

OPINION NO. 79-099**Syllabus:**

A teacher who has been a disability retirant pursuant to R.C. 3307.44 for less than five years may not serve on the board of education of the district in which he or she taught at the time of retirement, unless the teacher has resigned from the teaching position and has waived the rights conferred by R.C. 3307.44 to leave of absence status and to be restored to his or her former position should disability cease.

To: Keith A. Shearer, Wayne County Pros. Atty., Wooster, Ohio
By: William J. Brown, Attorney General, December 18, 1979

I have before me your request for my opinion in which you ask the following question:

May a teacher on disability under Section 3307.44 of the Ohio Revised Code serve on the Board of Education of the district in which he was formerly a teacher?

There are no statutory prohibitions against a teacher on disability serving as a member of a board of education, see R.C. 3313.13 and R.C. 3307.43, and I assume that there are no prohibitive rules or regulations promulgated by the school board in question applicable to other employment by board members or to board membership by a disability retirant. Nor is the prohibition of R.C. 124.57 against

political activity by classified civil servants a bar—even assuming that R.C. 124.57 would be applicable to an individual retired pursuant to R.C. 3307.44—since a teacher is in the unclassified civil service under R.C. 124.11(A)(7). Thus, it must be determined whether the common law test of incompatibility will operate to preclude a teacher who is a disability retirant under R.C. 3307.44 from serving as a member of the board of education in the district in which he or she formerly taught. That test may be stated 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. State ex rel. Attorney General v. Gebert, 12 Ohio C.C. (n.s.) 274, 275 (Cir. Ct. Franklin County 1909).

Certainly, under this test, a person could not simultaneously serve as a member of a board of education—which is a public office, 1979 Op. Att'y Gen. No. 79-049—and as a teacher employed by that board. There can be no stronger case of subordination, and, therefore, incompatibility, than a direct employer-employee relationship. See, e.g., 1966 Op. Att'y Gen. No. 66-072. However, inasmuch as the common law test of incompatibility is inapplicable when both positions are not in the public service, 1973 Op. Att'y Gen. No. 73-016, I must consider whether a former teacher on disability retirement is, in fact, a public employee.

If it were not for the provisions of R.C. 3307.44, a retired teacher clearly would not be a public employee. However, that section states, in part:

A disability retirant, notwithstanding section 3319.13 of the Revised Code, shall retain membership in the state teachers retirement system and shall be considered on leave of absence from his position during his first five years on the retired list. (Emphasis added.)

R.C. 3307.44 further provides that the state teachers retirement board may require a disability retirant to submit to a medical examination at any time, and, if the board concurs with a physician's report that the retirant is mentally and physically capable of resuming service, benefits will cease. If the leave of absence has not expired and the teacher was under contract at the time of retiring, the employer must restore him or her to the previous position and salary, or one similar thereto.

Thus, the individual in question is, pursuant to R.C. 3307.44, considered to be on leave of absence from his or her teaching post. The question whether a person on leave of absence from one position of public employment may hold a second public position which would be subordinate to, or a check upon, the other, was answered in the negative in 1966 Op. Att'y Gen. No. 66-181. In reaching this conclusion, my predecessor relied upon the case of State ex rel. Neffner v. Hummel, 142 Ohio St. 324 (1943), in which the Court stated that a leave of absence does not take a state employee out of the employ of the state or the classified service and further noted:

By such leave the employee forfeits none of his rights under the civil service law and therefore it would be a strange doctrine which would protect all the rights conferred upon the employee during such leave and yet would relieve such employee from all obligations and restrictions embodied in the same law which protects his rights. 142 Ohio St. at 331.

See also State ex rel. Cutright v. Akron Civil Service Commission, 95 Ohio App. 385 (Summit County 1953) (leave of absence not a separation from service, but rather a temporary excuse from the performance of active duties).

In Op. No. 66-181, supra, it was opined that a person on leave of absence from a municipal police force may not hold the position of city safety service director for the reason that, if the individual were permitted to hold both positions, he would be able to "administer his duties as Safety Service Director in such a manner

as to affect the responsibilities of a Captain in the Municipal Police Department, an office which he may reacquire at will." *Id.* at 2-394 (emphasis added). A teacher on disability cannot, however, reacquire his or her former position "at will." The medical examining board must first require the retirant to submit to an examination, and then determine that the retirant is physically and mentally capable of resuming a teaching position. Though the retirant may request reexamination for possible return to service, the medical review board may not accept such a request more than once a year. 2 Ohio Admin. Code §3307-1-15(E)(1)(b). Thus, a disability retirant's return to teaching service is not a matter of his or her personal choice, but rather is contingent upon his or her mental and physical condition. Accordingly, the reasoning employed by my predecessor in Op. No. 66-181, although persuasive, is not precisely on point.

