

May 1, 2015

**OFFICIAL OPINION 2015-5**

Judge Mary Beth Bonaventura  
Director  
Indiana Department of Child Services  
302 W. Washington St., Room E306  
Indianapolis, IN 46204

**RE: Dual Office Holding Inquiries**

Dear Judge Bonaventura:

You recently asked whether various employees of the Indiana Department of Child Services who are seeking elected/appointed political positions will be in violation of the dual office holding provisions found in Art. 2, § 9 of the Indiana Constitution.

**BRIEF ANSWERS**

In general, various employees of the Indiana Department of Child Services who are seeking elected/appointed political positions will not be in violation of the dual office holding provisions found in Art. 2, § 9 of the Indiana Constitution. However, a single employee who is seeking a city county council position and a sheriff’s reserve officer position would violate Art. 2, § 9 because both positions are lucrative offices. Additionally, employees who do not violate Art. 2, § 9 must also consider the separation of powers doctrine, possible conflicts of interest, public policy concerns, potential incompatibility of positions, and the federal Hatch Act. Each of these has the potential to prevent such employees from maintaining state employment while seeking or holding an elected/appointed political position.

**ANALYSIS**

The legal analysis for this question is divided into four parts: (I) dual office holding, including a consideration of each employee and elected/appointed political position at issue; (II) separation of powers; (III) incompatible offices/conflicts of interest; and (IV) the Hatch Act.

**I. Dual Office Holding**

The Indiana Constitution states in pertinent part, “No person holding a lucrative office or appointment under the United States or under this State . . . may hold more than one lucrative office at the same time, except as expressly permitted in this Constitution.”<sup>1</sup> This prohibition was adopted by the framers of the Constitution to prevent the consolidation of power in a small number of government officials.<sup>2</sup>

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<sup>1</sup> Ind. Const. Art. 2, § 9.

<sup>2</sup> See Gregory Zoeller, *Dual Office Analysis: Can the Legislature Carve Out Exceptions?*, 37 Ind. L. Rev. 733, 736-37 (2004).

### **A. What is an office?**

An “office” is “a position for which the duties include the performance of some sovereign power for the public’s benefit, are continuing, and are created by law instead of contract.”<sup>3</sup> An officer is appointed or elected, and the duration of an officer’s position is typically defined by statute. However, an office is not the same thing as mere employment, for which there is no Constitutional prohibition. With “employment” an individual works “under [a] contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed.”<sup>4</sup> An employee has no sovereign power of the state entrusted to him.<sup>5</sup> An employee’s compensation is generally agreed upon by the contract of hiring.<sup>6</sup> Finally, “[t]he most important characteristic which may be said to distinguish an office from an employment is that the duties of the incumbent of an office must involve an exercise of some portion of the sovereign power.”<sup>7</sup>

### **B. What is lucrative?**

Some type of compensation or payment is generally required for an office to be considered lucrative. Under Art. 2, § 9, a “lucrative office” is an “office to which there is attached a compensation for services rendered.”<sup>8</sup> Lucrativeness is not dependent on the amount of compensation received.<sup>9</sup> Compensation may be in the form of a salary or a per diem. The officer may choose not to accept the compensation, but as long as he or she is entitled to the compensation the office is considered lucrative.<sup>10</sup>

### **C. Is there a legislative exemption?**

In some cases where both positions are considered to be lucrative offices, one of the positions may be found to have been specifically exempted by statute from the lucrative office restriction.<sup>11</sup> For instance, the Legislature has exempted county police officers;<sup>12</sup> members of safety boards;<sup>13</sup>

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<sup>3</sup> *Thompson v. Hays*, 867 N.E.2d 654, 657 (Ind. Ct. App. 2007) (internal citations omitted).

<sup>4</sup> *Common Council of Peru v. Peru Daily Tribune, Inc.*, 440 N.E.2d 726, 729 (Ind. Ct. App. 1982) (internal citations omitted).

<sup>5</sup> *Id.* at 730.

<sup>6</sup> *Id.* at 731.

<sup>7</sup> *Shelmadine v. City of Elkhart*, 129 N.E. 878 (Ind. Ct. App. 1921); *see Platt v. Kirk*, 44 Ind. 401 (Ind. 1873) (holding that, in determining whether a position is an “office,” it is appropriate to consider the nature of the duties associated with the position).

<sup>8</sup> *Book v. State Office Bldg. Comm.*, 149 N.E.2d 273, 289 (Ind. 1958).

<sup>9</sup> *Id.*

<sup>10</sup> *Dailey v. State*, 8 Blackf. 329 (Ind. 1846).

<sup>11</sup> *See Gregory Zoeller, Dual Office Analysis: Can the Legislature Carve Out Exceptions?*, 37 INDIANA L. REV. 733, 746-47 (2004).

