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February 28, 1991

ATTORNEY GENERAL OPINION NO. 91- 15

The Honorable Don Montgomery
State Senator, Twenty-First District
State Capitol, Room 128-S
Topeka, Kansas 66612

The Honorable Carl D. Holmes
State Representative
One Hundred Twenty-Fifth District
State Capitol, Room 156-E
Topeka, Kansas 66612

Re: Schools--Organization, Powers and Finances of
Boards of Education--School District Officers and
Employees; Board Members to Receive No
Compensation; School Employees as Board Members

Synopsis: As stated in Attorney General Opinion No. 79-108,
no statute or common law doctrine exists which
would preclude an individual employed by a unified
school district as a teacher, substitute teacher,
custodian, school bus driver, counselor, or referee
of an athletic event from serving as a member of
the board of education of the unified school
district which employs the individual. Such
individuals are permitted to vote on their
contracts as a school board does not constitute a
business or person under K.S.A. 1990 Supp. 75-4301a
et seq. K.S.A. 72-8202e prohibits an
individual from receiving compensation for work or
duties performed as a member of the board of
education. The individual, however, may receive
compensation for services performed as an employee
of the unified school district. Cited herein:

Senator Don Montgomery
Representative Carl D. Holmes
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K.S.A. 72-7901; 72-8009; 72-8202e; K.S.A. 1990
Supp. 75-4301a; 75-4303a; 75-4304.

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Dear Senator Montgomery and Representative Holmes:

As state legislators you request our opinion regarding whether certain individuals employed by a unified school district may receive compensation for their services if the individuals also serve as members of the board of education for the unified school district which employs them. The individuals of concern to you are employed as: teacher; substitute teacher; custodian; school bus driver; and referee at an athletic event. You also ask whether a teacher would be required "to abstain from voting on any decisions relating to employment or in any other areas." Because these two requests involve related issues, the requests have been consolidated into this one opinion.

The governing body of a unified school district is a board of education composed of seven members. K.S.A. 72-7901. The members must reside within the unified school district. K.S.A. 72-8009. No statutory prohibition exists which would preclude an employee of a unified school district from serving as a member of the board of education. Therefore, it will be necessary to determine whether the common law doctrine of incompatibility of offices precludes an individual employed by a unified school district from serving as a member of the board of education of the unified school district which employs him.

In applying the doctrine of incompatibility of offices, the courts have traditionally held that this principle does not apply unless the person holds two incompatible public offices.

"The prohibition against one person holding more than one office at the same time has references 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.)
63A Am.Jur.2d Public Officers and Employees § 69 (1984).

While the Kansas Supreme Court has generally adhered to this rule, in Dyche v. Davis, 92 Kan. 971 (1914), "the Court applied the doctrine to a situation where a public officer also held a position of public employment and the compensation for the public office and public employment were both payable from public funds. Id. at 977. As stated in Attorney General Opinion No. 79-108, little question exists but that an elected school board member is a public officer. However, an employee of a unified school district does not exercise some portion of sovereign power. See Sowers v. Wells, 150 Kan. 630, 633 (1934). Thus, the position of employee of a unified school district does not constitute a public office. Pursuant to K.S.A. 72-8202e, a member of a board of education does not receive compensation from the unified school district. Therefore, we are not faced with a situation involving two offices or two salaries payable from public funds. As stated in Attorney General Opinion No. 79-108, the common law doctrine of incompatibility of offices does not preclude an individual employed by a unified school district from serving as a member of the board of education of the unified school district which employs the individual, regardless of whether the individual is employed as a teacher, substitute teacher, custodian, school bus driver, or referee.

A conflict of interest can exist when only one office or position is involved, the conflict being between that office or position and a nongovernmental interest. 63A Am.Jur.2d supra § 79. A conflict of interest of a local governmental employee or local governmental officer is subject to K.S.A. 1990 Supp. 75-4301a et seq. K.S.A. 1990 Supp. 75-4304 states in part:

"(a) No local governmental officer or employee shall, in the capacity of such an officer or employee, make or participate in the making of a contract with any person or business by which the officer or employee is employed or in whose business the officer or employee has a substantial interest.

