Approved: 4/6/00
Date

MINUTES OF THE HOUSE COMMITTEE ON EDUCATION.

The meeting was called to order by Chairperson Representative Ralph Tanner at 9:00 a.m. on March 10, 2000 in Room 313-S of the Capitol.

All members were present except: A quorum was present

Committee staff present: Avis Swartzman, Revisor of Statutes
Ben Barrett, Legislative Research Department
Carolyn Rampey, Legislative Research Department
Renae Jefferies, Revisor of Statutes
Linda Taylor, Committee Secretary

Conferees appearing before the committee: Cynthia Lutz Kelley, KASB
Craig Grant, KNEA
Linda Baker, USD 501 School Board Member
Brilla Scott, United School Administrators

Others attending: See Attached List

Hearings on **SB 231 - School districts, boards of education, membership by professional or administrative employees prohibited** were opened.

Ben Barrett, Legislative Research Department, gave the committee a briefing on the bill, stating that it comes up on a yearly basis.

Cynthia Lutz Kelley, attorney for KASB, appeared before the committee as a proponent of the bill. (Attachments 1 and 2) She urged the committee to pass **SB 231**, stating that the courts have repeatedly ruled in favor of similar legislation.

Craig Grant, KNEA, appeared before the committee in opposition to **SB 231**. (Attachment 3) He stated that his members look upon this bill as a way of denying employees of school district the opportunity to serve on school boards. He suggested that it should be left to the voters to choose their board members.

Linda Baker, USD 501 School Board Member and teacher in the district, appeared before the committee in opposition to **SB 231**. (Attachment 4) She also requested that committee members not pass this bill, but leave the decision of who serves on the boards up to the voters.

Brilla Scott, United School Administrators, appeared before the committee in support of **SB 231**. (Attachment 5)

Hearings on **SB 231** were closed.

The next meeting is scheduled for March 13, 2000

The meeting was adjourned at 10:30.

HOUSE EDUCATION COMMITTEE
GUEST LIST
DATE: March 10, 2000

NAME	REPRESENTING
Mark Tallman	KASB
Linda Baker	KNEA
Cindy Kelly	KASB
Craig Grant	KNEA
Bruce Dimmitt	Independent
Dana Reyna	Kaw Valley USD 321
BILL Brady	Schools For Fair Funding
Jacque Baker	SQE
Sheila Scott	USA

KANSAS ASSOCIATION OF SCHOOL BOARDS

1420 SW Arrowhead Road • Topeka, Kansas 66604-4024
785-273-3600

TO: House Committee on Education

FROM: Cynthia Lutz Kelly, Attorney

DATE: March 10, 2000

RE: Testimony on S.B. 231

Mister Chairman, members of the committee, thank you for the opportunity to testify, on behalf of our members, in favor of the proposed amendments to K.S.A. 72-7901. Those amendments would make it absolutely clear an employee of a unified school district cannot be a member of the board of education in the school district in which the person is employed. Our association has a long-standing position against allowing one person to serve in the capacity of both board member and employee in the same school district, and supports SB 231.

It is our belief that the legislature intended the current language in 72-8202e to create a similar prohibition. That statute provides, "No member of a board of education shall receive compensation from the school district for any work or duties performed by him." However, the Attorney General's office and courts in Shawnee and Edwards Counties have ignored the word "any" and the legislative history of the bill and concluded this language prohibits compensation only for duties performed as a board member. The Kansas Supreme Court heard arguments in that action earlier this week. Although we believe the Court will resolve the argument in our favor, we urge this committee to take definitive legislative action which will provide the taxpayers and residents of school districts with the same protection provided to other units of local government: protection against the inherent conflict which exists when one person is allowed to be both employer and employee, both the one supervised and the supervisor.

⇒ K.S.A. 25-1904 prohibits a "state, school district or community college officer or employee" from being a member of the state board of education.

⇒ K.S.A. 71-1403(d) provides "No member of the board of trustees of a community college shall be an employee of the community college."

⇒ K.S.A. 14-1302 prohibits city commissioners and mayors from being appointed to any position the commission creates or for which the commission sets compensation.

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⇒ Attorney General opinions have long concluded the common law principle of incompatibility of office prohibits a county commissioner from being an employee of a the county. (See Attorney General Opinion No. 82-111).

Allowing a school employee to serve as a school board member thwarts the public interest. A good example exists in the area of negotiations. Under the Kansas Professional Negotiations Act, K.S.A. 72-5413, *et seq.*, a teacher is automatically a member of the bargaining unit once the unit is recognized. Under the law, the board must bargain with teachers. The Kansas Open Meetings Act, K.S.A. 75-4517, *et seq.*, allows boards of education to discuss matters concerning negotiations in executive session. The reason for this exception is to allow the board to discuss its strategy in the negotiation process and protect the public interest in negotiating a fair and equitable contract that will be financed with public money. The purpose of this exception, to promote the public interest, is wholly thwarted if a member of the opposite side sits as a member of the board and is privy to the board's strategy. Further, an employee's interests in this situation are far different from those of the average citizen. As a member of the bargaining unit, the employee's interests must be in getting the most favorable contract for every teacher. As a board member, focus must be on the public interest, and the interests of other employees, not just the interests of the teachers.

Another example exists in the area of evaluation and hiring and firing of employees: the principal who must evaluate the employee can be fired by that same employee sitting in his or her capacity as a board member. The same is true of the superintendent, who is in charge of administering the district.

Every court that has examined the incompatibility question in the context of a school board and school employee has concluded one individual cannot properly act in both capacities and faithfully fulfill the duties of either position. In an era of heightened accountability, school boards should not be required to have members who cannot give the public interest their undivided attention.

Because employees are currently serving on some school boards, the House added the language in subsection (c) to address that issue. However, that language would allow some persons to continue to serve in incompatible positions for more than three years. We propose you replace that language with the following:

> *(c) Any employee of a school district who was serving as a member of the board of education of the unified school district by which the person is employed prior to the effective date of this act and who continues to serve as a member of the board of education of the unified school district by which such person is employed after the effective date of this act shall be deemed to have abandoned their employment with the school district and shall no longer receive compensation as an employee.*

We do not question that an employee of a school district should be allowed to run for school board. However, if elected, the employee should be required to either decline the office or resign from employment with the school district. We urge you to adopt the amendment we have proposed and recommend SB 231, as amended, favorably for passage.