<sup>12</sup> Ind. Code § 36-8-10-11(c).

<sup>13</sup> Ind. Code § 36-8-3-12.

appointed deputies;<sup>14</sup> members of any township, town or city police department;<sup>15</sup> city employees;<sup>16</sup> and a long list of state board members.<sup>17</sup>

Using the legal authority outlined above, we will analyze nine (9) separate combinations of DCS positions and elected/appointed political positions to determine whether any of the combinations violates the prohibition against dual office holding.

## **1. Staff Attorney/City Council**

### **a. Staff Attorney**

The Indiana Department of Child Services (DCS) is established by statute.<sup>18</sup> DCS is administered by an appointed director<sup>19</sup> who may employ necessary personnel to carry out the department's responsibilities.<sup>20</sup> "Personnel" is defined as "the people who work in a company [or] organization."<sup>21</sup> DCS personnel includes family case managers, investigators, business systems intermediates, and staff attorneys.

A DCS staff attorney is an employee for a number of reasons. Staff attorneys are hired under open-ended contracts rather than being elected/appointed to serve limited terms. They report to a practice supervisor who controls and directs the material details of how their work is to be performed. Their general responsibilities are to provide legal advice and services to the DCS central office – as well as to their assigned county office(s) – for juvenile law matters relating to child welfare, child support and personnel issues. Additionally, they assist the agency in administrative and/or other court matters. They have no sovereign powers of the State entrusted to them. All these elements indicate DCS staff attorneys are employees rather than officers.

### **b. City Council**

The legislative power of a city is vested in its legislative body.<sup>22</sup> "Legislative body" is defined as the common council for a city.<sup>23</sup> City council members are elected to serve four-year terms.<sup>24</sup> The city council may pass ordinances, orders, resolutions, and motions for the government of the city,

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<sup>14</sup> Ind. Code § 5-6-4-3.

<sup>15</sup> Ind. Code § 36-8-3-12.

<sup>16</sup> Ind. Code § 36-4-4-2(b).

<sup>17</sup> Ind. Code §§ 25-1-5-3.5, 25-1-6-3.5.

<sup>18</sup> Ind. Code § 31-25-1-1(a).

<sup>19</sup> Ind. Code § 31-25-1-1(b).

<sup>20</sup> Ind. Code § 31-25-2-2

<sup>21</sup> Black's Law Dictionary 1327 (10<sup>th</sup> ed. 2009).

<sup>22</sup> Ind. Code § 36-4-4-4(a).

<sup>23</sup> Ind. Code § 36-4-6-2(a).

<sup>24</sup> Ind. Code § 36-4-6-2.

the control of the city's property and finances, and the appropriation of money.<sup>25</sup> The council may also, by ordinance, make loans of money and issue bonds for the purpose of refunding those loans.<sup>26</sup> Additionally, the council may investigate city departments, officers, employees, and contractors, and may compel the attendance of witnesses and the production of evidence by subpoena.<sup>27</sup> Finally, city council members are entitled to a fixed annual compensation.<sup>28</sup>

City council members are lucrative officers for a number of reasons. The city council is created by statute rather than by contract. City council members are elected rather than hired as contract employees. City council members serve limited, four-year terms rather than working with open-ended employment. City council members have no employer (other than the voters) who directs how their work is to be performed. Most importantly, city council members have legislative and executive powers set forth by law which are usually reserved to the State. All these elements indicate that city council members are "officers." Furthermore, because city council members are entitled to a fixed annual compensation for their services, the office is "lucrative." Moreover, there is no legislative or other exception making this position a non-office. Significantly, there is a past decision of this office that opines a city council member is a lucrative officer.<sup>29</sup> Based on the above analysis, a city council member is deemed a lucrative office holder under Art. 2, § 9 of the Indiana Constitution.

Since a DCS staff attorney is an employee, while a city council member is a lucrative officer, there is no violation of the dual office holding prohibition if one person holds both positions simultaneously.

## **2. Business Systems Intermediate/Town Board**

### **a. Business Systems Intermediate for the Child Support Bureau**

The Indiana Child Support Bureau is a division of DCS and is established by statute.<sup>30</sup> It is charged with the administration of Title IV-D of the federal Social Security Act which requires every state to provide child support services.<sup>31</sup> Such administration necessitates workers like business systems intermediates.

A business systems intermediate for the Child Support Bureau is an employee for a number of reasons. Business systems intermediates are at-will workers who may be dismissed at any time.<sup>32</sup> They report to a senior manager who controls and directs the material details of how their work is to be performed. Their basic duties are to read and interpret business system requirements, create technical system guides, and communicate technical changes to county and state partners of the

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<sup>25</sup> Ind. Code § 36-4-6-18.

<sup>26</sup> Ind. Code § 36-4-6-19(a).

<sup>27</sup> Ind. Code § 36-4-6-21

<sup>28</sup> Ind. Code § 36-4-7-2(b).

