

tees promoting either the success or defeat of a proposition submitted to the electors in a local school millage election.

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**PUBLIC OFFICES AND OFFICERS: Incompatibility
Conflict of Interest**

STATE BOARD OF EDUCATION: Office of Member of

Persons employed by Michigan institutions of higher education granting baccalaureate degrees may simultaneously serve as members of the State Board of Education.

Office of member of a state professional licensing board and the office of member of the State Board of Education are not incompatible.

A member of the State Board of Education who has a contractual relationship with a local school district may be in conflict of interest if his interest in such a contract is substantial.

The doctrine of incompatibility applies to public offices and public positions; it does not apply to private employment.

No. 4620

August 7, 1968.

Honorable Jack Faxon
State Representative
State Capitol
Lansing, Michigan

You have requested my opinion on a number of questions involving the office of member of the State Board of Education. Each of your questions will be answered separately.

For the purpose of all the questions that you have asked, it would be well to expound the controlling principles relating to incompatibility of public offices and conflict of interest, since one or both concepts appear to be implicit in the questions that you ask.

Incompatibility

Based upon the common law, it is the public policy of the state of Michigan that the same person may not simultaneously occupy two public offices where the nature of the duties of such offices renders it improper from considerations of public policy for one person to retain both. The test of incompatibility is described as the character and relationship of the two offices. There is incompatibility where one office is subordinate to another, subject in some degree to its supervisory power, or where the functions of the two offices are inherently inconsistent and repugnant, so that the same person may not occupy them simultaneously. When such incompatibility exists, acceptance of the second office vacates *ipso facto* the first office. *Attorney General ex rel Moreland v. Common Council of*

Detroit, 112 Mich. 145 (1897); *Weza v. Auditor General*, 297 Mich. 686 (1941). See also O.A.G. 1963-64, p. 420; O.A.G. 1959-60, Vol. 1, p. 113; O.A.G. 1957-58, Vol. 1, p. 225; O.A.G. 1955-56, Vol. 1, p. 228.

The rule of incompatibility has been extended to public employment where the duties of the public employment and the public office are incompatible so that they may not be simultaneously exercised by the same person. It has also been held that the legal consequence of such incompatibility applies so that by acceptance of the second public position, there is a vacation of the first public position. *Knuckles v. Board of Education of Bell County*, 114 S.W. 2d 511, (Ken., 1938). See also O.A.G. 1963-64, p. 459.

It must be stressed that the above are common law principles involving incompatibility of public offices and positions. In the absence of a constitutional prohibition, it is within the authority of the legislature, by clear statutory provision, to permit the same person to occupy two public offices or two public positions, the duties of which are incompatible.

Conflict of Interest

In Article IV, Section 10 of the Michigan Constitution of 1963, the people have mandated in pertinent part as follows:

"No member of the legislature nor any state officer shall be interested directly or indirectly in any contract with the state or any political subdivision thereof which shall cause a substantial conflict of interest. The legislature shall further implement this provision by appropriate legislation."

My office has considered and construed this constitutional provision in a series of opinions relating to conflict of interest involving state officers.

It has been ruled that state officers are prohibited from having a direct or indirect interest in a contract with the state which creates a material, pecuniary or beneficial interest in the state officer in such contract. O.A.G. 1965-66, p. 216.

A state officer who simultaneously served as an officer or director of a private organization doing business with the state was found to be in substantial conflict of interest contrary to Article IV, Section 10 of the Michigan Constitution, in O.A.G. 4587, September 26, 1967.

Under Article IV, Section 10 of the Michigan Constitution of 1963, *supra*, a state officer was precluded from having an indirect interest in any contract with the state, and the nature of the indirect interest was considered and defined. O.A.G. 4646, June 18, 1968.

To restate these opinions of the Attorney General, a state officer violates the conflict of interest section of the Michigan Constitution when he has an interest in any contract with the state which involves a material, financial or pecuniary benefit to him. The constitution prohibits either a direct or indirect interest in any contract with the state. There is a substantial conflict of interest where a state officer is an officer or director of a private corporation which does business with the state. I will now address your questions.