Excerpts from the brief of U.S.D. No. 501 in *U.S.D. No. 501 v. Baker,* on appeal from the Shawnee District Court to the Kansas Supreme Court.

IV. ARGUMENT AND AUTHORITIES

K.S.A. 72-8202e prohibits a school board member from receiving compensation as an employee of the school district.

A. The plain language of K.S.A. 72-8202e prohibits a school board member from receiving compensation as an employee.

K.S.A. 72-8202e provides:

> 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.** (emphasis added).

Initially cases reviewing the rules of statutory construction should be considered. In *Estate of Soupene v. Lignitz*, 265 Kan. 217, 220, 960 P.2d 205 (1998), the Kansas Supreme Court reviewed the rules of statutory construction and stated:

> 'We initially note our fundamental rule of construction that it is the intent of the legislature, where it can be ascertained, which governs the construction of a statute. See *City of Wichita v. 200 South Broadway*, 253 Kan. 434, 436, 855 P.2d 956 (1993). The legislature is presumed to have expressed its intent through the language of the statutory scheme it enacted. We will not read into legislation provisions which do not there exist. See , *Joe Self Chevrolet, Inc. v. Board of Sedgwick County Comm'rs,* 247 Kan. 625, 633, 802 P.2d 1231 (1990).' *Marais des Cygnes Valley Teachers' Ass'n. v. U.S.D. No. 456*, 264 Kan. 247, 954 P.2d 1096 (1998).

Stated another way, when a statute is plain and unambiguous, the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be. *Brown v. U.S.D. No. 333*, 261 Kan. 134, 141-42, 928 P.2d 57 (1996). "In construing statutes, the legislative intent is to be determined from a general consideration of the entire act. Effect must be given, if possible, to the entire act and

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every part thereof. To this end, it is the duty of the court, as far as practicable, to reconcile the different provisions so as to make them consistent, harmonious, and sensible." *In re Marriage of Ross*, 245 Kan. 591, 594, 783 P.2d 331 (1989).

'[I]n construing statutes, "[s]tatutory words are presumed to have been and should be treated as consciously chosen and, with understanding of the ordinary and common meaning, intentionally used with the legislature having meant what it said." [Citation omitted.]' " *State v. Crank*, 262 Kan. 449, 451, 939 P.2d 890 (1997)." "It is presumed the legislature understood the meaning of the words it used and intended to use them; that the legislature used the words in their ordinary and common meaning; and that the legislature intended a different meaning when it used different language in the same connection in different parts of a statute.' [Citation omitted.]" *Bank of Kansas v. Davison*, 253 Kan. 780, 788, 861 P.2d 806 (1993).

If a statute's language is straight forward, the court must simply enforce it according to its terms. Its words then bear their ordinary meaning, and the statute is not read so as to add or subtract from that which is stated. *Gardner by and through Gardner v. Chrysler Corp.*, 89 F.3d 729 (10th Cir. 1996). A statute should not be read to add that which is not readily found therein. *George v. Capital South Mortgage Investments, Inc.*, 265 Kan. 431 (1998).

Given these rules, the language of K.S.A. 72-8202e must be considered. The first sentence of the law provides:

> 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.

The plain language of this provision allows the board to appoint officers and employees to serve at the pleasure of the board, other than those officers and employees specifically delineated in the act. K.S.A. 72-8202e came into existence as part of the session laws of 1973, L. 1973, ch. 297, §5. Prior to that time provisions governing compensation for school board members were included in K.S.A. 72-8203, which was repealed when K.S.A. 72-8202e was enacted. The provisions of "the act" are now codified at K.S.A. 72-8202a-e. K.S.A. 72-8202a through 72-8202d provide for the following officers: the president and vice-president of the board (K.S.A. 72-8202a), the superintendent and assistant superintendents (K.S.A. 72-8202b), the clerk (K.S.A. 72-8202c) and the treasurer (K.S.A. 72-8202d). The first sentence of K.S.A. 72-8202e gives the board authority to hire and fire additional employees or appoint additional officers. The second sentence of K.S.A. 72-8202e provides:

Such officers and employees shall receive compensation fixed by the board.

This provision requires any officer or employee, appointed under the authority of the board in the previous sentence, to receive compensation and gives the board the authority to determine the amount of compensation. The language in this provision mirrors the language in K.S.A. 72-8202b(a) ("The superintendent, any assistant superintendents, supervisors and principals shall receive compensation fixed by the board."); K.S.A. 72-8202c(a) ("The clerk shall receive compensation fixed by the board."); and K.S.A. 72-8202d(a) ("The treasurer shall receive compensation fixed by the board."). K.S.A. 72-8202a which defines the officers of the board itself contains no similar provision.

The final sentence of K.S.A. 72-8202e provides:

> No member of a board of education shall receive compensation from the school district for any work or duties performed by him.

This provision prohibits the board from compensating a board member for any work or duties performed by him or her for the school district in any capacity. The trial court erred in reading this section of the statute to include a limiting provision which prohibits compensation to a board member only in his or her capacity as a board member. This reading is clearly erroneous, and violates the rule of statutory construction by adding language which is clearly not included in the statute, and deleting consideration of the word "any," which is placed in the statutory language for a purpose.

The trial court erred in determining there is a conflict between the last two sentences of the statute if the statute is read to prohibit a board member from receiving compensation as an employee. Such a conflict does not exist. The statute allows board members to appoint employees, who must receive compensation. Board members can receive no compensation for **any** work or duties performed by them. The logical conclusion is that board members cannot be employees of the district. This is the plain and logical meaning of the statute and gives effect to all of the statute's words.

