House
Legislative
Analysis
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COUNTY COMMISSIONERS' COUNTY EMPLOYMENT

House Bill 5333 (Substitute H-1)
First Analysis (12-10-03)

Sponsor: Rep. Dale Sheltrown
Committee: Local Government and Urban Policy

THE APPARENT PROBLEM:

In 2001, a county commissioner in Ogemaw County (located in Michigan's Lower Peninsula on the northeast side of the state, and the location of the community of West Branch), applied for the position of building and zoning administrator for the county, with the full intention of resigning his position on the board of commissioners if he was appointed to the position. The prosecuting attorney in the Ogemaw County suggested the commissioner's application might not be legal, and suggested that the commission obtain an attorney general's opinion.

On May 8, 2002, the Office of the Attorney General responded to the commissioners' request, noting that "the Incompatible Public Offices Act generally prohibits dual office holding of two or more incompatible positions, but also provided certain exceptions for dual employment in communities with populations under 25,000 persons." The letter also noted that two prior Attorney General opinions—OAG 1991-1992, No 6730, p 175 (September 4, 1992), and OAG, 1993-1994. No 6748 p 7 (February 2, 1993)—concluded in the first instance, that a county commissioner could, in the same county, serve as a county ambulance service worker, and in the second instance, a county commissioner could serve as a maintenance worker of the county road commission, since the counties had a population less than 25,000, and the commissioners had been authorized to hold the positions by the county board of commissioners.

Given the authorization from the Office of the Attorney General, the county commissioner was appointed the building and zoning administrator. During the time he held the position, he earned $23,621.92.

However, in contrast to the Incompatible Public Offices Act, an earlier statute defining the powers and duties of county boards of commissioners (Public Act 156 of 1851) is *not* clear in its intent to allow county employment exceptions for commissioners who live and work in counties that have fewer than 25,000 people.

Because of the conflict between the two laws, four former county commissioners and one current county commissioner from Ogemaw County, all of whom voted in favor of the appointment of a fellow commissioner as building and zoning administrator relying on the opinion of the Office of the Attorney General, are now being charged with a violation of Public Act 156 of 1851, in a suit brought by the county prosecutor on behalf of a citizen. They are being held personally responsible for a judgment in the amount of $23,621.92—the amount earned by the appointee during his tenure as building and zoning administrator—in a judgment ordered by Timothy J. Kelly, District Judge for the County of Bay, on special assignment for the County of Ogemaw. According to the judgment (File No. 02-0253-GC), the moneys recovered in the action are to be deposited in the county treasury, to the credit of the general fund.

In order to make Public Act 156 of 1851 comply with the Incompatible Public Offices Act, legislation has been introduced to amend it.

THE CONTENT OF THE BILL:

House Bill 5333 would amend Public Act 156 of 1851, which defines the powers and duties of county boards of commissioners, to exclude county commissioners who live in counties with a population of 25,000 or less from the statutory prohibition on county employment.

Under the law, a member of the county board of commissioners of any county cannot receive an appointment from, or be employed by, an officer, board, committee, or other authority of the county. If an appointment or employment violation occurs, the

person must be removed, and both the person making the appointment and the person accepting the appointment are liable for the money paid to the person as salary, wages, or compensation. (In the case of a board or committee appointment, all members are liable.) House Bill 5333 would alter these provisions so that instead, the appointer(s) and the appointee would be "responsible for the costs of enforcing this section, not to exceed $100."

Also under the law, an action to enforce this section can be maintained by a taxpayer of the county, and any money recovered is deposited in the county treasury to the credit of the general fund. The law specifies that the prosecuting attorney of the county, upon the request of the taxpayer, must prosecute the action on the taxpayer's behalf, and if a member of the county board of commissioners is in violation—both appointer(s) and appointee—then each is guilty of a misdemeanor, punishable by a fine of not more than $100 or imprisonment for not more than 90 days, or both. The law specifies that these provisions do not prohibit or limit the right of a commissioner from becoming a candidate for elective office, and further specifies that "salary," "wages," and "compensation" do not include per diem compensation. House Bill 5333 would retain all of these provisions; however, the bill specifies that this section of the law would not apply to a county with a population of 25,000 or less, for an appointment otherwise allowed by law.

MCL 46.30a

FISCAL IMPLICATIONS:

The House Fiscal Agency notes that, as written, the bill should have no significant state or local impact. (12-8-03)

ARGUMENTS:

For:

The discrepancy between the Incompatible Public Offices Act, and another earlier statute—Public Act 156 of 1851—which also defines the powers and duties of county boards of commissioners, has led to confusion with regard to whether county commissioners in counties having a population of less than 25,000 people can be employed in county government. Following the advice of the attorney general (who cited two attorney general's opinions), five commissioners in Ogemaw County approved the employment of a fellow commissioner when he applied to serve as the county's building and zoning administrator. Subsequently, the commissioners were sued, and in a judgment entered by the district court, the commissioners have been held personally liable for the amount of money their colleague earned while employed by the county—more than $23,000.

The commissioners entered into the contract with their colleague in good faith, following the guidance of advice they sought from the Office of the Attorney General. They did not know that state statutes were in conflict. To ensure this cannot happen again, the laws that are in conflict should be aligned. That way the local elected officials in counties with a low population can be certain that their appointments of fellow commissioners to county employment are fully lawful.

Against:

County commissioners should not appoint their fellow commissioners to jobs in county government, in order to avoid conflicts of interest. Further, if county commissioners act to make such inappropriate appointments, they should be held liable for their actions by the courts. Holding an elected office and an appointed office in the same governmental unit creates a situation of incompatible roles and conflicting responsibilities. In essence, an employee in this situation would be his or her own employer. The incompatibility of the roles would hold true in counties with small populations as well as in counties with large populations. The incompatible roles should continue to be illegal, so that they will always be avoided.

Response:

The law should allow an exception for small counties, to account for the fact that locations with little population sometimes lack the personnel or expertise of more densely populated areas in the state. In these cases, dual officess—elected and appointed—can serve taypayers efficiently.

POSITIONS:

The Michigan Association of Counties testified in support of the bill. (12-9-03)

Analyst: J. Hunault

■This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.