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DIRECTOR OF HIGHWAY SAFETY—OFFICE INCOMPATIBLE
WITH OFFICE OF MEMBER OF BOARD OF ELECTIONS—
§§121.02, 121.12, 3501.06, R.C.

SYLLABUS:

1. Under the provisions of Section 121.12, Revised Code, no person may simultaneously hold the office of director of highway safety, created pursuant to Section 121.02, Revised Code, and the office of member of a board of elections, created pursuant to Section 3501.06, Revised Code.

2. Where a member of a board of elections is appointed and qualified as director of highway safety, such office of member of the board of elections is vacated upon such appointment and qualification.

Columbus, Ohio, January 15, 1960

Hon. J. Grant Keys, Director, Department of Highway Safety
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"In February of 1958, while serving as Mayor of the City of Elyria, I was elected to the Lorain County Board of Elections and duly appointed to a four-year term by the Secretary of State. The procedures followed the provisions set forth by the Ohio Statutes. I have been serving as a member of that Board since March 1, 1958, and have been receiving the compensation for such duties at the rate established in Lorain County.

"In December of 1958, I faced the decision of accepting an appointment to the Cabinet of Governor-Elect Michael V. DiSalle. In giving consideration to a possible conflict of interest at being a member of the Governor's Cabinet and at the same time a member of the Lorain County Board of Elections, I submitted the question to Mr. Joseph Ujhelyi, Chairman of the Lorain County Board of Elections. Mr. Ujhelyi conferred with the Secretary of State's office and I was then duly advised that there would be no incompatibility in holding the two positions. After receiving this information, I accepted the appointment as Director of the Ohio Department of Highway Safety. I have been serving in this position since taking the Oath of Office on January 12, 1959.

"Only recently my attention has been called to Section 121.12 of the Ohio Revised Code. The question has been raised that a conflict may exist. In the spirit of good public service, I feel the question must be formally resolved and the answer clearly defined. This is important to guide me in my responsibility and will be valuable to public officials in the future.

"May I request your formal opinion as to whether serving as a member of the Lorain County Board of Elections is incompatible with my position as Director of the Ohio Department of Highway Safety."

Since the writing of your request further questions have also been raised which I will number 2, 3 and 4, as follows:

2. If the two positions are incompatible, was the appointment as director of highway safety invalid or does the holder of the positions have the right to determine which position he will vacate?

3. If the position of director has been held illegally, should the salary paid to the holder be recovered?

4. If the position of director has been held illegally, were the acts of the holder in such capacity valid?

On the facts as given, at the time of your appointment and qualification to the office of director of highway safety, January 12, 1959, you were a member of the county board of elections, and since such date have

served in both capacities and have been paid the prescribed salary for each position.

Section 121.12, Revised Code, referred to in your letter, reads as follows:

“Each officer whose office is created by sections 121.02, 121.04, and 121.05 of the Revised Code shall devote his entire time to the duties of his office, and shall hold no other office or position of profit. In addition to his salary, each such officer and each member of the boards and commissions in the departments shall be entitled to his actual and necessary expenses incurred in the performance of his official duties.”

The office of director of highway safety is created by Section 121.02, Revised Code, such section reading in part:

“The following administrative departments and their respective directors are hereby created:

“* * *

“(K) The department of highway safety, which shall be administered by the director of highway safety;

“* * *.”

Boards of elections are created and members appointed pursuant to Section 3501.06, Revised Code. Members are paid in accordance with Section 3501.12, Revised Code, which provides for annual compensation on a population basis.

The office of director of highway safety, therefore, is included within the purview of Section 121.12, *supra*, and the holding of the office of member of a board of elections by such director, such office being an office of profit, is in conflict with the provisions of such section. The question then arises as to (1) was the appointment as director invalid, or (2) did the appointment as director vacate the office of member of the board of elections.

In 32 Ohio Jurisprudence, Section 50, at pages 909 and 910, it is stated:

“* * * At common law the acceptance by an officer of another office incompatible with the first ipso facto vacated the first. This rule is based on the presumption of election as evidenced by the acceptance and incumbency of the second office, and it is immaterial whether the title to the second office is valid or invalid. Nor can he

be restored to any right under the first office by subsequently resigning the second. The only exception to this general rule seems to be in a case where the person in office cannot divest himself of that office by his own act without the concurrence of another authority.

“On the other hand, it is well settled that the appointment or election of one to an office to which he is ineligible because of an express statutory provision prohibiting an incumbent of one office from holding another named office is absolutely void. In other words, he holds the first office and is ineligible to the second. * * *”

In applying the above-noted rules of law to the instant situation, I am of the opinion that the common law rule is here applicable. That is, the appointment as director of highway safety vacated the office of member of the board of elections. I believe that this is the inevitable conclusion since Section 121.12, *supra*, does not expressly prohibit a member of a board of elections from being appointed to an office such as director of highway safety but merely states that certain state officers shall hold no other office or position of profit.

