

Dual Office Holding Guide



Indiana Attorney General

Greg Zoeller

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Overview

Who should read this Guide?

Public officials who may be considering a second public service position should read this Guide with their attorneys. Under Indiana law, some government officials may not legally serve in more than one public service position at any given time. The holding of two lucrative offices may result in the constitutional violation commonly referred to as “dual office holding.” Further, even if serving in two positions does not result in a constitutional dual office violation, it may violate the constitutional doctrine of separation of powers, create a conflict of interest or public policy concern, or be prohibited by another federal, state, or local law.

All public officials should seek legal advice from an attorney before accepting a second public service position. State officials considering a second position should discuss the matter with their agency attorney before seeking an opinion from the Indiana Attorney General.

Why is an understanding and thorough analysis of dual office holding important?

A violation of the constitutional and statutory prohibitions against dual office holding may result in the loss of or removal from an official position, the commission of the Level 6 felony of conflict of interest, or loss of federal funding.

How should I use the Guide?

This Guide provides a four-part legal analysis that public officials may use in order to determine whether accepting a second public service position violates the law. The Guide also offers a list of citations to Indiana cases and Attorney General Opinions discussing specific public service positions and potential dual office conflicts.

How do I determine whether holding a second public service position violates law?

The following four-part analysis may be used to determine whether holding a second public service position violates the law:

- I. Are both positions lucrative offices within the meaning of Indiana Constitution Article II, Section 9?
- II. Would holding both positions violate the constitutional doctrine of "separation of powers" under Indiana Constitution Article III, Section 1?
- III. Are the positions incompatible and would holding both create a conflict of interest or a public policy concern?
- IV. Does a federal, state or local law or regulation prohibit the simultaneous holding of both offices?

Analysis

I. Are both positions lucrative offices within the meaning of Indiana Constitution Article II, Section 9?

Article II, Section 9 of the Indiana Constitution states:

No person holding a lucrative office or appointment under the United States or under this State is eligible to a seat in the General Assembly; and no person may hold more than one lucrative office at the same time, except as expressly permitted in this Constitution. Offices in the militia to which there is attached no annual salary shall not be deemed lucrative.

The dual office prohibition was adopted by the framers of the Indiana Constitution in order to prevent the consolidation of power in a small number of government officials. *See generally*, Gregory Zoeller, *Dual Office Analysis: Can the Legislature Carve Out Exceptions*, 37 Ind. L. Rev. 733, 736-37 (2004).

What should be considered when determining whether a position is a "lucrative office"?

Does the position constitute an office or employment? The dual office prohibition does not prohibit a person from maintaining an office while also serving as an employee of a governmental entity. An employee is one who is "in the service of another under any 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." *Common Council of Peru v. Peru Daily Tribune, Ind.*, 440 N.E.2d 726, 729 (Ind. Ct. App. 1982) (citations omitted).

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." *Gaskin v. Beier*, 622 N.E.2d 524, 528 (Ind. Ct. App. 1993) (citations omitted). More specifically, holders of public offices are described as being "charged with duties delegated to them under the state government, with duties imposed upon them by statute, and are subject to legislative control." *Wells v. State ex rel. Peden*, 94 N.E. 321, 322 (Ind. 1911). An officer is also distinguished by his or her power of supervision and control, and liability as a public offender in cases of malfeasance in office. *Gaskin*, 622 N.E.2d at 528. An officer maintains "greater importance, dignity and independence of his position" and is usually required to take an official oath and give an official bond. *Common Council of Peru*, 440 N.E.2d at 730. Additionally, the duration of the officer's position is usually defined by statute. *Id.* at 731.

Is the position in question lucrative? An office is considered "lucrative" when there is attached compensation for services rendered. *Book v. State Office Bldg. Comm'n*, 149 N.E.2d 273, 289 (Ind. 1958). Lucrativeness does not depend on the amount of compensation affixed to the office. *Id.* Compensation may be in the form of a salary or may be a per diem payment. A "per diem is not a fee, salary or wages. It is a compensation for a service given the government

for a day or a part of a day." 70 Ind. Op. Att'y Gen. 260 (1954). Even if the officer chooses not to accept compensation, as long as he or she is entitled to the pay affixed to the performance of the office's duties, the office is considered lucrative. *Dailey v. State*, 8 Blackf. 329, 330 (Ind. 1846). Only pure reimbursement for expenses actually incurred in connection with the officer's duties (such as travel expenses) does not constitute compensation. 45 Ind. Op. Att'y Gen. 259 (1960) (explaining *Book*, 149 N.E.2d at 289).

Are city and county officials affected? City and county officials whose duties are conferred by statute for a public purpose are generally considered officeholders for purposes of Article II, Section 9. However, if the duties of a local city or county officer are purely municipal in nature and the officer has no duties to perform under the laws of the state, such offices are not lucrative offices. See *Platt v. Kirk*, 44 Ind. 401, 406-08 (Ind. 1873). Local ordinances may add to one's understanding of a local city or county officer's duties.

What if state law requires an officer also serve on another board? "[A]n office is not necessarily created by a statute that imposes additional duties and powers upon an officer." *Book*, 149 N.E.2d at 290. No dual office holding violation occurs where state law simply requires an officer to perform additional duties by serving on another board or commission. *Id.* at 290-91 (discussing the Governor's duty to also serve on the State Office Building Commission).

