Coates' Canons Blog: What's a "Public Office"?

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What's a "Public Office"?

I am often asked to explain what it means to hold a public office. The questioner is sometimes trying to decide whether a particular person must take an oath, which is required of public office-holders. Or, the person may be trying to determine whether certain positions may be held simultaneously under North Carolina's constitutional and statutory multiple office-holding restrictions.

North Carolina's case law on office-holding is both venerable and extensive. Indeed, most of the rules that we follow today were originally developed in the late 1800s and the early 1900s.

Interest in office-holding probably arose because of a provision in North Carolina's pre-1971 constitutions that allowed a person to hold only one "office or place of trust or profit" at a time. ("Office" and "place of trust or profit" have basically the same meaning.) Perhaps because of this rule's strictness, questions often arose about two issues.

First, it was important to know the meaning of the term "office or place of trust or profit" because the ban did not apply to positions that were not such "offices" or "places." Second, questions arose about the distinction, if any, between *holding* an office and *performing the duties* of an office as part of the responsibilities of another office, in order to avoid violating the ban. This practice is called *ex officio* office-holding. Both of these issues remain important today, even though the present multiple office-holding rules are somewhat more liberal.

In this post, I will explore the meaning of the term "public office," and will explain generally what are and are not public offices.

In a later post, I will examine North Carolina's rules about holding multiple public offices, including the doctrine of *ex officio* office-holding.

If this subject interests you, you may also wish to consult David Lawrence's earlier posts on oaths (**Oaths of Office: How Many and By Whom?** and **Filing oaths of office**) and on city and county attorneys as public officers (**City and County Attorneys as Public Officers — Possible Downsides**, and **City and County Attorneys as Public Officers — A Possible Upside**).

Several factors must be taken into account in deciding whether a particular position is a public office. Does the position in question involve the exercise of independent decision-making power on behalf of the state or a duly constituted state subdivision such as a city or county, rather than being merely advisory? Is that power given by constitution or statute and does its exercise involve the carrying out of an important part of the executive, legislative, or judicial functions of government? Does the occupier of the position have significant legal power to make enforceable decisions concerning people's life, liberty, or property? Affirmative answers to one or more of these questions are a good indication that the position under consideration is indeed a public office.

Although most public officers are required to take oaths and most receive a salary or fees, these items "are mere incidents and constitute no part of the office." If no salary or fees are involved, "it is a naked office—honorary—and is supposed to be accepted merely for the public good." Further, a public office does not have to be continuing in nature. An office could involve doing only one act or it could be held for several years. *State* ex rel. *Clark v. Stanley*, 66 N.C. 60, 63-64 (1872).

The dividing line between public offices and public employment generally is often hard to draw. In one case, the North Carolina Supreme Court explained that "[t]he true test of a public office seems to be that it is parcel of the administration of government, civil or military, or is itself created by the law-making power." *Eliason v. Cooper*, 86 N.C. 236, 240-41 (1882) In another decision, it stated that an office involves "a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public, by which it is distinguished from employment or contract." *State* ex rel. *Barnhill v. Thompson*, 122 N.C. 493, 495-96, 29 S.E. 720, 721 (1898).

Here are two other examples. One case involved a person who served on the Raleigh Board of Aldermen at the same time that he was employed as the night watchman for the federal courthouse under an appointment from the United States Treasury department. The supreme court concluded that while the position of alderman was a public office, the position of night watchman was not. It explained that the watchman was "employed in a specific service having none of the attributes to raise it to the dignity of the constitutional disqualification." *Doyle v. Aldermen of Raleigh*, 89 N.C. 133, 135–36 (1883).

In a later case, the court concluded that the city government position of sinking fund commissioner was an office, rather than a "mere public employment," due to several characteristics of the position. It "was not of a temporary character, and the duties were continuous and not intermittent. The incumbent was required to perform continuous public service for a definite period and of a very responsible character." *Borden v. City of Goldsboro*, 173 N.C. 661, 662, 92 S.E. 694, 695 (1917).

