

# MAINE STATE LEGISLATURE

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April 18, 1980

Honorable James A. McBreairty  
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Dear Senator McBreairty:

This is in response to your request for an opinion as to whether a person may serve on the school committee of a municipality which is a member of a school union and be employed as a teacher in another municipality which is also a member of the same school union.

FACTS:

School Union #122 acts as the administrative body for the four communities of New Sweden, Stockholm, Westmanland, and Woodland. Each of these communities has its own three-member school committee. The several members of these four school committees make up a 12-member joint committee responsible for the operation of School Union #122. Two teachers employed by the Woodland School System serve on school committees in New Sweden and Stockholm and by virtue of their school committee positions, also are ex officio members of the joint committee in charge of School Union #122.

QUESTION:

Whether a person who lives in a municipality within a school union is prohibited from serving on that municipality's school committee because he is employed as a teacher in another municipality which is also part of the same school union?

ANSWER:

Under the common law doctrines of "incompatibility of offices" and "conflict of interests," it is improper for a teacher who is employed by a municipality within a school union to serve on the school committee of another municipality within that school union.

ANALYSIS:

A. Duties of school committee members and of superintendents.

The Legislature has mandated that the Commissioner of Educational and Cultural Services group administrative units within the State so that they will be governed by supervisory unions which shall include not less than 35 nor more than 75 teachers. 20 M.R.S.A. § 151, sub-§ 2.<sup>1/</sup> Also, in accordance with Maine Constitution, Article VIII, the Legislature has directed "every town, not included in a School Administrative District, [to] choose by ballot at its annual meeting a superintending school committee of 3 to hold office as provided in section 472." 20 M.R.S.A. § 471. Pursuant to the provisions of 20 M.R.S.A. § 473 the school committee is responsible for the management of the schools, for providing a general course of instruction, and for the overall operation of the public schools in the town. 20 M.R.S.A. § 473. It appears that School Union #122 was organized in accordance with the provisions of 20 M.R.S.A. § 151 and the four towns of New Sweden, Stockholm, Westmanland, and Woodland are the administrative units which have been grouped to form School Union #122. The school committees of those four towns thereby form the joint committee responsible for the operation of School Union #122 and "held to be the agents (sic) of each unit comprising the union." 20 M.R.S.A. § 153.

A joint committee of a school union is required to meet annually in December to choose a chairman and a secretary. Among its duties, the law provides that the joint committee

"shall make provisions for an office for the superintendent of schools, office assistants, supplies, utilities and other office expenses and shall apportion the cost among the several administrative units in proportion to the service to be performed. The joint committee shall determine the relative amount of service to be performed by the superintendent in each unit, including the minimum number of visits to be made each term to each school, fix his salary, apportion the amounts thereof to be paid by the several units, which amounts shall be certified to the treasurers of the units, respectively, and to the Commissioner, together with the amounts apportioned to each unit, provided the amount so certified shall be in proportion to the amount of service performed

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<sup>1/</sup> The term administrative unit has been defined to mean "all municipal or quasi-municipal corporations responsible for operating or constructing public schools." 20 M.R.S.A. § 3452.1.



in the several units. The joint committee, at the time of its organization or as soon thereafter as possible, and whenever a vacancy shall occur, shall, subject to the conditions provided, choose a superintendent of schools for a term of not more than 5 years . . . . Said committee, by a majority vote of its full membership, after due notice and investigation, may, for cause, discharge a superintendent of schools before the expiration of the term for which he was elected, and after such discharge the salary of said superintendent shall cease. . . . An administrative unit within a supervisory union may be authorized by the joint committee to serve as the contractual employer of teachers who provide services to more than one town in the supervisory union. Employment shall be subject to sections 161 and 473 and Title 26, Chapter 9-A." (Emphasis supplied). 20 M.R.S.A. § 153.

The superintendent of schools' responsibilities and duties are primarily found in 20 M.R.S.A. § 161. As set forth in sub-§ 1 of § 161, "[h]e shall be, ex officio, secretary of the superintending school committee or board of school directors and of any school building committee chosen by the administrative unit and shall perform such duties not enumerated as said committees or board shall direct." These duties are obviously subject to the provisions of 20 M.R.S.A. § 153 which authorizes the joint committee to apportion the superintendent's services to the member administrative units. Pursuant to sub-§ 5 of § 161 the superintendent "shall nominate all teachers, subject to such regulations governing salaries and the qualifications of teachers as the school committee or school directors shall make, and upon the approval of nominations, by said committee or directors, he may employ teachers so nominated and approved for such terms as he may deem proper, subject to the approval of the school committee or school directors." (Emphasis supplied). The superintendent is further directed pursuant to sub-§ 6 of § 161 to "direct and supervise the work of all teachers. . . ." (Emphasis supplied). The law also provides that he "shall enforce or cause to be enforced all regulations of the school committee or school directors." 20 M.R.S.A. § 161, sub-§ 9. Finally, pursuant to sub-§ 3 of § 161 a superintendent "shall examine the schools and inquire into the regulations and the discipline thereof and the proficiency of the pupils; for which purposes he shall visit each school at least the minimum number of times each term which the joint committee may designate." (Emphasis supplied).

