

CHAPTER 52

THE INCOMPATIBLE OFFICES ACT AND OTHER CONFLICT OF INTEREST ISSUES

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INTRODUCTION

Public officials and employees are often faced with competing demands for their time and energy. Regardless of the number of directions in which such individuals are pulled, however, it is crucial that they strive to maintain high ethical standards when carrying out the duties of their offices. This article is intended to make public employers aware of the types of situations in which conflicts of interest may arise, as well as to discuss the four primary statutes governing such situations (the Incompatible Public Offices Act, the Contracts of Public Servants with Public Entities Act, the Standards of Conduct for Public Officers and Employees Act, and the Political Activities by Public Employees Act). Because each situation is unique, however, it is impossible to provide specific guidance for every possible situation that may arise, and it is important to consult with a knowledgeable and experienced attorney if it appears that the potential for a conflict of interest exists.

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THE INCOMPATIBLE PUBLIC OFFICES ACT¹

Incompatible Offices Defined

The Michigan Incompatible Public Offices Act (“IPOA”), enacted in 1978, prohibits a public officer or public employee from holding two or more “incompatible offices” at the same time.² M.C.L. §15.181(b) defines “incompatible 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.

Although this proscription appears simple in concept, it is important to undertake a careful analysis of the text of the statute in order to thoroughly understand the nuances of its application.

Who Is Covered?

In what can only be described as a confusing bit of drafting, the IPOA refers to three different classes of individuals when setting forth its statutory proscriptions – “public employees,” “public officers,” and “public officials.” The terms “public employee” and “public officer” are defined by the statute:

“Public employee” means an employee of this state, an employee of a city, village, township, or county of this state, or an employee of a department, board, agency, institution, commission, authority, division, council, college, university, school district, intermediate school district, special district, or other public entity of this state or of a city, village, township, or county in this state, but does not include a person whose employment results from election or appointment.³

“Public officer” means a person who is elected or appointed to any of the following:

- (i) An office established by the state constitution of 1963.

¹ M.C.L. §§15.181, *et seq.*

² M.C.L. §15.182.

³ M.C.L. §15.181(d).

- (ii) A public office of a city, village, township, or county in this state.
- (iii) A department, board, agency, institution, commission, authority, division, council, college, university, school district, intermediate school district, special district, or other public entity of this state or a city, village, township, or county in this state.⁴

The term “public official” is not defined in the statute. However, the Michigan Supreme Court has explained that the term “public official” can refer to either a “public officer” or a “public employee,” effectively merging the three terms into two.⁵

When Does an Incompatibility Exist?

Having determined which positions are covered by the statute, the question becomes whether an individual’s service in two positions rises to the level of incompatibility prohibited by the statute. In a rare decision interpreting the IPOA, the Michigan Supreme Court recently addressed this issue and, in so doing, significantly limited the statute’s applicability.

In *Macomb County Prosecuting Attorney v. Murphy*,⁶ the court considered “whether [the] defendant violated the incompatible offices act by simultaneously holding positions as the delinquent personal property tax coordinator in the Macomb County treasurer’s office and as an elected member of the Harrison Township Board of Trustees.”⁷ In analyzing the incompatibility of the offices under the statute, the court found that, although both positions were covered by the Act, the offices were not incompatible because “only a potential breach of duty of public office arises from the ability of the township to contract with the county for the collection of its delinquent personal property taxes.”⁸ In clarifying what is required for a finding of incompatibility, the court specifically stated that the existence of a potential breach of duty (as opposed to an actual breach of duty) is insufficient to trigger the statute’s prohibitions, saying:

Under the statute, incompatibility exists only when the performance of the duties of one of the public offices “results in” one of the three prohibited situations. By using the phrase “results in,” the Legislature clearly restricted application of the statutory bar to situations in which the specified outcomes or consequences of a particular action actually occur.

⁴ M.C.L. §15.181(e).

⁵ *Macomb County Prosecuting Attorney v. Murphy*, 464 Mich. 149, 158, 627 N.W. 2d 247 (2001) (holding that the phrase “‘public offices held by a public official’ encompasses positions of public employment”). See also *Detroit Area Agency on Aging v. Office of Services to the Aging*, 210 Mich. App. 708, 713, 534 N.W. 2d 229 (1995) (stating that M.C.L. §15.181(b) “applies to public offices held by both public officials and public employees”).

⁶ 464 Mich. 149, 627 N.W. 2d 247 (2001).

⁷ *Id.* at 151.

⁸ *Id.*

That a breach of duty *may* occur in the future or that a *potential* conflict exists does not establish incompatible offices. The official’s performance of the duties of the offices must actually result in a breach of duty.⁹ (emphasis in original).

This interpretation of incompatible offices is narrower than the interpretations offered in previous cases and Attorney General opinions, many of which held that offices were incompatible if there existed even the potential for a conflict. Thus, in considering opinions rendered prior to May 2001 (and in utilizing the tables provided below), it is important to keep in mind that, under the *Macomb County* decision, offices previously held to be incompatible may, in fact, be compatible within the meaning of the statute if no actual conflict exists between their duties.

Curing a Potential Incompatibility

The plain language of the IPOA flatly prohibits a public officer or employee from simultaneously holding incompatible offices. However, case law interpreting the statute has made clear that, in situations where a potential (not actual) conflict exists, the individual holding the two positions may be able to cure the potential incompatibility.

