

## Appendix B. Positions that Can and Cannot Be Held at the Same Time

Serving in two public offices at the same time may be prohibited by constitution, by statute, or by the common law doctrine of incompatible public offices. Not all government positions are offices. The Tennessee Supreme Court has held that a public “office” is a position in which the individual receives compensation and the term and duties of the office are defined in statute.<sup>88</sup>

Article II, Section 26, of Tennessee’s constitution states that individuals cannot “hold more than one lucrative office at the same time.” The Tennessee Supreme Court has held that a lucrative office is one whose pay is affixed to the performance of its duties.<sup>89</sup> The court has held that Article II, Section 26, prohibits the holding of more than one lucrative office in state government at the same time and does not apply to either county or municipal offices.<sup>90</sup>

No Judge of any Court of law or equity, Secretary of State, Attorney General, Register, Clerk of any court of Record, or person holding any office under the authority of the United States, shall have a seat in the General Assembly; nor shall any person in this State hold more than one lucrative office at the same time; provided, that no appointment in the Militia, or to the office of Justice of the Peace, shall be considered a lucrative office, or operative as a disqualification to a seat in either House of the General Assembly.

State law expressly prohibits holding certain public offices at the same time. For example, Tennessee Code Annotated, Section 5-5-102, forbids county mayors, sheriffs, trustees, registers, county clerks, and property assessors to serve on county legislative bodies.

The common law doctrine of incompatible public offices, which applies to both state and local public offices, prevents a person from holding two public offices at the same time if “the occupancy of both offices by the same person is detrimental to the public interest, or whether the performance of the duties of one interferes with the performance of those of the other.” If the individual holds two public offices, then the incompatibility doctrine may deem the first position vacated when the second position was taken.<sup>91</sup>

### Examples of Positions that Can be Held at the Same Time

A county court judge can serve as a criminal court judge if one of the positions is uncompensated. *Hodge v. State*, 135 Tenn. 525, 188 S.W. 203, 1916 Tenn. LEXIS 45 (1916)

A state senator can serve in the office of school director or school board member because the

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<sup>88</sup> *Day v. Sharp*, 128 Tenn. 340 (Tenn. 1913) and *Wise v. Knoxville*, 194 Tenn. 90 (Tenn. 1952).

<sup>89</sup> *Hodge v. State*, 135 Tenn. 525, 188 S.W. 203, (1916).

<sup>90</sup> *Boswell v. Powell*, 163 Tenn. 445, 43 S.W. 495 (1931); *Phillips v. West*, 187 Tenn. 57, 213 S.W.2d 3 (1948).

<sup>91</sup> *State ex rel. Little v. Slagle*, 115 Tenn. 336, 89 S.W. 326, 1905 Tenn. LEXIS 67 (1905).

office of school director is “filled by the people or by representatives of the people other than the Executive or the General Assembly.” *Wallace v. Grubb*, 154 Tenn. 655, 289 S.W. 530, 1926 Tenn. LEXIS 164 (1926)

A county court clerk can serve as ex officio general sessions court clerk because a statute conferring additional duties on a public officer ex officio does not have the effect of appointing him to a second office. *Hancock v. Davidson County*, 171 Tenn. 420, 104 S.W.2d 824, 1937 Tenn. LEXIS 122 (1937)

A county judge or chair can serve an ex officio member of a county highway commission because the ex officio position does not confer on the judge a second office of trust or profit. *Cheatham County v. Murff*, 176 Tenn. 93, 138 S.W.2d 430, 1939 Tenn. LEXIS 104 (Tenn. 1940)

A county superintendent of schools can serve as a state senator because Article II, Section 26, prohibits holding more than one lucrative office in state government and does not apply to local offices. *Phillips v. West*, 187 Tenn. 57, 213 S.W.2d 3, 1948 Tenn. LEXIS 410 (1948)

A circuit court clerk can serve as ex officio general sessions court clerk because a statute conferring additional duties on a public officer ex officio does not have the effect of appointing him to a second office. *Clay County v. Stone*, 208 Tenn. 1, 343 S.W.2d 863, 1961 Tenn. LEXIS 388 (1961)

A deputy sheriff can serve as interpreter in a criminal prosecution because an interpreter is appointed on a case-by-case basis and does not hold an office within the meaning of Article II, Section 26. *Office of the Attorney General of the State of Tennessee*, 1999, Opinion No. 99-211

### **Examples of Positions that Cannot be Held at the Same Time**

An elected constable automatically vacates that office upon becoming a general deputy sheriff because those offices cannot be held at the same time under the common law doctrine of incompatible public offices. *State ex rel. Little v. Slagle*, 115 Tenn. 336, 89 S.W. 326, 1905 Tenn. LEXIS 67 (1905)

An incumbent member of the Tennessee General Assembly cannot run for re-election to the General Assembly and run for delegate to the Constitutional Convention because both are lucrative state offices and cannot be held at the same time under Article II, Section 26. *Office of Attorney General of the State of Tennessee*, 1998, Opinion No. 98-054

A municipal official cannot serve on the State Election Commission even though the municipal position is not a lucrative state office, because Tennessee Code Annotated, Section 2-1-112(a), forbids candidates for election or re-election to any state or local office to serve as a member of the State Election Commission. *Office of Attorney General of the State of Tennessee*, 2002, Opinion No. 02-117

A county medical examiner in whom the county commission has vested the duties of county coroner is prohibited by Tennessee Code Annotated, Section 5-5-102(c)(2), from serving as a county commissioner. Office of Attorney General of the State of Tennessee, 2011, Opinion No. 11-74

An elected or appointed member of a county soil conservation district cannot be a state legislator because both are lucrative state offices and cannot be held at the same time under Article II, Section 26. Office of Attorney General of the State of Tennessee, 2013, Opinion No. 13-18

### **Attorney General Opinions on Local Offices**

Article II, Section 26, does not apply to the following situations because none involve two state offices; however, the common law doctrine of incompatible public offices, other statute or private act, or judicial code of ethics may prohibit holding both at the same time.

A constable and a part-time town police officer.

Office of Attorney General of the State of Tennessee, 1999, Opinion No. 99-095

A county commissioner and a road board member.

Office of Attorney General of the State of Tennessee, 2000, Opinion No. 00-159

An alderman and a county constable.

Office of Attorney General of the State of Tennessee, 2001, Opinion No. 01-152

A juvenile court referee and an appointed counsel in a criminal case.

Office of Attorney General of the State of Tennessee, 2001, Opinion No. 01-162

A city court judge and a juvenile court referee.

Office of Attorney General of the State of Tennessee, 2006, Opinion No. 06-123

A county soil conservation district member and an elected county official.

Office of Attorney General of the State of Tennessee, 2013, Opinion No. 13-18

A county commissioner and a clerk and master for the chancery court in the same county.

Office of Attorney General of the State of Tennessee, 2014, Opinion No. 14-23

An interim chief of police and an interim city administrator.

Office of Attorney General of the State of Tennessee, 2014, Opinion No. 14-50