

SCHOOLS:
COUNTY SUPERINTENDENTS:
TEACHERS:
OFFICERS:
INCOMPATIBLE OFFICES:

1. A county superintendent who becomes a lawfully qualified public school teacher vacates his office regardless of the brevity of service as a teacher;

2. A county superintendent who acted as a public school teacher without executing a written contract as required by Sections 163.080 and 432.070, RSMo 1959, did not have a lawful right to the position of teacher. Since legally she

never held the position of teacher, there was no dual capacity and the doctrine prohibiting holding of incompatible public positions does not operate to vacate the county superintendent's office.

OPINION NO. 129

August 19, 1965

Honorable John K. Leopard
Prosecuting Attorney
Daviness County
Gallatin, Missouri 64640



Dear Sir:

This official opinion is issued in response to your request. You request clarification of our Opinion No. 350 issued December 30, 1964, to Marvin Dinger, so far as it may apply to your county superintendent.

You inform: Your county superintendent taught in the local junior high school for a period of 52 days pending a regular teacher becoming qualified to teach. The county superintendent did not enter into a signed, written contract to teach.

In Opinion No. 350 this office ruled that the capacities of county superintendent of schools and public school teacher are incompatible and a county superintendent who accepts employment as a public school teacher automatically vacates his office.

In your letter you suggest that our opinion should not apply to your situation because the teaching here was only on a temporary substitute basis and also that the common law incompatibility rule only applies between two public offices and not merely public employments.

Whether a public officer holds another incompatible position permanently or merely temporarily is generally not a basis for an exception to the incompatibility rule. There is authority holding that where an officer is wrongfully expelled or kept from entering his office, accepting a second office during the contest over the first does not vacate the first office. *Gracey v. St. Louis, Mo.*, 111 S.W. 1159. However, this is not the case here. You do not inform us that the county superintendent acted anyway but voluntarily in entering her second position. The authorities uniformly hold that if the

Honorable John K. Leopard

positions are incompatible, the length of time spent in the second position is not material. This question is annotated at 100 A.L.R. 1081.

As to your suggestion that the doctrine of incompatibility only applies to public offices and not to mere public employments:

We note that public school teachers have been held to be public officers in some cases. Other cases have held them to be public employees but not officers. 30 A.L.R. 1423; 75 A.L.R. 1352; 110 A.L.R. 800; 47 Am.Jr., Schools, § 108. The greater weight of authority holds them not to be officers. You will note that Opinion No. 350 is not premised on the proposition that a public school teacher is a public officer.

You suggest that the common law rule of incompatibility applies only to public offices. There is authority on both sides of this question. Cf. 42 Am.Jur., Public Officers, § 61; 67 C.J.S., Officers, § 23, p. 150.

In Opinion No. 350 we relied upon the case of Knuckles v. Board of Education of Belle County, Ky., 114 S.W.2d 511, 515. Knuckles was an assistant county superintendent who accepted employment as a public school teacher. The court in Knuckles did not consider a teacher to be a public officer.

" . . . Furthermore, the same opinions, as well as the texts, apply the consequences of incompatibility (either at common law or under the Constitution or statutes) not only as between public positions expressly designated as an 'office,' but such incompatibility is also applied, with the same consequences, as between what might be termed public employees when the functions to be performed by the incumbent partakes of the nature of the duties and functions of an officer, although the incumbent might be designated as only an 'employee,' or he may be so regarded by necessary inference."

The incompatibility rule is a doctrine of public policy. It is designed to prevent the concentration of governmental power in a single individual and further to prevent public officers from having conflicting interests in performing their duties. We have pointed out in Opinion No. 350 examples of conflicts which might arise if a county superintendent were simultaneously a teacher, principal or superintendent of instruction of a public school within his jurisdiction.

Therefore, we are of the opinion that a county superintendent who lawfully enters into employment as a public school teacher vacates

Honorable John K. Leopard

his office regardless of the length of term as a teacher.

We do not think, however, that your county superintendent has vacated her office under the facts you present us. This, for the reason that apparently she never lawfully qualified as a public school teacher. Of course, if an officer does not in fact enter another incompatible position, there is no dual capacity and no vacating of the office. You inform us that your county superintendent did not enter into a written, signed contract to teach. If this be the fact, then she never legally became a public school teacher.

School boards have only such powers as are conferred expressly or by necessary implication of statutes. School boards have no authority to employ teachers except under the provision of Section 163.080, RSMo 1959. This statute clearly contemplates a written, signed contract. Also Section 432.070, RSMo 1959, provides:

"No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

In Massie v. Cottonwood School District No. 36 of Nodaway Co., MoApp., 70 S.W.2d 1108, a teacher attempted to recover on the basis of an oral contract. The court held, citing the above statutes, that the contract must be in writing.

In a comparable case the Supreme Court affirmed a judgment recovering payments made to an individual under a contract with a city which was not validly executed as required by Section 432.070. Fulton v. City of Lockwood, Mo., 269 S.W.2d 1.

The board had no authority to employ a teacher without a written contract. No written contract was executed. Thus, the county superintendent did not have legal right to the position of public school teacher. Since, in legal contemplation, the county superintendent did not hold the position of school teacher, there was no dual capacity and accordingly the doctrine of incompatibility does not come into play.

Honorable John K. Leopard

CONCLUSION

Therefore, it is the opinion of this office that:

1. A county superintendent who becomes a lawfully qualified public school teacher vacates his office regardless of the brevity of service as a teacher;

2. A county superintendent who acted as a public school teacher without executing a written contract as required by Sections 163.080 and 432.070, RSMo 1959, did not have a lawful right to the position of teacher. Since legally she never held the position of teacher, there was no dual capacity and the doctrine prohibiting holding of incompatible public positions does not operate to vacate the county superintendent's office.

The foregoing opinion, which I hereby approve was prepared by my assistant, Louis C. DeFeo, Jr.

Yours very truly,


NORMAN H. ANDERSON
Attorney General