



Genine
Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

Robert R. Corbin

February 12, 1980

LAW LIBRARY
ARIZONA ATTORNEY GENERAL

The Honorable Jack J. Taylor
Arizona State Senator
Capitol Complex, Senate Wing
Phoenix, Arizona 85007

Re: I80-019 (R80-004)

Dear Senator Taylor:

We are writing in response to your request for our opinion on whether a member of a county board of supervisors of a county in which a State university is located may serve simultaneously as a member of the Arizona Board of Regents.

At common law public officers were not precluded from holding more than one office unless the offices were incompatible. Because of the state of the common law, a number of states, including Arizona, have enacted statutes specifying the circumstances under which public officers are not eligible to hold more than one office at a time.

The only statute dealing specifically with the eligibility of members of a county board of supervisors to hold dual offices is A.R.S. § 11-211 which makes any person holding any other county or precinct office ineligible to hold the office of supervisor.

No statute dealing specifically with the Arizona Board of Regents addresses the question of members holding dual offices.

We therefore must analyze your question under general statutes dealing with the simultaneous holding of more than one public office and the common law doctrine of incompatibility of public offices.

The general statute on the subject is A.R.S. § 38-296 which provides, in pertinent part:

A. 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.

* * *

C. 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 the resignation, nor shall it apply to any incumbent elective officer who seeks reelection to the same office or to any other public office during the final year of the term to which he has been so elected.

Previous opinions of the Arizona Supreme Court and of the Attorney General regarding A.R.S. § 38-296 have dealt only with questions involving two elective offices.^{1/} No previous opinion has considered whether A.R.S. § 38-296 applies to an incumbent of an elective office who seeks to serve simultaneously in an appointive office. A close reading of A.R.S. § 38-296 has convinced us, however, that it is limited to eligibility to hold more than one elective office at any time. The statute specifically addresses nomination or election to an office, the filing of nomination papers, and qualifying as a candidate, all of which appear to us to be unique to the holding of elective offices. If we were to conclude that A.R.S. § 38-296 made an incumbent of an elective office ineligible to hold an appointive office, we would have to conclude that the incumbent of the elective office was ineligible for "nomination," but not for "appointment," to any appointive office because the language of A.R.S. § 38-296 would address only "nomination" to the appointive office. Nominations to appointive offices are made only when an appointment is subject to the consent of someone other than the appointing authority. For example, a number of gubernatorial appointments are subject to the consent of the Senate pursuant to A.R.S. § 38-211, and, therefore, nomination to the

1. Moore v. Bolin, 70 Ariz. 354, 220 P.2d 850 (1950); Whitney v. Bolin, 85 Ariz. 44, 330 P.2d 1003 (1959); Shirley v. Superior Court, 109 Ariz. 510, 513 P.2d 939 (1973); Atty.Gen.Op. Nos. 68-10, 72-20-L, 177-180, 178-37, 178-121, 178-137.

appointive office must precede the appointment. On the other hand, the filling of appointive offices not subject to consent by another is accomplished by direct appointment by the appointing authority without any nomination. We find nothing in A.R.S. § 38-296 to indicate that the Legislature intended an incumbent of an elective office to be ineligible to hold an appointive office only when the filling of the appointive office is subject to a prior nomination and consent procedure but not otherwise.

We conclude, therefore, that no statute makes a county supervisor ineligible to serve as a member of the Board of Regents while serving as a supervisor.

Under the common law doctrine of incompatibility of public offices, a public officer who accepts a second office which is incompatible with the first office automatically vacates the first office. Perkins v. Manning, 59 Ariz. 60, 122 P.2d 857 (1942). In Perkins, the court said:

The doctrine of incompatibility of offices depends upon the public policy of the state; that offices are incompatible not only when the duties thereof are in conflict, but when it is physically impossible that they may be performed properly by the same person.

59 Ariz. at 70.

A further explanation of the doctrine of incompatibility appears in 3 McQuillin, Municipal Corporations, § 12.67 at 298 (3rd ed.rev. 1963):

While incompatibility has been described as physical impossibility to perform the duties of both offices, it is not simply a physical impossibility to discharge the duties of both offices at the same time, it is an inconsistency in the functions of the two offices, as where one is subordinate to the other, or where a contrariety and antagonism would result in the attempt by one person to discharge faithfully and impartially the duties of both. Two offices are said to be incompatible when the holder cannot in every instance discharge the duties of each. Incompatibility arises, therefore, from the nature of the duties of the offices, when

there is an inconsistency in the functions of the two, where the functions of the two are inherently inconsistent or repugnant, as where antagonism would result in the attempt by one person to discharge the duties of both offices, or 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. The true test is whether the two offices are incompatible in their natures, in the rights, duties or obligations connected with or flowing from them.

Not pertinent to the applicability of the doctrine of incompatibility is the distinction between a local office and a state one. Neither is it pertinent to say that the conflict in duties may never 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.

There is no yardstick by which the rule prohibiting the holding of incompatible offices may be applied; each case must be judged on its own particular facts.

[Footnotes omitted.]

We have reviewed the duties of the county boards of supervisors as they appear generally in A.R.S. § 11-251 and the duties of the Arizona Board of Regents as they appear generally in Title 15, Arizona Revised Statutes. From our review it appears to us that the duties of a county supervisor are not inherently inconsistent with the duties imposed upon the Arizona Board of Regents.^{2/} We have not, however, undertaken such a thorough investigation and analysis of the duties of both offices that we can say unqualifiedly a conflict could never arise. If you are concerned about whether a conflict

2. See also Ariz. Atty.Gen.Op. 76-214 (R76-294).

The Honorable Jack J. Taylor
February 12, 1980
Page 5

could ever arise, you may want to pursue further inquiry into the day-to-day requirements of both offices through appropriate legislative channels.

If we can assist you further, please let us know.

Sincerely,



BOB CORBIN
Attorney General

BC/mm