In summary: If state law grants any of the State's sovereign power (i.e., eminent domain, prosecution, taxation) to a public service position and the officeholder is entitled to any monetary compensation for service, then the public service position is considered a lucrative office for purposes of Article II, Section 9.

What are examples of lucrative and non-lucrative offices?

Appendix A to this Guide provides a list of public service positions that have been determined to be either lucrative or non-lucrative offices. Be advised that laws forming the basis for earlier decisions by courts or the Attorney General may have been amended or repealed since the publication of this Guide. Therefore, your attorney should assist you in determining whether a particular court or Attorney General opinion is still applicable. Appendix B contains a list of Attorney General Opinions and court decisions that have been overruled or are no longer based on current law. Appendix C includes additional resources that may be of assistance in your analysis.

What is the correct procedure to determine the right to an office?

Indiana Code section 34-17-1-1 provides that an information may be filed against a person unlawfully holding a public office. The information may be filed by the prosecuting attorney or by any other person who claims an interest in the office. Ind. Code § 34-17-2-1. In such a case, the plaintiff must demonstrate personal interest in right or title to the office. *Brenner v. Powers*, 584 N.E.2d 569, 576 (Ind. Ct. App. 1992).

If a person holds two lucrative offices in violation of Article II, Section 9, what are the consequences?

A lucrative officeholder who accepts a second lucrative office thereby surrenders or vacates the first office. *Chambers v. State ex rel. Barnard*, 26 N.E. 893, 894 (Ind. 1891); *Bishop v. State ex rel. Griner*, 48 N.E. 1038, 1041 (Ind. 1898); *Wells*, 94 N.E. at 323. A successor must be appointed or elected, depending on the law applicable to the office. *Gosman v. State ex. rel. Schumacher*, 6 N.E. 349, 353 (Ind. 1886). The acts of a de facto officer performed before being ousted from office are typically held to be valid as a matter of public policy. Courts have determined that the public should not suffer from the acts of an officer who may have had defective title or no title at all. *State ex rel. Bishop v. Crowe*, 50 N.E. 471, 473-74 (Ind. 1898); *State v. Sutherland*, 75 N.E. 642, 646 (Ind. 1905).

A person holding both a lucrative state office and a lucrative federal office may be expelled from the state office by order of a state court. *Foltz v. Kerlin*, 4 N.E. 439, 440-41 (Ind. 1886); 1987-88 Op. Att’y Gen. No. 87-17.

Under the four-part analysis, what if both public service positions are lucrative offices?

If both public service positions are lucrative offices, then holding both offices simultaneously infringes on Article II, Section 9’s prohibition against dual office holding. Because one may not hold two lucrative offices at the same time, no further inquiry is necessary under the four-part analysis set out above. If, on the other hand, you have determined that one or both public service positions is not a lucrative office, you should continue your analysis by considering questions 2 through 4 of the inquiry.

II. Would holding both positions violate the constitutional doctrine of "separation of powers" under Indiana Constitution Article III, Section 1?

The Indiana Constitution divides the powers of state government into three separate departments: Legislative, Executive (including Administrative), and Judicial. It prohibits a person charged with official duties under one of the departments from exercising the functions of another department. Article III, Section 1 of the Indiana Constitution provides:

The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial: and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.

The doctrine serves to rid each of the separate departments of state government from any control or influence by either of the other state government departments. *State ex rel. Black v. Burch*, 80 N.E.2d 294, 300-03 (Ind. 1948); *Schloer v. Moran*, 482 N.E.2d 460, 463 (Ind. 1985); *Phelps v. Sybinsky*, 736 N.E.2d 809, 815-16 (Ind. Ct. App. 2000).

Must one be an office holder in both departments for a separation of powers violation to occur?

The separation of powers prohibition is not a law against dual office holding and therefore, the simultaneous holding of public offices is not necessary for a violation to occur. *See Book*, 149 N.E.2d at 296. Thus, even if a person is not a dual officeholder, he or she may be in violation of the separation of powers prohibition by being an officer in one department and also performing functions in another department. *Id. See* 1983-84 Op. Att’y Gen. No. 83-5. 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. *Black*, 80 N.E.2d at 302.

Is Article III, Section 1 applicable to municipal positions?

"[Article III, Section 1] relates only to the state government and officers charged with duties under one of the separate departments of the state and not to municipal governments and officers." *Gaskin*, 622 N.E.2d at 529; *see also State v. Monfort*, 723 N.E.2d 407, 414 (Ind. 2000). However, Indiana Code chapter 36-4-4 sets out the separation of powers for city branches of government.

III. Are the positions incompatible and does holding both create a conflict of interest or a public policy concern?

The fact that a proposed dual office holding does not violate constitutional provisions does not determine finally whether dual office holding is permissible. It is necessary to review potential conflicts of interest between the two offices and also public policy concerns.

When are two positions incompatible?

Generally, a public officer is prohibited from simultaneously holding two incompatible offices. Offices are incompatible when there are potential conflicting or adverse 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." *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)). 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." 63C Am. Jur. 2d *Public Officers and Employees* § 58 (2012). Public policy is determined by considering the Indiana Constitution, state law, the practice of the state's administrative officers, and the decisions of the Indiana Supreme Court. *See Hogston v. Bell*, 112 N.E. 883, 886 (Ind. 1916).

