state solicitor and member of Congress were incompatible. The court noted that the two positions were located in different cities, and involved such a "multiplicity of business" as to make it impossible to perform them both "with care and ability."[67]

Fair treatment as a measure. Fair or impartial treatment of citizens lies at the heart of the third type of common-law incompatibility. For example, the common law assumed that one could not serve simultaneously as judge and prosecutor, since this would create a risk that one might have to advocate for a position in a particular case and then judge that case impartially on the merits. As the North Carolina Supreme Court put it in 1849 in *Troy v. Wooten*, discussed earlier, the duties of these two positions are "in their nature incompatible."[68]

The exact limits of the fairness restriction are not completely clear. For example, in *State v. Joyner*,[69] decided in 1900, the North Carolina Supreme Court was not troubled by a statute conferring on mayors the power to act *ex officio* as justices of the peace in criminal matters, even though this meant that mayors could be involved in enacting, enforcing, and judging violations of local ordinances. Another statute at issue in the *Joyner* case required cases to be removed from one justice of the peace to another if either party in the case filed an affidavit that they were unable to obtain justice before the first justice of the peace. Such an affidavit was in fact filed in *Joyner*, but the court refused to enforce the removal requirement. It explained that the removal statute did not apply, since the mayor was only acting as a justice of the peace *ex officio* in criminal matters and did not truly hold the 0ffice of justice of the peace.[70]

And in both *State v. McHone*[71] and *State v. Lord*,[72] dating respectively from 1955 and 1907, the North Carolina Supreme Court upheld the actions of police

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[66] Buttz, 9 S.C. 156.
[67] *Id*. at 184, *quoting* from Matthew Bacon, "Offices and Officers," Section (K), in A New Abridgement of the Law (Philadelphia: Farrand and Nicholas, 1811), which in turn cites Lord Coke as authority. *See also Perkins* and State *ex rel*. Welty v. Outland, 77 N.E.2d 245 (Ohio 1948) (positions of prosecuting attorney and military officer are incompatible, because one person cannot do both jobs at once, and even if one could, civil responsibilities would have to be subordinated to military ones).
[68] Troy v. Wooten, 32 N.C. 377, 379 (1849). Under current North Carolina law, prosecutor and judge positions are both elective offices, so that the constitutional multiple office-holding ban on holding more than one elective office applies. Other rules, such as the Code of Judicial Conduct, would also prevent holding both positions simultaneously.
[69] State v. Joyner, 127 N.C. 541, 37 S.E. 201 (1900).
[70] *Id.* at 541–43, 37 S.E. at 201–02.
[71] State v. McHone, 243 N.C. 231, 90 S.E.2d 536 (1955).
[72] State v. Lord, 145 N.C. 479, 59 S.E. 656 (1907).

officers who also served as justices of the peace, and who issued arrest warrants in the latter capacity. In *Lord* the court also upheld a statute that allowed the same person to act as recorder (judge) of a recorder's court and to serve as a justice of the peace, issuing warrants in the latter role.[73]

As the requirements of procedural due process have expanded in recent years, concerns about that constitutional doctrine have become a more important part of the fairness branch of incompatible office-holding doctrine. Under both the federal and state constitutions, certain procedural requirements must be met whenever governmental action is proposed that may affect a person's life, liberty, or property. Some more recent decisions from the United States Supreme Court and elsewhere take a case-by-case rather than a position-by-position approach to this question, and find incompatibility in a specific situation if the right to procedural due process is denied. While there may be extreme cases where bias on the part of a decision maker is assumed (e.g., when one seeks to be a judge in one's own case),[74] there is generally a presumption—at least in administrative adjudication—of honesty and integrity on the part of adjudicators, even if the adjudicator also plays another role such as investigator.[75]

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[73] Justices of the peace in North Carolina were exempt from the constitutional dual office-holding ban that existed in the state prior to 1971. *Cf.* State *ex rel.* Metcalf v. Goff, 9 A. 226 (R.I. 1887), in which the Rhode Island Supreme Court concluded that the positions of district court justice and deputy sheriff were incompatible and could not be held by the same person. The court based its decision on the "incongruity" of having the person who serves civil process (deputy sheriff) involved in issuing that same process and deciding on the sufficiency of its return (justice). The court noted that it was the *nature of the duties* of the two offices that made them incompatible rather than the possibility or probability that the same person might actually have to perform the duties of both at the same time.

