9/18/70

Memorandum 70-107

Subject: New Topic - Requirements for Office of Board of Trustees of Community College District

The attached opinion of the County Counsel of the County of Los Angeles points out that a provision enacted in 1955 upon recommendation of the Commission (now Section 1112 of the Education Code) is unclear. The meaning of the word "resident" in Education Code Section 1112 may mean "domiciled" or may mean "actually residing."

We call this opinion to your attention, but we recommend that the Commission not request authority to study this matter.

Respectfully submitted,

John H. DeMoully
Executive Secretary

THE LOS ANGELES Tuesday September 8, 1970
DAILY JOURNAL Wednesday, September 9, 1970

COUNTY COUNSEL OPINION

OFFICE OF THE COUNTY COUNSEL
COUNTY OF LOS ANGELES

JOHN D. MAHARG
COUNTY COUNSEL

June 19, 1970

Mr. Frederic A. Wyatt, Member
Board of Trustees of Los Angeles
Community College District
2140 West Olympic Boulevard
Los Angeles, California 90006

Re: School Board Member Assuming Office as Secretary of State—Compatible Offices (Our No. 71-70)

Dear Mr. Wyatt:

You have orally asked whether a member of the Board of Trustees would forfeit his office if he were elected to and assumed the statewide office of Secretary of State.

OPINION

Equally persuasive arguments can be made both ways, either that the school board member would forfeit his office upon becoming Secretary of State or he would not. We, therefore, advise that the Board of Trustees assume that if one of its members becomes Secretary of State that he can still serve on the Board unless, or until a court of competent jurisdiction holds otherwise. We base this advice on the following premises:

1. No provision of the state Constitution prohibits the same person from holding the two offices at the same time.

2. The two offices are not incompatible at common law. Therefore, the assumption of the statewide office would not vacate the school board membership which is not an incompatible office.

3. While plausible arguments can be made that the two offices cannot be held simultaneously because the Secretary of State must be physically present in Sacramento, that is have his factual abode there, and a trustee must have his factual abode in the junior college district, equally plausible argument can be made that domicile only in the junior college district is required which a trustee can retain while having his factual abode in Sacramento and, therefore, upon a trustee becoming Secretary of State his office of trustee should not be considered vacant unless and until a court so decides.

I

NO PROVISION OF THE STATE CONSTITUTION PROHIBITS THE SAME PERSON FROM HOLDING TWO OFFICES AT THE SAME TIME

A member of a school district governing board is a public officer. (People v. Elliott (1953) 116 Cal.App. 2d 410; 415; People v. Darby (1952) 114 Cal.App.2d 412, 422-423, app. dismissed 345 U.S. 937, 97 L.Ed. 1364, 73 S.Ct. 833; People v. Becker (1952) 112 Cal.App.2d 324) The Secretary of State is a public officer, elected for the term and as provided by the Constitution, for Sec. 11 of Article V of the California Constitution declares that the Secretary of State "shall be elected at the same time and places and for the same term as the Governor". His compensation shall be prescribed by statute but may not be increased or decreased during his four-year term of office. (Sec. 12 of Art. V, Const.) The Constitution expressly provides that the Governor "may not hold other public office" (Sec. 2, Art. VI, but there is no comparable provision in the Constitution or statutes for the Secretary of State.

Therefore there is nothing in the Constitution or statutes which specifically declares that the same person may not at the same time be Secretary of State and also a member of a school district governing board.

II

THE TWO OFFICES ARE NOT INCOMPATIBLE

Appropriate to our situation is the Supreme Court's statement in the leading case of People ex rel. Chapman v. Rapsey (1940) 16 Cal.2d 636, at pages 641 and 642:

" 'Two offices are said to be incompatible when the holder cannot in every instance discharge the duties of each. Incompatibility arises, therefore, from the nature of the duties of the offices, when there is an inconsistency in the functions of the two, where the functions of the two are inherently inconsistent or repugnant, as where antagonism would result in the attempt by one person to discharge the duties of both offices, or where the nature and duties of the two offices are such as to render it improper from considerations of public policy for one person to retain both. The true test is whether the two offices are incompatible in their natures, in the rights, duties or obligations connected with or flowing from them.'

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

In Mott v. Herstmann (1950) 36 Cal.2d 388 at pages 391 and 392 the Supreme Court said:

"The doctrine (of incompatible offices) applies where the functions of the offices concerned are inherently inconsistent, as, where there are conflicting interests, or where public policy dictates that one person may not retain both offices. * * * "

The Attorney General of California has defined incompatible offices as follows in 48 Ops. Cal.Atty.Gen. 141 (1966) at page 142:

" 'Offices are incompatible, in the absence of statutes suggesting a contrary result, if there is any significant clash of duties or loyalties 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 ....' 38 Ops. Cal.Atty.Gen. 113 (1961)."