This becomes even clearer when looking at the plain and ordinary meaning of potentially ambiguous words used in the statute. Webster's Ninth Collegiate Dictionary provides the following definitions:

> any . . . 1: one of some indiscriminately of whatever kind: a: one or another taken at random . . . b: EVERY--used to indicate one selected without restriction . . . 2: one, some, or all indiscriminately of whatever quantity: a: one or more -- used to indicate an undetermined number or amount . . . b: ALL -- used to indicate a maximum or whole . . . c: a or some without reference to quantity extent. . . 3 a: unmeasured or

unlimited in amount, number, or extent. . . b: appreciably large or extended. . .

work . . . 1: activity in which one exerts strength or faculties to do or perform something: a: sustained physical or mental effort to overcome obstacles and achieve an objective or result b: labor, task, or duty that is one's accustomed means of livelihood
* * *
syn WORK, EMPLOYMENT, OCCUPATION, CALLING, PURSUIT, MÉTIER, BUSINESS (emphasis added)

duty . . . 2 a: obligatory tasks, conduct, service, or functions that arise from one's position (as in life or in a group) b: assigned service or business . . . 3 a: a moral or legal obligation b: the force or moral obligation. . .

Duties are those things a board member must do because of his or her position as a board member. The definition of work goes beyond those things a board member has a legal obligation to do and includes employment. Further by using the word "any" to modify work, the legislature clearly intended it to include all work, any type of work, including work for which another individual could be compensated as an employee. This reading of the statute allows all parts of the language to be read in harmony, gives meaning to all of the words in the statute, and does not read limiting language into the statute. Applying the primary rules of statutory construction, an employee of a school district cannot receive compensation for work if he or she accepts a position on the board of education.

B. The legislative history of the Act supports the board's interpretation of the statute.

Although the trial court erred in determining the statute was ambiguous, if it can be argued the language of the statute is ambiguous, another rule of statutory construction can be applied. In determining legislative intent, courts are not limited to mere consideration of the language used, but can look to the historical background of the

enactment, circumstances attending its passage, the purpose to be accomplished, and the effect the statute may have under various suggested constructions. *State v. Le*, 260 Kan. 845 (1996).

Kansas statutes have long included provisions which prohibit school board members from receiving compensation. For instance, in 1935 the General Statutes of Kansas contained the following provision: "72-1713. No member of the board of education shall receive any pay or emolument for his services. [L. 1876, ch. 122, art. 10, §13; April 7; R.S. 1923 §72-1713] (Source on prior law: L. 1862, ch 46, art. 4, § 7; L. 1864, ch. 67, §13; G.S. 1868, ch. 18, §84.)" Provisions of this nature apparently date back to the 1860s.

The modern day version of the statute had its genesis in the Unification Acts of 1963, L. 1963, ch. 393, §20. With regard to the provision in question, that law provided, in pertinent part:

> SEC. 20. Unified district; officers and employees. At the first meeting in August in each year, the board shall elect a president and vice-president from its members, each of whom shall serve for one (1) year or until his successor is elected and qualified. The board shall appoint a clerk and treasurer, and other personnel as needed. **Such clerk, treasurer, and other personnel shall not be board members** and shall serve at the pleasure of the board. (emphasis added.)

This provision was codified at 72-8203. While the section was amended again in 1965, 1967 and 1968, the pertinent language was not changed in those amendments. The next significant amendments came in 1973. In the 1973 session of the legislature, two bills were introduced to amend the provisions of K.S.A. 72-8203: Senate Bill 135 and House Bill 1250. House Bill 1250 was ultimately passed and those are the provisions now found at K.S.A. 72-8202a-e. The legislative history reveals the following:

On February 20, 1973, the House Education Committee had hearings on the bill. The executive director of the Kansas Association of School Boards was the only conferee on the bill and, according to the committee minutes, provided testimony **explaining** the bill. The minutes of the committee reveal the purpose of the bill was to require that the clerk of the board be someone other than the superintendent and to eliminate the requirement that a superintendent's contract expire on July 31 of each year. (R.II, p. 49-52). With minor amendments, the bill was recommended favorably for passage. The bill created separate provisions for the board officers, the superintendent, the clerk, the treasurer, and other personnel. There is absolutely no testimony or committee discussion which indicates the committee considered deviating from the position clearly articulated in the previous language or intended the language used in section 5 (now 72-8202e) would nullify the State's long-standing position that board members could not be personnel of the school district.

The Senate Education Committee considered S.B. 135 on February 22, 1973. Those minutes reveal the discussion centered around the superintendent provisions. (R.II, p. 42-43). On March 20, 1973, the Senate considered H.B. 1250 and amended the provisions of S.B. 135 into the bill. (RII, p. 44-45). Again there is no discussion or testimony which would reveal any intent to change the provisions of 72-8203, which prohibited school board members from being personnel of the district, by changing the language. Rather, it would appear the language was changed to make all of the provisions of the entire act consistent. The bill was worded in terms of compensation. It indicates each type of officer (clerk, treasurer, superintendent & assistant superintendent) or employee who could receive compensation from the district, and specifically disallows

any type of compensation for any board member. Because the new language forbade a board member from receiving compensation for any work, there was no need to add language which specifically stated an employee could not be a board member. A person who is not entitled to receive compensation from the school district clearly cannot be employed by the district. The language specifically included in K.S.A. 72-8202b, 72-8202c and 72-8202d forbidding employment would have been redundant in K.S.A. 72-8202e. (For these same reasons, application of the maxim of *expressio unius est exclusio alterius* by the trial court was erroneous. The legislature clearly defines, in each part of the statute, who can and cannot receive compensation for their services. The superintendent, clerk, treasurer, and other employees can receive compensation. Board members cannot receive compensation.)

There is nothing in the committee minutes or testimony to suggest the change in this wording was intended to change the long-standing prohibition on a board member being an employee of the district. It is highly improbable the legislature would make such a change without any discussion of the issue, and without knowledge they had done so. Therefore, not only does the plain language of the statute suggest a board member cannot receive compensation for work they might do as an employee of the district, the legislative history supports this conclusion.

