

thereon, and same is transmitted herewith to you, together with all other papers submitted in this connection.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

993.

INCOMPATIBLE OFFICE — VILLAGE MAYOR — MEMBER
BOARD OF TRUSTEES OF SCHOOL DISTRICT PUBLIC
LIBRARY.

SYLLABUS:

The offices of mayor of a village and member of the board of trustees of a school district public library located in the village are incompatible, and can not lawfully be held by one and the same person at the same time.

COLUMBUS, OHIO, August 4, 1939.

HON. PAUL A. NOON, *State Librarian, Ohio State Library, Columbus, Ohio.*

DEAR SIR: This will acknowledge receipt of your request for my opinion, which reads as follows:

“To the best of our knowledge there is nothing in the law to prevent the mayor of Mentor Village from holding membership on the Mentor Library Board. Mentor Public Library is a school district one and according to our information the law provides only that the Library Board member must be a resident of the school district and that he is or has not been for a year prior to his election, a member or officer of the Board of Education.

To settle this matter we respectfully request an opinion from your office on this point.”

Speaking generally, there exists no reason under the law why a person otherwise qualified, may not hold two or more public offices or positions simultaneously, unless there is in force express constitutional or statutory provision prohibiting it or unless the duties incident to the offices or positions are such that there is a possibility that under some circumstances the duties of the incumbent of the positions might be conflicting. If under any circumstances that might possibly arise, the incumbent of one public office or public position might be called upon to perform duties which would in any wise conflict with the duties of an incumbent of another

public office or position, the two offices are said to be incompatible, and can not in such case be lawfully held by one person at the same time.

The rule of incompatibility of offices is sometimes stated in this manner; public offices or positions are said to be incompatible when there is an inconsistency in the functions of the offices or positions. Ohio Jurisprudence, Vol. 32, pages 906, 907, 908; L. R. A. 1917, page 211, Annotation 216. In Ruling Case Law, Vol. 22, page 414, it is stated:

“One of the most important tests as to whether offices are incompatible is found in the principle that the incompatibility is recognized * * * where a contrariety and antagonism would result in the attempt of one person to discharge the duties of both.”

In Throop on Public Offices, Section 33 it is said:

“Offices are incompatible when the nature and duties of each are such as to render it improper from consideration of public policy for one person to retain both; or when from multiplicity of business in them they cannot be executed with care and ability or when their being subordinate to and interfering with each other induces a presumption that they cannot be exercised with honesty.”

The Mentor Library to which you refer is a school district library established and maintained by the Board of Education of Mentor Village School District under and in pursuance of Section 7631, et seq., of the General Code, and the question is therefore presented whether or not the office of mayor of the Village of Mentor is incompatible with the office of member of the Board of Trustees of the Mentor School District Library.

I find no express statutory or constitutional provision prohibiting the mayor of the village from being one of the members of the board of library trustees. There is, however, a possibility that the duties of the two positions might under some circumstances be conflicting. The mayor of the village is ex officio the president of its council. He does not vote except in case of a tie in some instances, but upon examination of the statutes fixing the duties of a mayor of a village it seems manifest that the office of mayor is intended as a distinct supervisory or checking power over that of council. He is given power to protest expenditures of council if in his opinion they are unwarranted, and to make recommendations as to the business conducted by council, and must preside over and guide its deliberations. See Sections 4255 et seq., of the General Code of Ohio.

By the terms of Section 3711, General Code, municipal corporations are empowered to transfer, lease or permit the use of, by ordinance duly passed, any property, real or personal, acquired or suitable for library

purposes, to the trustees of any public library for the school district within which such municipal corporation is situated, or it may lease or permit the use of such property to any library association providing free library service to the citizens of the municipality, *upon such lawful terms and conditions as are agreed to between the municipal corporation and trustees.*

Under the rule of the Supreme Court of Ohio, in the case of Cleveland vs. Library Board, 94 O. S., 311, a municipality is not empowered to donate the property to the library but such transfer, lease or permit must be based upon consideration of some substantial value at least to the municipality to validate the transaction. See also Opinions of the Attorney General for 1918, page 1545, and for 1925, page 2539.

It would be difficult to say the least, for a mayor who was also a member of the board of trustees of a school district public library within the municipality, to act with entire disinterested partiality if the occasion should arise for the municipality and board of trustees of the library to negotiate for the transfer of property from the municipality to the library.

In an opinion of a former Attorney General, reported in Opinions of the Attorney General for 1927, pages 2325 and 2326, the following pertinent language appears:

“The question might arise whether or not, when the incompatibility between offices or public employments would not exist except upon the happening of certain contingencies, the positions would be said to be incompatible before the contingencies arise or only after the happening of the occurrences upon which the contingency hinges. I do not find that this question has ever been considered by the courts or textwriters.

It would seem apparent to me, however, that when an officer was elected or appointed for a definite term or an employe was employed by contract for a definite time, as are teachers, principals and superintendents of the schools in local districts, if there be a possibility of the contingency arising during the term of office or during the time which the contract of employment covers, which would make a position incompatible, the rule of incompatibility would apply.”

In an early English case—Rex vs. Tizzard, 9 B & C, 418, Judge Bailey in speaking of incompatibility in offices uses this language:

“I think that the two offices are incompatible when the holder cannot in every instance discharge the duty of each.”

See also Opinions of the Attorney General for 1929, page 1443.

Inasmuch as there is a possibility at any time of negotiations taking place between a municipality and a board of trustees of a school district library located in the municipality for the transfer or lease of property belonging to the municipality to the library board, I am constrained to hold that the offices of mayor of the municipality and member of the board of trustees for the library are incompatible, and cannot lawfully be held by one and the same person at the same time.

I am therefore of the opinion that the mayor of the village of Mentor is not eligible during his term of office to become a member of the Board of Trustees of the Mentor Public Library.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

994.

CONTRACT—STATE WITH THE BALTIMORE AND OHIO RAILROAD COMPANY AND THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY, RE-LOCATION AND CONSTRUCTION, PART OF STATE HIGHWAY NO. 7, ALONG AND ADJACENT TO PROPERTY OF SAID RAILROAD, WEST OF MARIETTA, WASHINGTON COUNTY.

COLUMBUS, OHIO, August 4, 1939.

HON. ROBERT S. BEIGHTLER, *Director of Highways, Columbus, Ohio.*

DEAR SIR: You have submitted for my consideration a proposed agreement between yourself as Director of Highways of the State of Ohio and the Baltimore and Ohio Railroad Company, and the Baltimore and Ohio Southwestern Railroad Company, covering the re-location and construction of a part of State Highway No. 7 (State Route No. 7) along and adjacent to the property of said railroad company west of Marietta, Washington County, Ohio.

After an examination, it is my opinion that said proposed agreement is in proper legal form and when duly executed by the railroad companies, will constitute a binding contract.

Said proposed agreement is being returned herewith.

Vry truly yours,

THOMAS J. HERBERT,
Attorney General.