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April 6, 1983

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ARIZONA ATTORNEY GENERAL

INTERAGENCY
The Honorable Richard "Dick" Pacheco
Arizona State Representative
State Capitol, House Wing
Phoenix, AZ 85007

Re: I83- 035 (R83-017)

Dear Representative Pacheco:

We are writing in response to your request for an opinion whether a volunteer fireman may also serve as a fire district board member.

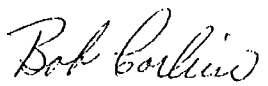
A.R.S. § 9-1002.D.2 sets forth the qualifications of candidates for board membership. Inasmuch as this statute does not prohibit a person from running for office if he serves as a volunteer fireman, there exists no statutory prohibition with respect to a volunteer fireman serving as a fire district board member.

However, a fireman may be prohibited from serving as a board member by virtue of the common law doctrine of incompatibility of public offices. That doctrine is discussed in detail in two recent opinions, Ariz.Atty.Gen.Ops. I80-019 and I80-061, both of which are attached for your reference. Basically, the doctrine provides that a person may not hold two positions where, inter alia, the duties of the two positions are inherently in conflict.

The duties of a fire district board are prescribed in A.R.S. § 9-1004. Whether these duties create an inherent conflict with the duties of a volunteer fireman is a judgment to

be made by the board in consultation with its legal counsel, the county attorney.[1]

Sincerely,



BOB CORBIN
Attorney General

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1. Putting aside the incompatibility issue, we note that the board member may have a conflict of interest in participating in any matter which would serve to benefit him financially in his position as a fireman. See A.R.S. §§ 38-501 et seq.

[2]Article 9, § 5 of the Arizona Constitution, cited in text of opinion; *Carr v. Frohmiller*, 47 Ariz. 430, 56 P.2d 644 (1936).

[3]*See* A.R.S. §§ 35-173 (allotment of appropriations) and 35-181.01 (presentation of claims).

[4]*Wiggins v. Kerby*, 44 Ariz. 418, 38 P.2d 315 (1934). In Ariz.Att'yGen.Op. No. 67-6-L, we said that a fund was exempt from the requirements of A.R.S. § 35-173, where the statute establishing the fund *expressly provided* for the exemption.

[5]In Ariz.Att'yGen.Op. No. 78-44, we noted that A.R.S. § 41-2155 provides that the District is a budget unit and shall comply with the provisions of Title 35, Chapter 1, Article 2. In that opinion we said that A.R.S. § 41-2155 did not require the District to comply with all of the provisions of Title 35. It is unnecessary, however, to decide which provisions of Title 35 the District impliedly may not be required to follow under A.R.S. § 41-2155, because A.R.S. §§ 41-2154 and 41-2155, not being facially inconsistent, must be harmonized so as to give meaning to both. Inasmuch as A.R.S. § 41-2154, by its terms, requires compliance with certain provisions of Title 35, neither A.R.S. § 41-2155 nor Ariz.Att'yGen.Op. No. 78-44 can be read to exempt the District from complying with those provisions. We wish to emphasize, however, that neither the legislation nor prior opinions of this office have provided clear guidance to the District for conducting its affairs. In fact, intergovernmental agreements which set forth the procedure utilized by the district have consistently been approved by us. We do not mean to imply that the expenditure procedure which the District has been utilizing was instituted in conscious disregard of statutory procedures.

The Honorable Jack J. Taylor
Arizona State Senator

Re: I80-019 (R80-004)
February 12, 1980

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

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[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, I77-180, I78-37, I78-121, I78-137.

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

Lt. M. L. Risch, Business Manager Arizona Law Enforcement Officers Advisory Council

Re: I80-020 (R79-301) February 13, 1980

In your letter of November 6, 1979, you asked for our opinion as to whether a person who is not a citizen of the United States may be hired as a peace officer in Arizona. In order to answer your question, it is necessary to examine the applicable Arizona statutes and constitutional provisions.