In *Macomb County*, the Michigan Supreme Court affirmed that “a breach of duty arises when a public official holding dual offices cannot protect, advance, or promote the interest of both offices simultaneously.”¹⁰ Specifically, the court spoke to what an individual must do when he or she faces the possibility that the two public bodies with which he or she is involved may enter into contractual negotiations (a potential conflict). The court held that a public official “may avoid breaching the duty of loyalty by not participating in the preliminary consideration of a possible agreement” between the two entities.¹¹ By the court’s reasoning, abstaining from such discussions would prevent an actual conflict from developing, thereby allowing the individual to continue to serve in both capacities. Implicit in the *Macomb County* decision, however, is a requirement that the individual resign one of the public positions should the two public bodies *actually* enter into a contractual relationship (or develop a similar conflict).

What the Act Does Not Prohibit

In addition to announcing the general rule that an individual cannot hold two or more incompatible offices at the same time, Section 3 of the Act provides specific, narrowly-drawn exceptions for certain public offices.¹² Section 3(1) allows for a public officer or public employee to also serve on the governing board of an institution of higher education.¹³ However,

⁹ *Id.* at 162-163.

¹⁰ *Id.* at 164.

¹¹ *Id.* at 166.

¹² M.C.L. §15.183.

¹³ M.C.L. §15.183(1).

an individual cannot simultaneously serve on two such governing boards, and cannot be employed by an institution of higher education while serving on its governing board.¹⁴

Section 3(2) of the Act allows an individual to be a member of a school board in one district while serving at the same time as the superintendent of another school district. Section 3(3) allows a public officer or employee of a city, village, township, school district, community college district, or county to simultaneously serve as a member of the board of tax increment finance authority, a downtown development authority, a local development finance authority, or a brownfield redevelopment authority.

Section 3(4) makes special exceptions for public officers or public employees of a city, village, township, or county having a population of less than 25,000. In such a local unit of government, an individual can serve both as a public official in one position and:

- (a) as emergency services personnel, either with or without compensation; or
- (b) as a firefighter in the same municipality, as long as the individual is not a full-time fire fighter, a fire chief, or a person who negotiates with the municipality on behalf of the firefighters.

Section 3(4) further allows the governing body of such a local unit of government to authorize a public officer or public employee to perform other additional services for the unit of local government, either with or without compensation, without creating an incompatibility problem.

Section 3 also explicitly limits its own application. Although it allows public employees to serve in two otherwise incompatible positions, Section 3 “does not relieve a person from otherwise meeting statutory or constitutional qualifications for eligibility to, or the continued holding of, a public office.”¹⁵ Further, it does not sanction activity constituting a conflict of interest prohibited by law or by the state constitution.¹⁶ Finally, Section 3 does not “allow or sanction specific actions taken in the course of performance of duties as a public official or as a member of a governing body of an institution of higher education that would result in a breach of duty as a public officer or board member.”¹⁷

In addition to the explicit statutory exceptions provided in Section 3 of the Act, other statutory provisions (outside the IPOA) may authorize the holding of two positions which otherwise appear incompatible. For example, the Court of Appeals has held that no incompatibility exists where the Drain Code¹⁸ specifically states that the “powers, duties and functions of the public works commissioner and drain commissioner may be combined” and a

¹⁴ M.C.L. §15.183(1).

¹⁵ M.C.L. §15.183(5).

¹⁶ M.C.L. §15.183(6).

¹⁷ M.C.L. §15.183(7).

¹⁸ M.C.L. §280.21

person holds those positions.¹⁹ A similar statutory provision allows one member of a township planning commission to also serve on the township's zoning commission.²⁰

Enforcement of the Act

The Incompatible Public Offices Act does not give rise to a private cause of action. Rather, the Attorney General or a prosecuting attorney may bring an enforcement action in circuit court.²¹ In addition, actions taken by a public officer or public employee serving in incompatible positions are not made absolutely void by the Act. Instead, such action is voidable at the court's discretion. Finally, any judicial relief or remedy is limited to prospective operation only.²²

Interpretation and Application of the Act

Neither the Michigan Supreme Court nor the Court of Appeals has interpreted the Act on many occasions. Rather, the majority of guidance in this area is found in numerous opinions of the Attorney General. In total, the Attorney General has issued over 100 opinions that apply the Act to very specific fact patterns, the most common of which are summarized below.²³

¹⁹ *Kramer v. City of Dearborn Heights*, 197 Mich. App. 723, 729, 496 N.W. 2d 301 (1992).

²⁰ M.C.L. §§125.331 and 125.288(1). Note, however, that the Attorney General has ruled that it violates the Incompatibles Offices Act for more than one member of the township planning board to simultaneously serve on the township's zoning board of appeals. Opp. Atty. Gen. 1999, No. 7012.

²¹ M.C.L. §15.184.

²² *Id.*

²³ In using these tables as a research tool, it is important to keep three caveats in mind: (1) the tables could not and do not include all possible combinations of public offices and public employment; (2) as stated earlier, opinions rendered prior to the Michigan Supreme Court's 2001 decision in *Macomb County* must be read in light of that court's holding that only actual conflicts are prohibited by statute, and (3) because the opinions cited below are often highly fact dependent, it is advisable to consult the Attorney General opinion listed for further detail on any specific combination of positions.

