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1. PROSECUTING ATTORNEY—CAN NOT EMPLOY LEGAL COUNSEL TO AID OR ASSIST HIM IN PREPARATION OF PROCEEDINGS, ISSUANCE AND SALE OF BONDS—LOCAL SCHOOL DISTRICTS—FUNDS APPROPRIATED UNDER SECTION 3004 G. C. MAY NOT BE SO USED.
2. LOCAL SCHOOL DISTRICTS — MAY NOT EMPLOY PROSECUTING ATTORNEY FOR WORK LEADING UP TO ISSUANCE AND SALE OF BONDS—HE MAY NOT BE COMPENSATED FROM GENERAL FUNDS.

SYLLABUS:

1. The prosecuting attorney can not employ legal counsel to aid and assist him in the preparation of proceedings leading up to the issuance and sale of bonds for local school districts from the funds appropriated to him under Section 3004, General Code.

2. Local school districts may not employ a prosecuting attorney of the county in which they are located and compensate him from the general funds for the preparation of proceedings leading up to the issuance and sale of bonds.

Columbus, Ohio, April 29, 1949

Hon. Howard G. Eley, Prosecuting Attorney
Darke County, Greenville, Ohio

Dear Sir:

This will acknowledge receipt of your letter requesting my opinion on the following questions:

“1. Whether a prosecuting attorney can employ legal counsel to aid and assist him in the preparation of proceedings leading up to the issuance and sale of bonds for local school districts from the funds appropriated to him under Section 3004, General Code.

2. Whether local school districts, other than city school districts, can employ the prosecuting attorney and compensate him from their general funds for the preparation of proceedings leading up to the issuance and sale of bonds?”

Section 3004, General Code, to which you refer in your letter of inquiry, provides in part as follows:

“There shall be allowed annually to the prosecuting attorney in addition to his salary and to the allowance provided by section 2914, an amount equal to one-half the official salary, *to provide for expenses which may be incurred by him in the performance of his official duties* and in the furtherance of justice, not otherwise provided for. * * *” (Emphasis added.)

Is it the official duty of the prosecuting attorney to prepare all proceedings leading up to the issuance and sale of bonds for a local school district? In 1915 an opinion was rendered by the then Attorney General, which appears in 1915 Opinions of the Attorney General, Volume II, page 1911, and wherein it was held as follows:

“It is the duty of prosecuting attorneys to prepare bond issues and transcripts for boards of education of which they are legal advisers.”

Section 4834-8 (formerly Section 4761) of the General Code provides:

“Except in city school districts, the prosecuting attorney of the county shall be the *legal advisor* of all boards of education of the county in which he is serving. * * * he shall be the legal counsel of such boards or the officers thereof in all civil actions. * * *” (Emphasis added.)

At first blush, it would seem that no conclusion other than that it is the official duty of the prosecuting attorney to prepare such papers could be reached.

Since the rendition of the above cited opinion of the Attorney General in 1915, Section 2293-30, General Code, has been enacted, and provides in part as follows:

“It shall be the duty of the clerk, or other officer having charge of the minutes of the taxing authority to furnish to the successful bidder for its bonds, a true transcript certified by him of all ordinances, resolutions, notices, and other proceedings had with reference to the issuance of said bonds. * * *”

By virtue of this section of the General Code it must be recognized that the 1915 opinion has been overruled by legislative action in so far as it pertained to the preparation of transcripts of proceedings relative to the issuance of bonds. This section of the General Code would have no effect upon the question of whose duty it would be to prepare the resolu-

tions, notices, certificates and other papers required to be prepared in order for the board of education to proceed with the issuance of bonds. On this point the statutes are silent.

It has been held by the Supreme Court in *Hicksville v. Blakeslee*, 103 O. S. 508, 134 N. E. 445, that a resolution for the sale of bonds by a municipality is legislative in its nature. This theory was raised in the 1915 opinion but not answered because the sole question in issue in that opinion was whether the prosecuting attorney could be paid by the board of education for preparing the necessary proceedings for the issuance of bonds. In the opinion it was stated that if, because of the legislative nature of the proceedings, it was the duty of the members of the board or the clerk, any statement for services should be against the members or clerk individually. This opinion was discussed in 1930 Opinion of the Attorney General, Volume II, page 1142, wherein the question of the duty of the prosecuting attorney with respect to the preparation of legislation for the issuing of school bonds was discussed, and the then Attorney General, at page 1145, said:

“* * * It is work that is not, strictly speaking, the giving of legal advice, nor is it, of course, conducting a case in court. In order that the various statutory steps be properly taken so that bonds to be issued may be valid and marketable, it is frequently necessary that a considerable amount of legal advice be given. Such advice it is clearly the duty of the prosecuting attorney to give to the board of education or to the clerk of the board. I concur in the opinion of this office rendered in 1915 hereinabove cited, in so far as it relates to the employment of an attorney as such other than the prosecuting attorney to prepare a transcript of the proceedings for the issuance of bonds but I have considerable doubt as to whether or not a board of education may not employ as assistant to the clerk to aid him in performing the duties imposed upon him under Section 2293-30, supra, in connection with the issuance of bonds. Boards of education are generally authorized to employ such employes as they may see fit. Section 4752, General Code, relates to proceedings necessary for the employment of ‘teachers and other employes’. In the event a board of education should see fit to employ an assistant for the purpose of assisting the clerk in the preparation of the bond transcript, I know of no reason why it may not do so. Such assistant would, of course, be employed as an assistant to the clerk and not as a legal adviser of the board, since, under Section 4761, supra, it is provided that the prosecuting attorney shall act in this capacity.”

