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Conflicting Offices and Interests

Problems with the legal incompatibility of offices and conflicts of interest are troublesome subjects which always nag at municipal officials. Even after elections are over, these issues continue to nag public officials and employees. Under the common law, offices were considered incompatible if their functions were inconsistent, one being subordinate to and interfering with the other so as to induce the presumption that they could not be executed impartially by the same officer. Also, at common law, the Biblical admonition that "no man can serve two masters" has been applied to prevent public officers from doing public business with themselves.

In addition to these heritages from the common law, there are definite provisions on the subject found in the Alabama Constitution of 1901 and the Code of Alabama. From a practical standpoint, these laws are the principal guides. Few cases construing these laws exist, but conscientious officials have requested numerous opinions of the Attorney General's office over the years relating to conflicting offices and conflicts of interest.

This article is a summary of constitutional and statutory provisions dealing with the compatibility of offices and conflicts of interest together with a collection of related opinions from the Attorney General and the courts.

Offices of Profit

State laws which prevent the holding of two offices of profit by the same person at one time have generated more opinions from the Attorney General than any other aspect of this subject. Section 280 Alabama Constitution, 1901, states:

> "No person holding an office of profit under the United States except postmasters, whose annual salaries do not exceed two hundred dollars, shall, during his continuance in such office hold any office of profit under this state; nor, unless otherwise provided in this constitution, shall any person hold two offices of profit at one and the same time under this state, except justices of the peace, constables, notaries public and commissioners of deeds."

In addition to this provision, Section 36-2-1(b), Code of Alabama 1975, provides that:

> "No person holding an office of profit under the United States shall, during his continuance in such office, hold any office of profit under this state, nor shall any person hold two offices of profit at one and the same time under this state, except constables, notaries public and commissioners of deeds."

What exactly does the term "office of profit" mean? The lack of a concise definition for the term has caused most of the trouble in construing these laws. The Alabama Supreme Court gave this guidance: "We are of the opinion and so hold, that any state, county, and municipal office, whether elective or appointive, carrying as a necessary incident to its exercise some part of the sovereign power of the state, the term and salary or prerequisites of which are fixed by law, is an office of profit within the purview and meaning of Section 280, Alabama Constitution, 1901." *State v. Wilkerson*, 124 So. 211 (1929). Stated another way, an office of profit is one that "derives its authority directly from the state by legislative enactment; its duties and powers are prescribed by law; and its holder is vested with a portion of the powers of government, whether it be legislative, judicial or executive." *Opinion of the Clerk No. 27*, 386 So. 2d 210 (Ala. 1980).

In *Montgomery v. State*, 107 Ala. 372, 18 So. 157 (Ala. 1895), three tests were established by the court to determine if an office is one of profit:

- whether the sovereignty, either directly or indirectly, as through a municipal charter, is the source of authority;
- whether the duties pertaining to the position are of a public character; that is, due to the community in its political capacity; and
- whether the tenure is fixed and permanent for a definite period by law.

To this might be added that the office must carry with it a right to compensation for the performance of its duties. See *Opinion of the Justices No. 64*, 13 So.2d 674 (1943).

It is important to understand that these provisions of the law do not prevent a person who holds an office of profit from being a candidate in an election for another office of profit, nor from continuing to hold the first office after election to the second office up to the time the duties of the second office are assumed. *Shepherd v. Sartain*, 185 Ala. 439, 64 So. 57 (Ala. 1913). Acceptance of the second office of profit automatically vacates the first office. *State v. Herzberg*, 141 So. 553 (Ala. 1932). This, of course, is true whether the second office of profit is elective or appointive.