Not all Western nations share this point of view. In countries that follow the civil law tradition, for example, the judge in a criminal case also might be involved in investigating the case. And despite the Rhode Island court's holding, a good argument can be made that it is possible to prevent incompatibility by simply prohibiting one person from performing both roles in the same case while not banning the simultaneous holding of both positions outright.

[74] Another example of assumed or per se bias may be cases where the same person holds the positions of both trial judge and appellate judge. Consider, for example, the offices of zoning enforcement officer and board of adjustment member. In some jurisdictions the enforcement officer makes decisions about the meaning of the zoning ordinance, and his or her determinations may be appealed to the board of adjustment. *See, e.g.*¸ [G.S. 153A-345(b), G.S. 160A-388(b) (North Carolina). One might expect a court to find these two offices to be incompatible. While the board does not supervise the enforcement officer, and it is not physically impossible for one person to perform both jobs, it seems unfair to persons appealing an interpretation of the zoning ordinance made by the enforcement officer to have that same officer sitting on the board that hears their appeals.

But see Boston v. Webb, 783 F.2d 1163 (4th Cir. 1986) (North Carolina case) (city manager may be involved both in the decision to fire an employee and in making the decision at subsequent constitutionally required name-clearing hearing). Also, the North Carolina Administrative Procedures Act, which may be similar to those in some other jurisdictions, allows an agency subject to that act that has made an initial decision in a case also to render the final determination in that same case after a contested case hearing is held by an administrative law judge. *See* N.C.G.S. Ch. 150B, Art. 3, especially § 150B-23(a) and § 150B-36. Presumably the same individual in the agency could play the roles of both initial and final decision maker.

[75] *See* Withrow v. Larkin, 421 U.S. 35, 47 (1975).

To overcome this presumption and demonstrate incompatibility, one generally needs to show evidence of personal bias or pecuniary interest.[76] It is not enough simply to point out the interrelationship between two positions.[77] Nor is it always enough to assert that there is a potential for unfairness if one person holds two different positions in the same case; for example, investigator and judge. Indeed, administrative law procedures that involve such a combination of functions have commonly been upheld by the courts.[78]

Codes of judicial conduct, on the other hand, often take a different approach. Relying on the idea that members of the traditional judiciary must be completely independent and impartial, they may prohibit judges from having any connections that create even a potential for bias.[79]

A fourth rule. In addition to these three types of incompatibility, some courts and commentators describe a fourth general rule that overlaps the other three to some extent and may act as a "gap-filler" in some cases that do not fall within one of the other categories. Under this standard, two positions are incompatible when the functions of the two offices are "inherently inconsistent and repugnant,"[80] or "when 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."[81]

For example, in a 1979 Michigan case it was asserted that one person could not serve both as school superintendent in one school district and as school board member in another district because the positions were incompatible. Analyzing the case using the first version of the standard just cited, the Michigan Court of Appeals concluded that the two offices were not *inherently* inconsistent and repugnant as a matter of law. However, it remanded the case to the trial court to

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[76] Jonal Corp. v. District of Columbia, 533 F.2d 1192, 1197 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 825 (1976), *quoted in* Citizens Ass'n of Georgetown v. District of Columbia Alcoholic Beverage Control Bd., 359 A.2d 295, 298 (D.C. 1976). An instructive North Carolina case on what constitutes personal bias is Crump v. Board of Education of the Hickory Administrative School Unit, 326 N.C. 603, 392 S.E.2d 579 (1990). An example of a pecuniary interest that offends due process is provided by Ward v. Village of Monroeville, 409 U.S. 57 (1972), in which a mayor who was heavily involved with village finance also served as judge in a mayor's court. A major part of the village income was derived from the fines, forfeitures, costs, and fees that the mayor imposed.

