

OPINION NO. 78-048**Syllabus:**

1. No person who is a member of any board of education may be appointed or reappointed to the position of trustee of a technical college under R.C. 3357.05.
2. A person who held the positions of trustee of a technical college district and member of a board of education prior to January 13, 1978 may, pursuant to R.C. 3357.05, continue to hold both positions, but may not accept a new term in either position without first resigning from the other.

3. A person who is a trustee of a technical college may not subsequently be elected or appointed to the position of member of the board of education without first resigning his trusteeship.

To: William Coulter, Acting Chancellor, Board of Regents, Columbus, Ohio

By: William J. Brown, Attorney General, July 24, 1978

I have before me your predecessor's request for my opinion which involves R.C. 3357.05 as amended by Am. H.B. 399 (effective 1-13-78). The relevant portion of the statute, now reads as follows:

Within ninety days after a technical college district is created...trustees shall be appointed to serve as a board of trustees of the technical college district. Appointees shall be qualified electors residing in the technical college district and shall not be employees of any governmental agency. No new trustee may be appointed who is a member of any board of education... (New language emphasized.)

Therefore, you have raised the following questions:

1. Do appoint and reappoint mean the same; that is, can an individual presently serving on the board of trustees of a technical college, who is also a member of a board of education be reappointed as a trustee for a new term?
2. Does this new law imply that a member of a board of trustees, who is subsequently selected as a member of a board of education, be required to resign as a trustee.
3. It is my understanding that most members of boards of education receive some remuneration for services to the board. Does this Section of 3357, prohibiting employees of governmental agencies from becoming trustees, automatically exclude members of boards of education because of the money they receive? I am of the opinion that a previous interpretation of this law prohibits staff members of public schools from serving because of this provision.

R.C. 3357.05, *supra*, is, as you indicate in your first question, a statute subject to two possible interpretations. Under one reading of the newly amended act, no person may be appointed as trustee of a technical college if he is a member of any board of education, even if he is currently a trustee. Another reading would permit reappointment of trustees even though they concurrently serve on a board of education, but would prevent appointment of a "...new trustee..." who holds the other office. Because of these possible interpretations, the statute is ambiguous, and therefore, R.C. 1.49 should be applied.

R.C. 1.49 establishes guidelines for the distillation of legislative intent. It provides:

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

- (A) The object sought to be obtained;

- (B) The circumstances under which the statute was enacted;
- (C) The legislative history;
- (D) The common law or former statutory provisions, including laws upon the same or similar subjects;
- (E) The consequences of a particular construction;
- (F) The administrative construction of the statute.

As indicated, R.C. 3357.05 was recently amended. Where formerly the statute made only the general prohibition against trustees being "...employees of any governmental agency...", the statute now specifically prohibits appointment of any new trustee who is on any board of education. The object of the statute is clear in one respect. It seeks to keep members of a board of education off the board of trustees. This amendment appears to recognize the likelihood that the two offices are in fact incompatible under the traditional common law test of incompatibility of offices. That test, often cited by holders of this office, was set forth in State, ex rel. Attorney General, v. Gebert, 12 Ohio C.C.R. (n.s.) 274, 275 (1909) as follows:

Offices are considered incompatible when one is subordinate to, or in any way a check upon the other; or when it is physically impossible for one person to discharge the duties of both. (Emphasis added.)

Since, under R.C. 3357.05(A), a majority of the trustees of a technical college district are to be selected by the various boards of education within the district, it is clear that the office of trustee is "subordinate" to the office of board of education member. I find additional support in this conclusion by virtue of the fact that board of education members and technical college trustees must be residents of their respective districts, and that therefore members of a board of education could appoint themselves trustees. Moreover, under R.C. 3357.09(M) the trustees of a technical college may contract with boards of education to allow the use of its facilities by various school districts. This would place a member of both bodies in an obvious conflict.

Returning to R.C. 1.49, it must be presumed that the General Assembly was cognizant of the incompatibility of the two offices when it enacted Am. H.B. No. 399 to amend R.C. 3357.05, and therefore the various factors to be considered in resolving ambiguity under R.C. 1.49 fall easily into place. The only construction of R.C. 3357.05 which is reasonable is that after the effective date of Am. H.B. 399, no appointee to the office of technical college trustee may be a member of any board of education, regardless of whether the appointee is currently a trustee of the technical college or not. Simply put, under R.C. 3357.05 "appoint" is synonymous with and includes "reappoint."

Your second question involves the practical result of the amendment to R.C. 3357.05 as set forth in Am. H.B. 399. If a technical college trustee is elected to serve on a board of education, you ask whether he must, at that point, resign his trusteeship. The statute speaks only to the reverse situation, *i.e.* where a board member is to be appointed as a trustee. In that instance, it seems clear that he must, in fact, resign in order to be appointed as trustee. Under Ohio case law, if one person is appointed to an office which is incompatible with an office he already holds, then he automatically vacates the first office. State, ex rel. Hover v. Wolven, 175 Ohio St. 114 (1963). To apply this result blindly to the situation you describe would, I think, contravene the intention of the legislature. It seems that the General Assembly has, through Am. H.B. No. 399, stated that only at time of appointment as trustee must a board member choose which office he will hold. If he opts for the trusteeship he must resign his board of education membership. However, to allow a trustee to affirmatively seek the office of board of education member, after the effective date of the act also contravenes the intent of the legislature that one person may not hold both offices. Therefore, in answer to your second question, if a member of a Board of Education also held the position of

technical college trustee prior to the effective date of Am. H.B. No. 399, (1-13-78) he may not be reappointed as a trustee but he need not resign either position. However, after the effective date of the act, no trustee may be elected or appointed as a Board of Education member while retaining the trusteeship.

My response to your first two questions renders specific treatment of your third question unnecessary. This is so because of the axiom of statutory construction that the specific part of a statute controls over the general. Moreover, members of a board of education are not "employees" in the traditional sense. Rather they are officers since they are not subject to control in the manner in which they execute their duties.

Accordingly, it is my opinion, and you are hereby advised that:

1. No person who is a member of any board of education may be appointed or reappointed to the position of trustee of a technical college under R.C. 3357.05.
2. A person who held the positions of trustee of a technical college district and member of a board of education prior to January 13, 1978 may, pursuant to R.C. 3357.05, continue to hold both positions, but may not accept a new term in either position without first resigning from the other.
3. A person who is a trustee of a technical college may not subsequently be elected or appointed to the position of member of the board of education without first resigning his trusteeship.