Ruled Offices of Profit

The following positions have been held to be offices of profit either by the courts or by the Attorney General: **Mayor**, 1 Q. Rep. Att. Gen. 85, 88 Q. Rep. Att. Gen. 8, and AGO to Hon. Bentley Hill, July 21, 1972; **members of county board of registrars**, AGO to Hon. W. H. Olvey, July 23, 1959 and AGO 2005-0031; **municipal judge** (see exception below), AGO to Hon. Arnold Teks, July 13, 1960, and Hon. P. M. Johnston, September 11, 1964; **county solicitor**, 64 Q. Rep. Att. Gen. 108, and AGO to Hon. P. M. Johnston, September 11, 1964; **member of county board of education**, 77 Q. Rep. Att. Gen. 77 and AGO 1988-0114; **supernumerary probate judge**, AGO 1980-518 (to Hon. Don Siegelman, August 19, 1980); **register of circuit court**, 52 Q. Rep. Att. Gen. 238 and 103 Q. Rep. Att. Gen. 8; **circuit solicitor**, AGO to Hon. Glenn Manning, August 23, 1956; **state docks director**, 88 Q. Rep. Att. Gen. 8, and AGO to Hon. K. L. McRae, July 8, 1957; **member of board of equalization**, 82 Q. Rep. Att. Gen. 20; **member of state legislature**, *Smith v. State*, 162 So.2d 473 (Ala. 1964), and Biennial Reports of the Attorney General, 1928-30, page 636; **councilmembers where their salary has been established by ordinance or resolution**, 103 Q. Rep. Att. Gen. 8 and AGO 1988-0114; **holder of any elective office of the county**, 77 Q. Rep. Att. Gen. 47 and AGO to Mayor of Cherokee, August 2, 1956; **police chief**, *Alexander v. State*, 150 So.2d 204 (1963) and AGO to Hon. Larry Moody, November 18, 1975; **county license inspector**, AGO to Mr. T. C. Almon, April 17, 1964; **coroner**, AGO to Hon. Moran Baxter, February 21, 1975; **county commissioner**, AGO to Hon. Charles R. Adair, Jr., January 27, 1975; **district attorney**, AGO to Hon. John Starnes, September 26, 1973; **deputy district attorney**, AGO to Hon. John T. Reid, April 9, 1974; **deputy coroner**, AGO 1979-0221 (to Hon. William J. Murray, June 11, 1979); **member of water improvement commission**, AGO 1979-0160 (to Hon. Robert Gulledge, April 26, 1979); **supernumerary probate judge**, AGO 1980-0518 (to Hon. Don Siegelman, August 19, 1980); **fire chief**, AGO 1981-0235 (to Hon. Charles A. Nix, February 10, 1981); **postmaster**, AGO to Hon. Berniece T. Clark, July 14, 1972; **city school superintendent**, AGO 1982-066 (to Hon. Bob M. English, November 6, 1981); **supernumerary district attorney**, AGO 1982-309 (to Hon. Joseph M. Carlton, April 29, 1982); **clerk of the State Supreme Court**, AGO 1984-136 (to Hon. John F. Tanner, January 27, 1984); **member of the board of Alabama Board of Funeral Services**, AGO 1993-212; **member of State Board of Education**, AGO 2003-0065; **member of Macon County Racing Commission**, AGO 2004-0199; **members of the State Oil and Gas Board**, AGO 1994-0132.

Section 280, Alabama Constitution, 1901, does cover a municipal councilmember who is entitled to receive a salary. If the councilmember is not entitled to receive a salary, then he or she does not hold an office of profit. The Attorney General has ruled that a councilmember entitled to receive compensation cannot waive that compensation in order to make the position one that is not an office of profit. AGO to Hon. John A. Denton, March 8, 1974; AGO 2000-0064. Neither Sections 145, 147, nor 280, Alabama Constitution, 1901, prohibit a municipal judge from also serving as a city council member. AGO 2006-0060.

Ruled NOT Offices of Profit

On numerous occasions the courts or the Attorney General have ruled that certain public positions are not offices of profit. Caution must be used in this aspect of the discussion of offices of profit. Simply because a position is not an office of profit does not necessarily mean it may be held simultaneously with an office of profit. Conflicts of interest statutes might prevent an officer of a municipality from being employed in a position not deemed to be an office of profit. Any position with a governmental unit which is a matter of contract is not deemed an office of profit.

The following is a list of positions held not to be offices of profit: **Councilmembers whose salary or compensation has not been set by ordinance or resolution**, 103 Q. Rep. Att. Gen. 8 and AGO 1992-400; **school principal**, AGO to Hon. William Olvey, August 31, 1956; **delegate to political party convention**, 83 Q. Rep. Att. Gen. 32; **city attorney**, AGO to Hon. Donald Burtkiewicz, September 28, 1964; **vocational teacher**, AGO to Hon. W. W. Weatherford, August 16, 1960; **jury commission clerk**, AGO to Hon. H. F. Koonce, February 9, 1961; **Civil Defense director**, AGO to Hon. W. M. Griffin, October 7, 1964; **assistant city attorney**, *State v. Wilkinson*, 124 So. 211 (Ala. 1929); **assistant director of vocational trade and technical school**, AGO to Hon. Herman Thompson, June 25, 1966; **city clerk**, 15 Q. Rep. Att. Gen. 350; **city treasurer**, 15 Q. Rep. Att. Gen. 350; **member of State Planning Board**, 46 Q. Rep. Att. Gen. 82; **superintendent of school bus transportation**, 52