1. Whether persons employed by Michigan institutions of higher education granting baccalaureate degrees may simultaneously serve as members of the State Board of Education in light of the constitutional

power of the State Board of Education to plan and coordinate for all public higher education and to advise the legislature as to the financial requirements therefor?

The people have created the office of member of the State Board of Education as a constitutional office through Article VIII, Section 3 of the Michigan Constitution of 1963. Thus there is no question that such an office is a state office.

As state officers, persons who occupy the office of member of the State Board of Education are subject to the common law doctrine of incompatibility if they should simultaneously occupy another public office or employment which is incompatible with their state office.

It is also abundantly clear that the members of the State Board of Education are subject to the mandate of the people found in Article IV, Section 10 of the Michigan Constitution of 1963, *supra*, in that they may not be interested directly or indirectly in any contract with the state which shall cause a substantial conflict of interest.

Since this question specifically refers to persons *employed* by Michigan institutions of higher education granting baccalaureate degrees simultaneously serving as members of the State Board of Education, we need concern ourselves here only with persons who are employed by and do not occupy any state offices at Michigan institutions of higher education.

We understand that your question relates to persons that are employed as: a professor and head of the department; a professor; and a part time lecturer by various Michigan institutions of higher education granting baccalaureate degrees.

Prior to the time that the first members of the State Board of Education were elected under the Michigan Constitution of 1963, the Attorney General rendered Opinion No. 4309, O.A.G. 1963-64, p. 459, *supra*, holding that there is no incompatibility between the office of member of the State Board of Education and a position of service on the instructional or administrative staff of a state college or university which confers baccalaureate degrees. This opinion cited Article VIII, Section 3 of the Michigan Constitution of 1963, which provides as follows:

"Leadership and general supervision over all public education, including adult education and instructional programs in state institutions, except as to institutions of higher education granting baccalaureate degrees, is vested in a state board of education. It shall serve as the general planning and coordinating body for all public education, including higher education, and shall advise the legislature as to the financial requirements in connection therewith.

* * *

"The power of the boards of institutions of higher education provided in this constitution to supervise their respective institutions and control and direct the expenditure of the institutions' funds shall not be limited by this section."

The boards of institutions of higher education referred to in Article VIII, Section 3 are set forth in Article VIII, Section 5 as they apply respectively to governing bodies of the University of Michigan, Michigan

State University and Wayne State University and to governing bodies of the other institutions of higher education established by law having authority to grant baccalaureate degrees recognized in Article VIII, Section 6 of the Michigan Constitution of 1963. It is noted that institutions of higher education as set forth in Article VIII, Section 5 and all presently existing institutions as recognized in Article VIII, Section 6 are all institutions of higher education granting baccalaureate degrees.

It is, of course, true that in Article VIII, Section 3 of the Michigan Constitution, *supra*, the people have conferred express power upon the State Board of Education to serve as the general planning and coordinating body for all public education, including higher education, and to advise the legislature as to the financial requirements in connection therewith. From this I conclude that the State Board of Education has been granted broad powers by the people for the systematic development of higher education with power to regulate and combine in harmonious design. Included in such grant of power is authority to determine the location of colleges and universities and the addition of new departments to existing colleges and university, both on the undergraduate and graduate levels. In this grant of authority is also the power to recommend the establishment of a new college or university. See the letter opinion addressed to State Senator Edward J. Robinson, dated October 5, 1965.

It is equally clear that the constitution confers express authority upon the State Board of Education to make recommendations to the legislature as to financial requirements concerning the general planning and coordinating of all public education, including higher education.

However, it is also clear that Article VIII, Section 3 does not limit the boards of institutions of higher education granting baccalaureate degrees from supervising their respective institutions and controlling and directing expenditure of institutional funds. A plain reading of Article VIII, Section 3 requires the conclusion that the State Board of Education cannot supervise or control the duties of any of the employees of Michigan institutions of higher education granting baccalaureate degrees.

Nor is it tenable to contend that the public position of employee of a Michigan institution of higher education granting baccalaureate degrees is subordinate to the office of member of the State Board of Education. Nor are the functions of the public employment and the public office in question inherently inconsistent and repugnant.

Whether such a public employment and public office should be simultaneously held by the same person is a question left to the good judgment of the electorate. We concern ourselves here only with the law.

