

2662.

INCOMPATIBLE OFFICES—MEMBER VILLAGE BOARD OF
EDUCATION—MEMBER BOARD OF TRUSTEES OF
PUBLIC AFFAIRS FOR VILLAGE.

SYLLABUS:

The office of member of the village board of education is incompatible with that of member of the board of trustees of public affairs for the village, and one person cannot hold these offices at the same time.

COLUMBUS, OHIO, July 5, 1938.

HON. GEORGE E. GERHARDT, *Prosecuting Attorney, Circleville, Ohio.*

DEAR SIR: This will acknowledge the receipt of your recent communication requesting an opinion from this office. Your letter reads as follows:

“Can a member of the Board of Trustees of Public Affairs, which is an elective office, be also a member of the Board of Education of a village school district?

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This question has arisen in this way that a member of the Board of Trustees of Public Affairs Village of Ashville has been elected in the Village of Ashville and he has also been elected to the office of the Board of Education of the Ashville Village School District.”

Section 4357 of the General Code provides for the establishment of a Board of Trustees of Public Affairs. Section 4709, General Code, provides for the election and membership of a Village Board of Education. The sections dealing with the offices in question do not contain express prohibitions as to the holding of other offices by a member of the board of education or by a member of the board of trustees of public affairs. This being true there is nothing to prevent one person from serving in both capacities unless the offices in question are incompatible at common law.

The ruling of the Gebert Case (12 C. C. (N. S.) 274) has long been accepted as authority for Ohio law upon the subject of incompatibility of offices. This case held briefly that offices are considered incompatible at common law when one is subordinate to or in any way a check upon the other, or where it is physically impossible for one person to discharge the duties of both.

A further interpretation and explanation of this rule may be found in *McQuillin on Municipal Corporations*, Vol. II, Section 469.

“Incompatibility is not simply a physical impossibility to discharge the duties of both offices, as where one is subordinate to the other, or where a contrariety and antagonism would result in the attempt by one person to discharge faithfully and impartially the duties of both. Two offices are said to be incompatible when the holder cannot in every instance discharge the duties of each. Incompatibility arises, therefore, from the nature of the duties of the offices, when there is an inconsistency in the functions of the two, where the functions of the two are inherently inconsistent or repugnant, as where antagonism would result in the attempt by one person to discharge the duties of both offices, or where the nature and duties of the two offices are such as to render it improper from considerations of public policy for one person to retain both. The true test is whether the two offices are incompatible in their natures, in the rights, duties or obligations connected with or flowing from them.”

The conditions above set forth have been consistently followed in Ohio.

Duties and powers of members of the board of education are set forth in Sections 4745 to 4762-1, General Code, inclusive. Boards of education are expressly given, among other powers, the power to sue, to contract and to hold property for the use and benefit of their districts. (See Sec. 4749, G. C.) Village boards of trustees of public affairs are likewise given definite powers by Section 4361, General Code. These powers are set forth as follows:

“The board of trustees of public affairs, shall manage, conduct and control the water works, electric light plants, artificial or natural gas plants, or other similar public utilities, furnish supplies of water, electricity or gas, collect all water, electrical and gas rents, and appoint necessary officers, employees and agents . . . For the purpose of paying the expenses of conducting and managing such water works, plants and utilities . . . such trustees may assess a water, light, power, gas or utility rent, of sufficient amount in such manner as they deem most equitable, upon all tenements and premises supplied with water, light, power or gas . . . The board of trustees of public affairs shall have the

same powers and perform the same duties as are possessed by, and are incumbent upon, the director of public service as provided in Sections 3955, 3959, 3960, 3961, 3964, 3965, 3974, 3981, 4328, 4329, 4330, 4331, 4332, 4333 and 4334 of the General Code, and all powers and duties relating to water works in any of these sections shall extend to and include electric light, power and gas plants and such other similar public utilities, and such boards shall have such other duties as may be prescribed by law or ordinance not inconsistent herewith."

Under the sections referred to above added power is given to members of boards of public affairs. Particularly important to the question under consideration is the authority included under Sections 3955 and 3961, General Code. Section 3955, General Code, confers upon the board of public affairs general power to take land for construction and extension for water works, a reservoir and pipes, and also to arrange for water rights and easements connected with the use of water. Section 3961, General Code, further permits the board of public affairs to make contracts for the building of machinery for water works, and all other purposes necessary for the full and efficient management and construction of water works.

Inasmuch as boards of education are quite frequently left property and have at times the management and control of properties, it is conceivable that there may be instances where contracts with regard to property, water rights or easements may be before the board of education and the board of public affairs. In such a case one person could not without some conflict serve as a member of the board of education and the board of public affairs.

Moreover, since the recent holding in *Board of Education of Willard School District vs. The Village of Willard* (130 O. S., 311) boards of education have been required to pay for water consumed by them. (O. A. G., 1936, No. 5147; O. A. G., 1936, No. 5655) I am advised that when a village owns and operates its own water works, there is no general prevailing rate for water used, and it is the custom for the village board of trustees of public affairs to adopt a schedule which sets certain rates which may differ for various groups of water users, such as home, factory and public institutions.

In view of this fact I do not believe that in reaching agreements as to water rates for the schools a person who served as member of the board of education could freely represent the interests of the board of education if he were also charged with the interests of the board of public affairs. Should these situations arise, there would be

a very definite check or subordination of interest in regard to the offices in question.

It is therefore my opinion that the office of member of the village board of education is incompatible with that of member of the board of trustees of public affairs for the village and that one person cannot hold these offices at the same time.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

2662A.

APPROVAL—BONDS, CITY OF CLEVELAND, CUYAHOGA COUNTY, OHIO, \$15,000.00, PART OF ISSUE DATED AUGUST 1, 1930.

COLUMBUS, OHIO, June 30, 1938.

*Retirement Board, State Public School Employes Retirement System,
Columbus, Ohio.*

GENTLEMEN:

RE: Bonds of City of Cleveland, Cuyahoga County,
Ohio, \$15,000.00.

The above purchase of bonds appears to be part of an issue of bonds of the above city dated August 1, 1930. The transcript relative to this issue was approved by this office in an opinion rendered to the Teachers Retirement System under date of September 19, 1934, being Opinion No. 3228.

It is accordingly my opinion that these bonds constitute valid and legal obligations of said city.

Respectfully,

HERBERT S. DUFFY,
Attorney General.