<sup>29</sup> 1991 *Ind. Att'y Gen. Op.* No. 91-14 (distinguishing *State ex rel. Platt v. Kirk*, as well as prior opinions of this office, in which city council was not seen as an "office" because its duties were not set out by state law, as they are now).

<sup>30</sup> Ind. Code § 31-25-3-1(a).

<sup>31</sup> *Id.*

<sup>32</sup> Ind. Code § 4-15-2.2-24.

Child Support Bureau. They have no sovereign powers of the State entrusted to them. All these elements indicate business systems intermediates are employees rather than officers.

## **b. Town Board**

The legislative power of a town is vested in its legislative body.<sup>33</sup> “Legislative body” is defined as the governing body of a political subdivision.<sup>34</sup> This would include town boards. In general, town board members are elected to serve four-year terms.<sup>35</sup> The town board may “adopt ordinances and resolutions for the performance of functions of the town; purchase, hold, and convey any interest in property, for the use of the town; and adopt and use a common seal.”<sup>36</sup> The town board fixes the compensation of its own members by ordinance.<sup>37</sup>

Town board members are lucrative officers for a number of reasons. The town board is created by statute rather than by contract. Town board members are elected rather than hired as contract employees. Town board members serve limited, four-year terms rather than working with open-ended employment. Town board members have no employer (other than the voters) who directs how their work is to be performed. Most importantly, town board members have legislative and executive powers set forth by law which are usually reserved to the State. All these elements indicate that town board members are “officers.” Moreover, there is no legislative or other exception making this position a non-office. Significantly, there are past decisions of this office that opine a town board member is a lucrative officer.<sup>38</sup> Based on the above analysis, a town board member is deemed a lucrative office holder under Art. 2, § 9 of the Indiana Constitution.

Since a business systems intermediate is an employee, while a town board member is a lucrative officer, there is no violation of the dual office holding prohibition if one person holds both positions simultaneously.

## **3. Investigator/Carroll County Sheriff Merit Board**

### **a. Investigator**

A DCS investigator is an employee for a number of reasons. Investigators are workers in the state classified service who may be dismissed only for just cause.<sup>39</sup> They report to a regional investigative supervisor who controls and directs the material details of how their work is to be performed. Their primary duty is to assist DCS family case managers in locating persons essential to supporting child safety and permanency, often an absent parent or relative. They have no sovereign powers of the State entrusted to them. All these elements indicate DCS investigators are employees rather than officers.

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<sup>33</sup> Ind. Code § 36-5-2-2.

<sup>34</sup> Ind. Code § 36-1-2-9(7).

<sup>35</sup> Ind. Code § 36-5-2-3.

<sup>36</sup> Ind. Code § 36-5-2-9.

<sup>37</sup> Ind. Code § 36-5-3-2(b).

<sup>38</sup> 1980 *Ind. Att’y Gen. Op.* No. 80-3; 1988 *Ind. Att’y Gen. Op.* No. 88-2.

<sup>39</sup> Ind. Code § 4-15-2.2-23.

## **b. Carroll County Sheriff's Merit Board**

A county sheriff's merit board ("board") is responsible for adopting and enforcing rules for the discipline of members of the sheriff's department.<sup>40</sup> Board members are either appointed by the sheriff, or elected by majority vote of the members of the county police force.<sup>41</sup> Generally, board members serve four-year terms.<sup>42</sup> Board members are empowered to recommend the number of personnel and their salaries;<sup>43</sup> to approve the establishment of ranks, qualifications, training, and education for personnel;<sup>44</sup> to approve rules and regulations governing the discipline of officers;<sup>45</sup> and to hear cases regarding the discipline and removal of officers.<sup>46</sup> Each board member is entitled to receive fifteen dollars (\$15) per day for each day engaged in transacting the business of the board.<sup>47</sup>

A county sheriff's merit board is a lucrative office for a number of reasons. Board membership is created by statute rather than by contract. Board members are elected or appointed rather than hired as contract employees. Board members serve limited, four-year terms rather than working with open-ended employment. Board members have no employer who directs how their work is to be performed. Most importantly, board members have executive powers set forth by law which are usually reserved to the State. All these elements indicate the members of the county sheriff's merit board are "officers." Furthermore, because board members are entitled to receive compensation for each day they are engaged in board business, the office is "lucrative."

Although there is no legislative exemption for merit boards, in a 2004 law review article the current Attorney General, Gregory Zoeller, noted that safety boards have been exempted by statute from application of Art. 2, § 9. He further opined:

Some positions are not expressly exempted but may be found to be exempted through analogy. For instance, the Vanderburgh County Sheriff's Merit Board performs similar, though more restricted, functions at the county level as do the public safety boards at the city level. The merit board is responsible for adopting and enforcing rules for the discipline of members of the sheriff's department. [See *Miller v. Vanderburgh Co.*, 610 N.E.2d 858 (Ind. Ct. App. 1993).] The sheriff's merit board is not charged with the broader public safety functions of safety boards; however, inasmuch as their functions overlap, the two bodies perform identical services.

