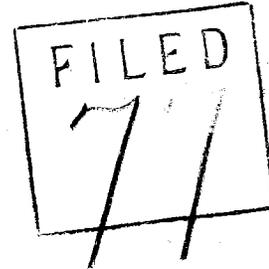


OFFICERS: Circuit Judges can not lawfully hold office of school director.

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April 13th, 1939.



Judge V. C. Rose,
Circuit Judge,
Unionville, Missouri.

Dear Judge:

We have received an inquiry from you which is as follows:

"For a number of years I have been and now am a member of the Board of Education of the Unionville School District. My present term will expire in April, 1941.

At the general election Nov. 8th, 1938, I was elected Circuit Judge of the Third Judicial District and will take office as such the first Monday in January, 1939.

It is my opinion that the offices of School Director and Circuit Judge are not incompatible, and that therefore I can hold both, however, I should like to have your opinion on this question and if in your judgment I should resign as a School Board member I will do so."

Replying thereto, 46 C. J. page 941, paragraph 46 states:

"At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. But where the functions of two offices are inconsistent, they are regarded as incompatible. The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other or to audit the accounts of the other."

By Section 22 of the Constitution of Missouri Circuit Courts are invested with general jurisdiction.

In State ex rel. against Ausk, 48 Mo. 242, the Supreme Court held that one person could at the same time occupy the office of the clerk of the Circuit Court and also clerk of the County Court, saying that the incompatibility of the two offices was not recognized in a legal sense:

"Inasmuch as in one or even in both of the courts, the clerk may appear by deputy. Were the duties necessarily personal, the deduction of counsel would be sound, but as it is we have no right to pronounce the offices incompatible."

In State ex rel. against Bus, 135 Mo. 325, (en banc), the court held that a person may hold the office of school director and constable at the same time in the City of St. Louis, and said at page 338:

"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 officers, as where one has some supervision of the other, is required to deal with, control, or assist him."

At page 339, the court, quoting from another case, said:

"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."

* * * * *

"We are unable to discover the least incompatibility or inconsistency in the public functions of these two offices, or where they could by possibility come in conflict or antagonism, unless the deputy sheriff should be required to serve process upon a director as such. We do not think such a remote contingency sufficient to create an incom-

patibility. The functions of the two offices should be inherently inconsistent and repugnant."

In State ex rel. Langford, against Kansas City, 261 S. W. 115, the court considered the question of whether the acceptance by a clerk of the board of public works of Kansas City, while wrongfully ousted from his office, as deputy sheriff was incompatible with his former position and did not vacate it as a matter of law, said at page 117:

"But by holding this appointment as deputy sheriff, while he was wrongfully ousted of his lawful office as clerk of said board, and was not permitted to discharge its duties, we hold that he did not thereby vacate as a matter of law his office as such clerk * *."

In the latter case the court summarized the holdings in various cases on the general question of incompatibility of offices and states at page 116:

"In State ex rel. v. Draper, 45 Mo. 355, it was held that the office of circuit judge and a member of the Legislature could not be held at the same time, because the two offices were incompatible at common law * * * * *."

Under the statutes of Missouri a member of the school board has various duties cast upon him. Section 9200, Revised Statutes of Missouri, 1929, empowers the board to issue funding and re-funding bonds for the district. Section 9201, Revised Statutes of Missouri, 1929, empowers the board to exchange such bonds. Section 9203, Revised

Statutes of Missouri, 1929, authorizes the board to make an estimate for the levy of a tax and sets forth certain other authorized powers. Likewise, Section 9204, Revised Statutes of Missouri, 1929, and Section 9205, Revised Statutes of Missouri, 1929, declare that the board shall have the care and keeping of all property belonging to the district and invests the board with certain other powers. Section 9206, Revised Statutes of Missouri, 1929, authorizes the board to enter into certain contracts. Section 9207, Revised Statutes of Missouri, 1929, authorizes the board to make rules for the organization, grading and government of school districts. Section 9209 authorizes the board to enter into contracts with and to employ teachers for the districts. Section 9215, authorizes the board of directors to condemn land. We do not set out in further detail the statutory authority conferred upon the board of directors of the school districts, but the above sufficiently illustrates the duties of the board of directors as showing there might be an inconsistency in the performance of the duties of a school board with the performance of the duties of the Circuit Judge. Litigation might arise with reference to the action of the school board in performing any of the duties set forth hereinabove.

If a contest exists as to the validity of a tax levy, of course that contest must come before the circuit judge for determination. If the district and the school teacher, who claims to have entered into a valid contract, get into a dispute as to whether such be the fact, it shows that to determine the status of the controversy must come before the circuit judge. It is not merely the duty of performing a ministerial act, but the person occupying the position as a member of the school board must exercise his judgment, likewise, of course, the person occupying the position of circuit judge must exercise his judgment.

While we recognize the high caliber of manhood and the public spirit and efficiency of the circuit judges and further recognize that in most instances school boards would function more efficiently when they have as members thereof circuit judges, yet it appears to us that the adjudicated duties on the question of incompatibility of offices indicate that the circuit judge should not occupy a position as another officer, in which capacity he would be subject to his action in his former capacity. Perhaps the outlying feature of the law justifying this conclusion is that in the frailty of human nature there may be someone somewhere in the history of the state who would let their actions as members of school boards be influenced by the fact that if a controversy arose as to the validity of such action, it would be determined by that same person thereafter, sitting as Circuit Judge.

We have in mind that of course, the circuit judge would usually disqualify himself in such a proceeding, nevertheless, if the test of incompatibility or inconsistency of duties is that in the exercise of judgment a person occupying one office might have before him as the incumbent of another office the regularity of his action as the former officer, then the two offices are inconsistent, and the acceptance of the latter vacates the former.

While we again recognize the high caliber of the individual in certain lines, yet it appears to us sound public policy that the public welfare be preserved by the officials being as "Caesar's wife, above suspicion." Out of the great body of citizens in each community, there ought to be available for the public service as school director individuals who do not hold another public office, the exercise of the duties of which latter office might be supervisory over the former.

Judge V.C. Rose

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April 13th, 1939.

CONCLUSION

It is our opinion that the office of circuit judge and that of school director are incompatible, and that sound public policy and the adjudged cases make inappropriate the holding of both of said offices at the same time by the same individual.

Yours very truly,

DRAKE WATSON
Assistant Attorney General

APPROVED:

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DW:RV