

BEFORE THE AUDITOR, RECORDER AND TREASURER  
OF SCOTT COUNTY, IOWA

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IN THE MATTER OF JOHN MAXWELL,  
SCOTT COUNTY SUPERVISOR

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BRIEF OF JOHN MAXWELL

Hearing date: March 15, 2021



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## **Introduction**

Scott County Supervisor John Maxwell submits this memorandum of law for consideration by the panel of the auditor, recorder, and treasurer to determine whether a vacancy exists in the office of supervisor as provided in Iowa Code § 69.2. As recognized by the Iowa Attorney General, there is no incompatibility of office between a county supervisor and a school board member. The fact that both the county supervisors and school board members are part of the Davenport City Conference Board does not change this result. Iowa law expressly allows other members of a city conference board (city office holders and school board members) to be elected to both offices *in the same election and on the same ballot*. This, in combination with an examination of the other relevant statutes (including a recent enactment), conclusively demonstrates that no vacancy exists.

**I. The offices of county supervisor and school board member are not incompatible.**

**A. Incompatibility of office: general principles.**

There are several provisions of Iowa law that regulate the circumstances under which an individual may occupy more than one elective or appointed office at the same time. The Iowa Constitution prohibits an individual holding any “lucrative office” under the United States or the State of Iowa from serving as a member of the general assembly. Iowa Const., Art. III, § 22. *See also*, Iowa Code § 69.2(1)(i) (prohibiting an individual from holding statewide office while a member of the general assembly). Thus, a person could not simultaneously be a state legislator and a member of Congress. A person also cannot hold more than one elective office “at the same level of government.” Iowa Code § 69.2(1)(h). This means, for example, that a person could not serve as a member of the board of supervisors and county sheriff.

Aside from any specific statutory prohibition, we must also consider the common law doctrine of incompatibility of office. It is often said that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other and subject in some degree to its revisory power, or where the duties of the two offices are inherently inconsistent and repugnant. *State v. White*, 257 Iowa 606, 609, 133 N.W.2d 903, 904 (1965). Courts will also consider whether the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both. *Id.*

The question raised in *White* illustrates the doctrine. White was elected to the Davenport Community School District in 1961 for a three-year term. He then was elected to the Scott County Board of Education in 1963. At the time, Iowa had county school boards that would appoint a single superintendent of schools for the county. Iowa Code § 273.13(1) (1962). The county board could review a local board's decisions about "the curriculum of a school, the instruction in the schools, the transportation of pupils to school where required by law..." *White*, 257 Iowa at 610, 133 N.W.2d at 905. The county board would even act as "an appellate body over disagreements between a school patron and the community board as to matters of transportation..." Iowa Code § 285.12 (1962).

The supervisory relationship of a county board of education over local school boards was unmistakable. Reviewing this statutory framework, the Iowa Supreme Court quoted with approval the finding of the district court that "[i]t thus appears that in many important matters the community school board is subordinate to the county board and subject to its revisory power in some degree." This relationship between the two offices held by White created the incompatibility. *White*, 257 Iowa 612, 133 N.W.2d 907.

But the incompatibility-of-office doctrine “should be construed narrowly and applied cautiously.” 1982 Iowa Op. Atty. Gen. 16 at \*2. This is for three reasons. “First, the legislature has indicated it is willing to suspend applications of the doctrine which are perceived to create hardship.” “Second, certain applications of the incompatibility doctrine...approach infringing upon interests of institutional dimension: the interest of a person in seeking public office, and the interests of constituents in having their choice of representation respected.” And, especially in the case of smaller communities, “the voters would ordinarily be aware that a candidate was serving in another office...” *Id.* at \*2-3.

It is important to value the choice of the voters who elected Maxwell. An arbitrary and incorrect application of the incompatibility doctrine threatens to suppress the voters who elected him to serve as a county supervisor. “Voting has traditionally been viewed in our democratic society as a basic and fundamental right of citizenship. In our representative form of governing, it serves to give a voice to the people.” *Griffin v. Pate*, 884 N.W.2d 182, 184-85 (Iowa 2016).