C. Legislative intent should not be presumed when the legislative history clearly reveals the intent.

In this case, the lower court concluded, "Since the legislature repealed the clear prohibition against an employee serving as a board member, it must be presumed that they intended to repeal that prohibition." R.III, p. 61. It is true, as stated by the trial court, "[w]hen the legislature revises an existing law, it is presumed that the legislature

intended to change the law as it existed prior to the amendment. *Kaul v. State of Kansas Department of Revenue,* 266 Kan. 464, 471 (1988)." However, this rule of statutory construction cannot be extended to allow a court to presume an intent when the actual intent of the change is revealed in the legislative history of the act.

The trial court erred in presuming the legislature intended to remove the prohibition on an employee serving on a board of education in the 1973 amendments. They intended to change the provisions regarding the superintendent and clerk. This is clear in the legislative history. There is no testimony and no indication in the minutes of either education committee to suggest that additional changes were intended. The prohibition in the current language on receipt of compensation can easily be read to prohibit a board member from being compensated as an employee of the school district.

Applying the construction suggested by the trial court presumes a legislative intent which is entirely unsupported in the legislative history. Further, this construction, according to the trial court, eliminates common law protections with regard to incompatibility of office. This overwhelming change in the law could not have been intended, and the court should not presume this intent.

In *Layton v. Heinlein,* 14 Kan. App. 2d 104, 107, 782 P. 2d 1254 (Kan. App. 1989) the court rejected a trial court's interpretation of a statute stating, "Neither the language of the statute nor the history of the legislative purpose and intent of the statute supports the exception proposed by the trial court in this case." The same is true here. The court here should reject the trial court's interpretation of the statute.

D. Legislative inaction is not indicative of legislative intent.

The trial court correctly ignored arguments of the plaintiff that legislative action reveals legislative intent. While bills have been introduced in the legislature to clarify the language of 72-8202e, the legislature has failed to pass the legislation. Passage of legislation constitutes affirmative action on the part of the legislature, and it has taken no action to make it clear a compensated employee of a school district can be a member of the board of education of the same school district. Hundreds of bills are introduced in the legislature every year. The fact a bill is introduced and fails to become law is irrelevant to the question at hand.

Case law supports the conclusion legislative action is not indicative of legislative intent. *See Board of County Com'rs of Leavenworth County v. McGraw Fertilizer Service*, Inc., 261 Kan. 901, 933 P.2d 698 (Kan. 1997) (the court can draw many contradictory inferences from the legislature's failure to pass a bill); *Jackson v. Jackson*, 217 Kan. 448, 536 P.2d 1400 (Kan. 1975) (legislative inaction should not be interpreted as an indication that the taxpayers of Kansas were intended to be deprived of the full benefit of the marital deduction provision in federal law); *Higgins v. Cardinal Mfg. Co.*, 188 Kan. 11, 360 P.2d 456 (Kan. 1961) (legislature's failure to pass a bill on the subject at hand was indicative of legislative intent as "highly speculative;" legislature may have considered the legislation unnecessary in light of current state law); *Murphy v. City of Topeka-Shawnee County Dept. of Labor Ser*vices, 6 Kan.App.2d 488, 630 P.2d 186 (Kan.App. 1981) (evidence of legislative inaction rather than action cannot defeat the public policy considerations).

Common law principles of incompatibility of office, as interpreted by the Kansas courts, prohibit defendant from being a member of the Board of Education of U.S.D. No. 501 and, at the same time, an employee of the school district.

The trial court erred in concluding a specific legislative statement supplants the common law doctrine of incompatibility of office in this case. R III, p. 62. There is no specific legislative statement that would defeat the common law principle. Nothing in K.S.A. 72-8202e affirmatively allows a board member to receive compensation as an employee. If the legislature had intended a board member could receive compensation as an employee it could have clearly stated its intent. Had it done this, common law principles would not apply. However, in the absence of action to defeat rights at common law, the legislature should not be presumed to have eliminated these rights.

Kansas case law indicates there is an incompatibility of offices in this situation which would prohibit a board member from also being an employee. This was the conclusion of the attorney general in Kan. Att'y. Gen. Op. 75-52 (2/7/75), where the attorney general was asked if a teacher could serve as a member of the board of education in the district in which he or she was employed. The Attorney General stated:

> Thus, on the basis that the two positions are demonstrably incompatible, we cannot but conclude that a person holding office and serving in the capacity of a member of the board of education of a unified school district may not receive compensation from that same district as an employee thereof in the position of a teacher.

In reaching this conclusion, the Attorney General relied on the opinion of the Kansas Supreme Court in *Dyche v. Davis*, 92 Kan. 971 (1914). In that case, the state auditor challenged whether the plaintiff, a professor on the faculty of the University of Kansas, was entitled to receive a salary for services as a state fish and game warden in addition to his salary for his services as a faculty member. The auditor argued the

following: paying an individual compensation for two positions violated public policy and the common law on incompatibility of offices did not apply because Dyche's position as a professor at a state university was not a "public office." (The auditor did not argue the position as state fish and game warden was not a "public office," and it would appear from the description of the position in the case that this position would be deemed a public office.) The Kansas Supreme Court rejected both of these arguments.

Initially the court concluded one person could receive compensation for two positions if the positions were not incompatible:

> The auditor does not say, however, that it is against the law or public policy to hold two offices, but contends that it is against public policy for one man to draw the salaries of two offices.
>
> In the absence of constitutional or statutory restrictions, the incumbent of two offices, which he may rightfully hold, is entitled to the compensation provided by law for each. (Mechem on Public Offices & Officers, § 857; 29 Cyc. 1424; *United States v. Saunders*, 120 U. S. 126, 7 Sup. Ct. 467, 30 L. Ed. 594; *Cornell v. Irvine*, 56 Neb. 657, 77 N. W. 114; State v. *Grant, 12 Wyo.* 1, 73 Pac. 470, 2 Ann. Cas. 382, and Note.) 92 Kan. at 977.

The opinion continues:

> This principle is not disputed, but the auditor distinguishes this case by the fact that a professor in the university is not a public officer. While that is true, his compensation is fixed by public authority and is made payable out of public funds and the principle is applicable. *United States v. Saunders*, supra. (Emphasis added). 92 Kan. at 977.

