

OFFICERS: Offices of Judge of County Court and Member of the County Board of Education inconsistent.

July 1, 1948

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Honorable Lane Harlan,  
Prosecuting Attorney  
Cooper County,  
Boonville, Missouri.

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Judge William Gerhardt, a member of our County Court, is desirous of getting an interpretation of Senate Bill No. 307 of the Sixty-Fourth General Assembly. As a member of the County Court he desires to know whether or not he would be eligible to become a member of the County Board of Education. Judge Gerhardt is qualified to be a member under Section One of the act. His specific question is whether or not the office of County Judge would be incompatible with the office of a member of the County Board of Education?"

Senate Bill No. 307 of the 64th General Assembly provides for the creation of county boards of education within each county of the state. The board is to be composed of six members. Section One of the Act provides for their selection by members of the boards of education and boards of directors of the various school districts of each county. The persons so selected are required to be citizens of the United States and of the State of Missouri, a resident householder of the county and not less than twenty-four years of Age.

Section 6 of Act provides as follows:

"Section 6. The county board of education, as provided for in the preceding sections, shall

"(1) Within six months after its organization, make or cause to be made and completed a comprehensive study of each school district of the county and prepare a plan of reorganization. Such study shall include:

"(a) The assessed tax valuation of each existing district and the differences in

such valuation under the proposed reorganization plan;

"(b) The size, geographical features and the boundaries of the proposed enlarged districts;

"(c) The number of pupils attending school, average daily attendance, and the population of the proposed enlarged districts;

"(d) The location and conditions of school buildings and their accessibility to the pupils;

"(e) The location and condition of roads, highways and natural barriers within the county;

"(f) The high school facilities of the county and recommendations for improvement of same;

"(g) The conditions affecting the welfare of the teachers and pupils;

"(h) Any other factors concerning adequate facilities for the pupils.

"(2). Upon completion of the comprehensive study, but not later than May 1, 1949, submit to the State Board of Education, a specific plan for the reorganization of the school districts of the county. Such plan shall be in writing and shall include such charts, maps and statistical information as are necessary to properly document the plan for the proposed reorganized districts.

"(3). Continue to study the school system of the county and propose subsequent reorganization plans as conditions warrant.

"(4). Cooperate with boards of adjoining counties in the solution of common organization problems, and submit to the State Board of Education for final decision any and all organization questions on which the cooperating boards fail to agree.

"(5). Approve the budget prepared by the county superintendent of schools in cooperation with the clerks of the boards of the several districts and approve the audit, made by the county superintendent,

of the expenditures report prepared by the district clerk and submitted for the approval of the State Board of Education.

"(6). Continue to advise with the county superintendent of schools, school patrons, and school officials on all matters pertaining to the improvement of the schools in the county."

Section 4 contains the following provision:

"\* \* \* If one or two vacancies occur in the membership of the county board of education the remaining members shall, before transacting any official business, appoint one or two qualified persons to fill such vacancies until the next annual meeting for the election of the members of the county board of education. In the event the board should be unable to agree in filling a vacancy or there should be more than two vacancies at any one time, the county court, upon notice from the secretary of the board of such vacancy or vacancies, shall immediately fill the same by appointment and shall notify said person or persons in writing of such appointment and the person or persons so appointed shall serve until the second Tuesday in April of the following year, when their successors shall be elected for the unexpired term." (Emphasis ours.)

There is no constitutional or statutory prohibition against the same persons holding the office of judge of the county court and member of the state board of education. Any objection must be based upon the common-law doctrine, which prohibits one person from holding two or more incompatible offices. The rule as stated in *State ex rel. Walker v. Bus*, 135 Mo. 325, 1.c. 338, 36 S.W. 636, is as follows:

"The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the offices, as where one has some supervision of the other, is required to deal with, control, or assist him.

"It was said by Judge Folger in *People ex rel. v. Green*, 58 N.Y. loc. cit. 304: 'Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must per se, have the right to interfere, one with the other, before they are incompatible at common law.'"

In the present case there would appear to be no essential conflict between the duties of a judge of the county court and those of a member of the county board of education, as hereinabove set out. However, the provision for the filling of vacancies in the county board of education by the county court under certain circumstances does present some difficulty. If one member of the county court is eligible to serve on the county board of education, two or three members of the county court might likewise do so. Should there be two members of the county court serving on the county board of education and more than two vacancies occur in the board of education, the filling of vacancies would devolve upon the county court, and the two members of the county court who were members of the board of education, would be in a position to fill the vacancies and thereby obtain control of the county board of education.

The Legislature has seen fit, where more than two vacancies occur, to take the power of filling the vacancies out of the hands of the county board of education. However, in the situation mentioned above, two members of the county court would be in a position to fill the vacancies in such capacity, whereas they would not be able to do so as members of the county board of education. This situation is believed to involve the possibility of antagonism which the common law rule is intended to avoid. The fact that the possibility might be remote does not alter the application of the rule. (*Knuckles v. Board of Education of Bell County*, 272 Ky. 431, 114 S.W. (2d) 511).

The courts of this state have never considered the question of whether or not the right of appointment might result in incompatibility, but the Supreme Court of New Jersey did so hold in the case of Westcott v. Scull, 87 N.J.L. 410, 98 Atlantic, 407.

CONCLUSION.

Therefore, this department is of the opinion that the offices of judge of the county court and member of the county board of education are inconsistent and cannot be held by the same person.

Respectfully submitted,

ROBERT R. WELBORN  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney-General

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