

CITIES, PUBLIC OFFICERS: Iowa Code §§4.4, 4.73, 362.5, 372.13. Iowa Code §372.13(8) (2018) bars city elected officers from receiving additional compensation for positions of employment beyond the salary received for their elected office. Iowa Code §362.5(3) (2018), providing exceptions to the general ban in that statute for city offices and employees having interests in contracts with the city do not allow city elected officers to receive additional compensation for positions of employment with their city beyond the salary provided for their elected office. That portion of prior formal opinion, Op. Atty. Gen. #93-8-2(L), finding that a city elected officer may serve as an employee of their city for additional pay if the compensation does not exceed annual cumulative amounts set under Iowa Code §362.5(3)(j)&(k) (2018), is retracted. (Bennett to Kraayenbrink, 8-15-18) #18-8-1

The Honorable Tim Kraayenbrink
State Senator
Local Mail

Dear Senator Kraayenbrink:

You requested a formal opinion of this office asking if city elected officials might enter contracts with the city they serve to perform water system supervision or meter-reading services as city employees. You specifically asked if any of the listed exceptions in Iowa Code §362.5 (2018) (generally forbidding city employees and officers to have interest in city contracts with listed exceptions) apply to allow city council members and mayors to enter contracts of employment with the cities they serve given the bar on elected city officers from receiving additional compensation from their cities under Iowa Code §372.13(8) (2018).

Our review of the facts and law, as set out in your letter, concludes that contracts for employment with the city by currently-serving city elected officers violates Iowa Code §372.13(8) (2018), which is consistent with two prior opinions of this Office, Op. Atty. Gen. #83-5-2(L) and Op. Atty. Gen. #93-8-2(L) (enclosed). This office has a policy not to overrule prior formal opinions of this office unless we find that the law has changed or that the prior opinion is clearly erroneous. Op. Atty. Gen. #90-12-2, Op. Atty. Gen. #91-4-7(L). We confirm the legal analysis contained in Op. Atty. Gen. #83-5-2(L). and Op. Atty. Gen. #93-8-2(L), but clarify that the exceptions allowing city employees and officers to contract with their cities under Iowa Code §362.5(3)(d), (j), & (k) (2018) (allowing contracts for purchases of goods or services by cities from city officers and employees awarded by competitive bids or which do not exceed stated annual amounts) do not apply to compensation for city employment and are not available to allow additional payment as a city employee to city elected officers. We re-cast our prior analysis to clarify this point, finding that city elected officers are not eligible for additional positions of employment for compensation by the cities they serve under Iowa Code §362.5(3)(d), (j), & (k) (2018), but may be contractors for the purchase of goods and services by the cities they serve subject to the competitive bidding procedures and total annual purchase price limitations provided under those subsections.

Overview of Iowa Code §372.13(8) (2018) and §362.5 (2018)

Iowa Code §372.13(8) (2018) is specific to city elected officers, and generally contains restrictions on compensation paid to elected city officials, and their ability to use official power

to increase that compensation. Under this subsection, compensation for the elected mayor may not be changed during the term in which a change is made, changes in compensation for the elected city council members must be delayed until the beginning of the next term for which city council members are elected, and no changes in elected city officers' compensation may be voted upon in November or December in the year of a regular city election. *Id.* Finally, Iowa Code §372.13(8) (2018) places the following limits on elected city officer's compensation:

Except as provided in section 362.5, an elected city officer is not entitled to receive any other compensation for any other city office or city employment during that officer's tenure in office but may be reimbursed for actual expenses incurred (emphasis added).

This bar on additional compensation for city elected officials is consistent with the other provisions contained in Iowa Code §372.13(8) (2018) listed above, which place significant limitations on city elected officials using their official power to increase their city compensation.

