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## PERSON EMPLOYED IN STATE CLASSIFIED SERVICE:

1. LABOR FOREMAN—DEPARTMENT OF HIGHWAYS—MAY NOT SIMULTANEOUSLY OCCUPY POSITION, MEMBER COUNTY BOARD OF EDUCATION—ELECTIVE OFFICE—NON-PARTISAN IN CHARACTER—AMENABLE TO SECTION 143.41 RC.
2. EMPLOYEE IN CLASSIFIED SERVICE, REGARDLESS OF POSITION, TITLE OR CLASSIFICATION MAY NOT SIMULTANEOUSLY OCCUPY POSITION AS MEMBER OF LOCAL BOARD OF EDUCATION.
3. PERSON IN CLASSIFIED SERVICE WHO SIMULTANEOUSLY OCCUPIES ELECTIVE OFFICE IN VIOLATION OF SECTION 143.41 RC—DOES NOT IP SO FACTO, VACATE OR TERMINATE EITHER POSITION—PERSON SUBJECT TO REMOVAL FROM CLASSIFIED POSITION—SECTION 143.27 RC.
4. PERSON WHO OCCUPIES ELECTIVE OFFICE—IP SO FACTO INELIGIBLE TO APPOINTMENT TO POSITION IN CLASSIFIED SERVICE.
5. PERSON IN CLASSIFIED SERVICE—DOES NOT FORFEIT OR TERMINATE POSITION IN CLASSIFIED SERVICE BY DECLARING CANDIDACY FOR ELECTIVE OFFICE—IS AMENABLE TO PROVISIONS OF SECTION 143.41 RC—SUBJECT TO PROCEEDINGS FOR REMOVAL UNDER SECTION 143.27 RC.

## SYLLABUS:

1. A person employed in the classified service of the state as a labor foreman in the Department of Highways, who simultaneously occupies a position as member of a County Board of Education, an elective office, is amenable to the provisions of Section 143.41, Revised Code, notwithstanding that the elective office is non-partisan in character.

2. An employee in the classified service of the state, regardless of his position, title or classification, who simultaneously occupies a position as a member of a local board of education, an elective office, is amenable to the provisions of Section

143.41, Revised Code, notwithstanding that the elective office is non-partisan in character.

3. A person who occupies a classified position in the state civil service, and simultaneously is occupying an elective office, in violation of Section 143.41, Revised Code, does not, ipso facto, vacate or terminate either position or office but is subject to removal from his classified position under the provisions of Section 143.27, Revised Code.

4. A person who is occupying an elective office is, ipso facto, ineligible to appointment to a position in the classified service of the state.

5. A person who is occupying a classified position does not, by declaring his candidacy for an elective office, thereby forfeit or terminate his position in the classified service, but becomes amenable to the provisions of Section 143.41, Revised Code, and is subject to proceedings for removal under Section 143.27, Revised Code.

Columbus, Ohio, July 8, 1954

Hon. Dorothy Kennedy, Prosecuting Attorney  
Brown County, Georgetown, Ohio

Dear Madam :

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

“1. May an employee in the classified service of the state, laborer foreman, Department of Highways, at the same time act as a member of the county board of education, an elective office, or is this in violation of Section 143.41 of the Revised Code of Ohio?

“2. May an employee in the classified service of the state at the same time act as a member of a local board of education, an elective office, or is this in violation of Section 143.41 of the Revised Code of Ohio?

Section 143.41 of the Revised Code of Ohio, reads as follows :

“Section 143.41 Political activity prohibited. (GC 486-23)  
No officer or employee in the classified service of the state, the several counties, cities, and city school districts thereof, shall directly or indirectly, orally or by letter, solicit or receive, or be in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political party or for any candidate for public office; nor shall any person solicit directly or indirectly, orally or by letter, or be in any manner concerned in soliciting any such assessment, contribution, or payment from any officer or employee in the classified service of the state and the

several counties, cities, or city school districts thereof; nor shall any officer or employee in the classified service of the state, the several counties, cities, and city school districts thereof, be an officer in any political organization *or take part in politics other than to vote as he pleases and to express freely his political opinions.*'” (Emphasis mine.)

“I realize that a number of opinions have been written in the past which hold generally that holding an elective office is engaging in politics and that such elective office could not be held concurrently with a position in classified civil service, however, I am unable to find an opinion which has been rendered specifically with regard to those positions I mentioned above, that is, member of the county board of education and member of a local board of education.

“The difference here appears to be that a candidate for a member of a board of education is non-partisan, neither Democrat or Republican. There is no primary election. Is such person then taking part in politics as prohibited by Section 143.41 of the Revised Code of Ohio?”

Your questions specifically considered would appear to comprehend the following:

1. Does the occupancy of an elective office render an employee in the classified civil service amenable to the provisions of Section 143.41, Revised Code, notwithstanding that such elective office is of a non-partisan nature?