The Scott County Attorney has offered his view that there is a potential incompatibility between the offices of supervisor and school board member because an administrative regulation states that both bodies are represented on the Davenport City Conference Board. This view is incorrect. There is no incompatibility between the offices merely because both bodies share ministerial property tax administration responsibilities. The claim is also not consistent with a formal opinion of the Iowa Attorney General and a 2017 legislative change.

**B. The offices of county supervisor and school board member are not incompatible.**

We need not look far to find legal authority on this question. In 1992 the Iowa Attorney General offered the formal opinion that the offices of county supervisor and school board member are not incompatible. The opinion notes there is no statutory prohibition against an individual simultaneously holding both offices. Further, “[n]either office is subordinate to, or subject to discretionary revisory power of the other.” 1992 Iowa Op. Atty. Gen 150, 1992 WL 470380 at \*2. This is so, even though the board of supervisors must levy the amount of tax certified by the school board. “[T]his duty is essentially ministerial in nature.” “We do not believe that this one overlapping, non-discretionary function renders these two offices incompatible...[n]or do we find the statutory functions of these two boards to be ‘inherently inconsistent or repugnant.’” *Id.*

Nor is there an inherent conflict of interest in the two positions. “An allegation of conflict of interest raises a question of divergence of loyalties.” *Id.* at \*3. “It appears, however, from review of the statutory functions of each of these boards that the potential for conflict would be minimal and that conflicts could be avoided by the officer’s awareness, and cautious exercise, of the need to abstain from discussion and voting when a conflict or the potential for conflict exists.” *Id.*

This Iowa Attorney General opinion has been public for nearly three decades. At no time has the legislature enacted any language that would make the offices of supervisor and school board member incompatible. As with legislative nonresponse to a court decision, “[w]hen many years pass following such a case without a legislative response, we assume the legislature has acquiesced in [the] interpretation.” *Ackelson v. Manley Toy Direct, L.L.C.*, 832 N.W.2d 678, 688 (Iowa 2013). When considering in particular the reliance interests at stake, the principle of stare decisis applies. The

principle, that calls upon a previous decision to not be revisited, “is especially applicable where the construction placed on a statute by previous decisions has been long acquiesced in by the legislature, by its continued use or failure to change the language of the statute so construed, the power to change the law as interpreted being regarded, in such circumstances, as one to be exercised solely by the legislature.” *In re Vaight*, 801 N.W.2d 570, 574 (Iowa 2011).

No one has identified any inherent conflict between the offices of supervisor and school board member. We have not heard, for example, of a decision made by the school board that is capable of revision by the board of supervisors. Nor does anyone explain a circumstance where the interests of Scott County and the North Scott School District are at odds. The sole basis for the alleged incompatibility is the fact that both entities are represented on the Davenport City Conference Board. As we will see, however, this is a distinction without a difference.

**C. The statutory membership of the Davenport City Conference Board does not create an incompatibility between supervisor and school board member.**

The administration of the Iowa property tax system starts with the assessment of property valuation. In most counties this is done by a county assessor. But Iowa law allows for a city with a population of more than 10,000 to have a city assessor. Iowa Code § 441.1. In both situations, the assessor is supervised by a conference board. The membership of conference boards is defined by Iowa Code § 441.2. The county attorney’s statement that city conference board membership is required by Iowa Administrative Code 701-71.19(2) is not fully correct. The administrative code merely recites the portion of statute that defines the conference board membership.

A county conference board consists of “the mayors of all incorporated cities in the county...,” “one representative from the board of directors of each high school

district of the county...,” and “members of the board of supervisors.” A city conference board consists of “the members of the city council, school board, and county board of supervisors.” For both boards, the members vote by delegation (called a “voting unit” of the conference board) with a total of three voting units, with “each unit having a single vote and no action shall be valid except by the vote of not less than two of the three units. The majority vote of the members present of each unit shall determine the vote of the unit.”