Sheriffs' merit boards effectively act as safety boards at the county level.... [In a municipality, a safety board has statutory responsibilities that include] oversight and discipline of the city's police department. [Citations omitted.] Therefore, the sheriff's merit board is needed in order to perform the oversight and disciplinary role at the

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<sup>40</sup> Ind. Code § 36-8-10 *et seq.*

<sup>41</sup> Ind. Code § 36-8-10-3(b).

<sup>42</sup> *Id.*

<sup>43</sup> Ind. Code §36-8-10-4(b).

<sup>44</sup> Ind. Code § 36-8-10-10(a).

<sup>45</sup> Ind. Code § 36-8-10-10(d).

<sup>46</sup> Ind. Code § 36-8-10-11.

<sup>47</sup> Ind. Code § 36-8-10-3(c).

county level. Because these two boards perform the same functions with respect to law enforcement agencies and because the sheriff's merit board essentially takes the place of the safety board at the county level it would be reasonable to extend the statutory exemption to sheriff's merit board members.<sup>48</sup>

While Mr. Zoeller's observation does address the issue in this case, it should be noted that he was not writing officially for the Office of the Attorney General (he was Chief Council at the time); a major thrust of the article questions whether the General Assembly has the power to create such exemptions; and his observation did not involve a scenario where the purported dual office holder is a DCS investigator. While the analogy in Mr. Zoeller's article is of academic interest, legislative intent cannot be divined from the analogy enunciated in the article.

Since a DCS investigator is an employee, while a member of a county sheriff's merit board is a lucrative officer, there is no violation of the dual office holding prohibition if one person holds both positions simultaneously.

#### **4. Assistant Deputy Director of Special Projects for DCS/City Council**

##### **a. Assistant Deputy Director of Special Projects**

An assistant deputy director of special projects for DCS is an employee for a number of reasons. Such assistants are at-will workers who may be dismissed at any time.<sup>49</sup> They report to the DCS chief financial officer who controls and directs the material details of how their work is to be performed. Their basic duties are to assist in projects and assignments generated by the chief financial officer and controller as needed in agency operations. They have no sovereign powers of the State entrusted to them. All these elements indicate assistant deputy directors of special projects are employees rather than officers.

##### **b. City Council**

As previously discussed, for dual office holding purposes city council members are lucrative officers rather than employees.

Since a DCS assistant deputy director for special projects is an employee, while a city council member is a lucrative officer, there is no violation of the dual office holding prohibition if one person holds both positions simultaneously.

#### **5. Family Case Manager/City Council**

##### **a. Family Case Manager**

A DCS family case manager is an employee for a number of reasons. Family case managers work under open-ended contracts rather than serving limited terms. They report to family case manager supervisors in larger counties – or to the county DCS director in smaller counties – who control

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<sup>48</sup> Gregory Zoeller, *Dual Office Analysis: Can the Legislature Carve Out Exceptions?*, 37 Ind. L. Rev. 733, 747-48 (2004).

<sup>49</sup> Ind. Code § 4-15-2.2-24.

and direct the material details of how their work is to be performed. Their basic duties are to protect children from abuse and neglect and either maintain or reunify families whenever possible, or to achieve a permanent home or independent living for children unable to be reunited with their families in a timely manner. They have no sovereign powers of the State entrusted to them. All these elements indicate DCS family case managers are employees rather than officers.

**b. City Council**

As previously discussed, for dual office holding purposes city council members are lucrative officers rather than employees.

Since a DCS family case manager is an employee, while a city council member is a lucrative officer, there is no violation of the dual office holding prohibition if one person holds both positions simultaneously.

**6. Family Case Manager/School Board President**

**a. Family Case Manager**

As previously discussed, for dual office holding purposes DCS family case managers are employees rather than officers.

**b. School Board President**

A school board president is a lucrative officer for a number of reasons. “It is well settled that the office of city or town school trustee is a lucrative office within the meaning of Section 9, Article 2 of the Constitution of Indiana.”<sup>50</sup> The Indiana Supreme Court has held that school trustees – analogous to school board members – are lucrative officers because their duties are fixed by statute, they are elected, and they receive compensation for their services.<sup>51</sup> A number of official opinions of the Attorney General have reached the same conclusion.<sup>52</sup>

Since a DCS family case manager is an employee, while a school board president is a lucrative officer, there is no violation of the dual office holding prohibition if one person holds both positions simultaneously.

**7. Family Case Manager/Town Council**

**a. Family Case Manager**

As previously discussed, for dual office holding purposes DCS family case managers are employees rather than officers.

