WILLIAM J. SCOTT
ATTORNEY GENERAL
STATE OF ILLINOIS
500 SOUTH SECOND STREET
SPRINGFIELD
62706

December 30, 1975

FILE NO. S-1025

OFFICERS:
Compatibility - Offices of
City Attorney and Deputy
Public Defender Incompatible

-

Honorable John J. Bowman
State's Attorney of DuPage County
207 S. Reber Street
Wheaton, Illinois 60187

Dear Mr. Bowman:

I have your letter wherein you request my opinion on the following question:

"Does a conflict of interest exist when a city attorney is also a deputy public defender?"

In answering your question I must determine both whether any constitutional or statutory provisions prohibit one person from holding both positions concurrently and whether

the common law doctrine of incompatibility of public offices prohibits one person from holding both positions simultaneously.

As I recently stated in opinion No. S-987 (October 29, 1975): "In the absence of a statutory or constitutional provision to the contrary, there is no necessary objection to the same person holding two positions". There are apparently no constitutional or statutory prohibitions against an individual holding simultaneously the positions of city attorney and assistant public defender, and therefore on that basis, there is no objection to the same person holding both positions at the same time.

Nevertheless, the common law doctrine of incompatibility of public offices must still be considered. That doctrine, however, as I stated in opinion No. S-987 most probably applies in Illinois only to offices and not to employments. Therefore, the first determination I must make in deciding whether the common law doctrine of incompatibility of public offices prohibits the situation you describe is whether the positions

of city attorney and assistant public defender are offices and not merely employments.

In opinion No. S-987 I set forth the following characteristics of a "public office":

> "An indispensable element of a public office, as distinguished from an employment, is that the duties of the incumbent of an office shall involve an exercise of some portion of the sovereign power. [citations omitted]
>
> * * *
>
> An office is a public position created by the Constitution or by law, continuing during the pleasure of the appointing power or for a fixed time, with a successor necessarily being elected or appointed. [citations omitted] It should be noted that an office is enduring in nature and cannot be eliminated by the fiat of a superior official. Thus, if an office is vacated, it must be filled."

Considering first the position of city attorney, I note initially that the statute making provision for it labels it an office. Section 3-7-3 of the Illinois Municipal Code (Ill. Rev. Stat. 1973, ch. 24, par. 3-7-3) provides:

> "§ 3-7-3. If the office of city attorney is established, the occupant shall be appointed by the mayor subject to the provisions of Section 3-7-2."

Section 3-7-2 in turn provides in part:

" * * *

> Any such officer of any city may resign from his office. If such officer resigns he shall continue in office until his successor has been chosen and has qualified. If there is a failure to appoint a city officer, or the person appointed fails to qualify, the person filling the office shall continue in office until his successor has been chosen and has qualified. If such officer ceases to perform the duties of or to hold his office by reason of death, permanent physical or mental disability, conviction of a disqualifying crime, or dismissal from or abandonment of office, the mayor may appoint a temporary successor to the officer."

An application of the characteristics set out above reveals that the position of city attorney is properly labeled "office".

The representation of the city in suits concerning it as an entity and the representation of the public in matters that concern it are clearly duties involving a delegation of some portion of the sovereign power of the city. The position of city attorney also has the other characteristics of an office which I set forth above. In Woods v. Village of LaGrange Park, 298 Ill. App. 595, the appellate court held that a village attorney was an office within the meaning of section 24 of article V of the Illinois Constitution of 1870, which defined an office

as a "public position created by the constitution or law, continuing during the pleasure of the appointing power, or for a fixed time, with a successor elected or appointed". The office of village attorney was created by ordinance pursuant to a statute which authorized the president of the board of trustees of a village to appoint any other officers necessary to carry into effect the powers conferred upon villages. Similarly, the position of city attorney was created pursuant to the statute quoted above, presumably by ordinance. Therefore, it follows that under the holding in Woods the position of city attorney is an office within the meaning of the Constitution of 1870. In addition, the statute quoted above clearly provided that once the office of city attorney has been established, any vacancy in the office must be filled. Since the position of city attorney possesses the essential characteristics of an office which I set forth in my previous opinion, it is clearly an office within the meaning of the common law doctrine of incompatibility of offices.

