

the ballots properly read "two years," that is, a lesser number of years during which the levy might be permitted. The board of education asked for authority from the voters to make a three mill levy (H. B. 613) for school purposes; the ballot submitted said as much. The affirmative majority was substantial for a township school election. Calling a special election to secure authority for two years, when already covered in a vote for five years by the electors, would be a useless public expense and delay not to be favored.

Based upon the statement of facts furnished and the citations and discussion appearing above, it is the opinion of this department that:

1. Where there is no showing that the result of the vote would have been in any way changed, the occurrence of mere irregularities that do not go to the foundation of an election, will not invalidate such election, although the provisions of the statute have been technically violated, if it appears that there has been a fair election and a comparatively full vote and no fraud or attempt to deceive or mislead.

2. Where the electors of a school district voted upon the question of a levy for taxes, under the provisions of section 5649-5 and 5649-5a, the amount to be three mills for two years, and a mistake was made in printing the ballots, providing for a levy of three mills for five years, the proceeding is not invalid and the board of education is authorized to levy three mills for school purposes during a period of two years, the period appearing in the resolution of the board of education.

Respectfully,

JOHN G. PRICE,
Attorney-General.

1778.

OFFICES INCOMPATIBLE—COUNTY AUDITOR—CLERK OF BOARD OF
DEPUTY STATE SUPERVISORS OF ELECTIONS.

1. *The office of county auditor is incompatible with any and all offices or employments which receive or pay out funds of the county, or where such offices or employments make a certificate to the county auditor for the payment of claims, and the county auditor cannot fill a second position when the duties of said second position or office require the incumbent to account for, receive or expend moneys or funds of the county, or to certify claims to the county auditor for payment.*

2. *The offices of county auditor and clerk of the board of deputy state supervisors of elections are incompatible and may not be held by one and the same person at the same time.*

COLUMBUS, OHIO, December 31, 1920.

HON. GEORGE S. MAY, *Prosecuting Attorney, Napoleon, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your recent request for an opinion on the following statement of facts:

"S. H. B. is auditor of Henry County, Ohio, and is now serving his second term and does not contemplate being a candidate for re-election to said office. A vacancy is about to occur in the position of clerk of the board of deputy state supervisors of elections of Henry County, and Mr. B. has been solicited to accept the position."

You desire to know whether the county auditor can at the same time hold the

position of clerk of the board of deputy state supervisors of election or whether the same are incompatible.

"In the absence of express statutory provisions, disqualification to hold two or more offices is limited to offices the duties of which are necessarily incompatible." (State ex rel. vs. Kinney, 20 O. C. C., 325.)

"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." (State v. Gebert, 12 C. C. (n. s.) 275.)

Attention is invited to the first branch of the syllabus of Opinion 1249, issued by this department on May 14, 1920, and reading as follows:

"The office of city auditor is incompatible with any and all offices or employments which receive or pay out funds of the city, or where such offices or employments make a certificate to the city auditor for the payment of claims, and the city auditor cannot fill a second position when the duties of such second position or office require the incumbent to account for, receive or expend moneys or funds of the city or to certify claims to the auditor for payment, except in those cases specifically provided by statute."

The above opinion was issued upon the question as to whether a city auditor could at one and the same time be clerk of the board of deputy state supervisors of elections of the county in which the municipality, of which he was the city auditor, was located.

In the second branch of the syllabus of such opinion it was pointed out that there was no incompatibility in the duties of a city auditor in a non-registration city and the clerk of the board of deputy state supervisors, because there did not appear to be any point of contact where these two positions would be incompatible. The same rule would not hold, however, in the case of the city auditor in a registration city of the county auditor being the clerk of the board of deputy state supervisors of elections, these offices falling within the rule appearing in the first branch of the syllabus quoted above. An examination of the statutes would show that the county auditor must certify the funds which are received from the clerk of the board of deputy state supervisors for deposit in the county treasury. It would appear, therefore, that the office of county auditor would also fall within the rule as to the office of city auditor, as laid down in the first branch of the syllabus of Opinion 1249, supra.

In establishing the incompatibility between the office of county auditor and the office of clerk of the board of deputy state supervisors of elections, attention is invited to the sections of the statutes which follow herein:

That the clerk of the board of deputy state supervisors of elections in each and every county does receive funds intended for the county, is apparent by a reading of section 4970-1, which reads in part as follows:

Sec. 4970-1: "At the time of filing the declaration of candidacy for nomination for any office, each candidate shall pay a fee of one-half of one per cent. of the annual salary for such office * * *. All fees so paid in the case of candidates for state offices * * * shall forthwith be paid by the officer receiving the same into the treasury of state. All other fees shall be paid by the officer receiving the same into the treasury of his county to the credit of the county fund. * * *"

