

## MPT – February 2018 – Selected Answer 1

### MEMORANDUM

TO: Emily Swan

FROM: Examinee

DATE: February 27, 2018

RE: Hastings resolution

It is likely MUD 12 directors will qualify as a civil office of emolument under the Franklin Constitution, while both county election judge positions and precinct chair positions will not qualify as civil offices of emolument.

#### II. Franklin Constitution

##### A. MUD directors

Under the State of Frankling Constitution, Article XII section 25, "no person shall hold or exercise, at the same time, more than one civil office of emolument", subject to specific exceptions provided by the Constitution. The constitutional dual-officeholding prohibition applies if both positions (1) qualify as civil offices and (2) are entitled to an emolument. In determining whether a position qualifies as one of civil office, the distinguishing factor for officer vs. employee is "whether any sovereign function of the government is conferred upon the individual to be exercised by the individual for the benefit of the general public largely independent of the control of others. (Morris). For determining emolument, it is defined as "a pecuniary profit, gain, or advantage. (State v. Babock). If an officeholder is reimbursed for actual expenses, this does not qualify as emolument, yet any amount received in excess of actual expenses is an emolument. (Id).

Here, MUD 12 directors qualify as civil offices of emolument. Municipal utility districts provide water, sewer, drainage, and other services to suburban communities. They are local (as opposed to state or county) government entities authorized under the Franklin Constitution and are subject to the Franklin Water Code. They are governed by a board of directors, who are elected to four year terms. A MUD board is responsible for the "management of all the affairs of the district" (id §37) and may levy and collect tax for operation and maintenance purposes, charge fees for provision of district services, issue bonds or other financial obligations to borrow money for its purposes, and exercise various other powers set out in the Franklin Water Code (id §39). A director of a MUD is a civil officer within the test stated by the Frankling Supreme Court in Morris based on the number of independent functions delegated to the MUD boards under the Water Code as discussed above. MUD directors are also entitled to receive compensation for serving on the MUD board, as they are entitled to receive a \$150 per diem payment a compensation for attending board meetings or engaging in other MUD related activiites.

Because MUD Directors qualify as a civil office entitled to compensation, they are subject to the dual-officeholding prohibition under the Franklin Constitution.

#### B. County Election Judges and Chief Judges

As noted above, under the Franklin Constitution, a civil office is subject to the dual-officeholding prohibition if it qualifies as a civil office under the definition provided by Morris, and whether the holder of the civil office position is entitled to compensation.

Here, the chief judge is in charge of and responsible for the management and conduct of the election at the polling place, shall appoint election clerks to assist the judge, shall designate the working hours and assign the duties performed by the election clerks, and shall preserve order and prevent breaches of the peace and violations of the code in the polling place area and in the area within which electioneering and loitering are prohibited. In performing duties, chief judge may appoint one or more licensed persons to act as special peace officers for the polling place. Based on the Morris test, it is likely chief judges will qualify as a civil office position, yet it will not be subject to the dual-officeholding prohibition because chief judges are not entitled to compensation. Here, chief judges are entitled to only actual expenses incurred through training, supplies purchased, etc. This type of reimbursement does not qualify as emolument for the purposes of civil office since the judges do not receive anything in addition to the compensation received as reimbursement.

Because the chief county election judge is not a civil office of emolument, it is not subject to the dual-officeholding prohibition under the Franklin Constitution.

#### C. Precinct Chair

Here, the position of the precinct chair is not a civil office of emolument. First, it does not qualify as a civil office under the Morris test. Precinct chairs are in charge of organizing and campaigning. Precinct chairs work with others to mobilize and organize voters and get them to the polls, while promoting party candidates and their events. Precinct chairs often organize phone banks and place calls to voters, walk door-to-door, and distribute campaign materials. All of the previously listed duties do not satisfy the Morris test. The duties of a precinct chair are not similar to the duties held by officers of the government and precinct chairs do not perform duties normally performed by the government. Furthermore, the duties of the precinct chair are not independent of the control of others as defined by the Morris test. Here, precinct chairs are subject to the control of the Executive Committee which is the governing body of that political party and conducts all official party business. Furthermore, precinct chairs are not paid and are merely volunteers. For this reason, precinct chairs are not subject to the dual-officeholding prohibition.