[77] *See* Citizens Ass'n of Georgetown, 359 A.2d at 298.

[78] See cases cited in Withrow, 421 U.S. at 47–50, 50–51 n.16; and 2 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 13.01, 175 (1958) ("The case law, both federal and state, generally rejects the idea that the combination [of] judging [and] investigating functions is a denial of due process."), quoted in Withrow, 421 U.S. at 52.

[79] *See, e.g.*, North Carolina Administrative Office of the Courts, Rules, Code of Judicial Conduct, as amended January 31, 2006. Complete text available at www.aoc.state.nc.us/www/public/html/rulesjud.htm

[80] *See* Attorney Gen. v. Common Council, 70 N.W. 450 (Mich. 1897), citing Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* § 422 (Chicago: Callaghan and Co., 1890).

[81] Martin v. Smith, 1 N.W.2d 163, 169 (Wis. 1941) (citation omitted); State *ex rel.* Klick v. Wittmer, 144 P. 648 (Mont. 1914) (citations omitted). Quotation is from *Klick; Martin* contains very similar language.

examine the facts concerning what the two roles involved, and then to determine whether there was such inconsistency and repugnancy in this particular case.[82]

Modifying incompatibility rules. Because incompatibility is a common-law doctrine, its reach can generally be modified by statute. Thus if the legislature chooses to declare that two offices are compatible, it can do so, even if holding those positions simultaneously would have been prohibited under the common law.

The only limitations on a legislature's ability to adopt statutory rules dealing with incompatibility are those restrictions imposed on the law-making body by state or federal constitutional or statutory provisions. Thus, for example, a legislature cannot overcome a state's constitutional ban on holding two elective offices simultaneously, nor may it allow two offices to be held at the same time if doing so would violate an individual's due process rights under the state or federal constitutions. Lawmakers also need to be aware of statutes such as the federal Voting Rights Act that may restrict their flexibility to allow holding multiple offices if the voting rights of minorities will be adversely affected.

Scope and effect of incompatibility rules. Common-law incompatibility rules may well apply to a much broader range of governmental positions than do the constitutional and statutory multiple office-holding restrictions. Although the courts generally speak of incompatible *office-holding*, there is nothing inherent in the doctrine that would keep it from being applied to government employment that does not rise to the level of an office. Problems with being one's own boss, for example, are not limited to cases where both the boss and the employee are public officers, as that term is used for multiple office-holding purposes.

If it is illegal, for example, for a city council member to serve as head of a city department in a council-manager city, then it makes little sense to allow that same council member to be an employee of that department, even if the employee position is not a public office. There is even more potential for conflict in the latter situation, because the council member would be under the direct or indirect supervision of not one but two city officials: the department head and the city manager.

Cases from jurisdictions that have considered the issue show an increasing willingness to apply the doctrine in employment situations, at least if a superior/subordinate relationship exists between the two positions in question. For example, a 1984 decision from Wisconsin's intermediate appellate court used similar reasoning to that described above, in explicitly holding that the incompatibility doctrine extended to public employment that was not an office.

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[82] Petitpren v. Wayne-Westland Cmty. Sch., 283 N.W.2d 812, 814 (Mich. App. 1979).

In *Otradovec v. City of Green Bay*,[83] the court determined that a residential appraiser employed in the city assessor's office violated the doctrine by accepting the office of alderman on the city common council. It explained that "[t]he public detriment in having one person hold incompatible public offices can also exist when one person holds a public office and a position of public employment with duties that might conflict."[84]

Similarly, the Wyoming Supreme Court states, in deciding that the position of schoolteacher, which was not a public office, was incompatible with the office of school board member, that it would not be bound by technical definitions of the word "office."[85] It reviewed a series of cases on the general subject from the courts of New Jersey and noted that while those courts continued to state that the rule applied only to "offices," they had actually expanded the incompatibility principle so that the issue became a question of the public interest to be served by allowing or not allowing the two positions to be held simultaneously.[86]

Ex Officio Office-Holding

As the law developed, courts continued to deal with two basic types of questions. First, as we have seen, it was important to decide which positions and offices were subject to incompatible and multiple-office holding restrictions, and how those rules applied. Second, questions arose about whether and when a distinction could be made between *holding* an office and *performing the duties* of an office as part of the responsibilities of another office, in order to avoid violating the ban. This practice is called *ex officio* office-holding.

