

In view of the fact that the employe or deputy in question has never been placed in the Unclassified Civil Service it would follow that the action taken by the Civil Service Commission in refusing to approve the payroll was authorized under the provisions of Section 486-21, General Code, supra.

In view of the above and without extending this discussion it is my opinion that:

1. A County Recorder is entitled to have any or all of his deputies as distinguished from his other employes placed in the Unclassified Civil Service. The State Civil Service Commission should be notified of the appointment of such deputies as are placed in the Unclassified Civil Service.

2. The provisions of Section 486-21, General Code, are mandatory in so far as they require the certificate of approval of payrolls by the State Civil Service Commission.

Respectfully,

JOHN W. BRICKER.

Attorney General.

4366.

GENERAL ASSEMBLY—MEMBER THEREOF MAY ACCEPT CERTAIN OFFICES WHEN.

SYLLABUS:

1. *A member of the General Assembly may lawfully accept any of the positions of clerk or deputy in the office of a county treasurer or surveyor, and road foreman or laborer under the county surveyor, during the period the legislature is not in session, but upon accepting such employment he is required by section 15, General Code, to forthwith resign his legislative office, and upon failure so to do such office becomes vacant.*

2. *If a member of the General Assembly accepts any of the employments mentioned in syllabus 1 upon adjournment of the legislature from its regular session, the tender of his resignation from such an employment prior to reconvening of the legislature in a special session will not serve to reinstate him as a member of the General Assembly.*

COLUMBUS, OHIO, June 26, 1935.

HON. FRAZIER REAMS, *Prosecuting Attorney, Toledo, Ohio.*

DEAR SIR:—This is to acknowledge receipt of a recent communication from your assistant Paul W. Alexander, as follows:

“May a member of the General Assembly lawfully accept any of the following employments during the period the Legislature is not in session:

- (a) As deputy in the office of the County Treasurer or Surveyor;
- (b) As clerk in the office of the County Treasurer or Surveyor;
- (c) As road foreman or laborer under the County Surveyor?

Should such member of the General Assembly accept any of the foregoing employments upon adjournment of the Legislature and tender his resignation from such employment prior to the reconvening of the Legislature, would he have forfeited his right to his seat in the General Assembly?”

Article II, Section 4, Ohio Constitution, and Section 15, General Code, provide as follows:

Art. II, Sec. 4. "No person holding office under the authority of the United States, or any lucrative *office* under the authority of this State, shall be eligible to, or have a seat in, the General Assembly; but this provision shall not extend to township officers, justices of the peace, notaries public, or officers of the militia."

Sec. 15, G. C. "No member of either house of the general assembly except in compliance with the provisions of this act shall:

1.—Be appointed as trustee or manager of a benevolent, educational, penal or reformatory institution of the state, supported in whole or in part by funds from the state treasury;

2.—Serve on any committee or commission authorized or created by the general assembly, which provides other compensation than actual and necessary expenses;

3.—Accept any appointment, employment or office from any committee or commission authorized or created by the general assembly, or from any executive, or administrative branch or department of the state, which provides other compensation than actual and necessary expenses.

Any such appointee, officer or employee who accepts a certificate of election to either house shall forthwith resign as such appointee, officer or employee and in case he fails or refuses to do so, his seat in the general assembly shall be deemed vacant. Any member of the general assembly who accepts any such appointment, office or employment, shall *forthwith* resign from the general assembly and in case he fails or refuses to do so, his seat in the general assembly shall be deemed vacant. But the provisions of this section shall not apply to school teachers, township officers, justices of the peace, notaries public or officers of the militia." (Italics the writer's)

With reference to the constitutional provision, quoted supra, it is clear that the inhibition only extends to a lucrative "*office*" held under authority of this state. It has been held that a "deputy" of a county treasurer is not an "officer", but merely an employe. See *State vs. Meyers*, 56 O. S. 340, 349; *Theobald vs. State*, 10 C. C. (N. S.) 175, affirmed without opinion, 78 O. S. 426, and 11 Ohio Jurisprudence, 270, 271, section 31, under the topic "Counties." Also, it was held in the Theobald case, supra, at page 176, that "deputies, assistants, bookkeepers, clerks and other employes" appointed by the county officers under section 2981, General Code, are "employes." Hence a "clerk" in the office of county treasurer or surveyor and a road foreman or laborer under the county surveyor, are "employes", and not officers. Thus Article II, Section 4, Ohio Constitution, has no bearing on the facts set forth in your communication.

With reference to section 15, General Code, it is evident that paragraph 3 will have application. The positions you mention are undoubtedly "employments" from an administrative branch of the state, which employments provide other compensation than actual and necessary expenses. That paragraph 3 applies to employments under a county as well as the state, seems to be clear from a consideration of the last sentence of the section making certain exceptions but not excepting a county employe. At the time paragraph 3 was inserted in section 15, General Code, by amendment in 1914 (104 O. L. 252, 253) the last sentence of the section was also inserted with the exception of the words "school teachers." The Supreme Court of Ohio has held that "counties" are administrative agencies of the state. See *State ex rel. vs. O'Brien*, 95 O. S. 166; and *Coun-*

ty Commissioners of Portage County vs. Gates, 83 O. S. 19, 30. Therefore, it would be necessary for a member of the General Assembly to resign upon acceptance of such employments, and in case he failed to do so, he would vacate his seat in the General Assembly automatically.