It has been said that:

"While incompatibility has been described as physical impossibility to perform the duties of both offices, it is not simply 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, as where one is subordinate to the other, or where a contrariety and antagonism would result in the attempt by one person to discharge faithfully and impartially the duties of both. * * * " (3 McQuillin on Municipal Corporations 298, Sec. 12.87, Citations omitted)

There is no inherent inconsistency or repugnancy in the functions of the two offices, one is not superior or controlling over the other, nor does it supervise or audit the functions of the other.

The Government Code provides that the Secretary of State shall keep a correct record of the official acts of the legislative

and executive departments of the state government (Secs. 12159 and 12160); shall be responsible for the state archives (Sec. 12153); shall attend every session of the Legislature, to receive bills and resolutions and to perform such other duties as the two houses may direct (Sec. 12161); shall record conveyances made to the state and articles of incorporation (Sec. 12164); shall be fourth in line of succession for the office of Governor (Sec. 12058 et seq); and shall perform related duties.

He also has general direction over statewide elections, like the presidential primary, direct primary and general election. (Elections Code, passim.)

If the school district wants to have one of its elections consolidated with a statewide election of which the Secretary of State has cognizance, such a matter is not even carried out through the Secretary of State but through the local county board of supervisors. (Secs. 23301 and 23302, Elections Code) The Secretary of State has no responsibility in the matter.

If school district records are to be destroyed, the superintendent of the school district must transmit a "list to the Historian, State Archives, of the Office of the Secretary of State at Sacramento, California, together with an inquiry asking whether the Historian desires transfer of any of the listed records to the State Archives." (Title 5, California Administrative Code, Sec. 3019) But this does not represent any supervision by the Secretary of State over the affairs of the school district. His Historian merely determines whether or not the school district records are worthy of placement in the State Archives, rather than being destroyed.

These responsibilities of the Secretary of State appear in no way to be inconsistent with the responsibilities of a school district governing board member nor does the Secretary of State have the duty to supervise or audit any work of a school district. We believe the two offices are not incompatible.

III
EQUALLY COMPELLING ARGUMENTS CAN BE MADE BOTH WAYS AS TO THE RIGHT OF A TRUSTEE TO CONTINUE IN OFFICE AFTER ACCEPTING THE OFFICE OF SECRETARY OF STATE

Section 1112 of the Education Code declares that to be eligible, a school board member shall be "a resident of the school district".

Section 1060 of the Government Code requires that the Secretary of State "shall reside at and keep (his) offices in the City of Sacramento".

It is necessary, therefore, to determine the meaning of the words "resident" and "reside" as used in these two code sections respectively. This is difficult because each of these words is used with two distinctly different meanings. In Whittell v. Franchise Tax Board (1964) 231 Cal.App.2d 278 at 284 the court said:

> "However, 'domicile' properly denotes the one location with which for legal purposes a person is considered to have the most settled and permanent connection, the place where he intends to remain and to which, whenever he is absent, he has the intention of returning but which the law may also assign to him constructively. Residence, on the other hand, denotes any factual place of abode of some permanency, that is more than a temporary sojourn. * * *."

On the other hand as we shall show later the word "residence" has been used as synonymous with "domicile."

What we must determine, therefore, is whether the words "resident" and "reside" as used in Section 1112 of the Education Code and Section 1060 of the Government Code refer to the "factual place of abode" or to "domicile".

In discussing this question the use of the word "resident", "reside" or "residence" is confusing since those are the very words we are seeking to define. We should confine ourselves to the words "factual place of abode" and "domicile".

We are inclined to believe that Section 1060 of the Government Code requires that the Secretary of State must have his "factual place of abode" at Sacramento. Section 1112 of the Education Code requires that a member of the Board of Trustees maintain his "domicile" in the school district. If this is the only requirement then a member of the Board of Trustees could hold the office of Secretary of State at the same time because he could retain his domicile in the district while having his factual abode in Sacramento. We find, however, that Section 1112 of the Education Code presents an extremely difficult question of legislative construction. Respectable arguments can be made that it requires domicile in the junior college district only. Equally respectable arguments can be made that it requires both domicile and factual place of abode in the school district. If the latter construction is correct a person could only retain the office concerning which he complied with the requirement of factual abode.

Section 1112 of the Education Code reads:

> "1112. Any person, regardless of sex, who is 21 years of age or older, a citizen of the State, a resident of the school district, a registered voter, and who is not disqualified by the Constitution or laws of the State from holding a civil office, is eligible to be elected or appointed a member of the governing board of a school district."

