



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH ATTORNEY GENERAL</p> <p>February 26, 2018</p>	<p>No. I18-001 (R17-023)</p> <p>Re: JTED Governing Board Member Eligibility</p>
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To: Clyde R. Dangerfield
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Questions Presented

1. Whether a teacher, who is employed by one of the member districts of a Joint Technical Education District (“JTED”) and teaches Career and Technical Education (“CTE”) satellite courses at the member district’s campus, is eligible to serve on the JTED’s governing board.

2. Whether a JTED governing board member who is also employed as a CTE satellite course teacher by one of the JTED’s member districts has a conflict of interest under Arizona Revised Statutes (“A.R.S.”) § 38-503.

Summary Answer

1. The governing statute does not expressly prohibit a teacher who is employed by a JTED member district and teaches CTE satellite courses at the member district’s campus from serving on the JTED’s governing board. The common law incompatibility of public offices

doctrine, however, could prohibit the teacher from serving on the JTED governing board, especially if the conflicts of interest are sufficiently numerous to make service on the governing board incompatible with maintaining the teaching position.

2. A JTED governing board member who also teaches CTE satellite courses at a JTED member district's campus may have a conflict of interest if the governing board member has a substantial interest in a contract, sale, purchase, or decision of the governing board. *See* A.R.S. § 38-503(A)-(B). If the board member has such a conflict of interest, he must declare that conflict of interest in the official records of the JTED board and refrain from participating in any manner in the contract, sale, purchase, or decision. *Id.*

Background

Pursuant to A.R.S. § 15-253(B), an attorney for the East Valley Institute of Technology ("EVIT"), one of Arizona's 14 JTEDs, submitted an opinion that he had provided to EVIT's Superintendent for review. Arizona Revised Statutes § 15-253(B) requires the Attorney General to "concur, revise or decline to review" opinions relating to school matters within 60 days of receipt.¹ This Opinion revises the opinion submitted by EVIT's attorney.

Arizona law allows two or more school districts, with the approval of the voters of those districts, to establish a JTED to oversee CTE courses provided for students of the districts within the JTED. *See* A.R.S. § 15-392(A). Management and control of a JTED is vested in its governing board, whose members may not be employees of the JTED or members of the governing board of one of its constituent school districts. *See* A.R.S. §§ 15-392(D), -393(A).

¹ The term "county attorney" in A.R.S. § 15-253(B) includes elected county attorneys as well as attorneys who represent school districts with the consent of the county attorney. *Ariz. Att'y Gen. Op. I88-052 (Substitute Opinion) (1988)*. The opinion revised herein falls in the latter category.

To clarify, “CTE satellite course” as discussed in the context of the questions asked here, is considered to be a “Joint technical education course” that is part of a JTED district program as defined in A.R.S. § 15-391(3),(5). This Opinion does not address CTE teachers who are teaching CTE courses that are not part of the JTED district program as defined by A.R.S. § 15-391(5).

Moreover, it is also worth noting that pending House Bill 2205, 53rd Leg. 2d Reg. Sess. (2018), if enacted, would amend A.R.S. § 15-393(A)(3) to expressly prohibit “an educator who teaches or administers a [CTE] program or course at a satellite campus” from holding “membership on the governing board of that [JTED.]”

Analysis

I. A CTE Teacher Is Likely Prohibited from Serving on a JTED Governing Board Because the Teaching Position Is Likely Incompatible with Board Service.

Eligibility to serve on a JTED governing board is governed by A.R.S. § 15-393(A)(3), which prohibits “[a]n employee of a joint technical education district” from serving on the governing board of that district. A.R.S. § 15-393(A)(3).

Because the teacher described in the Opinion request is an employee of one of the JTED member districts, but not of the JTED itself, the statute does not explicitly prohibit the teacher from serving on the JTED governing board. The inquiry, however, does not end there. If employment by a member district is incompatible with serving on the governing board, the teacher may not hold both positions at the same time.

The common law doctrine of incompatibility of public offices precludes a person from holding two public positions simultaneously when the duties of the two positions are in conflict, such as when one office is subordinate to and subject to the other office’s power to review and/or regulate its conduct. *See Perkins v. Manning*, 59 Ariz. 60, 65 (1942); Ariz. Att’y Gen.