While the Franklin Constitution does not prohibit Ms. Hastings from simultaneously holding her MUD director position and chief judge position, or MUD director and precinct chair position, the analysis does not end here. The positions must also be analyzed under the common law doctrine of incompatibility.

#### II. Common law doctrine of incompatibility

Common law doctrine of incompatibility is independent of article XII, section 25. The three aspects of the doctrine are self-appointment, self-employment, and conflicting loyalties.

#### A. Self Appointment and Self-Employment

The elements of self-appointment and self-employment are only implicated if the responsibilities of one position include appointing or self-employing the second position.

Here, the MUD directors do not appoint the chief county election judges, nor do they appoint precinct chairs, and vice versa. For this reason, only the element of conflicting loyalties remains for the analysis.

#### B. Conflicting loyalties

Under the rule listed in Spencer, the element of conflicting loyalties bars the holding of simultaneous civil offices that would prevent a person from exercising independent and disinterested judgment in either or both positions. It most often arises when one person seeks to be a member of two governing boards with overlapping jurisdictions. The conflicting loyalties analysis, though, applies to those positions which qualifies as a civil office. Here, the analysis for conflicting loyalties will only applies to chief judges, as precinct chairs are not civil offices for emolument as discussed above.

##### i. Chief County Election Judge

Here, chief county election judges do not render MUD director positions and chief judge positions incompatible. Chief judges and MUD directors are not involved with each other. MUDs hold their own separate elections, and chief judge elections do not even occur at the same time. Chief judges are appointed in November while MUDs elections occur in May. Also, MUDs are a separate and operate independently of county government. Chief judge positions are partisan based, while MUD directors are non-partisan and work towards providing services for the community that are not intertwined with the services of the chief judge, even if located in the same jurisdiction.

For this reason, the positions of chief county judge and MUD director are not incompatible.

MUD directors and precinct chairs do not conflict under the state constitution, nor the common law doctrine. MUD directors and chief judges do not conflict under either law as well.

### **MPT – February 2018 – Selected Answer 2**

#### MEMORANDUM

To: Emily Swan

From: Examinee

Date: February 27, 2018

Re: Whether an individual may simultaneously serve as director of a municipal utility district AND either county election judge OR precinct chair

### (1) County Election Judge

The issue presented is whether an individual who serves as a member of the board of directors for Municipal Utility District No. 12 (MUD 12) may also serve as a Marin County election judge. I conclude that an individual is not barred from doing so.

#### A. Civil office of emolument

Article XII, section 25(a) of the Franklin Constitution provides that "[n]o person shall hold or exercise, at the same time, more than one civil office of emolument." The constitutional dual-officeholding prohibition applies if both positions (1) qualify as "civil offices" and (2) are entitled to an "emolument." This is subject to some statutory exceptions, but those do not apply to the present situation.

First, we must examine whether each position is also a civil office of emolument subject to Article XII, section 25. The determinative factor distinguishing an officer from an employee is "whether any sovereign function of the government is conferred upon the individual to be exercised by the individual for the benefit of the general public largely independent of the control of others. *Morris Indep. Sch. Dist. v. Lehigh* (Franklin Supreme Ct. 1965).

MUDs provide public water, sewer, drainage, and other basic services to suburban residents. The MUD owns, operates, and maintains all the facilities necessary to supply water to suburban residents, collect and treat wastewater from their homes, and collect, store, and drain storm water from land within the MUD's boundaries. MUDs operate independently of the county government and provide municipal-level services, and are authorized to charge fees to their residents, assess and collect taxes, and sell bonds in order to pay the costs of constructing and operating the facilities that provide services to their residents. Based on this broad, independent authority for the benefit of the general public, I conclude the MUD directors meet the Morris test and are civil officers.

