

**Note from the Attorney General's Office:**

1937 Op. Att'y Gen. No. 37-164 was questioned  
by 1999 Op. Att'y Gen. No. 99-046.

theless is entitled, in addition to the fee allowed for mileage, a fee for viewing the body as provided for in Section 2866, supra.

Respectfully.

HERBERT S. DUFFY,  
*Attorney General.*

164.

CLERK OF BOARD OF COUNTY COMMISSIONERS MAY NOT BE SECRETARY TO BUILDING COMMISSION, WHEN—PAYMENT FOR SERVICES AS SECRETARY RECOVERABLE, WHEN—FINDING BY BUREAU OF INSPECTION OF PUBLIC OFFICES.

*SYLLABUS:*

1. *The clerk of the board of county commissioners employed under the provisions of Section 2409 of the General Code may not be legally employed by the building commission as secretary. Opinions of Attorney General for 1917, Vol. II, page 1435, affirmed.*

2. *If a clerk of the board of county commissioners employed under the provisions of Section 2409, General Code, has been paid an amount for services rendered as secretary to the building commission, such amount paid to him in that capacity may be recovered upon a finding made by an examiner of the Bureau of Inspection and Supervision of Public Offices.*

COLUMBUS, OHIO, February 23, 1937.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN: This acknowledges receipt of your request for my opinion which reads as follows:

“You are respectfully requested to furnish this department with your written opinion upon the following:

In Cuyahoga County, the county commissioners, under the provisions of Section 2409, employed a full time clerk at an annual salary of \$6500.00.

During the time the clerk was so employed, bonds were issued by vote of the people in the sum of \$1,850,000 for the

purpose of erecting a County Detention Home and Juvenile Court Building. The Chief Justice of the Common Pleas Court, under the provisions of Section 2333, General Code, appointed four citizens to act with the county commissioners, as the building commission for the construction of this building.

At the first meeting of the building commission, the clerk of the board of county commissioners was employed as secretary of the building commission, and upon completion of the work, the building commission paid to the clerk, by allowance of the commission, \$2,500.00 for his services as secretary.

QUESTION 1: May the clerk of a board of county commissioners, employed under the provisions of Section 2409, be legally employed by the building commission as secretary?

QUESTION 2: If, in your opinion, such employment is illegal, may the amount paid to him in that capacity be recovered upon finding made by an examiner from this department?

In this connection, we enclose copy of a letter received from our examiner referring to certain opinions of the Attorney General bearing upon this question, and giving more details with reference to the employment."

Section 2409 of the General Code provides for the appointment of a clerk by the board of county commissioners:

"If such board finds it necessary for the clerk to devote his entire time to the discharge of the duties of such position, it may appoint a clerk in place of the county auditor and such necessary assistants to such clerk as the board deems necessary. Such clerk shall perform the duties required by law and by the board."

This statute has been discussed in a previous opinion of this office, namely Opinions of the Attorney General for 1933, Vol. 1, page 187. The then Attorney General rendered his opinion as follows:

"1. A clerk of a board of county commissioners, appointed under authority of Section 2409, General Code, may not legally hold any public office at the same time and receive the salary attached to such office."

The opinion then goes on to read (page 188):

“It may be observed from a reading of the above statute that county commissioners are only allowed to appoint a clerk of the board when it is necessary for the person who is to perform the duties of said clerk to devote his entire time to the discharge of the duties of such employment.”

At this point, I wish to cite Section 2342, General Code:

“Full and accurate records of all proceedings of the commission shall be kept by the county auditor upon the journal of the county commissioners. He shall carefully preserve in his office all plans, drawings, representations, bills of material, specifications of work and estimates of costs in detail and in the aggregate pertaining to the building.”

You will note in regard to the above section that the duty of keeping these records of proceedings first falls upon the county auditor as duties enjoined upon him by law.

