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PUBLIC OFFICIALS AND EMPLOYEES—The Common-Law Rule Against Holding Incompatible Offices—Abolishing the “Office” Limitation. *Haskins v. State*, ex rel. *Harrington*, 516 P.2d 1171 (Wyo. 1973).

On May 27, 1970, the Wyoming Attorney General rendered an opinion which held that a teacher could properly serve on the board of trustees in his school district.¹ In reliance upon that opinion, Ray Haskins, a teacher in the Park County School District, ran for a seat on the board of trustees in that district. He was elected and on June 30, 1971, qualified as a member of the board. On December 11, 1973, the Wyoming Supreme Court affirmed a district court decision that found Haskins' office as board member to be incompatible with his position as a teacher.²

The explanation for this unusual sequence of events must lie in the fact that in *Haskins v. State*, ex rel. *Harrington*,³ the Wyoming Supreme Court unexpectedly departed from the traditional statement and application of the common-law rule⁴ against holding incompatible offices. Under the common-law rule, an official can not accept a second office incompatible with the first. The rule is strictly limited to situations involving two “offices.”⁵ The court in *Haskins* held that, in accord with the purpose of the rule, and in light of the facts of this particular case, the rule was to be applied here in spite of the fact that teachers are not recognized as holders of an “office.”⁶

After a brief examination of the common-law rule against holding incompatible offices, the reasoning of the court in *Haskins* will be developed, and an observation will be made on the proper role of the legislature in this area.

COMMON-LAW INCOMPATIBILITY

The common-law rule on incompatible offices is based on the policy that the public deserves to be represented by men of independent judgment,⁷ who have not hindered their

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1. 13 OP. WYO. ATTY. GEN. 68 (1970).

2. *Haskins v. State*, ex rel. *Harrington*, 516 P.2d 1171 (Wyo. 1973) (hereinafter cited as *Haskins*).

3. *Id.*

4. See text *infra* pp. 671-73.

5. See text *infra* p. 669.

6. *Haskins*, *supra* note 2, at 1175-78.

7. See *Haskins*, *supra* note 2, at 1179; *Jones v. MacDonald*, 33 N.J. 132, 162 A.2d 817, 818 (1960); and 3 E. McQUILLIN, MUNICIPAL CORPORATIONS § 12.67, at 295-96 (3d ed. 1973).

ability to serve by accepting two or more inconsistent offices. The rule is such that if an officer accepts another office, incompatible with the first, he has thereby automatically vacated the first office.⁸ The element of incompatibility lies in the conflict of duties or functions of the offices.⁹

Where such duties and functions are inherently inconsistent and repugnant, so that because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both.¹⁰

Determination of whether incompatibility exists in a given case is usually bound with broad statements of public policy, as the courts thus far have tended to avoid formulation of specific standards of incompatibility.¹¹ Many decisions, however, have been based on the fact that one of the offices was subordinate to the other, in that matters involving salary, tenure and promotion, were decided by the superior officer in regards to himself and associates, as subordinate officers.¹² If such subordination is found to exist between the offices, incompatibility is likely to be found. The rule against holding incompatible offices, however, is not limited by the concept of subordination. Incompatibility can also exist where a man holds two offices which are independent

8. F. MECHEM, PUBLIC OFFICERS § 420, at 267-68 (1890) (hereinafter cited as MECHEM).

9. Haskins, *supra* note 2, at 1180; Reilly v. Ozzard, 33 N.J. 529, 166 A.2d 860, 370 (1960); Jones v. Kolbeck, 119 N.J. Super. 299, 291 A.2d 378, 379 (1972). It will be pointed out later in this note that there is a distinction between conflicts of "duties" and conflicts of "interest." See text *infra* pp. ____.

10. 63 AM. JUR. 2d *Public Officers and Employees* § 73 (1972). See 3 E. McQUILLIN, MUNICIPAL CORPORATIONS § 12.67, at 297 (3d ed. 1973).

In § 12.67 (a), McQuillin lists many pairs of offices which have been held to be incompatible, including: mayor and councilman, mayor and city manager, councilman and county supervisor, alderman and commissioner of improvement district, city treasurer and member of the board of education, and justice of the peace and sheriff.

In § 12.67 (b) he lists some offices held not incompatible, including: court clerks and member of the legislature, mayor and justice of the peace, mayor and district attorney, and member of the board of education and sheriff.