Potential conflicts may arise in representation, salary negotiations, supervision and control of duties, and a public obligation to exercise independent judgment. 63C Am Jur. 2d at

§ 58; *see also Wells*, 94 N.E. at 323 (discussing two incompatible offices); *see also* 1951 Op. Att’y Gen. No. 77; 1954 Op. Att’y Gen. No. 70; 1967 Op. Att’y Gen. No. 11. When such incompatibility exists, the acceptance of the latter office vacates the first office. 1954 Op. Att’y Gen. No. 70.

When is a conflict of interest a crime?

In certain circumstances, Indiana Code section 35-44.1-1-4 prohibits a public servant who knowingly or intentionally has a pecuniary interest in, or derives a profit from, a contract or purchase connected with an action by the governmental entity served by the public. Such activity may result in a Level 6 felony charge. Further, even if there is no injury or actual benefit from the conflict of interest, the law does not permit public servants to place themselves in a situation where they may be tempted to do wrong. *Cheney v. Unroe*, 77 N.E. 1041, 1043 (Ind. 1906); 1989 Op. Att’y Gen. No. 89-3. To deter conflicts of interest, the courts hold all such conflicting employment void. *Cheney*, 77 N.E. at 1042.

Who determines when holding both positions creates a conflict of interest or violates public policy?

The public servant's appointing authority determines whether such positions are incompatible. *See Gaskin*, 622 N.E.2d at 530. 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. 1961 Op. Att’y Gen. No. 4; 1967 Op. Att’y Gen. No. 11; 1989 Op. Att’y Gen. No. 89-3.

IV. Does a federal, state or local law or regulation prohibit the simultaneous holding of both offices?

What are the prohibitions under the federal Hatch Act?

Since 1939, the federal Hatch Act, at 5 U.S.C. §§ 1501-1508, has limited the political activity of individuals employed by state, county, or municipal executive agencies that are affiliated with programs financed in whole or in part by federal loans or grants.

Specifically, 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.” 5 U.S.C. § 1501(4). 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.” 5 U.S.C. § 1501(2). To determine whether a particular agency is part of the executive branch of a state, one must use state law. 2010 Op. Att’y Gen. No 2010-4 (*citing Special Counsel v. Bissell*, 61 M.S.P.R. 637, 642 (1994)). The critical factor to examine is “which branch of the State government controls the [agency] . . . and/or how the state has perceived the agency’s place in State government.” *Id.* (*quoting Bissell* at 643).

The Hatch Act prohibits the above-mentioned state or local employees from the following: 1) using official authority or influence to affect the result of an election or nomination for office; 2) coercing a state or local officer to pay, lend or contribute to a party, committee, etc. for political purposes; or 3) being candidates for elective office. 5 U.S.C.A. § 1502(a).

The Hatch Act's limitations do not apply to: 1) individuals who exercise no functions in connection with federally financed activities; or 2) individuals employed by educational or research institutions, establishments, or agencies which are supported in whole or in part by state or political subdivisions thereof, the District of Columbia, or by recognized religious, philanthropic or cultural organizations (*e.g.*, administrators, teachers). 5 U.S.C.A. § 1501.

Also, the Act's limitations on candidacy for elected offices do not apply to: 1) the Governor or Lieutenant Governor; 2) the mayor of a city; 3) a duly elected head of an executive department of a state or municipality who is not classified under a State or municipal merit or civil-service system; or 4) individuals holding elective office. 5 U.S.C.A. § 1502(c).

If an officer or employee violates the Hatch Act, the U.S. Merit Systems Protection Board may determine that the violation requires the officer or employee be dismissed from employment. The employing governmental entity must either remove the employee or forfeit a portion of the federal assistance equal to two years salary of the employee.

Employees may obtain answers to specific questions regarding political activity by calling the U.S. Office of Special Counsel at 1-800-85-HATCH. Further information is available at <http://www.osc.gov/hatchact.htm>.

Do other laws affect dual office holding?

Appendix A includes a list of additional state statutory restrictions on officers. Local officers should also consult local laws for any additional restrictions.

Appendix A

Lucrative and Non-Lucrative Office Examples

Examples of officers determined to be lucrative or non-lucrative are organized in the following manner:

- Section 1: Lucrative officers as determined by Indiana courts and Indiana Attorney General opinion.
- Section 2: State laws restricting dual office holding.
- Section 3: Non-lucrative offices as determined by Indiana courts and Indiana Attorney General opinion.
- Section 4: Offices made non-lucrative under Indiana law.

