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writer of that opinion overlooked the fact that that section (§ 155) of the Indiana Election Code had been repealed (or superseded, if you will) by Acts 1945, ch. 229, § 2, the second Skip Election Law, (Burns § 29-4313) which put city primaries under a city election board. Acts 1947, ch. 29, § 1, amended this last cited section to put city primaries back under the supervision of county election boards. Such amendment was in effect at the time Acts 1957, ch. 168, § 1, amended section 165 of the Election Code to require town primaries and was in effect at the time 1959 O.A.G., p. 59 was written and the authority therein for the statement that county boards conduct city primaries should have been such amendment (Burns § 29-4313) rather than section 155 of the Indiana Election Code (Burns § 29-4306).

Since the statute which authorizes and requires primaries in some towns requires them to be conducted "pursuant to the laws of the state concerning the nomination of officers of cities," it follows that precinct election personnel for town primary elections are to be compensated under the same law as city primary precinct election personnel. Therefore, town primary election precinct personnel, judges, clerks, assistant clerks, sheriffs and inspectors are to be compensated pursuant to the provisions of Acts 1945, ch. 229, § 3b, as added by Acts 1947, ch. 29, § 4, and amended by Acts 1959, ch. 183, § 1, Burns § 29-4317.

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### OFFICIAL OPINION NO. 11

April 18, 1967

#### **CONSTITUTIONAL LAW—DUAL OFFICE HOLDING— Holding of Such Policy as Against Public Policy.**

Opinion Requested by Mr. Leslie Cale, President, State Egg Board.

I am in receipt of your recent inquiry as to the legality of the appointment as Executive Secretary of the State Egg

Board an individual who presently holds and would continue to hold the position of Executive Secretary of the State Poultry Association. You indicate that the individual's salary would be shared by the board and the association *pro rata* the time devoted to each position.

The legality of one individual holding two positions is a problem that over the years has often been referred to this office, and the following basic test has been devised (See 1961 O.A.G., p. 30):

1. Is each position a "lucrative office" within the meaning of the Indiana Constitution, Art. 2, Sec. 9?
2. Is such holding in violation of the provisions of the distribution and separation of powers provided in the Indiana Constitution, Art. 3, Sec. 1?
3. Are the offices incompatible with each other?
4. Would such holding be against public policy?

While your question is directed only to "conflict of interest" all four questions must be considered in determining whether there is any legal objection to the duality of positions proposed.

1. Article 2, § 9, Indiana Constitution prohibits any person holding more than one lucrative office at the same time. The concept of "lucrative office" was discussed in 1960 O.A.G., p. 42, thus:

"There is a distinction in the application of the constitutional prohibition in that the Indiana Constitution, Art. 2, Sec. 9, *supra*, refers to a 'lucrative office' and does not therefore apply to one who is merely an employee. To be classed as the holder of a 'lucrative office . . . under this State,' one must be in a position to exercise a portion of the sovereignty of the State of Indiana. We must look to the scope of the duties and the authority vested in the position under examination to make a proper determination.

"A public office with the meaning of the Indiana Constitution, Art. 2, Sec. 9, *supra*, was defined in the case of *Shelmadine v. City of Elkhart*, 75 Ind. App. 493, 495, 129 N.E. 878 (1920), as follows:

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“A public officer may be defined as a position to which a portion of the sovereignty of the state attaches for the time being, and which is exercised for the benefit of the public. The most important characteristic which may be said to distinguish an office from an employment is, that the duties of the incumbent of an office must involve an exercise of some portion of the sovereign power.’

“In the case of *State ex rel. Black v. Burch*, 226 Ind. 445, 456, 80 N.E. 2d 294 (1948), the Court said:

“In performing their respective jobs none of these relators were vested with any of the functions pertaining to sovereignty. “. . . An office is a public charge or employment, in which the duties are continuing, and prescribed by law and not by contract, invested with some of the functions pertinent to sovereignty, or having some of the powers and duties which inhere within the legislative, judicial or executive departments of the government, and emolument is a usual, but not a necessary element thereof.” *Wells v. State* (1911), 175 Ind. 380, 94 N.E. 321.’ ”

The State Egg Board is created and regulated by Acts 1941, ch. 232, as amended, the same being Burns §§ 35-2251 through 35-2267. That Act provides for a seven-member board that is vested with certain powers and duties that, as set out in the second section of the Act, Burns § 35-2252, do involve the exercise of some of the functions of sovereignty. An additional power is set out in section 11 of the Act, Burns § 35-2261, as follows:

“The director of Purdue University Agricultural Experiment Station is hereby authorized, subject to approval of the board, to employ inspectors, clerks, and other assistants necessary to carry out the provisions of this act under the direction and supervision of the board. Such inspectors shall inspect and examine eggs sold, offered or exposed for sale, as fresh eggs and shall also inspect and examine eggs sold by wholesalers and retailers as fit for human consumption under the

provisions of this act, at such times and places and in such manner as the board may direct.”