Iowa Code §362.5 (2018), referenced by Iowa Code §372.13(8) (2018), is a general provision applicable to all city employees and all city officers - both elected and appointed. This statute, consistent with the common law, proclaims a general rule barring all city officers and employees from having any interest in a contract, job of work or material, or the profits of these interests with their city. Iowa Code §362.5 (2018) broadly defines contracts to include any claim, account, demand or agreement with the city officer or city employee and voids any such contracts. *Id.* Subsection 3 of that statute sets out thirteen exceptions permitting contracts with the city by its officers and employees. Your opinion request asks if two of these exceptions, Iowa Code §362.5(3)(a) and (3)(d) (2018), would allow an elected city officer to have a contract of employment with their city to provide water utility-related services given the clause in Iowa Code §372.13(8) (2018) excepting provisions in Iowa Code §362.5 (2018) from the bar on elected city officer compensation for additional city employment or offices. You further ask if any other exception provided under Iowa Code §362.5(3) (2018) would allow employment of a city elected officer.

It is our conclusion that Iowa Code §362.5(3)(a) and (d) (2018) do not allow city elected officers to be employed for pay by their cities under these subsections. In reaching this conclusion, we rely upon the principles of statutory construction set out in Iowa Code §4.4 (2), (3), and (5) (2018) (in interpreting statutes, the entire statute is intended to be effective, a just and reasonable result is intended, and public interest is favored over any private interest). We also rely upon the rule set out in Iowa Code §4.7 (2018) (general provision conflicting with special/local provision read to give effect to both unless impossible, then special or local provision prevails as exception to the general). It is our further determination that no other exception under Iowa Code §362.5 (2018) would apply to the facts as stated in your letter.

Iowa Code §372.13(8) (2018) is a specific provision that prohibits only elected city officers from receiving additional compensation for holding other city offices and other city employment. This provision does not restrict elected city officers to supply goods or services to their cities through a legal relationship other than employment. This bar on additional elected officer

employment compensation in §372.13(8) (2018) specifically incorporates the applicable exceptions to this rule contained in Iowa Code §362.5 (2018).

Iowa Code §362.5 (2018) is a general provision applicable to all city officers and employees. That section bars contracts with city officers and employees but carves out thirteen listed exceptions. The only subsections under Iowa Code §362.5 (2018) that specifically pertain to compensation for additional employment or holding additional offices by city employees and officers are subsections (3)(a) (allowing payment to city officer or employee holding more than one city office or position not incompatible with another office or prohibited by law); and subsection (3)(c) (allowing city treasurer to have employment with a bank or trust company). Subsection (3)(c) is inapplicable to this opinion as it only pertains to city treasurers. The other subsections under Iowa Code §362.5 (2018) apply more generally to contracts between cities and their officers and employees and do not speak to the specific ban on additional compensation for additional city employment by elected city officers, nor do they relieve the specific bar on additional compensation to city elected officer's compensation under Iowa Code §372.13(8) (2018).

A. Iowa Code §362.5(3)(a) (2018) does not permit city elected officers to receive payment for other positions of city employment.

Iowa Code §362.5(3)(a) (2018) provides the following exception from the rule pronounced in that section generally barring contracts by city employees and officers with their city:

- a. The payment of lawful compensation of a city officer or employee holding more than one city office or position, the holding of which is not incompatible with another public office or is not prohibited by law (emphasis added).

This provision recognizes the power of cities, generally, to determine the scope of duties assigned to its employees and officers and to combine those duties subject to the statutory limitations and the common law doctrine of incompatibility. This power to define duties of city employees and officers is specifically set out in Iowa Code §372.13(4) (2018) (except as otherwise provided, city council may appoint city officers and employees and prescribe their powers, duties, compensation and terms).

This power of the city council to define the duties of city officers is restrained, in Iowa Code §362.5(3)(a) (2018) and in the common law, by the doctrine of incompatible offices. This doctrine bars public officers - both elected and appointed - from simultaneously serving in multiple public offices where one office is subordinate to the other, the duties of the offices are inherently inconsistent and repugnant, or the nature of the duties of the offices renders it improper under public policy for one person to retain both. *State ex. rel. LeBuhn v. White*, 257 Iowa 606, 133 N.W.2d 903 (Iowa 1965). Public offices differ from mere public positions of employment by possessing the following attributes: 1) created by constitution, legislature or legislative authority; 2) delegated a portion of government's sovereign power; 3) have duties and powers defined by legislative authority; 4) duties are performed without control of superior

power other than law; 5) position has permanency - not temporary/occasional. *State v. Spaulding*, 102 Iowa 639, 72 N.W. 288 (1897).

