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July 21, 1992

I - 92-039

COMPATIBILITY:
School District Superintendent and
Member of the Chicago Board of Education

Honorable Donne E. Trotter
State Representative, 25th District
Illinois State Representative
Room 2085 Stratton Building
Springfield, Illinois 62706

Dear Representative Trotter:

I have your letter wherein you inquire whether the superintendent of a suburban school district may simultaneously serve as a member of the board of education of the city of Chicago. Because of the nature of your inquiry, I will respond informally thereto.

The doctrine of incompatibility of offices precludes one person from holding two public offices where the written law of the State specifically prohibits the occupant of either one of the offices in question from holding the other or where the duties of either office are such that the officeholder cannot, in every instance, fully and faithfully perform all the

duties of the other office. (People ex rel. Myers v. Haas (1908), 145 Ill. App. 283, 286; Rogers v. Village of Tinley Park (1983), 116 Ill. App. 3d 437, 440.) In this case, there is a statute which generally prohibits a member of the Chicago school board from holding other public offices, with limited exceptions.

Section 34-4 of the School Code (Ill. Rev. Stat. 1991, ch. 122, par. 34-4), which establishes qualifications for appointment to the Chicago board of education, provides, in pertinent part, that board members:

> "* * * shall not hold other public office under the Federal, State or any local government other than that of Director of the Regional Transportation Authority, member of the economic development commission of a city having a population exceeding 500,000, notary public or member of the National Guard, and by accepting any such office while members of the board, or by not resigning any such office held at the time of being appointed to the board within 30 days after such appointment, shall be deemed to have vacated their membership in the board."

Thus, the school district superintendent in question generally would not be eligible to serve as a Chicago board of education member if he is deemed to hold another public office. Whether a school district superintendent is a public officer is an issue which has not been addressed by the Illinois courts.

The Illinois courts have long recognized the difficulty in determining whether a person is an officer or an employee (Bunn v. People (1867), 45 Ill. 397, 400-403), and the even greater difficulty in laying down any fixed rule to determine the question in all cases. (People ex rel. Jacobs v. Coffin (1918), 282 Ill. 599, 606.) In opinion No. S-515, issued October 17, 1972 (1972 Ill. Att'y Gen. Op. 241), Attorney General Scott discussed case authority from Illinois and other jurisdictions, and summarized as follows:

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> * * * [T]here are two indispensable requirements of a public office. One, to be a public office, a position must possess a delegation of a portion of the sovereign power of the government. Secondly, the position must be created by the constitution or by law and must be

> of an enduring nature and not subject to abolition by whim of superior officials. Other indicia that a position is a public office are whether the individuals must give bond or take an oath.
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> * * *

(1972 Ill. Att'y Gen. Op. 241, 244.)

The duties of an office are prescribed not by contract, but by law. (Wargo v. Industrial Commission (1974), 58 Ill. 2d 234, 236 and 237.) In determining whether a position constitutes an office, courts have also considered whether the statute or ordinance creating the position refers to the position as an "office", whether salary is fixed by or according to law rather than by contract, and whether a term of office is fixed. Wargo v. Industrial Commission, 58 Ill. 2d at 237-38; People ex rel. Adamowski v. Wilson (1960), 20 Ill. 2d 568, 583.

Section 10-21.4 of the School Code (Ill. Rev. Stat. 1989, ch. 122, par. 10-21.4) requires school boards in districts other than those which have only one school with less than four teachers "to employ a superintendent who shall have charge of the administration of the schools under the direction of the board of education". The position is, therefore, an enduring one created by law, and one of the indispensable elements of public office is present. (See, 1972 Ill. Att'y Gen. Op. 241, 245-46.) The most important characteristic of an office, however, is that it involves a delegation to the officer of some of the solemn functions of government to be exercised by the officer for the benefit of the public. Some portion of the sovereignty of the State, either legislative, executive or judicial, must attach to the office to be exercised for the public benefit. People v. Brady (1922), 302 Ill. 576, 582.

The General Assembly has, by law, conferred duties and powers on the superintendent of schools, but it is not clear that the General Assembly has authorized the superintendent to exercise any portion of the sovereignty of the State himself. Pursuant to section 10-21.4 of the School Code (Ill. Rev. Stat. 1991, ch. 122, par. 10-21.4), the superintendent has charge of the administration of the schools but is subject to the direction of the school board in exercising that power. In addition to these administrative duties, the superintendent is charged with making recommendations to the board concerning: the budget; building plans; site location; the selection,

retention and dismissal of teachers and other employees; and, the selection of textbooks, instructional material and courses of study. The responsibility of making decisions with respect to these matters and a vast array of other matters pertaining to the governance of the district, however, rests with the school board. (See, Ill. Rev. Stat. 1991, ch. 122, pars. 10-20 through 10-23.12.) The superintendent is required to keep or cause to be kept the records and accounts as directed by the board, to aid in making reports required by the board, and to perform such other duties as the board may delegate to him or her. (Ill. Rev. Stat. 1991, ch. 122, par. 10-21.4.) The superintendent is or may be required to perform other tasks involving reporting, notification, or assistance, but these tasks are generally ministerial in nature and could hardly be said to constitute solemn functions of government. (See, Ill. Rev. Stat. 1991, ch. 122, par. 2-3.15, 10-21.4, 18-12, 26-9, and 842.)

