



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

June 7, 1979

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 79-108

Dr. Merle Bolton
Commissioner of Education
Kansas State Department of Education
120 East Tenth Street
Topeka, Kansas 66612

Re: Schools--Boards of Education--Employees
Serving as Board Members

Synopsis: An employee of a unified school district may hold office as a school board member for the district by whom he or she is employed. The doctrine of incompatibility of offices is inapplicable.

* * *

Dear Dr. Bolton:

You have advised our office that an employee (school bus driver) of Unified School District No. 101 has been duly elected as a member of the board of education of said district, and you have requested our opinion whether he can serve in such dual capacities. You further indicate that this employee requested of, and received from, the Governmental Ethics Commission an opinion, i.e., Opinion No. 79-12 under date of March 21, 1979, in which the Commission opined that governmental entities are not a "person or business" as said terms are employed in K.S.A. 75-4304 and 79-4305. Thus, the Commission concluded:

Dr. Merle Bolton
Page Two
June 7, 1979

"K.S.A. 75-4304 and K.S.A. 75-4305 are inapplicable to this situation. In other words, the fact that you are employed by the school district on whose board you would serve as a member does not present any conflict of interest which prohibits you from serving on the board. In addition, based on this factual situation, those sections place no restrictions on your activities as a member of the board in fully performing your duties incident thereto including taking part in decisions dealing with your position of employment." (Emphasis added.) Governmental Ethics Commission Opinion No. 79-12.

Since the Governmental Ethics Commission has concluded that no statutory conflict of interest is presented by a bus driver serving as a member of the board of education by whom he is employed, and as there are no other statutory provisions which would prevent him from being a member of the board, we limit our discussion to consideration of possible common law principles which might prevent such action.

In our judgment, the only common law rule which may prevent such action is the doctrine of incompatibility of offices. However, in discussing this doctrine, it is important to note that the doctrine of incompatibility of offices has been applied by the courts in two different and distinct types of cases, to wit:

- (1) In cases where the issue is whether one person may be paid two salaries from public funds; and
- (2) In cases where the issue is whether a person who holds one public office has forfeited, ipso facto, that office by acceptance of another public office.

Dr. Merle Bolton
Page Three
June 7, 1979

Although the doctrine of incompatibility of offices, as it applies to situations in which a person seeks two salaries from the public treasury, would apply to this case, this issue does not arise because members of boards of education may not, pursuant to K.S.A. 1978 Supp. 72-7202e, receive compensation for their services. Thus, in regard to the person involved herein, the only issue is whether he may hold the office of school board member and retain his position as bus driver.

In applying the doctrine of incompatibility of offices in this type of case, the courts have, traditionally, held that this principle does not apply unless the person holds two, incompatible, public offices. The general rule is stated thusly:

"The prohibition against one person holding more than one office at the same time has reference to offices, as distinguished from positions in the public service that do not rise to the dignity of office. It does not extend to a position which is a mere agency or employment." (Emphasis added.) 63 Am Jur. 2d Public Officers and Employees §64, pp. 669, 670.

Although some courts have now enlarged this doctrine to include both public offices and public employment (see 70 A.L.R. 3d 1188), the majority of states follow the traditional rule. (See 63 Am Jur. 2d Public Officers and Employees §64, pp. 669, 670.) Unfortunately, the Kansas Supreme Court has not had occasion to address this issue. For that reason, we will not speculate whether our Court would deviate from the traditional common law rule and expand it so as to include positions of public employment, as well as public offices. Thus, it is our judgment that the traditional common law rule of incompatibility of offices is dispositive of the issue you have raised.

