

Opinion No. 51-5362

May 1, 1951

BY: JOE L. MARTINEZ, Attorney General

TO: Mr. Filo M. Sedillo Attorney at Law Belen, New Mexico

{*41} In reply to your letter of April 20, 1951, in which you request an opinion as to whether or not an elected municipal school board member can serve as a member of the City Council.

I have checked the law and I find that there is no incompatibility in these two offices. There are no conflicting duties of one with the other. There is no salary attached to either of the offices and one of the offices is not subordinate to the other.

Section 70 of 42 Am. Jr. reads as follows:

"Incompatibility of offices does not, it has been said, depend upon the incidents of the offices. For instance the courts, with some few exceptions, hold that mere physical inability to perform the duties of both offices personally does not constitute incompatibility. It is to be found in the character of the offices and their relation to each other, in the subordination of the one to the other, and in the nature of the duties and functions which attach to them. Incompatibility of offices exists where there is a conflict in the duties of the offices, so that the performance of the duties of the one interferes with the performance of the duties of the other. This is something more than a physical impossibility to discharge the duties of both offices at the same time. They are generally considered incompatible where such duties and functions are inherently inconsistent and repugnant so that, because of contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent {*42} to retain both. It is not an essential element of incompatibility of offices at common law that the clash of duty should exist in all or in the greater part of official functions. If one office is superior to the other in some of its principal or important duties, so that the exercise of such duties may conflict, to the public detriment, with the exercise of other important duties in the subordinate office, then the offices are incompatible."

I also call your attention to the case of Haymaker v. State, 22 N.M. 400, 163 P. 249, in which our Supreme Court stated:

"Incompatibility between offices is an inconsistency between functions thereof as where one is subordinate to the other, or where a **contrariety** and **antagonism** would result in the attempt by one person to faithfully and impartially discharge the duties of both."

Upon further examination of the cases, it appears that the doctrine of incompatibility of offices is rested on public policy. See Perkins v. Manning. 122 P (2) 857, 59 Ariz. 60

and the case of People v. Rapsey, 107 P (2) 388, 16 Calif. (2) 636 where the Court held that offices are incompatible if the nature and duties thereof are such as to render it improper from the consideration of the public policy for one incumbent to retain both.

In view of the above, it is my opinion that the offices of municipal school board member and that of City Council member are not incompatible.

Trusting that this fully answers your inquiry I remain