1. Lucrative Offices as Determined by Indiana Courts and Indiana Attorney General Opinion:

- **Alcoholic beverage board member:** 1951 Op. Att’y Gen. No. 78.
- **Armed forces officer (federal):** 1942 Op. Att’y Gen. 76.
- **Attorney General:** *State ex rel. Steers v. Holovachka*, 142 N.E.2d 593, 602 (Ind. 1957).
- **Circuit court judge:** 1942 Op. Att’y Gen. 76.
- **City clerk treasurer:** *Wilson v. Niesse*, 244 N.E.2d 436, 437 (Ind. 1969).
- **City council member**:** 1991 Op. Att’y Gen. No. 91-14; 2009 Op. Att’y Gen. No. 2009-1.
- **City judge:** 1960 Op. Att’y Gen. No. 45.
- **City mayor:** *Howard v. Shoemaker*, 35 Ind. 111, 115 (1871); 1967 Op. Att’y Gen. No. 22; 1962 Op. Att’y Gen. No. 67; 1942 Op. Att’y Gen. 88; 1949 Op. Att’y Gen. No. 6.
- **City Police Chief:** *Felder v. Oliverio*, 934 F.Supp. 1032, 1038 (U.S. Dist. Ct. 1996) (using the same analysis for determining who is an officer for purposes of Art. II, § 9, the court determined a city police chief is an officer under Art. XV, § 2).
- **City sanitary district board member:** 1987-88 Op. Att’y Gen. No. 88-1.
- **City school board member:** 1951 Op. Att’y Gen. No. 72.
- **City Traffic Engineer:** 1997 Op. Att’y Gen. No. 97-1.

- **Colonel of volunteers:** *Kerr v. Jones*, 19 Ind. 351 (Ind. 1862); 1942 Op. Att’y Gen. 76.
- **County auditor:** *State ex rel. Cornwell v. Allen*, 21 Ind. 516 (Ind. 1863).
- **County board of public welfare member:** 1957 Op. Att’y Gen. No. 12; 1966 Op. Att’y Gen. No. 33.
- **County board of registration member:** 1989 Op. Att’y Gen. No. 89-7; 1991 Op. Att’y Gen. No. 91-14.
- **County commissioner:** *Dailey v. State*, 8 Blackf. 329 (Ind. 1846); *Thompson v. Hays*, 867 N.E.2d 654 (Ind. Ct. App. 2007); 1957 Op. Att’y Gen. No. 13; 1962 Op. Att’y Gen. No. 67.
- **County coroner:** 1987-88 Op. Att’y Gen. No. 88-12; 1989 Op. Att’y Gen. No. 89-4.
- **County council member:** 1951 Op. Att’y Gen. No. 78.
- **County court referee:** 1987-88 Op. Att’y Gen. No. 87-17.
- **County director of public welfare:** 1936 Op. Att’y Gen. 155.
- **County election board member:** 1981-82 Op. Att’y Gen. No. 81-9; 1961 Op. Att’y Gen. No. 30; 1987-88 Op. Att’y Gen. No. 88-5; Ind. Code § 3-6-5-3.
- **County health officer:** 1967 Op. Att’y Gen. No. 29; 1987-1988 Op. Att’y Gen. No. 88-12.
- **County highway engineer:** 1997 Op. Att’y Gen. No. 1.
- **County highway superintendent:** 1987-88 Op. Att’y Gen. No. 88-1.
- **County highway supervisor:** 1967 Op. Att’y Gen. No. 39.
- **County Plan Commission member:** 1954 Op. Att’y Gen. No. 70.
- **County recorder:** *Dailey v. State*, 8 Blackf. 329 (Ind. 1846).
- **County surveyor:** 1917-1920 Op. Att’y Gen. 78; 1933 Op. Att’y Gen. 254.
- **County welfare department investigator:** 1936 Op. Att’y Gen. 412.

- **Deputies of lucrative officeholders** (except for appointed deputies of political subdivisions or a judicial circuit, per Ind. Code 5-6-4-3): *Wells v. State ex rel. Peden*, 94 N.E. 321, 322 (Ind. 1911); 1980 Op. Att’y Gen. No. 3.
- **Deputy gas inspector**: 1929-30 Op. Att’y Gen. 747.
- **Deputy insurance commissioner**: 1947 Op. Att’y Gen. 40.
- **Deputy postmaster**: *Bishop v. State ex rel. Griner*, 48 N.E. 1038, 1041 (Ind. 1898); 1906-08 Op. Att’y Gen. 442.
- **Deputy secretary of state**: 1929-30 Op. Att’y Gen. 78.
- **Federal Magistrate**: 1987-88 Op. Att’y Gen. No. 87-17.
- **Game warden for Indiana Conservation Department**: 1929-30 Op. Att’y Gen. 745.
- **Game warden, United States deputy**: 1931-32 Op. Att’y Gen. 462; 1929-30 Op. Att’y Gen. 745.
- **General Assembly membership**: Ind. Const. art. IV, § 30; 1938 Op. Att’y Gen. 270; 1944 Op. Att’y Gen. No. 110; 1953 Op. Att’y Gen. No. 96; 1954 Op. Att’y Gen. No. 70; 1960 Op. Att’y Gen. No. 9; 1961 Op. Att’y Gen. No. 7; 1961 Op. Att’y Gen. No. 18; 1967 Op. Att’y Gen. No. 1.
- **Health officer**: 1927-29 Op. Att’y Gen. 248; 1987-88 Op. Att’y Gen. No. 88-12.
- **Institute for the Education of the Deaf and Dumb trustee**: *Chambers v. State ex rel. Barnard*, 26 N.E. 893 (Ind. 1891).
- **Justice of the Peace**: *State ex rel. Kopinski v. Grzeskowiak*, 59 N.E.2d 110, 111 (Ind. 1945).
- **Muscatatuck Colony trustees and superintendent**: 1938 Op. Att’y Gen. 270.
- **Northern Indiana Children’s Hospital board of trustees member**: 1949 Op. Att’y Gen. No. 98.
- **Port Authority Board Member**: 2009 Op. Att’y Gen. No. 2009-1.
- **Prison director**: *Howard v. Shoemaker*, 35 Ind. 111 (Ind. 1871); *State ex rel. Platt v. Kirk*, 44 Ind. 401 (Ind. 1873).
- **Prosecuting attorney**: *State ex rel. Steers v. Holovachka*, 142 N.E.2d 593, 602 (Ind. 1957); 1929-30 Op. Att’y Gen. 747; 1960 Op. Att’y Gen. No. 9.