What is *ex officio* office-holding and when is it allowed? Many courts recognize the concept of *ex officio* office-holding, perhaps as a way of moderating the harshness of other office-holding rules. As noted just above, the *ex officio* rule distinguishes between *holding* more than one office and *performing the duties* of additional offices as part of the duties of one's original position. The term "ex officio" reflects this idea; it means literally "from office" or "by virtue of the

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[83] Otradovec v. City of Green Bay, 347 N.W.2d 614 (Ct. App. 1984).
[84] *Id.* at 616.
[85] Haskins v. State *ex rel.* Harrington, 516 P.2d 1171, 1178 (Wyo. 1973) (teacher is not an officer, but the position of teacher is found to be incompatible with the position of school board member). *See also* Tarpo v. Bowman Pub. Sch. Dist. No. 1, 232 N.W.2d 67, 71 (N.D. 1975).
[86] Haskins, 516 P.2d at 1178. *See, e.g.*, Township of Belleville v. Fornarotto, 549 A.2d 1267 (N.J. Super. L. 1988). In that case a New Jersey intermediate appellate court, faced with the question of whether incompatibility applied to nonoffices, followed the lead of an earlier New Jersey Supreme Court case, Reilly v. Ozzard, 166 A.2d 360 (N.J. 1960), in adopting a context-driven approach to the term "office." While purporting to limit the incompatibility doctrine to public offices, the court looked more closely at the clash of duties in the positions involved than at whether both positions met a particular definition of "office." Perhaps in recognition of this flexible standard, at times both of these New Jersey cases enclosed the term "office" in quotes in concluding that particular positions were "offices" for incompatibility purposes.

office." One who holds a position *ex officio* does so "without any other warrant or appointment than that resulting from the holding of a particular office."[87]

According to the *ex officio* doctrine, a public official may accept the responsibilities of additional public offices without regard to multiple office-holding concerns, as long as his or her service in the additional offices is part of the duties of the original public office to which he or she was appointed or elected and arises in connection with that appointment or election. *Ex officio* office-holders do not generally take an oath of office for their *ex officio* positions, since the *ex officio* service is part of the responsibilities of the original office.

It is important to note that the legal definition of the term *ex officio* differs from the common understanding of what it means to serve on a board in an *ex officio* capacity. Many persons assume that one who serves on a board *ex officio* is an honorary member without a vote. In reality, an *ex officio* holder of a board membership or other position is as much a "real" holder of the position as any other person. He or she has all the powers, rights, and responsibilities of any other person in that position. Thus an *ex officio* board member is as free to vote as any other member of that deliberative body. If one does *not* want *ex officio* members to vote, then they need to be designated as "*ex officio* nonvoting members."

Providing for *ex* officio service. Traditionally, there have been two sets of requirements for *ex officio* office-holding. First, there must be specific authorization for serving *ex officio* in one office as an incident of holding another, and this permission must be given by the creator of the two offices involved. An example of such an authorization would be a state statute declaring that "the chairman of the board of county commissioners [a legislatively created position] shall serve *ex officio* as the director of the 'x' program for the county [another legislatively created position]."

Second, since *ex officio* office-holding is traditionally seen as incident to the holding of *particular* elective or appointive positions, it has been assumed that it can only be done by specific named officials. Under this "specific designation" approach it is nonsensical to say, for example, that "'a member of' the city council (to be selected by that body) shall serve *ex officio* on the 'x' board." Since all city council members generally have the same powers, either all the council members in the example would have to be *ex officio* members of the "x" board as an incident of being council members, or none of them could be. *Ex officio* membership on the "x" board, if it existed at all, would have to derive automatically from holding the original named position (city council member).