County Positions

Op. Atty. Gen.	Position 1	Position 2	Determination
7129 (2003)	County commissioner	Member of concealed weapons licensing board for that county	Incompatible
7093 (2001)	Assistant county prosecuting attorney	Elected member of a municipal utility board in the same county	Compatible in the absence of negotiations for or a contract between the two public bodies or commencement of a civil or criminal action by the county prosecuting attorney against the municipal utility board
7060 (2000)	Member of county planning commission	Member of township planning commission created under Municipal Planning Act	Compatible
6993 (1998)	County controller	Officer of a nonprofit corporation established to assist in the maintenance of a county-owned natural area	Compatible
6931 (1997)	County drain Commissioner	Member of City council	Incompatible if the drain commissioner and the city council have any interaction under the provisions of the Drain Code of 1956
6927 (1996)	County Commissioner	City Commissioner	Incompatible in some circumstances
6913 (1996)	County commissioner in a county with a population under 25,000	City police chief who is deputized by the county sheriff	Compatible unless the city and county contract with one another on matters affecting the city police department or the county board of commissioners acts on non-contractual matters affecting the city police department
6857 (1995)	County equalization director	County register of deeds	Compatible

Op. Atty. Gen.	Position 1	Position 2	Determination
6808 (1994)	County equalization department employee	Township assessor in the same county	Incompatible
6794 (1994)	Member of board of county commissioners	Village marshal for a village within the same county	Compatible provided that a contract is neither negotiated nor entered into between the village and the county board of commissioners affecting the duties of the village marshal
6784 (1994)	County administrator	Member of city council	Incompatible if the person participates in contract negotiations between the county and the city
6748 (1993)	Member of county board of commissioners	Maintenance worker for the county road commission in the same county of less than 25,000 population	Compatible if authorized by the county board of commissioners
6730 (1992)	County commissioner	Ambulance worker for the same county with a population less than 25,000	Compatible
6718 (1992)	County road commissioner	Township supervisor	Compatible unless a contract is negotiated or entered into between county road commission and township board

City Positions

Op. Atty. Gen.	Position 1	Position 2	Determination
7125 (2003)	Member of city council of one city	City attorney for another city	Incompatible where the two cities are parties to a contract
7054 (2000)	Member of city council	Member of the board of a public transportation authority of which the city is a member	Compatible because Article 7, §28 of the Michigan Constitution permits such dual office holding
6931 (1997)	Member of City council	County drain Commissioner	Incompatible if the drain commissioner and the city council have any interaction under the provisions of the Drain Code of 1956
6927 (1996)	City Commissioner	County Commissioner	Incompatible in some circumstances
6913 (1996)	City police chief who is deputized by the county sheriff	County commissioner in a county with a population under 25,000	Compatible unless the city and county contract with one another on matters affecting the city police department or the county board of commissioners acts on non-contractual matters affecting the city police department
6854 (1995)	Member of City council	Member of city's board of public works	Incompatible
6825 (1994)	Elected city council member	Member of Board of Education	Compatible as long as the public bodies do not negotiate or enter into contracts with one another
6784 (1994)	Member of city council	County administrator	Incompatible if the person participates in contract negotiations between the county and the city
6754 (1993)	Elected city treasurer-assessor	Member of governing board of the city's downtown development authority	Compatible

Op. Atty. Gen.	Position 1	Position 2	Determination
6753 (1993)	Member of city commission	Member of city housing commission	Compatible if authorized to do so by the city commission if city has population of less than 25,000
6691 (1991)	City manager	City clerk	Incompatible where position of city clerk is subordinate to and subject to supervision by position of city manager
6611 (1990)	City treasurer	School board trustee in the same city	Incompatible
6030 (1982)	Mayor of a city	City assessor of the same city	Incompatible

Township Positions

Op. Atty. Gen.	Position 1	Position 2	Determination
7106 (2002)	Township treasurer	Member of board of education	Incompatible where township is located within the school district
7094 (2001)	Trustee of a charter township board	Assistant township fire chief in the same township	Incompatible
7060 (2000)	Member of a township planning commission created under Municipal Planning Act	Member of county planning commission in the same county	Compatible
6967 (1997)	Township supervisor in one township	Township assessor in another township	Compatible unless a matter arises that prevents this person from protecting, advancing and promoting the interests of either position
6967 (1997)	Township supervisor	School district superintendent	Compatible unless a matter arises that prevents this person from protecting, advancing and promoting the interests of either position

Op. Atty. Gen.	Position 1	Position 2	Determination
6918 (1996)	Township clerk	Member of board of education of a local school district	Compatible unless the township board and the board of education negotiate or enter into a contract, or one of the two public bodies acts upon a non-contractual matter affecting the other public body or the township clerk fails to perform duties imposed by §1801(2) of the Revised School Code
6859 (1995) ²⁴	Township Trustee	Clerical employee of district court in a district of the third class	Incompatible
6839 (1995)	Member of township board of review	Township zoning administrator	Compatible
6808 (1994)	Township assessor	County equalization department employee in the same county	Incompatible
6791 (1994)	Member of township planning commission	Assistant superintendent of a school district located in that township	Compatible
6791 (1994)	Township trustee	Public school teacher in a school district located in that township	Compatible
6743 (1992)	Township clerk	Township assessor of the same township	Compatible in a township with less than 25,000 population
6718 (1992)	Township supervisor	County road commissioner	Compatible unless a contract is negotiated or entered into between county road commission and township board
6618 (1989)	Township trustee	Township assessor in the same township	Incompatible

²⁴ *Affirmed, Oakland County Prosecutor v. Scott*, 237 Mich. App. 419 (1999).