The Kansas Supreme Court has clearly rejected the notion that incompatibility of offices does not apply to the situation where an individual holds a public position of employment. While other states may have rejected this notion, several have not, and Kansas Supreme Court decisions cannot be disregarded in interpreting Kansas law. The court then goes on to explain what constitutes incompatibility:

> Offices are incompatible when the performance of the duties of one in some way interferes with the performance of the duties of the other. This is something more than a physical impossibility to discharge the duties of both offices at the same time. It is an inconsistency in the functions of the two offices. It is difficult to give a definition which will have universal application. The distinction is best determined by an examination of the cases which have been held to fall on one side or the other of the line of cleavage. Many of these cases are collated in a note in 2 Ann. Cas. 380. In the *Abry* case this court held that the offices of clerk of the district court and city clerk were not incompatible so that by accepting one the other was vacated. In *Cornell v. Irvine*, supra, it was held that the duties of a commissioner of the Supreme Court of Nebraska were not incompatible with the duties of a lecturer at the state university, and that the commissioner who had received his salary in full was also entitled to the compensation allowed him as a lecturer. That case is quite similar to this one, and the opinion is very valuable, reviewing several other decisions. (emphasis added). 92 Kan. at 977-78.

Incompatibility is described in 63A Am. Jur. 2d, Public Officers and Employees §78 (1984) as follows:

> Incompatibility is to be found in the character of the offices and their relation to each other, in the subordination of the one to the other, and in the nature of the duties and functions which attach to them. They are generally considered incompatible where such duties and functions are inherently inconsistent and repugnant, so that because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both. Two offices or positions are incompatible if there are many potential conflicts of interest between the two, such as salary negotiations, supervision and control of duties, and obligations to the public to exercise independent judgment. If the duties of the two offices are such that when placed in one person they might disserve the public interests, or if the respective offices might or will conflict even on rare occasions, it is sufficient to declare them legally incompatible. Incompatibility has been said to exist when there is a built-in right of the holder of one position to interfere with that of the other, as when one is subordinate to, or subject to audit or review by, the second; obviously, in such circumstances, where both posts are held by the same person, the design that one act as a check on the other would be frustrated. (emphasis added).

Further, in §80 it is stated:

> In order for two offices to be incompatible, they must be subordinate, one to the other, and they must, per se, have the right to interfere, one with the other. Thus, two offices are incompatible where the incumbent of the one has the power of appointment to the other office or the power to remove its incumbent, even though the contingency on which the power may be exercised is remote.

Since the Attorney General opinion on this subject was issued in 1975, there have been two other Attorney General opinions issued on this subject. Both opinions are erroneous in their conclusions. In Kan. Atty. Gen. Op. No. 79-108 (6/7/79), the Attorney General stated:

> In applying the doctrine of incompatibility of offices in this type of case, the courts have, traditionally, held that this principle does not apply unless the person holds two, incompatible, public offices. The general rule is stated thusly:
>
> 'The prohibition against one person holding more than one office at the same time has reference to offices, as distinguished from positions in the public service that do not rise to the dignity of office. It does not extend to a position which is a mere agency or employment.' (Emphasis added.) 63 Am Jur. 2d Public Officers and Employees § 64, pp. 669, 670.
>
> Although some courts have now enlarged this doctrine to include both public offices and public employment (see 70 A.L.R. 3d 1188), the majority of states follow the traditional rule. (See 63 Am Jur. 2d Public Officers and Employees § 64, pp. 669, 670.) Unfortunately, the Kansas Supreme Court has not had occasion to address this issue. For that reason, we will not speculate whether our Court would deviate from the traditional common law rule and expand it so as to include positions of public employment, as well as public offices. Thus, it is our judgment that the traditional common law rule of incompatibility of offices is dispositive of the issue you have raised.

In reaching this conclusion, the Attorney General read the *Dyche* application of incompatibility principles as being limited to situations in which a public officer or employee receives two salaries from two different public positions. While *Dyche* involved the receipt of compensation in both positions, nothing in the opinion suggests

receipt of two salaries is a factor to consider in determining if positions are incompatible. It is the function and duties of each position that must be considered. If the functions and duties are compatible, one person may receive a salary for each position. However, if the functions and duties are incompatible, one person cannot hold both positions, whether or not either of those positions is salaried. Receipt of salary simply is not a factor to consider in determining incompatibility.

Further, both the *Dyche* case and the *Cornell* case from Nebraska, cited in *Dyche,* involved individuals who held one public office (state fish and game warden and state commissioner of the Supreme Court) and one public employment position (professor at a state university and lecturer at the state law school). The Attorney General opinion is simply wrong when it states the Kansas Supreme Court has not addressed the issue. The Kansas Supreme Court has found that incompatibility analysis should apply in situations involving one individual holding both public office and a position of public employment. Receipt of salary in either position is irrelevant to that analysis; it is the nature of the functions performed in each position, and their interference with each other that must be examined. When these factors are examined in the context of one person serving as a school board member and an employee of the same school district, the conclusion is inescapable: incompatibility exists.

Other courts have reached similar conclusions. See, e.g., *Otradovec v. City of Green Bay*, 347 N.W.2d 614,616 (Wis. App. 1984) ("The public detriment in having one person hold incompatible public offices can also exist when one person holds a public office and a position of public employment with duties that might conflict."); *Reilly v. Ozzard*, 33 N.J. 529, 166 A.2d 360, 366 (1960) ("The question is whether the public evil

which the doctrine of incompatibility was designed to meet is any less because one of the posts is other than an 'office.'"); *Hermann v. Lampe*, 175 Ky. 109, 194 S.W. 122 (1917) ("This seems to be a sound rule [refering to the test of incompatibility of office at common law] to be adopted in determining whether an employment which one accepts in incompatible with the duties of an office which he holds.").

Several courts in other jurisdictions have considered the question of whether a school board member can simultaneously serve as a teacher in the same school district. Those cases are summarized in "*Right Of School Teacher To Serve As Member Of School Board In School District Where Employed*," 70 A.L.R. 3rd 1188. In every case collected in the annotation the court, most frequently applying an incompatibility of office analysis, held a teacher does not have a right to serve as a member of the school board which governs the school district in which the teacher is employed.