Based on the foregoing 1930 opinion of the Attorney General, and upon an opinion of the Attorney General for the year 1923, Volume I, page 508, which latter opinion was discussed in the 1930 opinion, I held in Opinion No. 3441 of the Opinions of the Attorney General for the year 1938 that the preparation of a resolution, notices, certificates and other necessary papers that are required to be prepared in order for the board of education to proceed with the issuance of bonds for a city school district was not such duties as were imposed on a city solicitor by the provisions of Section 4761, General Code. Section 4761, General Code, now repealed, contained in similar language the statutory duties of both city solicitors and prosecuting attorneys with reference to boards of education. This section of the General Code is now embodied in Section 4834-8 in substantially the same wording.

A study of the foregoing opinions indicates that the preparation of the necessary resolutions, notices, certificates and other papers required for the issuance of bonds by a bond issuing authority is a legislative and clerical duty resting primarily upon the members of the board of education and the clerk of the board as its clerical officer, even though such theory is not definitely stated in any one of the opinions. I am of the opinion that such is the true nature of this type of work and concur in the above quoted wording of the 1930 opinion. This, therefore, would prevent the payment of an assistant prosecuting attorney from funds appropriated to the prosecutor's office under Section 3004 for the preparation of such proceedings.

As to your second question, it is obvious from the foregoing that the prosecuting attorney may not be employed by the local boards of education as an attorney for the purpose of giving legal advice to them for that is one of his statutory duties. The question then arises whether or not he could be employed by such school board in the capacity of an assistant clerk for the purpose of preparing such proceedings.

While it is logical to conclude, on the basis of my conclusions in the 1938 opinion that a prosecuting attorney would not be prevented from serving in the capacity of an assistant clerk to a local board of education for the purpose of preparing proceedings and transcripts for bond issues, it must be borne in mind that by the provisions of Section 5625-19, General Code, the prosecuting attorney is a member of the county budget commission. It has been a fundamental principle of our jurisprudence and consistently adhered to by all the Attorneys General since at least 1915

that even where an express constitutional or statutory prohibition does not exist against the holding of two public offices by the same person at one time, when such public offices are in fact incompatible because of conflicting duties, the offices may not lawfully be held simultaneously by one person.

In *State, ex rel. Baden v. Gibbons*, 17 Abs. 341, it was held, as disclosed by the sixth branch of the syllabus, as follows:

“One person may not hold two positions of public employment when the duties of one may be so administered that favoritism and preference may be accorded the other, and result in the accomplishment of purposes and duties of the second position which otherwise could not be effected.”

Many opinions of this office have heretofore been written on the subject of incompatibility of public offices. It appears that while almost all are in agreement upon the general underlying principles, none has even attempted to formulate an all-inclusive formula that will serve in all cases whether or not offices are incompatible. It is doubtful that such a formula could be established as almost every office includes duties and obligations sufficiently divergent from every other office to necessitate a different basis of reasoning in almost every instance in which the question might present itself. Without attempting to cover any substantial number of situations which have previously been held incompatible by this office, but to present some of the bases upon which the opinions have been predicated, I wish to call your attention to 1924 Opinions of the Attorney General, Volume I, page 324; 1929 Opinions of the Attorney General, Volume II, page 886; Opinion No. 3088 for the year 1940, Volume II, at page 1036; Opinion No. 1905 for the year 1947, and Opinion No. 4130 for the year 1948.

In the 1924 opinion the offices of prosecuting attorney and member of a district board of health within his county were held incompatible on the ground that as a member of the budget commission the prosecuting attorney would be passing on his acts as a member of the district board of health in the preparation of its budget.

In the 1929 opinion the offices of prosecuting attorney and chief county probation officer were held incompatible for the reason that the office of county probation officer is within the classified service of the civil service of the county and that it would be violative of the civil service laws for such prosecutor to hold both positions at the same time.

In the 1940 opinion the offices of member of the board of county commissioners and member of a board of education of a rural school district were held incompatible on the theory that each board is a separate taxing authority and could possibly be in the position of adversaries upon presenting their respective claims for adjustment of the county budget to the county budget commission.

In the 1947 opinion the position of superintendent of a county children's home located within a city school district was determined to be incompatible to membership on the board of education of such city school district for the reason that such board of education has the duty under the law to determine whether to maintain a school at the home for the instruction of the children in such home located within such school district or to provide for the admission of such children into the public schools of the district.

In the 1948 opinion the office of prosecuting attorney and county veterans' service officer were held incompatible because he is by statute the legal adviser to the board by which the county veterans' service officer is employed.

Were the prosecuting attorney to be employed as an assistant clerk, by reason of such employment he would necessarily be subservient to the board of education employing him, and as a member of the county budget commission would be required to pass upon and to adjust the estimated amount required for each fund as shown by the several budgets of the subdivisions within the county submitted to it, among which would be the budget for the school district wherein he was employed. Since it frequently happens that members of the several taxing authorities urge the making of adjustments for their benefit in such manner as to be detrimental to the interests of other subdivisions of the same county, it would be my opinion that this would place such county prosecutor in a position of dual responsibility, which would be against public policy. The mere possibility of such conflict of responsibilities is sufficient to render the offices incompatible without there being an actual conflict existing.

In view of the foregoing and in direct answer to your questions it is my opinion that a prosecuting attorney may not employ legal counsel to aid or assist him in the preparation of proceedings leading up to the issuance and sale of bonds for local school districts from funds appropri-

ated to him under Section 3004, General Code. It is further my opinion that local school districts may not employ a prosecuting attorney of the county in which they are located and compensate him from the general funds for the preparation of proceedings leading up to the issuance and sale of bonds.

Respectfully,

HERBERT S. DUFFY,
Attorney General.