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**ATTORNEY GENERAL**  
**STATE OF ILLINOIS**  
**SPRINGFIELD**

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FILE NO. S-1411

**COMPATIBILITY OF OFFICES:**  
The Offices of Assistant  
State's Attorney and City  
Commissioner Are Incompatible

Honorable Nicholas G. Byron  
State's Attorney  
Madison County  
103 Purcell Street, 3rd Floor  
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Dear Mr. Byron:

This responds to your letter wherein you asked whether a person appointed as an Assistant State's Attorney for Madison County may simultaneously serve as a city commissioner of the city of Collinsville, a municipality located within Madison County. Your letter states that the Assistant in question will be authorized by you to handle only felony prosecutions involving non-Collinsville defendants and crimes, and that he will have no authority to advise the county board or to perform any other civil functions of

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the State's Attorney's office. I am of the opinion that the offices of city commissioner and Assistant State's Attorney are incompatible and therefore the same person may not serve as city commissioner for the city of Collinsville and Assistant State's Attorney of Madison County. I believe this to be true even though you limit the duties of this Assistant State's Attorney.

I shall first consider the question as to whether an Assistant State's Attorney for Madison County may simultaneously serve as a city commissioner for the city of Collinsville disregarding the limitations which you would place upon the duties of your Assistant. I shall then consider the effect of such limitations.

From the general rules laid down in People v. Haas (1908), 145 Ill. App. 283, it appears that incompatibility between offices arises where the Constitution, or a statute, specifically prohibits the occupant of either one of the offices from holding the other, or where, because of the duties of either office a conflict in interest may arise, or where the duties of either office are such that the holder of one cannot, in every instance, properly and faithfully perform all the duties of the other.

There are no constitutional or statutory provisions which expressly prohibit an individual from simultaneously

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holding the two offices you have mentioned in your letter. Therefore, the question arises whether or not a conflict of interest exists in simultaneously holding the two offices or whether the duties of either office are such that the holder of one cannot, in every instance, properly and faithfully perform all the duties of the other.

It is therefore necessary to examine the duties, functions and powers of the offices of city commissioner and Assistant State's Attorney.

Section 2 of "AN ACT fixing and providing for the payment of the salaries of state's attorneys and their assistants, defining their duties, etc." (Ill. Rev. Stat. 1977, ch. 53, par. 18) provides for the creation of the office of Assistant State's Attorney. It was held by the Illinois Supreme Court that Assistant State's Attorneys perform the general duties of the State's Attorney. (People v. The Toledo, St. Louis and Western Railroad Company (1915), 267 Ill. 142. Also in People v. Nahas (1973), 9 Ill. App. 3d 570, the court held that the legislative purpose in creating the office of Assistant State's Attorney was to provide an official who would have full power to act in the case of the absence or illness of the State's Attorney in the same manner and to the same extent that the State's Attorney could act.

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A State's Attorney is the legal advisor and attorney for county officers. Section 5 of "AN ACT in regard to attorneys general and state's attorneys" (Ill. Rev. Stat. 1977, ch. 14, par. 5) provides:

"The duty of each State's attorney shall be:

(1) To commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in the circuit court for his county, in which the people of the State or county may be concerned.

\* \* \*

(3) To commence and prosecute all actions and proceedings brought by any county officer in his official capacity.

(4) To defend all actions and proceedings brought against his county, or against any county or State officer, in his official capacity, within his county.

\* \* \*

(7) To give his opinion, without fee or reward, to any county officer in his county, upon any question or law relating to any criminal or other matter, in which the people or the county may be concerned.

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It can be seen from the provisions of the foregoing statute that a State's Attorney may be called upon for advice and assistance with reference to a contract which the county may wish to make with the city. It has already been

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pointed out that an Assistant State's Attorney may perform any of the general duties of a State's Attorney. An Assistant State's Attorney who was also a city commissioner of a city with whom the county desired to contract would find himself in a position of having divided loyalty and a conflict of duties. One example of an area where a conflict could arise can be found in the provisions of section 11 of "AN ACT in relation to water supply, drainage, sewage, pollution and flood control in certain counties" (Ill. Rev. Stat. 1977, ch. 34, par. 3111) which authorizes counties to provide water and sewage service to municipalities.