"(b) No person or business shall enter into any contract where any local governmental officer or employee, acting in that capacity, is a signatory to or a participant in the making of the contract and is employed by or has a substantial

interest in the person or business."
(Emphasis added.)

Pursuant to K.S.A. 1990 Supp. 75-4303a, the Kansas public disclosure commission has issued Kansas Public Disclosure Commission Opinion No. 90-14. In that opinion, the commission states "that a school board is not a 'business' and since the term 'person' is undefined, a school board is not a 'person' either. Thus, under the local conflicts law, it is permissible for a member of a school board to vote on his or her own contract." The opinion continues to apply the analysis enunciated in Governmental Ethics Commission Opinion No. 79-12. Because "[t]he [] commission shall render advisory opinions on the interpretation and application of K.S.A. 75-4301a, 75-4302a, 75-4303a, 75-4304, 75-4305 and 75-4306 . . . [and a]ny person who requests and receives an advisory opinion and who acts in accordance with its provisions shall be presumed to have complied with the provisions of the general conflict of interests law," we must defer to the commission regarding individuals employed as a school bus driver (Governmental Ethics Commission Opinion No. 79-12) and school counselor (Kansas Public Disclosure Commission Opinion No. 90-14). As the controlling factor precluding application of K.S.A. 1990 Supp. 75-4301a et seq. to the activities of such individuals is that a board of education does not constitute a business or person under K.S.A. 1990 Supp. 75-4301a et seq., the same controlling factor would arise in situations involving individuals employed as teachers, substitute teachers, custodians and referees. Therefore, as is the situation regarding school bus drivers and school counselors, those individuals employed as teachers, substitute teachers, custodians and referees, and serving as a member of the board of education, are not precluded from voting on their own contracts.

The interpretation of a statute is a question of law. State ex rel Stephan v. Kansas Racing Commission, 246 Kan. 708, 719 (1990). The function of the court is to interpret the statute, giving it the effect intended by the legislature. Id. In determining legislative intent, we may look at the purpose to be accomplished, the necessity and effect of the statute, and the effect the statute may have under the various constructions suggested. Id. A statute should not be given a construction that leads to uncertainty, injustice, or confusion if possible to construe it otherwise. Id.

With these rules of statutory construction in mind, it must be determined whether K.S.A. 72-8202e prohibits an individual who


is employed by a unified school district from receiving compensation for services performed as an employee because the individual also serves as a member of the board of education. K.S.A. 72-8202e states:

"[T]he board of education of any school district may appoint other officers and employees to serve at the pleasure of the board. Such officers and employees shall receive compensation fixed by the board. No member of a board of education shall receive compensation from the school district for any work or duties performed by him." (Emphasis added.)

K.S.A. 72-8202e does not preclude an individual employed by a unified school district from receiving compensation for services performed as an employee. Rather, the statute prohibits an individual from receiving compensation for any work or duties performed as a member of the board of education. Any other interpretation of the statute would result in a conflict between the last two sentences of the statute, resulting in a violation of the rules of statutory construction.

In review, no statute or common law doctrine exists which would preclude an individual employed by a unified school district as a teacher, substitute teacher, custodian, school bus driver, counselor, or referee of an athletic event from serving as a member of the board of education of the unified school district which employs the individual. Such individuals are permitted to vote on their contracts as a school board does not constitute a business or person under K.S.A. 1990 Supp. 75-4301a et seq. K.S.A. 72-8202e prohibits an individual from receiving compensation for work or duties performed as a member of the board of education. The individual, however, may receive compensation for services performed as an employee of the unified school district.

Very truly yours,



ROBERT T. STEPHAN
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