It is quite evident that the section makes no provision that it shall have application only during the time the General Assembly is "in session." It would seem to make no difference whether the General Assembly is or is not in session.

Hence, I am of the view, in specific answer to your first question that while a member of the General Assembly may accept any of the employments you mention when the General Assembly is not in session, he must resign his seat in the General Assembly immediately or his seat will be considered vacant.

As for the second question, from what has already been stated, it would seem that if a member of the General Assembly should accept one of the employments mentioned in your letter upon adjournment of the regular session of the present General Assembly and tender his resignation from such employment prior to the reconvening of the General Assembly in a special session, he would forfeit his right to his seat in the General Assembly. Section 15, General Code, says that any member accepting an employment "shall forthwith resign from the General Assembly." Forthwith is defined in Webster's Twentieth Century Dictionary as:

- "1. Immediately; without delay; directly.
2. In law, as soon as the thing required may reasonably be done, commonly within twenty-four hours."

The section then goes on to state that "in case he fails or refuses to do so, his seat in the General Assembly shall be deemed vacant."

Since a member of the General Assembly who accepts such an employment after the regular session is over is deemed to have vacated his seat if he does not resign after accepting such employment, it would be impossible for him to be restored to his office in the General Assembly by resigning the employment prior to the reconvening of the General Assembly in special session, as the law does not provide for the appointment of persons to fill vacancies in the General Assembly. Such vacancies may only be filled at a special election. Article II, Section 11, Ohio Constitution, provides as follows:

"All vacancies which may happen in either House shall, for the unexpired term, be filled by *election*, as shall be directed by law."

Article XVII, Section 2, Ohio Constitution, states in part:

"2 * * Any vacancy which may occur in any state office *other than that of a member of the General Assembly* or of Governor, shall be filled by appointment by the Governor until the disability is removed, or a successor elected and qualified." (Italics mine)

Section 4829, General Code, provides:

"When a vacancy in the office of representative to congress or senator or representative to the general assembly occurs, the governor, upon satisfactory information thereof, shall issue a writ of election, directing that a special election be held to fill such vacancy in the territory entitled to fill it on a day spec-

ified in the writ. Such writ shall be directed to the sheriff or sheriffs within such territory who shall give notice of the time and places of holding such election as in other cases. Such election shall be held and conducted and returns thereof made as in case of a regular election."

Thus, I am of the view, in specific answer to your second question, that if a member of the General Assembly should accept any of the employments you mention upon adjournment of the legislature from its regular session and tender his resignation from such an employment prior to the reconvening of the General Assembly in special session, he would have forfeited his right to his seat in the General Assembly.

In passing, your attention should also be directed to the fact that a clerk in the office of the county treasurer or surveyor may be in the classified civil service of the county, unless exempted under paragraph 8 or 9 of section 486-8(a), General Code. If he is in the classified civil service of the county, he could not legally retain his membership in the General Assembly, as section 486-23, General Code, provides:

"nor shall any officer or employe in the classified service of the * * * several counties * * * take part in politics other than to vote as he pleases and to express freely his political opinions."

It has been held in numerous opinions of former attorneys general, as well as myself, that holding public office is taking part in politics within the inhibition of section 486-23, General Code. See Opinions of the Attorney General for 1927, Vol. I, page 462; Opinions of the Attorney General for 1928, Vol. II, page 1119; Opinions of the Attorney General for 1929, Vol. II, page 837; Opinions of the Attorney General for 1929, Vol. III, page 1904; Opinions of the Attorney General for 1931, Vol. II, page 922; Opinions of the Attorney General for 1933, Vol. III, page 1817 and Opinions of the Attorney General for 1934, Vol. I, page 414.

Respectfully,
JOHN W. BRICKER,
Attorney General.

4367.

APPROVAL, BOND FOR THE FAITHFUL PERFORMANCE OF HIS DUTIES AS RESIDENT DISTRICT DEPUTY DIRECTOR—ROBERT E. JENKINS; DISAPPROVAL, BONDS FOR THE FAITHFUL PERFORMANCE OF THEIR DUTIES AS RESIDENT DISTRICT DEPUTY DIRECTORS—HARRY L. DITTMER AND CHARLES E. KUNKER.

COLUMBUS, OHIO, June 27, 1935.

HON. JOHN JASTER, JR., *Director of Highways, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval three bonds guaranteeing the faithful performance of the duties of the officials as hereinafter named:

Robert E. Jenkins, Resident District Deputy Director in Meigs and Gallia Counties—The Fidelity and Casualty Company of New York.