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ATTORNEY GENERAL  
STATE OF ILLINOIS  
SPRINGFIELD

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FILE NO. S-1494

COMPATIBILITY OF OFFICES:  
Village Mayor and School  
Board Member

Honorable Thomas J. Fahey  
State's Attorney  
Vermilion County Courthouse  
7 North Vermilion Street  
Danville, Illinois 61832

Dear Mr. Fahey:

I have your letter wherein you inquire whether the offices of village mayor and school board member are inherently or otherwise incompatible in view of section 1 of "AN ACT in relation to State revenue sharing with local governmental entities" (Ill. Rev. Stat. 1979, ch. 35, par. 611), and whether the holding of both offices by the same person is a violation of section 3 of "AN ACT to prevent fraudulent and corrupt practices in the making or accepting of official appointments and contracts by public officers" (Ill. Rev. Stat. 1979, ch. 102, par. 3). Moreover, in the event that the two offices are incompatible, you inquire whether contracts

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between the village and school board are void.

For the reasons hereinafter stated, it is my opinion that the office of village mayor is incompatible with that of school board member for a district encompassing his village. Before discussing the legal consequences which result from the holding of those incompatible public offices, I will set forth the criteria established by the courts for determining the existence of incompatibility.

The general rule laid down in People ex rel. Meyer v. Haas (1908), 145 Ill. App. 283, 286, is that incompatibility arises where the Constitution or a statute specifically prohibits the occupant of either office from holding the other, or where the duties of the office are such that the holder of one cannot, in every instance, properly, fully and faithfully perform all the duties of the other. Incompatibility may arise from multiplicity of business in one office or the other, considerations of public policy or otherwise. According to this standard, incompatibility results when a conflict of duties may arise, not just when a conflict of duties does in fact exist.

The combination of two developments in Illinois law of the last decade has a direct bearing on the question of incompatibility which you raise. The first of these developments is the inclusion of the section on intergovern-

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mental cooperation within the Illinois Constitution of 1970 (Ill. Const. 1970, art. VII, § 10). Section 10(a) provides in pertinent part that:

"Units of local government and school districts may contract or otherwise associate among themselves, with the State, with other states and their units of local government and school districts \* \* \*."  
(Emphasis added.)

Secondly, the enactment of the Intergovernmental Cooperation Act (Ill. Rev. Stat. 1979, ch. 127, par. 741 et seq.) authorizes State and local governing bodies to cooperate in the performance of their responsibilities by contracts and other agreements.

Thus, by virtue of the combination of the Intergovernmental Cooperation Act and article VII, section 10(a) of the 1970 Illinois Constitution, villages and school districts are granted broad powers to contract and associate with each other. Moreover, you have pointed out in your letter that the school board does, in fact, contract with the village for water and sewage services. Consequently, the circumstances do presently exist, and other circumstances could easily and foreseeably arise in the future, where an individual acting in the dual capacity of village mayor and school board member cannot fully nor faithfully execute the duties of both with respect to contracts or agreements between both bodies.

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A possible conflict of duties could also arise, as you have pointed out, under "AN ACT in relation to State revenue sharing with local governmental entities" (Ill. Rev. Stat. 1979, ch. 85, par. 611 et seq.). These sections establish a fund from the income tax revenue, which fund is to be paid to municipalities and counties of Illinois. Thereafter, section 3 of the Act (Ill. Rev. Stat. 1979, ch. 85, par. 613) provides that:

"The amounts allocated and paid to the municipalities and counties of this State pursuant to the provisions of this Act shall be used solely for the general welfare of the people of the State of Illinois, including financial assistance to school districts, any part of which lie within the municipality or county, through unrestricted block grants for school purposes carried out within the municipality or county making the grant." (Emphasis added.)

In a prior opinion (1973 Ill. Att'y Gen. Op. 83), I determined that membership on the school board is incompatible with membership on the county board, because of the provisions of section 3. In doing so, I stated at pages 83-84 that:

" \* \* \*

If a county board member were also a member of a school board of a school district, any part of which was located in the county, the county board member would be in a position to favor his own school board. Although he could not benefit personally, he might not be able to give fair and impartial consideration to the duties of both offices. \* \* \*

\* \* \*

(Emphasis added.)

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It is my understanding that the Board of Education of Community Unit No. 7 encompasses a territory including all the territory within the corporate limits of the village of Rossville, Illinois. For that reason, it is apparent that possible conflicts of duties may arise due to State revenue sharing and holding of both the office of village mayor and the office of school board member.