Although there is some case authority that could support a contrary result (see, e.g., People ex rel. Landers v. Toledo, St. Louis & Western Railroad Co. (1915), 267 Ill. 142 (assistant county superintendent of schools exercised a portion of sovereign power of the State and was an officer); 1949 Ill. Att'y Gen. Op. 24 (offices of county superintendent of schools and supervisor of a community unit school district are incompatible)), it appears that the school district superintendent should not be considered to be a public officer, for purposes of the statute at issue. Cases from other jurisdictions have come to differing conclusions with respect to the question of whether a superintendent of schools is an officer, but most seem to turn on the extent to which the superintendent is perceived as exercising duties or powers prescribed by law independently of a governing board or other officer. See, e.g., Main v. Claremont Unified School District (Cal. App. 1958), 326 P. 2d 573, 583 (although statute defined city superintendent of school's powers and duties, superintendent was not an officer since he operated under the control of a board, exercising independent powers in no real sense, and since the exercise of independent powers is of the essence to the concept of sovereignty); Edwards v. Bronner (Ala. 1989), 547 So. 2d 1172, 1175-76 (county superintendent of schools exercised no independent public duties incident to an office created by law, carrying with it a part of the sovereignty of the State); Hall v. Pizzino (W. Va. 1980), 263 S.E. 2d 886 (county superintendent of schools who was required to take an oath and give bond, who was not required to execute a contract relating to his official duties and services, and who executed statutorily prescribed duties and powers independently of the county board, was an officer).)

The statutory framework here does not accord to the school district superintendent the independent powers and duties necessary to support the conclusion that the superintendent exercises a portion of the sovereign power of the State and is, therefore, an officer. The fact that the General Assembly may by law confer certain powers on individuals and require of them performance of certain duties does not necessarily make such individuals public officers. People v. Brady (1922), 302 Ill. 576, 581.

Other support for this conclusion comes from the fact that no oath or bond is required of the superintendent and that the statute makes no express provisions for salary. The absence of these common characteristics of office indicates that the General Assembly did not consider that it was surrendering to superintendents any of the sovereign powers of the State. (People v. Brady, 302 Ill. at 582.) The statute creating the position does not refer to the superintendent as an officer and does not fix a term of office. Rather, section 10-21.4 of the Code refers to the superintendent's annually renewable contract, and section 10-23.8 of the School Code (Ill. Rev. Stat. 1989, ch. 122, par. 10-23.8) authorizes school boards to employ superintendents under multi-year contracts.

As previously noted, the duties of an officer are not a matter of contract but of law. In People ex rel. Adamowski v. Wilson (1960), 20 Ill. 2d 568, the court held that a California resident was not barred from holding the position of superintendent of police because the superintendent, who was by ordinance the chief administrator of the police department, was not an officer for purposes of a constitutional residency requirement. The court reasoned, at p. 583:

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> * * * The distinction between an officer and an employee is to be determined by a consideration of relevant circumstances, including the nature of the duties, functions or service to be performed and power granted and wielded. * * * The ordinance does not refer to his position as an 'office,' and no term of office was fixed by law. In the performance of his duties, he is subordinate to the Police Board, his actions are subject to its control and direction, and it may remove him for cause.

For these reasons we are of the opinion that he is an employee, and not an officer.

* * *

The reasoning of this decision is equally applicable to the position of school superintendent.

In addition, the rule is that statutes imposing disqualifications on the right to hold office should be construed liberally in favor of eligibility (Velazquez v. Soliz (1986), 141 Ill. App. 3d 1024, 1029), and this rule applies to statutes that prohibit dual office holding. (Livingston v. Ogilvie (1969), 43 Ill. 2d 9, 17.) Such provisions should not be extended by implication beyond the office or offices expressly included or to persons not clearly within their purview. Livingston v. Ogilvie, 43 Ill. 2d at 17.

Based upon the foregoing, it appears that the superintendent of a school district outside the city of Chicago should not be considered a holder of other public office for purposes of the disqualification imposed by section 34-4 of the School Code. Moreover, the common law doctrine of incompatibility applies only to the simultaneous holding of two public offices (1975 Ill. Att'y Gen. Op. 278), and it would not be consistent to conclude that the superintendent is not an officer, for purposes of a statute on dual office-holding, but is an officer, for purposes of the common law rule on the same subject. Therefore, it appears that the superintendent would not be ineligible to serve on the board of education of the city of Chicago by reason of his employment as superintendent of another school district.

This is not an official opinion of the Attorney General. If we may be of further assistance, please advise.

Very truly yours,

[redacted]

MICHAEL J. LUKE
Senior Assistant Attorney General
Chief, Opinions Division

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