The employment positions of city water supervisor and water meter reader are not city offices - they are positions of city employment. Neither position is granted a portion of the city's sovereign power, is performed without supervision, and neither is permanent - but can be eliminated or contracted to private contractors at any time. The doctrine of incompatibility does not apply to simultaneous service in a public office and a position of mere public employment that is not an office, but only applies to the simultaneous holding of more than one office. 1992 Op. Atty. Gen. 36 (#91-7-2(L)) (finding public employment position of assistant county attorney not incompatible with office of school district board member as incompatibility requires both positions to be "offices").

Iowa Code §362.5(3)(a) (2018) allows city officers (both elected and appointed) and employees to hold more than one office or position if they are not incompatible. Interpreting this statute to allow city elected officers to hold all city positions of mere employment that are not incompatible with their city elected office would allow city elected officers to hold all positions of city employment that are not also city offices, as the doctrine of incompatibility only applies to service in multiple public offices. Under that interpretation, the exception provided by Iowa Code §362.5(3)(a) (2018), allowing non-incompatible employment by elected city officers, would swallow the rule provided by Iowa Code §372.13(8) (2018) barring these elected officers to be compensated for additional city employment. This interpretation of Iowa Code §362.5(3)(a) (2018) violates the rule of statutory construction set out in Iowa Code §4.4(2) (2018) (presuming that an entire statute is intended to be effective). See also, *State v. Wiseman*, 614 N.W.2d 66, 67 (Iowa 2000) (statute should not be interpreted in a way that makes portions thereof irrelevant or redundant); and *State v. Nall*, 894 N.W.2d 514, 518 (Iowa 2017) (citing to *State v. Wiseman*). The restriction in Iowa Code §372.13(8) (2018) barring city elected officials from any additional compensation for city employment would be without effect under this interpretation, allowing city elected officers to hold any positions of city employment that is not a city office - the very ill that Iowa Code §372.13(8) (2018) seeks to prevent.

That interpretation would also violate the statutory construction rules of Iowa Code §4.4 (3) & (5) (2018) (in interpreting a statute, a reasonable result is intended and the public interest is favored over any private interest). Allowing city elected officers to receive additional compensation from city employment positions that are subject to their official oversight is neither a reasonable interpretation of this statute intended to prevent city officer self-dealing and conflicts of interest, nor does such a reading favor the public interest over the private interests of city elected officers.

Additionally, the exception set out in Iowa Code §362.5(3) (a) (2018) is limited to the "...payment of lawful compensation of a city officer or employee holding more than one city office or position." As earlier noted, additional payments to elected officers for city employment is specifically barred by Iowa Code §372.13(8) (2018). Therefore, §362.5(3)(a) (2018) bars payment to city elected officials for city employment in addition to the elected position, as such payment is not lawful compensation under the prohibition set out in Iowa Code §372.13(8)

(2018). This interpretation would not render the exception in Iowa Code §362.5(3)(a) (2018) without effect, as it would still allow appointed city officers and other city employees to hold multiple positions of employment if to do so is not otherwise unlawful or the offices are incompatible. This is the conclusion previously reached in Op. Atty. Gen. #83-5-2(L).

B. Iowa Code §362.5(3)(d) (2018) (contracts made on competitive bid) does not apply to contracts for city employment.

Iowa Code §362.5(3)(d) (2018) creates an exception to the rule provided in subsection 2 of that statute, barring city officers and employees from having an interest in a contract, job of work or material, or profits thereof, if the contract is made on public bid, publicly invited and opened. Reason demands that this subsection does not contemplate contracts for employment with the city, but rather doing business with the city as an independent contractor outside of the city employee or officer's official duties. As set out above, the city has the power to add additional duties to a position of city employment and make adjustments to compensation to its employees and non-elected officers for added duties if the city so chooses. Iowa Code §372.13(4) (2018) (except as otherwise provided, city council may appoint city officers and employees and prescribe their powers, duties, compensation and terms). This power is also specifically recognized in Iowa Code §362.5(3)(a) (2018) (allowing lawful compensation to city officer or employee holding more than one city office or position if not incompatible or prohibited by law).