Village Positions

Op. Atty. Gen.	Position 1	Position 2	Determination
6932 (1997)	Village trustee in a village with a population less than 25,000	Village employee hired to perform services that are unrelated to and not in furtherance of his or her duty as a trustee	Compatible if authorized by the village council
6794 (1994)	Village marshal for a village within the same county	Member of board of county commissioners	Compatible provided that a contract is not entered into between the village and the county board of commissioners affecting the duties of the village marshal
6711 (1992)	Village council member	Village clerk in same home rule village	Incompatible

Educational Entities

Op. Atty. Gen.	Position 1	Position 2	Determination
7106 (2002)	Member of board of education	Township treasurer	Incompatible where township is located within the school district
7013 (1999)	Elected member of a local school board located within the legislator's district	State legislator's full-time aid	Compatible
6967 (1997)	Township supervisor in one township	Township assessor in another township	Compatible unless a matter arises that prevents this person from protecting, advancing and promoting the interests of either position

Op. Atty. Gen.	Position 1	Position 2	Determination
6918 (1996)	Township clerk	Member of board of education of a local school district	Compatible unless the township board and the board of education negotiate or enter into a contract, or one of the two public bodies acts upon a non-contractual matter affecting the other public body or the township clerk fails to perform duties imposed by §1801(2) of the Revised School Code
6899 (1996)	Member of State Board of Education	Member of Saginaw Valley State University Board of Control	Incompatible when either board must review and approve a program proposed by the other board
6825 (1994)	Member of Board of Education	Elected city council member	Compatible as long as the public bodies do not enter into contracts with one another
6791 (1994)	Assistant superintendent of a school district located in that township	Member of township planning commission	Compatible
6791 (1994)	Public school teacher in a school district located in that township	Township trustee	Compatible
6728 (1992)	Member of Board of Education	Nursery school employee in the same district	Incompatible when nursery school program is operated by board of education of same school district
6611 (1990)	School board trustee in the same city	City treasurer	Incompatible

Interplay of Conflict of Interest and Incompatible Offices

The Court of Appeals has differentiated between conflict of interest issues and a breach of duty under the IPOA. As the court made clear, incompatibility of office requires the involvement of two or more governmental offices or positions, while a conflict of interest can exist when only one office or position is involved and a breach of duty under the Incompatible

Offices Act.²⁵ Belows is a discussion of other conflict of interest statutes relating to public officers and employees.

OTHER CONFLICT OF INTEREST STATUTES

The Contracts of Public Servants with Public Entities²⁶

Purpose

The legislature enacted the Contracts of Public Servants with Public Entities Act (“CPSPEA”) to address conflicts of interest in situations where a “public entity” enters into a contract with a private entity in which a “public servant” of the public entity has an interest.²⁷ Because the legislature did not intend the CPSPEA to penalize “innocent persons,” the Act provides that contracts involving violations under the Act shall only be voidable by courts, not absolutely void,²⁸ and that actions to avoid contracts under the CPSPEA shall be barred if not brought within one year after discovery of the violation.²⁹

Provisions

Requirements of the CPSPEA

The CPSPEA prohibits public servants from being direct or indirect parties to contracts between themselves and the public entities of which they are officers.³⁰ Public servants also may not solicit, negotiate, or represent parties to contracts on behalf of certain private entities in which they hold certain interests, or in which they serve as either employees or officers.³¹ Violations of the CPSPEA are misdemeanor criminal acts.³²

²⁵ *Contesti v. Kelly*, 164 Mich. App. 271 (1987).

²⁶ M.C.L. §15.321 *et seq.*

²⁷ *See* M.C.L. §15.325.

²⁸ *Id.*

²⁹ *Id.*; *see VanBuren Twp. v. Ackron*, 63 Mich. App. 600, 234 N.W.2d 722 (1975).

³⁰ MCL §15.322(1).

³¹ M.C.L. §15.322(2) & (3).

³² M.C.L. §15.327.

