

Note from the Attorney General's Office:

1951 Op. Att'y Gen. No. 51-224 was modified by 1981 Op. Att'y Gen. No. 81-020.

ASSIGNMENT COMMISSIONER—CLERK OF COURTS MAY BE APPOINTED TO POSITION—SECTION 3007-1 G. C.—MUST BE PHYSICALLY POSSIBLE TO PERFORM DUTIES OF BOTH OFFICES—SALARY PROVIDED BY LAW FOR BOTH OFFICES.

SYLLABUS:

The clerk of courts may be appointed to the position of assignment commissioner, provided for by Section 3007-1 of the General Code, provided it is physically possible for him to perform the duties of both offices, and he may receive the salary provided by law for both offices.

Columbus, Ohio, April 9, 1951

Hon. Myron A. Rosentreter, Prosecuting Attorney
Ottawa County, Port Clinton, Ohio

Dear Sir:

I have before me your letter requesting my opinion and reading in part, as follows:

“Whereas, our Common Pleas Judge, who is the sole and only Common Pleas Judge in this county, is considering appointing an assignment commissioner pursuant to Section 3007-1 of the General Code, may the clerk of courts be appointed to said position and receive extra compensation therefor in addition to regular salary received as clerk of courts?”

Section 3007-1 of the General Code, provides as follows:

“When in its opinion the business requires it, the court of common pleas of any county in this state having not more than one common pleas judge, may appoint an assignment commissioner whose duty it will be to make assignments of cases of the judge holding such court. Said official assignment commissioner shall hold office during the pleasure of the court making the appointment and shall receive such salary as may be fixed by the court making the appointment, not exceeding eighteen hundred dollars per year, payable monthly.”

Section 2874 et seq. of the General Code, set out the duties of the clerk of courts. These duties are summarized in Section 2880 of the General Code, which provides:

“The clerk shall keep the journals, records, books and papers appertaining to the court, and report its proceedings.”

The tests of compatibility or incompatibility of public offices and positions were quite elaborately set out in an opinion of the Attorney General found in 1912 Opinions of the Attorney General, page 1874, in which it was held that one person could hold the offices of prosecuting attorney and city solicitor at the same time. It was stated in that opinion that there are three well recognized grounds of incompatibility: First, physical impossibility of the same person performing the duties of both offices; second, when one office is subordinate to the other; third, when one office is in any way a check upon the other. It was further said in that opinion:

“Whether or not it is physically possible for the same person to hold two offices at the same time must be determined from the facts and circumstances of each particular case.

“In many counties in this state it would be physically possible for the same person to be prosecuting attorney of the county and at the same time to be solicitor of a city or village in such county. In other counties the duties required of these two officers would make this physically impossible. This department cannot determine the physical possibility or impossibility from the facts submitted.”

To the grounds of incompatibility above listed, it should be added that the statutes expressly prohibit the clerk of courts from holding certain offices. These provisions are found in Sections 2565 and 2783 of the General Code, but there is no prohibition in either of these statutes against the clerk of courts holding the position of assignment commissioner.

The general subject of incompatibility of offices was discussed in the case of *State, ex rel. Attorney General v. Gebert*, 12 O. C. C. (N. S.) 274, where it was held that the offices of mayor and member of congress are not incompatible, and may be held by the same person. Both this case and the 1912 opinion above referred to, have been cited and applied in a large number of opinions of this office.

I am unable to see any legal incompatibility between the offices of clerk of the common pleas court and the position of assignment commissioner, as neither officer appears to have any control over the other, and neither is subordinate to the other. As to the right to receive the prescribed salary for both offices, it is said in 32 Oh. Juris. p. 1019:

“If an officer holds two or more offices not incompatible with each other, to each of which compensation is attached, he may recover the compensation provided by law for each office. In the

eyes of the law, the same individual is two distinct officers, and, for this reason, entitled to the compensation incident to each.”

To like effect, 43 Am. Juris. p. 153.

Accordingly, in specific answer to your question it is my opinion that the clerk of courts may be appointed to the position of assignment commissioner, provided for by Section 3007-1 of the General Code, provided it is physically possible for him to perform the duties of both offices, and he may receive the salary provided by law for both offices.

Respectfully,

C. WILLIAM O'NEILL
Attorney General