This section seems to be based upon Section 1801 of the 1943 Education Code as added by Stats. 1955, Chapter 799, page 1400 at 1402 as amended by Stats. 1955, Chapter 1685, page 3081 at 3082. The latter amendment extended the provisions of the section from elementary school districts only to all school districts and is immaterial to our problem. So far as we can find, prior to 1955 there was no statute relating to school trustees providing for their qualifications except the provision added to Section 1593 of the Political Code by Code Amendments 1880, Chapter 44, p. 28 at p. 35:

"No person shall be deemed ineligible to the office of School Trustee on account of sex."

This provision became part of Section 2.790 of the School Code and then Section 1004 of the 1943 Education Code until its repeal by Stats. 1955, ch. 799, p. 1400 supra, which placed it as the first sentence of Section 1801 of that code. It has been continued as the first part of Section 1112 of the Education Code, although its retention after women's suffrage in this state in 1912 seems to be an anachronism.

Between 1880 and 1955 the qualifications of school trustees were as provided in the "no sex discrimination" provision and Section 58 of the former Political Code and Section 275 of the present Government Code. These two sections make the same requirements. The latter reads:

> "275. Unless otherwise specifically provided, every elector is eligible to the office for which he is an elector, and no person is eligible who is not an elector."

Between 1880 and 1912 it was "otherwise provided" as to women who, during that time were not eligible to vote and, therefore, not electors.

Section 58 of the former Political Code was held applicable to school trustees in People ex rel. Davidson v. Mertz (1934) 2 Cal.2d 136 at 138, 39 P.2d 422. Relying upon this case the Attorney General held, 13 Ops. Cal.Atty.Gen. 127 (1949) that a person who was not an elector in an elementary school district was not eligible to hold the office of school trustee. Between 1912 and 1955, therefore, a person had to be an elector in a school district in

order to be eligible to hold the office of school trustee, that is, he had to be a citizen, at least twenty-one years old and domiciled in the district. This being the law immediately prior to the effective date in the fall of 1955 of Section 1801 of the 1943 Education Code, now Section 1112 of the present Education Code, what was its effect? Do the words "* * a resident of the school district * *" mean having a factual place of abode or domicile? It can be argued that factual abode is meant for the following reasons:

Prior to 1955 a trustee was required to have his domicile in the school district. Therefore, if "domicile" were meant the words would be surplusage and meaningless. It could, of course, be contended that the legislature intended to state all qualifications of a school trustee in one place and not rely on provisions in the Government Code or elsewhere. Conceding this, however, a provision that the trustee have his domicile in the district and be a citizen and a voter means that he must be a voter of the district. Then why not say so, instead of saying "21 years of age or older, a citizen of the State, a resident of the school district, a registered voter"? If, in Section 1112 of the Education Code the word "resident" refers to domicile it would be surplusage and contrary to the rule that:

> " Significance should be given, if possible, to every word, phrase, sentence and part of an act. (Gates v. Salmon, 35 Cal. 576 (95 Am. Dec. 139).)* * "
>
> People v. Western Airlines, Inc. (1954) 42 Cal.2d 621 at 636, 268 P.2d 723;
>
> Mercer v. Perez (1968) 68 Cal.2d at 112, 65 Cal. Rptr. 315 at 320, 436 P.2d 315 at 320.

To the same effect are:

Select Base Materials, Inc. v. Board of Equalization (1959) 51 Cal.2d 640 at 645, 335 P.2d 672 at 675; and,

Beirut Universal Bank v. Superior Court (1969) 269 Cal.App.2d 832 at 842, 74 Cal.Rptr. 333 at 339.

On the other hand it can be pointed out that this rule that no part of a statute should be construed as surplusage is not helpful in this case because even if the word "resident" is construed to mean "factual place of abode" a great deal in the section is surplusage anyway. A person who is a voter necessarily would be:

> "Any person, regardless of sex, who is 21 years of age or older, a citizen of this State "

The words "* * regardless of sex * * 21 years of age or older, a citizen of this State * * " all could have been omitted without changing the meaning in any way.

As to the age requirement note that, in 1955, when Section 1801 first was added to the 1943 Education Code there was no effort being made to lower the voting age.

Neither construction of the section gives meaning to all of the words of the section. If we construe "resident" as meaning "domicile" there is a little more surplusage than if we construe that word as meaning "factual place of abode."

