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| OPINION | : | No. 79-715 |
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| of | : | <u>October 18, 1979</u> |
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SUBJECT: DUAL SERVICE—Persons who are employed as superintendents of school districts may continue to serve as members of the State Board of Education.

The Honorable Michael W. Kirst, President, State Board of Education, has requested an opinion on the following question:

May a person who is employed as a superintendent of a school district in California continue to serve as a member of the State Board of Education?

CONCLUSION

A person who is employed as a superintendent of a school district in California may continue to serve as a member of the State Board of Education.

ANALYSIS

In 40 Ops. Cal. Atty. Gen. 238 (1962), we summarized the principles relating to the doctrine of incompatibility of public offices, as follows:

“Under the traditional common law rule, a public officer who is appointed or elected to another public office and enters upon the duties of the second office, automatically vacates the first office if the two are incompatible. *People ex rel. Chapman v. Rapsey*, 16 Cal. 2d 636, 644 (1940). Offices are incompatible, in the absence of statutes suggesting a contrary result (e.g., the consolidation statutes, Gov. Code §§ 24300, 24304; see 23 Ops. Cal. Atty. Gen. 22, 24 [1954]), if there is any significant clash of duties between the offices, if the dual office holding would be improper for reasons of public policy, or if either officer exercises a supervisory, auditory, or removal power over the other. 16 Cal. 2d at 640–644; 38 Ops. Cal. Atty. Gen. 113 (1961).”

(See also *People ex rel. Kraemer v. Bagshaw* (1942) 55 Cal. App. 2d 155, 157; 55 Ops. Cal. Atty. Gen. 36(1972); 56 Ops. Cal. Atty. Gen. 556, 557 (1973).)

This common law doctrine of incompatibility does not arise, however, where one of the positions is an employment rather than an office. (58 Ops. Cal. Atty. Gen. 109, 111 (1975); 56 Ops. Cal. Atty. Gen. 556, 557 (1973); 55 Ops. Cal. Atty. Gen. 94, 95 (1972); 47 Ops. Cal. Atty. Gen. 79, 80 (1966).) We must first determine therefore, whether both of the positions in question are public offices.

It has been stated that the power, duties, and functions incident to a position constitute the principal test of a public office. (*People v. Hulburt* (1977) 75 Cal. App. 3d 404, 411; 62 Ops. Cal. Atty. Gen. 126, 130 (1979).) The right, authority, and duty conferred by law must be continuing and permanent, not transient, occasional or incidental, involve an exercise of some of the sovereign power of the state, and require the exercise of judgment and discretion. (*Spreckels v. Graham* (1924) 194 Cal. 516, 528–530; 62 Ops. Cal. Atty. Gen. 126 (1979).) The delegation of some portion of the sovereign functions of government is almost universally regarded as essential to the existence of a public office. (*People v. Hulburt, supra*; 62 Ops. Cal. Atty. Gen., *supra*; 56 Ops. Cal. Atty. Gen. 556, 558 (1973).) Finally, it was noted in *People v. Hulburt, supra*, that a contract of employment is essentially inconsistent with status as a public officer, who is usually elected or appointed.

The State Board of Education was established under the provisions of section 33000 of the Education Code (Reorganized),¹ pursuant to the authority of article IX, section 7 of the California Constitution. A member of the State Board of Education, who is appointed by the Governor with the advice -and consent of two-thirds of the Senate (§ 33000), is

¹ Hereinafter, all sections references are to the Education Code (Reorganized) unless otherwise indicated.

clearly a public officer. In 41 Ops. Cal. Atty. Gen. 105, 111 (1963) we observed that the constitutional and legislative provisions relating to the powers and duties of the State Board of Education, the Superintendent of Public Instruction, and the Department of Education indicate the legislative intent to make the State Board of Education the ultimate governing and policy making body for the department and its officers and employees. (See § 33030.) In accordance with the premise that a member of the State Board of Education is the holder of a public office, we have determined that such membership is incompatible with membership on a county board of education. (31 Ops. Cal. Atty. Gen. 170 (1958).)

We next consider the position of superintendent of a school district. The basic provisions pertaining to the employment of a district superintendent are found in section 35026 et seq. In accordance with the principle that the duties rather than the title or designation of a position constitute the test of a public office, the pertinent statutes relating to the duties of district superintendent are set forth below. Section 35026 provides:

“The governing board of any school district employing eight or more teachers may employ a district superintendent for one or more schools and may delegate to the district superintendent any of the duties provided for in Section 35250.”