Under the "Municipal Public Employees Labor Relations Act" (26 M.R.S.A. §§ 961, et. seq.), the term public employer is defined to mean "any officer, board, commission, council, committee or other persons or body acting on behalf of any municipality or town or any subdivision thereof, or any school, water, sewer, or other district." 26 M.R.S.A. § 962.7. Since the term public employee means any employee of a public employer, the superintendent of School Union #122 is obligated to bargain collectively with the teachers who are employed in each of the four units which make up the Union. Specifically, 26 M.R.S.A. § 965.1 states that "it shall be the obligation of the public employer and the bargaining agent to bargain collectively." The term bargaining agent is defined to mean "any lawful organization, association or individual representative of such organization or association which has as its primary purpose the representation of employees in their employment relations with employers, and which has been determined by the public employer or by the executive director of the board to be the choice of the majority of the unit as a representative." 26 M.R.S.A. § 962.2.

B. Incompatibility of Offices.

Although the Legislature has prohibited any member of a school committee or the member's spouse from being "employed as a full-time employee in any public school in said town or contract high school or academy located within a supervisory union of which he is a member of the joint committee," it has not addressed the situation with which School Union #122 is faced. 20 M.R.S.A. § 472.<sup>2/</sup> Therefore, it is necessary to examine the common law of conflict of interests and incompatibility of offices to determine whether the teachers in question may serve on their respective school committees.

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2/ Under § 472, if the teachers in question were full-time employees in a contract high school or academy located within School Union #122, but not necessarily within the respective towns of New Sweden and Stockholm, they would be statutorily prohibited from serving on the school committees, or from continuing their employment while they served on their towns' school committees.

The law of incompatibility of offices has been summarized as follows:

"[I]ncompatibility of offices exists where there is a conflict in the duties of the offices, so that the performance of the duties of the one interferes with the performance of the duties of the other. They are generally considered incompatible where such duties and functions are inherently inconsistent and repugnant, so that because of the contrariness and antagonism which would result from the attempt of one person to discharge faithfully and impartially and efficiently the duties of both offices, considerations of public policy render improper for an incumbent to retain both. . . if one office is superior to the other in some of its principal or important duties, so that the exercise of such duties may conflict, to the public detriment, with the exercise of other important duties in the subordinate office, then the offices are incompatible. It is immaterial on the question of incompatibility that the party need not and probably will not undertake to act in both offices at the same time." 63 Am. Jur.2d Public Officers and Employees, § 73.3/

Initially, it would appear that a teacher within School Union #122 could not serve on a school committee of a municipality within the Union because of the common law doctrine of incompatibility of offices. However, this doctrine is only applicable when "each of the positions under assessment for 'incompatibility' is 'a public office.'" Opinion of the Justices, 330 A.2d 912, 916 (Me. 1975).

There is no Maine law as to whether a teacher is considered to hold a public office by virtue of his position as a teacher. However, it has been noted that "various positions. . . have been held not to be public offices, as, for example, . . . school teacher." 63 Am. Jur.2d Public Officers and Employees, § 14. In particular, in State v. Small, 145 N.E.2d 200, 202 (Ohio, 1956) the court held that although "a teacher is under

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3/ For additional discussion of this subject, see Howard v. Harrington, 114 Me. 443 (1916); Op. Att'y. Gen., May 25, 1978.

contract to perform duties under the control of the Board of Education. . . a teacher. . . is not holding office but is engaged under contract to perform public employment." The court's reasoning was that

"to constitute a public office, against the incumbent of which quo warranto will lie, it is essential that certain independent public duties, a part of the sovereignty of the State, should be appointed to it by law, to be exercised by the incumbent by virtue of his election or appointment to the office thus created and defined, and not as a mere employe (sic), only subject to the direction and control of someone else."