2. If the incumbent of the classified position is amenable to the provisions of said section, what is the effect thereof upon (a) the classified position and (b) the unclassified or elective office or position?

It does not appear from your letter whether the person or persons, concerned in your inquiry, are (1) presently occupying both the classified office and the elective office, (2) presently occupying the classified office and contemplating candidacy for the elective office, or (3) presently occupying the elective office and applying for an appointment to a position in the classified civil service. Inasmuch as the provisions of Section 143.41, supra, have been the subject of a number of opinions, both by this office and by those of my predecessors, and since I am unable to find any previous opinion which definitely considers the effect of said section upon the incumbent of either the elective office or the classified position in the circumstances above outlined, it is considered appropriate at this juncture to clarify the situation in each of the above enumerated situations.

Initially, I do not consider that your questions resolve themselves into a determination as to whether the respective positions are compatible or incompatible. Some of the criteria of incompatibility are succinctly stated in 32 Ohio Jurisprudence, page 908, as follows:

“\* \* \* One of the most important tests as to whether offices are incompatible is found in the principle that incompatibility is recognized whenever one office is subordinate to the other in some of its important and principal duties, or is subject to supervision or control by the other, as an officer who presents his personal account for audit and at the same time is the officer who passes upon it, — or is in any way a check upon the other, or where a contrariety and antagonism would result in an attempt by one person to discharge the duties of both.”

Aside from the provisions of Section 143.41, supra, it could certainly not be maintained that the position of labor foreman in the Department of Highways, as compared to the office of member of County Board of Education, is in any way subordinate to or check upon the other, and I believe it may be safely assumed that it is physically possible for one person to discharge the duties of both. Even assuming that Section 143.41 is operative, I do not conceive that its effect is to create an incompatibility in positions where it otherwise does not exist. Incompatibility would appear to arise only in those cases where the legal duties as such of the respective offices create the contrariety, antagonism, subordination or check. Section 143.41, supra, on the contrary, is directed toward regulating the conduct of the individual in those spheres de hors the legal duties and responsibilities of the positions or offices themselves.

Notwithstanding that the duties of labor foreman and member of the county board of education, as set forth in your first question, are not incompatible, and that the duties of “an employee in the classified service of the state” and member of a local board of education as set forth in your second question, may or may not be incompatible, it is my opinion that in both cases the person concerned is amenable to the provisions of Section 143.41, Revised Code. In such a case it would appear to make no legal difference that the elective offices are non-partisan, since, whether the candidate for the elective office is a member of one of the political parties, or neither of them, he is, in the words of the statute, taking part in politics in a manner other than by voting as he pleases, and other than by expressing freely his political opinions. In this connection, your attention is called to

Opinion No. 1312, Opinions of the Attorney General for 1916, p. 375, which states as follows :

“\* \* \* It does not require an argument to sustain the contention that an active candidate for an elective office is taking a part in politics because the things for which a candidate stands under such circumstances and upon which he seeks support are of the very essence of politics and this is so whether such candidate represents a party in his campaign for such office or stands upon a platform of his own.

“I am of the opinion, therefore, that an active candidate for an elective office is taking a part in politics within the prohibition of the statute quoted and that if he is at the same time holding an office or employment in the classified civil service he should resign therefrom or he would be subject to prosecution as provided by section 486-28, G.C., as amended 106 O.L., 417.”

I am in accord with this expression of my predecessor in this connection.

The collateral questions as to the effect on the respective positions and offices occupied by an incumbent may now be considered seriatim. If the person concerned in your inquiry is presently occupying both the elective office and the classified position in the civil service, it would appear that the question resolves itself into whether he has by so doing, vacated or terminated either one or both positions. I find nothing in Section 143.41, supra, to justify a conclusion that he has done so. The civil service law would appear to contain within itself the penalties for engaging in the course of conduct determined by the statute to be unlawful. Section 143.27, Revised Code, provides as follows :

“The tenure of every officer or employee in the classified service of the state and the counties, cities, and city school districts thereof, holding a position under sections 143.01 to 143.48, inclusive, of the Revised Code, shall be during good behavior and efficient service ; but any such officer or employee may be removed for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, *violation of such sections* or the rules of the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office.”

(Emphasis added.)

It would appear under the foregoing section, that the violation of

Section 143.41, Revised Code, is a ground for removal from the classified position. In addition, Section 143.46, Revised Code, provides as follows:

“After a rule has been duly established and published by any civil service commission according to sections 143.01 to 143.48, inclusive, of the Revised Code, no person shall make an appointment to office or select a person for employment contrary to such rule, *or willfully refuse or neglect to comply with or to conform to such sections*, or willfully violate any of such sections. If any person who is convicted of violating this section holds any public office or place of public employment, such office or position shall by virtue of such conviction be rendered vacant.”