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<sup>50</sup> 1951 *Ind. Att’y Gen. Op.* No. 72.

<sup>51</sup> *Chambers v. State ex rel. Barnard*, 26 N.E. 893, 894 (1891).

<sup>52</sup> 1967 *Ind. Att’y Gen. Op.* No. 29; 1991 *Ind. Att’y Gen. Op.* No. 91-14.



## **b. Town Council**

The legislative power of a town is vested in its legislative body.<sup>53</sup> “Legislative body” is defined as the town council for a town.<sup>54</sup> Town council members are elected to serve four-year terms.<sup>55</sup> The town council may pass ordinances and resolutions for the performance of functions of the town; purchase, hold, and convey any interest in property, for the use of the town; and adopt and use a common seal.<sup>56</sup> The town council is also empowered to issue bonds to be used in the exercise of town powers and for the payment of town debts,<sup>57</sup> as well as making loans and issuing notes.<sup>58</sup> Finally, the town council fixes the compensation of its own members by ordinance.<sup>59</sup>

Town council members are lucrative officers for a number of reasons. The town council is created by statute rather than by contract. Town council members are elected rather than hired as contract employees. Town council members serve limited, four-year terms rather than working with open-ended employment. Town council members have no employer (other than the voters) who directs how their work is to be performed. Most importantly, town council members have legislative and executive powers set forth by law which are usually reserved to the State. All these elements indicate that town council members are “officers.” Furthermore, because town council members are entitled to a fixed annual compensation for their services, the office is “lucrative.” Moreover, there is no legislative or other exception making this position a non-office. Based on the above analysis, a town council member is deemed a lucrative office holder under Art. 2, § 9 of the Indiana Constitution.

Since a DCS family case manager is an employee, while a town council member is a lucrative officer, there is no violation of the dual office holding prohibition if one person holds both positions simultaneously.

## **8. Family Case Manager/City County Council/Fulton County Sheriff’s Reserve Officer**

### **a. Family Case Manager**

As previously discussed, for dual office holding purposes DCS family case managers are employees rather than officers.

### **b. City County Council**

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<sup>53</sup> Ind. Code § 36-5-2-2.

<sup>54</sup> Ind. Code § 36-1-2-9(5).

<sup>55</sup> Ind. Code § 36-5-2-3(a).

<sup>56</sup> Ind. Code § 36-5-2-9.

<sup>57</sup> Ind. Code § 36-5-2-11(a).

<sup>58</sup> Ind. Code § 36-5-2-12(a).

<sup>59</sup> Ind. Code § 36-5-3-2(b).

The legislative power of a city is vested in its legislative body.<sup>60</sup> “Legislative body” is defined as a city-county council.<sup>61</sup> City council members are elected to serve four-year terms.<sup>62</sup> The city-county council may pass ordinances, orders, resolutions, and motions for the government of the city, the control of the city’s property and finances, and the appropriation of money.<sup>63</sup> The city-county council may also, by ordinance, make loans of money and issue bonds for the purpose of refunding those loans.<sup>64</sup> Additionally, the city-county council may investigate city departments, officers, employees, and contractors, and may compel the attendance of witnesses and the production of evidence by subpoena.<sup>65</sup> Finally, city-county council members are entitled to a fixed annual compensation.<sup>66</sup>

City-county council members are lucrative officers for a number of reasons. The city-county council is created by statute rather than by contract. City-county council members are elected rather than hired as contract employees. City-county council members serve limited, four-year terms rather than working with open-ended employment. City-county council members have no employer (other than the voters) who directs how their work is to be performed. Most importantly, city-county council members have legislative and executive powers set forth by law which are usually reserved to the State. All these elements indicate that city-county council members are “officers.” Furthermore, because city-county council members are entitled to a fixed annual compensation for their services, the office is “lucrative.” Moreover, there is no legislative or other exception making this position a non-office. Significantly, there is a past decision of this office that opines a city council member is a lucrative officer.<sup>67</sup> Based on the above analysis, a city-county council member is deemed a lucrative office holder under Art. 2, § 9 of the Indiana Constitution.

### **c. Fulton County Sheriff’s Reserve Officer**

A county may provide by ordinance for any number of police reserve officers.<sup>68</sup> County reserve officers are appointed by the same authority that appoints regular members of the department.<sup>69</sup> County reserve officers have all the same police powers as members of the regular police department, except as limited by the rules of the department.<sup>70</sup> By statute, county reserve officers may receive some incidental benefits, including insurance for life, accident, and sickness coverage.<sup>71</sup> It is our understanding that in Fulton County reserve police officers are unpaid volunteers, presumably based on the applicable county ordinance.

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<sup>60</sup> Ind. Code § 36-4-4-4(a).

<sup>61</sup> Ind. Code § 36-1-2-9(3).