The position of assistant public defender has been specifically held to have the essential characteristics of an office set out above. (People ex rel. Cook County v. Majewski, 28 Ill. App. 3d 269.) The court pointed out that the representation of indigent defendants, a requirement of due process of law, clearly constitutes a delegation of a portion of the sovereign power to the office of the public defender. The court further analyzed section 6 of the Public Defender Act (Ill. Rev. Stat. 1973, ch. 34, par. 5606), which provides for the appointment of assistants:

> "§ 6. The Public Defender shall have power to appoint, in such manner as the judges before mentioned shall direct, such number of assistants, all duly licensed practitioners, as such judges shall deem necessary for the proper discharge of the duties of the office, who shall serve at the pleasure of the Public Defender. He shall also, in like manner, appoint such number of clerks and other employees as may be necessary for the due transaction of the business of the office. The compensation of such assistants, clerks and employees shall be fixed by the County Board and paid out of the county treasury."

Rejecting the contention that discretionary action by the judiciary is necessary before the position of assistant

public defender is created, the court held that the office had been created by statute "even though there is no absolute certainty someone will occupy that office". The court, reasoning that the demand for services of the public defender in a county as large as Cook insures the continued existence of the office of assistant public defender, also rejected the argument that the position is temporary because appointment is a matter of judicial discretion. On the last point, while DuPage County is not as large as Cook County, it is nevertheless large enough to insure the continued existence of the office of assistant public defender. Thus, the position of assistant public defender is also clearly an office subject to the common law doctrine of incompatibility of public offices.

Having determined that the positions of city attorney and assistant public defender are both offices within the meaning of the common law doctrine of incompatibility of public offices, I must next determine whether the two offices are incompatible. The doctrine is enunciated in People v. Haas, 145 Ill. App. 283, 286:

> "* * * Incompatibility, in this connection, is present when the written law of a state specifically prohibits the occupant of either one of the offices in question from holding the other and, also, where the duties of either office are such that the holder of the office cannot in every instance, properly and fully, faithfully perform all the duties of the other office. * * *"

Cases in a number of other jurisdictions have also held that incompatibility exists where the duties of the two offices conflict. Schear v. City of Elizabeth, 196 A. 2d 774 (N.J. 1964); Russell v. Worcester County, 84 N.E. 2d 123 (Mass. 1949); People on Complaint of Chapman v. Rapsey, 107 P. 2d 388 (Cal. 1940); Polley v. Fortenberry, 105 S.W. 2d 143 (Ky. Ct. App. 1937).

I have already determined at the outset that holding the two offices simultaneously is not prohibited by the Constitution or by statute, but the possibility of incompatibility because of conflict between the duties of the offices remains to be considered.

The duty of assistant public defender is to help discharge the duties of the office of public defender, which include principally the representation of criminal defendants. (Ill. Rev. Stat. 1973, ch. 34, pars. 5604, 5606.) On the other

hand, it is the duty of the city attorney to prosecute persons charged with violating city ordinances. (1914 Ill. Att'y. Gen. Op. 1175; 1969 Ill. Att'y. Gen. Op. 46.) In opinion No. S-30 (1969 Ill. Att'y. Gen. Op. 46) I rendered the opinion that the offices of city attorney and public defender are incompatible because of conflicting duties. It is my opinion that the duties of city attorney and assistant public defender also conflict for the following four reasons.

First, the most direct conflict is that the person holding both offices might as assistant public defender have to defend an accused against a State criminal prosecution arising from the same activities based upon which the person as city attorney would have to prosecute the accused for a violation of a municipal ordinance. The municipal ordinance and the State statute would, of course, have to have one element not common to both in order for the defendant to be prosecuted for both without being twice put in jeopardy. Waller v. Florida, 397 U.S. 387.