Q. Rep. Att. Gen. 268; **member of municipal water board**, 81 Q. Rep. Att. Gen. 32; **school teacher**, AGO to W. H. Olvey, August 31, 1956 and AGO 1984-108 (to Hon. Fred M. Scoggins, January 4, 1984); **director of municipal utility board**, AGO to Hon. Robert S. Milner, June 5, 1967; **county attorney**, AGO to Hon. L. H. Boden, November 5, 1970; **president of a state university**, AGO to Hon. Robert Guillot, March 13, 1972; **rural mail carrier**, AGO to Ms. Martha Lawrence, June 29, 1972; **deputy sheriff**, AGO to Hon. E. H. Graves, Jr., June 15, 1972; AGO 2009-0048; **bailiff**, AGO to Hon. Curtis Wright, February 6, 1976; **unpaid member of city board of education**, AGO to Mr. Clifford S. Smith, August 1, 1977; **special assistant attorney general**, AGO to Hon. James D. Evans, December 20, 1977, and February 2, 1978; **county RSVP director**, AGO 1982-166 (to Hon. William B. Duncan, February 5, 1982); **assistant district attorney**, AGO 1985-0084 (to Hon. John C. Jay, Jr., November 20, 1984); **members of utility board, housing authority and industrial development board**, AGO 1985-137 to Hon. R. C. Hagood, December 27, 1984; **classified employees elected to county office**, AGO 1986-0010 (to William G. Hause, October 8, 1985); **county clerk**, AGO 1986-384; **employees of separately incorporated electric corporations**, AGO 1992-0309; **members of the board of commissioners of an emergency management communications district**, AGO 1992-375; **retired probate judge receiving retirement pay**, AGO 1992-497; **distribution clerk with U. S. Postal Service**, AGO 1980-0586 (to Hon. Thomas E. Manning, September 15, 1980); **Water Authority board member**, AGO 2004-0193; **county legislative coordinator**, AGO 2004-0224; **uncompensated member of local volunteer fire department**, AGO 2006-138; **uncompensated reserve police officer**, AGO 2004-0174; and an **uncompensated volunteer fire chief**, AGO 1993-0012; **uncompensated county park and recreation board members** serving on a board created pursuant to Section 11-22-1, et seq., Code of Alabama, 1975, AGO 2009-0064; **A supernumerary circuit clerk** employed with a unit of local county government in a clerical non-policymaking position. AGO 2013-0022; The position of **judicial secretary**. AGO 2014-0019; **director of a health care authority**. AGO 2022-0024.

Nepotism

The question often arises as to whether employees of cities and towns may be related to officers of the municipality by blood or marriage. In an opinion to Hon. L. C. Grigsby, dated December 21, 1959, the Attorney General ruled that his office could find no general laws which prohibit a relative of the municipal governing body from holding a position with the municipality. The state nepotism statute applies only to state officials and employees. AGO to Hon. Elizabeth O. Thomas, January 12, 1976; AGO 2002-0168, AGO 2004-0149 and AGO 2015-0005.

It should be pointed out, however, that several municipalities have local civil service statutes which prescribe conditions under which relatives may not be employed. The Attorney General's office has determined that absent local civil service prohibitions, a council member's spouse may be employed by the municipality as long as the council member does not participate in the employment decision or any other issue specifically concerning the spouse's employment. AGO 2000-181.

Membership on Boards

Alabama laws provide for the establishment of boards which act as agencies of municipalities. Notwithstanding any other provision of law, employees of any separately incorporated public corporation authorized to be created by a municipality pursuant to state law are employees of that separately incorporated entity and are not employees of the municipality authorizing the creation of the entity. Section 11-40-24, Code of Alabama 1975. These statutes invariably prescribe restrictions upon the persons who may serve as directors. Care must be used by a municipal governing body or other appointing authority, to comply with these restrictions in each case. Examples of these restrictions are revealed in the following Attorney General and court opinions:

- A municipal councilmember may not be appointed to serve as a member of the municipal housing authority because Section 24-1-24, Code of Alabama 1975, provides that "None of the commissioners may be city officials." AGO to Hon. E. E. Wakefield, December 11, 1956.
- A councilmember may not be a member of a zoning board of adjustment. AGO to Hon. John B. Nisbet, Jr., February 24, 1970.
- A mayor cannot serve as a member of the State Ethics Commission. AGO 1979-344 (to Hon. Leslie S. Wright, January 25, 1979).
- A councilmember may be employed by a separately incorporated utility board if he or she does not hold a managerial position with the board. AGO 2004-0213.
- Section 11-50-313, Code of Alabama 1975, has been amended to permit councilmembers serving on utility boards organized pursuant to said law to receive a fee for this service, provided the board of directors of the utility approves it first. However, a utility board cannot pass a resolution allowing a municipal officer to receive retroactive compensation for serving on the board. AGO 1986-0268.

- Prohibition against municipal officer serving on city waterworks and gas board included in board's original certificate of incorporation was invalidated and superseded by restated and amended certificate of incorporation that omitted any such prohibition; restated and amended certificate was properly adopted and recorded, as required by statute, and embodied all the terms and provisions required in a new certificate of incorporation, and thus complete reading of restated and amended certificate indicated clear intent for it to be treated prospectively as controlling certificate, superseding all prior amendments and expressing in totality powers of board. *State ex rel. Sargent v. Edwards*, 291 So.3d 1166 (Ala., 2019)
- A member of a city gas board may serve on the city medical clinic board, although Section 11-58-4, Code of Alabama 1975, prohibits a city officer from serving on a medical clinic board. However, the Alabama Supreme Court concluded in *Mobile v. Cochran*, 276 Ala. 530, 165 So.2d 81 (1964), that a member of a separately incorporated municipal utility board is not an officer or employee of the city. AGO to Hon. Louis P. Moore, November 3, 1978.
- A municipal officer or employee may serve as a director of a downtown redevelopment authority. Section 11-54A-7, Code of Alabama 1975.
- A councilmember may serve as a director of a county hospital association. AGO 1981-0003 (to Hon. W. D. Scruggs, Jr., October 2, 1980).
- A member of a County Board of Human Resources created pursuant to Section 38-2-7 of the Code may not also serve as a municipal official. AGO 2009-017.
- A member of the State Board of Human Resources may serve as a councilmember. AGO 2009-0017.
- Section 11-54-86 of the Code of Alabama, prohibits a member of the industrial development board serving both as an officer or employee of the municipality and as a director on an industrial development board. AGO 2006-104.
- A member of the Walker County Civil Service Board ("Board") vacates his or her position on the Board at the time he or she files qualifying papers for an elective office, due to a provision of Act 80-673 which authorized creation of the board. The board member's subsequent withdrawal as a candidate for elective office does not reinstate the board member. A vacancy exists on the Board that may be filled by appointment in accordance with section 5 of Act 80-673. AGO 2008-0086.

