
Coates' Canons Blog: Board Members as Employees

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Article: <https://canons.sog.unc.edu/board-members-as-employees/>

This entry was posted on January 06, 2010 and is filed under **Conflicts Of Interest, Ethics & Conflicts**

The governing board of a small town believes that it would be advantageous to hire the mayor as a part-time town administrator. Is this legal? In some cases, it is. There are two main legal prohibitions that would generally bar a local government board member from being employed by his or her unit of government. There are two statutory provisions that create exceptions to these prohibitions.

The Main Prohibitions

A criminal statute, **G.S. 14-234**, prohibits public officials from deriving a direct benefit from contracts they are involved in making or administering. The definitions in the statute make clear that a board member's employment by the unit would violate the statute, even if the board member doesn't vote on the appointment. Although there is an exception to this statute that allows a spouse of a board member to be an employee, that exception does not extend to the board members themselves. As noted below, other exceptions in the law may apply, but this basic prohibition will prohibit employment of a board member in most cases. Violation of the statute is a Class 1 misdemeanor. In addition, the contract itself would be void and any payments under the contract would be unlawful.

A second prohibition comes from the common law (meaning, law based on judicial decisions rather statutes): the doctrine of incompatible office holding. For a thorough discussion of this doctrine, I recommend Fleming Bell's book ***Ethics, Conflicts, and Offices***. In general, this doctrine recognizes that in some cases it is simply inappropriate for one person to serve in two roles that are incompatible. Cases have held under this doctrine that it is inappropriate for a person to hold two positions when one of them is subservient to the other. This is typically described in terms of a person being his or her own boss, or being the boss of his or her own supervisor. This type of incompatibility is certainly presented when a board member is also an employee.

The Exceptions

State law specifically allows a board member to serve as an employee in a town that has a mayor-council form of government and a population of less than 5,000. The statute, **G.S. 160A-158**, actually contains a prohibition on board members serving as the head (or even interim head) of any city department, but it goes on to create an exception for towns under 5,000, allowing a mayor or board member to serve as a department head or other employee, and to receive reasonable compensation for such employment. State law also authorizes boards of county commissioners, under **G.S. 153A-81(2)**, to confer upon any one of its members, including the chair, the powers of county manager (or interim county manager, under **G.S. 153A-84**). County commissioners who serve in this role are considered full-time county officials and may be compensated accordingly.

The criminal conflict of interest statute described above contains an exception for small jurisdictions that allows elected officials to contract with their own units of government, subject to certain restrictions. The statute applies to cities with a population of no more than 15,000 and counties in which there is no incorporated city with a population of more than 15,000. The statute limits the amount of a contract made under the exception to \$40,000 per twelve month period, prohibits the interested party from voting on or participating in making the contract, and includes reporting and other transparency requirements.

The exception in 14-234 does not specifically authorize a contract of employment. It applies to contracts generally. It is possible that a court might interpret the specific exceptions in **160A-158**, **153A-81**, and **153A-84**, as the exclusive authority for employing board members. Indeed, the prohibition in **160A-158** probably bars a board member in a city with a population between 5,000 and 15,000 from employing a board member as a department head. In addition, a court might find that the doctrine of incompatible office holding should be considered in determining whether the exception applies to

employment contracts, as opposed to contracts for provide goods or other types of independent contractor services.

Other Considerations

State law specifically allows board members in small cities to serve as employees. The exception to the conflict of interest statute for other cities and counties may remove legal obstacles for elected officials in those jurisdictions. The question of whether, in cases where it is legal to do so, it is appropriate or desirable for a board member to serve as an employee is certainly one to consider carefully. It is notable that both of the exceptions apply in small jurisdictions, perhaps in recognition of their limited access to resources (both fiscal and human). Jurisdictions may find it extremely beneficial and efficient to tap into the experience and motivation of elected of officials who are willing to work for the unit. On the other hand, a board member serving in both roles may present challenges for his or her co-workers and co-board members, as well as members of the public. It will important, but may be difficult, for the board member and others to separate the roles and relationships of employee and elected official.

Links

- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-234.html
- www.sog.unc.edu/publications/books/ethics-conflicts-and-offices-guide-local-officials-second-edition
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-158.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-81.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-84.html