

EDUCATION LAW ART 51, §§ 2501, 2502(7); PUBLIC OFFICERS
LAW § 3(11).

A person may not simultaneously serve as the corporation
counsel of the City of Troy and as a member of the board of
education of the Troy City School District.

February 6, 1996

James A.P. McCarthy, Esq.
Enlarged City School
District of Troy
120 State Street
Albany, NY 12207-2829

Informal Opinion
No. 96-2

Dear Mr. McCarthy:

You have asked whether a person may serve as corporation
counsel of the City of Troy while also holding the position of
member of the board of education of the Troy City School
District.

You have indicated that the City of Troy has a population of
fewer than 125,000 people and that the district is, therefore, an
enlarged city school district. Article 51 of the Education Law
governs school districts of each city which according to the last
Federal census has fewer than 125,000 inhabitants. Education Law
§ 2501. In such a school district, no person "shall hold at the
same time the office of member of the board of education and any
city office other than as a policeman or fireman". Id.,
§ 2502(7). If the position of corporation counsel of the City of
Troy is a public office, simultaneous service on the Troy School
District's Board of Education and as corporation counsel of the
City of Troy would violate section 2502(7).

In a recent opinion of this office, we set forth the
standards for determining whether a position is an office rather
than a position of employment.

A determination as to whether an
appointee is an officer rather than an
employee requires a judgment whether the
powers, duties, qualifications and other
characteristics of the job make him an
officer rather than an employee. The
distinction between a public office and
public employment is not always clear.

Matter of Dawson v Knox, 231 App Div 490, 492 (3d Dept 1931). The duties of a public official involve some exercise of sovereign powers while those of a public employee do not. Ibid.; Matter of Haller v Carlson, 42 AD2d 829 (4th Dept 1973). The statutory designation of a position as an office is some indication that the legislative body intended to treat its occupant as a public officer. Matter of MacDonald v Ordway, 219 NY 328, 332 (1916); Matter of Haller v Carlson, supra, p 830. Other indicia of a public office are the requirement to take an oath of office or file bonds, appointment for a definite term and receipt of a commission of office or official seal. Macrum v Hawkins, 261 NY 193, 200-201 (1933). A public office is created by statute or local law and its powers and duties are prescribed by statute or local law. Matter of Lake v Binghamton Housing Authority, 130 AD2d 913, 914 (3d Dept 1987); Matter of County of Suffolk v State of New York, 138 AD2d 815, 816 (3d Dept 1988), affd, 73 NY2d 838 (1989).

. . .

It is clear that while there are several indicia of status as a public officer, one qualifies as a public officer by exercising a portion of the sovereign powers of government.

Op Atty Gen (Inf) No. 95-40.

While there is a lack of uniformity in judicial decisions as to whether municipal attorneys are public officers, in our view, a municipal attorney who is the head of the municipality's law department, serves as the chief legal officer of the municipality, and is responsible for offering advice to municipal officials and defending and commencing actions on behalf of the municipality is a public officer.

A town attorney is a public officer (Riester v Reilly, 138 Misc 2d 68 [Sup Ct Albany Co 1988]). A village attorney was found not to be a public officer (Fisher v City of Mechanicville, 225 NY 210 [1919]), but in a later decision was determined to have this status (D'Ambrosio v Reile, 106 AD2d 856 [4th Dept

1984]). In Fisher, however, the Court of Appeals based its determination upon the act incorporating the village which listed village officers and did not name the village attorney; did not require that the village attorney take an oath; and did not specify the duties that the village attorney was to perform. The Court found that legal services were being provided to the village by contract for a period of one year for a fixed sum.

In Matter of Dawson v Knox, 231 App Div 490 (3d Dept 1931), affd without opinion, 267 NY 565 (1935), the Court determined that the county attorney is not a public officer. In another decision, however, the Court of Appeals held that the county attorney does have public officer status. Thompson v Hofstatter, 265 NY 54 (1934). While Hofstatter was decided after the Appellate Division decision in Dawson v Knox, it was handed down prior to the Court of Appeals affirmance of Dawson. However, the County Law had been amended when Hofstatter was decided and the Court of Appeals in Hofstatter specifically criticized the Appellate Division's decision in Dawson, stating that the holding in that case that the county attorney is an employee and not an officer "does not meet with our approval". In finding that the county attorney is a public officer, the opinion in Matter of DesPres v Niagara County Supervisors, 37 Misc 2d 1087 (Sup Ct Niagara Co 1963), referred to these factors in stating that the affirmance by the Court of Appeals in the Dawson case did not indicate a reversal of its opinion in Hofstatter. DesPres, supra, p 1089.

In Senecal v City of Cohoes, 27 AD2d 773 (3d Dept 1967), the Court found that the corporation counsel was not a public officer but based this determination on a review of the city charter, which revealed that the counsel was neither appointed nor elected to office but was rather retained in his professional capacity. In Rappel v Roberts, 79 Misc 2d 201 (Sup Ct Nassau Co 1973), the court found that the position of corporation counsel is not a public office because it is not vested with sovereign powers of government. The primary cases cited, however, in support of this finding, were Dawson, Fisher, and Cohoes which were decided on particular facts.

The State Legislature presumed that the position of city attorney of the City of Salamanca is a public office in creating an exception to the residency requirement under section 3 of the Public Officers Law for that position. Public Officers Law § 3(11). This office had concluded in a prior opinion that the corporation counsel is a public officer. 1975 Op Atty Gen (Inf) 141.

You have informed us that the corporation counsel of the City of Troy is the head of the department of law. He or she is appointed by the mayor, subject to confirmation by the city council and serves at the pleasure of the mayor. To qualify he must have at least five years experience in the practice of law prior to his appointment. He acts as the legal advisor to the city council and to the mayor and appears for and protects the rights and interests of the city in all actions, suits or proceedings brought by or against it or against any city officer, department, board or commission in connection with municipal business.

In our view, the corporation counsel of the City of Troy is a public officer. He is the head of a municipal department. Additionally, he serves as the chief legal officer of the municipality. Therefore, we conclude that simultaneous service as corporation counsel and as a member of the Troy City Board of Education would violate section 2502(7) of the Education Law.

You also have asked whether the membership of the corporation counsel on the board of education would jeopardize votes taken by the board in the event they are later challenged. A presumptively valid but defeasible appointment does not warrant invalidation of the acts of the appointee or the body to which he was appointed. Ontario v Western Finger Lakes Solid Waste Management Authority, 167 AD2d 848 (4th Dept 1990).

Under the de facto officer doctrine, the acts of one who carries out the functions of a public office under color of authority are generally valid as to third persons and the public, and hence immune from collateral attack, notwithstanding irregularities in the manner in which the officer was appointed.

Id., p 849. The de facto officer doctrine is founded upon reasons of policy and necessity, in that it protects the interests and reasonable expectations of the public which must rely on the presumptively valid acts of public officials. Id.

We conclude that a person may not simultaneously serve as the corporation counsel of the City of Troy and as a member of the board of education of the Troy City School District.

The Attorney General renders formal opinions only to officers and departments of State government. This perforce is an informal and unofficial expression of the views of this office.

Very truly yours,

JAMES D. COLE
Assistant Attorney General
in Charge of Opinions