Assuming certain disclosure requirements are met,³³ the contract prohibitions above do not apply to public servants paid for working an average of 25 hours per week or less as public employees of a public community college, junior college, or state college or university.³⁴

The CPSPEA also does not apply to contracts between public entities, contracts awarded to the lowest qualified bidder, or contracts for utility services where the state or federal government regulates the utility rates.³⁵

Definitions

Under the CPSPEA, “public servant” includes “all persons serving any public entity, except members of the legislature and state officers.”³⁶ However, Section 10, Article 4 of the Michigan Constitution orders that “[n]o member of the legislature nor any state officer shall be interested directly or indirectly in any contract with the state or any political subdivision thereof which shall cause a substantial conflict of interest.” Thus, although the CPSPEA does not expressly apply to members of the legislature or state officers, the constitution itself proscribes conflicts of interest in public contracts on the part of these individuals. According to the Michigan Attorney General, those covered by the CPSPEA’s prohibitions include officers and employees of public school academies created under Part 6A of the Revised School Code (M.C.L. §380.1 *et seq.*),³⁷ members of county boards of commissioners, city councils, township boards, and any other public bodies that the preceding three bodies may establish by law.³⁸

Under the CPSPEA, “‘public entity’ means the state including all agencies thereof, any public body corporate within the state, including all agencies thereof, or any non-incorporated public body within the state of whatever nature, including all agencies thereof.”³⁹ “Public entity,” therefore, seems to broadly encompass all state and local offices, agencies, and bodies.⁴⁰

³³ Where a city councilperson owns a lumberyard with which the city intends to do business, the councilperson must disclose his interest in the contract to the city manager prior to approval of the contract by the city manager if the purchase price is less than \$2,500; the councilperson must promptly disclose his interest to the city council itself, with the disclosure as a matter of record, if the purchase price of the contract is more than \$2,500. Op. Atty. Gen. 1985, No. 6276.

³⁴ M.C.L. §15.323.

³⁵ M.C.L. §15.324.

³⁶ M.C.L. §15.321(a).

³⁷ Op. Atty. Gen. 1997, No. 6966.

³⁸ Op. Atty. Gen. 1996, No. 6906.

³⁹ M.C.L. §15.321(b).

⁴⁰ See note 37, *supra*, and accompanying text.

Preemption

The CPSPEA is intended by the legislature to set out the “sole law in [Michigan]” with respect to conflict of interest standards for public contracts.⁴¹ The CPSPEA includes specific preemption language such that no locality within the state may alter the CPSPEA standards.⁴² Again, however, the contracts covered by the CPSPEA do not include those only involving members of the state legislature or state officers.⁴³

Common Law Conflicts

The continuing force of the common law regarding conflicts of interest in public contracts is somewhat in doubt in light of the legislative intent that the CPSPEA act as the “sole law” regarding such conflicts. Nevertheless, such decisions bear mentioning because of the possibility that they will influence the interpretation of the current law of Michigan.

Prior to the enactment of the CPSPEA, courts had determined that, depending on the circumstances, immediate family relationships may or may not cause conflicts of interest. For example, where a husband held the office of assessor of the school district, and a wife served as a teacher in that same school district, the Michigan Supreme Court held that the husband was not directly or indirectly interested in the contract between the school district and the teachers of the school district.⁴⁴ On the other hand, where the mayor of a city and his wife lived on premises owned by the mayor’s wife, and the mayor himself had endorsed notes secured by the mortgage on that property, the contract for the sale of the property to the city was deemed void because the mayor was improperly interested when he acted as selling agent for his wife and participated in the city council vote to approve the sale.⁴⁵

In another family conflict case, the Michigan Supreme Court found that a father/son relationship did not imperil a public contract to build a waterworks system where a father was a village trustee and a son was the contractor hired by the village to build the system.⁴⁶ The court merely stated, without explanation, that the father/trustee “was not disqualified [from participating in the vote of the trustees to award the contract] by reason of his relationship to [his son] the defendant.”⁴⁷ Despite the conclusory nature of the court’s ruling in the father/son context, it is apparent from the immediate family relationship cases that Michigan courts have not established a *per se* common law rule invalidating contracts because of family relationship conflicts; rather, the court decisions make clear that even though a particular family connection

⁴¹ M.C.L. §15.328; *see also* Op. Atty. Gen. 1996, No. 6906.

⁴² *Id.*

⁴³ M.C.L. §15.321(a).

⁴⁴ *Thompson v. District Board of School Dist. No. 1 of Moorland Twp.*, 252 Mich. 629, 631-32, 233 N.W. 439 (1930).

⁴⁵ *Woodward v. City of Wake Field*, 236 Mich. 417, 210 N.W. 322 (1926).

⁴⁶ *Lewick v. Glazier*, 116 Mich. 493, 74 N.W. 717 (1898).

⁴⁷ *Id.* at 501.

may not create conflict of interest problems in one context, that same relationship may create such problems in another.

In two other situations involving taxpayer interest and eventual beneficiary status, the Michigan Supreme Court has long held that no significant conflict problems exist. In 1874, the court ruled that mere resident taxpayer status does not prohibit public officers – in this case, school inspectors – from taking official action to change the boundaries of a school district.⁴⁸ The court stated, “[i]f interest could prevent men from performing these local duties, they could not be performed at all.”⁴⁹ In a similar vein to its resident taxpayer ruling, the court held that the mere fact that an alderman is a city officer does not preclude that alderman from engaging in any business relations with any person who has a contract with the city.⁵⁰ A contrary holding by the court in these two cases would have paralyzed local government altogether or prevented local government officials from personally dealing with an extremely large segment of the business population.

