dual offices of Profit

How Many Hats Can You Wear?

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Just as it is difficult to literally wear more than one hat at a time, it is also very challenging, if not prohibited by law, to simultaneously perform the duties of more than one public office in Maryland. The post-census process of redrawing electoral boundaries within the State of Maryland and its political subdivisions may end in a crescendo of "hat tossing" by potential candidates for public office. Recently, electoral districts for the United States Congress, the Maryland General Assembly, county councils and commissions, local school boards and several municipalities have been redrawn. Consequently, the formation of new constituencies coupled with term limits for county office has emboldened office seekers to "throw their hats into the ring."

In anticipation of the coming November election, a number of municipal officials have decided to run for higher elective office. Moreover, several city/town officials have voiced an intent to remain in municipal office while holding another state or county office. Unfortunately for those candidates already serving in elected office, Maryland law generally prohibits a person from simultaneously holding more than one public office that provides compensation, regardless of whether it is a state or local office.

Under Article 35 of the Maryland Declaration of Rights, "no person [with a few exceptions stated below] shall hold, at the same time, more than one office of profit, created by the Constitution or Laws of this State." The three main elements of the law being (1) whether the position is legally an "office," (2) whether the office is one "of profit," and (3) whether the office of profit was created by "law." Similarly, Article III, Section 11 of the *Constitution of Maryland* prohibits, with the exception of police, firefighters and rescue workers, any "person holding any civil office of profit, or trust" from serving as a state senator or delegate.

The law's purpose

The *Maryland Constitution* and its predecessors have had dual office prohibitions since 1776 and most states have the same or similar prohibitions in their constitutions.[i] In Board of Supervisors of Elections v. Attorney General[ii], the Court of Appeals of Maryland explained that "[t]he need for and purpose of [dual office holding] provisions manifestly was to protect against conflicts of interest, self aggrandizement, concentration of power, and the blurring of the doctrine of separation of powers..." Therefore, the dual offices prohibition is another of many checks and balances used to prevent abuses of power by the government and its agents.

What is an "office?"

Not all positions within state and local government qualify as an "office" and succumb to the constitutional prohibition. Most government personnel are employees as opposed to officeholders. Employees fall under the supervision of a public officer who unilaterally exercises some state power expressly delegated by law. Therefore, it is possible as a municipal official to be employed by the state, county or another municipal government (or possibly the same municipality[iii]) while simultaneously holding elected office in a municipality. The traditional test applied to determine whether a position is a public office scrutinizes whether that office:

1. was created by law and casts upon the incumbent duties which are continuing in nature and not occasional;
2. the incumbent performs an important public duty;
3. the position calls for the exercise of some portion of the sovereign power of the State;
4. the position has a definite term, for which a commission is issued, a bond required and an oath required; and,
5. the position is one of dignity and importance.

Although each of the factors above is useful in determining whether a position is a public office, no single one is decisive. The Court has determined that the fifth "dignity and importance" factor has lost almost all significance but that the third "exercising sovereign power" test is most important. The first test asks whether a charter or ordinance created the office and whether the duties are specified in law and performed by the officer "in his own right." The second and third factors deal with whether the duties of the position are of significant magnitude and include discretion in directly exercising basic governmental power. The fourth and final factor of significance involves some of the traditional trappings of public office i.e. taking an oath or posting a bond.

What does "of profit" mean?

An office "of profit" is simply one

where the law provides for some form of compensation. The amount and form of compensation does not matter and "can be a salary, fee, or per diem (including a flat rate expense allowance) - even as small as one dollar."[iv] However, a payment for actual expenses incurred by an official is *not* considered compensation or profit. Therefore, absent any other form of salary or wages, an office will not be considered "of profit" if the official is only paid for actual travel expenses, accommodations or other reimbursables related to the office.

Despite the dual offices prohibition, it is still possible for an official to "wear several hats" as long as he is not legally authorized to receive compensation. There have been situations where a municipal official has indeed occupied a second office that did not provide him with any compensation aside from reimbursement for actual expenses. Therefore, in situations where holding multiple offices occurs, the law providing for compensation for a particular public office may be repealed converting the office of profit to an unpaid "office of trust."

