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Robert R. Corbin

April 16, 1980

INTERAGENCY

The Honorable Edward G. Guerrero
Arizona State Representative
House Wing, State Capitol
Phoenix, AZ 85007

Re: I80-061 (R80-030)

Dear Representative Guerrero:

You have requested an opinion on the following question:

Under the terms of § 38-296, Arizona Revised Statutes, may a member of the Board of Directors of a volunteer fire district run for another public office -- city, county or state -- without first resigning from the board?

We have concluded that this would be permissible under the statute you cited.

Pertinent portions of A.R.S. § 38-296 read as follows:

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 resignation, nor shall it apply to any incumbent elective officer

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who seeks re-election to the same office or to any other public office during the final year of the term to which he has been so elected.

(Emphasis added.)

It is clear from reading A.R.S. § 38-286.C that if an officeholder desires to run for another office during the final year of the term which he is serving he may do so without violating the prohibition spelled out in A.R.S. § 38-296.A. We assume therefore that the question you pose is whether a member of the board of directors of a volunteer fire district may run for public office, and, if elected serve in that office, and at the same time retain his position on the board indefinitely.

A similar question was raised in Shirley v. Superior Court In and For County of Apache, 109 Ariz. 510, 513 P.2d 939, cert. denied 415 U.S. 917 (1973). In that case a school district trustee was elected to the board of supervisors for the same county although he resigned prior to assuming his position on the board of supervisors. An issue raised was whether a violation of A.R.S. § 11-211 or § 38-296 had occurred because of these circumstances. The Arizona Supreme Court sitting in banc stated that it is "extremely doubtful" that a school district trustee is an elective officer as contemplated by A.R.S. § 38-101; thus A.R.S. § 38-296.A would not be applicable. The court reasoned that since the position of school trustee is not compensated, it did not fall within the meaning of "office" "board" or "commission" as defined in A.R.S. § 38-101. The court acknowledged that the office of school district trustee was one of public service or trust and was thus distinguishable from an "office of profit." See Shirley, supra, 109 Ariz. at 515, 516, and Article 4, Part 2, Section 4 of the Arizona Constitution.

Ariz. Atty. Gen. Op. No. 72-20-L addressed a virtually identical question. The question raised in that case was whether concurrent service on a town or city council and a school board is prohibited by A.R.S. § 38-296. The opinion concluded that since a school board member is not compensated, A.R.S. § 38-296 was inapplicable even though the position of town or city council member is a compensated one. That opinion recognized that there is only a remote possibility of conflicts of interest or duties but stated that if a conflict should arise, the officeholder affected should refrain from action to avoid a violation of conflict of interest statutes. Our Opinion No. 59-30 considered the question whether an individual

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It is therefore consistent with Shirley v. Superior Court In And For County of Apache, supra, to conclude that a fire district director is not an elective officer within the meaning of A.R.S. § 38-296.A. While this conclusion appears to answer your question, the cases and opinions given above reveal the necessity of examining other factors.

2. INCOMPATIBILITY DOCTRINE. There are two situations under this doctrine where a person could be precluded from holding public office: 1) when the duties of two positions are in conflict, and 2) when it is physically impossible that two positions be held simultaneously by one person. Perkins v. Manning, 59 Ariz. 60, 122 P.2d 60 (1942); Coleman v. Lee, 58 Ariz. 506, 121 P.2d 433 (1942). With respect to the conflict of duties concern, the incompatibility decision means that whenever there are foreseeable conflict of interest problems, the officeholder should refrain from accepting a second office without first resigning from his present office. See Ariz. Atty.Gen.Op. No. I80-004.

The "physically impossible" aspect of the incompatibility doctrine can involve several factors, i.e., time, location, physical and mental capacity. Different offices involve different constraints. To determine whether two positions are incompatible each situation must be examined individually. Since you did not specify what position the volunteer fire district member would hold concurrently, it is impossible to advise you on this point. In determining if incompatibilities do exist, you should examine A.R.S. §§ 9-1002.02.I and 9-1004.A where the duties and responsibilities of volunteer fire district board members can be found.

We hope that this letter has satisfactorily answered your question.

Sincerely,

Bob Corbin

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BC/lfc

could act as justice of the peace and serve as a school board member at the same time. In concluding that this was permissible, we noted:

It is believed that the legislature by enacting the foregoing statutes was considering the possibility of a state officer using the power and influence of one office to obtain another state office with additional compensation, powers and influence. Membership on a school board can be distinguished from compensated state offices in that it is purely an office of public service by one who earns his livelihood by some other means. We believe that the purpose of the prohibition is to prevent one from holding two public offices that would require full time work or for which there is authorized compensation, rather than to disqualify an elected officer from also holding an uncompensated office of trust such as a school board member.

In that opinion the issue of whether the principle of incompatibility of offices presented a problem under the circumstances was considered. The opinion quoted a portion of a case that discussed the incompatibility doctrine.

We hold, therefore, that 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. . . .

Perkins v. Manning, 59 Ariz.
60, 70, 122 P.2d 60 (1942).

These cases and opinions reveal the factors which should be considered in answering the question you posed. We will address each factor separately.

1. COMPENSATION. Volunteer fire district directors receive no compensation for their services, but they may be reimbursed for expenses incurred in performing duties required by law. See A.R.S. § 9-1002.02.H. In that respect a volunteer fire district director is like a school board trustee; the office is one of service and trust, not an office of profit.