We note at the outset that the Arizona Law Enforcement Officer Advisory Council (ALEOAC) is mandated to prescribe minimum qualifications for peace officers pursuant to A.R.S. § 41-1822.3, which provides:

[illegible]ncil shall:

* * *

3. Prescribe reasonable minimum qualifications for officers to be appointed to enforce the laws of this state and the political subdivisions of this state. *Such qualifications shall relate to physical, mental and moral fitness* and shall govern the recruitment, appointment, and retention of all such peace officers and police officers of every political subdivision of this state, notwithstanding any other provisions of law to the contrary. . . . (Emphasis added.)

Pursuant to that authority, ALEOAC promulgated a rule which establishes citizenship as a minimum qualification.[1]

Our first question, then, is whether the requirement of United States citizenship reasonably relates to "physical, mental and moral fitness" of an officer.

Qualifications of fitness relate to a person's innate capabilities to perform a job.[2] Citizenship is a classification which exists independently of "fitness". Although it may be a reasonable qualification for service as a peace officer,[3] it is not related to the "fitness" of a candidate. Thus, it is our opinion that citizenship does not relate to the "fitness" of an officer and that part of the rule is therefore invalid because it exceeds the statutory authority of ALEOAC.

Even though ALEOAC's requirement is invalid, our inquiry is not over. Article 18, § 10 of the Arizona Constitution provides in part:

Section 10. (EMPLOYMENT OF ALIENS.) No person not a citizen or ward of the United States shall be employed upon or in connection with any state, county or municipal works or employment. . . . The legislature shall enact laws for the enforcement and shall provide for the punishment of any violation of this section.

Pursuant to this provision, the Legislature enacted A.R.S. § 38-201.B, which makes citizenship a requirement for all public employment. In *Miranda v. Nelson*, 351 F.Supp. 735, *aff'd* 413 U.S. 902 (1973), the state constitutional and statutory provisions were declared unconstitutional in that they violated the Equal Protection Clause of the United States Constitution. It is unclear, however, whether the provisions were held by the court to be unconstitutional on their faces or unconstitutional as applied to the person challenging them. As a result, we cannot say with certainty whether the provisions are or are not constitutional with respect to peace officers, in light of the fact that a state may constitutionally limit employment as a peace office to citizens of the United States.[4] Thus, although the Legislature clearly has the authority to establish citizenship as a requirement for service as a peace officer, in the absence of specific legislation, we cannot say that, peace officers must be citizens.

It is our suggestion that you seek legislative clarification in this matter. If the Legislature wishes to limit employment as a peace officer to citizens, it would best accomplish that end by enacting specific legislation to that effect. Until that is done, we can only advise you that citizenship is not necessarily a requirement for employment as a peace officer under existing law.

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[1]A.C.R.R. R13-4-05 reads, in part:

1. Minimum qualifications. A peace officer applicant in Arizona must satisfy the following requirements before he/she may be authorized to enforce the laws of Arizona as a peace officer.

a. The applicant must be a citizen of the United States.

[2]Black's Law Dictionary (4th ed. 1951) defines "moral" as that which "pert[illegible] character, conduct, intention, [and] social relations." "Mental" is defined as "[r]ela[illegible]r ex-

Mr. Russell H. Burdick, Jr.
Deputy Apache County Attorney

Re: I80-053 (R80-055)
April 9, 1980

We have reviewed your opinion dated March 4, 1980, concerning the status of the assets of Navajo Compressor Station School District No. 5 after its annexation to Ganado School District No. 19, pursuant to A.R.S. § 15-406. We concur with your conclusion that the property belonging to Navajo Compressor Station School District No. 5 vests in Ganado School District No. 19 when the annexation becomes effective.

Mr. J. Michael Low
Director of Insurance

Re: I80-054 (R80-072)
April 9, 1980

This is in response to your letter of March 19, 1980, in which you requested an opinion from this office as to whether an insurer must possess a certificate of authority to transact insurance business in the State of Arizona, notwithstanding the fact that the insurer is only engaged in the reinsurance of Arizona risks. You refer to a previous opinion of this office, dated July 12, 1974, and signed by an Assistant Attorney General, which appears to answer your question in the affirmative. For the reasons indicated below, that opinion is overruled to the extent it is inconsistent with what we say herein.