Therefore, it must be concluded, based upon a study of the controlling provisions of the Michigan Constitution of 1963, that there is no incompatibility between the position of employee of a Michigan institution of higher education granting baccalaureate degrees and the public office of member of the State Board of Education. It is my opinion that persons employed by Michigan institutions of higher education granting baccalaureate degrees may simultaneously serve as members of the State Board of Education.

2. Whether a person may serve as a member of another state board licensing a profession and also serve as a member of the State Board of Education having constitutional authority to approve schools for training in such professions?

Since your question is probably related to service as a member of the State Board of Examiners in Optometry, this opinion will, as an example, address itself to service upon such board.

Act 71, P.A. 1909, as amended, being C.L.S. 1961 § 338.251 et seq.; M.S.A. 1956 Rev. Vol. § 14.641 et seq., provides for the examination, regulation, licensing and registration of optometrists practicing optometry. Section 1 of the act, supra, creates a state board of examiners in optometry, composed of five persons appointed by the Governor with the advice and consent of the Senate. Some of the powers of the board are enumerated in this section, and the board is specifically authorized thereunder to make rules and regulations governing the practice of optometry, and such other rules as may be necessary to carry out the provisions of the act.

Section 3 of the act, supra, specifies that a person seeking licensure must be a graduate of an optometric school or college rated as Class A or Class B by the International Association of Boards of Examiners in Optometry, teaching optometry and giving a course of at least two years of six months each, and the State Board of Examiners is authorized by this part of the statute to fix the number of hours of actual clinical instruction and recitation necessary to constitute a year's attendance course at an optometric school or college.

These sections of the statute providing for the regulation and licensing of optometrists were construed by the Michigan Supreme Court in *Coffman v. State Board of Examiners in Optometry*, 331 Mich. 582 (1951), that the board was lawfully authorized to set up higher standards for professional schools than the minimum standards set forth by the legislature in the statute creating the board. The Court further held that the legislature could not delegate to a nongovernmental agency the power to approve schools teaching optometry, and upheld a rule of the board requiring that applicants be graduates in optometry of a university, school or college approved by the board giving a course of at least four years duration.

Thus, for example, if a public college or university were to seek to establish a school or college teaching optometry, prior approval of the State Board of Education would be required. See letter opinion of the Attorney General addressed to Senator Edward Robinson, supra.

Section 171 of Act 327, P.A. 1931, as amended, being C.L. 1948 § 450.1 et seq.; M.S.A. 1963 Rev. Vol. § 21.1 et seq., provides that the word "college" or "university" in the name of any group, organization or association hereafter formed in this state is limited to educational corporations complying with the requirements set forth in the statute. This statute specifies that, before an educational corporation is authorized to file its articles of incorporation, it must present a written statement from the State Board of Education that its proposed housing space and administration facilities are adequate, its proposed educational program is adequate for the instruction proposed and at least ½ of its capital as defined in statute has been paid or reduced to possession.

Relative to the capital requirements set forth in Section 171, consideration must be given to Section 172 of Act 327, P.A. 1931, being C.L.S. 1961 § 450.172; M.S.A. 1963 Rev. Vol. § 21.173, which specifies the type of college or schools that can be conducted, depending on the amount of capital of the educational corporation.

The State Board of Education is authorized, pursuant to the provisions of Section 1 of Act 142, P.A. 1964, being M.S.A. 1968 Rev. Vol. § 15.1110(1), to approve educational programs leading to diplomas, certificates, or degrees based on two or more years of education beyond high school or its equivalent, in terms of minimum standards which the board may establish with regards to: housing space and administration facilities; educational programs; laboratory, library and teaching facilities; and instructional staff. It is the clear purpose of Act 142, P.A. 1964, supra, to provide for state regulation of educational institutions which purport to offer degrees, diplomas, or certificates based on two or more years of education beyond high school that are not incorporated as educational corporations.

Should such schools, colleges or universities be proposed for the first time, either as new departments of established Michigan colleges or universities or as incorporated educational corporations or unincorporated institutions, the State Board of Education has authority to give its approval and set forth minimum standards as provided by law, as the case may be. At the same time, such school, college or university would be subject to approval by the State Board of Examiners in Optometry before its graduates could be licensed in accordance with the provisions of Act 71, P.A. 1909, supra.