11. Annot., 89 A.L.R.2d 632 (1963).

12. Haskins, *supra* note 2, at 1178; See, e.g., Jones v. MacDonald, *supra* note 7, at 819; Kaufman v. Pannaccio, 121 N.J. Super. 27, 295, A.2d 639, 641 (1972); and Linman and Alfton, *Municipal Officials in PRACTICAL MUNICIPAL LAW* § 2.07, at 49 (E. Wright ed. 1972) (hereinafter cited as WRIGHT).

of each other's supervision, but which are related to each other in a way that results in the biased or haphazard execution of an office. Such would be the case where a city judge was appointed city attorney.¹³ The judge could not be expected to exercise his normally independent judgment in a case where he was counsel for the city.

Incompatibility is not found where the duties of the offices are the same, or where the holding of one office assists the officer in fulfilling the duties of the other.¹⁴

The limits of the common-law rule against holding incompatible offices are particularly important in one's analysis of *Haskins*.¹⁵ As traditionally stated, the rule only applies to incompatible "offices," and the courts have refrained from applying the rule in cases involving only one "office" and an incompatible "position" or "employment."¹⁶ The distinction between an "office" and a "position" is often based on hyper-technicalities,¹⁷ and the distinction has therefore been criticized as an artificial limit to the rule against incompatible offices.¹⁸ Despite the criticism, the distinction has continued to limit the rule, perhaps because of the problematic uncertainty that would result if the limitation were abolished.¹⁹

Mention should be made here of the dual-office holding statutes, which are closely related to the rule against holding incompatible offices. "Dual-office holding" is a term associated with a variety of statutes which forbid the holding of two or more specifically named offices. Some of these, such

13. *People, on Complaint of Chapman, v. Rapsey*, 96 P.2d 1000 (Cal. Dist. Ct. App. 1939).

14. 63 AM. JUR. 2d *Public Officers and Employees* § 73 (1972).

15. *Haskins*, *supra* note 2.

16. *See, e.g., Baker v. Bd. of Comm'rs of Crook County*, 9 Wyo. 51, 54, 59 P. 797, 797-98 (1900); and *Wilentz, Atty. Gen., ex rel. Golat, v. Stanger*, 129 N.J.L. 606, 30 A.2d 885, 889 (N.J. Ct. Err. & App. 1943).

Although a few special types of litigation require a three-way distinction among "office," "position," and "employment," incompatibility cases only require that "office" be distinguished from everything else, which may be called "position" or "employment," interchangeably. Glasser, *A New Jersey Municipal Law Mystery: What is a "Public Office?"*, 6 RUTGERS L. REV. 503, 507-10 (1952) (hereinafter cited as Glasser).

17. *See Main v. Claremont Unified School Dist.*, 326 P.2d 573 (Cal. Dist. Ct. App. 1958).

18. *See Haskins*, *supra* note 2, at 1173; and Glasser, *supra* note 16, at 504.

19. *See text infra* pp. 672-73.

as WYO. STAT. § 5-75,²⁰ are based on the same policy as the rule against incompatible offices. Others²¹ are based on similar policies, such as the policy that offices should not be allowed to collect in the hands of a few men, or the policy that the separation of powers doctrine should extend down to the individual office-holder.²² These dual-office holding statutes supersede the common-law rule against holding incompatible offices with respect to the specific offices with which the statutes deal. The courts in most jurisdictions, including Wyoming,²³ have recognized the legislature as the ultimate creator of standards and qualifications for elections.²⁴

Of particular importance to this analysis of the *Haskins* case is the conflict of interest concept. Conflict of interest is concerned with the misuse of a public office by one who is engaged in self-dealing.²⁵ A conflict of interest involves personal or pecuniary gain to the office-holder,²⁶ as opposed to the more general injury to the public caused by the holding of incompatible offices.²⁷ Under the common-law rule, if any officer or employee of the governmental unit has an interest in a government contract, that contract is declared void.²⁸ Wyoming has two statutes which deal with conflict of interest. WYO. STAT. § 6-178²⁹ provides a criminal penalty