Another example can be found in contracts for garbage disposal. Section 25.11b of "AN ACT to revise the law in relation to counties" (Ill. Rev. Stat. 1977, ch. 34, par. 418) authorizes counties to contract with municipalities in relation to the collection of garbage.

Furthermore, a county is authorized to contract with the city for the use of the city workhouse; for a joint program of air contamination control; for joint plans and construction of projects for the control of floods and the conservation or development of water, waterways and water resources; for leasing space in the city courthouse. Ill. Rev. Stat. 1977, ch. 34, pars. 405, 421.2, 3115, 3551.

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Furthermore, the section on intergovernmental cooperation in the Illinois Constitution of 1970 (Ill. Const., art. VII, sec. 10) and the Intergovernmental Cooperation Act (Ill. Rev. Stat. 1977, ch. 127, par. 741 et seq.) greatly expand the power of the county and the city to contract with each other.

Section 3 of the Intergovernmental Cooperation Act (Ill. Rev. Stat. 1977, ch. 127, par. 743) provides:

"Any power or powers, privileges or authority exercised or which may be exercised by a public agency of this State may be exercised and enjoyed jointly with any other public agency of this State and jointly with any public agency of any other state or of the United States to the extent that laws of such other state or of the United States do not prohibit joint exercise or enjoyment."

Section 5 of the same Act (Ill. Rev. Stat. 1977, ch. 127, par. 745) provides:

"Any one or more public agencies may contract with any one or more other public agencies to perform any governmental service, activity or undertaking which any of the public agencies entering into the contract is authorized by law to perform, provided that such contract shall be authorized by the governing body of each party to the contract. Such contract shall set forth fully the purposes, powers, rights, objectives and responsibilities of the contracting parties."

Prior to the adoption of the new Constitution and the enactment of the Intergovernmental Cooperation Act, the power of a municipality and a county to enter into contracts

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was restricted to limited purposes in specified areas. Now the two units of government may contract in extremely broad areas of activity not permitted prior to July 1, 1971, the effective date of the 1970 Constitution.

The governing body of a city under the commission form of government is the council. (Ill. Rev. Stat. 1977, ch. 24, par. 1-1-2(2).) Thus, the intergovernmental cooperation provisions of the new Constitution and the Intergovernmental Cooperation Act grant broad powers to the council and, therefore, to a council member to vote upon contracts that might be entered into with a county and about which he may be called upon to advise the county as Assistant State's Attorney.

You have stated that you propose to limit the duties of the Assistant State's Attorney who is the city commissioner. In my opinion your proposed limitation of duties cannot change the inherent power of an Assistant State's Attorney to exercise the general powers of the State's Attorney. An Assistant State's Attorney could act contrary to the instructions of the State's Attorney and could exercise the powers of the State's Attorney. Such an event happened in the case of an Assistant United State's Attorney in United States v. Smyth et al. (N.D. Cal. 1952), 104 F. Supp. 283.

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In this case it was held that an Assistant United State's Attorney can do anything which the United State's Attorney can do, and if designation is made by appointment, such Assistants can bind the United States in open court, even though contrary to interests of the government and directly contrary to instructions of the United State's Attorney.

I am of the opinion that a similar rule would apply with reference to an Assistant State's Attorney. Because of the inherent powers of an Assistant State's Attorney and because he could act contrary to the instructions of the State's Attorney, I am of the opinion that a conflict in interest could arise in a situation where the city commissioner also served as an Assistant State's Attorney of the county.

The mere possibility of a conflict in the duties of offices is sufficient to make them incompatible. It is no answer to say that a conflict in duties does not now exist or may never arise or even that the occurrence of a conflict could only occur on a rare occasion. McDonough v. Roach (N.J. 1961), 171 A. 2d 307, 309.

In conclusion, I am of the opinion that the offices of city commissioner and Assistant State's Attorney are incompatible.

Very truly yours,

  
ATTORNEY GENERAL