Unfortunately, most parts of these definitions are not particularly useful. A great many public jobs are concerned in some way with the administration of government. Most are permanent rather than temporary, with continuous, non-intermittent duties. All public positions by their very nature involve public service and are exercised for the benefit of the public. And what specific attributes raise a public position to the "dignity" of a public office? Do not all public positions derive their legitimacy from the sovereign and hence involve "sovereign functions"?

Public offices are positions that involve significant responsibility and discretion under the law. The one characteristic that might provide a useful distinction is the last one mentioned in the cases above: public offices involve public service of "a very responsible character." This trait of great responsibility may well be what the *Eliason* court had in mind when it explained that a portion of a country's (or state's) sovereignty attaches for the time being to a public office. *Eliason v. Cooper*, 86 N.C. at 239-40. Perhaps another way to state the same idea is to say that public officers have a good deal of independent decision-making power involving the exercise of discretion.

Thus, the fact that someone holds a public job does not alone make that person a public officer for multiple office-holding purposes. But the more discretion, responsibility, and power to make decisions that a position involves, the more likely that courts will see that position as a public office rather than as "mere employment." And this may be particularly true if the position involves the relatively direct exercise of the State's authority.

The position of city or county manager provides a good example. Managers can be characterized as public officers due to the amount of independent discretion that they exercise, discretion that they have been delegated by the state. *See Leete v. County of Warren*, 341 N.C. 116, 119, 462 S.E.2d 476, 478 (1995) (county manager); *State* ex rel. *Grimes v. Holmes*, 207 N.C. 293, 298, 176 S.E. 746, 748 (1934) (city manager); and *Ratcliff v. County of Buncombe*, 663 F. Supp. 1003, 1009–10 (W.D.N.C. 1987) (county manager) for examples of how the courts have treated the manager position.

A 1965 supreme court case supports this view. In that case, the court examined the question of whether police chiefs and police officers are public officers or public employees for purposes of **G.S. 14-230**, which deals with willful failure by public officers to discharge official duties. The court pointed out that what determines a police officer's status is "the nature and extent of his duties and responsibilities with which he is charged under the law." In language similar to that found in multiple office-holding cases, it referred to the position's creation by the sovereign power and its exercise of part of that power as distinguishing an office from employment. *State v. Hord*, 264 N.C. 149, 155, 141 S.E.2d 241, 245 (1965) (citation omitted). The court held that duly appointed chiefs of police, as well as police officers, are public officers rather than mere

employees within the meaning of G.S. 14-230. *Id.*

In determining whether a position is an office, North Carolina's courts will look at whether the powers attached to the position are those of a public office, not at whether those powers are actually being exercised. If the position has the powers of an office, it is an office. Similarly, the term of the position is unimportant.

Positions that do not actually involve the exercise of sovereign power but are merely advisory are not public offices. No matter how wise or extensive one's advice may be, nor how much it is listened to by others, a position is not a public office if one can only advise and not decide.

Thus, for example, the members of a local planning board are not public officers if they only make recommendations to the governing body concerning re-zonings and subdivision plats. But if the planning board is given the responsibility of approving subdivision plats, so that a plat cannot be recorded in the register of deeds office without that approval, the position of planning board member is probably an office. Decisions about governmental recognition of a particular scheme for dividing land involve discretion and the exercise of a fair amount of sovereign governmental power.

A position that involves the wielding of significant legal control over people's lives is generally a public office. This test for a public office is suggested by the last example. As noted above, if I want to record a subdivision plat, I may be required by law to go to the planning board for its approval. As another example, certain types of transactions will not be recognized in a court of law unless the parties' signatures are notarized. The notary public is a public officer, **N.C. Constitution, art. VI, § 9(2)**; State *ex rel*. Attorney-General v. Knight, 169 N.C. 333, 353, 85 S.E. 418, 428 (1915), just as the members of a planning board with plat approval authority probably are. Both types of officials may have received that designation as much because of the legal power that they have over people's lives as because of the amount of independent discretion that they exercise.

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