STATE OF WISCONSIN

Assembly Journal

Eighty-Third Regular Session

WEDNESDAY, June 7, 1978.

The chief clerk makes the following entries under the above date:

COMMUNICATION

State of Wisconsin
Department of State
Madison

To Whom It May Concern:

Dear Sir: Acts, joint resolutions and resolutions, deposited in this office, have been numbered and published as follows:

Bill, Jt. Res. or Res.	Chapter No.	Publication date
Assembly Bill 523	419	May 26, 1978
Assembly Bill 1044	420	June 2, 1978
Assembly Bill 1045	421	June 2, 1978
Assembly Bill 1147	422	June 2, 1978
Assembly Bill 1260	423	June 2, 1978
Assembly Bill 468	424	June 6, 1978
Assembly Bill 576	425	June 6, 1978
Assembly Bill 860	426	June 6, 1978
Assembly Bill 884	427	June 5, 1978
Assembly Bill 898	428	June 6, 1978
Assembly Bill 940	429	June 6, 1978
Assembly Bill 966	430	June 6, 1978
Assembly Bill 1119	431	June 6, 1978
Assembly Bill 463	437	June 6, 1978
Assembly Bill 969	438	June 6, 1978
Assembly Bill 1040	439	June 6, 1978
Assembly Bill 1077	440	June 6, 1978
Assembly Bill 1118	441	June 6, 1978

DOUGLAS LaFOLLETTE
Secretary of State

COMMUNICATIONS

June 5, 1978

The Honorable Bronson C. La Follette
Attorney General, State of Wisconsin
Room 114 East, State Capitol
Madison, Wisconsin 53702

Dear Mr. La Follette:

Upon the direction of the Committee on Assembly Organization I am submitting to you their request for your opinion as to whether or not a nursing home, which is operated by a religious organization, may give preference in admission to members of that religion.

Sincerely
EVERETT E. BOLLE
Assembly Chief Clerk

OPINION OF THE ATTORNEY GENERAL

OAG 42-78

June 6, 1978

Mr. Everett E. Bolle
Assembly Chief Clerk
Committee on Assembly Organization
216 West, State Capitol
Madison, Wisconsin 53702

Dear Mr. Bolle:

The Committee on Assembly Organization has requested my opinion on four questions involving the authority of a city employe to contemporaneously serve as alderperson.

1. May a city employe contemporaneously serve as alderperson?

The answer to your general question is no. But there may be exceptions which will depend in part on the nature, responsibilities and duties of the specific position of employment involved; whether the council is the appointing authority; the degree of supervisory power exercisable by the council over the position; whether the position was created during the term of such alderperson; the amount

of compensation for such position; and whether the council has power to establish, increase or decrease such compensation.

Where there are substantial potential areas of conflict between two offices or an office, such as alderperson, and a position of employment, the rule of common-law incompatibility would preclude the same person from holding both. See general rules as to incompatibility in 58 Op. Att'y Gen. 247 (1969), and 67 C.J.S. *Officers* sec. 23a, at 133. An employe who was also an alderperson would also have to be careful to avoid criminal liability imposed by sec. 946.13, Stats., as amended by ch. 166, Laws of 1977.

This statute prohibits municipal officers and employes from having a private interest in certain public contracts, but is not applicable where the interest is in contracts which involve receipts and disbursements by the political subdivision aggregating less than $5,000 in any year.

Section 66.11(2), Stats., provides:

> "Eligibility of other officers. Except as expressly authorized by statute, *no member of a* town, village or county board, or *city council shall, during the term for which he is elected, be eligible for any office or position which during such term has been created by, or the selection to which is vested in, such* board or *council*, but such member shall be eligible for any elective office. The governing body may be represented on city or village boards and commissions where no additional remuneration is paid such representatives and may fix the tenure of such representatives notwithstanding any other statutory provision. This subsection shall not apply to a member of any such board or council who resigns from said board or council before being appointed to an office or position which was not created during his term in office."

In *Martin v. Smith*, 239 Wis. 314, 1 N.W.2d 163 (1941), it was stated that the doctrine of incompatibility of offices, which renders it improper from considerations of public policy to permit one person to hold two offices at the same time where the nature and duties are in conflict, was part of the common law in force in the Territory of Wisconsin at the time of the adoption of the Wisconsin Constitution and continues by reason of Wis. Const. art. XIV, sec. 13. The case further states that one who accepts an office which is incompatible with the one held vacates the first.