The court in the case of *State, ex rel vs. Edmondson*, 12 O. N. P. (N. S.) 577, in construing the two sections, namely 2409 and 2342, held the fact that the county commissioners have appointed a clerk to take the place of the auditor as their secretary under this section (Sec. 2409), does not impose upon such clerk the duty of keeping the record of proceedings of the building commission, which is required by Sections 2341 and 2342, General Code. This section by its terms applies only to the duties of the county auditor with reference to the proceedings of the county commissioners; and, furthermore, the statutes which provide for the building commission (G. C. Secs. 2333 to 2342) were enacted after this section was enacted, and accordingly it would supersede this section if the two were inconsistent.

To further substantiate this interpretation, I call your attention to the case of *State, ex rel. vs. Edmondson, supra*, at page 586:

“The commissioners of Hamilton County have availed themselves of Section 2409 and have appointed a clerk to take the place of the auditor as their secretary, and it is argued that by reason thereof said clerk should perform the duties specifically enjoined upon the auditor under Sections 2341 and 2342. In addition to the fact that the building commission act is a later act and charges such duties upon the auditor specifically and not upon the secretary or clerk of the board of county commissioners, and the further fact that Section 2409 is by its terms and context applicable only to the duties of the auditor

in connection with the proceedings of the county commissioners, Section 2409 also contemplates that such duties of the clerk shall be such as to require him 'to devote his entire time' to such duties, leaving no time for him to act for the building commission. The Legislature therefore provided that the auditor should act as recording officer of the building commission. For these additional duties he can adequately provide by the appointment, if necessary, of a deputy under Section 2563.

The recording officer of the building commission is therefore the county auditor, or a deputy appointed by him for such purpose."

This question was likewise ruled upon by an Ohio Attorney General's Opinion for 1917, Vol. II, page 1435, in which the then Attorney General rendered his following opinion:

"SYLLABUS 1.

A clerk appointed by the county commissioners, under the provisions of Section 2409, General Code, is not authorized to perform the duties provided for in Section 2342, General Code."

In this opinion, it is stated:

"It seems to me that the holding of the court, as above set out (referring to the case of *State ex rel. vs. Edmondson*, 12 N. P. (N. S.) 57) is the better reasoning and I therefore adopt the same and hold that the clerk appointed by the county commissioners, under the provisions of Section 2409 of the General Code, is not authorized to perform the duties imposed upon the county auditor by virtue of Section 2342 of the General Code, and that therefore the building commission is unauthorized to pay the clerk of the board of county commissioners any compensation for duties performed under Section 2342 of the General Code." (Words in parenthesis the writer's).

Considering your second question, I am of the opinion that Section 286, General Code, gives ample authority to institute proceedings for the recovery of public money that has been illegally expended and in the light of the case of *State, ex rel. vs. Maharry*, 97 O. S. 272:

"1. All public property and public moneys, whether in the custody of public officers or otherwise, constitute a public trust fund, and all persons, public or private, are charged by law with the knowledge of that fact. Said trust fund can be disbursed only by clear authority of law.

2. Sections 274, 284 and 286 et seq., General Code, creating the bureau of inspection and supervision of public offices, defining its powers, and providing for the short form of pleading, are constitutional statutes.

3. Said sections are remedial statutes, and, therefore, should be liberally construed and applied to effect their clear and controlling purpose.

4. These statutes are comprehensive enough to warrant actions against either public officers, former public officers or private persons."

it is my opinion that the salary paid to such employe in his capacity as secretary to the building commission may be recovered upon finding made by an examiner of your department.

In view of the above considerations, I am of the opinion in specific answer to your questions that the clerk of the board of county commissioners employed under the provisions of Section 2409 of the General Code may not be legally employed by the building commission as secretary, and, secondly, if so employed the amount paid to him in that capacity may be recovered upon finding made by an examiner of your department.

Respectfully.

HERBERT S. DUFFY,  
*Attorney General.*

165.

APPROVAL—LEASE TO OFFICE ROOMS IN CINCINNATI,  
OHIO.

COLUMBUS, OHIO, February 23, 1937.

HON. CARL G. WAHL, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR: You have submitted for my examination and approval a lease which by its terms is one by and between Val Duttonhofer, Jr., of Cincinnati, Ohio, as lessor, and the Department of Public Works