

State of New Jersey

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ATTORNEY CLIENT PRIVILEGED AND CONFIDENTIAL

Norma E. Blake
State Librarian
New Jersey State Library
P.O. Box 520
Trenton, New Jersey 08625

Re: 05-0079—Whether the Mayor of a Municipality May
Appoint Council Persons or Municipal Employees to
The Municipal Library Board.

Dear Ms. Blake:

You have asked whether the Mayor of a municipality may appoint council/committee persons or commissioners (hereinafter referred to as councilmen) or municipal employees to the board of trustees of the free public library in that municipality. For the reasons set forth below, you are advised that under the common law doctrine of incompatibility of offices neither a councilman, commissioner nor employee of the municipality may be appointed to the board of a free public library of the same municipality.

Dual employment in the public sector is permissible unless prohibited by a statute, the Constitution or the common law doctrine of incompatible offices. F.O. No. 18 (1976). The statute governing the Board of Trustees of a free public library does not address whether a councilman or municipal employee may be appointed as a member of the board of trustees. N.J.S.A. 40:54-9 provides that after the establishment of a free public library, a board of trustees shall be formed to consist of seven to nine members, one of whom shall be the mayor or chief executive officer of the municipality, one of the local superintendents of school and five to seven citizens to be appointed by the mayor or chief executive officer, four of whom shall be residents of the municipality. This statute also provides that, except in cities, these appointments shall be made with the consent of the governing body. No other state statute appears to be applicable to these appointments. Accordingly, the question here is whether the offices at issue are incompatible under the common law.

The common law doctrine of incompatible offices is an ancient one whose outer limits are not easily delineated. Ahto v. Weaver, 39 N.J. 418, 422 (1963); Jones v. MacDonald, 33 N.J. 132, 135 (1960). Significantly, that doctrine has been held to embrace all situations which come within the reason for the rule. McDonough v. Roach, 35 N.J. 153, 159 (1961).

The doctrine of incompatible offices is a common law creation arising out of the public policy that an officer holder's performance not be influenced by divided loyalties. Shear v. Elizabeth, 41 N.J. 321, 325 (1964). It is usually understood to mean a conflict or inconsistency in the functions of an office. It is found "where in the established governmental scheme one office is subordinate to another, or subject to its supervision or control, or the duties clash, inviting the incumbent to prefer one obligation to another." Jones v. MacDonald, *supra*, 33 N.J. at 136; Reilly v. Ozzard, 33 N.J. 529, 543 (1960). It is designed to assure that office holders discharge their duties with undivided loyalty, Jones v. MacDonald, 33 N.J. at 135, and, is calculated to insure that there be the appearance as well as the actuality of impartiality and undivided loyalty. Kaufman v. Pannuccio, 121 N.J. Super. 27, 31 (App. Div. 1972).

While the doctrine is not limited to instances of subordination, subordination of one office to another is clear evidence of incompatibility. This is so even if that subordination is less than complete, as, for example, when one office may vote for an appointee to another or if the fiscal needs of one office are within the control of another. Jones v. MacDonald, *supra*, 33 N.J. at 137.

Application of this doctrine does not turn upon the integrity of the person concerned or his individual capacity to achieve impartiality. The courts have recognized that inquiries of that kind would be too subtle to be rewarding. Kaufman v. Pannuccio, *supra*. Instead, the doctrine applies inexorably if the offices are incompatible.

An application of the doctrine to councilmen and the position of board member of the local library board indicates that the offices are incompatible. The nature of the relationship between a municipality and the free public library is discussed in Board of Trustees of the Free Public Library of Union City v. Union City, 112 N.J. Super. 484 (Ch. Div. 1960); *aff'd*, 116 N.J. Super. 186 (App. Div. 1971). In that case, the governing body of the municipality formed an investigating committee to examine all officials, officers and employees of the City of Union City regarding the discharge of their official duties. This committee was formed to investigate "Certain deficiencies in records heretofore kept and in other practices of the various departments..." 112 N.J. Super. At 487. The committee subpoenaed members of the board of trustees of the free public library to testify before it. They objected on the grounds that the free public library is an autonomous board and that the board members were not officers, officials or employees of the city.

