

Committee



DEPARTMENT OF LAW
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September 15, 1977

The Honorable Larry Bahill
Democratic Leader
Arizona House of Representatives
House Wing, State Capitol
Phoenix, Arizona 85007

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ARIZONA ATTORNEY GENERAL

RE: R77-218 - 77-180

Dear Representative Bahill:

This is in response to your letter of June 21, 1977, wherein you requested our opinion on substantially the following question:

In light of A.R.S. § 38-296, is a member of a Community College District Board, who intends to retain his or her seat on the Board, eligible to seek election to a county-wide office?

It is our opinion, based on the reasons set forth below, that A.R.S. § 38-296 does not prohibit community college district board members from qualifying as candidates for county elective offices and then, if elected, from serving concurrently in both positions, provided that the two offices are not legally incompatible.

A.R.S. § 38-296(A) provides that:

No incumbent of an elective office, whether holding by election or appointment, shall be eligible for nomination or election to any office other than the office so held, nor shall the nomination papers of such incumbent be accepted for filing. (Emphasis added.)

At first glance, this provision apparently acts as an absolute ban against dual office-holding by all elected officials of the State and its political subdivisions. However, the term "elective office" is limited by definition in A.R.S. § 38-101 which states:

In this title, unless the context otherwise requires:

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1. "Office," "board" or "commission" means 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 from a fund raised by taxation or by public revenue. (Emphasis added.)

Therefore, the provision of A.R.S. § 38-296(A), making incumbents of elective offices ineligible "for nomination or election to any office other than the office so held," applies only to offices of profit, not to offices of trust. Although A.R.S. § 11-419 provides for the compensation of elective county officers, an examination of the statutes relating to the district governing boards of community colleges reveals that the members thereof are not authorized to receive any compensation. Thus, we conclude that a community college district board member is not an "elective officer" within the meaning of A.R.S. § 38-296(A) and is consequently eligible for nomination and election to a county office.

Our conclusion is consistent with the Arizona Supreme Court's decision in Shirley v. Superior Court in and for County of Apache, 109 Ariz. 510, 513 P.2d 939 (1973), and with two prior Attorney General Opinions (Nos. 72-20-L and 59-30). In Shirley, the Court held that a member of a school board of trustees was not holding "elective office" within the meaning of A.R.S. § 38-296 because school trustees do not receive compensation from the public treasury. In refusing to hold that a school board trustee was disqualified as a candidate for election to the County Board of Supervisors, the Court indicated that the provisions of A.R.S. § 38-101(1) and § 38-296(A) do not contemplate offices merely of public service or trust, but rather extend only to offices of profit.

In addition, because school board members are not compensated, Atty.Gen.Op. No. 72-20-L held that a member of a school board was not an "elective officer" within the meaning of A.R.S. § 38-296 and was therefore not prohibited from serving on a city council. Based on the same reasoning, Atty. Gen.Op. No. 59-30 held that A.R.S. § 38-296 did not prevent a school board member from concurrently serving as a justice of the peace.

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However, with respect to dual office-holding, the Arizona Supreme Court has held that when an elected official accepts a second office, the duties and emoluments of which are in conflict or when it is physically impossible that they can be performed properly by the same person, the first office becomes ipso facto vacated because of incompatibility with the second. Perkins v. Manning, 59 Ariz. 60, 122 P.2d 857 (1942).

Therefore, in conclusion, it is our opinion that a member of a community college district board is eligible to seek election to a county-wide office, and that such a board member is not prohibited from holding both offices, unless they are deemed incompatible under the standards set forth above. It is not readily apparent to us that the duties of a county elective office would be incompatible with those of a community college district board member. However, we are not aware what elective county office is involved here, and we would require more specific information than provided us in your letter before we could resolve the issue specifically.

If you have any questions, please contact us.

Sincerely,



BRUCE E. BABBITT
Attorney General

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