At times questions are raised as to the legality of professionals serving on municipal boards. Section 36-25-9, Code of Alabama 1975, states that nothing in that section shall prohibit real estate brokers, agents, developers, appraisers, mortgage bankers or other persons in the real estate field or other state-licensed professionals from serving on any planning boards or commissions, housing authorities, zoning board, board of adjustment, code enforcement board, industrial board, utilities board, state board or commission. The statute further provides that all municipal regulatory boards, authorities or commissions currently comprised of any real estate brokers, agents, developers, appraisers, mortgage bankers or other persons in the real estate industry may allow these individuals to continue to serve out their current term if appointed before December 31, 1991, provided that, at the conclusion of such term, subsequent appointments shall ensure that membership of real estate brokers and agents shall not exceed one less of a majority of any municipal regulatory board or commission effective January 1, 1994.

The mayor, as a member of the city council and of the planning commission and who is also a realtor with a client affected by a vote, is prohibited from voting on any matter defined in Sections 11-43-53 and 36-25-9, Code of Alabama 1975. AGO 1993-0193. Pursuant to Section 11-43-45 of the Code of Alabama, councilmembers who have been nominated to fill the position of council president may vote for themselves. AGO 2017-0014.

Public Utility Employees

Section 11-43-11, Code of Alabama 1975, states the following:

> "No officer of any municipality shall, during his term of office, be an officer nor employed in a managerial capacity, professionally or otherwise, by any corporation holding or operating a franchise granted by the city or the state involving the use of the streets of the municipality. This section shall not apply to or affect any attorney or physician employed by the municipality, and any municipality incorporated or organized under any general, special or local law of the state of Alabama may employ an attorney or physician, or attorneys or physicians, employed by a public utility."

The Alabama Supreme Court in *State v. Morrow*, 162 So.2d 480 (1964), held that the legislative intent and purpose of this section is clear. The court stated that this provision of law was enacted on the theory that employment by a public utility

holding a franchise granted by the city involving the use of the city's streets could be incompatible with serving as an officer of the municipality at the same time. The real basis of such incompatibility is the possibility of a conflict of interest between the interest of the municipality and the interest of the public utility. The Attorney General has ruled that the law does not prevent a person covered by its provisions from running for municipal office and being elected thereto. But before assuming the duties of the office that person must resign from employment with such utility, even though that employment is not within the municipality. AGO to Hon. Charles R. Cain, September 22, 1960. This section prohibits the treasurer of the Northwest Alabama Gas District from serving as mayor or councilmember where the district serves the municipality. AGO to Hon. M. C. Hollis, Jr., July 24, 1956. A cable television company which holds a franchise issued by the city is within the coverage of the section. AGO to Hon. W. K. Little, May 12, 1972.

This statute does not prohibit the mayor of a municipality from being appointed superintendent of utilities as such is expressly authorized by law. See, Section 11-43-161, Code of Alabama 1975. The manager of the local office of Alabama Power Company cannot be a member of the city's incorporated utility board. AGO 1981-0403 (to Hon. J. D. Falkner, June 2, 1981). A person employed by a utility holding a city franchise may serve on the city governing body unless he serves in a managerial capacity for the utility. AGO 1986-0211 (to Hon. W. A. Smith, April 15, 1986).

Conflicts of Interest

A number of statutes prohibit municipal officers and employees from having specific dealings with a municipality, but the one most widely referred to is found in Section 11-43-12, Code of Alabama 1975. It provides, in part, as follows:

> "No alderman or officer or employee of the municipality shall be directly or indirectly interested in any work, business, or contract, the expense, price, or consideration of which is paid from the treasury, nor shall any member of the council, or officer of the municipality be surety for any person having a contract, work, or business with such municipality, for the performance of which a surety may be required."

This section not only prohibits officers and employees from having contracts with the municipality, it prohibits their being employed by the municipality. 53 Q. Rep. Att. Gen. 67. The following opinions indicate the wide scope of this section.