This code section is unchanged from the 1991 Code in effect when the Iowa Attorney General determined there was no incompatibility between the offices of supervisor and school board member. In both county and city conference boards, the entire membership of the board of supervisors serves on the conference board. The only difference, as far as school boards are concerned, is whether the school board is represented by a single designee per board of education in the county (for a county conference board) or the entirety of each school board (for a city conference board).

It is worth noting what the 1992 Attorney General opinion does *not* say. The Attorney General, who, we will remember, reviewed “relevant statutory provisions” about each office, did *not* caution against the situation where the board of supervisor member could be designated by the school board to serve on the conference board. Surely the Attorney General was aware of Iowa Code § 441.2 and the taxing function of the school board and board of supervisors and would have raised this issue if it were relevant.

The different composition of city and county conference boards has no bearing on the lack of incompatibility of office. The county supervisors and the school board voting units are equals on the conference board. The key feature of incompatibility of office is where one office has a supervisory power over the other or where the duties

are inconsistent or repugnant. *White*, 257 Iowa at 609, 133 N.W.2d at 904-05. No such relationship exists between equal voting units on a conference board.

Nor is there any fundamental conflict in the positions of the two voting units on a city conference board. The conference board supervises the functions of the city assessor. This board does not determine the allocations of tax revenue among the county and schools. There is not a situation where, for example, the county would “win” and the school district would “lose” in a decision made by the conference board. In the Iowa property tax system, each taxing body sets its levy against the total assessed value in the jurisdiction and the taxpayer is assessed a single charge that is the result of every regular and special assessment against the property. There is no difference in assessment for the county’s or school board’s levy. See, Iowa Code Chapter 445.

**D. Iowa law expressly allows other members of a city conference board to simultaneously hold office.**

We must also consider the implications of legislation that expressly permits other members of a city or county conference board to be elected to more than one voting unit in the same election. Traditionally there were three general elections in Iowa: a partisan general election held in November of every even-numbered year, a nonpartisan school election held in September of every odd-numbered year, and a nonpartisan city election in November of every odd-numbered year. In 2017 the Iowa Legislature changed this schedule and in so doing specifically permitted individuals to be elected to two offices on the same ballot.

The 2017 legislation combined the city and school elections into a single November general election held in odd-numbered years. 2017 Iowa Acts Ch. 155, § 1. In so doing, the legislature had to amend another statutory provision that generally prohibited an individual from appearing more than once on the same ballot. “A person

shall not be a candidate for more than one office to be filled at the same election, except that a person may be a candidate for a city office and school board office at the same election.” Iowa Code § 49.41 as amended by 2017 Iowa Acts Ch. 155, § 23. This amendment recognized that there was no inherent incompatibility of office between city offices and school board. It avoided creating the predicament where a person could otherwise be elected to both offices but for the general rule against appearing twice on the same ballot.

The legislation makes clear the error of the claim that there is an incompatibility between county supervisor and school board member. The sole basis asserted for the incompatibility is that the county and school board are both represented on the Davenport City Conference Board. But other members of the same board *could be elected on the same ballot simultaneously*. The membership of a city conference board cannot be the basis for incompatibility of office.

- II. Recent legislation expressly eliminates any basis to find that the offices of county supervisor and school board member are incompatible.**
  - A. The determination of a vacancy on the board of supervisors requires due process before the panel of the auditor, recorder, and treasurer.**

All should readily agree that Maxwell is currently serving on the board of supervisors. He is entitled to remain in office unless the panel, acting pursuant to Iowa Code § 69.2, were to declare the existence of a vacancy after a hearing that meets the fundamental requirements of due process. *Botsko v. Davenport Civil Rights Commission*, 774 N.W.2d 841, 848 (Iowa 2009) (discussing right to due process before a fair tribunal), *Burke v. City Council of City of Lansing, Iowa*, 898 N.W.2d 204 (Iowa Ct. App. 2017) (unpublished) (finding removal of city council member by other members

violated due process because of their financial interest in removal). Unless that were to happen, Maxwell's participation on the board of supervisors cannot otherwise be challenged. *Iowa Farm Bureau Federation v. Environmental Protection Commission*, 850 N.W.2d 403 (Iowa 2014) (discussing the de facto officer doctrine and recognizing that an official's actions cannot be collaterally attacked by claiming he is not validly in office).