- **Public Employees Retirement Fund trustee:** 1947 Op. Att’y Gen. No. 40.
- **Public Service Commission public counselor:** 1947 Op. Att’y Gen. No. 30.
- **Representative:** Ind. Const. art. IV, § 30; 1929-30 Op. Att’y Gen. 78; 1961 Op. Att’y Gen. No. 18; 1934 Op. Att’y Gen. 334; 1953 Op. Att’y Gen. No. 26.
- **Rural mail carrier:** 1907-1908 Op. Att’y Gen. 467.
- **Sanitary Board member:** 1997 Op. Att’y Gen. No. 97-1.
- **Sanitary district trustee:** 1942 Op. Att’y Gen. 88.
- **School board member:** 1967 Op. Att’y Gen. No. 29; 1991 Op. Att’y Gen. No. 91-14.
- **School commissioners board:** 1991 Op. Att’y Gen. No. 91-14.
- **School trustee:** *Wells v. State ex rel. Peden*, 94 N.E. 321 (Ind. 1911); *Chambers v. State, ex rel. Barnard*, 26 N.E. 893 (Ind. 1891); 1922 Op. Att’y Gen. 682; 1967 Op. Att’y Gen. No. 39; 1951 Op. Att’y Gen. No. 72; 1966 Op. Att’y Gen. No. 33; 1989 Op. Att’y Gen. No. 89-7.
- **Senator:** Ind. Const. art. IV, § 30; 1929-30 Op. Att’y Gen. 78; 1942 Op. Att’y Gen. 76; 1961 Op. Att’y Gen. No. 18.
- **State Board of Tax Commissioners member:** 1934 Op. Att’y Gen. 334.
- **State Fair Board member:** 1953 Op. Att’y Gen. No. 96; 1951 Op. Att’y Gen. No. 60.
- **Supreme Court reporter:** 1942 Op. Att’y Gen. 76.
- **Teachers’ retirement fund board of trustees member:** 1961 Op. Att’y Gen. No. 18.
- **Toll bridge commission member:** 1951 Op. Att’y Gen. No. 72.
- **Town board member:** 1980 Op. Att’y Gen. No. 3; 1987-88 Op. Att’y Gen. No. 88-2.
- **Town board of trustees member:** *Gaskin v. Beier*, 622 N.E.2d 524, 528 (Ind. Ct. App. 1993); 1989 Op. Att’y Gen. No. 89-4.
- **Township advisory board members:** *Pipe Creek Sch. Twp. v. Hawkins*, 97 N.E. 936, 937 (Ind. App. 1912); 1987-88 Op. Att’y Gen. No. 88-2.

- **Township trustee:** *Bishop v. State ex rel. Griner*, 48 N.E. 1038, 1041 (Ind. 1898); *Foltz v. Kerlin*, 4 N.E. 439 (Ind. 1886); *Creighton v. Piper*, 14 Ind. 182 (Ind. 1860); 1935 Op. Att’y Gen. 333; 1949 Op. Att’y Gen. No. 57; 1961 Op. Att’y Gen. No. 30.
- **United States marshal:** 1935 Op. Att’y Gen. 333.
- **Utility service board members:** *Common Council of Peru v. Peru Daily Tribune, Inc.*, 440 N.E.2d 726, 733 (Ind. Ct. App. 1982).
- **Voter registration board trustee:** 1989 Op. Att’y Gen. No. 89-7.

** - this opinion is contrary to an 1873 Indiana Supreme Court case that declared the position of city councilman to be NON-lucrative. (*see* city councilman on the non-lucrative list)

2. State Laws Restricting Dual Office Holding:

- **Auctioneering Commission, Indiana** - may not hold another elected or appointed office in either the state or federal government. Ind. Code § 25-6.1-2-1(d).
- **Board of Elections and Registration** - may not become a candidate for elected office or a member of a candidate’s committee. Ind. Code § 3-6-5.2-4.5, [Tippecanoe County] Ind. Code § 3-6-5.4-4.5
- **Candidate’s Committee Member** –
 - may not be appointed county election board members, proxy of record, or alternate proxy of record. Ind. Code § 3-6-5-3.
 - may not be appointed a member of a county board of elections and registration. Ind. Code § 3-6-5.2-4.5.
 - may not be appointed as a member of the Tippecanoe County Board of Elections and Registration. Ind. Code § 3-6-5.4-4.5.
- **Candidates for elected office** –
 - may not be appointed county election board members, proxy of record, or alternate proxy of record. Ind. Code § 3-6-5-3.
 - may not be appointed a member of a county board of elections and registration. Ind. Code § 3-6-5.2-4.5.
 - may not be appointed deputy election commissioner or employed by county election board. Ind. Code § 3-6-5-24.

