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AUDITOR OF COUNTY—CHIEF DEPUTY—OFFICE INCOMPATIBLE WITH OFFICE OF MAYOR OF VILLAGE IN SAME COUNTY.

SYLLABUS:

The office of chief deputy in the office of auditor of a county is incompatible with the office of mayor of a village in the same county.

Columbus, Ohio, August 29, 1953

Hon. Don W. Montgomery, Prosecuting Attorney
Mercer County, Celina, Ohio

Dear Sir:

I have before me your request for my opinion which reads as follows:

“On August 1, 1953, the Auditor of Mercer County, Ohio, appointed as his Chief Deputy, a person who is now mayor of a village in the same county and the question arises as to whether these two positions are compatible and I am unable to find authority which will definitely answer this question either way.

“1949 Attorney Generals Opinion number 963, Syllabus number 1, seems to lay down a general rule which might be followed in this case. Since the mayor of a town, unlike the member of the council or a fiscal officer, does not handle money directly, nor does he certify claims or have budget functions with the Budget Commission, I am inclined to believe that the positions are incompatible. There is no question in our case about the physical ability to perform the duties of both jobs.

“To resolve any doubt about the matter I am asking for your informal opinion on the compatibility of the two positions above described.”

The test of incompatibility of public offices most commonly applied in Ohio is that stated in *State, ex rel. Attorney General vs. Gebert*, 12 O.C.C. (N.S.), 274, 275, as follows:

“Offices are considered incompatible when one is subordinate to, or in any way a check upon, the other; or when it is physically impossible for one person to discharge the duties of both.”

The point of contact between the two offices here involved, which at once suggests a possible basis of incompatibility, is in the preparation of the annual budget of the village, an operation in which the office of the county auditor has an important function. By the terms of Section 5625-1, General Code, the term, "taxing authority" is defined as meaning, in the case of a municipal corporation, the "council or other legislative authority of such municipal corporation." Assuming that the village in question is organized under the general statutory plan of government set out in Section 4215, et seq., General Code, the office of mayor must be deemed a part of such "legislative authority" by reason of the provision in Section 4255, General Code, which provides that the mayor shall preside over council meetings and shall cast the deciding vote therein in the event of a tie.

In the matter of the adoption and approval of the budget of a village, you may note that in Section 5625-19 to 5625-26, General Code, inclusive, a budget commission is established in each county to consist of the county auditor, county treasurer, and county prosecuting attorney, and these sections provide in some detail the various duties of such commission.

The statutes require that each year the taxing authority of the several subdivisions shall prepare a tax budget for the next succeeding fiscal year. The statutes provide in some detail the information to be included therein with respect to the financial condition of the taxing subdivision for the ensuing fiscal year and, when such budget is adopted, it is adopted to be submitted to the county auditor. That officer is required thereafter to lay before the budget commission the annual tax budget thus submitted to him, together with an estimate prepared by the auditor of the amount of certain other levies required by law. The authority of the budget commission to act on such proposed budgets is set out in Section 5625-24, General Code, which reads in part as follows:

"The budget commission shall so adjust the estimated amounts required from the general property tax for each fund, as shown by such budgets, as to bring the tax levies required therefor within the limitations specified in this act for such levies, but no levies shall be reduced below a minimum fixed by law. It shall have authority to revise and adjust the estimates of balances and receipts from all sources for each fund and shall determine the total appropriations that may be made therefrom. * * *"

In the event that the budget commission should be inclined to **make** certain adjustments in a village budget, as provided in this section, it is

impossible to suppose that the village mayor would not be keenly interested in the matter since it is under his executive supervision that a considerable portion of the village revenues are expended. Accordingly, if the commission should propose to reduce such budget below the amounts requested by the village authorities, it could well happen that the mayor would wish to appear before the commission to defend the estimates originally submitted. In this situation it is apparent that the office of county auditor is a check on that of the mayor and that the two are clearly incompatible.

We may next inquire whether this incompatibility is such as to extend to the office of chief deputy county auditor as well. "Deputy" is defined in Bouvier's Law Dictionary as follows:

"One authorized by an officer to exercise the office or right which the officer possesses, for and in place of the latter."

Section 9, General Code, provides in part:

"A deputy, when duly qualified, may perform all and singular the duties of his principal * * *."

In opinion No. 2573, Opinions of the Attorney General for 1925, page 406, the syllabus is as follows:

"A deputy treasurer or a deputy auditor may not act in the place of a treasurer or auditor as members of a county budget commission or the county board of revision."

An examination of this opinion indicates that this conclusion was based largely on the following language in *Hulse vs. State*, 35 Ohio St., 421, 425:

"A duty enjoined by statute upon a ministerial officer, and an act permitted to be done by him, may be performed by his lawful deputy."

The writer then went on to say, page 407:

"While this decision does not state in so many words that a judicial function may not be exercised by a deputy, it has been cited in numerous instances as authority for such rule by reason of the statement in the alternative.

"It is, therefore, believed that the rule in this state is that a deputy may perform a purely ministerial duty of his principal

but that he may not exercise a duty enjoined upon his principal which is of a judicial or quasi-judicial nature or a duty requiring the exercise of judgment or discretion.”