On the other hand, it might be permissible under this approach to say that "the mayor shall serve *ex officio* on the 'x' board." The mayor is a specific, named official, and one may assume that the seat that he or she is to occupy on the "x" board is one held only by mayors serving *ex officio*.

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[87] BLACK'S LAW DICTIONARY (8th ed. 2004), s. v. "*ex officio*."

While the traditional concept of *ex officio* office-holding still has its adherents, some courts now take a more relaxed position concerning what is required. Turning again to North Carolina as an example, we will see that North Carolina's courts now allow for greater flexibility concerning both the detail with which *ex officio* office-holding provisions must be drafted and who may appoint the *ex officio* office-holder.[88]

North Carolina's legislature has gone even further, allowing the governing boards of local governments created by the state legislature, as well as the state itself, to create public offices and to provide for *ex officio* service.

Examples of North Carolina cases dealing with *ex officio* office-holding. The first North Carolina case specifically upholding *ex officio* office-holding as a way around the multiple office-holding ban is *McCullers v. Board of Commissioners of Wake County*. In *McCullers* the North Carolina Supreme Court evaluated a state law that followed the traditional approach to *ex officio* office-holding. The statute provided that the county board of health consisted of the chairman of the board of county commissioners, the mayor of the county town (county seat) or the clerk of court, the superintendent of schools, and two doctors elected by the other three members. The court held that it was permissible for the chairman, the mayor, and the superintendent to serve as board of health members, explaining that "[i]t is not a case where one person holds two offices at the same time, but rather the case where the duties of a member of the county board of health are to be performed *ex officio* by the [three officials]."[89]

The court, in distinguishing this case from cases where holding more than one office was forbidden, explained that the chairman, the mayor, and the superintendent "have not been elected or appointed to any other office, but the added duties of the county board of health have been placed upon the offices they already held. . . ." None of them vacated their other offices by acting as members of the board of health. To the contrary, if one of them had done so, that person would immediately have become ineligible to serve as a health board member.[90]

The traditional concept of the *ex officio* doctrine was broadened significantly by the state supreme court thirty-six years later in the case of *State ex rel. Grimes v. Holmes*.[91] *Grimes* upheld a local act allowing a city council to delegate the duties of city manager to one of its members "to be performed *ex officio* as mere auxiliary duties, and [to] designate one of its members to perform such duties" in case the manager's position was vacant or the manager was sick, absent from the city, or otherwise unable to perform. The court noted the legislature's almost unlimited power over the creation and abolition of local governments and

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[88] McCullers v. Bd. of Comm'rs of Wake County, 158 N.C. 75, 73 S.E. 816 (1911).
[89] *Id.* at 80, 73 S.E. at 818.
[90] *Id.* at 81, 73 S.E. at 818, *distinguishing* State *ex rel.* Barnhill v. Thompson, 122 N.C. 493, 29 S.E. 720 (1898).
[91] State *ex rel.* Grimes v. Holmes, 207 N.C. 293, 176 S.E. 746 (1934).

observed that "[i]f the General Assembly can abolish, they can subject to the limitations of the Constitution, place additional duties on officers of a municipality."[92]

Grimes introduces flexibility into the *ex officio* doctrine in at least two ways. First, it upholds the idea that *ex officio* service need not be tied to a specific seat on the board from which the *ex officio* office-holder will be chosen. Second, we learn from the case that the creator of a position—the legislature—may place the responsibility with another body for choosing whether or not there will be *ex officio* service in a position that the legislature has created. In particular, we see that local governing boards may make decisions about *ex officio* service in legislatively created positions, if they are given statutory authority so to do.