- may not be appointed as a member of the Tippecanoe County Board of Elections and Registration. Ind. Code § 3-6-5.4-4.5.
- **Circuit Court Clerk** - may not be a member of a candidate for elected office's committee other than the clerk's own candidate's committee. Ind. Code § 3-6-5-3, Ind. Code § 3-6-5.2- 4.5, Ind. Code § 3-6-5.4-4.5.
- **Commission for Higher Education** - except for the one full-time faculty member and one appointed student member, may not be an employee of or serve on the governing board of any state public or private college or university in Indiana. Ind. Code § 21-18-3-2.
- **Commission to Regulate Plumbers** - except for the state department of health representative, may not hold another elective or appointive state or federal office. Ind. Code § 25-28.5-1-4.
- **County Alcoholic Beverage Board Member** (other than the designated representative of the Alcohol and Tobacco Commission) – does not hold other lucrative offices or employment. Ind. Code § 7.1-2-4-5.
- **County Election Board employee** - may not become a candidate for elected office. Ind. Code § 3-6-5-24.
- **County Election Board member** – may not hold elected office. Ind. Code § 3-6-5-3.
- **Deputy Election Commissioner** - may not become a candidate for elected office. Ind. Code § 3-6-5-24.
- **Employee of political subdivision as candidate for or appointed to office** - an employee of a political subdivision may be a candidate for any elected office and serve in that office if elected or be appointed to any office and serve in that office if appointed without having to resign as an employee of the political subdivision. Ind. Code § 36-1-8-10.5.
- **Government Employee** - except as provided in Ind. Code § 3-5-9-7, a government employee is considered to have resigned from this employment when he or she assumes an elected office of the unit that employs him or her. Ind. Code § 3-5-9-5.
- **Health and Hospital Corp. of Marion County Governing Board** - ineligible to hold an appointive office or employment under the corporation. Ind. Code § 16-22-8-13.
- **PS School Commissioners** - may not serve in any elective or appointive office under the board of school commissioners or under the government of the civil city while serving on the board. Ind. Code § 20-25-3-3.

- **Ivy Tech Community College Board of Trustees** - may not hold an elective or appointed office of the state. Ind. Code § 21-22-3-3.
- **Judicial Nominating Commission** - other than the Chief Justice or his designee, may not hold any other salaried public office or an office in a political party or organization; also no appointment to a judicial office so long as he is a member of the commission and for a period of three years thereafter. Ind. Const. art. VII, § 9.
- **Municipal Electric Utility Joint Agency commissioner** – eligible to receive compensation unless holding another lucrative office. Ind. Code § 8-1-2.2-8(g).
- **Northern Indiana Regional Transportation District Employee** – may not hold an elected office or be a candidate for elected office while employed by the district. Ind. Code § 8-24-8-7(4).
- **Redevelopment Commissioner** – eligible to receive compensation unless holding another lucrative office. Ind. Code § 36-7-14-7(g).
- **Worker’s Compensation Board** - shall not hold any other position of trust or profit or engage in any occupation or business interfering with or inconsistent with the discharge of his duties as such member. Ind. Code § 22-3-1-1(c).
- **Full-Time Firefighter, who is an Employee of and is Paid by a Unit, in a Department that Provides Fire Protection Services to more than one Unit, excluding Fire Protection Services Provided under Mutual Aid Agreements** – may not assume or hold an elected office of any unit that receives fire protection services from the department. Ind. Code § 3-5-9-4.
- **Board of Zoning Appeals Member** - may not hold other elective or appointive office, except as permitted by section 36-7-4-902. Ind. Code § 36-7-4-905.

3. Non-Lucrative Offices as Determined by Indiana Courts and Indiana Attorney General Opinion:

Positions that are not considered “offices”

- **Attorney for board of zoning appeals:** 1997 Op. Att’y Gen. No. 97-1.
- **Attorney for the metropolitan planning commission:** 1997 Op. Att’y Gen. No. 97-1.
- **Barber inspector:** *State ex rel. Black v. Burch*, 80 N.E.2d 294, 297-99 (Ind. 1948).
- **Board of public works and safety clerk:** 1947 Op. Att’y Gen. No. 24.
- **Board of public works member:** 1921-23 Op. Att’y Gen. 682.