Marin County election judges administer the election procedures set forth in the Franklin Election Code. This includes handling and securing election equipment and ballots, locating and retaining election clerks to work at their polling station, organizing the setup of election equipment and the operation of the election, handing out and collecting ballots, and certifying the polling site results. Marin County election judges also serve on a panel to resolve any voting-

related challenges that may arise. Marin County election judges are responsible for following the Franklin Election Code and conducting a fair election. Based on this broad, independent authority for the benefit of the general public, I conclude Marin County election judges meet the Morris test and are civil officers.

Next, we must determine whether either position constitutes an office of "emolument." An emolument is "a pecuniary profit, gain, or advantage." *State v. Babcock* (Franklin Ct. App. 1998).

MUD directors are entitled to receive compensation for serving on the MUD board. They receive a \$150 per diem payment as compensation for attending MUD board meetings or engaging in other MUD-related activities. FR. WATER CODE § 46. This is compensation and not reimbursement of actual expenses. Therefore, the \$150 per diem compensation qualifies as an emolument. Because an MUD director receives compensation for his or her services and holds a civil office of emolument, he or she cannot hold another civil office of emolument.

By contrast, Marin County election judges do not receive compensation. They are volunteers. While they are reimbursed for the cost of any training, supplies purchased, or other expenses incurred, they are otherwise not compensated. Therefore, Article XII, section 25 does not bar a person from serving as a Marin County election judge and holding another office (including MUD director).

#### B. Common law doctrine of incompatibility

The common law doctrine of incompatibility may, however, prevent this dual service, whether or not an election judge receives compensation for that position, because compensation is not relevant to determining whether offices are incompatible. The common law doctrine of incompatibility bars one person from holding two civil offices if the offices' duties conflict. *Spencer v. Lafayette Indep. Sch. Dist.* (Franklin Ct. App. 1947). The doctrine has three aspects: self-appointment, self-employment, and conflicting loyalties.

Self-appointment and self-employment are implicated if the responsibilities of one position include appointing or employing the second position. A person who is a candidate in an election for a contested public or party office is ineligible to serve, in an election held on the same day as that election, as an election judge or clerk in any precinct in which the office sought is to be voted on. FR ELECTION CODE § 480. Here, the MUD does not appoint or employ Marin County election judges, and vice-versa. MUDs conduct their own elections in May, and appoint their own MUD election judges for the MUD elections. Partisan or political elections supervised by Marin County election judges, are conducted independently, in November, and do not oversee nonpartisan MUD elections. Therefore self-appointment and self-employment aspects of the common law doctrine of incompatibility do not appear to be implicated here.

The third aspect of common law incompatibility, conflicting loyalties, bars the holding of simultaneous civil offices that would prevent a person from exercising independent and disinterested judgment in either or both positions. It most often arises when one person seeks to be a member of two governing boards with overlapping jurisdictions. As a threshold matter: each

position must constitute a civil office; we look at duties of each that would render it incompatible with that of other. MUDs oversee utilities, while Marin County election judges oversee elections. The jurisdictions do not overlap, and the duties of one do not render it incompatible with that of the other. They are not authorize to contract with each other.

## (2) Precinct Chair

The issue presented is whether an individual who serves as a member of the board of directors for Municipal Utility District No. 12 (MUD 12) may also serve as a precinct chair. I conclude that an individual is not barred from doing so.

### A. Civil office of emolument

As above, we must examine whether each position is also a civil office of emolument subject to Article XII, section 25. MUD directors are a civil office of emolument, for the reasons described in (1) A, above.

Precinct chairs are political positions; they are created by political parties and not by statute. They are elected by voters in their precincts. They are responsible for contacting, guiding, and organizing voters from their respective political parties in their precincts. Their duties include organizing and campaigning, working with others to mobilize voters, and encouraging voting in upcoming primary and general elections. They serve on their party's Executive Committee to conduct the local business of that political party. These are not sovereign functions of government but of political parties.

