

The following opinion is presented on-line for informational use only and does not replace the official version. (Mich Dept of Attorney General Web Site - www.ag.state.mi.us)

STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

CITIES:

INCOMPATIBILITY:

LEGISLATURE:

MUNICIPALITIES:

City's authority to dissolve local public transportation authority

Member of city council and board of public transportation authority

Act of Legislature needed for dissolution of local public transportation authority

The incompatible public offices act prohibits a person from simultaneously serving as a member of the city council and as a member of the board of a public transportation authority within the same municipality.

The dissolution of a transportation authority organized under the Public Transportation Authority Act requires an act of the Legislature and may not be accomplished by the unilateral action of the city in which it was established.

Opinion No. 7003

December 23, 1998

Mr. John McBain
Jackson County Prosecutor
312 S. Jackson Street
Jackson, MI 49201

You have asked three questions concerning a public transportation authority established within a city pursuant to the Public Transportation Authority Act.

Your first question asks whether the incompatible public offices act prohibits the same person from simultaneously serving as a member of the city council and as a member of a public transportation authority board within the same municipality.

The Public Transportation Authority Act (PTAA), 1986 PA 196, MCL 124.451 *et seq*; MSA 5.3475(451) *et seq*, authorizes the formation of public transportation authorities. A transportation authority created under the PTAA may, *inter alia*, plan, promote, finance, own, construct, operate, and maintain a public transportation system. Section 12. Although several municipalities may form a single transportation authority, information supplied with your request indicates that the transportation authority referenced in your question consists of only one municipality. A transportation authority shall be administered by a board in accordance with the authority's articles of incorporation. Section 13. A transportation authority formed under the PTAA is a public corporation, public benefit agency, and an instrumentality of the state. Sections 12 and 13.

The incompatible public offices act, 1978 PA 566, MCL 15.181 *et seq*; MSA 15.1120(121) *et seq*, prohibits public officers and public employees from simultaneously serving two or more incompatible public offices.¹

Section 1(b) of the incompatible public offices act defines incompatible public offices as follows:

"Incompatible offices" means public offices held by a public official which, when the official is performing the duties of any of the public offices held by the official, results in any of the following with respect to those offices held:

- (i) The subordination of 1 public office to another.
- (ii) The supervision of 1 public office by another.
- (iii) A breach of duty of public office.

As a threshold issue, it must be determined whether the offices of city council member and transportation authority board member constitute public offices for purposes of the incompatible public offices act. Under section 1(e)(ii) of the incompatible public offices act, an elected member of a city council is a public officer. Similarly, under sections 12 and 13 of the PTAA, a public transportation authority is a state instrumentality. Thus, a transportation authority board member is a public officer under section 1(e)(iii) of the incompatible public offices act. See also, OAG, 1985-1986, No 6409, p 441 (December 16, 1986). It is now necessary to determine whether the two offices are incompatible.

Under sections 1(b)(i) and (ii) of the incompatible public offices act, a subordinate and supervisory relationship exists where one office has the power of appointment or removal with respect to another public office. OAG, 1995-1996, No 6834, p 9, 10 (February 3, 1995); OAG, 1979-1980, No 5626, p 537, 542 (January 16, 1980). The articles of incorporation of the transportation authority referenced in your question provide, in part, that:

The Authority Board shall consist of three City Council members appointed by the Mayor and confirmed by the City Council, and two citizens appointed for two year terms by the Mayor and confirmed by the City Council. These citizen terms shall commence on the first day of December of even-numbered years. *In lieu of one City Council position, the Mayor may appoint, subject to City Council confirmation, a citizen representative to serve for a two-year term.*

The City Commission may remove any board member for cause.²

(Emphasis added.)

While it is the mayor who actually appoints persons to the PTAA, the city council is given the duty to confirm such appointments. This duty clearly constitutes a subordinate and supervisory relationship. The incompatible public offices act is violated where a public official, as a mayoral appointee to another public body, has the duty to support or oppose his or her appointment to another public office. Moreover, even if a public official abstains from voting on his or her appointment or removal, the refusal to perform that official duty is itself a breach of duty. See, e.g., *Contesti v Attorney General*, 164 Mich App 271, 281; 416 NW2d 410 (1987), *lv den* 430 Mich 893 (1988), quoting OAG, 1979-1980, No 5626, p 537, 545 (January 16, 1980).

In addition, the city council has removal powers over members of the transportation authority board. Although board members may only be removed for cause, information supplied with your request indicates that such power is not merely theoretical; rather, the city council recently used its removal powers to oust two members from the

transportation authority board. Accordingly, on the basis of the foregoing, the city council and the transportation authority board are involved in a subordinate and supervisory relationship, a relationship prohibited by the incompatible public offices act.

Finally, the incompatible public offices act is also violated where a breach of duty actually results between the two offices. *Contesti*, 164 Mich App at 280. A breach of duty arises where a dual officeholder is on both sides of a contract or contractual negotiations, *Id.* at 281-282; *Wayne County Prosecutor v Kinney*, 184 Mich App 681, 684-685; 458 NW2d 674, *lv den* 436 Mich 887 (1990), or where the public offices compete for tax dollars. *Contesti, supra*; OAG 1995-1996, No. 6918, p 211, 212 (October 2, 1996). If a breach of duty exists, abstention does not cure the incompatibility; rather vacating an office is the only solution. *Contesti*, 164 Mich App at 281.

It is my opinion, therefore, in response to your first question, that the incompatible public offices act prohibits the same person from simultaneously serving as a member of the city council and as a member of a public transportation authority board within the same municipality.