The Standards of Conduct for Public Officers and Employees Act⁵¹

Purpose

The Michigan legislature enacted the Standards of Conduct for Public Officers and Employees Act (“Standards of Conduct Act,” or “SCA”) “as a code of ethics for public officers and employees.”⁵²

Provisions

The SCA imposes many duties upon both “public officers” and “public employees.”⁵³ Because the SCA was only enacted as a “code of ethics,” and “not as a rule of law for public contracts,” if public officers or employees breach their duties under the Act while forming a contract, the contract will be void or voidable⁵⁴ only if the contract also “is a violation of another statute which specifically provides for the remedy.”⁵⁵

⁴⁸ *Seth N. Clement and Others v. David O. Everest and Others*, 1874 WL 6350 (Mich.)

⁴⁹ *Id.* at *2.

⁵⁰ *People, to Use of Mol v. Southern Surety Co.*, 199 Mich. 30, 33, 165 N.W. 769 (1917).

⁵¹ M.C.L. §15.341 *et seq.*

⁵² M.C.L. §15.342a(2).

⁵³ M.C.L. § 15.342.

⁵⁴ *See, Detroit Area Agency on Aging v. Office of Services to the Aging*, 210 Mich. App. 708, 534 N.W.2d 229 (1995).

⁵⁵ *Id.*

Standards imposed by the Standards of Conduct Act

To avoid conflicts of interest, the SCA mandates that public employees and officers not do the following: improperly disclose to unauthorized persons confidential information acquired in the course of employment;⁵⁶ represent their personal opinion as that of an agency;⁵⁷ use public resources and property injudiciously, unlawfully, or for personal gain or benefit;⁵⁸ solicit or accept gifts or loans of value (other than for state benefit) if the gift or loan tends to influence the way they perform official duties;⁵⁹ engage in business transactions in which they may profit from their official position or authority or financially benefit from confidential information they obtained or may obtain because of their position or authority;⁶⁰ engage in employment or render services incompatible with the discharge of their official duties or when the employment may impair their independent judgment;⁶¹ or participate in the negotiation or execution of contracts, or loans, granting of subsidies, fixing of rates, issuance of permits or certificates, or other regulatory actions in which they have an interest.⁶² Although these prohibitions may initially appear numerous, they are not particularly onerous and generally coincide with widespread notions of ethics.

Definitions

Under the SCA, a “public employee” only includes “classified or unclassified [employees]” of the executive branch.⁶³ In only one exceptional circumstance, involving reports of violations of standards imposed upon public employees and officers under the SCA, does the term “public employee” include all employees of the state or its political subdivisions.⁶⁴ This is because all employees of the state or its political subdivisions are protected from retaliation for reporting violations under the SCA.⁶⁵

⁵⁶ M.C.L. §15.342(1).

⁵⁷ M.C.L. §15.342(2).

⁵⁸ M.C.L. §15.342(3).

⁵⁹ M.C.L. §15.342(4).

⁶⁰ M.C.L. §15.342(5).

⁶¹ M.C.L. §15.342(6). The office of county controller, and the office of member of county social services are incompatible and may not be simultaneously occupied by the same person. Op. Atty. Gen. 1983, No. 6180. In addition, if a volunteer auxiliary police or fire agency is the official agency of the municipality to provide police or fire protection, a member of the volunteer force will be incompatible if they also serve as an official reviewing the work or determining the compensation and conditions of service of their volunteer colleagues. Op. Atty. Gen. 1978, No. 5390.

⁶² M.C.L. § 15.342(7). The son of a member of the barrier free design board may be employed by the board without violation of the ethical standards of the SCA, although a member of that board may not participate in any case in which his or her son appears on behalf of the agency. Op. Atty. Gen. 1980, No. 5640.

⁶³ M.C.L. § 15.341(b).

⁶⁴ *Id.*

⁶⁵ *Id.*

Under the SCA, a “public officer” only includes “a person appointed by the governor or other executive department official.”⁶⁶ Like the “public employee” definition, one exceptional circumstance also exists for public officers when “public officer” includes all elected or appointed officials of the state or its political subdivisions.⁶⁷ All elected or appointed officials of the state or its political subdivisions are protected from retaliation for reporting violations under the SCA.⁶⁸ Members the governing board of state universities, however, are not subject to the provisions of the SCA.⁶⁹

In *Forster v. Delton School District*,⁷⁰ the Court of Appeals of Michigan answered the question of whether a public school district officer’s spouse could be considered a “business entity” under the Act. In that case, a school district officer’s wife was a teacher in the same school district. The school district officer participated in contract negotiations with the school district teachers. The SCA prohibits public officers from participating in the negotiation of contracts “relating to a business entity in which the public officer...has a financial or personal interest.”⁷¹ The court found that the public school district officer did not violate the SCA when he negotiated a public contract in which his wife had an interest because his wife was not a “business entity.”⁷²

In *People v. Barry*,⁷³ the Court of Appeals of Michigan used dicta to more clearly define exactly the type of direct or indirect solicitations, gifts, and loans the SCA prohibits. In *Barry*, a drain commissioner had the contractor on a drainage project deliver fill dirt from the project to the private property in which the commissioner had a personal interest.⁷⁴ The court stated that such conduct clearly violated the SCA: “the property...was substantially improved without cost to the owners [including the drain commissioner]. Such conduct is clearly unethical and made for a punishable offense....”⁷⁵

Constitutionality of the Standards of Conduct Act

The SCA originally allowed public employees to sue in circuit court for relief from violations of the SCA’s retaliation prohibition.⁷⁶ The Court of Appeals of Michigan found that

⁶⁶ M.C.L. § 15.341(c).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Op. Atty. Gen. 1984, No. 6211.