In *Haskins v. State, ex rel, Harrington*, 516 P.2d 1171 (Wyo. 1973), members of the board of education of a Wyoming school district filed a *quo warranto* action challenging the election of a teacher in the district to the board of education. The petition alleged incompatibility of office and requested ouster and a declaration of forfeiture of office. The court agreed. Initially the court concluded "the application of the rule against holding incompatible offices, whether by common law or as it might be declared by legislative enactment, does not result in unconstitutional infringement of personal and political rights." 516 P.2d at 1173. Next the court considered whether principles of incompatibility could be applied to employment as well as offices. After reviewing cases from other jurisdictions, the court noted that in cases where offices are involved, courts "uniformly declare that 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." 516 P.2d at 1178. The court refused to be "bound by technical definitions of the word office" and held "that employment as a teacher and office as a member of the board of trustees of the school district are incompatible within the meaning and intent of the common law rule." Id. The court stated:

> We believe that the undisputed facts established by the affidavits are sufficient to establish that the employment as a teacher is subordinate to and under the supervision of the board of trustees; that a member of the board would have the right to hire and fire; that there are many instances in which Haskins' self-interest as a teacher has and will run counter to the board's loyalty to the public; that Haskins as a trustee would be supervising himself and at the same time supervising other teachers and administrative personnel who in turn have supervision or authority over Haskins as a teacher.
>
> . . . There is present a conflict in the duties of the two positions which constitutes an incompatibility which is not in the best interests of the school district or the general public and which, under properly interpreted principles of common law, should not be permitted to exist. 516 P.2d at 1180.

See, also, *Thomas v. Dremmel*, 868 P.2d 263 (Wyo. 1994) (employment with district disqualified defendant from holding office as a member of the board of trustees).

Other courts have reached similar conclusions. In *Visotcky v. City Council of the City of Garfield*, 113 N.J. Super. 263, 273 A.2d 597, 599 (1971), the court stated:

> Common sense dictates the conclusion that being a school teacher and a member of a board of education in the same school district is patently incompatible. 'The members of the board of education of a municipality are public officers holding positions of public trust. They stand in a fiduciary relationship to the people whom they have been appointed or elected to serve.' *Cullum v. Board of Education*, 27 N.J. Super. 243, 248, 99 A.2d 323, 326 (App. Div. 1953). A teacher's position is also one of public service, but the teacher is an employee whereas the board of education is the employer. There are many potential conflicts of interest between the two. . . The widespread differences throughout our State in matters of salary negotiations, with resultant 'job action' by teachers and injunctions obtained by boards of education against teachers activities,

> remind us vividly of the conflicts between teachers and boards of education. A teacher's self-interest can readily run counter to a board member's loyalty to the public. We entertain no doubt that an individual may not properly act contemporaneously as a teacher and a member of the board of education in the same school district. The positions are incompatible and represent intolerable potential conflicts of interest.

In *Tarpo v. Bowman Pubic School District No. 1*, 232 N.W.2d 67, 70 (N.D. 1975), the court stated:

> In that case [*State v. Lee*, 78 N.D. 489, 50 N.W.2d 124 (1951)], at 126 of 50 N.W.2d, we said:
>
> > 'It is hard, and the courts have hesitated to form a general definition of what constitutes incompatibility. Each case is discussed and decided upon its particular facts. The functions and duties of the offices are determinative of whether they are incompatible or not.'
>
> Recognizing that this court said, in *Mootz v. Belyea*, 60 N.D. 741, 236 N.W. 358, 75 A.L.R. 1347(1931), that "when a teacher is employed by a school district she is not employed as an officer and she does not become an officer," nevertheless, the same test must be applied to determine the compatibility of the two positions held by Tarpo, even though one of those positions is not an 'office.'

Concluding the rule should apply to offices or employments, the court went on to explain incompatibility:

> Two offices or positions are incompatible when one has the power of appointment to the other or the power to remove the other, and if there are many potential conflicts between the two, such as salary negotiations, supervision and control of duties and obligations to the public to exercise independent judgment.

See, also, *Ferguson v. True*, 66 Ky. 255 (1897) (duties of school trustee and teacher were incompatible; when trustee accepted teaching contract he ceased to be a trustee); *Clifford v. School Committee of Lynn*, 275 Mass. 258, 175 N.E. 634 (1931) (by becoming a member of the school committee, a teacher who was wrongfully discharged and ordered reinstated in her teaching position was no longer eligible to be a teacher in

the district); *Doebler v. Mincemoyer*, 446 Pa. 130, 285 A.2d 159 (1971) (instructor from an area community college was precluded from being a school director in one of the sponsoring school districts by state statute); and *Cranston Teachers Alliance v. Mi*ele, 495 A.2d 233 (R.I. 1985) (upheld application city ordinance prohibiting employment with city and serving in a municipal elected office finding the governmental interest in preventing a potential conflict of interest outweighed the defendant's right to hold office).

In each of these cases, the court concluded a school teacher does not have a right to serve as a member of the governing body of the school in which the teacher is employed. While some cases include references to state statutes which prohibit such service, others are based solely on common law incompatibility principles. Each of these cases has found one individual cannot act as both employer and employee.

Two cases suggest a teacher is not disqualified from assuming a position on the board if the teacher resigns or takes a leave of absence without pay before taking office. *Wright v. State Comm. on Ethics*, 389 So.2d 662 (Fla. App. 1980) (teacher did not violate state statute prohibiting employee from serving on board of employer by serving on board of education of school district from which she took leave of absence without pay); *Lane Education Service Dist. v. Swanson*, 71 Or. App. 328, 692 P.2d 662 (1984) (teacher who resigned before the date his term of office commenced was entitled to hold office on the board).