Duration of *ex officio* service. If it is the nature of *ex officio* service that one performs the duties of a second office as part of the responsibilities of the first office held, then it stands to reason that one would lose the *ex officio* position at the same time that one gave up the first office. The North Carolina Supreme Court reached this result in the *McCullers* case, in which it concluded that the board of health duties could not be carried out by the specified individuals "any longer than during the period they hold the offices of chairman, mayor, and superintendent." It reasoned that "[t]he right to discharge such duties is not conferred upon them as individuals, but is a part of the duties of the one office already held by each."[93]

But why, if a county commissioner is a fully voting member of another board, serving in a position for which a specific term is stated, should she not be able to complete that term even after leaving her position on the board of commissioners? The *McCullers* court answered this question by returning to the idea that in *ex officio* office-holding, the duties of health board members are not being given to a particular individual but to the holder of a particular office. "[A]s long as [the mayor, chairman, and superintendent] retain such offices they must discharge such duties [as health board members], and *when they vacate such office* [as mayor, chairman, or superintendent] *their successors must continue to perform them*."[94]The court determined that statutory language about when the term of office of the board of health members expired apparently applied only to the two physician members of the health board and not to the *ex officio* members.

In short, one who assumes a position *ex officio* assumes it accompanied by *nearly all* of its attributes. The only attributes not carried over are the *ex officio* position's status as a separate office for multiple office-holding purposes and a definite term, if one exists.[95]

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[92] *Id.* at 298, 176 S.E. at 748–49.
[93] McCullers, 158 N.C. at 80, 73 S.E. at 818.
[94] *Id.* at 81, 73 S.E. at 818.
[95] The North Carolina Supreme Court reaches a different conclusion about the duration of the term of an *ex officio* office in one case that post-dates *McCullers*. State *ex rel.* Pitts, 2600 N.C. 168, 132

Office-Holding and Local Government Attorneys

The local government's legal adviser is in a somewhat unusual position with respect to office-holding rules. Since the attorney's role is essentially advisory—he or she can only recommend what course of action the local government should follow and cannot generally tell others what to do—the position should perhaps not be considered a public office as that term is used for multiple office-holding purposes. That is, it generally does not involve the exercise of a substantial amount of sovereign governmental power.

Other points of view also exist. The courts sometimes recognize local government attorneys as public officers for particular purposes,[96] and statutes may also characterize the attorney in a variety of ways. North Carolina law, for example, refers to city and county attorneys as "officials" for purposes of *ex officio* office-holding, and as "employees" for purposes of the state's lobbying laws.[97]

Nowhere is this confusion more evident than in the approach taken by the Internal Revenue Service to the nature of the position of attorney in the many cases where a local government contracts with an attorney or law firm in private practice to provide it with legal representation, rather than employing an attorney as part of its staff. In such cases, the attorney may represent a broad array of clients, with one or several local governments making up only part of his or her

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S.E.2d 329 (1963) However, *McCullers* is not overruled, and it may be possible to limit *Pitts* to the specific situation it involved.

[96] *See, e.g.*, City of Winston-Salem v. Yarbrough, 117 N.C.App. 340, 349, 451 S.E.2d 358, 365 (1994), *disc. review denied*, 340 N.C. 260, 456 S.E.2d 519 (1995), holding that under North Carolina tort law a city attorney is a public officer, for purposes of determining that a claim against the attorney in the attorney's official capacity is a suit against the public body that the attorney represents. The court reasons (1) that the attorney's position is a creation of statute (cities in North Carolina are required by N.C.G.S. § 160-173 to appoint a city attorney) and (2) that the attorney's job, the rendering of legal opinions, involves the exercise of personal deliberation, decision, and judgment.

While these criteria may be important in determining public officer status under state tort law, they might not be enough to make someone a public officer for purposes of multiple office-holding rules. A position may be statutorily created and may include some individual decision making, without it necessarily involving the independent, discretionary exercise of sovereign power that characterizes a public office for multiple office-holding purposes.