Their powers are not exercised with independence but rather on behalf of their political party; they are political agents subject to control of the party that employs them. Furthermore, they do not act for the good of the general public (except perhaps in basic matters such as encouraging their neighbors to vote), but rather, they conduct the local business of their political party and work to represent and mobilize their party's voters.

Therefore, I conclude Marin County precinct chairs do not meet the Morris test and are not civil officers. As such, Article XII, section 25(a)'s restriction does not apply and one is not barred from holding a civil office of emolument and a non-civil office.

## **MPT – February 2018 – Selected Answer 3**

MEMORANDUM In re Hastings

To: Emily Swan

From: Examinee

Date: February 27, 2018

Re: Danielle Hastings inquiry

The question is whether the client can apply for and hold the position of election judge and/or the position of precinct chair while simultaneously serving as member of the board of a MUD.

## 1. Legal Framework

Art XII, Section 25 of the Franklin Constitution prohibits dual service, if both positions (1) qualify as civil offices and (2) are entitled to emolument. There are, however, a number of exceptions listed. If a person wants to hold or exercise two civil offices but the Franklin Constitution does not apply because there is no emolument for one or both of the positions, the common law doctrine of incompatibility may be implicated. This doctrine is independent of Art XII Section 25. (see AG opinion 2010). Factors that need consideration under the doctrine are those of self-appointment, self-employment and conflicting loyalties.

Below, the framework will be set out in further detail and applied to the facts of the case.

## 2. Art XII Section 25 of the Franklin Constitution

The Section applies when the dual positions (i) are civil offices and (ii) the positions are for emolument.

### A. Civil Offices

A position qualifies as civil office if it meets the Morris test: to distinguish between a private employee or public officer the question is whether any sovereign function of the government is conferred upon the individual to be exercised by the individual for the benefit of the general public largely independent of the control of others. (see opinion AG 2003, and AG 2008, referring to the Morris case).

#### (i) MUD Director Position

A Municipal Utility District (MUD) is a local government entity, authorized by the Franklin Constitution, that provide public water, sewer, drainage, and other services to suburban neighborhoods not served by the city. Client currently serves on the board of directors for MUD No. 12. In the AG's opinion of 2008, it is stated that a director of a MUD is a civil officer within the test stated by the Franklin Supreme Court in Morris based on the number of independent functions delegated to MUD boards under the Water Code, including the levying and collection of tax for operation and maintenance purposes, charging of fees for provision of district services, etc.

#### (ii) County Election Judge

A county election judge supervises elections in a particular precinct, according to the rules states in the Franklin Election Code. They serve the benefit of the public by ensuring secure, fair, accessible elections.

Therefore, they are a civil office.

### (iii) Precinct Chair

A precinct chair helps reach out to voters and educate them about candidates in our political party who are running for office. This political position is created by party not statute, and the person represents their home precinct on their party's Executive Committee. This does not serve the public at large.

Therefore, this position is not one of civil office. This means that the prohibition of dual offices under the Constitution does not apply to the Precinct Chair position. This means that the client may take up both functions, that of MUD and that of precinct chair.

## B. Emolument

A position is one of emolument if there is a pecuniary profit, gain or advantage. (See opinion AG 2003, referring to the Babcock case). If an officeholder is entitled to compensation, his or her office is an office of emolument, even if the person refuses to accept any compensation. The term does not include the legitimate reimbursement of expenses, though. But any amount received in excess of the actual expenses is an emolument. Moreover, an amount received as compensation for each meeting is also an emolument.

### (i) MUD Director Position

MUD Directors are entitled to receive compensation for serving on the MUD board - specifically a 150 USD per diem payment - as compensation for attending MUD board meetings or engaging in other MUD-related activities. So this position is for emolument. The question is whether a second, future position would be for emolument, as well. Only if both positions are for emolument, dual positions will be prohibited under the Franklin Constitution.