- **City attorney:** 1964 Op. Att’y Gen. No. 14.
- **City civil engineer:** 1997 Op. Att’y Gen. No. 97-1; 1934 Op. Att’y Gen. 500; 1921-23 Op. Att’y Gen. 365.
- **City clerk:** 1947 Op. Att’y Gen. No. 24; *Mohan v. Jackson*, 52 Ind. 599 (Ind. 1876).
- **City engineer:** 1936 Op. Att’y Gen. 438; 1934 Op. Att’y Gen. 500.
- **City fireman:** *City of Peru v. State ex rel. McGuire*, 199 N.E. 151, 153 (Ind. 1936); 1964 Op. Att’y Gen. No. 56; Ind. Code § 36-8-3-12.
- **City police department members:** Ind. Code § 36-8-3-12; *Kirmse v. City of Gary*, 51 N.E.2d 883, 884 (Ind. App. 1944); *State ex rel. Palm v. City of Brazil*, 73 N.E.2d 485, 488 (Ind. 1947); 1961 Op. Att’y Gen. No. 4.
- **Committee membership:** *Branham v. Lange*, 16 Ind. 497 (Ind. 1861).
- **Controller of South Bend Public Transportation Corporation:** 1968 Op. Att’y Gen. No. 4.
- **County attorney:** 1964 Op. Att’y Gen. No. 14.
- **County civil engineer:** 1997 Op. Att’y Gen. No. 97-1.
- **County park manager:** *Mosby v. Bd. of Comm’rs*, 186 N.E.2d 18, 22 (Ind. Ct. App. 1962).
- **County political party chairman:** *State ex rel. Kiser v. Millspaugh*, 175 N.E.2d 13, 15 (Ind. 1961).
- **Deputy inspector under the direction of the state commissioner:** *Freyermuth v. State ex rel. Burns*, 2 N.E.2d 399, 404 (Ind. 1936).
- **Deputy sheriff:** *Thompson v. Hays*, 867 N.E.2d 654, 658 (Ind. Ct. App. 2007); Ind. Code § 36-8-10-11; Ind. Code § 5-6-4-3.
- **Deputy town marshal:** *Gaskin v. Beier*, 622 N.E.2d 524, 529 (Ind. Ct. App. 1993); Ind. Code § 5-6-4-3.
- **Egg Board executive secretary:** 1967 Op. Att’y Gen. No. 11.
- **Firemen:** *City of Huntington v. Fisher*, 40 N.E.2d 699, 700 (Ind. 1942); *State ex rel. Palm v. City of Brazil*, 73 N.E.2d 485, 488 (Ind. 1947); 1946 Op. Att’y Gen. No. 72.

- **Housing Authority executive director:** 1967 Op. Att’y Gen. No. 1.
- **Indiana Flood Control and Water Resource Commission secretary:** *State ex rel. Black v. Burch*, 80 N.E.2d 294, 296-99 (Ind. 1948); 1947 Op. Att’y Gen. No. 30.
- **Investigator for a prosecuting attorney:** 1961 Op. Att’y Gen. No. 7.
- **Judge pro tempore:** 1951 Op. Att’y Gen. No. 33.
- **Motor Vehicle Department director:** *State ex rel. Black v. Burch*, 80 N.E.2d 294, 296-99 (Ind. 1948).
- **Northern Indiana Children’s Hospital active staff member:** 1949 Op. Att’y Gen. No. 98.
- **Police officer:** *Roth v. State*, 63 N.E. 460, 468-69 (Ind. 1902); *City of Huntington v. Fisher*, 40 N.E.2d 699, 700 (Ind. 1942); *Crooke v. Lugar*, 354 N.E.2d 755, 761 (Ind. App. 1976); *Foley v. Consolidated City of Indianapolis*, 421 N.E.2d 1160, 1164 n.5 (Ind. Ct. App. 1981); *Wencke v. City of Indianapolis*, 429 N.E.2d 295, 297 (Ind. Ct. App. 1981); 1946 Op. Att’y Gen. No. 72; 1966 Op. Att’y Gen. No. 39.
- **Probation officer:** 1946 Op. Att’y Gen. No. 72; 1961 Op. Att’y Gen. No. 25.
- **Professor at Indiana University:** 1933 Op. Att’y Gen. 170.
- **Public officer performing ex officio the duties of another office:** *State ex rel. McManamon v. Felger*, 102 N.E.2d 369, 370 (Ind. 1951); 1991 Op. Att’y Gen. No. 91-19; 1987-88 Op. Att’y Gen. No. 88-5.
- **Public Service Commission secretary:** 1947 Op. Att’y Gen. No. 30.
- **Rural mail carrier:** 1917-20 Op. Att’y Gen. 102.
- **School corporation attendance officer:** 1946 Op. Att’y Gen. No. 72.
- **Senior judge of the Court of Appeals:** *McCullough v. McCullough*, 705 N.E.2d 190, 197 (Ind. Ct. App. 1999).
- **Special judge:** 1951 Op. Att’y Gen. No. 33.
- **Teacher:** Ind. Code § 20-28-10-15; 1938 Op. Att’y Gen. 424; 1953 Op. Att’y Gen. No. 26.

Positions that are not considered “lucrative”

- **Building commission membership:** *Book v. State Office Bldg. Comm’n.*, 149 N.E.2d 273, 289 (Ind. 1958).
- **City councilman:** *State ex rel. Platt v. Kirk*, 44 Ind. 401, 408 (Ind. 1873); 1917-20 Op. Att’y Gen. 49; 1923-24 Op. Att’y Gen. 649; 1944 Op. Att’y Gen. No. 110; 1949 Op. Att’y Gen. No. 6.
- **City planning commission secretary:** 1921-23 Op. Att’y Gen. 365.
- **Deputy internal revenue collector:** 1917-20 Op. Att’y Gen. 49.
- **Library Board member:** 1960 Op. Att’y Gen. No. 45.
- **National Guard First Lieutenant:** 1937 Op. Att’y Gen. 252.
- **Town trustee:** 1917-20 Op. Att’y Gen. 49; 1927-28 Op. Att’y Gen. 248; 1949 Op. Att’y Gen. No. 57.