Op. I90-023 (1990). In *Perkins*, the Arizona Supreme Court set forth two tests to determine incompatibility. The first test is whether it would be physically impossible to perform the duties of both offices. For example, when one office is a county office—the duties of which are to be performed in the county—and the second is a Congressional office—the duties of which are to be performed in Washington, D.C.—the offices may be incompatible. See *Perkins*, 59 Ariz. at 66-68 (collecting cases). Second, the duties of the two offices may be incompatible when “one office is subordinate to the other or has the power or duty of reviewing or regulating the conduct of the other,” such as the office of auditor and an office whose accounts he must audit. *Id.* at 65.

It does not appear that it would be physically impossible to serve as both a teacher of CTE courses at a JTED satellite campus and on the JTED governing board. However, the role of a JTED governing board member may be incompatible with the CTE teacher position because of the JTED governing board’s oversight role regarding CTE programs. See *Perkins*, 59 Ariz. at 65; Ariz. Att’y Gen. Op. I90-023, at 1 (concluding that the duties of a district teacher are incompatible with the duties of a district board member).

Arizona Revised Statutes § 15-393(A) provides that JTED governing boards are responsible for the management and control of:

- the content and quality of the courses offered by the JTED
- the quality of teachers who provide instruction on behalf of the JTED
- the salaries of teachers who provide instruction on behalf of the JTED
- the reimbursement of other entities for the facilities used by the JTED

These oversight duties are similar to those deemed incompatible with a teaching position in a previous Attorney General Opinion concluding that a school district governing board’s duties of “prescribing rules for the governance of schools in the district, which teachers are bound to follow, and reviewing the performance of and actions taken by teachers” were incompatible with a teaching position within the district. Ariz. Att’y Gen. Op. I90-023 at 1 (footnotes omitted).

Here, a member district is responsible for the direct oversight of the teacher's employment. Nevertheless, the JTED governing board's oversight role, which includes teacher-quality and compensation decisions, is sufficiently related to the teacher's work that the two positions are likely similarly incompatible.

II. A JTED Governing Board Member Who Is Also Employed as a CTE Satellite Course Teacher May Face Repeated Conflicts of Interest.

Contributing to the incompatibility of the governing board member and teacher positions are the conflict of interest rules that apply to public officers and employees. In particular, a JTED board member who has a substantial interest in a contract, sale, purchase, or decision of a public agency "shall refrain from voting upon or otherwise participating in any manner as an officer or employee in such contract, sale[,] purchase[, or] decision." A.R.S. § 38-503(A)-(B). A "substantial interest" is "any non-speculative pecuniary or proprietary interest, either direct or indirect, other than a remote interest." A.R.S. § 38-502(11). As relevant to this Opinion, a "remote interest" of a public officer or employee in a contract or decision is one that would not "confer a direct economic benefit or detriment on the officer [or] employee . . . of any of the following: (i) Another political subdivision; (ii) A public agency of another political subdivision; [or] (iii) A public agency except if it is the same governmental entity." A.R.S. § 38-502(10)(i).

Accordingly, a member of a JTED governing board who is also employed as a CTE satellite course teacher by one of the JTED's member districts would have a conflict of interest and would be prohibited from voting on or participating in the discussion of any contract between the JTED and the member district that would confer a direct economic benefit or detriment on the teacher-board member. A.R.S. § 38-503(A)-(B). For example, it is likely that a decision that provides funding from the JTED to the member district that employs the teacher-

board member would create a conflict of interest, unless it is clear that that funding would not confer a direct benefit on the teacher-board member. Whether any particular board action confers such a benefit or detriment on the teacher-board member, however, is a factual question that must be determined on a case-by-case basis.

If the teacher-board member determines that a particular matter involves a conflict of interest, the board member must make the substantial interest known in the JTED board's official records and refrain from participating in any way in the decision. The frequency with which the teacher board-member must recuse himself from matters could also demonstrate that employment as a teacher of CTE satellite courses by one of the JTED's member districts is incompatible with service as a board member.

Conclusion

In summary, while not expressly prohibited by statute, employment by one of a JTED's member districts as a CTE satellite course teacher is likely incompatible with service as a member of the JTED's governing board. Moreover, incompatibility is particularly likely if the board member's employment gives rise to enough conflicts of interest that would require the board member frequently to refrain from participating in and voting on board decisions.

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