- An officer of a municipality may not hold any other salaried position in the municipality even though he receives no pay for such office. AGO to Hon. Cecil White, February 7, 1966. An officer of a municipality may not also serve as a police officer even though the only compensation provided would be payment for gasoline, oil and automobile upkeep. AGO to Hon. H. B. Wilson, December 14, 1964. However, the law does not prohibit a municipal firefighter from serving as a county commissioner. AGO 1992-0277. A municipal clerk is not prohibited from serving as a director of a separately incorporated utility board or from receiving compensation for such service. AO NO. 1993-1.
- A municipal councilmember is prohibited from engaging in the bail bond business while serving on the council. A properly authorized professional bail company owned by the spouse of a councilmember may do business in the municipality. AGO 1997-0084.
- A mayor has an indirect interest in the contracts of his wife who does business in her individual capacity and the municipality is prohibited from contracting with her by law. AGO to Hon. Josh Mullins, May 4, 1965. The section prohibits a municipality from doing business with a corporation whose sole stockholder and owner is the spouse of a municipal employee. AGO 1988-275. These sections also prohibit a mayor from selling insurance to the municipality, if he or she is an agent for the insurance company. AGO to Mayor of Florence, March 14, 1952. A municipal officer may not subcontract to perform part of a contract between the city and its prime contractor without violating the section. AGO to Hon. Carlton Mayhall, October 6, 1964. An officer may not lease a water supply to the waterworks system since he would be directly interested in a contract the consideration for which would be paid from the municipal treasury. AGO to Hon. E. C. Morrison, September 2, 1964. When a municipality serves as a sponsor for a summer food service program and federal funds pass through the municipal treasury, councilmembers are prohibited by Section 11-43-12, Code of Alabama 1975, from serving as the compensated program administrator. AGO 1992-0299.
- A councilmember may not lawfully sell goods, wares or merchandise to a municipality which he serves as councilmember. However, the Attorney General has ruled that an exception exists when the only newspaper in the municipality is owned by a municipal official. In this case, the city may go ahead and advertise in that paper as required by law. It is reasoned that the publication requirement overrides the conflict prohibition; it is further noted that publication rates for legal advertisements are established by law. 56 Q. Rep. Att. Gen. 108.
- A municipal employee may not use municipal facilities to conduct Tupperware or jewelry parties on a lunch break or after hours, when the party will result in a financial gain to the employee or a business with which he or she is associated. AO NO. 1996-59.

- A member of a city council, who is employed by an insurance agency, may not vote, attempt to influence or otherwise participate in any matters coming before the city council involving a client of their employer, if either the employer or the councilmember stands to benefit from council action. AO NO. 2004-07.
- Members of a city council may vote on a rezoning issue affecting the neighborhood in which they or a family member resides, as there is no personal gain, nor will the members be affected any differently than the other residents of the neighborhood. AO NO. 2004-08 and AO NO. 2008-03.
- A town may sell real property to a company that has a councilman as a member of that company, if the councilman does not participate in the discussion of the consideration of the sale by the town council, for an amount determined by the council to be adequate consideration. It is best public policy to sell such property by competitive bid. The councilmember should make a public disclosure of the potential conflict of interest. AGO 2014-0076; AGO 1993-0194.
- In *Mobile v. Cochran, supra*, the Alabama Supreme Court ruled that members of separately incorporated boards are not officers of the city and, therefore, are not governed by the restrictions of Section 11-43-12, Code of Alabama 1975.
- The chair of a municipal water and sewer board may accept employment with the city housing board as long as the individual does not use either position to financially benefit either the waterworks and sewer board or the housing authority. AO NO. 1993-126.
- A councilmember may not hold the job of municipal clerk even though no pay is received for services as a councilmember. AGO to Hon. Lloyd Barnes, November 26, 1956. A municipal employee who is elected to the council may not continue to serve as an employee when he assumes office on the council. AGO to Hon. Charles Adams, July 31, 1956.
- Although public officials and employees may accept free athletic tickets to sporting events or other social occasions, they may not solicit these tickets. AO NO. 1999-16.
- Section 11-50-313, Code of Alabama 1975, allows councilmembers serving as directors of utility boards to receive compensation for their service. Also, Section 11-43-80, Code of Alabama 1975, specifically allows the mayor to be hired as superintendent of utilities for additional compensation. An individual may not serve on a utility board and also be employed as manager of the board. AGO 1993-0052.
- An employee of a separately incorporated municipal utility board, incorporated pursuant to the provisions of Act 175 of the 1951 Regular Session of the Alabama Legislature, may serve on the board of a municipal housing authority. AGO 2006-0003.
- The spouse of a city council member may serve on the board of a municipal housing authority. AGO 2006-0003.
- A person may serve as a postmaster and as a part-time councilmember. AGO 2005-0019.

Section 11-43-12, Code of Alabama 1975, has also been interpreted to prohibit a city parks and recreation director from simultaneously serving as mayor. AGO to Hon. T. E. Whitmore, April 6, 1976. It also prohibits the same person from simultaneously serving as city judge and as city attorney. AGO to Hon. Bobby Claunch, November 21, 1972. However, different members of the same law firm may serve as municipal judge and as municipal attorney, provided the earnings of neither position become revenues of the firm and are not taken into account when firm profits are divided. AGO 1992-0044.