### (ii) County Election Judge

Election judges are volunteers. They are reimbursed for the cost of any training, supplies purchased, or other expenses occurred, but - as stated above - the legitimate reimbursement of expenses is not an "emolument." Therefore, this position is not one of emolument. This means that Art XII Section 25 of the Franklin Consitution does not apply to the County Election Judge position, and that the common law doctrine of incompatibility must be assessed next.

### (iii) Precinct Chair



Precinct chairs are volunteers and are not compensated for their services. However, as stated above, the position is not one of The result is the same as described under the County Election Judge.

### C. Exceptions

The exceptions of Art XII Section 25 of the Franklin Constitution do not apply and thus don't have to be further examined.

### 3. Common law doctrine of incompatibility

The doctrine of incompatibility bars one person from holding two civil offices if the offices' duties conflict. (see AG opinion 2008, referring to the Spencer case). So even if the Franklin Constitution does not bar a person from serving in two positions because a position is not for pecuniary profit, gain, or advantage, the common law doctrine of incompatibility may still prevent this dual service as civil officer, because under this doctrine compensation is not a relevant factor. The three factors that are relevant in determining whether the two offices' duties conflict: 1. self-appointment, 2. self-employment, 3. conflicting loyalties.

#### A. Prerequisite: Civil Offices

As with Art XII Section 25 of the Franklin Constitution, only the holding and use of dual civil offices is prohibited. As described under 2A, the MUD and Election Judge positions qualify as civil offices, while the precinct position does not. This means that the precinct position can be taken up together with the MUD Director position, since the precinct position does not fall under the Art XII Sec 25 Franklin Constitution nor under the common law doctrine of incompatibility.

#### B. Relevant factors for the common law doctrine

The following factors only need to be established regarding the MUD position and the Election Judge position fulfilled by one and the same person, our client Danielle.

##### (i) Self-appointment

This factor is only implicated if the responsibilities of one position include appointing the second position.

Here, the Election Judge are appointed by Marin County Board of Commissioners. Thus, they are not appointed by MUD or the board of a MUD. Moreover, Election Judges do not appoint board members of the MUD. They conduct their own elections under state law.

Therefore, this factor is not relevant to this case.

##### (ii) Self-employment

This factor is only implicated if the responsibilities of one position include employing the second position.

Here, the Election Judge can employ a number of people, including clerks and peace officers, to help with the management of the polling place, and such. However, these people are not MUD officers that are employed by the judge. Moreover, MUD does not employ the Election Judge. The Election Judge works for the precinct that is having an election.

Therefore, this factor is not relevant to this case.

### (iii) Conflicting loyalties

Under this factor, the question is whether officers in position 1 have powers and duties that are incompatible with the powers and duties of an officer in position 2. (See AG opinion of 2008). It bars the holding of simultaneous civil offices that would prevent a person from exercising independent and disinterested judgment in either or both positions. It most often arises when one person seeks to be a member of two governing boards with overlapping jurisdictions. (See AG opinion of 2010).

Here, the client's precinct is that of Eagle Springs including a handful of adjacent neighborhoods and the election judge position would be for that precinct. However, the tasks of the election judge and the MUD director do not overlap. The MUD function relates to water regulation under the Constitution and the Election Judge relates to the election process in precincts under the Election Code. MUD appoints their own election judges for MUD elections, who oversee their own elections.

Therefore, there are no conflicting loyalties between the MUD and the Election Judge position.

## 4. Overall Conclusion

The MUD position and the Election Judge position are not prohibited to be executed simultaneously because they are not prohibited under the Franklin Constitution, nor the common law doctrine applicable. The MUD position and the precinct chair position is not prohibited under the Constitution or the common law doctrine either. It sounds as if Danielle is interested in one position only, and she will make a choice. However, in case Danielle was considering taking up these two new positions at once, we would have to assess whether they would be compatible.