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COMPATIBLE—INCOMPATIBLE OFFICE—PRESIDENT OF CITY COUNCIL ELECTED PURSUANT TO SECTION 4272 G. C. —NOT A MEMBER OF CITY COUNCIL—SECTION 4207 G. C., FORBIDDING A MEMBER OF COUNCIL HOLDING ANY OTHER PUBLIC OFFICE OR EMPLOYMENT DOES NOT APPLY TO SUCH PRESIDENT OF COUNCIL—OFFICE, PRESIDENT OF COUNCIL OF CITY—INCOMPATIBLE WITH POSITION OF RELIEF DIRECTOR OF RELIEF AREA CONSTITUTING SUCH CITY, APPOINTED UNDER SECTION 3391-7 G. C.

SYLLABUS:

The president of a city council elected pursuant to Section 4272 General Code, is not under any circumstances a member of the city council, and hence the provision of Section 4207 General Code, forbidding a member of the council holding any other public office or employment does not apply to such president of council. However, the office of president of council of a city is incompatible with the position of relief director of the relief area constituting such city, appointed pursuant to Section 3391-7 of the General Code.

Columbus, Ohio, February 13, 1946

Bureau of Inspection and Supervision of Public Office
Columbus, Ohio.

Gentlemen :

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

“We are inclosing herewith copies of correspondence with City of Barberton officials concerning the matter of the President of Council acting at the same time as Relief Director.

We fail to find any previous ruling on this question in our index of offices or employments held to be compatible or incompatible, therefore, we request your official opinion in answer to the following questions :

Question 1: Do the provisions of section 4207 General Code apply to the President of Council to prevent that official from serving the city as Poor Relief Director at one and the same time?

Question 2: If the provisions of section 4207 General Code do not prevent one person from holding the two offices in question, is the President of Council, by the nature of his duties, barred from acting as Poor Relief Director on the common law grounds of incompatibility?”

I. Your first question is as to the applicability of Section 4207 General Code. That section reads as follows :

“Councilmen at large shall have resided in their respective cities, and councilmen from wards shall have resided in their respective wards, for at least one year next preceding their election. Each member of council shall be an elector of the city shall not hold any other public office or employment, except that of notary public or member of the state militia, and shall not be interested in any contract with the city. A member who ceases to possess any of the qualifications herein required, or removes from his ward, if elected from a ward, or from the city, if elected from the city at large, shall forthwith forfeit his office.”

Section 4272 General Code, relating to the president of council, provides :

“The president of council shall be elected for a term of two years, commencing on the first day of January next after his

election, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation, and shall preside at all regular and special meetings of council, but shall have no vote therein except in case of a tie.”

Section 4273 General Code, reads as follows:

“When the mayor is absent from the city, or is unable for any cause to perform his duties, the president of the council shall be the acting mayor. While the president of the city council is acting as mayor, he shall not serve as president of council.”

There is nothing in either of the sections above quoted or in any other section of the General Code, so far as I know, that makes the president of council, who is elected by the electors as such, a *member* of the council, even though he is charged by law with the duty of presiding over it, and is authorized to cast a vote in certain instances in case of tie vote by the members of council. It is important, however, to observe that the statutes lay down certain formalities as to the enactment of ordinances. Section 4224 General Code, provides that the action of council shall be by ordinance or resolution, and it further provides:

“No *ordinance* shall be passed by council without the concurrence of a *majority of all members elected thereto.*”

(Emphasis added.)

The statutes do not clearly define what measures must be enacted by ordinance and what may be enacted by resolution. There are, however, in the statutes a number of instances in which it is provided that certain actions shall be taken by ordinance and in a few cases that certain actions shall be taken by resolution. An instance of the latter is found in Section 3814 General Code, relating to public improvements which are to be paid for by special assessment, in which case it is provided that in taking the first step, “council shall declare the necessity thereof by resolution, *three-fourths of the members elected thereto concurring*” etc.