I find no conflict in the exercise of authority by members of the State Board of Examiners in Optometry in approving universities, schools or colleges of optometry and the State Board of Education in giving its approval before such institutions may be operated in the state of Michigan. Both boards are interested in the proper education of persons seeking to practice optometry in the state of Michigan.

The Michigan Supreme Court has held in *Coffman*, supra, that the State Board of Examiners in Optometry has authority to set standards, within reason, higher than the regulatory standards set by statute. Should at some future time a school, college or university be established or created to teach courses in optometry, we cannot assume that there would be any conflict in regards to approval by either the State Board of Examiners in Optometry or by the State Board of Education. The education of persons seeking to practice optometry would be a common goal shared by both boards, so that a person serving on both boards would not be holding incompatible offices.

The same reasoning would apply to membership on all other licensing boards and, therefore, it is my opinion that a person serving as a member of any state professional licensing board may also serve as a member of the State Board of Education.

3. May a member of the State Board of Education have any contractual or otherwise financial relationship with any local school district under its jurisdiction?

It has held herein that the office of member of the State Board of Education is a state office created by the people in Article VIII, Section 3 of the Michigan Constitution. Persons occupying such office are subject to the prohibition contained in Article IV, Section 10 of the Michigan Constitution of 1963. Thus no member of the State Board of Education may have any interest, direct or indirect, in any contract with the state which shall cause a substantial conflict of interest.

School districts are state agencies created by the state for educational purposes. *Board of Education of the City of Detroit v. Superintendent of Public Instruction*, 319 Mich. 436 (1947); *School District of City of Lansing v. State Board of Education*, 367 Mich. 591 (1962).

Ruling was made in O.A.G. 1965-66, p. 216, supra, that a state educational officer was prohibited by Article IV, Section 10 of the Michigan Constitution from having any direct or indirect interest, material, pecuniary or beneficial, in a contract with the state. This holding is equally applicable to agencies of the state.

While your question is somewhat ambiguous as to the nature of "otherwise financial relationship," giving recognition to the rule that not all contracts are required by law to be in writing, it must be concluded that Article IV, Section 10 of the Michigan Constitution bars a member of the State Board of Education from having any material, financial or pecuniary interest, direct or indirect, in any contract with a school district in the state of Michigan.

4. Whether a person's principal employment with a private institution of higher education granting baccalaureate degrees is in conflict with his serving as a member of the State Board of Education when such service as a Board member requires approval of programs offered at such institution, rules and regulations promulgated under authority of Section 6, P.A. 313 of 1966, and the planning of future public institutions of higher education?

Your question relates to a person employed as a professor by a private institution of higher education granting baccalaureate degrees, incorporated in the year 1915.

At the outset it is clear that the doctrine of incompatibility between public offices or public positions is not applicable, since your question relates to private employment.

By constitutional grant found in Article VIII, Section 3, supra, the people have empowered the State Board of Education to have general supervision over all public education, except as to institutions of higher education granting baccalaureate degrees. In addition the legislature has imposed various statutory duties upon the State Board of Education. Among such duties is an area of responsibility over private institutions of higher education granting baccalaureate degrees. In answer to your second question, the role of the State Board of Education over such private institutions was considered.

The Attorney General has ruled in Opinion No. 14341, dated February 1, 1940, that Sections 171, 172 and 173 of Act 327, P.A. 1931, supra, apply only to educational corporations formed after the effective date of

Act 162, P.A. 1939. It is noted that Act 162, P.A. 1939, amended Sections 171, 172, 173 and 177 of the General Corporation Act, being Act 327, P.A. 1931, supra. The Attorney General held that Section 177 applies to all educational corporations.

As so amended, Section 177 of Act 327, P.A. 1931, being C.L. 1948 § 450.177; M.S.A. 1963 Rev. Vol. § 21.178, imposes a duty upon the State Board of Education to visit and inspect in person or through visitors or inspectors appointed by them, at least once every three years, each educational corporation, and to ascertain its condition, management, instruction and practices. Upon evidence that the educational corporation is not complying with the provisions of the act, notice is required to be given to remedy the defects and, upon failure to do so within a reasonable time fixed in the notice, proceedings may be instituted at law for the dissolution of such corporation.

