

April 17, 1950

Mr. Warren L. McCarthy  
County Attorney  
Maricopa County  
Phoenix, Arizona

Attention: Fred [unclear]  
Deputy [unclear] Attorney

LAW LIBRARY  
ARIZONA ATTORNEY GENERAL

Gentlemen:

We acknowledge receipt of your letter of April 5, containing the inquiry of Mr. Coor and your answer to the same.

As we understand the question, it is this:

Is it legally possible for a person to serve as a member of a school board and at the same time be eligible for election and for service as a state representative in the Legislature?

It is our opinion that a school board member is neither disqualified from seeking the office of state legislator nor is he, upon becoming a member of the Legislature, precluded from continuing to serve as a member of the board of trustees of a school district.

Insofar as we have been able to ascertain, the applicable statutes and constitutional provisions are as follows:

Article IV, Part 2, Section 4 of the Constitution provides:

"Incompatible offices. No person holding any public office of profit or trust under the authority of the United States, or of this state, shall be a member of the legislature; provided, that appointments in the state militia and the offices of notary public, justice of the peace, United States commissioner, and postmaster of the fourth class, shall not work disqualification for membership within the meaning of this section."

Section 5 of the same Article and Part provides:

"No member of the legislature, during the term for which he shall have been elected or appointed shall be eligible to hold

any other office or be otherwise employed by the state of Arizona, or any county, or incorporated city or town thereof. This prohibition shall not extend to the office of school trustee, nor to the employment of a teacher or instructor in the public school system."

Section 8, of this Article and Part provides:

"Each house, when assembled, shall choose its own officers, judge of the election and qualification of its own members, and determine its own rules of procedure."

Section 12-110, ACA 1939 provides:

"(a) No person shall hold more than one (1) office at the same time, nor shall any incumbent of an elective office, whether holding by election or appointment, be eligible for nomination or election to any office other than the office being so held, nor shall the nomination papers of any such person be accepted for filing. This section shall not be construed to prohibit a person whose resignation from office has become effective, from qualifying as a candidate for another office during the unexpired portion of the term affected by such resignation. The resignation of any such person, duly filed in writing with the officer, board or commission having jurisdiction of the same, shall, if not accepted within ten (10) days, be deemed to have become effective. This section shall not apply to any incumbent elective office holder who shall seek reelection to the same office or to any other public office, during the final year of the term to which he shall have been so elected."

Section 12-101, ACA 1939 uses the following language:

"By the word 'office,' 'board' or 'commission,' used in law, is meant any office, board or commission of the state, or any political subdivision thereof, the salary or compensation of the incumbent or members of which is paid out of a fund raised by taxation, or by public revenue; by the words 'public institution' is meant any institution the maintenance of which is paid out of a fund raised by taxation, or

by public revenue; by the word 'officer,' or 'public officer,' unless the context otherwise requires, is meant the incumbent of any office, member of any board or commission, his deputy or assistant exercising the powers and duties of such officer other than clerks or mere employees of such officer."

We first consider the problem presented by Section 12-110, supra; that is, the question of whether or not the nomination papers of a school board member for the office of state legislator can be accepted for filing. We assume herein that the school board member has not resigned as trustee and is not serving in the final year of the term to which he has been elected.

Section 12-110, supra, is Chapter 68 of the Laws of 1949, and its title reads as follows:

"AN ACT -- RELATING TO PUBLIC OFFICERS,  
AND AMENDING ARTICLE 1, CHAPTER 12, ARIZONA  
CODE OF 1939, BY ADDING SECTION 12-110."  
(Emphasis supplied)

From a reading of the title it is apparent that the Legislature in adding Section 12-110 had in mind all of the provisions of Article 1, of Chapter 12, and it is our belief that in adopting the language they did in the title and body of Section 12-110 the Legislature intended this section to apply only to the class of officers mentioned in Section 12-101, supra. See State Board of Barber Examiners v. Walker, 67 Ariz. 156, 192 P. 2d 723 for ejusdem generis rule. Section 12-101 contemplates that the word 'office,' as used therein must carry with it a salary or compensation which is paid to the officer "out of a fund raised by taxation, or the public revenue". Trustees of a school district do not receive any "salary or compensation" and their office is not one of profit, but rather is an office of trust. It is therefore our opinion that the provisions of Section 12-110, supra, do not apply to the trustee of a school district.

