

OFFICIAL OPINION NO. 95-03, Lead/Deadwood School District.

June 30, 1995

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OFFICIAL OPINION 95-03

Lead/Deadwood School District.

Dear Mr. Carr:

As legal counsel to the Lead/Deadwood School District, and as legal counsel to the Black Hills Special Services Cooperative, you have requested an opinion regarding the following factual situation.

FACTUAL SITUATION:

The Lead/Deadwood School District (District) is a member of the Black Hills Special Services Cooperative (Cooperative). The Cooperative is a cooperative education service unit and legal entity as defined by statute. SDCL 13-5-31. In addition to being a member of the Cooperative, the District also contracts for certain services to be performed by the Cooperative.

Two vacancies on the District Board of Education were filled at a recent election. One board Member-Elect (Member-Elect) is an employee of the Cooperative.

The Member-Elect is contractually employed and paid by the Cooperative as the Assistant Director of the Developmental Disabilities Division. In this position, the Member-Elect will have some contact with students and teachers from the District. The Cooperative conducts an autism clinic composed of a team of evaluators for the identification of students with autism. The Member-Elect is a psychometrist in the team evaluating process. The Member-Elect also participates and conducts psychological evaluations on students enrolled in the Cooperative's developmentally disabled program. These psychological evaluations are

conducted under three-year review standards required by federal and state special education regulations.

The Member-Elect does not supervise any District personnel or any public education employees. The only employees supervised by the Member-Elect are Cooperative employees. In her capacity with the Cooperative, however, it is highly likely that the Member-Elect would give advice and counsel to teachers of the District who are working with developmentally disabled students.

In addition, the District has some students in the developmentally disabled program operated by the Cooperative. These students, together with other students outside of the District, are taught and supervised by Cooperative certified staff employees and Cooperative aides. The Cooperative-certified staff employees and Cooperative aide employees are supervised by the Member-Elect, and subject to her counsel and direction.

The Member-Elect is responsible to and is supervised by the Director of the Developmental Disabilities Division of the Cooperative, who in turn is responsible to the Director of the Cooperative. The Member-Elect is not under the supervision, direction or control of the District or any employee of the District, and receives no compensation or payment directly from the District for the services performed by the Cooperative. The District does, however, pay the Cooperative for services rendered.

Based upon the foregoing factual situation, you have asked the following question:

QUESTION NO. 1:

Does SDCL 13-43-1 prohibit the Member-Elect from simultaneously serving on the school board and being employed as Assistant Director of the Cooperative's Developmental Disabilities Division?

This request raises on its face another question, which I will also deal with in this opinion so that this matter may be comprehensively addressed:

QUESTION NO. 2:

Does either the common law doctrine of incompatibility or SDCL 13-7-3 prohibit a person from simultaneously fulfilling the functions of District board member and Cooperative employee?

IN RE QUESTION NO. 1:

You first ask whether SDCL 13-43-1 prohibits the Member-Elect from simultaneously serving as a school board member and as an assistant director of the Cooperative's developmental disabilities division. SDCL 13-43-1 provides as follows:

No person employed to teach or to draw public money as a teacher may serve as a board member in the same school district.

This statute does not directly prohibit the Member-Elect from serving on the school board. However, the term "teacher" is defined at SDCL 3-12-47(68) (concerning the state retirement system), as follows:

'Teacher,' any person who has a valid teacher's certificate issued by the state of South Dakota, who is in the employ of a public school district, and shall also include the certified teachers employed by the human services center, South Dakota developmental center - Redfield, state penitentiary, division of education, state training school, school for the deaf, school for the visually handicapped, crippled children's hospital and school, public nonprofit special education facilities, adjustment training centers certified by the department of human services and public financed multi-district education programs.

The Member-Elect is indeed employed by a "public financed multi-district education program." Your request does not indicate whether she holds a valid teacher certificate issued by the State. I would note, however, that to the extent that she has contact with students of the Lead-Deadwood School District she is, according to the described functions, fulfilling the role of a special education teacher. Although not employed directly by the District, public funds of the District are paid to the Cooperative. Thus, the Member-Elect draws public money for her functions; if she is a certified teacher, it is my opinion that she is "drawing public money as a teacher."

