

1910.

OFFICES COMPATIBLE AND INCOMPATIBLE—WHEN PUBLIC OFFICER RESIGNS AND THERE IS ACCEPTANCE—VACANCY—CANNOT HOLD AN OFFICE IN INTERVAL BETWEEN DATE WHEN RESIGNATION OFFERED AND DATE EFFECTIVE IF OFFICE INCOMPATIBLE—FINDING AS TO SALARY PAID BY TWO SUBDIVISIONS—PHYSICIAN—HEALTH COMMISSIONER.

SYLLABUS:

1. *When a public officer offers his resignation to take effect at a specific date and that resignation is duly accepted by the proper authority, such an officer cannot in the interval between the date on which the resignation is offered and the date it is to take effect hold an office which is incompatible with the one in which he serves.*

2. *When an officer of one subdivision draws the salary incident to an incompatible office under a second subdivision, and is not a legal incumbent of that office, finding should be made against the officer for the salary paid him by the second subdivision, and against the official or officials of the second subdivision who are responsible for such payments having been made.*

COLUMBUS, OHIO, February 11, 1938.

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

GENTLEMEN: Your recent communication requesting an opinion from this office is hereby acknowledged. The following statement of facts is taken from the letter enclosed with your request.

"The record of proceedings of the Mansfield Board of Health shows that on March 25, 1937, Dr. H. submitted his resignation as Health Commissioner, effective May 1, 1937, and same was accepted by the Board. The minutes indicate the reason for the resignation was that Dr. H. had accepted a position as head of the Health Department of Toledo, Ohio, effective May 1, 1937. Dr. H. remained on the payroll of Mansfield Board of Health through the month of April, 1937, and I have been advised by Mr. D. L. Rupert that the payrolls of the City of Toledo indicate that Dr. H. began receiving compensation from the City of Toledo on April 15, 1937. This would indicate that Dr. H. was paid a salary as Health Commissioner by both

the City of Mansfield and City of Toledo for the last half of the month of April, 1937.

The records pertaining to the resignation of Dr. H. do not make any reference to a vacation and I am advised by the Mayor that no mention was made in the Board of Health meetings as to granting Dr. H. a vacation prior to the affective date of his resignation, but that it has been customary for the Health Commissioner to arrange annual two weeks vacations for himself and other employes without action of the Board. I am also advised that Dr. H. devoted a part of his time to his Mansfield office during the last half of April.

Inasmuch as the position of Health Commissioner of the City of Mansfield together with that of Richland County is a full time position please advise if under the above circumstances it was proper for Dr. H. to receive compensation as Health Commissioner of the combined City-County Board of Health in Mansfield and Richland County for the last half of April, 1937, and at the same time receive compensation for a similar position from the city of Toledo. If you find this procedure is not proper how should the matter be handled by this office?"

From the facts above given there seems to have been no issue or doubt as to relationship between this physician and the City of Mansfield and their obligations existing during the interval between March 25th and May 1st. Certainly no vacancy was contemplated as the resignation by its terms was to take effect May 1st. The common law rule yet accepted in Ohio provides that in the absence of legal proof to the contrary *the resignation of an officer to take effect at a time specified creates a vacancy at that time.* (*Reiter vs. State*, 51 O. S., 74). This being the case there was no termination in the responsibilities and obligations between the Physician and the City of Mansfield, between March 25th and May 1st, and for such reason I am constrained to hold that no vacancy was created by the resignation before May 1st.

We come now to a discussion of the Toledo appointment and what effect, if any, the assumption of its duties by Dr. H. had upon his office with the Mansfield Health District. Certainly no extensive reasoning is needed to reveal that the same person could not be at once Health Commissioner of Mansfield and Health Commissioner of Toledo. These two offices by their very nature and responsibilities require full time service and the duties each entails could not be properly executed by one person without running afoul of the well established rule as to incompatibility of offices.

“Offices are incompatible when the nature and duties of each are such as to render it improper from consideration of public policy for one person to retain both; or when from multiplicity of business in them they cannot be executed with care and ability or when their being subordinate to and interfering with each other induces a presumption that they cannot be exercised with honesty.” (Thróop: Public Offices, page 34, Sec. 33; *State vs. Gebhart*, 12 C. C. (N. S.) 275; *State vs. Kinney*, 20 C. C. 325.)