⁷⁰ 176 Mich. App. 582, 440 N.W.2d 421 (1989).

⁷¹ M.C.L. § 15.342(7).

⁷² 176 Mich. App. at 588.

⁷³ 53 Mich. App. 670, 220 N.W.2d 39 (1974).

⁷⁴ *Id.* at 672-73.

⁷⁵ *Id.* at 674 (citing M.C.L. §15.342(4)).

⁷⁶ M.C.L. §15.342c

provision to be unconstitutional in *Department of Social Services v. Kulling*.⁷⁷ According to the court, the Michigan Constitution prohibits the legislature, in most circumstances, from statutorily bypassing the Civil Service Commission to allow for court resolution of disputes concerning state-classified civil service employees. The court held that the Michigan Constitution places exclusive jurisdiction in the Civil Service Commission to hear non-discrimination and non-civil rights related, state-classified civil servant employment matters.⁷⁸ Thus, to the extent the provision allowed state-classified civil servants to sue for relief in circuit court, it was deemed unconstitutional as applied and severable from the SCA in those circumstances.⁷⁹

Evidentiary standard

In *Garchow v. Michigan Department of Civil Service*,⁸⁰ the Court of Appeals of Michigan more clearly defined the evidence needed to show a proscribed conflict of interest under the SCA. In that case, a Michigan State Police officer sought to use polygraph training he had received from the State of Michigan to gain outside employment as an expert polygraph examiner.⁸¹ The Michigan Department of Civil Service and the Department of State Police denied the officer's request to use his polygraph skills outside the department, in part, because they believed that Section 2 of the SCA prohibited such uses of state-provided training where there was a reasonably foreseeable conflict of interest existed.⁸² The court found, however, that the record did not show "competent, material and substantial evidence" justifying the decision to deny the officer the use of his skills in supplemental employment.⁸³ The court further stated that "[u]tilization for private gain of a skill obtained incident to public employment is not prohibited so long as such use does not compromise plaintiff's primary responsibility as a police officer."⁸⁴ The court found "no evidence" of such compromise on the record.

Preemption

The SCA does not preempt local governments from establishing their own standards to regulate the behavior of local government officials. Unlike the Michigan Contracts of Public

⁷⁷ 190 Mich. App. 360, 475 N.W.2d 464 (1991).

⁷⁸ *Id.* at 365.

⁷⁹ *Id.*

⁸⁰ 88 Mich. App. 384, 276 N.W.2d 597 (1979).

⁸¹ *Id.* at 393.

⁸² *Id.* at 387-88. M.C.L. § 15.342(5) states: "A public officer or employee shall not engage in a business transaction in which he may profit from his official position or authority or benefit financially from confidential information which he has obtained or may obtain by reason of such position or authority."

M.C.L. § 15.342(6) states: "A public officer or employee shall not engage in or accept employment or render services for any private or public interest when that employment or service is incompatible or in conflict with the discharge of his official duties or when that employment may tend to impair his independence of judgment or action in the performance of his official duties."

⁸³ 88 Mich. App. at 392.

⁸⁴ *Id.* at 393-94.

Servants with Public Entities Act,⁸⁵ the SCA has no preemption clause.⁸⁶ In addition, the SCA does not occupy the field in the local government area because, as mentioned above, it only applies to local government officials and employees when retaliation for reporting violations under the SCA is at issue.

The Political Activities by Public Employees Act⁸⁷

Purpose

The Michigan legislature passed the Political Activities by Public Employees Act, otherwise known as the Political Freedom Act (“PFA”), to “protect and insure the personal freedoms of all citizens, including the rights of free speech and political association....”⁸⁸

Provisions

Activities Allowed by the PFA

The PFA allows an employee of the state classified civil service to become a member of a political party,⁸⁹ be a delegate to state political conventions,⁹⁰ become a candidate for any local or state elective office,⁹¹ and engage in other political activities on behalf of candidates or issues.⁹² Further, the PFA protects public employees from being coerced by their public employers or other public employees into giving anything of value to support political organizations, issues, or candidates.⁹³

Employees of political subdivisions of the state may engage in the same activities as state civil service employees,⁹⁴ except that local government or school district employees elected to office within that local government or school district must resign or be granted a leave of absence from their local government employment prior to beginning their elected term of office.⁹⁵ For example, a person employed by a school district as a school bus driver who is

⁸⁵ M.C.L. § 15.321 *et seq.*

⁸⁶ Compare M.C.L. § 15.328, with M.C.L. § 15.341 *et seq.*

⁸⁷ M.C.L. § 15.401 *et seq.*

⁸⁸ *Michigan State AFL-CIO v. Michigan Civil Service Commission*, 455 Mich. 720, 732, 566 N.W.2d 258 (1997).

⁸⁹ M.C.L. § 15.402(a).

⁹⁰ M.C.L. § 15.402(b).

⁹¹ M.C.L. § 15.402(c).

⁹² M.C.L. § 15.402(d).

⁹³ M.C.L. § 15.405.

⁹⁴ M.C.L. § 15.403(1).