<sup>62</sup> Ind. Code § 36-4-6-2.

<sup>63</sup> Ind. Code § 36-4-6-18.

<sup>64</sup> Ind. Code § 36-4-6-19(a).

<sup>65</sup> Ind. Code § 36-4-6-21.

<sup>66</sup> Ind. Code § 36-4-7-2(b).

<sup>67</sup> 1991 *Ind. Att’y Gen. Op. No. 14* (distinguishing *State ex rel. Platt v. Kirk*, as well as prior opinions of this office, in which city council was not seen as an “office” because its duties were not set out by state law, as they are now).

<sup>68</sup> Ind. Code § 36-8-3-20(a), (b).

<sup>69</sup> Ind. Code § 36-8-3-20(c).

<sup>70</sup> Ind. Code § 36-8-3-20(e).

<sup>71</sup> Ind. Code § 36-8-3-20(f) (incidental benefits may include a uniform allowance; compensation for time lost from other employment because of court appearances; and insurance for life, accident, and sickness coverage; and compensation for lake patrol duties if approved by the county sheriff).

Fulton County reserve police are lucrative officers for a number of reasons. Their positions are created by statute rather than by contract. They are appointed to their positions. Most importantly, they have all the same police powers as members of the regular police department – powers that are normally reserved to the State. All these elements indicate that reserve police are officers. Furthermore, because reserve police officers are entitled to incidental benefits – specifically life, accident, and sickness coverage – their offices are lucrative. In a recent appellate court decision, members of the East Chicago Public Library Board were held to have received statutorily prohibited compensation in the form of health, dental, vision, and life insurance in exchange for their service on the Board.<sup>72</sup> In this case, a reserve police officer’s statutory entitlement to some of the same types of insurance marks the office as lucrative. Based on the above analysis, a Fulton County reserve police officer is deemed a lucrative officer holder under Art. 2, § 9 of the Indiana Constitution.

Since a DCS family case manager is an employee, while a Fulton County sheriff’s reserve police officer and a city county council member are lucrative officers, there is a violation of the dual office holding prohibition if one person holds all three positions simultaneously. More to the point, a single person cannot simultaneously hold positions as a reserve police officer and a city county council member – it violates Art. 2, § 9 of the Indiana Constitution. And as discussed below, this person must be aware of the potential for abuse of power and possible conflicts of interest that may exist if he or she attempts to perform the functions of an FCM and a reserve police officer simultaneously.

## **9. Family Case Manager/Chandler Police Department Reserve Officer**

### **a. Family Case Manager**

As previously discussed, for dual office holding purposes DCS family case managers are employees rather than officers.

### **b. Chandler Police Department Reserve Officer**

A city may provide by ordinance for any number of police reserve officers.<sup>73</sup> City reserve officers are appointed by the same authority that appoints regular members of the department.<sup>74</sup> City reserve officers have all the same police powers as members of the regular police department, except as limited by the rules of the department.<sup>75</sup> By statute, city reserve officers may receive

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<sup>72</sup> *Manuel Montalvo, et al. v. State of Indiana*, 27 N.E.3d 795, 799 (Ind. Ct. App. 2015).

<sup>73</sup> Ind. Code § 36-8-3-20(a), (b).

<sup>74</sup> Ind. Code § 36-8-3-20(c).

<sup>75</sup> Ind. Code § 36-8-3-20(e).

some incidental benefits, including insurance for life, accident, and sickness coverage.<sup>76</sup> It is our understanding that in Chandler, Indiana, reserve police officers are unpaid volunteers, presumably based on the applicable city ordinance.

Chandler, Indiana, reserve police are lucrative officers for a number of reasons. Their positions are created by statute rather than by contract. They are appointed to their positions. Most importantly, they have all the same police powers as members of the regular police department – powers that are normally reserved to the State. All these elements indicate that reserve police are officers. Furthermore, because reserve police officers are entitled to incidental benefits – specifically life, accident, and sickness coverage – their offices are lucrative. In a recent appellate court decision, members of the East Chicago Public Library Board were held to have received statutorily prohibited compensation in the form of health, dental, vision, and life insurance in exchange for their service on the Board.<sup>77</sup> In this case, a reserve police officer’s statutory entitlement to some of the same types of insurance marks the office as lucrative. Based on the above analysis, a Chandler, Indiana, reserve police officer is deemed a lucrative officer holder under Art. 2, § 9 of the Indiana Constitution.

Since a DCS family case manager is an employee, while a Chandler Police Department reserve officer is a lucrative officer, there is no violation of the dual office holding prohibition if one person holds both positions simultaneously. But as discussed below, this person must be aware of the potential for abuse of power and possible conflicts of interest that may exist when he or she attempts to perform the functions of both positions simultaneously.