Another possible course of action allowing one to steer clear of the ban against holding dual offices of profit occurs in cases where the second position is "ex officio" or one that is held simply by virtue of holding the first position, e.g. a city council member serving as an ex officio member of the planning commission. Still other, perhaps less desirable, options to avoid the illegality would be to amend the applicable charter or ordinance to fundamentally change the appointed position from a chartered or statutory office into either, (1) a contractual or "at-will" employee position supervised by a public officer, such as the mayor, or (2) an advisory board or commission office of trust.

Was the office "created by law?"

The "created by law" requirement is significant from a municipal perspective because several key city/town positions are often not created by local charter or ordinance. For example, in a city or town having a traditional council-manager form of government, the manager would usually have his or her power and duties expressly delineated by charter. However, in several Maryland municipalities the "town manager" is simply an employee and assistant to the mayor. Furthermore, as the legally designated "chief executive officer," the person occupying a "pure" city/town manager position acts as a municipal officer, which calls for the independent exercise "of some portion of the sovereign power" delegated to the municipal corporation by the State. Similarly, the office of clerk is usually created by municipal charter and could also be characterized as a public office under the multi-factor test.

Certain common-law created offices like deputy sheriff are excluded from the dual offices prohibition because the courts have confined the law's application to only those offices expressly created by constitution or statute (charter/ordinance). Therefore, one would be hard pressed to find an elected municipal official in Maryland who was not a public officer. Furthermore, members of most non-advisory statutory boards and commissions and appointed agency heads, created by legislative act, are also considered officers.

Consequences and exceptions to Article 35

A violation of the dual offices of profit restriction in the Maryland Declaration of Rights usually results in vacating the first office. Upon taking the oath of office for the second office of profit, the law operates to automatically remove the officer from the first office of profit. Simply refusing to accept compensation will not cure the illegality nor prevent involuntary removal from the first office. An official afforded an opportunity to occupy two compensated public offices must choose one or the other before taking the oath for the second office of profit, unless as discussed, the appropriate governing body is willing and able to amend the law in time, which is generally thirty days, to qualify for office.

The *Constitution of Maryland* has been amended several times to allow certain officials to hold multiple offices as an exception to the general rule. In 1964, an amendment to Article 35 allowed notaries public to hold a second office of profit. In 1990, the exception was expanded to include members of the military reserves and militia. Lastly in 1996, law enforcement officers, fire department members and rescue squad personnel were also excluded from the prohibition.

However, despite being allowed to serve in one of the above exempted positions while holding another office of profit, the common law doctrine of incompatible positions may nevertheless prohibit holding two or more municipal positions that are considered to be in conflict or subordinated, one to the other. For example, unless the local charter states otherwise, a municipal police chief may be prohibited from serving on the same city council for which he also serves as a department head despite the constitutional exemption from the dual offices ban, due to the common law prohibition on incompatibilities. Officials confronted with these issues should also consult applicable ethics law for any other legal impediments to holding multiple offices.

Conclusion

A willingness to fulfill the additional responsibilities of another elective office usually requires dedication and ambition. However, any municipal official who considers throwing his or her hat into the ring for a second elective office may want to instead consider "throwing in the towel" on the notion. Unless a mayor or council member in Maryland receives absolutely no payment or is allowed reimbursement solely for actual expenses incurred, the law will usually bar an elected official from donning more than one hat at a time.

This article is provided for informational purposes only. Officials are encouraged to seek legal counsel for any actual cases.

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[i] Report of the General Assembly's Task Force to Study Dual Office Holding, pursuant to Joint Resolution 7, Robert Zarnoch, Chair, 5 (1995).

[ii] 246 Md. 417, 428 (1967).

[iii] *But see* discussion of common law doctrine of incompatibilities below.

[iv] Report of the General Assembly's Task Force to Study Dual Office Holding at 11.