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20. WYO. STAT. § 5-75 (1957). "The office of district court commissioner and clerk of the district court are hereby declared to be incompatible"
 21. Other Wyoming dual-office holding statutes include: WYO. CONST. art. 3, § 8, dealing with restrictions on state legislators; WYO. CONST. art. 6, § 9, dealing with restrictions on congressmen and other federal officeholders; and WYO. STAT. § 18-98 (1957), dealing with county assessors.
 22. 63 AM. JUR. 2d *Public Officers and Employees* §§ 63-72 (1972).
 23. See *Haskins*, *supra* note 2, at 1179.
 24. See, e.g., *Reilly v. Ozzard*, *supra* note 9, at 363-66; *People, on Complaint of Chapman, v. Rapsey*, *supra* note 13, at 1002-03; and *Childs v. Moses*, 178 Misc. 828, 36 N.Y.S.2d 574, 577 (Sup. Ct. 1952).
 25. *Haskins*, *supra* note 2, at 1179; *Reilly v. Ozzard*, *supra* note 9, at 368-70. See generally *Eisenberg, Conflicts of Interest Situations and Remedies*, 13 RUTGERS L. REV. 666 (1959).
 26. *Quackenbush v. City of Cheyenne*, 52 Wyo. 146, 155, 70 P.2d 577, 579 (1937); *WRIGHT*, *supra* note 12, at 47-48.
 27. *Haskins*, *supra* note 2, at 1179.
 28. See, e.g., *City of Lincoln v. First Nat'l Bank of Lincoln*, 146 Neb. 221, 19 N.W.2d 156, 160 (1945).
 29. WYO. STAT. § 6-178 (Supp. 1973).
 - (a) Any state officer, county commissioner, trustee of any school district, mayor . . . who shall . . . be interested, directly or indirectly, in any contract for the construction of any state building, courthouse, schoolhouse . . . or work of any kind . . . ; or who shall bargain for or receive any percentage, drawback, premiums, or profits, or money whatever on any contract . . . shall be fined not more than five thousand dollars (\$5,000.00) nor less than one hundred dollars (\$100.00).

for having an interest in construction contracts, and WYO. STAT. § 9-680³⁰ allows the common-law remedy for a conflict of interest involving any other government contract. Both of these statutes were amended in 1969 to provide exceptions where the interested party disclosed his interest and refrained from participating in the consideration of the matter.³¹ As will be seen shortly, these statutes were directly involved in *Haskins v. State, ex rel. Harrington*.³²

WYOMING'S DIVERGENCE FROM THE COMMON-LAW RULE

The relators in *Haskins* were members of the board of trustees for Park County School District. They filed a complaint in the district court in quo warranto, alleging that common-law incompatibility existed as a result of a teacher being elected to the board. Haskins argued that he had a constitutional right to hold office,³³ and, alternatively, that he had satisfied the disclosure requirements of WYO. STAT. §§ 6-178 and 9-680, which he felt had abrogated the common-law rule on incompatibility.³⁴ Both parties moved for summary judgment. Judgment was rendered against Haskins and he was thereby ordered to give up the board seat.³⁵ A stay of the order was procured pending appeal.

(b) [I]f any such officer . . . shall be interested as aforesaid in such contract, but shall disclose the nature and extent thereof to all the contracting parties concerned therewith and shall absent himself during the considerations and vote thereon . . . then the said acts shall not be unlawful.

30. WYO. STAT. § 9-680 (Supp. 1973). (a) It shall not be lawful for any person . . . holding any office . . . to become in any manner interested . . . in any contract . . . in the making or letting of which such officer may be called upon to act or vote. . . . [A]ny and all contracts made and procured in violation hereof, shall be null and void. Subsection (b) provides for the same disclosure exception as subsection (b) of WYO. STAT. § 6-178 (Supp. 1973). See note 29 *supra*.
31. Ch. 158, §§ 1-3 [1969] WYO. SESS. LAWS 336.
32. *Haskins, supra* note 2, at 1178-79.
33. *Id.* at 1172. This argument was made under the equal rights provisions of WYO. CONST. art. 1, and the equal protection and due process clauses of the 14th amendment to the U.S. CONST.
34. *Haskins, supra* note 2, at 1172. This argument was founded upon the incorrect assertion by the Wyoming Attorney General that the statutes had abrogated the rule against holding incompatible offices. See 13 OP. WYO. ATTY. GEN. 68 (1970).
35. Although the rule usually operates to vacate the first office, that of teacher here, there is a recognized exception at common law where the officer is unable to resign the first office, because of a contract obligation, *METCHEM, supra* note 8, § 421 at 268; 22 R.C.L. § 63 at 418-19 (1918).

On appeal before the Wyoming Supreme Court, Haskins made three arguments:³⁶

1) that he had a constitutional right to run for and hold office;

2) that the common-law rule against holding incompatible offices had been abrogated by statute; and

3) that the common-law rule did not apply here because of the "office" limitation.

On the first argument, the court held that the individual's right to hold office was subordinate to any compelling public interest, and that the rule on incompatibility thus could not be deemed an unconstitutional infringement of Haskins' rights.³⁷

The second argument failed because, as pointed out earlier,³⁸ conflict of interest deals with a different problem than the rule on incompatibility. Statutes dealing with conflict of interest certainly cannot have any determinative effect on the common-law rule against incompatibility.