This section prohibits a town from purchasing land from its mayor. AGO 1981-0239 (to Hon. Charles Couch, February 10, 1981). A municipality may, however, condemn the property of a municipal officer or employee provided that the officer or employee refrains from the decision-making process regarding the condemnation. AGO 1996-0231. A municipality may purchase property owned by the mayor's mother when the mother is not a member of the mayor's household, not financially dependent on the mayor and the mayor does not participate in either the discussion or the vote. AGO 1997-0140. A city may enter into an agreement, which involves the mayor's son as a real estate broker, provided the mayor does not reside in the same household as his son, is not financially dependent on his son, and does not participate in the discussion or vote on whether or not to enter into the agreement. AGO 2005-0181.

The section also prohibits a company in which a councilmember owns a majority of the stock from selling materials to an independent contractor who is working on a city project if such materials will be used in the city project. AGO 1981-0258 (to Hon. William J. Trussell, February 19, 1981). A councilmember who is a landlord may not participate in a community block grant program in the municipality for which he or she serves. AGO 1996-0323.

A councilmember may not be employed by an engineering firm as a resident inspector for a project where the engineering company is performing services under direct contract with the city. AGO 1982-0077 (to Hon. Charles E. Bailey, November 16, 1981). A councilmember may participate in the appointment or election of a son-in-law or stepfather to a city board provided the relative is not financially dependent upon the councilmember and is not an employer or employee of the councilmember.

AGO 1983-112 (to Hon. Fred W. Purdy, December 29, 1982). A police dispatcher cannot serve as an agent for a bail bonding business in the city. AGO 1993-0116. A mayor and members of the council may receive water and cable television discounts only if granted as part of their salaries. AGO 1991-0173.

Section 41-16-60, Code of Alabama 1975, prior to its amendment by Act 2011-583, stated that no member of the municipal governing body or of a municipal board shall be financially interested or have any personal beneficial interest, either directly or indirectly, in the purchase of or contract for any personal property or contractual services. This section is part of the competitive bid law applicable to municipal purchases of personal property or contractual services. The office of the Attorney General has determined that a member of a municipal utility board who is the sole owner of a business may not sell trucks to the utility board, with or without bids. AGO 1999-0098. Section 41-16-60, Code of Alabama 1975, also precludes a member of the Water Works and Sewer Board from having any personal or financial beneficial interest, directly or indirectly, in a contract for the provision of services to the Board. Whether a direct or indirect benefit actually exists is a question of fact for the Board to determine. AGO 2007-0078. These opinions were based on the prohibitions of Section 41-16-60 before amended by Act 2011-583. Section 41-16-60 of the Code, as amended, states as follows:

> "Members and officers of the city and county boards of education, the district boards of education of independent school districts, may be financially interested in or have any personal beneficial interest, either directly or indirectly, in the purchase of or contract for ***any personal property or contractual service*** under either of the following conditions:
>
> (1) The contract or agreement under which the financial interest arises was created prior to the elec¬tion or appointment of the individual to the position he or she holds.
>
> (2) The individual holding the position does not participate in, by discussion or by vote, the decision-making process which creates the financial or personal beneficial interest."

The Attorney General relying on the amended version of Section 41-16-60 of the Code, determined that a member of a city or county board of education may contract with the board of education for personal property or personal services if: (1) the contemplated contract was in existence before a person was elected or appointed to the board or (2) the individual does not participate in the deliberation or vote on the proposed contract. AGO 2012-0017 and 2012-0018. These opinions also noted that Section 41-16-60 is not applicable to contracts subject to the Public Works Law. Furthermore, members of city and county boards of education may be subject to the Ethics Law and should submit these questions directly to the Ethics Commission.

The Alabama Firefighters' Personnel Standards and Education Commission/Alabama State Fire College may employ off-duty municipal firefighters and paramedics during their "off time" as educational adjunct fire instructors for the Commission's "open enrollment" training classes to teach educational training classes to other firefighters and paramedics, including his or her own coworkers who may also be enrolled in such classes. This employment does not violate section 11-43-12 of the Code of Alabama. AGO 2011-0019.

Section 11-43-12 of the Code of Alabama does not prohibit a city employee from holding the position of president of the humane society that provides contractual services to the City of Lanett, so long as the employee receives no compensation from the humane society. AGO 2013-0002

The Water Works and Gas Board of the Town of Maplesville may lease equipment from an employee without violating sections 11-43-12, 41-16-60, or 13A-10-62 of the Code of Alabama. AGO 2013-0031.

Section 11-43-12 of the Code of Alabama prohibits the receipt of federal grant funds by a municipal employee when the grant program is administered by the municipality for which the employee works. AGO 2013-0010.

Purchase of property by the City of Florence from an estate of which a current employee is a beneficiary could result in a violation of section 11-43-12 of the Code of Alabama. The prohibitions found in section 11-43-12 do not apply to the Lauderdale County Commission. Thus, neither the Lauderdale County Commission, nor a municipal employee, would violate the criminal provisions of section 11-43-12 if the property in question is purchased by the county commission using county funds from an estate that has a municipal employee as a beneficiary. AGO 2016-0018.