The Act contains no other reference to the employment of personnel and makes no mention of a position of “Executive Secretary.” Therefore, that position must be one which was created by the Egg Board itself in order to facilitate its internal organization and the management of its affairs. The duties of the position, therefore, are prescribed by a contract of employment and not by law. The position thus lacks one of the attributes of an office as set out in *Black v. Burch, supra*. The “Executive Secretary” of the Egg Board does not hold a “lucrative office” as that term is used in Art. 2, § 9, of the Indiana Constitution.

While the conclusion that the position of Executive Secretary of the Egg Board is not a lucrative office is sufficient to satisfy the first part of the test being applied, it might be well to consider in passing the position of “Executive Secretary of the State Poultry Association.” Documents filed in the office of the Secretary of State of Indiana show that association to be a private, not-for-profit, domestic corporation incorporated February 7, 1929, under the name “State Poultry Association of Indiana,” and reorganized October 26, 1953, under the name “Indiana State Poultry Association, Inc.” Although it is a private corporation, Acts 1951, ch. 80, § 854, the same being Burns § 16-2405, purports to grant to it some of the sovereign power of the State by the following provision:

“The Baby Chick Department of the State Poultry Association of Indiana is designated as the official State Agency to cooperate with the United States Department of Agriculture in administering the National Poultry Improvement Plan, to set up and promulgate the necessary rules and regulations, and to supervise and carry out the approved plan.”

Since the association is a private corporation its plan of internal organization disclosing the functions and powers of its Executive Secretary is not a matter of public record. However, it would appear that the above statutory grant of sovereign power, insofar as it is valid, is a grant to the directors

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of the association rather than to the Executive Secretary. He, therefore, does not hold a "lucrative [public] office."

2. The second question of the test concerns the doctrine of separation of powers and is easily answered. The State Egg Board is an administrative agency and, insofar as it is a state agency, the Indiana State Poultry Association, Inc., is an administrative agency. Both agencies thus being within the same department of the state government, employment in both would be no violation of Art. 3, § 1, of the Indiana Constitution.

3. The factors which create a conflict of interest between two positions have been amply described in 1954 O.A.G., p. 258. A short excerpt from that opinion's long quotation of *Weza v. Auditor General*, 297 Mich. 686, 298 N.W. 368 (1941), should suffice to illustrate the general principles to be considered:

"Numerous authorities are cited in support of the text of 22 R.C.L. (pp. 413-414), §§ 55 and 56, which in part reads:

" "It is extremely difficult to lay down any clear and comprehensive rule as to what constitutes incompatibility of offices. . . . Sometimes it is said that incompatibility exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one incumbent to retain both. \* \* \* It is not an essential element of incompatibility at common law that a clash of duty should exist in all, or in the greater part, of the official functions. . . ."

"One of the most important tests as to whether offices are incompatible is found in the principle that the incompatibility is recognized whenever one is subordinate to the other in some of its important and principle duties, or is subject to supervision by the other, or where a contrariety and antagonism would result in the attempt by one person to discharge the duties of both.'"

My knowledge of the functions and duties of the two positions is admittedly incomplete, but within that limitation I can

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see no basis for a conflict of interest. The purpose and function of the State Egg Board, as discerned from an examination of Acts 1941, ch. 232, as amended, is to regulate the distribution and sale of eggs for human consumption in order to protect the health of consumers. The power statutorily granted the Indiana State Poultry Association, Inc., is intended to encourage and improve the breeding of poultry. The two functions do not appear incompatible.

The conclusion above is not intended as, and should not be construed as, a statement that the positions are in fact not compatible. Aspects of the two positions not known to me could lead to the opposite conclusion. If, for instance, one of the private functions of the Indiana State Poultry Association, Inc., should be to represent its members as producers of eggs, in their dealings with wholesalers and retailers of eggs intended for human consumption, then the positions would be in obvious conflict.

4. Except in those instances where the simultaneous holding of two positions by one individual would be blatantly against public policy the decision on this point is best left to the appointing authority who is in full possession of the relevant facts. See 1964 O.A.G., p. 304. Having such factual knowledge the appointing authority is better able to judge whether the public policy as expressed in the constitutional provisions discussed above and the various statutory prohibitions against public officers having a private interest in the results of their official acts would be violated.

Therefore, in answer to your question, the simultaneous holding by one individual of the position of Executive Secretary of the State Egg Board and Executive Secretary of the Indiana State Poultry Association, Inc., would not be prohibited by the Constitution of Indiana. Whether the two positions are incompatible, and whether simultaneous holding of the two positions would involve a conflict of interest and therefore be against public policy are questions finally to be determined by the appointing authority in accord with the principles set out above.