We further feel that even if this section were deemed to apply to school board trustees, because of the fact that it applies to all offices of profit and is general in nature, it would necessarily give way to Sections 4 and 5, of Article 4, Part 2 of the Arizona Constitution, for the reason that they deal specifically with members of the Legislature and with school board trustees. It is a well settled rule that a specific statute will govern over a general statute. State v. Lumbermen's Indemnity Exchange, 24 Ariz. 306, 209 P. 294. This should hold true even more so when the specific enactment is a part of the Constitution.

The constitutional provisions applicable to this problem do not estop a member of a school board from seeking election to the

Legislature nor do they forfeit the office of a school trustee who becomes a member of the Legislature. At first blush, Sections 4 and 5 of Article 4, Part 2 seem contrary to each other. However, we do not believe they are, and if the rule of construction which directs that statutes are to be given a construction which will make them harmonious and consistent with each other rather than one which would tend to make them contradictory and inconsistent is applied, then reasonable and logical effect can be given both these sections and this effect can be harmonized. Gietz v. Webster, 46 Ariz. 260 at p. 267, 50 P. 2d 573; and Industrial Commission v. School Dist. No. 48, 56 Ariz. 476, 108 P. 2d 1004; and Industrial Commission v. Hartford A. & I. Co., 61 Ariz. 86, 144 P. 2d 548. There have been several Arizona cases on the question of incompatible offices. The general tenor of these cases seems to be that if the incumbent in an office seeks election to a second office which is incompatible with the first, upon his election and qualification to the second office his right to hold the first office is forfeited ipso facto. Out Supreme Court in Campbell v. Hunt, 18 Ariz. 442, said:

"The holding of one office does not render the incumbent ineligible to another; but the acceptance of a second office, when prohibited, ipso facto absolutely vacates the first office."

In McCluskey v. Hunter, 34 Ariz. 189, the Court, in dealing with the question of the appointment of a member of the Industrial Commission to the Colorado River Commission, stated:

"It is equally clear also that the effect of this acceptance is that he vacated, ipso facto, the office of Industrial Commissioner."

Article 4, Part 2, Section 4, supra, which provides that "no person holding any public office of profit or trust \* \* \* shall be a member of the Legislature," if considered alone and without regard to the next following section, would place the fact situation in question within the rule of Campbell v. Hunt and McCluskey v. Hunter, supra. However, we believe that the words "shall be a member of the Legislature" mean exactly what they say and do not mean "shall file nomination papers for election to the Legislature" or "shall seek election to the Legislature." We believe that the following statement from the Campbell v. Hunt case, supra, at page 454, would be applicable.

"Upon receiving the certificate of election and taking and filing the oath of office prescribed by law, the plaintiff unqualifiedly accepted the office he is now contending for and ipso facto he vacated the office of tax commissioner. It is well settled by an overwhelming array of authority that the holding of one office does not render the incumbent ineligible to another, but that the acceptance of the second office, when pro-

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hibited, ipso facto absolutely vacates the first office. \* \* \* " (Emphasis supplied) (See the numerous authorities therein cited)

Therefore, if John Doe is a member of a school board, he could seek election to the Legislature and be elected to the Legislature by the people, still he would continue to hold his office as trustee of the school board. However, at the instant he is sworn in and seated as a member of the Legislature (without considering the exemption contained in Section 5 of Article 4, Part 2, hereinafter discussed) he would immediately forfeit as a matter of law the office of trustee of the school board. This undoubtedly would be the result under the law if the people had not enacted at the general election on November 8, 1938 the amendment contained in Section 5 of Article 4, Part 2. Article 4, Part 2, Section 4 cannot apply until a person becomes a member of the Legislature by being sworn and seated in the Legislature. Neither can Section 5 of the same article and part apply until such time, because the mere election of a legislator by the people does not make the person elected a member of the Legislature. We do not deem it necessary to cite authority for the proposition that the Legislature is the judge of the election and qualification of its own members. This is the universal rule and is provided for expressly by the Constitution. Article 4, Part 2, Section 8, supra. The Legislature must pass on election and qualification of persons elected to be a member. No person can be a member until this is done. However, when such person does become a member of the Legislature, as indicated above, he immediately falls within the exception, in Article IV, Part 2, Section 5, which provides:

"This prohibition shall not extend to the office of school trustee, \* \* \* "

In the light of these authorities and affording the pertinent constitutional and statutory provisions the effect which we believe they were intended to receive, it is our opinion that a person may serve as school trustee and at the same time not only seek election to the Legislature but also actually serve as a member of the Legislature.

Very truly yours,

FRED O. WILSON  
Attorney General

CALVIN H. UDALL  
Assistant Attorney General

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