

1331.

OFFICES—VILLAGE CLERK AND MEMBER OF VILLAGE PLANNING COMMISSION, INCOMPATIBLE—BUILDING INSPECTOR AND MEMBER OF PLANNING COMMISSION, COMPATIBLE.

SYLLABUS:

1. *A village clerk, being the auditing official of the municipality, is required to keep a check upon the expenditures of all departments, including the village planning commission, and his position is, therefore, incompatible with that of a citizen member of such planning commission.*

2. *The building inspector of the village may be appointed as a citizen member of a village planning commission.*

COLUMBUS, OHIO, December 5, 1927.

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

GENTLEMEN:—This will acknowledge receipt of your recent communication which reads as follows:

“The pertinent part of Section 4366-1, General Code, reads:

“The council of each village may establish a city planning commission consisting of five members, the mayor, one member of council to be selected by council for the remainder of his term as a member of council, and three citizens of the municipality to be appointed by the mayor for terms of six years each, except that the term of one of the members of the first commission shall be for four years and one for two years, all such members to serve without compensation.”

QUESTION: May the clerk and building inspector of a village be appointed as citizen members of a village planning commission?”

Obviously, from the language of the statute which you quote, the membership of the planning commission, other than the mayor and one of the council members, is to include three citizens of the municipality. The only qualification, therefore, is that the appointee shall be a citizen and I assume that in the case of both the clerk and the building inspector of the village the qualification of citizenship exists.

It may be argued, however, that the legislature in using the word “citizens” has at least implied that the appointees must be private citizens in contradistinction of the official members of the commission. It may possibly be well said that, having named two members from the official family of the village, the legislature deemed it advisable to include others than the official family in the membership of the commission. Credence to such a contention is lent by the functions and duties of a planning commission.

Without quoting the sections relating to the duties of the planning commission, I deem it sufficient to observe that, in the main, that body functions in an advisory capacity. It makes plans and maps of the municipality, incorporating therein its recommendations for new streets, alleys, etc., together with such relocation, widening, etc., as may be deemed advisable. It makes recommendations to the mayor, council and department heads concerning the location of streets, public buildings, grounds, transportation and communication facilities. It is authorized to pass upon the location of public buildings, streets and other public improvements, subject to a review by action of council.

These functions being, as I have said, of a more or less advisory character, it may well be argued that the legislature has deemed it wise to secure outside advice. The clerk of council and the building inspector are both members of the official family

of the municipality, and, as such, may be said to be under an obligation already to advise with council with respect to the matters concerning which the planning commission is given power.

On the other hand, however, I am unable to find any specific statutory prohibition against either the clerk or the building inspector holding an office of this character. In the absence of action on the part of council prohibiting the acceptance of another position, there is, therefore, apparently no express restriction upon that right.

This leads me to a consideration of whether or not either the village clerk or the building inspector may, under the common law rule of compatibility, hold the office of a member of the planning commission. As stated in Throop on Public Officers, on page 38:

“Offices are said to be incompatible and inconsistent, so as not to be executed by the same person, when from the multiplicity of business in them they cannot be executed with care and ability, or when, their being subordinate and interfering with each other, it induces a presumption that they cannot be executed with impartiality and honesty.’ And in Dillon on Municipal Corporations (Section 166, note), it is said, that ‘incompatibility in offices exists, where the nature and duty of the two offices are such as to render it improper, from considerations of public policy, for one incumbent to retain both.’”

Applying the tests set forth in this quotation, it can scarcely be said that the village clerk could not, because of the exigencies of his duties in that capacity, also properly perform the duties incumbent upon him as a member of the planning commission. The commission quite obviously is not required to give full time to the work. It normally functions by meeting at stated intervals and it is entirely possible and is in fact contemplated that a person be otherwise employed than as a member of such body.

The second test is whether or not one of the officers is subordinate to or a check upon the other. By the terms of Section 4279 of the Code, provision is made for the election of the village clerk. It will be observed that his duties differ from those of a city clerk in that he is also made the auditing officer of the village.

Sections 4283 and 4284 of the General Code are as follows:

Section 4283: “In the following provisions of this chapter, the word ‘city’ shall include ‘village’ and the word ‘auditor’ shall include ‘clerk’.”

Section 4284: “At the end of each fiscal year, or oftener if required by council, the auditor shall examine and audit the accounts of all officers and departments. He shall prescribe the form of accounts and reports to be rendered to his department, and the form and method of keeping accounts by all other departments, and, subject to the powers and duties of the State Bureau of Inspection and Supervision of Public Offices, shall have the inspection and revision thereof. Upon the death, resignation, removal or expiration of the term of any officer, the auditor shall audit the accounts of such officer, and if such officer be found indebted to the city, he shall immediately give notice thereof to council and to the solicitor, and the latter shall proceed forthwith to collect the indebtedness.”

It can scarcely be denied that the planning commission of a village is a department subject to audit by the village clerk. By the provisions of Section 4366-5 of the Code, the commission is authorized to employ architects, engineers and other subordinates and to pay therefor from appropriations made by council. The expendi-

ture of these funds is necessarily subject to audit by the village clerk under the provisions of Section 4284 of the Code. I therefore feel that by reason of this duty the two positions are incompatible and that a village clerk may not be appointed a citizen member of the planning commission. In the case of the building inspector, however, I scarcely believe that it can be said that it would be impossible for him to perform the duties pertaining to membership on the planning commission as well. Likewise, I do not find there is any conflict between the offices or that one is a check upon the other, which would come within the other rule of incompatibility which I have applied in the case of the village clerk. The nature of the work of the building inspector is along similar lines to that of the planning commission. In the interest of efficient government the planning commission and the building inspector should work in harmony and I feel that to have the building inspector upon the planning commission would tend toward the promotion of harmony rather than otherwise. I have, therefore, reached the conclusion that the two positions are not incompatible.

So far as the building inspector is concerned, there is, therefore, only remaining the arguments which I advanced in the first part of this opinion to the effect that there is an implication that three members of the commission shall be private citizens. As opposed to this argument, however, is the general rule that any person having the qualifications for the office is entitled thereto, unless the statute has, in effect, prohibited that employment or by the common law rules of incompatibility he cannot properly function. This right is not to be disregarded lightly and I therefore feel that I cannot by what is, after all, a mere inference in the language of the statute, deny the right of the building inspector to the appointment in question.

I am, therefore, of the opinion that a village clerk may not be appointed as a citizen member of a village planning commission but that the building inspector of such village is eligible to such appointment.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1332.

SINKING FUND TRUSTEES OF A CITY—MAY INVEST SURPLUS FUNDS
IN NOTES ISSUED BY SUCH MUNICIPAL CORPORATION.

SYLLABUS:

The sinking fund trustees of a city or village are authorized by Section 2293-27, General Code, to invest surplus funds in notes issued by such municipal corporation.

COLUMBUS, OHIO, December 6, 1927.

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

GENTLEMEN:—This will acknowledge your recent inquiry as follows:

“Section 4514, G. C., reads:

‘The trustees of the sinking fund shall invest all moneys received by them in bonds of the United States, the State of Ohio, or of any municipal corporation, school, township or county bonds, in such state, and hold in reserve only such sums as may be needed for effecting the terms of this title. All interest received by them shall be re-invested in like manner.’