Haskin's third argument was based on the "office" limitation of the common-law rule. This argument should have warranted a reversal, because teachers are not considered to be officers.³⁹ The Wyoming Supreme Court, however, wanted to reach a different result. Crediting the common law with remarkable flexibility,⁴⁰ the court held that, in accord with the purpose of the rule, the technical "office" limitation would not be allowed to stop the court from acting in a situation like this where public policy demanded that the rule be applied.⁴¹ The court here was clearly reaching for a result, as it simultaneously expanded the common-law rule beyond its traditional limits, and contracted the expanded version so that it only applied to the teacher-trustee situation. In rendering this narrow holding, the court did not foreclose

36. Haskins, *supra* note 2, at 1173.

37. *Id.* at 1173-74.

38. *Id.* at 1178-79.

39. *Id.* at 1173 n.1.

40. *Id.* at 1178. One might well question "that capacity for growth and adaptation is the 'peculiar boast and excellence of the common law' . . ."

41. *Id.* at 1175-78.

the application of the expanded rule to other officer-employee situations. It seems that the court is going to attempt to gauge the public interest in each case in deciding whether to apply the expanded rule. The result is likely to be a series of narrow holdings, some finding incompatibility, others not. This has created an atmosphere of uncertainty, and it is likely to have a negative effect upon the discovery of future candidates for Wyoming offices.

MISAPPLICATION OF THE RULE AGAINST INCOMPATIBILITY

*Haskins v. State, ex rel. Harrington*⁴² is the first case in which the Wyoming court has ever applied the rule against incompatible office-holding.⁴³ The reason that the rule was so extended here is that it really was not an incompatibility case. The facts in *Haskins* indicated that a conflict of interest was involved, and the conflict of interest statute⁴⁴ should have been allowed to control. Many conflicts of interest stem from the relation of the officer's personal employment to his role as an officer. The mere fact that the personal employment is in a government field, such as public education, is no reason to abandon the conflict of interest approach in favor of the incompatibility concept.

In the *Haskins* situation, there was clearly a potential conflict of interest, but this alone will not support a finding of incompatibility.⁴⁵ A conflict of "duties" must be found if common-law incompatibility is to be invoked.⁴⁶ The duties of the members of the board of trustees are outlined in detail in WYO. STAT. § 21.1-26.⁴⁷ Clearly a teacher's duties will not

42. *Id.*

43. *Id.* at 1175.

44. WYO. STAT. § 9-680 (Supp. 1973). See note 30 *supra*.

45. *Haskins, supra* note 2, at 1179; *Jones v. Kolbeck, supra* note 9, at 379.

46. *Haskins, supra* note 2, at 1179-80; *Reilly v. Ozzard, supra* note 9, at 367-70; *WRIGHT, supra* note 12, at 49.

47. WYO. STAT. § 21.1-26 (Supp. 1973). These duties include:

- (a) prescribing rules and regulations for the government of the schools under the board's jurisdiction;
- (b) keeping minutes of meetings and publishing salaries paid;
- (c) electing board officers;
- (e) submitting financial reports to the state board;
- (f) estimating a budget;
- (g) controlling and dispersing moneys;
- (i) obtaining competitive bids for construction and improvements; and,
- (n) considering petitions presented by the citizens of the school district.

conflict with those specified. In addition, the teacher will be able to offer invaluable information and a measure of expertise on matters involving the actual operation of the schools.

Because the board will necessarily deal with teacher's contracts and working conditions, conflicts of interest are certain to occur with a teacher on the board. WYO. STAT. § 9-680⁴⁸ was enacted by the legislature to deal with just this type of problem. With the conflict of interest statute so readily at hand, it might be asked why the court by-passed it to get to an inapplicable common-law rule, which had to be revamped in order to make it apply in the case.⁴⁹

THE "INTOLERABLE CONFLICT OF INTEREST" PROBLEM

Apparently the court was convinced of the soundness of the policy arguments made, and the results reached, in teacher-trustee cases in New Jersey⁵⁰ and Kentucky.⁵¹ In *Visotcky v. City Council of the City of Garfield*⁵² and *Knuckles v. Board of Education of Bell County*,⁵³ courts of those states declared the "position" of teacher to be incompatible with the "office" of board member, although the holdings were based on statute,⁵⁴ rather than the common-law rule. In citing those

48. WYO. STAT. § 9-680 (Supp. 1973). See note 30 *supra*.

49. Mr. Justice McEwan's concurring opinion brought up one potential problem with the conflict of interest approach. He pointed out the fact that there is no statutory limit to the number of teachers who could be elected to a board. Because WYO. STAT. § 21.1-21 (Supp. 1973) requires the vote of a majority of the trustees elected for effective board action, no action could be taken on teacher contracts if a majority of the board were teachers. Haskins, *supra* note 2, at 1181. If the possibility of this problem became real enough, the legislature could easily solve it by limiting the number of teachers who could be elected to a board.