Although eight of the nine combinations of positions already discussed do not violate the dual office holding prohibition found in Art. 2, § 9 of the Indiana Constitution, those eight DCS employees must also be aware of the “separation of powers” doctrine and how it may affect their ability to maintain state employment while serving in an appointed/elected position.

## II. Separation of Powers

The Indiana Constitution divides the powers of state government into three separate departments: Legislative, Executive (including Administrative), and Judicial.<sup>78</sup> It prohibits a person charged with official duties under one of the departments from exercising the functions of another department.<sup>79</sup> The doctrine serves to protect a separate department of state government from any control or influence by either of the other state government departments.<sup>80</sup>

The separation of powers prohibition is distinct from the dual office holding prohibition, so the simultaneous holding of public offices is not necessary for a violation to occur.<sup>81</sup> Even if a person is not a dual office holder, he or she may be in violation of the separation of powers prohibition

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<sup>76</sup> Ind. Code § 36-8-3-20(f) (incidental benefits may include a uniform allowance; compensation for time lost from other employment because of court appearances; insurance for life, accident, and sickness coverage; and compensation for a lake patrol duties if approved by the county sheriff).

<sup>77</sup> *Manuel Montalvo, et al. v. State of Indiana*, 27 N.E.3d 795, 799 (Ind. Ct. App. 2015).

<sup>78</sup> Ind. Const. Art. 3, § 1.

<sup>79</sup> *Id.*

<sup>80</sup> *State ex rel. Black v. Burch*, 80 N.E.2d 294, 300-03 (Ind. 1948); *Scholer v. Moran*, 482 N.E.2d 460, 463 (Ind. 1985); *Phelps v. Sybinsky*, 736 N.E.2d 809, 815 (Ind. Ct. App. 2000).

<sup>81</sup> *See Book*, 149 N.E.2d at 296.

by being an officer in one department and also performing functions in another department.<sup>82</sup> If a person charged with official duties in one state government department is employed to perform duties, official or otherwise, in another department, the door is opened to influence and control by the employing department.<sup>83</sup>

In this case, the separation of powers determination would hinge on which department of state government each of the positions falls under – legislative, executive, or judicial. If both positions fall under the same department, there is no violation of Art. 3, § 1. But if each position falls under a different department, the door would be opened for the employee to simultaneously perform the functions of two separate state government departments in violation of Art. 3, § 1. A careful review of the employee’s functions under both departments would be required.

Even if a DCS employee’s seeking of political office does not violate the constitutional prohibitions against dual office holding or the separation of powers, the employee must still consider incompatibility or potential conflicts of interest between the two positions.

### **III. Incompatible Offices/Conflicts of Interest**

Generally, a public officer is prohibited from holding two incompatible offices. Offices are incompatible when there are potential conflicting interests between the two positions. Conflicts of interest arise when one office is subordinate to the other or where the functions of the two offices are “inherently inconsistent and repugnant.”<sup>84</sup> When one person cannot “discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both.”<sup>85</sup> The public servant’s appointing authority determines whether such positions are incompatible. When such incompatibility is found to exist, the acceptance of the latter office vacates the first office.<sup>86</sup> Past Attorneys General have declined to opine on the question of incompatibility for the appointing authority absent blatant conflicts of interest or violations of public policy.<sup>87</sup>

As noted above, our office has traditionally deferred ultimate conclusions regarding incompatibility and possible conflicts of interest to the agencies themselves since they are best positioned to know the specific job duties that are key to making the determinations on incompatibility and conflicts of interest. Attorney General Zoeller has continued this policy while providing assistance with outlining the applicable legal test in appropriate instances.

### **IV. The Hatch Act**

Originally passed in 1939, the Hatch Act was enacted to prevent certain government employees from participating in partisan political activity in hopes that it would prevent misuse of government funds. The Office of Special Counsel (OSC) has the important responsibility of investigating

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<sup>82</sup> *Id.* See 1983-84 *Ind. Att’y Gen. Op.* No. 83-5.

<sup>83</sup> *Black*, 80 N.E.2d at 302.

<sup>84</sup> See Gregory Zoeller, *Dual Office Analysis: Can the Legislature Carve Out Exceptions?*, 37 *Ind. L. Rev.* 733, 763 (2004) (citing *Metcalf v. Goff*, 9 A. 226, 227 (R.I. 1887)).

<sup>85</sup> 63C *Am. Jur. 2d Public Officers and Employees* § 58 (2012).

<sup>86</sup> 1954 *Ind. Att’y Gen. Op.* No. 70.