Thus, the determination of what is a "public office" and who is a "public officer," are relevant to your inquiry. These questions were directly in issue in Sowers v. Wells, 150 Kan. 630 (1934). There the Court said:

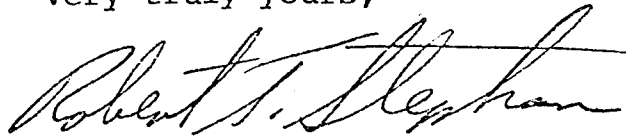
Dr. Merle Bolton
Page Four
June 7, 1979

"While the authorities are not in complete harmony in defining the term 'public office,' or 'public officer,' it universally has been held that the right to exercise some definite portion of sovereign power constitutes an indispensable attribute of 'public office.' (Cites omitted.)" (Emphasis added.) Id. at 633.

Thus, under this definition, little question exists but that an elected school board member is a public officer. However, as important as the job of safely transporting children to and from school is, it in no way can be said that in performing his or her duties, a bus driver is "exercising some definite portion of sovereign power." Thus, one who is employed as a bus driver does not hold public office. Consequently, the common law doctrine of incompatibility of offices, as it applies to the holding of public offices, is inapplicable to the question of whether a bus driver may serve as a member of the board of education of the unified school district by whom he or she is employed. In such a situation, only one public office, that of school board member, is involved. The person holds no other public office.

In light of the foregoing analysis, we are unable, as a matter of law, to conclude that a bus driver may not hold the office of school board member, even though he or she is employed by the school district. The common law doctrine of incompatibility of offices is not applicable. If some other matter of public policy prevents the holding of these two positions, it is for the courts or the legislature to so declare. Such has not been done, and, therefore, in our judgment, a bus driver may serve as a member of the board of education of the district by whom he or she is employed.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Rodney J. Bieker
Assistant Attorney General

RTS:BJs:RJB:gk



GOVERNMENTAL ETHICS COMMISSION

109 W. NINTH
TOPEKA, KANSAS 66612
PHONE: (913) 296-4219

March 21, 1979

Opinion No. 79-12

Mr. Tommy A. Stipp
R.R. 1
Thayer, Kansas 66776

Dear Mr. Stipp:

This opinion is in response to your letter of March 8, 1979, in which you request an opinion from the Governmental Ethics Commission.

We note at the outset that the Commission's jurisdiction in this case is limited to K.S.A. 75-4301 et seq. and K.S.A. 46-215 et seq., which is not applicable here. Thus, whether some other common law or statutory system applies to your question is not covered by this opinion.

We understand you request this opinion in your capacity as a candidate for election to the Board of Education of School District #101 at Thayer, Kansas. You advise us that you are employed by that district as a bus driver.

Based on this factual situation, you ask whether your employment with the district would cause any conflict of interest should you be elected to the school board and, if so, under what restrictions would you be placed.

Two sections of the Act may be applicable to the situation you have described. K.S.A. 75-4304 states, "(a) No public officer or employee shall in his capacity as such officer or employee, make or participate in the making of a contract with any person or business by which he is employed or in whose business he has a substantial interest, and no such person or business shall enter into any contract where any public officer or employee, acting in such capacity, is a signatory to or a participant in the making of such contract and is employed by or has a substantial interest in such person or business. A public officer or employee does not make or participate in the making of a contract if he abstains from any action in regard to the contract. This section shall not apply to the following: (1) Contracts let after competitive bidding has been advertised for by published notice; and (2) Contracts for property or services for which the price or rate is fixed by law"

Mr. Tommy A. Stipp
March 21, 1979
Opinion No. 79-12

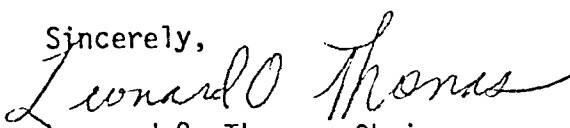
In addition, K.S.A. 75-4305 states, "Any public officer or employee who has not filed a disclosure of substantial interests and who, while acting in his official capacity, shall pass upon any matter which will affect any business in which such officer or employee shall hold a substantial interest, shall, before he acts upon such matter, file a written report of the nature of said interest with the office of the secretary of state, if such person is a state officer or employee, or if such person is an officer or employee of a municipal or quasi-municipal corporation, with the county clerk of the county in which all or the largest geographical part of such municipal or quasi-municipal corporation is located. A public officer or employee does not pass or act upon any matter if he abstains from any action in regard to the matter."