Whereas the common-law doctrine of incompatibility has generally been applied only where two offices are involved, there is a

trend to apply the doctrine to positions, or an office and a position 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. In *Tarpo v. Bowman Public Sch. Dist. No. 1*, 232 N.W.2d 67 (N.D. 1975), it was held that a teacher serving in a school district could not at the same time serve as school board member. The court held that there was not automatic ouster but that such person could choose which position he desired to continue to serve in. At p. 71 the court stated:

> "The court in Wyoming recently had before it the question which confronts us in this case. In a well-documented decision, *Haskins v. State ex rel. Harrington*, 516 P.2d 1171 (Wyo. 1973), it was concluded that '*** employment as teacher and office as member of the board of trustees of the school district are incompatible within the meaning and intent of the common-law rule.' We agree that this is equally applicable in North Dakota.
>
> "Following *Haskins*, we conclude that there is no constitutionally protected right to hold incompatible offices or employments and that the rule against holding incompatible offices (or positions) does not result in an unconstitutional infringement of personal and political rights.
>
> "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.
>
> "We hold that the adoption of a conflict-of-interest statute (sec. 15-49-02, N.D.C.C.) in no way abrogated the common law rule against the holding of incompatible positions. ..."

2. May a teacher employed in a city or joint city school district serve as an alderperson?

I am of the opinion that such person probably can but would have to avoid violation of sec. 946.13, Stats.

In 26 Op. Att'y Gen. 582 (1937), it was stated that a teacher in a city school district could not also at the same time serve as alderperson. However, the statute therein relied upon, sec. 62.09(2)(c), Stats. (1937), is no longer in force. It provided that a city office would become vacant if such officer acquired a pecuniary

interest in certain contracts. Under present law, teachers in a city school district and joint city school district are appointed, and salaries are established by the school board. The degree of control exercised by the city council over the teacher is limited and indirect. Where there is a fiscal board, such board rather than the city council has power "to approve the school budget, to levy the general property tax for school purposes and to exercise all other fiscal controls over the city school district which were exercised by the common council prior to the establishment of the fiscal board." Sec. 120.50(3), Stats.

3. May a city firefighter serve as alderperson?

4. May a city firefighter serving in emergency situations as an assistant fire chief also serve as an alderperson?

I am of the opinion that such dual service is prohibited under common-law rules of incompatibility. A fire chief in a city is appointed by the board of police and fire commissioners, and the chief appoints subordinates subject to approval of such board. Section 62.13(7), Stats., provides that "The salaries of chiefs and subordinates shall be fixed by the council"; and subsecs. (7m), (7n), (8), (10m), (11) and (11a) grant the common council substantial power over the fixing of rest days, hours of labor, type of department and rules for permission to leave the city. These are important areas of concern and would in my opinion preclude the holding of the office of alderperson and the position of firefighter at the same time.

Sincerely yours,
BRONSON C. La FOLLETTE
Attorney General

CAPTION:

Compatibility of the office of alderperson with positions of city employe, teacher in city school district and firefighter discussed in general terms.

SPEAKER'S RULING

Clarification of March 9 Ruling on the Second Point of Order Concerning AB-656

Point of Order

On March 9, 1978 following the point of order and ruling by the Chair discussed on pages 4049-52 of this Journal, the Representative of the 44th Assembly District raised the further point of order that

Assembly Bill 656 was not properly before the House because s. 13.50(5) of the Wisconsin Statutes requires that all actions of the Joint Survey Committee on Retirement Systems be approved by a majority vote of all its members -- i.e., at least six -- and the Committee's recommendations on certain of the amendments to Assembly Bill 656 were carried by a lesser number (5 to 3).

The Chair ruled the point of order not well taken.

Background

Section 13.50(5) of the Wisconsin Statutes reads as follows:

> Committee Action. All actions of the committee shall require the approval of a majority of all the members.

Assembly Bill 656, an act relating to implementing merger of the Wisconsin Retirement Fund, the State Teachers Retirement System and the Milwaukee Teachers Retirement Fund and granting rule-making authority, was referred to the Joint Survey Committee on Retirement Systems on April 14, 1977.

At the request of the Committee, a substitute amendment to the proposal was drafted and introduced by the Assembly Co-Chairperson on August 31, 1977. The report required by s. 13.50(6)(a) was written on the bill and this substitute amendment was approved by a majority vote of all the Committee's members, and was subsequently transmitted to the Assembly on September 13, 1977.

Thereafter, the bill was referred, as required by law, to a standing committee in this House and then to the Joint Committee on Finance.

