WILLIAM J. SCOTT
ATTORNEY GENERAL
STATE OF ILLINOIS
500 SOUTH SECOND STREET
SPRINGFIELD
62706

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FILE NO. S-987

OFFICERS:
Common Law Doctrine of
Incompatibility Pertains
to Offices Not to Employees

Joseph M. Cronin
State Superintendent of Education
Illinois Office of Education
100 North First Street
Springfield, Illinois 62777

Dear Mr. Cronin:

I have your letter wherein you state:

"The State Board of Education is requesting your opinion on the following question:

Would it be permissible for an employee of the Illinois Office of Education to run for a local school board position?"

In responding to your request, attention is drawn to your reference to "an employee of the Illinois Office of Education". Often the words "office","officer", and "employee" are not always used in a strictly legal sense nor are they always used consistently. A particular public

servant may be an officer for some purposes and an employee for others. Since the answer to your question depends on this distinction, consideration of the essential characteristics of a "public office" would be helpful at this point.

An indispensable element of a public office, as distinguished from an employment, is that the duties of the incumbent of an office shall involve an exercise of some portion of the sovereign power. People v. Brady, 302 Ill. 576, 582; Olson v. Scully, 296 Ill. 418, 421; Martin v. Smith, 239 Wisc. 314, 332, 1 N.W. 2d 163, 172 (1941); Parker v. Riley, 18 Cal. 2d 83, 87, 113 P. 2d 873, 875 (1941); State ex rel. Green v. Glenn, 39 Del. 584, 587, 4 A. 2d 366, 367 (1939); State ex rel. Barney v. Hawkins, 79 Mont. 506, 528, 257 P. 411, 418 (1927); 53 A.L.R. 595, 602 (1928); 140 A.L.R. 1076, 1081 (1942).

In People v. Brady, 302 Ill. 576, the Illinois Supreme Court held that committeemen of political parties were not public officers. The court placed strong emphasis on the notion that a person must exercise some portion of State sovereignty to be a public officer. At page 582, the court states:

> "* * * The most important characteristic of an office is that it involves a delegation to the officer of some of the solemn functions of government to be exercised by him for the benefit of the public. Some portion of the sovereignty of the State, either legislative, executive or judicial, attaches for the time being to the officer, to be exercised for the public benefit. Unless the powers conferred by the act creating the office are of this nature the individual filling the office is not a public officer."

An office is a public position created by the Constitution or by law, continuing during the pleasure of the appointing power or for a fixed time, with a successor necessarily being elected or appointed. (Fergus v. Russel, 270 Ill. 304; Bunn v. Illinois, 45 Ill. 397; 140 A.L.R. 1076, 1080 (1942); see, also, Ill. Const., art. V, sec. 24 [1870].) It should be noted that an office is enduring in nature and cannot be eliminated by the fiat of a superior official. Thus, if an office is vacated, it must be filled.

The fact that one occupying a position is compelled by law to give a bond for the faithful performance of his duties is some evidence that the position is an office not merely an employment. People v. Brady, 302 Ill. 576, 582; Martin v. Smith, 293 Wisc. 314, 332, 1 N.W. 2d 163, 172 (1941); State

ex rel. Barney v. Hawkins, 79 Mont. 506, 528, 257 P. 411, 418 (1927); 53 A.L.R. 595, 608 (1928); 140 A.L.R. 1076, 1091 (1942).

The fact that one occupying a position must subscribe to the oath required by the Constitution or by law is also strong evidence of an office. People v. Brady, 302 Ill. 576, 582; Martin v. Smith, 293 Wisc. 314, 332, 1 N.W. 2d 163, 172 (1941); Kingston Associates v. LaGuardia, 156 Misc. 116, 281 N.Y.S. 390 (1935); aff'd. 246 App. Div. 803; 285 N.Y.S. 19 (1936); Annot., 53 A.L.R. 595, 608 (1928); 140 A.L.R. 1076, 1092 (1942).

Guided by the aforementioned characteristics of "public office", you should first determine whether a public servant under jurisdiction of the Illinois Office of Education is an officer or employee.

In the absence of a statutory or constitutional provision to the contrary, there is no necessary objection to the same person holding two positions. Thus, it is permissible, in the absence of statutory or constitutional prohibition, for one person to be employed by a State agency and to be an officer of a school district.

However, under the common law doctrine of incompatibility, which is in effect in Illinois, one person is precluded from holding two incompatible offices simultaneously.

In People ex rel. Myers v. Haas, 145 Ill. App. 283, the Illinois Appellate Court, at page 286, describes the occurrence of incompatibility as follows:

> "* * * Incompatibility, in this connection, is present when the written law of a state specifically prohibits the occupant of either one of the offices in question from holding the other and, also, where the duties of either office are such that the holder of the office cannot in every instance, properly and fully, faithfully perform all the duties of the other office. This incompatibility may arise from multiplicity of business in the one office or the other, considerations of public policy or otherwise. * * *"

The language of Haas refers only to offices with no mention of employees. It has been held in other jurisdictions that the common law doctrine of incompatibility affects only officers and not employees. (Wilentz v. Stanger, 30 A. 2d 885 (N.J. Ct. Er. and App. 1943); Corsall v. Glover, 10 Misc. 2d 664, 174 N.Y.S. 2d 62 (N.Y. Sup. Ct. 1958), Anson v. Montgomery County, 71 Pa. Super. 225 (1919).) According to

62 Am. Jur. 2d, Public Officers and Employees, section 62, p. 668:

> "[I]t is a settled rule of the common law that a public officer cannot hold two incompatible offices at the same time. The rule is founded upon the plainest principles of public policy, is imbedded in the common law, and has obtained from very early times. * * * However, at common law it extends no farther than to incompatible offices."

Only one jurisdiction has expanded the common law rule to encompass an incompatible employment. In Haskins v. State ex rel. Harrington, 516 P. 2d 1171 (Wyo. 1973), a teacher was elected to the school board which employed him and the Supreme Court of Wyoming determined that an intolerable potential conflict of interest would arise. Stating it should not be bound by technical definitions and that the case should not turn on the classification as employment, the court held that employment as a teacher and office as member of the school board were incompatible within the meaning and intent of the common law rule.

The Illinois Supreme Court has never been confronted with the question of applicability of the common law doctrine of incompatibility to employment. (See, however, Livingston v. Ogilvie, 43 Ill. 2d 9, 16-17.) In light of the fact that

only one State court has invoked public policy reasons and expanded the common law rule to encompass employees, the traditional limitation to only offices would most probably be observed in Illinois.

Consequently, if the individual or individuals seeking election to a local school board are actually employees, there is no problem of incompatibility of offices. Since the employment relationship is voluntary in nature, the Illinois Office of Education can take whatever lawful action it determines necessary to protect its interests. If potential conflicts could arise from the employment, it is also within the province of the legislature to enact remedial legislation to protect the public interest.

Only if you discern that a particular individual is indeed an officer and is seeking election to a local school board, may a question of incompatibility arise. Since the common law rule of incompatibility has been traditionally limited to offices and there is no statutory provision to the contrary, an employee of the Illinois Office of Education

is not prohibited from serving as a member of a local school board.

Very truly yours,

ATTORNEY GENERAL