

STATE OF MICHIGAN

MIKE COX, ATTORNEY GENERAL

INCOMPATIBILITY: Whether person serving as township
PUBLIC OFFICES AND OFFICERS: supervisor and city police officer holds
incompatible offices

A person holding positions as an elected township supervisor and a city police officer does not violate the Incompatible Public Offices Act, MCL 15.181 *et seq*, unless: 1) the township and the city have or are negotiating a contract for police services; or 2) other particularized facts are present that demonstrate the individual cannot faithfully perform the duties of a city police officer and township supervisor in a manner that protects, advances, or promotes the interests of both offices simultaneously.

Opinion No. 7226

March 11, 2009

Honorable Sharon Tyler
State Representative
The Capitol
Lansing, MI 48909

You have asked whether the offices of township supervisor and city police officer are incompatible when both the township and the city in question have existing contracts for matters other than police protection and the potential exists for a contract between the township and city for police protection.

The Incompatible Public Offices Act (Act), 1978 PA 566, MCL 15.181 *et seq*, sets forth the general restriction against public officers or employees simultaneously holding incompatible offices. Specifically, the Act provides that "a public officer or public employee shall not hold 2 or more incompatible offices at the same time."
MCL 15.182.

Whether the offices of township supervisor and city police officer are "incompatible" requires consideration of MCL 15.181(b), which defines "incompatible offices" as:

[P]ublic offices held by a public official which, when the official is performing the duties of any of the public offices held by the official, results in any of the following with respect to those offices held:

- (i) The subordination of 1 public office to another.
- (ii) The supervision of 1 public office by another.
- (iii) A breach of duty of public office.

The first step in determining whether two offices are incompatible requires establishing if the offices are "public offices held by a public official" within the meaning of MCL 15.181(b). While the Legislature did not explicitly define the term "public official" in the Act, the Michigan Supreme Court in *Macomb County Prosecutor v Murphy*, 464 Mich 149; 627 NW2d 247 (2001), concluded that "public offices held by a public official" include "positions of public employment." See *Murphy*, 464 Mich at 157-163. See also *Wayne County Prosecutor v Kinney*, 184 Mich App 681, 683; 458 NW2d 674, lv den 436 Mich 887 (1990), and OAG, 1979-1980, No 5626, p 537, 541 (January 16, 1980). Section 2 of the Act also evinces the applicability of the Act to public employees by stating "a public officer or public employee shall not hold 2 or more incompatible offices at the same time." MCL 15.182.

A township supervisor is a voting member of the township board. MCL 41.70. As an elected official, a township supervisor is a public officer. MCL 41.1b(a) and 41.1b(b); MCL 15.181(e). Therefore, a township supervisor is subject to the Act. A

police officer employed by a city is a public employee, serves in a position of public employment, and is also subject to the Act. MCL 15.181(d).

Townships and cities are distinct units of local government with separate statutory authority and separate governing bodies. A township is governed by a board of trustees and a city is governed by a city council. A township supervisor serves as a voting member of a township board of trustees, whereas a city police officer is not a member of a city council but rather serves as a city employee. Therefore, regarding sections 1(b)(i) and 1(b)(ii) of the Act, the offices of township supervisor and city police officer are neither subordinated to nor supervised by the other. Thus, section 1(b)(iii) of the Act remains as the final consideration in order to determine whether performing the duties of both public positions, in light of an existing or potential contractual relationship, would result in a breach of duty of public office.

Generally, a township supervisor's job includes the responsibility to negotiate contracts the township may enter into with other contracting entities – including cities – and to vote on these contracts when submitted to the township's board of trustees for approval. A city police officer's job functions involve law enforcement activities and do not include the authority to vote on a service contract between the city and the township.¹

It is well established in cases decided by the Michigan Court of Appeals that, when two public offices occupied by the same person call upon that person to sit on

¹ The extent to which a police officer might benefit from any specific contract, if at all, is not within the scope of this opinion.

opposite sides of a contractual relationship, there is a breach of duty of public office because the interests on each side are competing and cannot be advanced simultaneously. Further, abstaining from voting on the contract is itself a breach of duty. Only the vacating of one office will solve the public official's dilemma. *Contesti v Attorney General*, 164 Mich App 271, 280-281; 416 NW2d 410 (1987), lv den 430 Mich 893 (1988); *Kinney*, 184 Mich App at 684.

Murphy, decided in 2001, is the most recent Michigan Supreme Court case to address a breach-of-duty issue arising under the Act. The question before the Court was whether a person violated the Act by simultaneously holding positions as an elected member of a township board of trustees and the delinquent property tax coordinator in the county treasurer's office, given that a township can contract with a county for the collection of its delinquent personal property taxes. The person holding both offices faced the possibility of considering and voting on a proposal to have the county, rather than the township, collect the township taxes. The Court of Appeals held that the potential for a conflict between two offices was sufficient to find a breach of duty of public office. *Macomb County Prosecutor v Murphy*, 233 Mich App 372, 382; 592 NW2d 745 (1999). In reaching this conclusion, the Court of Appeals viewed the Act as focused on the possibility that a conflict might arise:

The purpose of the incompatible offices act is to preclude *any suggestion* that a public official is acting out of self-interest or for hidden motives because of a conflict between his two offices. This purpose is served by finding a breach of duty when an issue arises in which one constituency's interests *may* conflict with the interests of a separate constituency represented by the official. [*Murphy*, 233 Mich App at 382; emphasis added.]

