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ATTORNEY GENERAL OPINION NO. 2018- 11

Gregory P. Goheen, Legal Counsel
Unified School District No. 500, Wyandotte County
McAnany, Van Cleave & Phillips, P.A.
10 E. Cambridge Circle Drive, Suite 300
Kansas City, Kansas 66103

Re: Schools—School District Board of Education Powers and Duties; General Powers and Duties—School District Officers and Employees; Board Members to Receive No Compensation; Retired Employee Serving as Board Member; Incompatibility of Offices

Synopsis: Neither state statute nor the common law doctrine of incompatibility of offices precludes a retiree from serving as a member of the school board for the school district from which the retiree retired. Because benefits received by a retiree of a unified school district from the Kansas Public Employees Retirement System or the school district's early retirement program are earned during the retiree's employment with the school district and are not compensation for work or duties performed as a board member, K.S.A. 2018 Supp. 72-1137 does not preclude a retiree from receiving the benefits during the time the retiree is serving as a board member. Cited herein: K.S.A. 2018 Supp. 72-1134; 72-1135; 72-1136; 72-1137; Kan. Const., Art. 6, § 5.

* * *

Dear Mr. Goheen:

As legal counsel for the Board of Education of Unified School District No. 500, Wyandotte County (Kansas Ciy), you ask our opinion regarding whether a retiree of a unified school district who is receiving compensation and benefits through the Kansas Public Employees Retirement System (KPERS) or a school district's early retirement program, or both, may serve as a member of the Board.

In determining whether a person may serve in dual roles for a public governing body, it must be determined whether such service is precluded by state law or the common law doctrine of incompatibility of offices.

Statutory Provisions

Before determining whether the common law doctrine of incompatibility of offices precludes serving in the dual positions, we first address whether such service is governed by state statute. "The legislature decides who may qualify for public office. . . . If the legislature has spoken, the statement supersedes common law, and the doctrine of incompatibility of office does not apply."[1]

Local public schools are "maintained, developed and operated by locally elected boards."[2] A local board of education "shall appoint a superintendent of schools . . . [and] may appoint one or more assistant superintendents of schools, supervisors and principals."[3] A local board shall also appoint a clerk[4] and a treasurer.[5] Provisions in the statutes authorizing the appointments expressly preclude the appointed persons from being a member of the board.[6]

Conversely, K.S.A. 2018 Supp. 72-1137 states:

> In addition to the officers provided for in this act, the board of education of any school district may appoint other officers and employees to serve at the pleasure of the board. Such officers and employees shall receive compensation fixed by the board. *No member of a board of education shall receive compensation from the school district for any work or duties performed by him*.[7]

In determining whether K.S.A. 2018 Supp. 72-1137 precludes a retiree from a unified school district from serving as a member of the board of education for the school district and receiving compensation and benefits through KPERS or a school district's early retirement program, or both, we follow the rules of statutory construction.

> The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. We first attempt to ascertain legislative intent by reading the plain language of the statutes and giving common words their ordinary meanings. When a statute is plain and unambiguous, we do not speculate as to the legislative intent

[1] *Unified School District No. 501, Shawnee County v. Baker*, 269 Kan. 239, 243 (2000).
[2] Kan. Const., Art. 6, § 5.
[3] K.S.A. 2018 Supp. 72-1134.
[4] K.S.A. 2018 Supp. 72-1135.
[5] K.S.A. 2018 Supp. 72-1136.
[6] K.S.A. 2018 Supp. 72-1134 ("No person employed under the authority of this section shall be a member of the board."); K.S.A. 2018 Supp. 72-1135 ("The clerk shall not be a member of the board. . . ."); K.S.A. 2018 Supp. 72-1136 ("The treasurer shall not be a member of the board. . . .").
[7] Emphasis added.

> behind it and will not read into the statute something not readily found in it. But when the statute's language or text is unclear or ambiguous, we employ canons of construction, legislative history, or other background considerations to divine the legislature's intent and construe the statute accordingly.[8]

The Legislature has neither defined the terms used in K.S.A. 2018 Supp. 72-1137, nor included a provision expressly precluding persons appointed under the statute from serving on the local board. Therefore, the terms are given their ordinary meanings.

In reviewing whether K.S.A. 2018 Supp. 72-1137 precludes a tenured teacher from serving as a member of the board of education for the unified school district by which the teacher is employed, the Kansas Supreme Court determined the statute "only prohibits compensation for 'work or duties' performed as a board member."[9] "The . . . language [in K.S.A. 2018 Supp. 72-1137][10] stating no board member 'shall receive compensation from the school district for any work or duties performed by him' raises only the question of compensation—not whether one may serve."[11] Thus, even if a retiree is considered an officer or employee serving at the pleasure of the board, K.S.A. 2018 Supp. 72-1137 does not preclude the retiree from serving as a board member.

Determining whether K.S.A. 2018 Supp. 72-1137 prohibits a retiree who is serving on the board from receiving compensation and benefits through KPERS or a school district's early retirement program, or both, requires determining whether the benefits are compensation from the school district for work or duties performed as a board member.