Having arrived at the conclusion that these offices are incompatible, it necessarily follows that Dr. H. was ineligible to take office as Toledo Health Commissioner before May 1st. His appointment was not effective until that date by its terms and he could not by exercising the duties of that office before May 1st do indirectly what he could not do directly. Moreover, his attempt to exercise the duties of an incompatible office did not create a vacancy in the office he held. At common law the acceptance by an officer of another office incompatible with the first ipso facto vacated the first. However, the rule now followed by Ohio authorities seems to alter the common law, since it has been held that when the duties of two offices are incompatible and cannot be performed at the same time, the latter appointment to the conflicting office is illegal and void. This has been true in cases where ineligibility was based on a statutory prohibition as well as where it was based upon common law incompatibility of offices. (*State ex rel Monnett vs. McMillan*, 15 O. C. C. 163; *State vs. Taylor*, 12 O. S., 130).

Then finally, the matter of salary being received from both offices must be considered. It is now well established that the salary and fees belonging to an office are incident to the title and not to the usurpation and colorable possession of an office. The physician in question was not before May 1st an incumbent of the office of Health Commissioner of Toledo. An incumbent of an office is one who is legally authorized to discharge the duties of that office. Dr. H. was certainly vested with no capacity to act as Health Commissioner of Toledo before the date of his appointment which was expressly set as May 1st. There can be no question over the fact that he was not entitled to salary as an incumbent of that office.

There may be some question, however, as to whether or not this physician by actually giving service as the Toledo Health Commissioner before May 1st, could have drawn salary as a de facto officer. A de facto officer is one who has the reputation or appearance of being the officer of an office he assumes to hold. The distinction between a de facto officer and a mere usurper or intruder is revealed in the fact that the

former holds by some color or right or title, while the latter intrudes upon the office and assumes to exercise its functions without either the legal right or color of title to such an office. It does not seem to me that this physician was in any sense a de facto officer. It could not be said that he was acting under color of title or under color of a known appointment. His title until May 1st was Health Commissioner for the Mansfield Board of Health and any reputation he might have had was as such commissioner. His Toledo appointment was for May 1st, therefore, no rights, responsibility or duties with respect to Toledo were his until May 1st. He had no official authority whatsoever to act as a Toledo officer before May 1st, and such being the case, he could not legally draw money from the City of Toledo. Moreover, the City in turn had no authority to pay him the salary of an incumbent of the office in question. Dr. H. then was neither a de facto officer nor an incumbent. He had not qualified or taken oath for services in the office of Health Commissioner of Toledo and he possessed in no way color of title to this office. The rule as to compensation in such matters is that an officer who has not qualified as provided by law is not entitled to compensation for services rendered, or to salary therefor. (*State vs. Eshelby*, 2 C. C., 468).

To hold otherwise in the circumstances before us would encourage such irregular procedure and use with respect to public funds as would in time if continued and followed be the basis of a precedent presenting more than a harmless irregularity.

I have not gone into the matter of a vacation or leave of absence as the facts given disclose no definite evidence that such was the case. This physician did not render part time services or accept a limited private employment; his services were made as the incumbent of a public office to which he was appointed.

In specific answer to your question, it is my opinion that:—

1. When a public officer offers his resignation to take effect at a specific date and that resignation is duly accepted by the proper authority, such an officer cannot in the interval between the date on which the resignation is offered and the date it is to take effect hold an office which is incompatible with the one in which he serves.

2. When an officer of one subdivision draws the salary incident to an incompatible office under a second subdivision, and is not a legal incumbent of that office, finding should be made against the officer for the salary paid him by the second subdivision, and against the official

or officials of the second subdivision who are responsible for such payments having been made.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

1911.

APPROVAL—BONDS HAMILTON COUNTY, OHIO, \$25,000.00,
PART OF ISSUE DATED FEBRUARY 1, 1931.

COLUMBUS, OHIO, February 11, 1938.

The Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN :

RE: Bonds of Hamilton County, Ohio, \$25,000.00.

I have examined the transcript of proceedings relative to the above bonds purchased by you. These bonds comprise part of an issue of Hamilton County tuberculosis sanatorium bonds, Series E, in the aggregate amount of \$675,000 of a \$2,000,000 authorization by election of November 6, 1928, dated February 1, 1931, bearing interest at the rate of 4% per annum.

From this examination, in the light of the law under authority of which these bonds have been authorized, I am of the opinion that bonds issued under these proceedings constitute valid and legal obligations of said county.

Respectfully,

HERBERT S. DUFFY,
Attorney General.