Regarding the rule of law applying as in the instant case, it is stated in *State, ex rel. Baden v. Gibbons*, 40 O.L.R., 285 at page 291 :

“The general rule is succinctly further stated in 22 R. C. L. 418. Section 63; ‘the acceptance of a second office, incompatible with one already held, vacates the first, and this is true whether the incompatibility is based on the common law or by reason of a constitutional mandate, or because of an express statutory direction to the effect that an office becomes vacant when the incumbent accepts and undertakes to discharge the duties of another incompatible office.’ In the case of a constitutional or statutory command it is not a question as to whether or not the offices or employments are incompatible in the light of the various definitions as to what makes offices incompatible, for our legislature in its wisdom has seen fit to declare that all public office and employment, other than that of a notary public or militiaman is incompatible with the office of councilman. Mechem in his work on Public Offices and Officers in Section 429 says :

“Where, however, it is the holding of two offices at the same time which is forbidden by the constitution or the statutes, a statutory incompatibility is created, similar in its effect to that of the common law, and, as in the case of the latter, it is well settled that the acceptance of a second office of the kind prohibited, operates ipso facto to absolutely vacate the first.”

“No judicial determination is therefore necessary to declare the vacancy of the first, but the moment he accepts the new office the old one becomes vacant, as is said in one case ‘His acceptance of the one was an absolute determination of his right to the other’ and left him ‘no shadow of title, so that neither quo warranto nor a motion was necessary.’” (Emphasis added)

The exception to the general rule was applied in *State, ex rel. v. Kearns, et al.*, 47 Ohio St., 566, and in *State, ex rel. Attorney General v. Craig*, 69 Ohio St., 236. In these cases, however, the statute in question, Section 1717, Revised Statutes, specifically held that “no member of council shall be eligible to any other office.” Also, in *State, ex rel. Gettles v. Gillen*, 112 Ohio St., 534, the exception was applied, the question dealing with Section 4 of Article II, Ohio Constitution, reading in part:

“No person holding office under the authority of the United States; or any lucrative office under the authority of this state, shall be eligible to, or have a seat in, the general assembly; * * *.” (Emphasis added)

It will be noted that a specific statement of ineligibility is present in this constitutional section, thus differing from the provision of Section 121.12, Revised Code, here concerned.

Accordingly, since the statute here in question does not constitute an exception to the general rule, I am of the opinion that upon your appointment and qualification as director of highway safety, you automatically vacated your position as member of the board of elections, and the appointment as director of highway safety was a valid appointment.

While my answer to the first question is dispositive of the other questions noted earlier, I might note that even if Section 121.12, *supra*, had precluded you from being validly appointed to the position of director of highway safety, the fact that you were appointed and did accept and that you served in the position, would have qualified you as a *de facto* officer in such position. On this point, it is stated in 32 Ohio Jurisprudence, page 1080:

“ * * * A person is a *de facto* officer where the duties of the office are exercised: * * * Third. Under color of a *known* election or *appointment*, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, *such ineligibility*, want of power, or defect *being unknown to the public*. * * *” (Emphasis added)

Also, in 32 Ohio Jurisprudence, page 1090, it is stated:

“Where an office exists under the law, and a person is elected or appointed to fill it and duly qualifies and enters upon the discharge of his official duties, he is a *de facto* officer, *and his acts are valid*, even though he may not possess the necessary qualifications for the office. One who is elected to an office to which he is declared ineligible by statute because of incumbency in another office is a *de facto* officer in the second office.” (Emphasis added)

Regarding salary which has been paid to a *de facto* officer, the rule is stated in 32 Ohio Jurisprudence, page 93, as follows:

“But a salary which has been paid to a *de facto* officer cannot be recovered back by the public corporation which has made payment thereof, at least where he has actually rendered the services for which he was paid.” (Citing *State, ex rel. Will v. Taylor*, 3 N.P. (N.S.) 505, 77 Ohio St., 597)

In conclusion, it is my opinion and you are advised:

1. Under the provisions of Section 121.12, Revised Code, no person may simultaneously hold the office of director of highway safety, created pursuant to Section 121.02, Revised Code, and the office of member of a board of elections, created pursuant to Section 3501.06, Revised Code.
2. Where a member of a board of elections is appointed and qualified as director of highway safety, such office of member of the board of elections is vacated upon such appointment and qualification.

Respectfully,

MARK McELROY

Attorney General