**B. The law has been amended to eliminate any basis whatsoever to conclude that there is an incompatibility between the offices of supervisor and school board member.**

Governor Kimberly Reynolds signed Senate File 413 (89th G.A.)<sup>1</sup> on March 8, 2021. Section 2 of the Act provides:

**Sec. 2. NEW SECTION. 39.13 Conference boards — appointment — limitations.**

1. Notwithstanding section 441.2, for the purposes of conducting the business of a conference board established pursuant to section 441.2, a person shall not serve in a voting unit of a conference board if such service would be incompatible with another office held by that person.

2. If a person is a member of more than one body whose members make up a voting unit on the conference board, that person shall waive the person's position on the conference board for all but one of the bodies the person represents. A waiver pursuant to this subsection does not cause the person to vacate any elective office.

The Act further provides that it takes effect upon enactment. *Id.* at § 73. Subsection two is applicable to Maxwell. He has sent through counsel a letter to the Davenport City Assessor waiving his position on the conference board for purposes of service with the North Scott School Board. Maxwell will confirm this waiver during the conference board's next regular meeting and will request that the waiver is noted in the minutes of the meeting.

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<sup>1</sup> Available at: <https://www.legis.iowa.gov/legislation/BillBook?ga=89&ba=SF%20413> (last viewed March 10, 2021).

This statute should be applied by the panel when it makes its decision. *Board of Trustees of Municipal Fire & Police Retirement Systems of Iowa v. City of West Des Moines*, 587 N.W.2d 227, 231 (Iowa 1998) (procedural statutes apply to existing cases). Maxwell is in office and the legislature has plainly directed that the waiver under subsection 2 “does not cause the person to vacate any elective office.” We must remember that the legislature is free to impose or excuse any alleged incompatibilities between offices. 1982 Iowa Op. Atty. Gen. 16 at \*2. The legislature has now expressly considered the possibility that there could be a claim of incompatibility of office between members of a conference board and provided a mechanism, other than removal, to address the concern. The offices of county supervisor, school board member, and city conference board member have been created by the legislature. As such, the legislature’s determination that a person may resolve a claim of incompatibility through waiver of conference board participation is final. *Sueppel v. City Council of Iowa City*, 257 Iowa 1350, 136 N.W.2d 523 (Iowa 1965) (describing legislature’s authority to create, define, and abolish offices).

The statute also expressly contemplates the possibility that a person may be elected to more than one position represented in a conference board voting unit. This expression of the legislature’s understanding, in combination with the authorization for a person to be elected to city and school office in the same election discussed above, eliminates any concern of incompatibility of office between county supervisor and school board member. *State v. Jones*, 298 N.W.2d 296, 298 (Iowa 1980) (“The legislature is presumed to know the state of the law, including case law, at the time it enacts a statute.”) And we must presume that the legislature intended to accomplish a just and reasonable result by enacting this language. *State v. Iowa Dist. Court for Black Hawk County*, 616 N.W.2d 575, 578 (Iowa 2000). *See also*, Iowa Code § 4.4(2)

(legislature instructs that courts are to presume that “[t]he entire statute is intended to be effective.”)

### **III. Conclusion**

No person has adequately identified *why* the offices of supervisor and school board member are incompatible. No one can point to any power that one office has over the other. Nor have we heard of any public policy consideration against it.

The Iowa Attorney General’s formal opinion that there is no incompatibility must receive the utmost respect from this panel. This opinion has been existence for almost three decades. The legislature has done nothing in that time period to say otherwise. In fact, the two pieces of legislation touching simultaneous service both undermine the claim that there is an incompatibility of office. The panel should find that there is no vacancy in office.