The court noted that despite the fact that the board of trustees is a corporate entity with independent powers to manage the free public library, (N.J.S.A. 40:54-12), the library is an adjunct of the municipality and under its control. *Id.* At 488 (citing to Glick v. Trustees of Free Public Library, 2 N.J. 579 (1949)).

The court in Union City noted the various facets of interdependence between the municipality and the free public library as set forth in the legislative scheme:

The cost of operation is borne by local taxation, and the moneys are appropriated by the local governing body, albeit the amount of the appropriation is mandated by the Legislature. N.J.S.A. 40: 54-8. The trustees are appointed by the mayor, and the mayor and the head of the local school system are ex-officio members of the Board. N.J.S.A. 40: 54-9. ¹ Library funds are deposited in the municipal treasury and disbursed by the municipal officials on the vouchers of the trustees. N.J.S.A. 40: 54-18. The mayor fixes

¹ The ex-officio status of the mayor and superintendent of schools was dropped from the statute by L. 1952, c. 240 §1.

the amount of the bond of the treasurer of the board. N.J.S.A. 40:54-13. the board is required to render an annual report to the governing body. N.J.S.A. 40:54-15. The board can only purchase lands, erect buildings, or alter the same with the approval of the mayor and governing body of the municipality; and after such a purchase, title to the real estate is taken in the name of the municipality. N.J.S.A. 40:54-25. [Id. 112 N.J. Super. At 488.]

The court went on to note that the New Jersey courts have also determined that municipal employees of the library are in the paid service of the municipality, and have also held that the municipal bidding statutes are applicable to contracts undertaken by the library. Id. At 489.

Finally, the court noted that the board members were subject to subpoena by the municipal governing body because “[t]he governing body and the public are entitled to know in what manner moneys are expended, how the buildings and equipment are used, whether the members of the board are qualified, in what manner they are performing their duties, and a myriad of other facts and data in connection with the management of the Library.” Id. At 490.

Clearly, the municipal governing body exercises considerable supervision over the municipal library and its fiscal affairs. It is apparent that there are a number of situations in which the member of a municipal committee or council could have to prefer the obligations of one office over those of another. The fact that the mayor is an automatic member of the municipal library board does not change our conclusion. The doctrine of incompatibility is a common law one, one that can be changed by the Legislature by statute. Here, the Legislature exempted only the mayor from operation of the doctrine and intended that the mayor and the governing body of municipality play only the limited role set forth in N.J.S.A. 40:54-9. If the legislature had wanted councilmen to also be eligible for positions on the library board, it could have so provided in the statute. Accordingly, you are advised that councilmen may not be appointed to boards of free public libraries in the same municipality. Although the decision in Union City deals with a committee form of government, the power to create an investigative committee applies to all municipalities. See N.J.S.A. 40:48-25. The statutes dealing with free public libraries, N.J.S.A. 40:54-1 et seq. govern the free public libraries in all municipalities, except where specifically noted otherwise. Therefore, this determination applies to all municipalities, whatever their form of government.

Turning to the second part of your inquiry, to determine whether a municipal employee may be appointed as a member of the library board, the language of the statute provides some guidance. N.J.S.A. 40:54-9 provides for the appointment of between 5 to 7 “citizens” as members of the board, of which at least four must be residents of the municipality. The term “citizen” is not defined in the New Jersey statutes, but, from the context here, one can infer that the term was used by the Legislature to indicate that the class persons eligible for appointment to the library board of trustees included non-residents of the municipality, because the provision continues by stating that “at least four” of these citizen/trustees must be municipal resident. Elsewhere in the New Jersey Statutes, the Legislature has used the term “citizen members” interchangeably with “public member” to differentiate between members of a state board or commission who are non-governmental residents “representing the public interest” as advocates for the general public. These public members may be appointed to serve beside members who represent the special interests of regulated professionals and members who are governmental officials serving ex-officio (e.g. N.J.S.A. 45:1-2.2b - “public members” on Professional Boards; N.J.S.A. 18A:73-22 - “citizen members” on the New Jersey Historical Commission; N.J.S.A.