The opposite conclusion was reached by the Supreme Court of Wyoming in Haskins v. State Ex Rel Harrington, 516 P.2d 1171 (Wy., 1973). Noting "that a teacher is not usually considered an officer," the court nevertheless stated that

"a majority of the Court are convinced that we should not let ourselves be bound by technical definitions of the word office and while we do not say that there may not be cases in which the definition may not be important, we think that this case should not turn on that point. We therefore hold that employment as teacher and office as member of the board of trustees of the school district are incompatible within the meaning and intent of the common law rule." 516 P.2d at 1178.

Although the law is not settled in Maine as to whether a teacher's position is a public office, it is clear that if it were deemed to be such, then the doctrine of incompatibility of offices would preclude a person from being a teacher in a school union while serving on a school committee of a member town within the same union. While we are inclined to view a teacher as a public officer, at least in the context of your question, and thus to believe that the doctrine of incompatibility applies, it is unnecessary for us to finally resolve this issue. If the positions are not incompatible for the reason stated above, it would be our conclusion that a person could not serve in both capacities because of the common law principle barring conflicts of interests. We shall proceed to explain the reasoning underlying this conclusion.

C. Conflict of Interests.

Although the Legislature has enacted various statutes dealing with conflict of interests,<sup>4/</sup> none of these would appear relevant to the question you have raised. Accordingly, it is necessary to resolve the issue under common law principles as they have been interpreted by the courts.

In 1975, the Justices of the Supreme Judicial Court articulated the basic principle that a person may not accept a public office if there is a sufficient conflict of interests between the responsibilities the individual would hold in that public office and the positions he would hold outside of public office. Opinion of the Justices, 330 A.2d 912 (Me. 1975). To determine whether this same principle would hold true for the facts surrounding School Union #122, it is necessary to delineate the nature of the interest which would be established when the teacher becomes a member of the school committee and thereby a member of the joint school committee of the union. Before examining the specific interests of school committee members and teachers, however, it is important to more fully explore the public policy behind the prohibition against conflicts of interests.

In a case dealing with the validity of public contracts, the Law Court explained the nature of the fiduciary responsibility imposed upon those in positions of public trust.

"It is well established as a general rule that one acting in a fiduciary relation to others is required to exercise perfect fidelity to his trust, and the law, to prevent the neglect of such fidelity, and to guard against any temptation to serve his own interest to the prejudice of his principal's, disables him from making any contract with himself binding on his principal. The invalidity of the contract entered into in violation of this rule does not necessarily depend upon whether the fiduciary intended to obtain an advantage to himself, but rather upon whether it affords him the opportunity, and subjects him to the temptation, to obtain such advantage. The test is not whether harm to the public welfare has in fact resulted from the contract, but whether its tendency is that such harm will result." (Emphasis supplied). Lesieur v. Inhabitants of Rumford, 113 Me. 317, 320 (1915).

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<sup>4/</sup> See, e.g., 17 M.R.S.A. § 3104 and 30 M.R.S.A. § 2251.



The Court further pointed out that "the law requires perfect fidelity [of public officers] in the exercise of . . . [their power] and whatever has a tendency to prevent their exercise of such fidelity is contrary to the policy of the law and should not be recognized as lawful and enforceable through the administration of the law." 113 Me. at 321. The Court concluded by stating that "it is the policy of the state that persons, whom the law has placed in positions where they may make, or be instrumental in making, or in superintending the performance of, contracts in which others are interested, should not themselves be personally interested in such contracts." 113 Me. 322.<sup>5/</sup>

The general principles articulated by the Maine Law Court were applied by the Supreme Court of Wyoming to a fact situation closely analogous to the problem you have raised. In Haskins v. State ex. rel. Harrington, supra, the Wyoming Court held that a person could not serve simultaneously as a teacher and as a member of the board of trustees of the school district which employed him.<sup>6/</sup>

Proceeding from the premise that a public official owes his undivided loyalty to the people by whom he is elected or appointed, the court in Haskins exhaustively analyzed the possible conflicting interests between the positions of teacher and school board member. Based upon that analysis, Haskins concluded that a person serving in both of these positions could readily find his self-interest as a teacher coming into conflict with his loyalty to the public as a member of the board of education. As a result, the court held that for individuals to continue in these dual positions would deprive the citizens of the independent judgment of their elected officials whenever an issue might arise affecting their respective jobs.

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<sup>5/</sup> See also, Tuscan v. Smith, 120 Me. 36, 46 (1931) ("the question really is whether the town officer by reason of his interest is placed in a situation of temptation to serve his own personal interest to the prejudice of the interest of those for whom the law authorized and required him to act in the premises as an official.")