In the case of *Wuebker v. Hopkins*, 29 O. App. 386, the court had before it the validity of an ordinance which had been passed by the village council consisting of six members, three of whom voted for the ordinance and three against it, the mayor having assumed the right to cast the deciding vote in favor of the ordinance. The ordinance in question was one authorizing the employment of a village solicitor. The court held:

“1. Where council is required to act by passage of ordinance, majority of council must concur therein, and mayor, in case of tie, cannot cast deciding vote.

2. Under Section 4224, General Code, providing council may act either by ordinance or by resolution, unless statute prescribes one or other method of procedure, adoption of resolution is proper procedure for informal enactment providing for disposition of particular item of business, while passage of ordinance is proper procedure for enactment of regulation of general or permanent nature.

3. Where council was not taking action of general or permanent nature, but was simply making contract for employment of legal counsel, recognized under Section 3809, General Code, as nothing more than contract, only resolution was required; in which case mayor had right to break tie by casting determining vote under Section 4255, regardless whether act of council was called an ordinance.

4. Council has no power by calling resolution an ordinance to divert mayor of authority to break tie by casting determining vote under Section 4255, General Code, that he would have had if measure had been properly denominated.”

While this case arose out of the action of the mayor of a village in voting to break a tie, the principle appears to me to apply with equal force to the situation where the president of council of a city exercised his right to vote in case of a tie. Plainly, he can only do so on matters that are not strictly legislative in character and he cannot vote on an ordinance or resolution which by the terms of the statute requires for its passage a majority of all the elected members of council. The mayor of a village while exercising his right to cast a vote in case of a tie, and the president of council of a city while exercising a similar right, do not lose their character as such officers and are certainly not members of council “elected thereto” as contemplated by law.

Accordingly, it seems clear that the president of council would not be barred from serving the city as poor relief director by reason of the provisions of Section 4207 General Code.

2. A different question, however, presents itself when we consider the nature of the office of president of council and that of poor relief director and undertake to determine whether these two offices are compatible. As hereinabove indicated in the quotation of Section 4273, when

the mayor is absent from the city temporarily or is unable for any cause such as illness, to perform his duties, the president of council shall be the acting mayor. While he is acting in that capacity, he is endowed with all the powers and charged with all the duties of the mayor. The mayor under the terms of the statutes is the chief conservator of the peace within the corporation. He is the chief executive officer of the corporation. Section 4246 General Code, provides :

“The executive power and authority of cities shall be vested in a mayor, president of council, auditor, treasurer, solicitor, director of public service, director of public safety, and such other officers and departments as are provided by this title.”

By the provisions of Section 4258 General Code, the mayor is to perform all the duties prescribed by the by-laws and ordinances of the corporation and to see that all such by-laws and ordinances are faithfully obeyed and enforced.

Referring to the disposition of poor relief and to the statutes relating to the administration of poor relief as embodied in the act found in 118 O. L. 710, and codified as Sections 3391 to 3391-13 inclusive, of the General Code, I note the following definition :

“‘Local relief authority’ means the board or officer required by law or charter to administer or carry on poor relief in a local relief area.”

Section 3391-1 General Code, provides that each city shall be a local relief area and that the portions of the county outside of cities shall constitute the county local relief area.

Section 3391-7 General Code, provides in part, as follows :

“Each local relief authority may appoint a relief director, who shall be exempt from the provisions of sections 486-1 to 486-30, both inclusive, of the General Code, * * *.”

Since the council of a city is forbidden by law to exercise any administrative functions, it would appear that the mayor as chief executive officer of a city, would have the power and duty when authorized by council to appoint a poor relief director and as chief executive to supervise his conduct.

In view of the fact that the president of council may upon occasion become the acting mayor, it seems obvious that it would be quite inconsistent with the recognized principles of compatibility of office that he should at the same time hold the position of poor relief director. That principle is stated in 32 Oh. Juris. p. 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 * * * or is in any way a check upon the other.”

Citing State, ex rel. v. Gebert, 12 O. C. C., N. S. 274; State, ex rel. v. Taylor, 12 O. S., 130; Mason v. State, 58 O. S. 30.

It is accordingly my opinion that the president of council of a city cannot hold the position of poor relief director of such city.

Respectfully,

HUGH S. JENKINS

Attorney General.