Incompatible Offices
20 MRSA 51
5 MRSA 14

Board

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May 25, 1978

Honorable Edith Beaulieu
13 Sheridan Street
Portland, Maine 04101

Dear Representative Beaulieu:

This responds to your opinion request of May 4, 1978.

FACTS:

Governor James B. Longley has nominated Mary Adams of Garland, Maine, to serve on the State Board of Education. Mrs. Adams serves on the Board of Directors of School Administrative District No. 46.

QUESTION:

Is it compatible for an individual to serve on the State Board of Education and on a School Administrative District's Board of Directors?

ANSWER:

The respective duties of the offices of members of the State Board of Education and member of a School Administrative District's Board of Directors are such that they create an incompatibility between the two offices. Therefore, if a member of the District Board accepts an appointment to the State Board, the former position would be considered vacated by the acceptance of the latter position. However, the incompatibility creates no bar to consideration or confirmation of the nominee to the State Board of Education.

DISCUSSION:

The State Board of Education is created by 20 M.R.S.A. § 51 which states that the membership of the State Board of Education "shall be broadly representative of the public. No person who earns a substantial portion of his income as a teacher or as an administrator in an educational institution, other than as a college

president, shall be eligible for appointment or service under this section." There does not appear to be any statutory prohibition which would prohibit an individual from serving on both the State Board of Education and on a SAD's Board of Directors. Neither does there appear to be a constitutional prohibition against an individual serving in that dual capacity.

The fact that there is no statutory or constitutional prohibition does not, however, resolve the issue. Offices may be incompatible as a matter of common law. Since your question involves possible conflicting duties of two public offices, the appropriate test is based on the common law doctrine of incompatibility of offices, rather than conflict of interests. Opinion of the Justices, 330 A.2d 912 (Me., 1975). This common law doctrine is one of great antiquity and often has been recognized in Maine, as well as other jurisdictions. Howard v. Harrington, 114 Me. 443 (1916).*

Before turning to the specific offices involved in the present question, it would be helpful to review generally the state of the law in this area. Most courts have chosen to examine "incompatibility" on a case-by-case basis since the duties of each specific office will differ. However, general standards relating to the question are articulated in the Howard case cited above, as follows:

> "'Two offices are incompatible when the holder cannot in every instance discharge the duties of each. The acceptance of the second office, therefore, vacates the first.' The King v. Tizzard, 9 B. & C., 418. This language is cited with approval by this court in Stubbs v. Lee, supra. 'Incompatibility must be such as arises from the nature of the duties, in view of the relation of the two offices to each other.' Bryan v. Cattell, 15 Iowa, 535. 'Incompatibility arises where 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.' Abry v. Gray, 58 Kan., 148. 'Incompatibility between two offices exists when there is an inconsistency in the functions of the two.' People, ex rel. Ryan v. Greene, 58 N.Y., 295.

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* In reviewing this question we have also considered whether the common law doctrine may have been abrogated with regard to the offices in question by specific legislation. Although it might be argued that members of the State Board are possibly "state employees" whose rights to participate in nonpartisan local activities are protected by 5 M.R.S.A. § 14, we do not find this argument persuasive. There is no indication whatsoever either in the wording of § 14 or its legislative history to indicate a legislative intent to abrogate the doctrine vis-a-vis all state officers and employees. Nor did we find any other indication of such intent in other legislative enactments.

> 'The functions of the two must be inconsistent, as where an antagonism would result in the attempt by one person to discharge the duties of both offices.' Kenney v. Georgen, 36 Minn., 190. 'The test of incompatibility is the character and relation of the offices, as where the function of the two offices are inherently inconsistent and repugnant.' State v. Goff, 15 R.I., 505. 'The true test is whether the two offices are incompatible in their natures, in the rights, duties or obligations connected with or flowing out of them.' State ex rel. Clawson v. Thompson, 20 N.J. Law, 689. The foregoing cases may also be cited in support of the doctrine that acceptances of the latter of two incompatible offices vacates the former. See also Cotton v. Phillips, 56 N.H., 220; People v. Carrigan, 2 Hill, 93; Van Orsdale v. Hazard, 3 Hill, 243; Magie v. Stoddard, 25 Conn., 565; 3 Com. Dig. Tit. Officer (K. 5.) Mechem on Public Officers, sect. 420. An office holder is not at common law ineligible to appointment or election to another and incompatible office, but the acceptance of the latter vacates the former." 114 Me. 446-7.