(Emphasis added.)

It is noted that the violation of this section as quoted subjects the violator to the penalty provisions of Section 143.99, Revised Code, which impose a fine or imprisonment or both. In short, the civil service statutes, by making the violation of Section 143.41, both a ground for removal and a ground for the possible imposition of criminal penalties, does not comprehend that the occupancy of the elected position, ipso facto, terminates the classified position. I think it may be safely assumed that had the legislature intended such a result it would have inserted a provision to that effect as a penalty in addition to those already provided in the applicable statutes. On the contrary, the fact that the legislature has made the violation a ground for removal would appear to negate any assumption that such removal would be automatically accomplished by engaging in political activity.

Contrariwise, it would not appear that the incumbent could be held prior to the institution of removal proceedings to have vacated his elective office. While I do not intend to imply that his holding of the classified position would be grounds for such a removal, it would appear that until and unless removal proceedings are instituted against him he is entitled to the office and the emoluments thereof, regardless of whatever other position he might hold. 32 Ohio Jurisprudence, p. 1019.

I do not conceive that previous opinions state anything contrary to the opinion herein expressed. For example, in Opinion No. 902, Opinions of the Attorney General for 1927, p. 1583, it is stated that a classified employee, by becoming a candidate for elective office is “subject to removal” from the classified position. In Opinion No. 1015, Opinions of the Attorney General for 1951, p. 854, it is stated that Section 486-23, General Code, now Section 143.41, Revised Code, “has the effect” of prohibiting the same

person from holding concurrently an elective office and classified position. In Opinion No. 2545, Opinions of the Attorney General for 1938, p. 2054, the syllabus states that a person may not hold an elective office and a classified position "without thereby violating Section 486-23, General Code," now Section 143.41, Revised Code. To the same effect is Opinion No. 1074, Opinions of the Attorney General for 1929, p. 1619.

I am not unmindful, moreover, of the expression of the Supreme Court in *State ex rel. Neffner v. Hummel*, 142 Ohio St., 324, which is susceptible of the construction that the acceptance of an elective office worked a forfeiture of the classified position. Examination of that decision shows that the discussion in that connection was purely obiter and, in the court's own words "was not seriously urged in the oral arguments or the briefs." The court then proceeded to pass upon the salient point of the case to the effect that the Secretary of State was empowered to claim the position of statistician and editor as exempt from the classified civil service.

Where, however, the incumbent already occupies the elective position previous opinions have held that he is ineligible to appointment in the classified service, Opinion No. 3398, Opinions of the Attorney General for 1931, p. 922; also Opinion No. 862, Opinions of the Attorney General for 1951, p. 656. I do not perceive, however, that these opinions are in any way in conflict with the conclusions already reached. Obviously if the incumbent is already occupying an elective office and thereby engaging in political activity, his very appointment to the classified position would render him automatically amenable to Section 143.41, *supra*, and the penalties of removal of Section 143.27. Thus, his appointment to the classified position would be a nugatory act since the very act by which he is appointed subjects him to removal and would further constitute an acquiescence of admittedly unlawful conduct.

What has been previously said would appear to be dispositive of the third situation, which may conceivably arise in this problem of actual or potential dual occupancy. Clearly, if the person concerned is already occupying the classified position he would not, *ipso facto*, be ineligible to declare his candidacy and to prosecute said candidacy with an end to occupying a public office. However, the very declaration would amount to the violation of Section 143.41, *supra*, and subject him to the penalties previously enumerated. In any case, however, before his classified position

can be terminated, some action must be taken to remove him, as provided by Section 143.27, supra.

Accordingly, and in specific answer to your inquiry, it is my opinion that:

1. A person employed in the classified service of the state as a labor foreman in the Department of Highways, who simultaneously occupies a position as member of a County Board of Education, an elective office, is amenable to the provisions of Section 143.41, Revised Code, notwithstanding that the elective office is non-partisan in character.

2. An employe in the classified service of the state, regardless of his position, title or classification, who simultaneously occupies a position as a member of a local board of education, an elective office, is amenable to the provisions of Section 143.41, Revised Code, notwithstanding that the elective office is non-partisan in character.

3. A person who occupies a classified position in the state civil service, and simultaneously is occupying an elective office, in violation of Section 143.41, Revised Code, does not, ipso facto, vacate or terminate either position or office but is subject to removal from his classified position under the provisions of Section 143.27, Revised Code.

4. A person who is occupying an elective office is, ipso facto, ineligible to appointment to a position in the classified service of the state.

5. A person who is occupying a classified position does not, by declaring his candidacy for an elective office, thereby forfeit or terminate his position in the classified service, but becomes amenable to the provisions of Section 143.41, Revised Code, and is subject to proceedings for removal under Section 143.27, Revised Code.

Respectfully,

C. WILLIAM O'NEILL  
Attorney General