Section 11-43-12 of the Code of Alabama prohibits a city council member from engaging in business contracts with the municipality for which the council member serves. AGO 2013-0028.

Violation of Section 11-43-12 is deemed a misdemeanor and constitutes grounds for impeachment. A violation of Section 41-16-60 also constitutes a misdemeanor punishable by fine not exceeding $500 or imprisonment not exceeding 12 months. Removal from office is mandatory.

Exception for Class 7 and 8 Municipalities

Exceptions to Sections 11-43-12 and 41-16-60, Code of Alabama 1975, are provided by Section 11-43-12.1 for Class 7 and 8 municipalities (under 12,000 population according to the 1970 federal decennial census). Notwithstanding any statute or law to the contrary, any Class 7 or 8 municipality may legally purchase from any of its elected officials or employees any personal service or personal property, provided the elected official or employee is the only domiciled vendor of the personal service or personal property within the municipality. The cost or value of such personal property or service shall in no event exceed $3,000. The elected official or employee, who proposes to sell to the municipality, shall not participate in the decision-making process determining the purchase but shall make any disclosure required by the state ethics commission. The governing body of such municipality shall determine and find that the elected official is the sole vendor domiciled in the municipality and that the selling price of such service or property is lower than could be obtained from a vendor domiciled outside the municipality. In making such determination, consideration may be given to the quality of service or property proposed to be supplied, conformity with specifications, purposes for which required, terms of delivery, transportation charges and the date of delivery. The office of the Attorney General has determined that a Class 8 municipality may contract, under the provisions of Section 11-43-12.1, with a wood-waste recycling business partially owned by a council member if the provisions set out in the statute are followed. AGO 2003-0014.

Section 11-43-12.1, Code of Alabama 1975 permits a Class 8 municipality to do business with a shop owned by a municipal officer when that shop or vendor is the only domiciled vendor within the municipality and the cost of the personal property or service offered by the vendor does not exceed $3000 yearly. If the vendor is not the only one of its kind domiciled within the Town limits, or the service will exceed $3,000 yearly, the elected official or municipal employee may bid on providing service to the Town pursuant to Section 11-43-12.1(b) and in accordance with Section 41-16-50 of the Code. AGO 2015-0051.

This law also allows any Class 7 or 8 municipality to legally purchase from any of its elected officials any personal service or personal property under competitive bid law procedures. This authority is not restricted to situations where the elected official or employee is the sole vendor within the municipality. The elected official or employee, if he or she proposes to bid, shall not participate in the decision-making process determining the need for or the purchase of such personal property or personal service or in the determination of the successful bidder. The governing body shall affirmatively find that the elected official or employee is the lowest responsible bidder as required by the state law. It shall be the duty of the municipality to file a copy of any contract awarded to any of its elected officials or employees with the state ethics commission. All awards shall be as a result of original bid taking. In the event an elected official or employee offers to sell or submit a bid to the municipality, he or she shall make full disclosure of his or her ownership or the extent of ownership in the business organization with which he or she is associated, under oath, to the municipality.

Other Exceptions

Although Sections 11-43-12 and 41-16-60 have been used as authority for prohibiting numerous activities, the courts and the Attorney General have ruled that certain exceptions, other than Section 11-43-12.1, do exist. For instance, a municipal official's son is not prohibited from bidding on a municipal contract because of kinship as long as the father has no financial interest in the son's business. AGO to Hon. James C. Wood, September 10, 1975. A person whose spouse serves as a municipal judge may serve on the municipal council provided he recuses himself from voting on issues dealing with his wife's position as judge. AGO to Hon. James H. Sims, July 8, 1975. A councilmember may serve as a volunteer firefighter for the municipality provided he receives no compensation for his services other than reimbursement for expenses incurred in the performance of his municipal duties. AGO to Hon. Paul Shipes, February 8, 1974. An incorporated water board may purchase insurance from an insurance agency owned by the municipal attorney. *Mobile v. Cochran, supra*. A municipal official may rent TV sets to patients in a municipal hospital. AGO to Hon. Oscar Peden, June 11, 1971.

These sections prohibit a municipal official or employee from doing business with the municipality, even if the contract is made on a competitive bid basis. However, the Attorney General has ruled that these sections do not prohibit a municipality from doing business with incorporated firms which have municipal officers or employees as shareholders or corporate officers. 128 Q. Rep. Att. Gen. 30. A municipality may not, however, do business with the incorporated firm if the firm is a **family-held** corporation or if the municipal official is a majority shareholder in the corporation. See, AGO to Hon. Frankie J. Kucera, April 6, 1976; AGO to Hon. Wayne Harrison, December 6, 1973; AGO to Hon. Herbert G. Hughes, August 9, 1968; and AGO to Hon. Andrew J. Gentry, Jr., March 8, 1974.

These sections do not prohibit a municipal official from bidding on real property being sold by the municipality, 129 Q. Rep. Att. Gen. 48, nor does it prohibit a corporation which employs a municipal official from selling automobiles to the municipality which the official serves. AGO to Hon. Robert S. Milner, April 4, 1975.

