

JAN 12 2010

January 5, 2010

Ms. Pamela Medford-Tow-Conley  
117 S. Fifth Street  
Cedar Springs, MI 49319

Dear Ms. Medford-Tow-Conley:

This office has been contacted by both the Cedar Springs Public Schools and the City of Cedar Springs in regard to the potential incompatibility of you simultaneously holding the offices of city council member and school board member.

At the outset, I would like to commend you for your willingness to be so actively involved in your community. Having had a father who was, at different points in time, mayor and a school board member in a community of 1,500, I have some idea of the demands placed on your time.

Unfortunately, a review of the relevant statute, multiple Attorney General Opinions interpreting the statute as well as appellate court decisions regarding its application, leads to the inescapable conclusion that you cannot continue to serve in both capacities.

The Michigan Incompatible Public Offices Act, Public Act 566 of 1978 holds, in part, as follows:

Under the Act, incompatible offices are:

Public offices held by a public official which, when the official is performing the duties of any of the public offices held by the official, result in any of the following with respect to those offices held:

- (i) The subordination of 1 public office to another.
- (ii) The supervision of 1 public office by another.
- (iii) A breach of duty of public office.

It is clear that your two offices are not incompatible under either sub-section (i) or (ii). The school district and the city are separate and distinct units of government which do not have supervisory authority over one another and do not hold a subordinate position with relation to one another. Therefore, the determinative question is whether holding both public offices simultaneously results in a violation of sub-section (iii); "a breach of duty of public office."

"A person may simultaneously serve as a board of education member and an elected city council member **so long as the public bodies do not negotiate or enter into contracts with one another.**" See attached Attorney General Opinion [OAG No. 6825]. As the Michigan Attorney General has properly concluded, the two offices are incompatible once the two public bodies enter into contractual negotiations. The rationale for this conclusion is that an individual cannot be placed on opposite sides of a proposed contract because it necessarily prevents the person from being able to protect, advance or promote the interests of both offices at the same time. Of equal significance, **an individual cannot avoid the incompatibility by abstaining from voting** on resolutions to initiate negotiations, or to approve or disapprove proposed contracts that result from those negotiations, because **abstention under such circumstances "is itself a breach of duty."** See attached decisions of *Contesti v Atty General*; *Wayne Cty Prosecutor v Kinney*; *OAG No. 7156*.

In this regard, it is my understanding that the school district and the city are parties to existing contracts and agreements. For example, the city collects the district's summer tax levy pursuant to an agreement and is compensated for this service. As such, the board annually resolves to impose a tax levy of all school property taxes upon property located in the district and requests that the city collect those taxes. Pursuant to the Michigan Revised School Code, the district authorizes the Superintendent to negotiate a reasonable expense for the city's services. Any proposed agreement between the Superintendent and the city must therefore be brought before the board for its approval or disapproval. The same approval process is by necessity required by the city council.

Although non-contractual, it is my further understanding that the city also conducts school board elections. Under the Revised School Code, the district is required to reimburse the actual costs incurred by the city and has the ability to disapprove specific costs sought by the city. Irrespective of the established contractual relationship between the district and the city, "an incompatibility may arise by virtue of a noncontractual issue coming before one or both of the offices a person holds, if the two public bodies have competing interests on the issue."; see attached OAG 7156. The Attorney General held that the offices of city clerk and school board member were automatically incompatible as of January 1, 2005; the effective date of a legislative amendment that requires school boards to reimburse the county, city or township that conducts the regular or special elections for the school board. In essence, the Attorney General found that an incompatibility exists because the township [city] will seek to maximize its recovery of costs, and the school board will want to minimize the costs it must pay for an election.

Based on the foregoing analysis, [most significantly the contractual agreements entered into between the city council and the school board] it is my opinion that your offices are incompatible. Furthermore, based on the attached documentation, it is my further opinion that your abstention from voting, while admirable, constitutes "a breach of duty of public trust." As such, your options are limited; one allows you to make the decision, the other places the decision-making in the hands of a Circuit Judge.

Obviously, the most expedient course of action would be for you to resign from either the school board or the city council. If you choose this option, it will be your decision as to which office you wish to retain. If, however, you decide to remain in both positions, this office will be required, pursuant to MCL 15.184, to file an action in the Kent County Circuit Court seeking "injunctive or other appropriate judicial relief or remedy." Under this scenario, a judge, assuming he concludes your offices are incompatible, will in all likelihood determine which seat you may retain. While I won't begin to predict what a judge may or may not do, the Michigan Supreme Court has stated that "it is the universal rule that when incompatibility exists, the acceptance of the latter office vacates the first." Consequently, applying this rationale, if a Circuit Judge concludes your offices are incompatible, he may well decide that you vacated your seat on the school board when you were sworn in as a member of the city council.

I recognize that I've presented you with a lot of information and have asked you to make an extremely important decision. As such, I would encourage you to seek the advice of an attorney. Nonetheless, because time is of the essence, I will need an answer from you by Friday, January 22. If I do not hear from you by the 22<sup>nd</sup>, I will be required to commence proceedings in the Kent County Circuit Court.

In the interim, if you have any questions or concerns, please feel free to contact me.

Very truly yours,



William A. Forsyth  
Kent County Prosecuting Attorney