4. Offices Made Non-Lucrative Pursuant to State Law:

- **Appointed deputy of a judicial circuit officer:** Ind. Code § 5-6-4-3.
- **Appointed deputy of a political subdivision officer:** Ind. Code § 5-6-4-3.
- **Attorney employed by county executive:** Ind. Code § 36-2-2-30.
- **Attorney employed by county fiscal body:** Ind. Code § 36-2-3-10.
- **City employee other than an elected/appointed public officer:** Ind. Code § 36-4-4-2.
- **Deputy clerk of the circuit court:** Ind. Code § 5-6-4-3.
- **Deputy county auditor:** Ind. Cod § 5-6-4-3.
- **Deputy mayor:** Ind. Cod § 5-6-4-3.
- **Deputy prosecuting attorney:** Ind. Cod § 5-6-4-3.
- **Deputy registration officer:** Ind. Cod § 5-6-4-3.
- **Deputy township assessor:** Ind. Cod § 5-6-4-3.

- **Deputy township trustee:** Ind. Cod § 5-6-4-3.
- **Fire department members, including volunteers:** Ind. Code § 36-8-3-12.
- **Homeland Security Foundation:** membership on the foundation does not constitute the holding of a public office. Ind. Code § 10-15-2-4.
- **Indiana Criminal Justice Institute board of trustees:** membership does not constitute holding a public office. Ind. Code § 5-2-6-4.
- **Law Enforcement Academy Building Commission:** membership on the commission shall not constitute holding of a public office. Ind. Code § 5-2-2-4.
- **Law Enforcement Training Board:** membership on the law enforcement training board shall not constitute holding a public office; no member of the board or of the advisory council shall be disqualified from holding any public office or position by reason of his appointment or membership, nor shall any such person forfeit any office, position, or employment by reason of an appointment, notwithstanding the provisions of any statute, ordinance, or city charter. Ind. Code § 5-2-1-5.
- **Militia positions with no compensation:** offices in the militia to which there is attached no annual salary shall not be deemed lucrative. Ind. Const. art. II, § 9.
- **Notary Public:** Ind. Code § 33-42-2-7.
- **Precinct election officer:** Ind. Code § 3-6-6-37.
- **Professional licensing board membership:** Ind. Code § 25-1-5-3.5.
- **Safety board members:** Ind. Code § 36-8-3-12.
- **Solid waste management district controller:** Ind. Code § 13-21-3-10(b).
- **Town police department members:** Ind. Code § 36-8-3-12.
- **Township police department members:** Ind. Code § 36-8-3-12.

Appendix B

Cases and Attorney General Opinions No Longer Reflecting Current Law

- **Deputy clerk of the circuit court:** *Wilson v. Niesse*, 244 N.E.2d 436, 437 (Ind. 1969).
- **Deputy County Auditor:** *Sharp v. State*, 99 N.E. 1072, 1074 (Ind. App. 1912); *Wells v. State ex rel. Peden*, 94 N.E. 321, 323 (Ind. 1911); 1962 Op. Att’y Gen. No. 15.
- **Deputy mayor:** 1981-82 Op. Att’y Gen. No. 81-9.
- **Deputy prosecuting attorney:** 1960 Op. Att’y Gen. No. 9.
- **Deputy registration officer:** 1962 Op. Att’y Gen. No. 15.
- **Deputy sheriff:** 1962 Op. Att’y Gen. No. 15.
- **Deputy town marshal:** 1980 Op. Att’y Gen. No. 3.
- **Deputy township assessor:** 1917-1920 Op. Att’y Gen. 78.
- **Deputy township trustee:** 1962 Op. Att’y Gen. No. 15.
- **Health Facility Financing Authority, Indiana:** notwithstanding the provisions of any other law, an officer or employee of the state may not be required to leave his office or employment solely because he is a member of the authority or has provided services to the authority. Ind. Code § 5-1-16-11 (1983) (*Repealed by P.L.162-2007, SEC.42.*)
- **Notary public:** *Sharp v. State*, 99 N.E. 1072, 1074 (Ind. App. 1912); 1906-08 Op. Att’y Gen. 467; 1917-20 Op. Att’y Gen. 49; 1917-20 Op. Att’y Gen. 78; 1917-20 Op. Att’y Gen. 102; 1923-24 Op. Att’y Gen. 14; 1957 Op. Att’y Gen. No. 12.
- **Probation officer:** 1936 Op. Att’y Gen. 155.

Appendix C

Additional Resources

Gregory Zoeller, *Dual Office Holding Analysis: Can the Legislature Carve Out Exceptions?*, 37 Ind. L. Rev. 733 (2004).

Jeffrey Modisett, *Indiana Dual Office Holding Guide* (1999).

Steven G. Calabresi & Joan W. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 Cornell L. Rev. 1045 (1994).

The website of Indiana Attorney General Greg Zoeller: <http://www.in.gov/attorneygeneral/>.

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