

2746

MEMBER OF BOARD OF EDUCATION OF CITY SCHOOL DISTRICT MAY SERVE AS CLERK OF A CITY COUNCIL PROVIDED THAT THE CHARTER OF THE CITY DOES NOT CONTAIN A CONTRARY PROVISION—§§3313.02, 731.04 R.C.

SYLLABUS:

A member of a board of education of a city school district, elected under Section 3313.02, Revised Code, may at the same time serve as clerk of a city council to which he is elected by such council under Section 731.04, Revised Code, provided the charter of the city does not contain a contrary provision in regard to such clerk, and provided it is physically possible for one person to perform the duties of such offices.

Columbus, Ohio, January 10, 1962

Hon. George E. Martin, Prosecuting Attorney
Portage County, Ravenna, Ohio

Dear Sir:

I have your request for my opinion which reads:

“We would like an informal opinion as to whether the same person can be a member of the City Board of Education and occupy the office of Clerk of the City Council in the same city.

“The Clerk of Council is appointed by the Council, his duties are clerical in nature and he receives a small monthly salary for his services.

“In short, are the positions described above incompatible?”

The common law rule of incompatibility is stated in *State, ex rel., Attorney General v. Gebert*, 12 C.C. (N.S.), 274:

“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.”

Section 3313.02, Revised Code, creates boards of education in city school districts. Under Section 3313.13, Revised Code, prosecuting attorneys or other officials acting in a similar capacity, are barred from serving as members of a board of education, this for the obvious reason that they are by statute designated as advisers to the boards of education; in the case of cities, the city solicitor is designated as such adviser, and is, therefore, disqualified from being at the same time a member of a city board of education. As regards the clerk of a city legislative authority, there is no similar statutory limitation.

In connection with the question at hand, I note that you do not mention whether or not the city involved operates under a charter, or that the provisions relative to the position of the clerk of the council under such charter, in case it does so operate, are different from those contained in Section 731.04, Revised Code, which reads:

“Within ten days from the commencement of their term, the members of the legislative authority of a city shall elect a president pro tempore, a clerk, and such other employees as are necessary, and fix their duties, bonds, and compensation. Such officers and employees shall serve for two years, but may be removed at any time for cause, at a regular meeting of the legislative authority by a two-thirds vote of the members elected.” (Emphasis added)

Section 731.20, Revised Code, provides that ordinances, resolutions, and bylaws shall be authenticated by the signature of the presiding officer and clerk of the legislative authority of the municipal corporation. The clerk is also required, under such section, to record all bylaws, resolutions, or ordinances, after they have been signed, in a book furnished by the legislative authority for that purpose. While the clerk of a city council is apparently an officer, it is quite clear that his functions are purely clerical and ministerial.

Pursuing the question at hand further, I find that under Section 5705.01 (C), Revised Code, the taxing authority of a school district is the

board of education, and that the taxing authority of a municipal corporation is the council or other legislative authority of such corporation. Under division (D) of the same section, the fiscal officer of a board of education is the clerk of such board, and of a city, the city auditor. While a person who is serving as a member of a city board of education would no doubt have the right to appear, under Section 5705.32, Revised Code, before the county budget commission in a representative capacity, there is nothing in that or any other section of the Revised Code whereby such appearance is imposed upon him as a duty. Therefore, the possibility of inconsistency between the two offices here involved is practically eliminated. A conflict of interest between a city and the board of education of such city in this regard is further removed by virtue of Section 5731.53, Revised Code, dealing with the distribution of inheritance tax. That section expressly provides that the fifty per cent of such tax allowed to local governments, is to be credited to the general fund of the city where such tax originated. I mention this because in situations where such tax originates in a township, the board of trustees may, under Section 5731.53, either keep such share of such tax, or by resolution turn it over to the school district of which the township is a part.

Further, since the position of clerk of the city council is not in the classified civil service, there would be no question of incompatibility under Section 143.41, Revised Code, prohibiting political activity by classified employees. (See Opinion No. 1116, Opinions of the Attorney General for 1952, page 60).

In conclusion, your attention is directed to Opinion No. 2598, Opinions of the Attorney General for 1934, Volume I, page 569, where the then Attorney General ruled that a member of a city board of education may at the same time hold the office of mayor of said city, in the absence of charter provision in respect thereto.

On the basis of the foregoing, I find no ground for viewing the offices here considered as being incompatible under the law as laid down in the *Gebert* case, *supra*, provided that it is physically possible for one person to perform the duties of both, which, however, is a question of fact and not one of law.

Specifically answering your inquiry, it is my opinion and you are advised that a member of a board of education of a city school district,

elected under Section 3313.02, Revised Code, may at the same time serve as clerk of a city council to which he is elected by such council under Section 731.04, Revised Code, provided the charter of the city does not contain a contrary provision in regard to such clerk, and provided it is physically possible for one person to perform the duties of such offices.

Respectfully,

MARK McELROY

Attorney General