It has long been the rule that "one may not hold two positions of public employment when the duties of one may be so administered and discharged that favoritism and preference may be accorded the other . . ." State ex rel. Baden v. Gibbons, 17 Ohio L. Abs. 341, 344 (Ct. App. Butler County 1934). A school board, of course, deals extensively with matters relating to its teachers. Thus, any decision in this respect made by a teacher retired pursuant to R.C. 3307.44 serving as school board member would, ultimately, have a direct effect upon that person should the disability cease and teaching be resumed. A conflict, therefore, arises between the individual's duties as school board member and his or her interest in furthering the rights and status of teachers. The common law rule of incompatibility is designed to avoid such divided loyalties, and it would be "contrary to public policy for a public officer to be in a position which would subject him to conflicting duties or expose him to the temptation of acting in any manner other than the best interest of the public." 1970 Op. Att'y Gen. No. 70-168.

On the other hand, it is only speculative whether the individual in question here will ever return to teaching. It has been stated in opinions of the Attorney General that, where possible conflicts of interest between two positions of public service are remote and speculative, the common law rule of incompatibility is not violated. *See, e.g.*, 1979 Op. Att'y Gen. No. 79-049; 1973 Op. Att'y Gen. No. 73-108; 1971 Op. Att'y Gen. No. 71-081, 1970 Op. Att'y Gen. No. 70-168.

Under the facts presented in this situation, however, not only may the conflict exist at some future time if the individual is required to resume teaching, but, because of the possibility that the individual may resume teaching, the conflict is also inherent in every matter under consideration by the school board which involves the remuneration, rights, obligations, and duties of teachers. Furthermore, these facts do not present a case in which the individual may avoid conflicts by abstaining from discussion or voting upon teacher-related matters, inasmuch as such matters must, of necessity, consume a significant portion of the school board's attention and time. Therefore, I conclude that a disability retirant may not serve as a member of the school board in the district in which he or she taught at the time of retirement, unless certain actions with respect to his or her employment with the board, and statutory rights accorded pursuant to R.C. 3307.44, are taken.

If the individual in question here is able to resign from his or her employment with the board of education, and, further, to waive the rights under R.C. 3307.44 to leave of absence status and to be restored to the former position should disability cease, there will be no possibility of a return to service pursuant to R.C. 3307.44 during the retirant's tenure of office on the school board. In such case, the impediment to holding office on the school board will be removed.

Certainly, a disability retirant may terminate his or her contract with the board by giving written notice pursuant to R.C. 3319.15. Furthermore, I am aware of no positive prohibition against a retirant waiving the rights granted by R.C. 3307.44 to be considered on leave of absence and to be restored to his or her former position should disability cease. The "principle of law is well established that one is free to waive the rights and privileges which are due him, whether secured by contract, conferred by statute, or guaranteed by the Constitution, so

long as there is no violation of public policy." State ex rel. Ford v. Board of Education, 141 Ohio St. 124, 127 (1943) (teacher's waiver of statutory tenure rights) (emphasis added). See also Rowe v. Rowe, 58 Ohio L. Abs. 497 (Ct. App. Franklin County 1950); Seligman v. Toledo Moving Pictures Operator's Union, 88 Ohio App. 137 (Lucas County 1947). It is clear, however, that a waiver must be made voluntarily and knowingly. Parente v. Day, 16 Ohio App. 2d 35 (Cuyahoga County 1968). If there is adequate assurance that these requirements have been met, I am of the opinion that the statutory rights to leave of absence status and to be restored to the former position are effectively waived, and the conflicts thereby removed. The intent to waive a statutory right must be clearly expressed and unmistakable. See Allenbaugh v. City of Canton, 137 Ohio St. 128 (1940). Thus, it has been held that a teacher has not waived the statutory right to a continuing contract where a written resignation has not been tendered. State ex rel. Mt. Healthy Teachers' Assoc. v. Mt. Healthy Board of Education, 54 Ohio App. 2d 235 (Hamilton County 1978). Hence, I conclude that the waiver of the rights conferred by R.C. 3307.44 must be made in writing and tendered to the school board which employed the teacher at the time of retirement.

I am of the further opinion that such rights may be waived without waiver of the right to continue to receive disability payments. R.C. 3307.44 provides that a disability retirant "shall retain membership in the state teachers retirement system and shall be considered on leave of absence" The provisions as to retention of membership in the retirement system and leave of absence are severable. A retirant's right to receive disability payments is not dependent upon retention of leave of absence status, as evidenced by the fact that such payments continue after the five-year leave period ends. The retention of membership in the state teachers retirement system would not, in itself, result in any conflict with the duties of a school board member.

Accordingly, it is my opinion, and you are advised, that a teacher who has been a disability retirant pursuant to R.C. 3307.44 for less than five years may not serve on the board of education of the district in which he or she taught at the time of retirement, unless the teacher has resigned from the teaching position and has waived the rights conferred by R.C. 3307.44 to leave of absence status and to be restored to his or her former position should disability cease.