The previous opinion of this office concluded that a certificate of authority must be obtained by an insurance company before it may act as a reinsurer of workmen's compensation insurance. That opinion was based in substantial part upon *Connecticut General Life Insurance Co. v. Johnson*, 8 Cal.2d 624, 67 P.2d 675 (1937), *reversed on other grounds*, 303 U.S. 77, 58 S.Ct. 436, 82 L.Ed. 673. The court in *Connecticut General* held in part that a certificate of authority which permits a company to transact a specific type of insurance necessarily includes the authorization to transact that specific type of reinsurance. The previous opinion reasoned that the converse is necessarily true and that, therefore, the authority to transact insurance business regarding a certain type of insurance is necessary before reinsurance may lawfully be transacted with respect to that type of insurance.

It should be noted that the California Insurance Code contained no provision regarding the transaction of reinsurance at the time of the court's decision in *Connecticut General*. *Id.* Arizona's Insurance Code, however, does contain a relevant and, for the purposes of this opinion, controlling provision. A.R.S. § 20-401.01 provides in pertinent part as follows:

> A. It is unlawful for any insurer to transact insurance business, as provided by § 29-106, in this state without a certificate of authority from the director.
>
> B. The provisions of subsection A of this section do not apply to:
>
> * * *
>
> 2. The lawful transaction of reinsurance by insurers.

The language of the above-quoted section is clear and unambiguous: A certificate of authority to transact insurance business in the State of Arizona is not a prerequisite to the lawful transaction of reinsurance.[1]

It is our opinion, therefore, that an insurer need not possess a certificate of authority to transact insurance business in the State of Arizona if the insurer is engaged only in the lawful transaction of reinsurance.

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[1]Also, note A.R.S. § 20-261.D, which specifically provides for reinsurance contracts with unauthorized insurers upon the approval of the Director of the Department of Insurance.

The Honorable Edward G. Guerrero
Arizona State Representative

Re: I80-061 (R80-030)
April 16, 1980

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 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 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. 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. I80-019.

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 determinining 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.

Mr. James J. Brunstein
Associate Superintendent
Arizona Department of Education

Re: I80-062 (R80-057)
April 16, 1980

You have requested clarification of Ariz.Att'yGen.Op. No. I78-157, which addresses the responsibility of public schools in Arizona to provide special education services to handicapped children attending private and church-related schools. Specifically, you request clarification of footnote 6, which states that school districts may not render special education services on nonpublic school premises.

As you have correctly pointed out, the federal regulations governing special education contain no prohibitions against providing these services on nonpublic school premises. Although not fully set forth in our earlier opinion, the basis for this statement is the establishment clause of the First Amendment to the United States Constitution.

In *Wolman v. Walter,* 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977), the United States Supreme Court considered the constitutional challenge to provisions of an Ohio statute dealing with the expenditure of public funds to provide aid to students in nonpublic schools. The Ohio statutory scheme was attacked on the basis that it violated the establishment clause of the First Amendment made applicable to the states by the Fourteenth Amendment to the United States Constitution. Among the specific programs challenged were the provision of diagnostic speech, hearing and psychological services, and certain therapeutic, guidance and remedial services to students at church-related schools. The Supreme Court specifically addressed the issue of whether such services could be provided on the premises of the church-related school. In its opinion, the Court determined that, while diagnostic services on nonpublic school premises did not violate the establishment clause, the provision of therapeutic services on nonpublic school premises was impermissible. In reaching this decision, the Court distinguished the two services in the following fashion:

> . . . First, diagnostic services, unlike teaching or counseling, have little or no educational content and are not closely associated with the education mission of the nonpublic school. Accordingly, any pressure on the public diagnostician to allow the intrusion of sectarian views is greatly reduced. Second, the diagnostician has only limited contact with the child, and that contact involves chiefly the use of objective and professional testing methods to detect students in need of treatment. The nature of the relationship between the diagnostician and the pupil does not provide the same opportunity for the transmission of sectarian