<sup>87</sup> See 1961 *Ind. Att’y Gen. Op.* No. 4; 1967 *Ind. Att’y Gen. Op.* No. 11.

alleged violations of the Hatch Act.<sup>88</sup> If the OSC brings charges, they are adjudicated by the Merit Systems Protection Board (Board).<sup>89</sup> At the state and local level, the Hatch Act applies to employees of State or local agencies whose “principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a federal agency.”<sup>90</sup> A “State or local agency” is defined as the “executive branch of a State, municipality, or other political subdivision of a State, or an agency or department thereof.”<sup>91</sup> The Hatch Act prohibits State employees from being candidates for elective office if their salaries are “paid completely, directly or indirectly, by loans or grants made by the United States or a Federal agency.”<sup>92</sup> However, the Hatch Act does not prohibit a State employee from being a candidate in a non-partisan election.<sup>93</sup>

To determine whether a particular agency is a part of the executive branch of a state the Board uses state law.<sup>94</sup> In *Special Counsel v. Bissell*, the Board took up the certified question of “whether the Tennessee Public Service Commission (TPSC) is an entity within the meaning of 5 U.S.C. § 1502(2).”<sup>95</sup> The Board had to determine if the TPSC belonged to the executive branch of government. The Board stated “because the Hatch Act specifically states that a covered State employee must work in an agency within the ‘executive branch of a State,’ State law is the appropriate and convenient measure of the governing federal law in determining what agencies are within the executive branch of a State government.”<sup>96</sup> In making its determination, the Board stated that the “‘critical factor’ to examine is not what functions the agency performs, but rather which branch of the State government controls the TPSC . . . and/or how the state has perceived that agency’s place in State government.”<sup>97</sup> In determining what branch of government controls, the Board considered such factors as: (1) who controlled the funding of the agency; (2) who controlled the personnel policies; and (3) whether the agency head was appointed by the executive or if they were separately elected.<sup>98</sup>

In Indiana, the Department of Child Services is part of the executive branch of State government. Funding for DCS comes from two sources: state funds and federal funds from the Title IV-D program. The state funds are overseen by the state auditor, an officer of the executive branch. The director of the DCS is appointed by the Governor, Indiana’s highest executive office.<sup>99</sup> The director controls the personnel policies that are specific to the agency. All these elements indicate DCS is part of the executive branch of Indiana’s government for the purposes of the Hatch Act.

As an agency within the executive branch, DCS employees are prohibited from being candidates for elective office if their salaries are paid completely by federal loans or grants. However, DCS

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<sup>88</sup> 5 U.S.C. § 1216(a)(2).

<sup>89</sup> 5 U.S.C. §§ 1504-1508.

<sup>90</sup> 5 U.S.C. § 1501(4).

<sup>91</sup> 5 U.S.C. § 1501(2).

<sup>92</sup> 5 U.S.C. § 1502(a)(3).

<sup>93</sup> 5 U.S.C. § 1503.

<sup>94</sup> *Ohio v. United States Civil Service Commission*, 65 F. Supp. 776 (S.D. Ohio 1946); *Special Counsel v. Bissell*, 61 M.S.P.R. 637, 642 (1994).

<sup>95</sup> *Bissell* at 639.

<sup>96</sup> *Id.* at 642.

<sup>97</sup> *Id.* at 643.

<sup>98</sup> *Id.* at 644-647.

<sup>99</sup> Ind. Code § 31-25-1-1(b).

is funded by both state and federal monies. Because of this dual funding, DCS employees' salaries may not be paid completely by federal money alone, and the agency itself would be the best source of information regarding the actual use of the monies it receives. Additionally, the Hatch Act only applies to elective offices; appointed offices (*e.g.*, certain county sheriff's merit board members and reserve police officers) are not affected. To be completely certain, individuals may contact the OSC to request an advisory opinion about their political activity under the Hatch Act.<sup>100</sup>

For further guidance regarding applicable public policy, conflict of interest, and related considerations, as well as an explanation of the consequences of dual office holding or accepting incompatible positions, you may wish to consult the Attorney General's *Dual Office Holding Guide*, available at [www.in.gov/attorneygeneral/files/DOH%20Guide%202016%20Update.pdf](http://www.in.gov/attorneygeneral/files/DOH%20Guide%202016%20Update.pdf).

## CONCLUSIONS

In general, employees of the Indiana Department of Child Services who are seeking elected/appointed political office will not violate the dual office holding provisions found in Art. 2, § 9 of the Indiana Constitution. However, a single employee who is seeking a city county council position and a sheriff's reserve officer position would violate Art. 2, § 9 because both positions are lucrative offices. Additionally, employees who do not violate Art. 2, § 9 must also consider the separation of powers doctrine, possible conflicts of interest, public policy concerns, potential incompatibility of positions, and the federal Hatch Act. Each of these has the potential to prevent such employees from maintaining state employment while seeking or holding an elected/appointed political office.

Sincerely,

Gregory F. Zoeller  
Attorney General

Donald Hannah  
Deputy Attorney General

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<sup>100</sup> 5 U.S.C. § 1212(f) (authorizing the OSC to issue advisory opinions regarding the political activity of certain state and local employees under the Hatch Act).