When the bill reached the floor of the Assembly on February 28, 1978, questions arose concerning the ability of the Assembly to act upon certain pending amendments which had been introduced after the Joint Survey Committee reported on the bill. The Chair advised those who asked that, in the Chair's opinion, the Assembly could not consider any such amendment to the bill if it would have a direct impact on a state retirement system because of the requirement in s. 13.50(6)(a) of the statutes. The Chair further advised that since amendments "follow" the proposals to which they relate, and since there is no procedure for separately referring amendments to a committee, if the members wished to consider any amendments that had not been offered before the bill left the Retirement Committee, the bill would have to be rereferred to that Committee. That action was subsequently taken.

The Committee then met on March 3, 1978 to consider the amendments then pending to the bill. At that meeting, it was decided not to submit a report on the amendments under s. 13.50(6)(a) but rather to merely report on the members' support for, and opposition to, certain of the amendments in a manner similar to that utilized by standing committees in this House. This "report" was subsequently transmitted along with the bill (which by previous committee action had a written Retirement Systems Committee report appended to it) to the Assembly, and the Chair then rereferred the bill to the calendar.

Findings

The Chair has previously found that under s. 13.50(6)(a) and (b):

> Amendments affecting state retirement systems must be referred to the Joint Survey Committee on Retirement Systems prior to action by either House of the Legislature; because there is no procedure in the Assembly for referring such amendments to the Committee independently of the proposal to which they relate, in the case of amendments offered after a bill has left that Committee, rereferral is the only means of meeting this requirement; the Committee may, but need not report on such amendments in the same manner as it must report on bills -- i.e., with a written report as discussed in the law; in the case of rereferrals to the Committee, the Committee need not transmit a second report on the bill or any of its amendments.

Since reporting on amendments in the manner prescribed by law is optional, it follows that any inability of the Committee to agree on a written report on any amendment by the majority vote prescribed in s. 13.50(5), or any decision by the Committee not to issue such a report, cannot subsequently preclude Assembly action on any such amendment, or the bill itself, because legal requirements have not been met by the Committee. Optional actions are optional, not requirements.

Section 13.50(5), furthermore, applies only to actions taken by the Committee. Under the Assembly's rules, and by long standing tradition, the action of transmitting a bill from an Assembly standing committee to the Assembly is a discretionary action taken by the Chairperson of that committee. Under standard Assembly procedure then, no committee ever votes to transmit a bill to this House. Rather, the committee's action on any bill referred to it is limited to voting to recommend that the Assembly take a special course of

action on the bill and thereafter the Chairperson, at his or her discretion, transmits the bill together with a report on the committee's action to the Chief Clerk for action by the Assembly. The point is that once a committee has properly voted to recommend some action on a bill -- be it passage, indefinite postponement or not to make a recommendation -- the Chairperson may, but need not, transmit that bill to the Assembly. Given the fact that s. 13.50 does not prescribe another transmittal procedure for the Joint Survey Committee on Retirement Systems, the Chair can only conclude that the legislative intent of those who drafted this law was that the committee would be governed by Assembly and Senate transmittal practices. Accordingly, the Chair finds that the transmittal of an Assembly bill from the Joint Survey Committee on Retirement Systems is an action taken by the Assembly Co-Chairperson of that committee rather than an action taken by the committee. Consequently, s. 13.50(5) does not apply to such transmittals.

There is only one remaining question concerning this matter and that is: given s. 13.50 was the committee's report on its recommendations concerning the amendment properly stated. Since s. 13.50(5) clearly states that all actions of the committee must be by the approval of a majority of all the members, and since the votes by which the committee recommended adoption of certain amendments did not carry by such a majority, the Chair is of the opinion that the report should have indicated that the committee could not agree on a recommendation regarding these amendments rather than that it had voted to recommend adoption of the amendments. This error was corrected on the floor by an announcement from the Chair and was, in the opinion of the Chair, not of sufficient magnitude to delay action on the bill.

ED JACKAMONIS
Speaker

Abstract

All actions taken by the Joint Survey Committee on Retirement Systems must be approved by a majority vote of all the Committee's members (6); this requirement does not prevent a bill or amendment from being considered on the Assembly floor if the action the committee could not agree on by a sufficient vote was optional to begin with; recommendations or written reports on amendments are such optional actions. The transmittal of a bill to the Assembly is a properly discretionary action of the Chairperson and not the Committee; consequently, no majority vote of all the members is needed to accomplish this action.