It has long been settled in Illinois that municipalities may exercise police power concurrently with the State, so long as the municipal regulation is not in conflict with corresponding

State regulation. (City of Litchfield v. Thorworth, 337 Ill. 469; City of Decatur v. Schlick, 269 Ill. 181; City of Chicago v. Union Ice Cream Manufacturing Company, 252 Ill. 311; Hankins v. People, 106 Ill. 628; Wragg v. Penn Township, 94 Ill. 11; Village of Mt. Prospect v. Malouf, 103 Ill. App. 2d 88.) While the creation of home rule by the Constitution of 1970 has modified this rule to some extent with respect to home rule units, it did not change the fact that such municipalities may in certain instances exercise police power concurrently with the State. As I have noted in my previous opinion No. S-30, the same acts may be deemed violative of State criminal law as well as of city ordinances. (1969 Ill. Att'y. Gen. Op. 46.) Provision of a lesser penalty by the municipal ordinance will not, standing alone, be sufficient to bring that ordinance into conflict with the concurrent State legislation on the subject. (City of Evanston v. Wazua, 364 Ill. 198; Village of Winnetka v. Sinnett, 272 Ill. App. 143.) Thus, a person as city attorney might be required to prosecute a defendant for violation of a municipal ordinance and then as assistant public defender be required to

defend that same defendant against State charges stemming from the same activities which constituted a violation of the municipal ordinance. In my opinion, this is a clear conflict between the duties of the two offices.

While this problem could be avoided by the discretionary refusal of the public defender to appoint an assistant also serving as city attorney to defend cases involving potential ordinance violations, such discretionary refusal would not be sufficient to eliminate the conflict existing because one man holds both offices. It should also be noted that People v. Cox, 22 Ill. 2d 534, held that while by statute an indigent defendant may choose whether or not he shall be defended by the public defender, the statute does not give a defendant the right to choose any certain member of the public defender's staff. If a defendant could or might be assigned as counsel a defender who was also a city attorney, there could well be a violation of procedural and substantive due process of law.

Second, as noted by the decision to which you make specific reference in your letter, People v. Rhodes, (Cal. 1974)

524 P. 2d 363, an additional basis for a finding of incompatibility lies in the close tie between prosecutor and police. A potentially debilitating effect on the quality of defense afforded an indigent by the assistant public defender may result from the need of counsel as city attorney to maintain a good working relationship with police witnesses. This may result in reluctance on the part of the assistant public defender to engage in the exhaustive or abrasive cross-examination which may be required in a given case. (Karlin v. State, (Wis. 1970) 177 N.W. 2d 318.) This reluctance would also affect the questioning of police witnesses who are members of neighboring communities and upon whom a city attorney might rely for various courtesies and types of assistance. People v. Rhodes, supra.

Third, it is possible, that as the result of vigorous representation of a criminal defendant by a city attorney and an ensuing weakening of assistance provided by law enforcement officials that the city attorney's ability to enforce ordinance

violations would be undermined. (People v. Rhodes, supra.) Thus, even if defendant's interests were unaffected by counsel's dual position, the proper functioning of the criminal justice system might nevertheless be impeded where a public prosecutor appeared as the representative of a criminal defendant.

Finally, in relation to permitting public officials to exercise their duties free of any appearance of impropriety, the appointment of a city attorney as an assistant public defender might create the appearance that such an official employed his influence and position to extract favorable treatment for defendant in order to further his professional career. (People v. Rhodes, supra.) For example, police files and information might be improperly examined and employed by a city attorney in his role as assistant public defender. Even the appearance of such impropriety could operate to weaken the public's confidence in our system of criminal justice.

For the above mentioned reasons, I am of the opinion that the duties of the offices of city attorney and assistant

public defender are in conflict and that the two offices are therefore incompatible. The rule is also expressed in the Haas case that "in case of incompatibility the acceptance of the second office is ipso facto a resignation of the first office". Hence, if a person holding either the office of city attorney or the office of assistant public defender accepts the other office, his acceptance of that office operates as a resignation of the one he first held.

You have also asked whether a conflict of interest exists where a city attorney also represents criminal defendants as a private attorney or is a member of a private firm whose other members represent criminal defendants. Litigation, some of which involves this office, is now pending, however, which may affect the answers to those questions. For that reason I think it inappropriate to comment on these last two questions and respectfully decline to advise on them. I do nevertheless direct your attention to the case of People v. Cross, 30 Ill. App. 3d 199, and the following ethics opinions issued by the Illinois State Bar Association: Professional Ethics Opinion

No. 186 (approved: January 14, 1960); Professional Ethics Opinion No. 323 (approved: July 8, 1969); Professional Ethics Opinion No. 364 (approved: June 26, 1971); Professional Ethics Opinion No. 522 (October 7, 1975).

Very truly yours,

A T T O R N E Y G E N E R A L