In addition to the cases dealing with school board members serving as employees of the school district, there are a number of cases addressing similar issues at the city level. See, e.g. *Otradovec v. City of Green Bay*, 347 N.W. 2d 614 (Wis. App. 1984) (individual could not serve as city alderman and be employed as residential appraiser);

Acevedo v, City of North Pole, 672 P.2d 130 (Alaska 1983) (city council member could not serve as a member of the municipal police force); *Rogers v. Village of Tinley Park*, 451 N.E.2d 1324 (Ill. App. 1983)(city council member could not simultaneously be employed by the municipal police force); *O'Connor v. Calandrillo*, 117 N.J. Super. 586, 285 A.2d 275 (1971), *aff'd*, 121 N.J. Super. 135, 296 A.2d 326, cert. denied, 62 N.J. 1193, 299 A.2d 727, *cert. denied*, 412 U.S. 940 (city commissioners could not be employed as police sergeant, secretary to the Board of Assessors or advisor of veterans' affairs, positions which were subordinate to the board of commissioners); *Kaufman v. Pannuccio*, 121 N.J. Super. 27, 295 A.2d 639 (1972) (positions of city council member and police lieutenant were incompatible).

Allowing a school employee to serve as a school board member is against the public interest. A good example of the incompatibility exists in the area of negotiations. Under the Kansas Professional Negotiations Act, K.S.A. 72-5413, *et seq*., a teacher is automatically a member of the bargaining unit once the unit is recognized. Under the law the board must bargain with teachers. The Kansas Open Meetings Act, K.S.A. 75-4517, *et seq*., allows boards of education to discuss matters concerning negotiations in executive session. The reason for this exception is to allow the board to discuss its strategy in the negotiation process and protect the public interest in negotiating a fair and equitable contract which will be financed with public money. The purpose of this exception, to promote the public interest, is wholly thwarted if a member of the opposite side (teacher) can sit as a member of the board and be privy to the board's strategy. Further, the teacher's interests in this situation are far different from those of the average citizen. As a member of the teacher bargaining unit, his or her interests must be in

getting the most favorable contract for every teacher. As a board member, focus must be on the public interest, and the interests of other employees, not just the interests of the teachers.

Another example exists in the area of evaluation and hiring and firing of employees: the principal who must evaluate the teacher can be fired by the teacher sitting in her capacity as a board member. The same is true of the superintendent, who is in charge of administering the district.

In determining there was no common law incompatibility of office, the Kansas Attorney General also relied on Public Disclosure Commission advisory opinions which conclude no conflict of interest would exist under the state conflict of interest law, if an employee of a school district, sitting as a member of the board, votes on his or her own contract of employment with the district. K.S.A. 75-4304 provides:

> (a) No local governmental officer or employee shall, in the capacity of such an officer or employee, make or participate in the making of a contract with any person or business by which the officer or employee is employed or in whose business the officer or employee has a substantial interest.
>
> (b) No person or business shall enter into any contract where any local governmental officer or employee, acting in that capacity, is a signatory to or a participant in the making of the contract and is employed by or has a substantial interest in the person or business.

The commission has reasoned that since a school board is not a "business" or a "person," the provisions do not apply. This opinion has not been tested in the Kansas courts. Regardless, reliance on these decisions by the Attorney General is misplaced. The distinction between incompatibility and conflict of interest is discussed in 63A Am. Jur. 2d, Public Officers and Employees §79:

> Incompatibility of office or a position is not the same as a conflict of interest. Incompatibility of office or position involves a conflict of duties between two offices or positions. While this conflict of duties is also a conflict of interest, a conflict of interest can exist when only one office or position is involved, the conflict being between that office or position and a nongovernmental interest. Incompatibility of office or position requires the involvement of two governmental offices or positions. Moreover, incompatibility of office or position may be sufficient for a vacation of an office when conflict of interest is not.

The courts in *Tarpo* and *Haskins* rejected similar arguments in those states, correctly recognizing that the ability to avoid a conflict under state conflict of interest law does not cure other factors which make positions incompatible. Further, the existence of conflict of interest laws does not abrogate the common law rule against the holding of incompatible positions. *Tarpo*, 232 N.W.2d at 71. The same is true here.

Although interpreting an older version of Kansas conflict of interest laws, the case of *Weston v. Lane*, 20 P. 260, 261-262, 40 Kan. 479 (Kan. 1889), should not be ignored. In that case Weston had a construction contract with the district and was later elected to the board of the same district. At the time of the election, the contract had not been completed. Because of the contract, his predecessor on the board seat refused to relinquish the seat. Weston brought an action in *quo warranto* seeking an order that he be awarded the seat. The court refused, stating:

> When the plaintiff was elected he might have transferred his interest under the contract to another, and have severed the contract relations which existed between him and the district. The voters of the district had a right to assume that he would do so; and, if this had been done, he would have been entitled to the possession of the office and to the remedy which he now seeks. Instead of doing this, however, he insists upon occupying the incompatible positions of clerk and contractor. He boldly declares in his petition that he proposes to complete the contract which he has entered into, and at the same time asks to be installed as one of the officers who are to supervise, control, and pay for the materials furnished and labor done under that contract. If he was invested with the office, and should

> proceed as he proposes, he would subject himself to removal and to punishment.
>
> The court is invested with some discretion in granting this extraordinary remedy, and it would exercise its discretion unwisely to assist the plaintiff in violating the law as he proposes. It would also be idle to clothe him with an office from which he would be at once subject to removal, and when the performance of its duties would lay him liable to prosecution and to punishment. Judgment must therefore be given in favor of the defendant.

While this case was decided based on the conflict of interest law in place at the time of the decision, the court also recognized the incompatibility inherent in this situation, clearly suggesting there is no right to be both the supervisor and supervised.

Under incompatibility analysis, a person who accepts an office which is incompatible with a previous office or position is deemed to have voluntarily resigned from the first position. In *Congdon v. Knapp*, 106 Kan. 206, (Kan. 1920), the court stated:

> Granting that the office of mayor and councilman are incompatible, and that the duties of both may not be exercised by the same person at the same time, a councilman is not thereby rendered ineligible to election to the office of mayor. Granting, further, that the resignation of an officer is not completed until it is accepted by the body empowered to appoint a successor, still the contention of the defendant would not be sound. There are other ways plaintiff may lay down the office of councilman, besides by resignation. One of these is by the acceptance of an incompatible office. 23 A. & E. Ency. of Law (2d Ed.) 427. This would not require the concurrence of the mayor and council. When he shall be inducted into the office of mayor, he thereby vacates the office of councilman. He cannot hold both at the same time, but he may carry on the necessary legal proceedings to obtain the adjudication of his right to assume the office of mayor while he is yet councilman, just as he may carry on the effort to be elected as mayor while he is yet councilman. They are both means to the end of actually becoming mayor.