> Public employment seldom pays as much as a comparable job in the private sector. A pension to be received upon retirement is a prime inducement in securing qualified workers and avoiding the expense of a high turnover rate. Retirement benefits are a valuable part of the consideration for entering into and continuing in public service. A member of a governmental pension system has certain vested rights in the pension plan because it is a vital part of the consideration for entering into and performing under the employment contract.[12]

Benefits received by a retiree of a unified school district from KPERS or a school district's early retirement program are earned during the retiree's employment with the school district. They are consideration under the employment contract and would be paid to the retiree even if the retiree performed no additional public service. The

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[8] *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 918 (2013) (internal citations and quotation marks omitted).
[9] *Baker*, 269 Kan. at 244.
[10] K.S.A. 72-8202e was recodified in July 2017 and is now K.S.A. 2018 Supp. 72-1137.
[11] *Baker*, 269 Kan. at 245.
[12] *Kansas Public Employees Retirement System v. Reimer & Koger Associates, Inc.*, 262 Kan. 635, 646 (1997), quoting *Brazelton v. Kansas Public Employees Retirement System*, 227 Kan. 443,449 (1980).

benefits received from KPERS or a school district's early retirement program are not compensation for work or duties performed as a board member.

Finding no other applicable statutes that preclude a retiree of a school district from serving on the board of education, we turn to the common law doctrine of incompatibility of offices.

Common Law Prohibition

The common law doctrine of incompatibility of offices prohibits an individual from holding more than one public office at the same time when there is an incompatibility between the offices.[13] "Offices are incompatible when the performance of the duties of one in some way interferes with the performance of the duties of the other."[14] The Kansas Supreme Court long has applied the doctrine "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."[15]

In Attorney General Opinion No. 2013-19, we stated:

> The Kansas Supreme Court addressed the distinction between officers and other employees in *Durflinger v. Artiles*.[16] As summarized by Attorney General Opinion No. 91-11, *Durflinger* concluded that the essential characteristics of public office are: (1) a position created by statute or ordinance, (2) a fixed tenure, and (3) the power to exercise some portion of [the] sovereign function of government. In addition, *Durflinger* cited an earlier case holding that an officer has responsibility for results and the power of direction, supervision, and control.[17]

The position of retiree does not possess any of the characteristics of a public office. The positions of school board member and retiree are not two public offices performing incompatible duties.

In *Dyche v. Davis*,[18] the Kansas Supreme Court determined the doctrine applies when a person concurrently holds a public office and another position of public employment.[19] "It is inimical to the public interest for one in public employment to be both the employer and the employee or the supervisor and the supervised."[20] The doctrine applies irrespective of whether the person draws two salaries.[21]

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[13] *Baker*, 269 Kan. at 249.
[14] *Dyche v. Davis*, 92 Kan. 971, 977 (1914).
[15] *Baker*, 269 Kan. at 248, quoting *Abry v. Gray*, 58 Kan. 148, 149 (1897).
[16] 234 Kan. 484 (1983) (disapproved on other grounds by *Boulanger v. Pol*, 258 Kan. 289, 292 (1995)).
[17] Internal quotation marks omitted.
[18] 92 Kan. 971 (1914).
[19] *Baker*, 269 Kan. at 248-49.
[20] *Baker*, 269 Kan.at 239, Syl. ¶ 6.
[21] *Baker*. 269 Kan.at 239, Syl. ¶ 5.

The Kansas Supreme Court in *Unified School District No. 501, Shawnee County v. Baker*[22] reviewed whether the common law doctrine of incompatibility of offices precludes one person from concurrently serving as a school board member and a teacher in the same school district.

> As we focus on the agreed facts before us, the inescapable conclusion is that Baker's positions are incompatible. By assuming the role of teacher and Board member, Baker occupies one position that is subordinate to the other. As Board member she is the employer and as teacher, the employee. In her capacity as Board member she sits on a policy-making body that negotiates with the teachers' collective bargaining representative, who is also her representative as a teacher. This is a clear conflict of interest. Similarly, Baker is subject to discipline by the Board. She may, under certain circumstances, be fired by it. The principal who must evaluate Baker's performance as a teacher indirectly answers to Baker as a board member. As Baker discharges her Board duties, her actions, no matter how well-intentioned, will be colored by the conflict inherent in her two positions.[23]

The existence of an employer-employee relationship is based on "whether the employer has the right of control and supervision over the work of the alleged employee, and the right to direct the manner in which the work is to be performed, as well as the result which is to be accomplished."[24] Retirement, however, is a voluntary termination of employment or service upon reaching retirement age.[25] Once a person retires, the person is no longer obligated to perform duties or functions for the employer. The employer does not have the right to control or supervise the retiree, or to terminate the employment of the retiree. A retiree is not an employee of the school district. The positions of school board member and retiree do not involve two public offices performing incompatible duties.

Since the positions of school board member and retiree are neither two public offices performing incompatible duties nor involve an employer-employee relationship, the common law doctrine of incompatibility of offices does not prohibit a retiree from serving as a member of the school board for the school district from which the retiree retired.

In review, neither state statute nor the common law doctrine of incompatibility of offices precludes a retiree from serving as a member of the school board for the school district from which the retiree retired. Because benefits received by a retiree of a unified school district from KPERS or the school district's early retirement program are earned during the retiree's employment with the school district and are not compensation for work or duties performed as a board member, K.S.A. 2018 Supp. 72-1137 does not preclude a

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[22] 269 Kan. 239 (2000).
[23] *Baker*, 269 Kan. at 251.
[24] *Craig v. FedEx Ground Package System, Inc.*, 300 Kan. 788, 794 (2014), quoting *Jones v. City of Dodge City*, 194 Kan. 777, 780 (1965).
[25] *See McIntosh v. Sedgwick County*, 32 Kan.App.2d 889, 896 (2004).

retiree from receiving the benefits during the time the retiree is serving as a board member.

Sincerely,

/s/Derek Schmidt

Derek Schmidt
Attorney General

/s/Richard D. Smith

Richard D. Smith
Assistant Attorney General

DS:AA:RDS:sb