<sup>6/</sup> Although, as noted above, the Haskins decision was predicated upon incompatibility of offices, its reasoning applies with equal force to the doctrine of conflict of interests.

Of paramount concern to the Haskins court was the inherent problems which arise when a person in public employment serves as both the employer and employee of another public official. Since that concern is germane to the question you have posed, the court's language on the subject bears repeating.

"[I]t is inimical to the public interest for one in public employment to be both the employer and employee or the supervisor and the supervised. Subordination is the key word. After considerable research and careful consideration of the reason and basis for the rule against incompatibility, a majority of the Court are convinced that we should not let ourselves be bound by technical definitions of the word office and while we do not say that there may not be cases in which the definition may be important, we think that this case should not turn on that point. We therefore hold that employment as teacher and office as member of the board of trustees of the school district are incompatible within the meaning and intent of the common law rule." 516 P.2d at 1178.

Having set out the applicable principles of law, it is now possible to analyze the problem under consideration here in accordance with those principles. As was discussed above, a member of the school committee of one of the member towns of School Union #122 also has several duties as a member of the joint committee for School Union #122. The most important of those duties is the hiring and supervision of the superintendent of schools, along with the authorization to dismiss the superintendent. Consequently, if a teacher within Union #122 serves on the joint board, then he would be supervising the work of the superintendent. Furthermore, since the contracts between the individual administrative units and the teacher associations, which represent the teachers in collective bargaining, have to be negotiated between the individual school committees and the teacher associations, there is the possibility that the teacher may be sitting on the side of the teacher association in one town during those negotiations and sitting on the side of the superintendent and the school committee in his home town during similar negotiations.

As the employee of the joint committee, the superintendent not only has the responsibility of supervising the teacher and assigning his class load, but also plays a major role in the employment of teachers. See 20 M.R.S.A. § 161.5. Without going into every possible conflict of interest which might

exist, it is obvious that the most repugnant of those conflicts would be that the teachers serving on the school committees in the towns within School Union #122 would necessarily be supervising the superintendent who is responsible for supervising them. As was pointed out in the Haskins decision, "subordination is the key word . . . it is inimical to the public interest for one in public employment to be both the employer and the employee or the supervisor and the supervised." (Emphasis supplied)

It could be argued that pursuant to the provisions of 20 M.R.S.A. § 153 this conflict of interests could be avoided since the "school committee of any unit may authorize one of its members to act for the committee in the meetings of the joint committee." The thrust of this argument would be that by refraining from representing the unit on the joint committee, the teacher avoids the conflict of interests. However, if the teacher were to avoid sitting on the joint committee but remain a member of the school committee and remain a teacher within the union, this "would deprive the citizens of the school district of the independent judgment of a full and impartial. . . [joint committee] . . . elected to represent the entire public interest." Haskins, supra, at 1179. Since the joint committee acts as the agent for each of the towns, it is essential that each school committee be able to act in the best interest of the town it represents whenever the joint committee meets.<sup>7/</sup>

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<sup>7/</sup> Another problem with this argument is that it ignores the fact that in his capacity as a member of the school committee, the teacher would still have a major voice in selecting one of the individuals with supervisory authority over the superintendent. Thus, while this approach may make the conflict more remote, it arguably does not eliminate it.

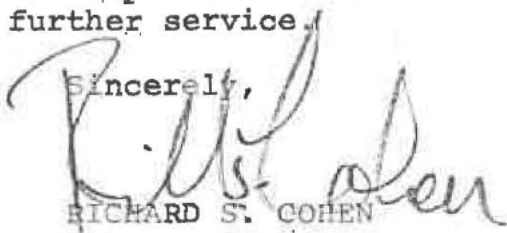


CONCLUSION:

Given the duties and powers vested in a school committee and in a joint committee of a union, it is clear that a member of a school committee within School Union #122 is a "trustee" owing the legal obligation of fidelity to promote the public interest underlying the public control of schools within the union. The very nature of the teacher's interest as an employee within School Union #122 results in a loyalty of that teacher to his employment which may be in conflict with the loyalty which the public would expect of him in his office as a member of a school committee within that union. As the Justices determined in Opinion of the Justices, supra, at 919, the above facts result in a conflict of interests and mandate the conclusion that a person may not simultaneously hold both of these positions.

I hope this information is helpful. Please feel free to contact me if I can be of any further service.

Sincerely,

  
RICHARD S. COHEN  
Attorney General

RSC/ec