The applicability of K.S.A. 75-4304 to this situation depends in part on whether the public officer or employee (in this case you) is employed or holds a substantial interest in "any person or business". Thus, the threshold question is whether the school district which employs you is a "person or business". In Opinion No. 75-64, a copy of which is enclosed, we discussed a similar question and we concluded then, as we do now, that governmental entities do not fall within that phrase. Thus, since the school district is not a "person or business" within the meaning of that phrase as used in K.S.A. 75-4304, your employment therewith does not fall within the purview of K.S.A. 75-4304.

For the same reasons we have just discussed, it is, likewise, our opinion that K.S.A. 75-4305 is inapplicable to this situation.

In sum, it is our opinion that K.S.A. 75-4304 and K.S.A. 75-4305 are inapplicable to this situation. In other words, the fact that you are employed by the school district on whose board you would serve as a member does not present any conflict of interest which prohibits you from serving on the board. In addition, based on this factual situation, those sections place no restrictions on your activities as a member of the board in fully performing your duties incident thereto including taking part in decisions dealing with your position of employment.

In closing, we again note that this opinion is strictly limited to the applicability of K.S.A. 75-4301 et seq. Thus, to the extent your question deals with some other common law or statutory system, we suggest you contact your County Attorney or the Attorney General.

Sincerely,

Leonard O. Thomas, Chairman

By Direction of the Commission

DDP:ljh
Encs.

STATE OF KANSAS



GOVERNMENTAL ETHICS COMMISSION

STATE HOUSE

TOPEKA, KANSAS 66612

PHONE: (913) 296-2348

COMMISSION MEMBERS

DREW HARTNETT

SALINA

HERBERT A. MEYER

INDEPENDENCE

BRIAN J. MOLINE

WICHITA

JAMES F. PILLEY

SHAWNEE MISSION

JOHN R. WEBB

EMPORIA

LYNN HELLEBUST
EXECUTIVE DIRECTOR

Opinion No. 74-59

November 13, 1974

Mr. Ron Svaty
Ellsworth County Attorney
Box 83
Ellsworth, Kansas 67439

Dear Mr. Svaty:

This opinion is issued by the Governmental Ethics Commission in response to your letter of October 30, 1974 to Attorney General Vern Miller. Your letter was referred to this Commission insofar as it relates to K.S.A. 75-4301 et seq. which is within the Commission's jurisdiction.

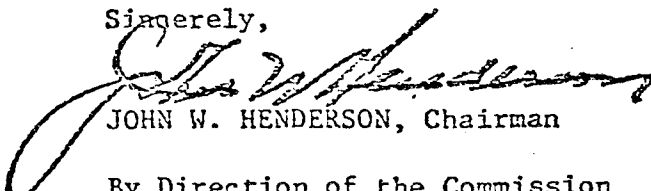
We understand that you are the Ellsworth County Attorney. In your capacity as such, you ask whether there is any violation of any state statute in the situation where a school board member is also employed as a teacher in a vocational school administered by the school board of which he is a member.

We note at the outset that the Commission has jurisdiction to render opinions which relate to this specific question only in regard to K.S.A. 75-4301 et seq. Thus, whether some other common law or statutory system may prohibit the holding of the dual positions you have described or restrict the behavior of one holding such dual positions is not covered by this opinion.

K.S.A. 75-4301 et seq. does not prohibit the holding of the two positions at the same time that you have described. Rather, the Act is aimed at restricting the behavior of those who hold such dual positions. Specifically, under appropriate circumstances, K.S.A. 75-4302 and 75-4305 require the filing of disclosure statements of substantial interests. In addition, K.S.A. 75-4304 prohibits participating in the making or making certain contracts under specific situations. If after review of these restrictions you have a question concerning their interpretation, feel free to contact the Commission for a further opinion.