Under this rule, when a school employee accepts the position of school board member, he or she automatically resigns his or her employment. Accord, *Clifford, supra.*

Alternatively, some courts have held that by remaining in the employ of the district after accepting a position on the board, the right to the board position is relinquished. See, *Haskins, supra, Ferguson,* supra. Finally, some states have allowed the individual to choose which position will be resigned. See, *Tarpo v. Bowman Public Sch. Dist. No. 1*, 232 N.W.2d 67 (N.D. 1975).

KANSAS NATIONAL EDUCATION ASSOCIATION / 715 SW 10TH AVENUE / TOPEKA, KANSAS 66612-1686

Craig Grant Testimony Before
House Education Committee
Friday, March 10, 2000

Thank you Mr. Chairman. Members of the Committee, I am Craig Grant and I represent Kansas NEA. I appreciate this opportunity to visit with the committee in opposition to SB 231.

Kansas NEA looks at this bill as one which could deny education employees the right to hold public office in their community. We do not think this is necessary. We already have some school boards with employees serving on the board. It does not seem to harm the operation of the schools. The board member involved usually excuses himself or herself when his or her contract is the topic of discussion. I have not observed major problems with the system as it is now.

The key to this situation, we believe, is that the voters of a school district realize who is running for office. The issue of whether or not to allow an employee to serve on a board should be left to the voters. If there is a problem, the voters in the district will deal with it at the ballot box. Kansas NEA believes that the voters are intelligent enough to sort out the situations and vote accordingly. A change in the law will allow, in some cases, fewer choices for voters to have as school board members. It really is not a change needed in our laws.

Attorney General Stephan issued two opinions which indicated that no law, either common or actual, prevented an employee from serving on the school board. Mr. Stephen indicated that a person could even vote on his/her own contract and could definitely be paid for his/her teaching duties. Proponents have mentioned city and county offices as a parallel to school boards. The one major difference I would note is the city and county commissioners are paid a salary for their service. School board members are not.

Kansas NEA would ask that you report SB 231 unfavorably for passage. Thank you for listening to our concerns.

Telephone: (785) 232-8271 FAX: (785) 232-6012 Web Page: www.knea.org

House Education
3-10-00
Attachment 3

Linda Baker Testimony
House Education Committee
Friday, March 10, 2000

Thank you Mr. Chairman. Members of the House Education Committee, I am Linda Baker and I appreciate the opportunity to visit with the committee about SB 231.

I am a teacher in USD 501 here in Topeka. I am also on the Board of Education of the District. I ran for election about a year ago for one of the at-large positions on the board. Almost immediately the issue of my being a teacher hit the public through the newspaper and other media in Topeka. In fact, there was a second 501 teacher who also ran for one of the positions on the board. Shortly after I filed, SB 231 was introduced at the request of the 501 district. The district made sure that the publicity continued throughout the primary and general election.

The voters of the district knew I was a teacher; and elected me to my position on the board in April.

I worked hard as I went door-to-door in the district to address the concerns of the voters. At no time did I hide the fact that I was a teacher in the district. The second teacher running was defeated by the voters and did not win her election.

I was proud to win and anxious to start my duties as board member.

Shortly before I took office, USD 501 filed suit in district court alleging that they could not pay me as a teacher because the law said that no board member should be compensated by the district. The lawsuit was heard by Judge Marla Luckert, who ruled in my favor. Since then the district has appealed the case to the Court of Appeals. We are waiting for a decision in this case.

There is no doubt in my mind that my teaching in the district was an issue in the election. My opponent used it and the press covered the issue, as they should. The voters of this district believe that I could fairly and competently represent them on the school board. I believe that their wishes should be respected.

I have not had problems in my dual roles in USD 501. I believe I can continue to teach my students and represent the voters on the school board. I would ask that you defeat SB 231 and allow the voters voice to be honored. Thank you for your time.

House Education
3-10-00
Attachment 4

a Highfill Scott
cutive Director
bhsusa02@ink.org

M. Katharine Weickert
Director of
Administrator Services
usak01@ink.org

Victor J. Braden
Legal Counsel
vbraden1@aol.com

Rome Mitchell
Professional Development
Coordinator

UNITED SCHOOL ADMINISTRATORS

Kansas Association of Elementary School Principals (KAESP)

Kansas Association of Middle School Administrators (KAMSA)

Kansas Association of School Administrators (KASA)

Kansas Association of School Business Officials (KASBO)

Kansas Association for Supervision and Curriculum Development (KASCD)

Kansas Association of Special Education Administrators (KASEA)

Kansas Association of Secondary School Principals (KASSP)

Kansas Council of Vocational Administrators (KCVA)

Kansas School Public Relations Association (KanSPRA)

SB 231: Membership on Boards of Education

Testimony presented before the House Education Committee

by
Brilla Highfill Scott, Executive Director
United School Administrators of Kansas

March 10, 2000

Mister Chairman and Members of the Committee:

United School Administrators of Kansas supports SB 231 which states, as amended by the Senate, that no employee of a unified school district can be a member of the board of education where s/he is employed.

When a teacher, administrator or district employee serves as a member of the board of education where s/he is employed, a conflict of interest occurs. A board-member teacher would have the right to listen to executive sessions involving pre-negotiation strategies; then actually be negotiating his/her contract and the contracts of peers.

Personnel matters are discussed in board of education executive sessions. The board-member teacher would have access to confidential information about fellow teachers as well as supervisors.

A board-member district employee would be in the position of evaluating his/her superintendent or supervisor. How does a fair evaluation occur from either party in such a situation?

United School Administrators of Kansas asks that you favorably report SB 231.

House Education
3-10-00
Attachment 5

820 SE Quincy St Suite 200 • Topeka KS 66612-1165 • 785.232.6566
FAX 785.232.9776 • www.ink.org/public/usa