In overruling the Court of Appeals, the Supreme Court made clear that the Act requires an *actual* breach of public duty to support a finding that incompatibility is present. *Murphy*, 464 Mich at 162-163. The Court agreed with the Court of Appeals that a breach of duty arises when a public official holding dual offices cannot protect, advance, or promote the interest of both offices simultaneously. But it disagreed that the likelihood an issue "*may* conflict with the interests of a separate constituency represented by the official" was alone sufficient to find incompatibility. *Id.* at 164. (Emphasis added.) Instead, the Court explained, the Court of Appeals "failed to recognize that the statute focuses on the manner in which the official actually performs the duties of public office." *Id.*

The Court provided guidance for persons holding dual public positions who may be called upon to make decisions concerning contracts, explaining when a breach of duty may arise and how such a situation must be handled. With regard to the facts present in *Murphy*, the Court distinguished between preliminary consideration of a contract and actual negotiations:

[N]o incompatibility exists between defendant's positions until the public entities actually enter into contractual negotiations. A public official in defendant's position may avoid breaching the duty of loyalty by not participating in the preliminary consideration of a possible agreement [D]efendant's holding of dual offices did not violate the incompatible offices act because the governmental entities never entered into contractual negotiations. [*Murphy*, 464 Mich at 166-167.]

The *Murphy* decision focused on the language of the Act, holding that incompatibility "exists only when the performance of the duties of one of the public offices '*results in*' one of the three prohibited situations" under the Act. *Id.* at 162-163.

(Emphasis added.) Thus, the *potential* for a conflict, by itself, is not adequate to determine incompatibility. The performance of a public official's duties with interaction between the two public offices can create incompatibility, but the breach of duty must be actual and not merely possible. Relative to a contractual relationship between two public entities, there must be an existing contract or active negotiations toward a contract that places the dual officeholder at both ends in order to create the incompatibility. *Id.* at 163-164 (citing OAG No 5626 at 542).

In reaching its decision in *Murphy*, the Michigan Supreme Court cited with approval OAG No 5626. *Id.* Based upon its examination of the legislative history associated with enactment of the Incompatible Public Offices Act and the Act's clear departure from the common law incompatibility principle that the *mere potential* for a breach of duty alone was determinative, OAG No 5626 concluded that the Act instead limits incompatibility to situations where the performance of the duties of the two offices *actually results in* a breach of duty. OAG No 5626 at 542, 544; *Murphy*, 464 Mich at 163.

It is important to emphasize the distinction drawn by the Court between a public entity's "preliminary consideration" of an agreement and "actual negotiations" towards reaching a formal agreement. Abstention will avoid a conflict with regard to decisions on the possibility of entering into negotiations, while vacating one of the offices is necessary upon commencement of negotiations or upon entering into a contract. *Murphy*, 464 Mich at 164 n 13, 166 n 15. This distinction effectively limits the potential for political

maneuvering whereby one board member offers a motion that the public entity enter into contract negotiations with another public entity, with the knowledge that a fellow board member serves as a dual officeholder. Incompatibility would exist only if the public entity formally votes and approves the motion to commence contract negotiations. Acknowledging the dual officeholder's loyalty dilemma when the mere possibility of contracting arises, the Court instructed that "[a] public official in defendant's position may avoid breaching the duty of loyalty by not participating in the preliminary consideration of a possible agreement." *Murphy*, 464 Mich at 166. See also OAG No 5626 at 542.

Applying *Murphy's* principles to your question, where the same person holds public positions as an elected township supervisor and a city police officer and the respective township and city maintain a contractual relationship for non-police services, it cannot be concluded that these positions are inherently incompatible. Unless the township supervisor/city police officer sit on opposite sides of the contract or are positioned on opposite sides of a non-contractual matter that would give rise to competing interests, there is no basis upon which to conclude that the performance of duties of these offices would result in an actual breach of duty requiring the dual officeholder to vacate one of the positions. It also cannot be concluded that the positions are incompatible because the potential exists for a contract involving police services between the township and the city. As noted, the individual serving both entities may avoid breaching the duty of loyalty by abstaining from participating when the mere possibility of contracting is at issue.

Moreover, with respect to any existing contracts between the township and city that do not involve police protection, each contract would have to be analyzed independently to determine its effect on the respective public offices and the dual officeholder. An actual breach of duty must be present to create incompatibility. Assuming that the subject matter of a particular contract does give rise to competing interests, once the township board votes to enter into contract negotiations with the city, incompatibility exists and the township supervisor/city police officer must immediately decide which position to vacate and do so without delay.