⁹⁵ M.C.L. § 15.403(2).

elected a member of the board of education of that district must either resign or obtain a leave of absence from his or her position as a bus driver for the term to which he or she was elected.⁹⁶

The PFA limits the times during which each employee of the state, or of a political subdivision of the state, may engage in political activities. The PFA only allows such activities during the time when the employee is not being compensated for his or her duties as a public employee.⁹⁷ Auxiliary police officers and volunteer firefighters represent examples of people not normally considered employees of the city if there is no ordinance setting forth their duties and responsibilities and if they offer their services without compensation or control by the city.⁹⁸

Remedies under the PFA

If an employee of a political subdivision of the state is coerced into contributing anything of value to a political organization, issue, or candidate in violation of the PFA, that employee may file a complaint about this violation with the state department of labor.⁹⁹ The labor department must then hold a hearing to determine whether a violation occurred.¹⁰⁰ If a violation did occur, the department may remedy the violation by ordering back pay, reinstatement, attorney fees, or reinstatement of work-related benefits.¹⁰¹ The department may also move for an injunction in circuit court.¹⁰²

The PFA does not, however, give an explicit remedy for state employees who have had their rights violated.¹⁰³ Also, no private right of action exists to enforce the provisions of the PFA prohibiting public employees from engaging in political activity while being compensated for their work as public employees.¹⁰⁴

Constitutional Issues

Michigan's constitution creates the Civil Service Commission, which has broad authority to regulate internal civil service procedures beyond the control of the Michigan legislature.¹⁰⁵ The Civil Service Commission, however, can only restrict civil service employees' political

⁹⁶ Op. Atty. Gen. 1986, No. 6368.

⁹⁷ M.C.L. § 15.404.

⁹⁸ Op. Atty. Gen. 1978, No. 5390.

⁹⁹ M.C.L. § 15.406.

¹⁰⁰ M.C.L. § 15.406(1).

¹⁰¹ *Id.*

¹⁰² M.C.L. § 15.406(2).

¹⁰³ *See* M.C.L. § 15.406, only giving explicit remedy to employees of state political subdivision.

¹⁰⁴ *Forster v. Delton School District*, 176 Mich. App. 582, 586-87, 440 N.W.2d 421 (1989).

¹⁰⁵ *Council #11, American Federation of State, County and Municipal Employees, AFL-CIO v. Michigan Civil Service Commission*, 87 Mich. App. 420, 428, 274 N.W.2d 804 (1979), *aff'd*, 408 Mich. 385, 292 N.W.2d 442 (1980)

activity if that activity is “on-the-job behavior related to job performance.”¹⁰⁶ The Civil Service Commission may regulate fundamental First Amendment political activity rights of a civil servant during his or her off-duty hours only if the “individual’s off-duty political activities have an actual effect on job performance.”¹⁰⁷ Thus, the PFA does not run afoul of the Michigan Constitution’s provisions for the powers of the Civil Service Commission because the PFA only protects civil servants’ rights to speech and political association while off-duty, a sphere over which the Civil Service Commission does not have plenary authority.¹⁰⁸

Implications for Union Leave

In 1997, the Supreme Court of Michigan ruled that a Michigan Civil Service Commission rule prohibiting the use of union leave for political activity violated both the PFA and the First Amendment as applied.¹⁰⁹ The court reasoned that the commission could not prohibit the employees in this case from participating in political activity because: (1) the commission did not have plenary power to regulate activity unless it was “actual-duty activity,”¹¹⁰ (2) “actual-duty activity” does not include attendance at union meetings for which the employee is not being compensated by the employer under union leave buy-back or leave bank programs,¹¹¹ (3) union leave is antagonistic to an employer’s interest,¹¹² and (4) the employees here took union leave under the above buy-back and leave bank programs.¹¹³

CONCLUSION

In conclusion, the statutes discussed above: (1) prohibit public officers and employees from holding two or more incompatible offices simultaneously; (2) avoid public contracts involving public and private parties where a public servant of the public entity has an interest in the private entity; (3) establish a code of ethics for public officers and employees; and (4) ensure that public employees remain able to exercise their fundamental rights of free speech and political association as private persons while also properly performing their duties on the job. Read together, these statutes address many scenarios that commonly arise in public employment and provide the framework for a thorough analysis of potential conflicts of interest.

¹⁰⁶ *Council #11, American Federation of State, County and Municipal Employees, AFL-CIO v. Michigan Civil Service Commission*, 408 Mich. 385, 408, 292 N.W.2d 442 (1980).

¹⁰⁷ *Council #11, American Federation of State, County and Municipal Employees, AFL-CIO v. Michigan Civil Service Commission*, 87 Mich. App. at 432. This determination of actual affect on job performance is made on a case-by-case basis. *Id.* When determining in general whether political activities of public employees may be regulated, the “proper inquiry is a balancing of government needs and private rights.” *Phillips v. City of Flint*, 57 Mich. App. 394, 403, 225 N.W.2d 780 (1975).

¹⁰⁸ *Id.*

¹⁰⁹ *Michigan State AFL-CIO v. Michigan Civil Service Commission*, 455 Mich. 720, 566 N.W.2d 258 (1997).

¹¹⁰ *See Id.* at 733.

¹¹¹ *Id.* at 735-39.

¹¹² *Id.* at 739.

¹¹³ *Id.* at 723-24.