For the views of courts in some other states on the question of whether a local government's attorney is a public officer, see the cases cited in EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 12.31, ns. 15-18 (3d ed. rev. vol. 1990).

[97] *Cf.* the language in N.C.G.S. § 128-1.2, in which a city or county attorney is labeled an "official" for purposes of certain *ex officio* appointments, with that in N.C.G.S. § 120C-700(3). A city or county attorney is considered an "employee" of the city or county for purposes of the latter statute, which exempts elected or appointed officials and employees of units of state and local government from most provisions of North Carolina's state lobbying act (N.C.G.S. § Chapter 120C) when they appear solely in connection with matters pertaining to their own offices and public duties.

practice. The attorney is paid by the local government through a retainer or other contractual arrangement, and that income is generally reported by the attorney as part of the income of the attorney's firm or practice.

The many local governments and attorneys with such arrangements have traditionally understood that the attorney is a general contractor rather than an employee of the local government. The IRS, on the other hand, has in recent years attempted to classify these independent attorneys as employees. If it is successful in so doing, the attorney may be faced with paying taxes twice on his or her income—once when the attorney's income is reported to the IRS by the local government, and again when the attorney's firm reports its income on the firm's tax returns.

While this approach certainly results in more income for the federal government, what logic underlies the Service's argument? In essence, it argues (1) that the attorney is a public official, and (2) that all public officials are to be treated as employees for tax purposes. The IRS provides the following example.[98]

> ***Example.*** State A establishes the position of city attorney by statute and defines it as that of an officer and employee. This statute defines the duties of the position. The city attorney is required to direct all litigation in which the city is a party, including prosecuting criminal cases; to represent the city in all legal matters in which the city or a city officer is a party; to attend meetings of the commissioners, advise commissioners, mayors, etc., on all legal questions, and approve all contracts and legal documents. A city manager appoints, supervises and controls the work of the city attorney. The city attorney must take an oath of office. These facts show the importance of state statutes in establishing a right of direction and control over a public official and thus classify the individual as a common-law employee.[99]

While the listed characteristics would not generally be enough to make the attorney's position a public office as we have used the term for multiple and incompatible office-holding purposes, they are apparently sufficient for the IRS to conclude that the attorney holds an office. And because the attorney is a public official, the IRS concludes that he or she is bound by a 1926 Supreme Court case that according to the Service holds that all public officials are public employees.[100]

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[98] *See generally* Internal Revenue Service, "Federal-State Reference Guide," IRS Publication 963 (Rev. 11-2008), Catalog Number 21843B, 4-6 to 4-8.

[99] "Federal-State Reference Guide," 4-7 to 4-8.

[100] Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926). *Cited in* "Federal-State Reference Guide" at 4-6. It is unclear to this writer how the Service determined that *Metcalf* stands for this proposition. In *Metcalf*, the Court is concerned with independent contractors who are not public officers or employees. It decides that "one who is not an officer or employee of a state, does not establish exemption from federal income tax merely by showing that his income was received as compensation for service rendered under a contract with the state" *Metcalf*, 269 at 526.

Most local government attorneys would probably have problems with this approach. First of all, it ignores the fact that the statutory and constitutional duties of local government attorneys vary widely from place to place. These variations mean that the example given may not fit any particular attorney, so that the IRS's conclusion may or may not be valid.

Second, the Service ignores the reality of contracting for services between most local governments and their attorneys, particularly in small jurisdictions. The fact that a statute may specify that a local government must have an attorney does not really answer the question of whether an independent contractor or an employer-employee relationship exists.

IMLA Executive Director Charles L. Thompson, Jr., expresses these ideas quite well in a letter that he drafted on behalf of IMLA in support of the position of one local attorney, David P. Brown, City Attorney in Henderson, Texas, who was challenged by the IRS.