Certain other general principles can be gleaned from e sive judicial comment on the incompatibility doctrine. First, t ctrine applies only to consideration of the duties of the offices, rather than any attributes of the incumbent.

> "[The doctrine's] applicability does not turn upon the integrity of the person concerned or his individual capacity to achieve impartiality, for inquiries of that kind would be too subtle to be rewarding. The doctrine applies inexorably if the offices come within it, no matter how worthy the officer's purpose or extraordinary his talent." Marini v. Holster, 209 A.2d 349, 352 (N.J., 1965), quoting from Jones v. MacDonald, 162 A.2d 817 (N.J., 1960).

Second, unlike the common remedy for a conflict of interest, there is no latitude under the doctrine of incompatibility for the incumbent to avoid the problem by abstention from participating on issues where a conflict is present.

> "It is no answer to say that the conflict in duties. . . may never in fact arise. It is enough that it may in the regular operation of the statutory plan. . . Nor is it an answer to say that if a conflict should arise, the incumbent may omit to perform one of the incompatible roles. The doctrine was designed to

> avoid the necessity for that choice." Jones v. MacDonald, supra.*

Third, though the mere possibility of a conflict of duties will invoke the doctrine, the possibility must be found within the regular operation of the statutory plan, rather than from extraneous duties voluntarily accepted. Brown v. Healey, 192 A.2d 589 (N.J., 1963).

One final example of case law on incompatibility which is particularly on point is State v. Wolven, 191 N.E.2d 723 (Ohio, 1963). In Wolven, the offices in question were on a local school district board and a county board of education. The court checked to see whether under the statutes one office was subordinate to the other or subject in some way to the other's supervision or control. The court also stated:

> "One person may not hold two public offices where the duties of one may be so administered that favoritism and preference may be accorded the other and result in the accomplishment of purposes and duties of the second position which otherwise could not be effected." 191 N.E.2d at 725.

On this basis, the Ohio Court found the offices to be incompatible.

It is necessary at this point to review the specific statutory plan concerning the two positions in question in order to apply the general principles noted above. There follows a list of duties of the State Board of Education which have impact upon individual local districts:

1. Pursuant to 20 M.R.S.A. § 6.3 the State Board makes the determination as to whether there are reasonable grounds to believe that a school administrative district unit is not in compliance with the reporting requirements prescribed under Title 20;

2. Pursuant to 20 M.R.S.A. § 51.3 the State Board acts upon applications for additions to and dissolution of school administrative districts, adjusts subsidy to an administrative unit when the expenditures for education show evidence of manipulation to gain an unfair advantage or are adjudged excessive, and grants permission for administrative units to enter into an agreement for cooperative educational purposes;

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* See also: State ex rel. Metcalf v. Goff, 9 A. 226 (R.I., 1887) cited in Howard, supra; and Lilly v. Jones, 148 A. 434 (Md., 1930).

3. Pursuant to 20 M.R.S.A. § 2356-A the State Board has the approval authority over the operation of vocational centers and satellite programs.

4. Pursuant to 20 M.R.S.A. § 3131 the State Board of Education is involved in the appeal process regarding the placement of an exceptional child.

5. Pursuant to 20 M.R.S.A. § 3471.2 the State Board approves all school construction projects, thereby allocating available state funds for this purpose.

6. Pursuant to 20 M.R.S.A. § 4750.10 the State Board makes the final decision regarding the computation of State allocation for school administrative units which have appealed from the amount computed by the Department of Educational and Cultural Services.

In each of the functions listed above, the State Board may exercise in one way or another supervision or control over local district boards of directors. For this reason, and in light of the legal precedent noted above, we are compelled to conclude that the offices are incompatible.

Since it is our opinion that these offices are incompatible, it follows that if the Governor's nominee is confirmed and she accepts the appointment, her previous office on the local district board of directors will be considered vacated. Howard, supra.

This opinion should in no way be considered a bar to Mrs. Adams' consideration or confirmation. There is no legal impediment to her being confirmed to the State Board of Education. The only impact of the incompatiblity is with respect to the office of director of a School Administrative District.

It should be noted in conclusion that this opinion should not in any way be considered as reflecting upon the integrity or talents of the Governor's nominee, since, as discussed above, the question turns entirely upon the duties of the two offices. Nor should this opinion be considered as an opinion of this office on any offices other than those specifically considered here. Each case must be considered individually.

Sincerely,

Joseph E. Brennan

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Attorney General

JEB/ec
cc: Honorable James B. Longley
Honorable Bennett D. Katz
Honorable Arthur P. Lynch
Mrs. Mary Adams