Iowa Code §372.13(8) (2018) specifically bars city elected officers from receiving compensation for city employment during their tenure in city elected office. Allowing city elected officers to bid for employment positions with the city they serve undermines this bar on additional compensation to elected city officers for city employment and creates the very conflicts that statute was designed to avoid - the potential for self-dealing by elected officers and the challenge of supervision of a city employee whose elected office is tasked with supervision of all city activities. See Iowa Code §4.4(5) (2018) (presumption in enactment of a statute that public interest is favored over private interest). Therefore, we find the exception to the general bar by city officers and employees to contract with their cities under Iowa Code §362.5(3)(d) (2018) does not apply to contracts for employment by a city but is limited to contracts for purchase of goods and services as an independent contractor.

C. Iowa Code §362.5(3)(j)&(k) (2018) does not apply to contracts for city employment.

Iowa Code §362.5(3)(j)&(k) (2018) exempt the "purchase of goods or services" by a city from its employees or officers from the general bar of that statute for city officers or employees having an interest in a city contract or job of work or material or profit thereof if the total annual "purchase price" is under \$1,500 per year cumulative compensation in cities with a population of more than 2500 and \$2,500 per year cumulative for cities with 2,500 or less population. This is, in effect, a *de minimis* contract exception.

Applying these two exceptions to contracts of employment with city officers and employees raises the same concerns set out above in Section B of this opinion. These exceptions are

unnecessary for city employees and non-elected officers, as additional official duties may be added by the city council under that body's statutory power to define duties and compensation for these officials under Iowa Code §372.13(4) (2018) and Iowa Code §362.5(3)(a) (2018). Likewise, to include employment contracts under this exception would allow elected officers to create and hold positions of city employment, increasing their pay beyond that set for their elective office as barred by Iowa Code §372.13(8) (2018) and raising identical concerns on the supervision of these elected officers/employees and the conflicts of interest such employment creates. That interpretation of this statute intended to prevent conflict of interests by city officers is inconsistent with the rules of statutory construction. *See* Iowa Code §4.4(5) (2018) (presumption in enactment of a statute that public interest is favored over private interest).

Interpreting this provision to be limited to purchases of goods and services that create independent contractor relationships with city employees or officers, rather than contracts for employment, eliminates these concerns. This reading has the advantage of being consistent with the plain meaning of the operative language of this subsection. It is not common to refer to hiring a person for employment as a "purchase of goods or services" nor is the compensation received for employment in a year commonly referred to as the "cumulative total purchase price". Rather, this terminology used in Iowa Code §362.5(3)(j)&(k) (2018) is consistent with the sale of goods or services pursuant to an independent contract between a city employee or officer and the city. This interpretation also supports the presumptions of statutory enactment in Iowa Code §4.4(3) (2018) (enactment of statute presumes a just and reasonable result).

Limiting the exceptions allowing contracts by city officers and employees under §362.5(3)(j)&(k) (2018) to non-employment contracts is inconsistent with our previous review of this section in Op. Atty. Gen. #93-8-2(L), which interpreted these subsections (then located at Iowa Code §362.5(10)&(11)) to allow a city elected officer to be employed by the city if the total annual compensation does not exceed the amounts provided in those subsections. We find this analysis is erroneous. We therefore retract that opinion to the extent that it would permit a city elected officer to serve as an employee of the city if the annual cumulative compensation received by the officer does not exceed the limitations applicable to that city under Iowa Code §362.5(3)(j)&(k) (2018). This does not bar elected city officers entering non-employment contracts for the purchase of goods or services with their cities if otherwise lawful under strict compliance with these statutory exemptions. We determine this interpretation of these sections best effectuates the purpose of these statutes to prevent self-dealing by city elected officers and avoiding the conflicts of interest that arise when these elected officers serve as employees for their cities.

In summary, we find that none of the statutory exceptions to the general bar for city officers and employees to contract with their city listed in Iowa Code §362.5 (2018) apply to allow city elected officers to serve as city employees to provide city water-related services to the cities

The Honorable Tim Kraayenbrink
State Senator
Page 7

these officials serve under the ban on additional compensation for city employment by city elected officers under Iowa Code §372.13(8) (2018).

Sincerely,

A handwritten signature in blue ink that reads "Michael L. Bennett". The signature is written in a cursive style with a long, sweeping underline.

MICHAEL BENNETT
Assistant Iowa Attorney General