

CITIES, CONFLICT OF INTEREST, COUNTIES, INCOMPATIBILITY OF OFFICES: Iowa Constitution art. III, secs. 1, 21, 22; art IV, sec. 14; art. V, sec.18; Iowa Code §§ 29C.9, 34A.3, 39.11, 39.12, 400.13, 455B.386, 690.1, 724.1A, Ch. 331 (2018). City police chief and member of county board of supervisors are not incompatible offices; however, conflicts of interest from such dual service are likely to arise requiring recusal. (Bennett to Danielson, 4-3-18) #18-4-1

The Honorable Jeff Danielson  
State Senator  
L O C A L

Dear Senator Danielson:

You requested a formal Attorney General's opinion asking if there are constitutional or statutory restrictions on a person serving concurrently as a chief of police for a city and as a county board of supervisors member. The question you pose involves the legal doctrine of incompatibility of offices. This doctrine has state constitutional, statutory, and common law implications, and, if applicable, bars the simultaneous holding of multiple offices that are subject to these restrictions. Violations of these restrictions on dual office-holding can result in vacation of incompatible offices. Iowa Code § 39.12 (2018) (holding more than one office at the same level of government requires resignation from all but one office prior to taking another office or vacancy is created in all); *State ex. rel. LeBuhn v. White*, 133 N.W.2d 903 (Iowa 1965) (acceptance of incompatible office under common law vacates prior incompatible office). It is our opinion that simultaneous service as a city police chief and a county board of supervisor member does not create an incompatibility of offices.

### **Constitutional Incompatibility**

The Iowa Constitution provisions regarding incompatible offices are contained in Article III, Sections 1, 21 and 22; Article IV, Section 14; and Article V, Section 18. Each of these provisions place limitations on dual office holding for state-level public officers, and so are not implicated by the questions posed in your request, which involve only local government offices.

### **Statutory Incompatibility**

Iowa Code section 39.11 (2018) bars elected local officials from serving in more than one elected office at the same level of government at the same time and requires resignation from all but one office at the same level. Iowa Code §§ 39.11 and 39.12 (2018). This office issued a prior formal opinion that determined that the "same level of government" for purposes of this statute bars holding multiple offices in the same distinct governmental subdivision - such as school, county, city, township - not all local offices. 1993 Op. Att'y Gen. 35 (#93-9-1) (county hospital board of trustees and community college board of directors are not same level of government under Iowa Code section 39.11). As the offices of city police chief and county

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board of supervisor are not within the same “level of government” under Iowa Code section 39.11, this statute does not bar such dual service.

Furthermore, Iowa Code section 39.11 does not bar holding multiple local offices unless both are elected offices. City police chiefs are not elected officials, but rather appointed by the city council, mayor, superintendent of public safety, or as provided by ordinance or charter, depending on the statutory plan of government the city operates under. Iowa Code § 400.13 (2018).

### **Common Law Incompatibility**

Iowa common law bars holding multiple offices where one office is subordinate to the other, the duties of the offices are inherently inconsistent or repugnant to each other, or the nature of the duties of each office renders it improper under public policy for one person to retain both offices. *State ex. rel. LeBuhn v. White*, 133 N.W.2d 903 (Iowa 1965). Incompatibility is not concerned with the particular attributes of the persons holding these offices, but is a structural analysis of the duties of the offices to determine if such duties conflict in a manner that would prevent any person holding both offices simultaneously from fulfilling the duties of each office. Op. Att’y Gen. #04-3-1. Application of the common law doctrine of incompatibility under this office’s more recent formal opinions has applied this doctrine narrowly and cautiously. 1992 Op. Att’y Gen. 150 (#92-9-1) (finding offices of board of supervisor and member of public school district board of directors are not incompatible); 1993 Op. Att’y Gen. 11 (#93-4-8(L)) (finding offices of city mayor and county board of supervisor are incompatible).

Incompatibility of offices only applies when both positions held are actually public offices, rather than positions of mere public employment. Op. Att’y Gen. #04-3-1; Op. Att’y Gen. #00-9-1. The attributes of a public office require that all the following be present:

1. The position is created by the constitution or the legislature or through authority conferred by the legislature.
2. A portion of the sovereign power of government must be delegated to that position.
3. The duties and power of the position must be defined directly or impliedly by the legislature or through legislative authority.
4. The duties must be performed independently of and without control of a superior power other than law.
5. The position must have some permanency and continuity rather than be temporary or occasional.

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*State v. Spaulding*, 102 Iowa 639, 72 N.W. 288 (1897); *State v. Taylor*, 260 Iowa 634, 144 N.W.2d 289, 292 (1966).

It is clear that the members of the board of supervisors are county officers. 1992 Op. Att’y Gen. 150 (#92-9-1) (finding county board of supervisor is a public office subject to incompatibility doctrine). Prior opinions of this office have examined the city police chief position under the incompatibility doctrine without specific analysis to determine if that position is, in fact, a public office. 1977 Op. Att’y Gen. 110 (#77-4-3) (finding incompatibility for simultaneous service as city public safety director and city police chief); 1979 Op. Att’y Gen. 314 (#79-7-28(L)) (simultaneous service as city police chief and city/county emergency planning coordinator not incompatible). For the purpose of this opinion, we will assume, without so finding, that a chief of a city police department is a city office.

The duties of the county board of supervisors are mostly contained within Iowa Code Chapter 331 (2018) (County Home Rule), while the statutory duties of a city police chief are found in various portions of the code which assign the chief of police various investigative or regulatory duties. *See generally*, Iowa Code § 455B.386 (2018) duty to report hazardous material spill; Iowa Code § 690.1 (2018) (duty to furnish criminal identification records as requested by the Director of Public Safety); Iowa Code § 724.1A (2018) (duty to issue certificates for transfer or make a firearm suppressor). After review of the statutory duties of the county board of supervisors and a city police chief, we find no provisions granting powers to either position to supervise the duties of the other, no duties that place the other in a subordinate position, no provisions creating significant inconsistencies in the duties of each, and find no duties of either position that would undermine public policy for one person to hold both positions.

Conflicts of interest may arise, from time to time, for any person serving as a city police chief and board of supervisor member. Such conflicts of interest may be avoided, generally, by recusal from taking part in any official action where the conflict of interest is implicated. Op. Att’y Gen. #98-5-3. While all areas of potential conflict of interest would be impossible to identify through this opinion, participation by a city police chief also serving as a board of supervisor on either the county emergency management commission created under Iowa Code section 29C.9 (2018) (local emergency management commission to include one member of the board of supervisors, the mayor of each city, and alternates designated by each member agency) and the joint E911 service board created under Iowa Code section 34A.3 (2018) (providing for voting membership of each political subdivision with a public safety agency in the county on a joint E911 board) would likely create such a conflict of interest. An official simultaneously serving as a board of supervisor member and city police chief should remain vigilant to identify these conflicts, and timely recuse when these conflicts arise.

Therefore, it is our conclusion that simultaneous, dual service as a city police chief and county board of supervisor within the same county does not create an incompatibility of offices

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but may raise significant conflict of interest issues requiring recusal by an official holding both positions when such conflict arises.

THOMAS J. MILLER  
Attorney General of Iowa

A handwritten signature in black ink, reading "Michael L. Bennett". The signature is written in a cursive style with a long horizontal flourish extending to the right.

MICHAEL BENNETT  
Assistant Iowa Attorney General