

**Local Finance Board
Advisory Opinions 92-004 & 93-019
February 8, 2005**

QUESTION SUMMARY:

Can publicly elected Board of Fire Commission Members, who handle the budget and expenditures of fire tax dollars, also serve as elected officials of the fire companies in their own districts, when they handle company monies raised or contributed privately?

There are approximately 188 Fire Districts and 489 Fire Departments in the State of New Jersey. The impact of an advisory opinion on this matter will be far-reaching as there are potentially dozens of fire officials who stand to be affected by the Local Finance Board's decision. For these reasons, the Board is issuing this as a public Advisory Opinion and not a confidential Advisory Opinion as provided for in the Local Government Ethics Law, N.J.S.A. 40A:9-22.8.

DISCUSSION:

The Local Government Ethics Law, N.J.S.A. 40A:9-22.5(e), states:

No local government officer or employee shall undertake any employment or service, whether compensated or not, which might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties;

The question at issue concerns compatibility of offices and the discussion to follow will address this issue.

The statute pertaining to Fire Districts, N.J.S.A. 40A:14-70, provides that the governing body of a municipality, "shall designate a territorial location or locations for use as a fire district or districts and, by resolution, provide for the election of a board of fire commissioners for the district or each district, to consist of five persons, residents therein, and specify the date, time and place for the election of the first board." Furthermore it states that, "The said body corporate shall have the power to acquire, hold, lease, sell or otherwise convey in its corporate name such real and personal property as the purposes of the corporation shall require."

N.J.S.A. 40A:14-78.1, provides that, "The Fire Commissioners of any fire district shall introduce and approve the annual budget..."

N.J.S.A. 40A:14-70.1.a., states, "Any person desiring to form a volunteer fire company to be located within or otherwise servicing the area encompassing a fire district or other type of volunteer organization which has as its objective the prevention of fires or regulation of fire hazards to life and property therein shall first present to the board of fire commissioners a written application for the organization of such a company." It furthermore provides that, "The board of fire commissioners, after considering such application and approving the

members of the proposed company, may by resolution grant the petition and constitute such applicants a volunteer fire company of the district."

N.J.S.A. 40A:14-70.1.b., states, "The members of the company shall be under the supervision and control of the board of fire commissioners and in performing fire duty shall be deemed to be exercising a governmental function;"

Michael A. Pane, in his work New Jersey Practice: Local Government Law, addresses the doctrine of incompatibility of offices. He states,

In one sense, incompatibility of office represents a special type of conflict. It is a situation in which the nature of two offices individually is such that they cannot be executed with care or ability by the same individual either because one is subordinate to the other or because one office in some other fashion interferes with the other. Mr. Pane furthermore states, "In one case the classic definition of incompatibility was restated as follows:

Offices are incompatible when there is a conflict or inconsistency in their functions. Therefore offices are not compatible when one is subordinate to or subject to the supervision or control of the other or the duties of the offices clash requiring the officer to prefer one obligation over the other."

Mr. Pane cites *Hollander v. Watson*, 167 NJ Super. 588. at 592, 401 A.2d 560 at 562 (Law Div. 1979), affirmed 173 NJ Super. 300, 414 A.2d 275 (App. Div. 1980).

Mr. Pane continues, "Traditionally the doctrine of incompatibility has been applied with such thoroughness that a person, having accepted a second office incompatible with the first office held, was deemed to have vacated the first office. The doctrine has been made flexible to the extent of usually allowing an election between the two offices by the individual caught in the incompatibility." (*McCue v. Antisell*, 105 NJ Super. 128, 251 A.2d 308 (App Div. 1969).

To revisit N.J.S.A. 40A:14-70.1.b., the members of a fire company shall be under both the supervision and control of the board of fire commissioners..."

This question surrounds the issue of dual office holding and whether holding the positions of Fire Commissioner and local fire company board member or officer would place an individual in a situation where their independence of judgment might reasonably be expected to be prejudiced as they exercise their official duties.

A second question is whether holding these positions would require the individual in question to act in an official capacity in a matter where he has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

N.J.S.A 40A:9-22.5(d) states:

No local government officer or employee shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment;

The official duties and responsibilities of a Fire Commissioner affect the status of the members of the local fire company. See statutes previously mentioned, specifically N.J.S.A. 40A:14-70.1.b.: "The members of the company shall be under the supervision and control of the board of fire commissioners and in performing fire duty shall be deemed to be exercising a governmental function;"

Using the standard cited in New Jersey Practice, section 358, Incompatibility of Office, by Michael Pane, these offices appear to be incompatible because "one is subordinate to or subject to the supervision or control of the other or the duties of the offices clash requiring the officer to prefer one obligation over the other."