This opinion is not free from doubt (among other things, there are other definitions of "teachers," see SDCL 13-43-12 and 13-43-16). On balance, however, it is my opinion that SDCL 13-43-1 prohibits the Member-Elect from simultaneously holding the positions of Board member and Cooperative employee or officer. Further, I note that I do not rest my conclusion as to incompatibility solely upon this statute, as set out below.

IN RE QUESTION NO. 2:

The next issue is whether the offices of school district member and assistant director of developmental disabilities division of the cooperative, or employment as an assistant director for the cooperative, are incompatible under statute or common law. SDCL 13-7-3 provides as follows:

No elective county, municipal or state officer or the holder of any other office, the duties of which are incompatible or inconsistent with the duties of a school board member, shall be eligible for such membership.

This statute appears to prohibit the simultaneous holding of two offices that are incompatible with one another.

In addition, there is a common law doctrine of incompatibility with broader application. A person may not, under the common law, hold two positions that are incompatible. In *Tarpo v. Bowman Public School District No.1*, 232 N.W.2d 67, 71 (N.D. 1975), the North Dakota Supreme Court stated as follows:

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 of interest between the two, such as salary negotiations, supervision and control of duties and obligations to the public to exercise independent judgment.

Id. at 71. This doctrine extends to positions of public employment, as well as to public offices. *Otradovec v. City of Green Bay*, 347 N.W.2d 614, 616 (Wis. App. 1984).

The position described in the Cooperative appears to constitute a "public office," as opposed to mere employment. First, the South Dakota Supreme Court implied in *Merrill v. Birhanzel*, 310 N.W.2d 522 (S.D. 1981) that teachers are "officers." There is also an extensive discussion of public office versus public employee in *Aeymour v. Western Dakota Vocational Technical Institute*, 419 N.W.2d 206 (S.D. 1988). The lead opinion in that case, holding that a vocational instructor, farm supervisor, and department head was not an "officer," had the vote of only one justice. One justice deemed himself disqualified, and the remaining three justices stated, although somewhat briefly and obliquely, that they believed that the department head was, in fact, an officer. (Concurrences of Justices Henderson, Morgan, and Sabers, 419 N.W.2d at 209-210.)

On balance, I believe that the Member-Elect's position as an assistant director and supervisor makes her a public officer of the Cooperative. I will thus analyze incompatibility based both upon the statute and upon the common law doctrine. The question is one of incompatibility of the offices or the employment.

A cooperative educational service unit is established pursuant to an agreement between participating school districts, each of which is entitled to have at least one school board member on the governing board of the cooperative unit. SDCL 13-5-32.1(2). Control of the cooperative is vested in the participating districts through such appointments. *Id.* All members of the Lead-Deadwood School District Board, therefore, have input into the practices of the Cooperative. The District therefore also has control over the funding source for the Cooperative. This Office has previously opined that because the State Board of Vocational Education might have to act on a funding request for a multi-district board, the positions of school board member and State Board of Vocational Education member were inconsistent. In addition, one could not serve on the multi-district board and also on the State Board of Vocational Education. 1976-77 AGR 8.

In my view, the facts that the District has input into, and partial control over, the Cooperative, and that the District at least partially controls its funding, create an incompatibility in the exercise of independent judgment by a school board member where such judgment would have an influence over the member's employment. *See also* 1981-82 AGR 171, opining that county commissions were controlled by the Legislature, and one may not simultaneously serve both; and 1974-75 AGR 41, opining that the Office of State Board of Education and local school boards are incompatible, and stating that incompatibility arises when one office is in some sense subordinate to the other.

The role of local school boards in setting up, funding, authorizing, and continuing a cooperative educational service unit amounts to substantial control over it and its officers and employees. One may not simultaneously exercise this substantial control as a local school board member and also be an officer or employee of the substantially controlled governmental unit.

Based upon the above, it is my opinion that the offices of school board member and officer or employee of a cooperative educational services unit are incompatible. In my view, only one of these positions may be held by any one person.

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