This ruling was wholly disregarded in Opinion No. 3506, Opinions of the Attorney General for 1931, page 1072, in which the question of the compatibility of the offices of deputy auditor of a county and member of a board of education of the city school district was under consideration. In that opinion the writer pointed out the statutory provisions relative to budget preparation already noted herein, and having concluded from them that the offices of county auditor and member of such board were incompatible, it was said, with respect to the auditor's deputy, pages 1072, 1073, that:

“A deputy county auditor acts for and in place of the auditor, and may perform all and singular the duties of the auditor. It is possible for a deputy auditor to act for the auditor in any circumstances, and his acts will be the acts of his principal. It is probable that the occasion often arises when it is necessary for a deputy auditor to act in place of the auditor himself.

“It is a well known fact that in some counties the deputy auditor, by reason of long experience in the position, is more familiar with the duties of the auditor's office than the auditor himself and does in fact perform the more technical duties of the office. In any case, he is required, by reason of his powers as fixed by Section 9, General Code, supra, to hold himself in readiness, and be at all times qualified, to act for and in the stead of his principal. He should be qualified the same way and to the same extent as the latter. Commenting on this fact, a former Attorney General, in speaking of a deputy city auditor, was prompted to say:

‘Hence, if the person who fills the office of city auditor is disqualified by reason thereof from holding some other office or position, it would seem to follow clearly that the one who acts as his deputy would be likewise prohibited from doing so.’

Opinions of the Attorney
General, 1917, p. 1744.

“To the same effect is the opinion of the Attorney General found in the Annual Report of the Attorney General for 1914, at p. 383, where it is said:

‘The disability of a city auditor to hold certain positions would pass to his deputy who has the right to act for and in place of his principal, as to his official duties.’”

In Opinion No. 3791, Opinions of the Attorney General for 1931, page 1417, the syllabus is as follows:

“The same person may not simultaneously hold positions of city auditor and deputy auditor of the county in which the city is located.”

The writer of this opinion took note of the conclusions reached in the 1925 opinion, *supra*, and with respect to it, had the following to say:

“I am not unmindful of an opinion found in 1925 O.A.G. 406, which held that a deputy auditor may not act in the place of an auditor as the member of a county budget commission. In the body of such opinion reference was made to the case of *Hulse v. State*, 35 O.S. 421, which held in part as disclosed by the first branch of the syllabus:

‘1. Neither a deputy clerk of the court of common pleas, nor a deputy county auditor, has any power to act in selecting the names of persons for a struck jury. That duty must be performed by the clerk, auditor, and recorder in person, except as otherwise provided in the statute. (75 Ohio L. 642, §27; Rev. Stats. §5186.)’

“The then Attorney General declared:

‘While this decision does not state in so many words that a judicial function may not be exercised by a deputy, it has been cited in numerous instances as authority for such rule by reason of the statement in the alternative.’ See also *Davies, ex rel., v. Scherer*, 11 O.C.C. (n.s.) 209.

“The case of *Hulse v. State*, *supra*, involved the construction of Rev. Stats. 5185 and 5188, relative to selecting and striking juries, and the latter statute read in part ‘if the clerk, auditor or recorder is interested in the cause, sick, absent from the county, related to either of the parties, or does not stand indifferent between them, a judge entitled to hold such court may in term time or vacation appoint some judicious disinterested person to take the place of the officer so disqualified, * * *.’

“It is apparent from an examination of this statute that a specific manner is set forth relative to the action to be taken in case the county officials mentioned in such section are unable or disqualified to act, which section would control Rev. Stat. 4949, analogous to Section 9, General Code, which read at that time:

‘A duty enjoined by statute upon a ministerial officer and an act permitted to be done by him may be performed by his lawful deputy.’

“A consideration of the foregoing principles leads to the conclusion that the 1925 opinion, insofar as it prohibits a deputy

auditor from performing the duties of the county auditor on the county budget commission, is not tenable since there is no designated method to be followed in case of the inability on the part of the county auditor to serve on the county budget commission. It is also evident that Section 9, General Code, above quoted, confers a larger scope of authority upon deputies than that formerly conferred by Rev. Stat. 4949." Page 1419.

The reasoning and conclusions in this opinion were approved and followed in Opinion No. 3605, Opinions of the Attorney General for 1934, page 1721, the syllabus of which is as follows:

"The chief deputy county treasurer may, in the absence of the treasurer, serve as member of the county budget commission. Opinions of Attorney General for 1931, Vol. III, page 1417, affirmed."

After a careful consideration of these opinions, I find myself in accord with the conclusions stated in the two latter opinions and, in any event, I must conclude that the office of deputy auditor is one so closely identified with the office of county auditor that the office of the deputy should be deemed incompatible with any office with which the office of county auditor is incompatible; and I am clearly of the opinion that the office of mayor of a village is incompatible with that of auditor of a county.

Accordingly, in specific answer to your inquiry, it is my opinion that the office of chief deputy in the office of auditor of a county is incompatible with the office of mayor of a village in the same county.

Respectfully yours,

C. WILLIAM O'NEILL
Attorney General