Sec. 2567: "Except moneys collected on the tax duplicate, the auditor shall certify all moneys into the county treasury, specifying by whom to be paid and what fund to be credited, charge the treasurer therewith and preserve a duplicate of the certificate in his office. * * *"

Sec. 2568: "The county auditor shall keep an accurate account current with the treasurer of the county, showing all moneys paid into the treasury, the amount thereof, the time when, by whom, from what source and to what fund paid, and of all moneys paid out, showing the amount thereof, the time when, to whom, for what purpose and from what fund paid. * * *"

Under section 4970-1, the clerk of the board of deputy state supervisors of elections receives the fees paid by all candidates for office who enter in a primary. These fees shall then be paid "by the officer receiving the same into the treasury of his county to the credit of the county fund." It would thus appear that where the auditor of a county was also the clerk of the board of elections in the same county, he would receive these fees as clerk, and, in the process of paying the same into the treasury, he would, as auditor, certify to the correctness of such transaction. In practice in the larger counties, these fees from primary candidates are taken by the clerk of the board of elections to the county auditor in the first instance, and such auditor prepares a receipt for the clerk of the board of elections, which is made in duplicate; and upon the clerk returning from the county treasurer with such instrument properly endorsed or stamped by the treasurer, the clerk then receives from the county auditor the instrument which discharges him from further obligation to the county for those particular fees. Where this condition obtains, the office of county auditor would be a check upon the office of clerk of the board of deputy state supervisors in giving a receipt for moneys received for the county, and having the duty placed upon him as auditor of making a proper certification of such transaction in the county records.

It is true that in the minor counties these fees might amount to a very small amount, even in the aggregate, prior to a primary, but any rule laid down would have to fit the larger counties as well as the smaller ones, because section 4970-1 is a law of a general nature, applying in all counties, regardless of size or whether there is a registration city in the county or not.

Incompatibility between the office of county auditor and the clerk of the board of deputy state supervisors might be presumed to exist on the basis that an officer handling money, like the clerk of the board of deputy state supervisors of elections, would give a bond and that the same might be deposited with the county auditor. Investigation, however, shows that no incompatibility rests here because neither the clerk of the board of elections or the members of such board are under any bond, and of course there is no county officer with whom such bond would then have to be deposited. If a bond were required of the clerk, and such bond was to be deposited with the county auditor, and the same person held both positions, they would then clearly be incompatible, because an officer cannot have the custody of his own bond.

The rule laid down in Opinion 1249 says that an office is incompatible with another office where one of these offices or employments makes a certificate to the other for the payment of claims, or where the duties of the second office require the incumbent to account for, receive or expend moneys or funds of the city or to certify claims to the auditor for payment. It has been shown above that the clerk of the board of deputy state supervisors and inspectors of elections does receive funds for the county, which are certified to the auditor.

Attention will now be given to the question as to whether the auditor accounts

for or expends moneys where the claims have been certified to the county by the clerk of the board of deputy state supervisors of elections.

Section 4822 reads in part as follows:

“ * * * The clerk shall receive for his services the sum of four dollars for each election precinct in his respective county. * * * Such compensation shall be paid quarterly from the general revenue fund of the county upon vouchers of the board, *made and certified* by the chief deputy and *the clerk thereof*. Upon presentation of any such voucher, the county auditor shall issue his warrant upon the county treasurer for the amount thereof, and the treasurer shall pay it.”

“Sec. 4990: For * * * services in conducting primary elections * * * the clerk shall receive for his services the sum of three dollars for each election precinct in his county * * *.”

Section 4991 provides that the payment for primary election expenses shall be made in the same manner as for the general election, as covered in section 4822 G. C., *supra*.

It will be noted that the compensation of the clerk for the regular election and for the primary is specifically set out as to the amount that shall be paid, and thus no action on the part of the board of county commissioners is required upon these particular claims of the board of deputy state supervisors of elections in a county, because section 2460 reads as follows:

“No claims against the county shall be paid otherwise than upon the allowance of the county commissioners, upon the warrant of the county auditor, except in those cases in which *the amount due is fixed by law, or is authorized to be fixed by some other person or tribunal*, in which case it shall be paid upon the warrant of the county auditor, upon the proper certificate of the person or tribunal allowing the claim. * * * ”

For a discussion on the above section, see *State ex rel Craig*, 21 O. C. R., 180. Thus it appears in the language of section 4822 that the compensation of the clerk is “made and certified by the chief deputy and the clerk in the form of a voucher, direct to the county auditor, who shall issue his warrant upon the county treasurer for the amount thereof.” If the same person was clerk of the board of elections and county auditor, he would in a sense be certifying his own compensation to himself. It is true that the certificate as to compensation must be made out and certified by both the chief deputy and the clerk, and such certificate would not be valid unless it would be signed by both of them.