Under the ruling of the Attorney General, private institutions granting baccalaureate degrees are subject to visitation and inspection by the State Board of Education or visitors or inspectors appointed by them, and to other provisions of this particular statute.

There is no basis to assume that the person occupying the office of member of the State Board of Education will not fairly discharge his duties under Section 177 of Act 327, P.A. 1931, as last amended by Act 162, P.A. 1939, supra, because he is employed by a private institution of higher education granting baccalaureate degrees.

Your reference to Section 6 of Act 313, P.A. 1966, being M.S.A. 1968 Rev. Vol. § 15.2097(86) M.C.L.A. § 390.996, has no application to your question, since it confers statutory authority upon the Higher Education Assistance Authority, as a separate state agency, to prescribe rules and regulations to carry out the provisions of the act awarding tuition grants to full-time resident students enrolled in private, nonprofit institutions of higher education.

Although the Higher Education Assistance Authority has been transferred to the State Board of Education by a type I transfer, pursuant to Section 308 of Act 380, P.A. 1965, being M.S.A. 1968 Cum. Supp. § 3.29(308), M.C.L.A. § 16.408 and the State Board of Education is the head of the Department of Education as set forth in Section 301 of Act 380, P.A. 1965, being M.S.A. 1968 Cum. Supp. § 3.29(301), M.C.L.A. § 16.401 under Section 3A of Act 380, P.A. 1965, being M.S.A. 1968 Cum. Supp. § 3.29(3), M.C.L.A. § 16.103, the rule making power of a board granted a type I transfer is to be exercised independently of the head of the department. See O.A.G. 1965-66, p. 209, for an exposition of the nature of a type I transfer under the Executive Organization Act of 1965. It must follow that the rule-making power of the Higher Education Assistance Authority is exercised independently of the State Board of Education. Moreover, it should be noted that the act makes grants to students and not to institutions of higher education.

Finally your question makes reference to the power of the State Board of Education to plan future public institutions of higher education. I find no conflict between the employment with a private institution of higher education granting baccalaureate degrees and the exercise of authority and

duty to plan future public institutions of higher education. In fact, it may well be that such a person could bring extra insights into the planning of future public institutions of higher education based upon his own experiences as an educator in a private institution of higher learning.

Therefore it is my opinion that there is no conflict between a person's principal employment with such a private institution of higher learning and service as a member of the State Board of Education.

5. Whether a person employed as legal counsel for sectarian institutions may serve on the State Board of Education, which has the authority to make rules and regulations to assist such schools and colleges pursuant to such rule-making powers granted under P.A. 343 of 1965 and P.A. 313 of 1966?

Your question concerns a person who has and is performing legal services for a sectarian institution in two areas: labor negotiations with its social services and youth division of charities employees and relative to a low cost housing project proposed to be constructed with proceeds of a federal grant under a federal law.

The controlling principles of incompatibility between public offices or public employments have been expounded in response to your first question and need not be repeated here. They do not apply to a public office and a private employment.

In response to the fourth question, it was demonstrated that the State Board of Education has no supervisory authority over rules and regulations promulgated by the Higher Educational Assistance Authority under Section 6 of Act 313, P.A. 1966, *supra*. Further, the act makes grants to students.

Act 343, P.A. 1965, *supra*, amended Act 269, P.A. 1955, to add a new Section 622 thereto, being M.S.A. 1968 Rev. Vol. § 15.3622, M.C.L.A. § 340.622, to require that whenever a Board of Education of a school district provides any extra services to children in a public school, it should also provide them to children attending nonpublic schools. The services shall be provided in accordance with the rules and regulations promulgated by the State Board of Education.

While the State Board of Education is given rule-making authority for the provision of such services, I note that the statute requires services to be provided on an equal basis to school children, regardless of the school of attendance. I note further that the State Board of Education approved rules and regulations for the implementation of Act 343, P.A. 1965, *supra*, without dissenting vote. The rules have not been amended.

Therefore, it is my opinion that a person who is employed as legal counsel for a sectarian institution may serve on the State Board of Education.

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