Section 35250 provides:

“The governing board of every school district shall:

“(a) Certify or attest to actions taken by the governing board whenever such certification or attestation is required for any purpose.

“(b) Keep an accurate account of the receipts and expenditures of school moneys.

“(c) Make an annual report, on or before the first day of July, to the county superintendent of schools in the manner and form and on the blanks prescribed by the Superintendent of Public Instruction.

“(d) Make or maintain such other records or reports as are required by law.”

Section 35035 provides:

“The superintendent of each school district shall, in addition to any other powers and duties granted to or imposed upon him:

“(a) Be the chief executive officer of the governing board of the district.

“(b) Excepting in districts where the governing board has appointed or designated an employee other than the superintendent, or a deputy, or assistant superintendent, to prepare and submit a budget, prepare and submit to the governing board of the district, at such time as it may direct, the budget of the district for the next ensuing school year, and revise and take such other action in connection with the budget as the board may desire.

“(c) Subject to the approval of the governing board, assign all employees of the district employed in positions requiring certification qualifications, to the positions in which they are to serve. Such power to assign includes the power to transfer a teacher from one school to another school at which the teacher is certificated to serve within the district when the superintendent concludes that such a transfer is in the best interest of the district.

“(d) Upon adoption, by the district board, of a district policy concerning transfers of teachers from one school to another school within the district, have authority to transfer teachers consistent with such policy.

“(e) Determine that each employee of the district in a position requiring certification qualifications has a valid certificated document registered as required by law authorizing him to serve in the position to which he is assigned.

“(f) Enter into contracts for and on behalf of the district pursuant to Section 39656.

“(g) Submit reports showing the financial and budgetary conditions of the district, including outstanding obligations, to the governing board at least once every three months during the school year.”

Section 39656 provides:

“Wherever in this code the power to contract is invested in the governing board of the school district or any member thereof, such power may by a majority vote of the board be delegated to its district superintendent, or to such persons as he may designate, or if there be no district superintendent then to such other officer or employee of the district as the

board may designate. Such delegation of power may be limited as to time, money or subject matter or may be a blanket authorization in advance of its exercise, all as the governing board may direct; provided, however, that no contract made pursuant to such delegation and authorization shall be valid or constitute an enforceable obligation against the district unless and until the same shall have been approved or ratified by the governing board, said approval or ratification to be evidenced by a motion of said board duly passed and adopted. In the event of malfeasance in office, the school district official invested by the governing board with such power of contract shall be personally liable to the school district employing him for any and all moneys of the district paid out as a result of such malfeasance.”

These specified duties and powers are entirely consistent with an employment relationship between the governing board of a school district and the district superintendent. Thus, a district superintendent has been universally regarded as an employee rather than an officer of the school district. (*Main v. Claremont Unified School District* (1958) 161 Cal. App. 2d 189, 205; *Stewart v. Eaves* (1927) 84 Cal. App. 312, 319; and *cf. People v. Hulbert, supra*, 75 Cal. App. 3d at p. 411; 61 Ops. Cal. Atty. Gen. 303, 304 (1978); 59 Ops. Cal. Atty. Gen. 532, 534 (1976).) Consequently, the doctrine of incompatibility of public offices does not preclude a person from occupying simultaneously the positions in question.

In view of the absence of any express constitutional or statutory prohibition, it is concluded that a person who is employed as a superintendent of a school district in California may continue to serve as a member of the State Board of Education. This conclusion is specifically limited to the scope of the inquiry. We express no opinion with respect to the application of other statutes nor affecting the status of a person as a member of the State Board of Education. (*Cf. Gov. Code, § 1126*, pertaining to activities of local agency officers and employees; see 59 Ops. Cal. Atty. Gen. 604, 612–613 (1976).) Nor do we discuss the various provisions regarding conflicting economic interests.² (*Cf. Gov. Code, §§ 1090, 3600, 87100.*)

² The doctrine of conflict of interest pertains to conflicting public and private interests. (58 Ops. Cal. Atty. Gen. 109, 111 (1975); and see 58 Ops. Cal. Atty. Gen. 670 (1975); 57 Ops. Cal. Atty. Gen. 458 (1974); 48 Ops. Cal. Atty. Gen. 80 (1966); 46 Ops. Cal. Atty. Gen. 74 (1965).) The question does not arise merely because two public agencies contract with each other. (*Cf. 55 Ops. Cal. Atty. Gen. 94, 95 (1972); 55 Ops. Cal. Atty. Gen. 36,38 (1972).*)