> Generally, it is these smaller local governments [with fewer than 1,000 inhabitants] that have attorneys who represent them as part of a private practice. These attorneys, while holding a position characterized as "city attorney," "county attorney," board attorney," etc., represent the local government as they do any other client. Thus, the only distinguishing factor between this form of employment and their representation of private clients exists within the terms of the contract and the fact that their client is a public entity.
>
> IMLA respectfully suggests that in these circumstances the designation of these officials as public officers should not in any way affect their status under the Internal Revenue Code to distinguish them as employees instead of independent contractors. Since, the founding of our country, most communities have identified an official to act as its legal representative and like today, most of those officials acted to represent the local government as they would other clients within their private practice. **Historically, local government attorneys who represent general purpose local governments or special purpose local governments as part of their legal practice considered themselves acting as independent contractors and their clients considered the relationship similarly.** Only under circumstances where the attorney became a full or part time employee within the local government's classification system would the perspective of this relationship change.
>
> **IMLA** is not in a position to analyze the facts of the specific relationship in this case at this time to suggest whether the relationship should be considered one of employer-employee or one involving an independent contractual relationship, but **respectfully urges you to recognize that holding a statutory office of "city attorney" cannot**

> **reasonably be indicative of whether a person acts as an employee instead of as an independent contractor. IMLA believes the determination should be made based on the traditional analysis associated with distinguishing between an employee and an independent contractor.**
>
> On behalf of the over 1400 local governments that are members of IMLA and of the some 87,000 local governments generally, **IMLA urges you to abandon from your analysis of this case as a determining factor whether there is a statutorily created office of "city attorney" and make your determination based on whether the relationship fits within the analysis of other employee – independent contractor situations**. [emphases added][101]

Given the uncertainty in this area, what should a local attorney do? First, the attorney should avail him or herself of excellent tax counsel.[102] Second, the attorney should make certain that the contract between the attorney or his or her firm and the local government is quite explicit about the nature of the relationship being created. Third, the attorney should follow tax counsel's advice in how to treat the local government client for income purposes.

Finally, if the Internal Revenue Service asks questions, there is no need for alarm. For example, the attorney who was the subject of the IMLA letter lost in the initial proceeding, but effectively won on appeal when the IRS chose not to pursue the case further, citing the "hazards of litigation." While this case does not set a precedent for other local government attorneys, it may indicate some uncertainty on the Service's part about some of the issues involved. Future victories are certainly possible. [103]

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[101] Letter from Charles L. Thompson, Jr., to Mr. Adell McCarter, Jr., Appeals Officer, Internal Revenue Service, Appeals Office, MC 8000 NWSAT, 4050 Alpha Road, Dallas, TX 75244-4201, Re: City Attorney of Henderson, Texas, draft copy, no date.

[102] In the interest of full disclosure, please note that the author is not such a qualified tax attorney.

[103] See letter from Mr. Adell McCarter, Jr. to Mr. David P. Brown, Dec. 10, 2007, next page.

Conclusion

This paper has explored a variety of issues involving public offices, such as what offices are, when they are incompatible with each other, and when they may be held simultaneously. The legal meaning of *ex officio* office-holding has also been examined, as well as some special office-holding and employment issues affecting local government attorneys. Hopefully the information found here will be useful when office-holding issues arise involving local officials and their attorneys.

Internal Revenue Service
Appeals Office
4050 Alpha Road
Suite 517, MC:8000NWSAT
Dallas, TX 75244

Date: December 10, 2007

DAVID BROWN
P O BOX 1688
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Department of the Treasury

Person to Contact:
Adell McCarter, Jr.
Employee ID Number: 75-00466
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Refer Reply to:
AP:FE:DAL:AM
In Re:
CITY OF HENDERSON
Tax Period(s) Ended:
03/2004 06/2004 09/2004 12/2004
03/2005 06/2005 09/2005 12/2005

Dear Mr. Brown:

The issue in the above referenced case was whether compensation paid by the City of Henderson to David Brown, an attorney, were wages subject to employment tax and withholding.

Based on the hazards of litigation, Appeals settled the case by recommending to the Government that it concede the issue in full.

If you have any questions, please contact me.

Sincerely,



Adell McCarter, Jr.
Appeals Officer