

Opinion No. 62-101

July 30, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General Oliver E Payne, Assistant Attorney General

TO: Mr. Clay Buchanan, Director, New Mexico Legislative Council, State Capitol Building, Santa Fe, New Mexico

QUESTION

QUESTIONS

1. Is the office of State Board of Education member incompatible with the position or office of employee of the public school system?
2. If the offices or positions are incompatible, which office or position is vacated?
3. Can the legislature provide that an employee of a public school system cannot be a member of the State Board of Education?

CONCLUSIONS

1. This depends upon the office or position that the person holds in the public school system. The following offices or positions, and there may be others, are incompatible with the office of member of the State Board of Education: teacher superintendent (whether elected or appointed), principals and their assistants and local school boards members.
2. The first office or position is vacated. See analysis for explanation as to whether the vacancy is automatic or whether it is contingent upon qualification of a successor.
3. No, but the same thing can be accomplished by providing that a member of the State Board of Education cannot accept an office or position with a public school system.

OPINION

ANALYSIS

The definitive case on incompatibility in this jurisdiction is **Haymaker v. State ex rel., McCain**, 22 N.M. 400, which involved a situation where the same person held office as a member of the board of education and as clerk of the same board.

In holding that the two offices were incompatible, the Court laid down the following rule:

"In legal contemplation, incompatibility between two offices is an inconsistency between the functions of the two. The offices must subordinate, one to the other, and they must, per se, have the right to interfere with the other before they are incompatible . . . The incompatibility between two offices, which upon the acceptance of the one by the incumbent of the other operates to vacate the latter, is not simply a physical impossibility to discharge the duties of both offices at the same time, but it is an inconsistency in the functions of the two offices, 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."

The fact that a school employee may not be a public officer in the usual sense of the term does not change the fact that a position of employee of a public school system may be incompatible with various other offices or positions under common law precepts.

Turning specifically to the position of school teacher, the following rule is set forth in 78 C.J.S., Schools and School Districts, p. 972:

"A school officer whose duties are incompatible with those of a teacher cannot be both officer and teacher at the same time."

In the case of *Richardson v. Bell County Board of Education*, 296 Ky. 520, 177 S.W. 2d 871, the Court held that the office of assistant county school superintendent, the duties of which were purely administrative, was incompatible with the position of teacher in that school system.

As long ago as 1920 this office held that the position of county school superintendent was incompatible with a position as teacher in the public schools of the county in which the superintendent was elected. Opinion No. 2739. The ruling was based upon the fact that the county school superintendent was a member of the county board of education, and, as such, would be in a position to pass on his own contract.

We have an analogous situation here. Article XII, Section 6 of our State Constitution provides that:

"The state board of education shall determine public school policy and vocational educational policy and shall have control, management and direction of all public schools, pursuant to authority and powers provided by law."

In addition, there has been considerable implementing legislation. The State Board of Education has the power to determine the qualifications of teachers, to certificate them and to revoke such certification under certain conditions. Section 72-1-7, N.M.S.A., 1953 Compilation. The State Board of Education is designated as the body which hears all appeals from decisions made by local school boards or school officials. Section 73-1-13, N.M.S.A., 1953 Compilation (P.S.). In our opinion, the power to sit in judgment on an appeal which could affect his own position as teacher in the public school system

renders the position teacher incompatible with the position of State Board of Education member. See **Russell v. Worcester County**, 323 Mass. 717, 84 N.E. 2d 123.

The fact that in actual practice a conflict might be a rarity does not mitigate the incompatibility. **De Feo v. Smith**, 17 N.J. 183, 110 A.2d 553; **Knuckles v. Board of Education of Bell County**, 272 Ky. 431, 114 S.W. 2d 511. Nor does the fact that the teacher is only one member of a multi-member board change the result. See in this connection **Haymaker v. McCain, supra**.

What we have said regarding the position of school teachers is equally applicable to public school principals and their assistants, superintendents of municipal schools, elected county school superintendents and all members of local school boards. We so conclude because the State Board of Education is the body which hears all appeals from decisions made by local boards of education and school officials. Section 73-1-13, *supra*. Again the State Board of Education members who also held office as a school official would be in a position to sit in review of a decision made by him. See **Allison v. Baynes, Ohio**, 115 N.E. 2d 62. We do not mean to imply that the foregoing list of offices and positions is all-inclusive insofar as the question of incompatibility is concerned.

As to non-certified school jobs such as clerks, stenographers, janitors, gardeners, cafeteria employees and the like, it is doubtful if any of these positions would be incompatible with the office of State Board of Education member. The control which the State Board could exercise over such positions would appear to be too indirect and remote to make the positions incompatible.

You also ask for an opinion as to which office or position is vacated upon the acceptance of an incompatible office or position. The well-established common law rule is that acceptance by a public officer of another incompatible office or position thereby vacates the first office or position. **Haymaker v. State ex rel. McCain, supra**; **Application of Burns**, 108 N.Y.S. 2d 62; 3 McQuillan, **Municipal Corporations**, Section 12.61.

Whether the vacancy results automatically or is conditional upon a successor being qualified depends upon whether the person initially held an "office", as opposed to a "position", and if so whether he was formally removed.

Article XX, Section 2 of the Constitution provides that "every **officer, unless removed**, shall hold his office until his successor has been duly qualified." (Emphasis added). The **Haymaker** case interpreted this provision to mean that only by following the statutory removal procedure is an **office** automatically vacated. If the applicable removal procedure has not been followed, or if there is none (as in the case of members of the State Board of Education. Article XII, Section 6), the vacation of the first office is contingent upon qualification of a successor.

Since Article XX, Section 2, is applicable only to **offices**, if the person initially holds a **position**, then the acceptance of an incompatible office or position, creates an automatic vacancy in the first position.

As a guide, we would state it is our opinion that teachers do not hold an office in the constitutional sense, while superintendents, principals and members of local school boards do hold such an office.

You ask whether the legislature can prescribe that no employee of a public school system can be a member of the State Board of Education. In our opinion such legislation would impose an added restriction on the right to hold office and, as such, would violate Article VII, Section 2 of the New Mexico Constitution. See **Gibbany v. Ford** 29 N.M. 621, 225 Pac. 577. However, we see no legal impediment to legislation providing that no member of the State Board of Education can accept employment in a public school system.