18A:71-32”citizen members” also called “public members” of the New Jersey Educational Opportunity Fund Board). The Division of Law has advised that a full-time state employee should not be appointed as “public member” on a State Commission which is within the State Department which employs him/her, due to the doctrine of incompatibility of office.

While there is no definitive prior DOL advice, or binding legal precedent, it follows that the “citizen” members of the board of trustees of the public library are similarly intended by the Legislature to be independent advocates of the general public interest. As such, they should not have the strong associational tie to the current municipal government administration which would naturally be created by the employment relationship.

To date the courts of New Jersey have not ruled on whether any municipal employee may be a trustee for a free public library, and no prior formal or informal advice from this office has been located exactly on this point. In similar instances, however, the state courts have found incompatibility of a municipal employee holding elective office as councilman or city commissioner. See Kaufman v. Pannuccio, *supra*; Belleville v. Fornarotto, 228 N.J.Super. 412 (Law Div. 1988); and Dun v. Froehlich, 155 N.J.Super. 249 (App. Div. 1978). In Belleville v. Fornarotto, *supra*, the court found incompatibility of offices when the same individual who was employed as a housing inspector also held a city commissioner position (although not as the commissioner who headed the department in which the housing inspector served).

The court noted that:

[W]here an individual is both a public employee and an elected public official, a conflict exists if...the two positions create the possibility of undue influence of one elected official on the independent judgment of a second because the first official is also the employer of the second. [Id. At 424]

In the Belleville case, the court opined that Commissioner Frantantoni (who supervised Fornarotto in his employment as the housing inspector) “might take retaliatory action against defendant [Fornarotto] by way of disciplinary action, because the defendant did not vote as Commissioner Frantantoni desires” with respect to matters decided by the Commission. Id. At 426. Likewise, here, when a public employee owes his municipal job to the will of the mayor, the mayor may exercise undue influence upon this employee to cause him to vote in a block with the mayor on library board matters, although the best interests of public library operations may diverge from the operational expediencies of the municipality. For example, the public library statute expressly permits the board of trustees of the library to loan library funds to the municipality. N.J.S.A. 40:54-19.1. in a municipal budget crisis, those public employees of the municipality appointed by the mayor to serve as “citizen” members of the library board of trustees would surely be vulnerable to pressure to vote with the mayor in favor of such a loan, to avoid budget cuts and layoffs in the general municipal administration which might adversely effect their own municipal employment. While a library board of trustees made up of non-employee “citizen” members, exercising independent judgment, might consider such a loan to be fiscally imprudent or likely to jeopardize or unreasonably curtail library operations, and reject the loan despite the mayors advocacy in favor of it, a library trustee who is also a municipal employee might understandably feel that he had to choose between conflicting interests: his obligation as a trustee of public library funds v. the security of his position as a municipal employee. The doctrine of incompatibility of office is intended to prevent such divided loyalties before they occur. For these reasons, we advise that the office of any municipal employee is incompatible with holding an appointment as a trustee of the library board.

In conclusion, for the foregoing reasons, you are advised that the office of councilman and the office of member of the board of a free public library are incompatible. You are further advised that the public employees of a municipality may not serve as citizen members of the library board of trustees for that municipality due to incompatibility of offices.

Sincerely yours,
Peter C. Harvey
Attorney General of New Jersey.

By: _____
Sarah T. Darrow
Deputy Attorney General