

Opinion No. 60-18

February 4, 1960

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: Hon. Ralph Gallegos State Representative Santa Fe County 634 Gomez Road
Santa Fe, New Mexico AG-213

QUESTION

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Can a person elected to the office of County Commissioner, continue, while serving in that office, to hold and work under a contract with the County School Board as a school bus driver?

CONCLUSION

Yes.

OPINION

{*360} ANALYSIS

The specific situation to which you refer in asking your question is this: Mr. Abe Gallegos of Chama, New Mexico is planning on running for the office of County Commissioner in Rio Arriba County. Mr. Gallegos is presently employed by the County Board of Education as a contract school bus driver, which contract, by its terms, will continue in force beyond the time County Commissioners will assume office after the forthcoming general election. The contract under which he is employed provides in effect that the contractor is to be paid a salary for the term of the contract and further provides for a great many controls by the school board over the operations under the contract.

We have previously held in two recent opinions that identical contracts were contracts of employment. See Opinions Nos. 57-129 and 59-184. Therefore, there can be no question but that Mr. Gallegos is an employee of the school board under the contract.

We have also held that there is no prohibition against a school bus driver so employed being eligible for and running for the office of County Commissioner. Opinion No. 59-210. In that opinion we declined to rule on the question of whether such person may continue to be so employed if he is elected to and assumes the office of County Commissioner. This precise question is now before us.

The question is really one of whether the office of County Commissioner is incompatible with employment by the County school board as a school bus driver. The general rule as to what constitutes incompatibility of public office is succinctly spelled out in 42 Am. Jur., Public Officers, § 70, which reads in part as follows:

" . . . Incompatibility of offices does not, it has been said, depend upon the incidents of office. 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 the 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 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 the 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. . . ."

There are no New Mexico cases directly in point on this precise question. However, the New Mexico court in the leading case of **Haymaker v. State**, 22 N.M. 400, 163 P. 248 (1917) in deciding {361} whether the offices of member of a city board of education and clerk of said board were incompatible, said:

"In legal contemplation, incompatibility between two offices is an inconsistency between the functions of the two. The offices must be subordinate, one to the other, and they must per se, have the right to interfere with the other before they are incompatible. (citing *People v. Green*, 58 N.Y. 295; *Stubbs v. Lee*, 64 Me. 195, 18 Am. Rep. 251; *State v. Brown*, 5 R. I. 1.)."

Basing our conclusion upon the theories advanced by the Haymaker case, we have previously held, in Opinion No. 3936, dated October 29, 1941, that there was no incompatibility between the offices of County Assessor and school bus driver. We stated that:

"Since the person contracting to transport school children is merely an employee of the Board of Education, and since under the decision of the Supreme Court there is no inconsistency in the functions of the two offices, it is my opinion that a county assessor may legally contract to transport pupils, and that such employment is not incompatible with his duties as a county officer.

In our opinion, the holding in this opinion should be equally applicable in the case at hand. The contract of employment under which Mr. Gallegos drives school busses is with the County Board of Education, not with the Board of County Commissioners. The County Boards of Education are entities separate and apart from the Boards of County Commissioners, the Board of Education being elected pursuant to §§ 73-9-1 et seq., N.M.S.A., 1953 Compilation. Nothing in the statutes requires that the Boards of County Commissioners be a party to, or approve such contracts. Further, we have been informed by Mr. J. T. Reece, Director of Transportation for the Department of Education that there is no approval listed on Mr. Gallegos' contract by the Board of County Commissioners of Rio Arriba County. Therefore, considering the legal standards of incompatibility set forth above, we cannot see where the office of County Commissioner and employment as a school bus driver by the County Board of Education would be incompatible so as to prohibit Mr. Gallegos, if elected as a County Commissioner, from continuing his employment as a school bus driver.

By: Philip R. Ashby

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