50. *Visotcky v. City Council of the City of Garfield*, 113 N.J. Super. 263, 273 A.2d 597 (1971). The court in *Haskins* spends a good deal of time examining the development of common-law incompatibility in New Jersey, where a healthy disrespect for the office/position distinction has developed. See *Reilly v. Ozzard* *supra*, note 9, at 366; *Ahto v. Weaver*, 39 N.J. 418, 189 A.2d 27 (1963); and *Glasser*, *supra* note 16, at 504. In spite of the developing criticism, the New Jersey courts have limited their attack to areas where New Jersey statutes authorize the finding of incompatibility between an "office" and a "position."

51. *Knuckles v. Bd. of Educ. of Bell County*, 272 Ky. 431, 114 S.W.2d 511 (Ct. App. 1938).

52. *Visotcky v. City Council of the City of Garfield*, *supra* note 50.

53. *Knuckles v. Bd. of Educ. of Bell County*, *supra* note 51.

54. N.J.S.A. § 18A:12-2 (1968). "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board." The court in *Visotcky v. City Council of the City of Garfield*, *supra* note 50, at 599, read this section in conjunction with N.J.S.A. § 18A:12-1, as establishing the qualifications for holding office on the board. KY. REV. STAT § 61.090 (1971). "The acceptance by one (1) in office of

cases, however, the Wyoming Supreme Court neglected to mention that they were brought under, and decided under, the applicable statutes.

The New Jersey Superior Court spoke of the problem quite fittingly in terms of "intolerable potential conflicts of interest."⁵⁵ The Wyoming Supreme Court obviously felt that Haskin's election to the board presented an "intolerable conflict of interest." The Wyoming statute⁵⁶ on conflict of interest did not do what the court wanted done here, which was simply to declare that a teacher could not serve on the board of trustees. As a result, the common-law rule against incompatible offices was invoked, changed drastically, and then limited to the facts of the case.

If this and other conflict of interest situations involving public employment are so "intolerable," then the legislature should take some action. Both incompatibility and conflict of interest principles are based on sound public policy. The specific details of the policy, however, should be mapped out by the legislature. In *Haskins*, because of the statutory void, the court was forced to legislate on a narrow point. The shift of legislative duties to the judiciary is not becoming of either body, at least if what we see in *Haskins* is representative of the results.

Prior to the *Haskins* case, the conflict of interest statutes⁵⁷ and the incompatibility rule must have seemed quite effective within the spheres in which they operated. The *Haskins* case indicates, however, that there is an area where the distinction between the two becomes blurred, an area involving "intolerable conflicts of interest." Although legislation would be appropriate in regards to the qualifications and restrictions on candidates for any office, it is particularly appropriate in this area of "intolerable conflict of interest." This area includes all those situations where it is

another office or employment incompatible with the one (1) he holds shall operate to vacate the first." This section was formerly KY. STAT § 3744 (Carroll 1936), under which *Knuckles v. Bd. of Educ. of Bell County*, *supra* note 51, was decided.

55. *Visotcky v. City Council of the City of Garfield*, *supra* note 50, at 599.

56. WYO. STAT. § 9-680 (Supp. 1973). See note 30 *supra*.

57. WYO. STAR. §§ 6-178 and 9-680 (Supp. 1973).

deemed proper to declare that certain public employees are ineligible to run for certain specific offices, because the particular conflicts of interest would be so great, or would occur with such regularity, that the present conflict of interest statutes are inadequate to protect the public interest. The alternative is to allow, or possibly force, the court to legislate the public interest here on a case-by-case basis, utilizing the newly-extended common-law incompatibility rule. The problem with the judicial approach is that it would take many years in Wyoming to develop a line of cases sufficiently limiting the now uncertain applicability of the rule established in *Haskins*.

It may be argued that the proper result was reached by the Wyoming Supreme Court in *Haskins v. State, ex rel. Harrington*.⁵⁸ What must be conceded, however, is that determination of restrictions on office-holding ultimately belongs within the jurisdiction of the legislature, and that statutory resolution of the questions involved would result in much less uncertainty than we now have. In these times of sophisticated and costly election campaigns, such uncertainty could well have a deterrent effect upon conscientious citizens considering public service. It is therefore imperative that the legislature remove this uncertainty by appropriate legislation.

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58. *Haskins, supra* note 2.