Your second question asks whether a public transportation authority may be dissolved by action of the city in which it was established.

Your second question requires analysis of two provisions in the Michigan Constitution. Const 1963, art 7, § 24, provides in pertinent part:

Subject to this constitution, any city or village may acquire, own or operate, within or without its corporate limits, public service facilities for supplying water, light, heat, power, sewage disposal and *transportation* to the municipality and the inhabitants thereof.

Any city or village . . . may operate transportation lines outside the municipality within such limits as may be prescribed by law.

(Emphasis added.)

Const 1963, art 7, § 27, provides as follows:

Notwithstanding any other provision of this constitution *the legislature may establish in metropolitan areas additional forms of government or authorities with powers, duties and jurisdictions as the legislature shall provide.* Wherever possible, such additional forms of government or authorities shall be designed to perform multipurpose functions rather than a single function.

(Emphasis added.)

Thus, under Const 1963, art 7, §§ 24 and 27, a public transportation authority possesses only those powers as granted by the Legislature. If the Legislature has not established a dissolution procedure, the transportation board involved in your question lacks authority to dissolve itself. This conclusion is consistent with *Cain v Brown*, 111 Mich 657, 661; 70 NW 337 (1897), where the Michigan Supreme Court held that a village, as a municipal corporation, may only be dissolved by legislative consent or by legislative provision:

"Unless otherwise specifically provided by the legislature, the nature and constitution of our municipal corporations, as well as the purposes they are created to subserve, are such that they can only be dissolved by the legislature, or pursuant to legislative enactment. They may become inert or dormant, or their functions may be suspended, for want of officers or of inhabitants; but dissolved, when created by an act of the legislature, and once in existence, they cannot be, by reason of any default or abuse of the powers conferred, either on the part of the officers or inhabitants of the incorporated place. As they can exist only by legislative sanction, so they cannot be dissolved or cease to exist except by legislative consent or pursuant to legislative provision."

(Emphasis added; citation omitted.)

Consistent with these constitutional provisions, the PTAA provides the statutory mechanism governing the formation and operation of a public transportation authority. In turn, the PTAA requires a transportation authority to adopt articles of incorporation. With respect to the dissolution of the transportation authority involved in your question, its articles of incorporation provide that:

The Authority may be dissolved in accordance with statutory provisions.

The Authority may not be dissolved . . . if such dissolution . . . would or could operate as an impairment of any authorized bond obligation.

There is, however, no provision within the PTAA which governs, or even alludes to, the dissolution of a public transportation authority. Rather, the only arguably relevant provision of the PTAA relates to the withdrawal or release of a municipality from a public transportation authority. Section 8. Since the transportation authority referenced in your question is comprised of only one member, its withdrawal from the authority might produce the appearance of dissolution. Such withdrawal, however, would not affect the existence of the authority's corporate entity. The PTAA does not provide for the dissolution of a public transportation authority.

Pursuant to PTAA sections 12 and 13, the transportation authority referenced in your question is an instrumentality of the state, in the form of a public corporation, rather than a traditional municipal corporation to which the *Cain* rule expressly applies. Courts in other states have applied a *Cain*-type rule to public corporations, generally, and to state instrumentalities. See, e.g., *Collins v Manhattan & Bronx Surface Transit Operating Authority*, 465 NE2d 811, 814 (NY App, 1984) (public corporations created by the state are subject to dissolution by the state); *Oakdale Irrigation Dist v Calaveras County Bd of Supervisors*, 283 P2d 732, 736 (Cal App, 1955) (the Legislature, absent constitutional restrictions, has absolute power over the organization and dissolution of a public corporation established as an agency of the state); and *State v Leahy*, 199 NW2d 713, 715 (Neb, 1972) (municipal corporations, as legislative creations, are subject to dissolution by legislative action).

Prior opinions of this office are in accord with the above cases. For example, OAG, 1985-1986, No 6411, p 444 (December 19, 1986), concluded that since a county hospital was a "type of municipal corporation," the *Cain* rule prohibited the county from dissolving the hospital. Similarly, in OAG, 1985-1986, No 6342, p 226 (February 6, 1986), the *Cain* rule was construed to prohibit the dissolution of a consolidated drainage district. In neither situation did the underlying statute establish a procedure to dissolve the public corporation.

It is my opinion, therefore, in answer to your second question, that the dissolution of a transportation authority organized under the Public Transportation Authority Act requires an act of the Legislature and may not be accomplished by the unilateral action of the city in which it was established.

Your third question asks if a public transportation authority can be dissolved by action of the city in which it is established, may the transportation authority be absorbed by the city as a municipal department. In light of my answer to your second question, it is not necessary to answer your third question.

FRANK J. KELLEY
Attorney General

¹ Const 1963, art 7, § 28, however, establishes a limited exception to the incompatible public offices act. See, e.g., OAG, 1997-1998, No 6959, p 80 (October 17, 1997); OAG, 1987-1988, No 6440, p 96 (June 2, 1987). The exception only applies where a person serves on a governmental body that is established for the purposes set forth in Const 1963, art 7, § 28. Such purposes involve the joint administration of governmental functions and powers among municipalities. The transportation authority referenced in your question involves one municipality rather than the joint administration of a governmental function by several municipalities. Therefore, the exception created by Const 1963, art 7, § 28, does not apply.

² Although the articles involve a city council and a city commission, your office has advised that the bodies are one and the same.

<http://opinion/datafiles/1990s/op10073.htm>

State of Michigan, Department of Attorney General

Last Updated 11/10/2008 20:49:34