The matter of incompatibility, as expounded by Mr. Pane, has relevance to the Local Government Ethics Law in that objectivity is clouded to the extent that the individual's independence of judgment would reasonably be expected to be prejudiced in the exercise of his official duties.

The appearance of a conflict is more than apparent in the situation where a Fire Commissioner may act preferentially or antagonistically toward the fire company where he is also an officer. Additionally, the information he gathers as a result of his position with the fire company can be used for or against that company when the Commissioners set their budget and policy priorities. One person should not be privy to both sides of this information. All budget decisions of the Fire Commission would impact on how the fire company is being run and would, in turn, affect the priorities of the individual companies.

Additionally, fire company officials are voted for by the members of the individual fire company, not the public. It is likely that a Fire Commissioner is the supervisor of the fire company Chief in his capacity as Fire Commissioner while, at the same time, being subordinate to the same Chief as a fire fighter. Further, in fire districts with more than one fire company, the independence of judgment of the Fire Commissioner who is a member of one district is impaired by his lack of knowledge in the other fire companies that have no specific representation on the Board of Fire Commissioners.

SYNOPSIS OF PUBLIC HEARING:

Having detailed the statutory support for a determination, it is now necessary to apply the premise to current organizational needs. Namely, will the public be served State-wide by a determination that the two positions are inherently incompatible?

The Board held a public hearing on this subject on July 12, 1994. The State Association of Fire Districts presented a position that a majority of their 102 Fire District members

believe that elected officials are in conflict by also serving as commissioners. They did not believe that volunteer members of the fire company are in conflict. There was additional support for their position from individual fire districts who have instituted policies whereby Fire Commissioners cannot hold an elected or appointed position in the fire department. It is not known if these districts are already included in the survey presented by the State Association of Fire Districts.

In support of the Association's position, their testimony states as follows:

We (the association) feel that any elected officer of a fire company who is in a position to suggest, recommend or request services, supplies and or other financial encumbrances of the board would appear to be in conflict. Our consensus shows that the ranking fire officers, i.e. chief and assistant chief would be a definite conflict. We also feel in some cases the ranking executive officers, i.e. president and vice president may also have roles that could be considered in conflict

The State Association of Fire Districts is therefore requesting that the Board consider that there is a conflict of interest for fire company chiefs and assistant chiefs serving on boards of fire commissioners. Other fire company officers if serving on a board of fire commissioners may be in conflict. However, conflict does not extend to members and non officers of a fire company.

A review of the input reveals that there are numerous arrangements for fire services in New Jersey and that perhaps not all will be satisfied by the Board maintaining one position in this area. It is within the Board's jurisdiction, however, to respond to the request for an advisory opinion on this matter. It appears that an appropriate guideline then would be to endorse the limitation set forth by the Association.

ADVISORY OPINION:

The Board has determined that such a proposed activity, holding the positions of Commissioner of a fire district and elected or ranking officer of a fire company in that district, would, in its opinion, constitute a violation of the Local Government Ethics Law. The officials affected by this opinion include the chief, deputy chief, president and vice president. More specifically, such dual office holding violates N.J.S.A. 40A:9-22.5(d) and (e) as stated below.

(d) No local government officer or employee shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment;

(e) No local government officer or employee shall undertake any employment or service, whether compensated or not, which might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties;

The community of interest to hold the position of Fire Commissioner is significantly small in most of the districts established in New Jersey. Determining that all of the fire company members would be in conflict with the Ethics Law if they serve as Fire Commissioners may not serve the community. Thus, the Board's position is that only those officials who are in a position to suggest, recommend or request services, supplies and or other financial encumbrances of the board would be in conflict for serving both positions simultaneously. This again is interpreted to include the chief, deputy chief, president and vice president of the fire company.

Additionally, if there are cases where fire fighters or officers are paid or receive some other sizable and tangible benefit, officers and fire fighters could be in violation of Sections (d) and (e) if they serve as Fire Commissioners. In these cases, they would be acting as employer and employee. This arrangement would appear to be incompatibility of offices.

Further, by limiting the dual office holding to the positions listed, the Board does not imply that the Ethics Law can not be violated by some specific action/activity of Fire Commissioners or fire company members. There is the potential for a person serving the district or fire company to act in their official capacity in a matter where they have a direct or indirect financial or personal involvement that might reasonably be expected to impair their objectivity or independence of judgment. Thus, individuals could be found to be in violation of the Ethics Law. Such specific actions or activities would be reviewed by the Board as separate ethics complaints.

The Board has also elected to make this opinion public, except for the names of the requesting agents, since it will effect numerous municipalities in the State.

The Board further advises that this opinion in no way questions the integrity of any individuals currently in this situation or their ability to maintain their independence of judgment. This opinion is limited to the question at issue and due to the fact sensitive nature of the circumstances, an advisory opinion may only be applied to the question at issue.

/s/ Beth Gates, Chair,
Local Finance Board