Finally, you ask whether the holding of both positions could create the type of conflict prohibited by section 3 of "AN ACT to prevent fraudulent and corrupt practices in the making or accepting of official appointments and contracts by public officers" (Ill. Rev. Stat. 1979, ch. 102, par. 3). Section 3 of the Act provides in pertinent part that:

"No person holding any office, either by election or appointment under the laws or constitution of this state, may be in any manner interested, either directly or indirectly, in his own name or in the name of any other person, association, trust or corporation, in any contract or the performance of any work in the making or letting of which such officer may be called upon to act or vote.  
\* \* \*"

It is my opinion, based on the facts in the situation presented, that there is no violation of the above provision. The rule has been well established by the Illinois courts that the type of interest to be prohibited by "AN ACT to prevent

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fraudulent and corrupt practices, etc." must be a certain, definable, pecuniary or proprietary interest. The Act is aimed at actual bad faith abuse of power for an officer's own personal benefit and to prevent the creation of relationships which possess the potential for such abuse. Hollister v. North (1977), 50 Ill. App. 3d 56, 59; People v. Simpkins (1977), 45 Ill. App. 3d 202, 208; Panozzo v. City of Rockford (1940), 306 Ill. App. 443.

In the situation presented in your request, an officer of one public body is also serving as an officer of another public body. Although the two positions are incompatible, the personal pecuniary interest necessary for a violation of section 3 is not present. Consequently, I will not discuss the sanctions provided in section 4 (Ill. Rev. Stat. 1979, ch. 102, par. 4) for violations of the Act. I am also of the opinion that an analysis of similar provisions, if applicable, found at section 3-14-4 of the Illinois Municipal Code (Ill. Rev. Stat. 1979, ch. 24, par. 3-14-4) and section 10-9 of The School Code (Ill. Rev. Stat. 1979, ch. 122, par. 10-9) would result in the same determination.

I turn now to a discussion of the legal consequences which flow from the holding of these two incompatible offices. It is my understanding that the officer in question was serving as a member of the school board when he accepted

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appointment as village mayor. It is well settled in Illinois that the acceptance of an incompatible office by the incumbent of another office will be regarded as ipso facto resignation of the first office. (People v. Bott (1931), 261 Ill. App. 261, 265; People ex rel. Meyer v. Haas (1903), 145 Ill. App. 283, 287.) Formal resignation or ouster by legal proceedings is not required. (Packingham v. Parker (1895), 61 Ill. App. 96, 100.) Consequently, by accepting appointment to the office of village mayor, the officer in question resigned his position as member of the school board.

In your letter you note that the officer is currently serving in both capacities and you inquire as to the legal effect of actions taken by the individual if incompatibility does in fact exist. For the following reasons, it is my opinion that the individual has been a de facto member of the school board and, as such, his acts are valid as far as the public and third parties are concerned. People v. Hess (1933), 353 Ill. 147, 151; Hicks v. Lycan (1924), 314 Ill. 590, 593.

In Howard v. Burke (1910), 248 Ill. 224, 228-29, the court stated that:

"A mere claim to be a public officer and exercising the office will not constitute one an officer de facto. There must be at least a fair color of right or an acquiescence by the public in his official acts so long that he will be

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presumed to act as an officer either by right of appointment or election. (Brown v. Lunt, 37 Me. 423.) A de facto officer was defined by Lord Ellenborough as 'one who has the reputation of being the officer he assumes to be and yet is not a good officer in point of law.' (Rex v. Bedford Level, 6 East, 356; Barlow v. Standford, 82 Ill. 298; State v. Carroll, 38 Conn. 449; 8 Am. & Eng. Ency. of Law, --2d ed.--p. 781, and cases cited.) Color of title to an office has been defined to be 'that which in appearance is title but which in reality is no title.' (Wright v. Mattison, 18 How. 50; 8 Am. & Eng. Ency. of Law, --2d ed.--794.) Color of authority (which is usually considered synonymous with color of title) to an office is held to be authority derived by an election or an appointment, however irregular or informal, so that the incumbent be not a mere volunteer. (McCrary on Elections, --4th ed.--sec. 253; State v. Oates, 86 Wis. 634; People v. Lieb, 85 Ill. 484.) \* \* \*

Therefore, because, after assuming the incompatible position of village mayor, the person continued to act as a member of the school board, he continued to do so in a de facto capacity.

In People v. Bott (1931), 261 Ill. App. 261, 266), the court, finding incompatibility of offices, held that a judicial officer could not also hold a position in the executive department of government and that his acts thereafter in a judicial capacity were void, the individual being incapable of being even a de facto officer in that circumstance. However, the constitutional separation of powers provision upon which the finding in Bott rested is not relevant to the situation you present. School and village boards, being local governmental entities, are not as easily identified as being in a



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particular branch of government as are State agencies. Both boards are similar in that neither is in the judicial branch and both have some characteristics associated with both the legislative and executive branches. Consequently, it is my opinion that, based on the facts of your case, the individual has acted as a de facto member of the school board.

Very truly yours,

A T T O R N E Y G E N E R A L