> "The term 'residence' and 'domicile' as used in many statutes are held to be synonymous, and such seems to be the case where they appear in statutory provisions relating to qualifications for office." 42 Am.Jur. 916, Public Officers, Sec 45. (Emphasis added)

Also it pertinently can be asked why a trustee must have his factual place of abode within the school district? The board meets once a week and may meet twice a week. A member could have his factual abode elsewhere and yet be able to attend all meetings. Even special meetings and emergency meetings present no difficulty in view of modern methods of transportation not only now available but also available in 1955.

Section 1801 was added to the 1943 Education Code by Stats. 1955, chapter 799, page 1400 at p. 1402. This statute had its origin as Assembly Bill 1605 of that year. It was amended several times

during course of passage but Section 1801 remained unchanged The bill states:

"(Revision by California Law Revision Commission)."

Concerning this bill and another one, the Report of the California Law Revision Commission for January 1, 1955 at page 13 says:

"The commission has, accordingly, prepared two bills for submission to the Legislature. One bill presents the commission's proposed revisions of the parts of the code which concern the election, appointment and recall of school district governing board members. The other bill presents the commission's proposed revisions of certain other parts of the code for the purpose of repealing obsolete sections, clarifying sections which are ambiguous, and resolving conflicts between sections of the code * * *

" Copies of the preprinted bills, together with mimeographed notes explaining them, will be sent to interested persons and groups during the early part of January, 1955, so that their comments and suggestions will be available to the Legislature before it acts upon the bills."

The office of legislative counsel in Los Angeles informed us that it does not have this mimeographed material and suggested that we write Mr. John H. De Moully, the Executive Secretary of the California Law Revision Commission which we did. In his letter to us of April 23, 1970 he says:

"We have made a search of our files and find no background material at all on the bills to which you refer. I am sorry that we are unable to be of assistance to you."

As to the Secretary of State we incline to the view that he need not have his domicile in Sacramento but must have his factual abode there. Section 1060 of the Government Code reads, in part:

"1060. The following officers shall reside at and keep their offices in the City of Sacramento:

"(b) The Secretary of State. * * *"

In our opinion the word "reside" does not mean "domicile". Section 14283 of the Elections Code reads:

"14283. A person does not gain or lose residence solely by reason of his presence at or absence from a place while employed in the service of the United States or this State * * *."

A person is an "elector" for the office of Secretary of State so long as his domicile is anywhere within the state.

In 24 Ops. Cal.Atty.Gen. 65 (1954) the Attorney General concludes that, as to members of the Governor's Council, the requirement that they reside at Sacramento refers to an "official residence" which can be neither at the domicile nor factual abode of the member. With all due respect to the author of this opinion who is now one of the ablest justices on the State Court of Appeal we find it hard to follow the reasoning. The idea of a person having his domicile in one place, his factual place of abode in a second, and an "official residence" in a third seems theoretical in the extreme. We also have no assurance that the Attorney General would apply this opinion to the Secretary of State or those other officers listed in Section 1060 of the Government Code. This section begins:

"1060. The following officers shall reside at and keep their offices in the City of Sacramento ."

The juxtaposition of "reside at" and "keep their offices in" would seem to imply that the officer should be physically present in the city where his office is, that is, have his factual abode there. In Gallagher v. Board of Supervisors of Elections (1959) 219 Md. 192, 148 A.2d 390 the court held that the governor must have his factual abode in the City of Annapolis because:

" the desirability of having the governor, as the Chief Executive of the State, live at the seat of the state government to promote an efficient and expeditious conduct of the State's affairs. * * * there much of the day to day business of the State is transacted. * * *"

In **Marabuto** v. **Town of Emeryville** (1960) 183 Cal. App 2d 406 at 411, 6 Cal. Rptr. 690 the court held valid at least as to policemen and firemen a resolution of the Town of Emeryville that all civil service employees reside within the city. The court apparently treated the word "reside" as meaning "factual abode" since in justifying the resolution the court said:

" An employee who cannot get to the job in time to perform, when performance is demanded, is not qualified. * * *"

Just what is accomplished by an officer having a theoretical "Official Residence" in Sacramento, many miles, perhaps, from both the factual abode and the domicile, the Attorney General does not explain and we can think of none.

CONCLUSION

Our office is not a court. We cannot foretell what construction a court will place on Section 1112 of the Education Code and we frankly say so. If Section 1112 merely requires domicile in the district a member can retain his domicile there and move his factual abode to Sacramento and hold both offices. On the other hand, if Section 1112 of the Education Code requires factual abode in the district it will be impossible to maintain a factual abode in both the junior college district and at Sacramento at the same time. Therefore, we advise that if a trustee is elected Secretary of State his office as trustee should not be considered vacant unless and until a court so decides.

Very truly yours,

JOHN D. MAHARG
County Counsel

By Edward H. Gaylord
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APPROVED AND RELEASED:

JOHN D. MAHARG
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