As to those expenses of elections which are not specifically provided for, as in the cases mentioned above, the following sections apply:

“Sec. 5052: All * * * other proper and necessary expenses of any general or special election * * * shall be paid from the county treasury as other county expenses.”

“Sec. 5053: In November elections held in odd numbered years, such compensation and expenses shall be a charge against the township, city, village or political division in which such election was held, and the amount so paid by the county shall be retained by the county auditor from funds due such township, city, village or political division, at the time of making the semi-annual distribution of taxes. * * * ”

Sec. 5054: The county commissioners *** shall make the necessary

levy to meet such expenses, which levy may be in addition to all other levies authorized or required by law."

The rule laid down in section 5053 as to compensation for November elections is also the rule which applies in the case of the expenses of primary elections. In both cases compensation "so paid by the county" shall be retained by the county auditor from funds due, etc. Claims paid under these sections are paid by the board of county commissioners, of which board the county auditor is the secretary, as indicated in section 2566 G. C., reading as follows:

"By virtue of his office, the county auditor shall be the secretary of the county commissioners, except as otherwise provided by law. When so requested, he shall aid them in the performance of their duties. He shall keep an accurate record of their proceedings, and carefully preserve all documents, books, records, maps and papers required to be deposited and kept in his office."

Thus the clerk of the board of elections might have an expense account which he was desirous of having approved by the county commissioners and if the clerk of the board of elections was also the secretary of the board of county commissioners, the order made as to such expense account would have to be entered in the minutes of the commissioners by the auditor, or, in other words, by himself. It has been pointed out above that the county auditor receives the compensation vouchers direct from the clerk of the board of elections, and under section 2460 G. C. the board of county commissioners does not pass upon such compensation where the latter is specified by law or set by another body. The law would indicate, however, that it was the intention that the county commissioners should pass upon all emoluments received by the county auditor before he could draw his own warrant for any services performed by himself, for section 2630 and section 2631 read as follows:

"Sec. 2630: All claims for services of the county auditor, payable from the county treasury, shall be made out in detail according to the rates named in the foregoing sections, and shall be presented to the county commissioners who after being satisfied that the labor has been performed shall allow such bill or claim and cause it to be entered upon the minutes of their board. After being so allowed, the county auditor is authorized to draw his warrant upon the treasurer of the county, for the amount of such bill or claim."

"Sec. 2631. The fees and compensation provided for by the foregoing sections shall be in full for all services lawfully required to be performed by the auditors of such counties. *No county auditor shall charge or receive any other or further fees or compensation, either as clerk of any board, or for any other services rendered by him.*"

It is interesting to note that the position of clerk of the board of deputy state supervisors of elections in a county is not always a ministerial office, for there frequently comes a time when he is clothed with power co-equal with that of the chief deputy in his county, where protests have been filed against the candidacy of a person in the district. Section 4974 reads as follows:

"In case of protests filed against the candidacy of a person in a district comprising more than one county, the same shall be heard and determined by the chief deputies and clerks of the board of deputy state supervisors of

the several counties comprising such district and their decision shall be final."

The clerk in the above instance would lose his ministerial status and would be one of those who would directly decide a question at issue in a senatorial district, a congressional district or a court of appeals district.

The incompatibility existing between the office of county auditor and the office of clerk of the board of elections in a county, is more marked in those counties which contain registration cities than in the county wherein this question arises. In the larger counties, where there are registration cities, under section 4896 G. C. a person who desires to register, knowing that he will be absent, "may go before such clerk at the office of the board and the clerk * * * shall thereupon * * * make registration of such person * * *." Similarly section 4938 provides that the registers, duplicate lists and ballot boxes shall be returned to "the clerk at the office of the board within twenty hours."

Section 4944 provides for the payment of the registrars for their services, and "such allowance and order shall be certified by the chief deputy and clerk of the board to the city or county auditor."

From the above discussion, based upon the question submitted, and the sections of the statutes quoted, it is therefore the opinion of this department that:

(1) The office of county auditor is incompatible with any and all offices or employments which receive or pay out funds of the county, or where such offices or employments make a certificate to the county auditor for the payment of claims, and the county auditor cannot fill a second position when the duties of said second position or office require the incumbent to account for, receive or expend moneys or funds of the county, or to certify claims to the county auditor for payment.

(2) The offices of county auditor and clerk of the board of deputy state supervisors of elections are incompatible and may not be held by one and the same person at the same time.

Respectfully,

JOHN G. PRICE,

Attorney-General.

1779.

APPROVAL, BONDS OF GREEN TOWNSHIP RURAL SCHOOL DISTRICT
IN AMOUNT OF \$64,000, TO PURCHASE AND EQUIP SCHOOL
HOUSE.

COLUMBUS, OHIO, December 31, 1920.

Industrial Commission of Ohio, Columbus, Ohio.