In closing, we again note that this opinion is strictly limited to the applicability of K.S.A. 75-4301 et seq. to your question.

Sincerely,



JOHN W. HENDERSON, Chairman

By Direction of the Commission

JWH:jj

c: Donna Heller
Attorney General's Office



STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

CURT T. SCHNEIDER
Attorney General

February 7, 1975

Opinion No. 75- 52

The Honorable Richard D. Rogers
President of the Kansas Senate
3rd Floor - State Capitol Building
Topeka, Kansas 66612

Dear Senator Rogers:

You inquire whether a teacher under contract to Unified School District No. 383 may run for office as a member of the board of education of that district, and serve if elected.

In Dyche v. Davis, 92 Kan. 971 (1914), the court pointed out that "the common law does not prevent one person from holding two offices, provided that the duties of neither one are incompatible with the duties of the other." Concerning incompatibility, the court stated thus:

"Offices are incompatible when the performance of the duties of one in some way 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. It is an inconsistency in the functions of the two offices."
92 Kan. at 977.

In that case, the question was posed whether the plaintiff, a professor on the faculty of the University of Kansas, was entitled to receive, in addition to his salary for his professional services, salary for services as a state fish and game warden. The auditor

The Honorable Richard D. Rogers
Page Two
February 7, 1975

pointed out that the doctrine of incompatibility of offices was not technically applicable, because a "professor in the University is not a public officer," but an employee of the state. The court acknowledged that

"[w]hile that is true, his compensation is fixed by public authority and is made payable out of public funds, and the principle is applicable."

Thus, in the circumstance you pose, the individual in question in the position of a teacher is not an officer of the school district, but an employee thereof, while in the capacity as a member of the board of education of the district, the individual would be an officer. Notwithstanding, the court made clear in Dyche that the same doctrine is applicable as to positions of dual office-holding.

In State ex rel. Clawson v. Thompson, 20 N.J.L. 689 (Sup. Ct. 1846), the court stated a general criterion of incompatibility which is universally accepted:

"Offices are incompatible when one has power of removal over the other, when one is in any way subordinate to the other, when one has power of supervision over the other, or when the nature and duties of the two offices are such as to render it improper from considerations of public policy for one person to retain both."

See also Clifford v. School Committee of Lynn, 275 Mass. 258, 175 N.E. 634 (Mass. 1931).

Clearly, applying the standards set forth above in Clawson, the positions of board member and teacher employed by the same district are incompatible. It needs little discussion to demonstrate the pertinence of those criteria to the holding of the two positions.

Thus, on the basis that the two positions are demonstrably incompatible, we cannot but conclude that a person holding office

The Honorable Richard D. Rogers
Page Three
February 7, 1975

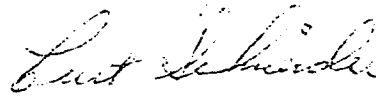
and serving in the capacity of a member of the board of education of a unified school district may not receive compensation from that same district as an employee thereof in the position of a teacher.

We should point out that the statutory general conflict of interest law, K.S.A. 75-4304(a), does not disqualify the individual from being a candidate and accepting the office if elected. It provides thus:

"No public officer or employee shall in his capacity as such officer or employee, make or participate in the making of a contract with any person or business by which he is employed or in whose business he has a substantial interest, and no such person or business shall enter into any contract where any public officer or employee, acting in such capacity, is a signatory to or a participant in the making of such contract and is employed by or has a substantial interest in such person or business. A public officer or employee does not make or participate in the making of a contract if he abstains from any action in regard to the contract." [Emphasis supplied.]

Although the individual in question is not ineligible by virtue of his position as a teacher-employee of the district from seeking election as a member of the board thereof, he is disqualified, in our judgment, from receiving compensation from the district for his services as a teacher should be elected to and accept the office of a member of the board of education thereof.

Yours very truly,


CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj