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the formation thereof is determinable by reference to the Corporation Fee Act of 1957 as it relates to domestic corporations for profit. (Burns § 25-601 to and including § 25-606).

OFFICIAL OPINION NO. 22

July 18, 1967

OFFICERS—Dual Office Holding—Mayor of City as Salaried Employee of City School Corporation.

Opinion Requested by Hon. Quentin A. Blachly, State Representative.

I am in receipt of your request for an Official Opinion, which request reads as follows :

“A problem has arisen in an Indiana community which might possibly create an illegal conflict of interest problem in violation of certain Indiana laws pertaining to public officials.

“The situation concerns the possibility of a mayor also serving in an administrative capacity within the city school corporation wherein most of the school board members are appointed by the mayor.

“The specific question is, can a mayor of such a second class city under these circumstances also serve in a salaried administrative position as the physical education and athletic co-ordinator for the respective school corporation?”

In any question pertaining to the legal right of an individual to hold more than one position under state government the following tests should be taken into consideration, namely :

- (1) Is each position a "lucrative office" within the meaning of the Indiana Constitution, Art. 2, Sec. 9?
- (2) Is such dual holding in violation of the provision for the distribution and separation of powers provided in the Indiana Constitution, Art. 3, Sec. 1?
- (3) Are the offices incompatible with each other?
- (4) Would such dual holding be against public policy?

If the dual holding cannot pass any one of the tests above that holding is improper. For convenience, we shall first consider the third test, incompatibility of offices.

Usually an Attorney General will not express an opinion on the compatibility of two offices but will leave that question to the appointing authority. See 1961 O.A.G., p. 22; 1966 O.A.G., p. 228. This is due to the inability of the Attorney General to know all the facts peculiar to a specific situation. There always exists the possibility that some unusual circumstance will render incompatible two positions ordinarily considered independent.

However, when the positions are such that the incompatibility is evident the Attorney General will state that such is his opinion. One such instance involved the positions of a Member of the General Assembly and Deputy Prosecuting Attorney and was determined in 1960 O.A.G. 9, p. 42 at 52, thusly:

"Third: Let us now examine the dual holding on the issue of whether such offices are incompatible with each other.

"In my 1954 O.A.G., page 258, No. 70, the offices concerned were membership in the Indiana General Assembly and membership on the Marion County Plan Commission. In that Opinion, I said, in part:

"(b) It is also a general rule that a public officer is prohibited from holding two incompatible offices at the same time, the rule being founded on principles of public policy. (67 C.J.S. Officers, Section 23, p. 133.) In this regard offices are generally held to be

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incompatible where a conflict of interests exists, as where one is subordinate to the other and subject in some degree to the supervisory powers of its incumbent. In a case similar to the situation now under consideration, *Weza v. Auditor General et al.* (1941), 297 Mich. 686, 298 N.W. 368, the Supreme Court of Michigan considered the question as to whether the office of a member of the State Legislature was incompatible with the office of County School Commissioner. The Court held that:

“ “. . . Clearly the office of county school commissioner is subordinate to that of a member of the legislature. The former owes its creation and continuation to legislative enactment and is completely subject to legislative control. Further, as a matter of sound public policy these two offices should be held incompatible. . . .

“ “ ‘The test of incompatibility is the character and relation of the offices; as where one is subordinate to the other, and subject in some degree to its revisory power, or where the functions of the two offices are inherently inconsistent and repugnant. In such cases it has uniformly been held that the same person cannot hold both offices.’ *Attorney General v. Detroit Common Council*, 112 Mich. 145, 168, 79 N.W. 450, 458, 37 L.R.A. 211.” ’

“It was concluded that the offices were incompatible and that a member of the Marion County Plan Commission could not continue to serve and be compensated for such service after being elected a member of the General Assembly. In my opinion, incompatibility exists between the offices of a member of the General Assembly and that of a deputy prosecuting attorney, inasmuch as the office of deputy prosecuting attorney owes its creation, authority and continuation to legislative enactment and is completely subject to legislative control, as an office under the state.”

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If, as your question indicates, the mayor appoints a majority of the members of the School Board, then the office of mayor and the position of employee within the school corporation are unquestionably incompatible when judged by the standard above.

The incompatibility is clearly demonstrated by the following portions of Acts 1965, ch. 307, known as the Indiana General School Powers Act, the same being Burns §§ 28-6401 through 28-6451:

Section 102; Burns § 28-6402:

“This act shall be applicable to all school corporations as defined in sec. 103 except school townships.”

Section 103; Burns § 28-6403:

“As used in this act, the following terms shall have the following meanings:

“(a) ‘School corporation’ shall mean any local public school corporation established under the laws of the State of Indiana, including but not limited to school cities, school towns, metropolitan school districts, consolidated school corporations, county school corporations, community school corporations and united school corporations, excluding, however, school townships.

“(b) ‘Governing body’ shall mean the board or commission charged by law with the responsibility of administering the affairs of a school corporation, including but not limited to, a board of school commissioners, metropolitan board of education, board of school trustees or board of trustees; and ‘member’ shall mean a member of such governing body.”

Section 202; Burns § 28-6410:

“In carrying out the school purposes of each school corporation, its governing body acting on its behalf shall have the following specific powers: . . .

“(7) To employ, contract for and discharge superintendents, supervisors, principals, teachers, librarians, business managers, superintendents of buildings and

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grounds, janitors, engineers, architects, physicians, dentists, nurses, accountants, teacher aides performing non-instructional duties, educational and other professional consultants, data processing and computer service for school purposes, including but not limited to the making of schedules, the keeping and analyzing of grades and other student data, the keeping and preparing of warrants, payroll and similar data where approved by the State Board of Accounts as provided below, and such other personnel or services, all as the governing body considers necessary for school purposes; to fix and pay the salaries and compensation of such persons and such services; to classify such persons or services and to adopt schedules of salaries or compensation; to determine the number of such persons or the amount of services thus employed or contracted for; and to determine the nature and extent of their duties. . . .

“(8) When the governing body by resolution deems a trip by an employee of the school corporation or by a member of the governing body to be in the interest of the school corporation, including but not limited to, attending meetings, conferences or examining equipment, buildings and installations in other areas, to permit such employee to be absent in connection with such trip without any loss in pay and to refund to such employee or to such member his reasonable hotel and board bills and necessary transportation expenses; and to pay teaching personnel or time spent in sponsoring and working with school related trips or activities. . . .

“(18) To ratify and approve any action taken by any member of the governing body, any officer of the governing body or by any employee of the school corporation after such action is taken, if such action could have been approved in advance, and in connection therewith to pay any expense or compensation permitted under this act or any other law.”

Thus, persons appointed by the mayor as mayor and therefore under his control would make decisions in relation to the

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mayor as a school employee concerning his duties, salary, performance, and discharge. A clearer case of incompatibility cannot readily be imagined.

Since the positions involved so clearly fail to pass the test of incompatibility there is no need to consider the other tests set out above.

OFFICIAL OPINION NO. 23

July 19, 1967

**TAXATION—Collection by Indiana Merchants of
Out-of-State Sales and Use Taxes on Purchases
Made by Out-of-State Residents—Remittances
of Taxes to Other Jurisdictions.**

Opinion Requested by Hon. J. Ben Ricketts, State Representative.

This is in response to your March 6, 1967 letter requesting my opinion with respect to the following situation as stated by you:

“A sales tax problem has developed in Vincennes, Indiana which is best explained by the following:

“Several Vincennes merchants sell goods to Illinois residents and then deliver said goods to their homes. These merchants do not collect the 4% Illinois sales tax on the merchandise sold and delivered. However, representatives from the State of Illinois have contacted some of these merchants and informed them that they must collect this Illinois sales tax and remit same to the State of Illinois. . . . These merchants have also been requested to register with the State of Illinois. However, if they so register they must open up their books for the past two years and pay all back sales