The process for determining whether dual offices are incompatible in violation of the Act requires reviewing the particular facts on a case-by-case basis, examining the actual duties performed by the person in each of the positions held, and analyzing whether the circumstances support a conclusion that the person cannot protect, advance, or promote the interests of both offices simultaneously. As observed by the Supreme Court in *Murphy*, the Act's break from the common law's focus on potential conflicts in favor of actual breaches of duty "encourages civic-minded individuals to engage in public service in as many capacities as they choose." *Murphy*, 464 Mich at 164 n 13. But along with this broadened approach is the continued recognition that "[p]ublic officers and employees owe a duty of loyalty to the public" and continued adherence to the principle that all public officers are agents whose powers are fiduciary and rendered in service of the public's interests. *Id.* at 164.

Your question provides an opportunity to review prior opinions of the Attorney General addressing breach-of-duty issues to determine if any issued before 2001 when *Murphy* was decided are now superseded. Several of those opinions pursued similar reasoning to that followed in *Murphy*, concluding that an actual breach of public duty is required where a member of a voting body of one unit of government simultaneously serves as a non-voting officer or employee of another unit of government. For example, OAG, 1995-1996, No 6903, p 172 (May 28, 1996), found that the position of county commissioner and township police chief are not incompatible unless the county and township enter into a contract on matters affecting the township police department or the county board acts on non-contractual matters affecting the township police department.

Similarly, other opinions have concluded that dual public positions are not incompatible, unless: 1) there is an actual breach of duty as evidenced by a contract or contractual negotiations between one governmental unit where the individual is a member of its governing body and the contract involves the duties of the individual's position within the other governmental unit; or 2) some non-contractual issue arises where the individual cannot protect the interests of both offices simultaneously. See OAG, 2001-2002, No 7119, p 121 (November 20, 2002);² OAG, 1995-1996, No 6913,

² Township manager and county commissioner are not incompatible provided that the township manager has no responsibility for administering, negotiating, or enforcing contracts between the township and county.

p 197 (August 19, 1996);³ OAG, 1993-1994, No 6795, p 132 (May 5, 1994);⁴ OAG, 1993-1994, No 6794, p 129 (April 12, 1994);⁵ OAG, 1993-1994, No 6756, p 27 (May 30, 1993);⁶ OAG, 1987-1988, No 6418, p 15 (January 13, 1987);⁷ OAG, 1981-1982, No 5955, p 311 (January 12, 1981);⁸ OAG, 1979-1980, No 5626, p 537 (January 16, 1980).⁹

However, two pre-*Murphy* Attorney General opinions found incompatibility where a contract was negotiated, even though the officer participated for only one of the public entities and the contract did not affect the officer's employment by the other entity: OAG, 1993-1994, No 6747, p 5 (January 14, 1993),¹⁰ and OAG, 1995-1996, No 6885, p 124 (January 11, 1996).¹¹ To the extent that the analysis or conclusions in OAG

³ City police chief and county commissioner are not incompatible unless there is a contract for police services or a non-contractual issue arises involving police services.

⁴ City council member and county undersheriff are not incompatible unless there is a contract for police services.

⁵ Village marshal and county commissioner positions are not incompatible unless there is a village-county contract involving the village marshal.

⁶ Township supervisor and county undersheriff are not incompatible unless there is a contract for police services.

⁷ City attorney and county commissioner are not incompatible unless there is a contract negotiated or if there is a legal conflict between the city and county.

⁸ Deputy sheriff and township trustee are not incompatible unless there is a good faith contract negotiation between the county sheriff and township.

⁹ School board member and city superintendent of public works are not incompatible unless there is a contract imposing duties on the city superintendent of public works.

¹⁰ Incompatibility exists if a person simultaneously serves as a county road commissioner and as a deputy township supervisor whenever a contract is negotiated or entered into between these two public entities, regardless of the subject matter of the contract, how the contract impacts the job duties of the deputy township supervisor, and the non-voting capacity of the deputy township supervisor.

¹¹ The positions of county clerk/register of deeds and member of a university board of trustees are incompatible once a joint contract is negotiated or entered into between the university and the county, without consideration of the subject matter of the contract or the fact that a county clerk/register of deeds does not have the responsibility to vote on contracts.

No 6747 and OAG No 6885 are inconsistent with this opinion by concluding that incompatibility is present when the potential for a conflict exists absent any conflict or relationship that may create an opportunity for one office to influence the other, they are superseded.

It is my opinion, therefore, that a person holding positions as an elected township supervisor and a city police officer does not violate the Incompatible Public Offices Act, MCL 15.181 *et seq*, unless: 1) the township and the city have or are negotiating a contract for police services; or 2) other particularized facts are present that demonstrate the individual cannot faithfully perform the duties of a city police officer and township supervisor in a manner that protects, advances, or promotes the interests of both offices simultaneously.

MIKE COX
Attorney General