A municipality may do business with a bank where the mayor of the city serves on the bank's board of directors and is a minority stockholder, provided, however, that the mayor does not vote on matters relating to the bank that are brought before the city council. AGO 1993-0168 and AGO 2005-0047.

Political Activity of Public Employees

Section 17-1-4, Code of Alabama 1975, provides that no city employee, whether classified or unclassified, shall be denied the right to participate in county and state political activities to the same extent as any other citizen of the state, including the endorsing of candidates and contributing to campaigns of his or her choosing. The statute gives county employees the right to participate in city and state elections and gives state employees the right to participate in county and city elections.

Section 17-1-4, Code of Alabama 1975, allows municipal employees the right to participate in municipal elections. To be a candidate, the employee must take an unpaid leave of absence or use personal leave or compensatory time. Employees who violate this provision must be dismissed. Employees may not use public funds or property for political activity. AGO 1993-00108. Supervisors may not coerce employees to campaign. Employees who campaign must do so on their own time.

Unpaid reserve officers do not have to take a leave of absence to run for municipal office unless the council establishes a policy requiring this. AGO 1997-0034. A personnel policy that allows employees during an unpaid leave to continue their health insurance coverage, provided they pay the premiums, would permit an employee taking time off to run for office to do the same. AGO 1998-0090. A part-time municipal judge is not required to resign or take a leave of absence in order to qualify and run for the office of probate judge. AGO 2018-0013. A municipal police officer is not required to take a leave of absence to be a candidate for the office of sheriff because he is not seeking a municipal political office. AGO 2006-0067.

A local act that prohibits employees of a county commission from participating in political activities at the city, county and state levels is in conflict with Section 17-1-4 of the Code of Alabama, which sets forth the right of city, county and state employees to participate in political activities. AGO 2000-0153.

The federal Hatch Act covers federal employees and officers and employees of a state or local agency if their principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States government or a federal agency. Generally, this law does not restrict activity in nonpartisan elections. Municipal elections are nonpartisan. The Hatch Act is enforced by the U.S. Office of Special Counsel. Additional information may be obtained from that office.

Other Statutory Restrictions

No officer of a municipality may be surety for any person having a contract, work, or business with the municipality for the performance of which a surety may be required. Section 11-43-12, Code of Alabama 1975. Certain exceptions exist for public works bids. See, Section 39-1-4, Code of Alabama 1975.

No officer or employee of a municipality, personally or through any other person, shall deal or traffic in any manner whatsoever in any warrant, claim or liability against the municipality. Violation constitutes a misdemeanor and grounds for impeachment. Section 11-43-14, Code of Alabama 1975.

A councilmember or mayor is prohibited from voting on questions which come before the council in which he or she or his or her employer or employee has a special financial interest, either at the time of voting or at the time of his or her election. Section 11-43-54, Code of Alabama 1975. The Attorney General has ruled that this section requires a councilmember whose spouse is employed as a teacher in the city's school system to refrain from voting on all matters pertaining to compensation, tenure and benefits of his or her spouse. AGO 1989-0084 and AO NO. 1992-87. However, the Attorney General has ruled that a mayor whose spouse is employed by the city school system may vote on school board appointments or on appropriations to the school system if the vote of the council ends in a tie. AO NO. 1992-83. Section 36-25-5(a), Code of Alabama 1975, permits a councilmember, whose spouse is employed in a private capacity by a person who is a current member of the city board of education, to vote on the appointment of a new board member. AO NO. 1991-51.

A county commissioner may not vote on a one-cent sales tax that would benefit a city board of education which employs him or her. AO NO. 1994-33. Councilmembers who are employed by a board of education cannot vote on a proposed sales tax increase for school system capital outlays. AGO 1991-0041. A councilmember may not vote on a budget which would benefit his or her spouse, nor vote on a disciplinary matter, if the vote might affect his or her spouse financially. AO NO. 1992-98.

No member of a municipal council may be appointed to any municipal office which has been created or the emoluments of which have been increased during the term for which he or she was elected. He or she may not be interested, directly or indirectly, in any contract, job, work, material or the proceeds thereof or services to be performed for the municipality, except as provided by law. Section 11-43-53, Code of Alabama 1975.

The towing company of a councilmember who is chairman of the police committee may be placed in rotation for dispatch by police if the councilmember does not participate in the discussion of the consideration of, or the vote on, the issue by the city council or committee. AGO 2015-0030.

Chapter 10 of Title 13A, Code of Alabama 1975, as amended, sets out a number of offenses against public administration, such as obstructing governmental operations, refusal to permit inspection, failure to file a required report, tampering with governmental records, bribery of public officials, failure to disclose conflict of interests, trading in public office, misuse of confidential information and perjury. Municipal officials should become familiar with these statutes.

The Theft of Honest Services Act. did not make criminal undisclosed self-dealing by a public official or private employee, i.e., the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty. The honest services statute covers only bribery and kickback schemes. *Skilling v. U.S.*, 561 U.S. 358 (2010).