

3605.

BUDGET COMMISSIONER—CHIEF COUNTY TREASURER MAY SERVE ON COUNTY BUDGET COMMISSION WHEN—O. A. G. 1931, VOL. III, P. 1417 AFFIRMED.

SYLLABUS:

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.

COLUMBUS, OHIO, December 8, 1934.

HON. GEORGE N. GRAHAM, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—Your letter of recent date is as follows:

“Our county treasurer is inquiring as to whether or not his chief deputy can serve in the absence of the treasurer, as a member of the budget commission. We find a 1925 opinion which says that the deputy auditor cannot serve as a member of the budget commission, in the absence of the auditor. However, in the 1931 opinions, at page 1419, we find that it has been held by the Attorney General that the deputy auditor or deputy treasurer could act as a member of the budget commission in the absence of their chief.

Will you kindly let us have your opinion as to which rule should be followed?”

Your inquiry is with respect to whether or not the chief deputy county treasurer may serve as member of the budget commission in the absence of the treasurer, while the opinions to which you refer relate to the question of whether or not the deputy county auditor may thus serve. It is accordingly necessary to determine at the outset whether or not the chief deputy treasurer is in the same category as the deputy county auditor in so far as the authority to serve on the budget commission is concerned, in the absence of the treasurer and county auditor respectively.

Section 2563, General Code, authorizes the appointment of a deputy county auditor in the following language:

“The county auditor may appoint one or more deputies to aid him in the performance of his duties. The auditor and his sureties shall be liable for the acts and conduct of such deputy or deputies. When a county auditor appoints a deputy, he shall make a record thereof in his office and file a certificate thereof with the county treasurer, who shall record and preserve it. When a county auditor removes a deputy, he shall record such removal in his office and file a certificate thereof with the county treasurer, who shall record and preserve it.”

Substantially the same provisions with respect to the appointment of a deputy county treasurer are contained in Section 2637 of the General Code as follows:

"Each county treasurer may appoint one or more deputies, and he shall be liable and accountable for their proceedings and misconduct in office."

There are no provisions in the General Code which confer upon the deputy county auditor any greater powers as such than those so conferred upon the deputy county treasurer and it is therefore obvious that these officers are in the same category in so far as your inquiry is concerned. This was the position taken by this office in an opinion rendered in 1925 hereinafter referred to.

It remains then to pass upon the position heretofore taken by this office upon the question of whether or not a deputy county auditor may serve as member of the county budget commission, which commission under Section 5625-19, General Code, consists of the county auditor, the county treasurer and the prosecuting attorney.

The 1925 opinion appearing in Opinions of the Attorney General for 1925, page 406, held as set forth in the syllabus:

"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."

The then Attorney General based his conclusion upon the position that the county auditor and the county treasurer as members of the budget commission exercised quasi judicial functions.

This opinion was reversed, in part, by this office in the 1931 opinion to which you refer, reported in Opinions of the Attorney General for 1931, Vol. III, page 1417, the syllabus of which reads:

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

The then Attorney General based his position as to the incompatibility of the offices of city auditor and deputy county auditor upon the conclusion that the deputy auditor was authorized to sit as a member of the budget commission in the absence of the auditor, thus reversing in part the 1925 opinion, *supra*. The discussion and reasoning upon which this reversal was based is set forth on page 1419 as follows:

"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 vs. 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.*, vs. *Scherer*, 11 O. C. C. (n. s.) 209.

The case of *Hulse vs. 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."

Upon careful consideration of the position last taken by this office upon the subject matter of your inquiry, I am constrained to affirm the same.

It is accordingly my opinion in specific answer to your inquiry that the chief deputy county treasurer may, in the absence of the treasurer, serve as member of the county budget commission.

Respectfully,

JOHN W. BRICKER,
Attorney General.

3606.

APPROVAL—CANAL LAND LEASE EXECUTED TO THE GUMMED PRODUCTS COMPANY OF TROY, OHIO, FOR LAND IN TROY, MIAMI COUNTY, OHIO.

COLUMBUS, OHIO, December 10, 1934.

HON. T. S. BRINDLE, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You recently submitted to this office for my examination and approval a canal land lease in triplicate executed by you as Superintendent of Public Works and as Director of said Department, to The Gummed Products Company, a corporation, of Troy, Ohio. By this lease, which is one for a term of ninety-nine years, renewable forever, and which provides for an annual rental of \$96.00, subject to the reappraisal of the land for rental purposes at the