Saunders, 120 U. S., 126, *Woodwell* vs. *U. S.*, 214 U. S. 82. With reference to this subject it is said in Ruling Case Law, Vol. 22, page 534:

> "Where new duties are imposed on a public officer which are not within the scope of his office, and extra compensation is provided therefor, such increase in compensation is not within a constitutional provision prohibiting any increase in the compensation of any officer during his term of office." See note 18, Annot. Cases, 404.

Fifth, a recreation board is empowered to contract for the use of an automobile to be used in furtherance of the activities of the board or for the use of any of its employes. Should the recreation director employed by the board use his own automobile in the performance of his duties, a proper allowance may be made for the maintenance of the same.

Respectfully,
GILBERT BETTMAN.
Attorney General.

1328.

APPROVAL, NOTES OF WESTERVILLE VILLAGE SCHOOL DISTRICT, FRANKLIN COUNTY—$125,000.00.

COLUMBUS, OHIO, December 24, 1929.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

1329.

ELECTION—CITY CIVIL SERVICE COMMISSIONER ELECTED TO COUNCIL—ELIGIBLE FOR LATTER OFFICE IF HE RESIGNS FROM CIVIL SERVICE PRIOR TO BEGINNING OF TERM.

SYLLABUS:

1. *The inhibition against a councilman holding other public office or employment, found in Section 4207 of the General Code, relates to his term as councilman and not to some office or employment he held at the time of his election which was relinquished before he took office as councilman.*

2. *Where a person serving as member of a municipal civil service commission at the time of his election as councilman, resigns such position prior to the beginning of his term as councilman, he becomes eligible to take his seat in council.*

COLUMBUS, OHIO, December 24, 1929.

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

GENTLEMEN:—I am in receipt of your request for my opinion, which reads as follows:

> "At the November 1929 election, the electors of the city of _____ elected a person as councilman at large who, at the time of such election and at the present time, is a member of the City Civil Service Commission.

The headnotes in the case of *State ex rel.* vs. *Gard*, 8 C. C. (N), 599, affirmed, 75 O. S., 606, read:

'1. The inhibition against the holding of other public office or employment found in Section 120 of the municipal code (Revised Statutes, Section 1536-613), relating to the qualifications of councilmen, is not limited to other offices or employment by the municipality, but extends to all public office and employment.

2. Where one is elected to council who is already serving in the office of school examiner and is further employed as superintendent of a public school, the election is a nullity by reason of his ineligibility, and council has the right to so determine without notice to the one so affected or the taking of any proceedings against him, and may proceed to fill the vacancy forthwith.'

In view of the above decision, is such party eligible for membership in the council for the term beginning on January 1, 1930, if he resigns from the office of member of the City Civil Service Commission prior to such date?"

Sections of the General Code pertinent to your inquiry, are:

Section 4207. "Councilmen at large shall have resided in their respective cities, and councilmen from wards shall have resided in their respective wards, for at least one year next preceding their election. Each member of council shall be an elector of the city, shall not hold any other public office or employment, except that of notary public or member of the state militia, and shall not be interested in any contract with the city. A member who ceases to possess any of the qualifications herein required, or removes from his ward, if elected from a ward, or from the city, if elected from the city at large, shall forthwith forfeit his office."

Section 4218. "Each member of council shall have resided in the village one year next preceding his election, and shall be an elector thereof. No member of the council shall hold any other public office or employment, except that of notary public or member of the state militia, or be interested in any contract with the village. Any member who ceases to possess any of the qualifications herein required or removes from the village shall forfeit his office."

Ohio Supreme Court decisions interpreting Section 4207, General Code, formerly Section 1679, Revised Statutes, deal with the eligibility of a member of council to accept another office while a member of council. Thus, in *State* vs. *Craig*, 69 O. S. 236, it was held that the appointment of a member of council to the municipal board of health was a nullity for the reason that the appointee was by statute ineligible to such office.

In the case of *State, ex rel* vs. *Gard*, 19 O. C. D. 426, which was affirmed by the Ohio Supreme Court without opinion in 75 O. S. 606, the headnotes of which you cite in your inquiry, S. was serving as a member of the county board of school examiners and as a principal in a city school both at the time of election and at the time he took his seat in council. The court held that "at no time between his election and the hearing of this case did S. have the qualifications of a member of council provided and required by Section 120 of the municipal code", thus intimating that had S. resigned as a member of the county board of school examiners after his term as councilman began, he would have been eligible to take his seat in council.

McQuillin, in his work on Municipal Corporations, Second Edition, Vol. II, Sec. 468, said:

"These prohibitory laws are generally construed to mean that one person

shall not hold two offices at the same time. The prohibition, it has been said, relates not to the situation on election day but on the day he qualifies to perform the duties of the office."

In *People ex rel Miller* vs. *Mynderse*, 126 N. Y. S. 198, affirmed in 201 N. Y. 524, it was held:

"Section 42 of the village law (Consol. Laws, c 94) providing that a person shall not hold two village offices at the same time except the office of collector and police constable, etc., relates in terms and spirit to the situation of the officer, not on election day, but on the day when he enters into the performance of his duties, so that when the office of president began at noon on a certain day, and a trustee of the village, who had been elected to the presidency, resigned his trusteeship prior to noon, he became entitled to the presidency; Section 53 of the village law providing that 'the person eligible and receiving the highest number of votes for an office shall be elected thereto', not changing the situation, as it relates to persons who have the capacity to be chosen."

In *Commonwealth* vs. *Pyle*, 18 Pa. 519, this rule was laid down:

"Where one would be ineligible to an office on account of a disqualification, he must get rid of the disqualification before he is appointed or elected; but, where the prohibition extends only to the enjoyment or exercise of an office, it is sufficient that the person appointed be qualified before he is sworn."

It is not believed that the decision in the Gard case, supra, is contra to the weight of authority to the effect that eligibility at the time of taking office is sufficient, unless the statutory requirements as to eligibility relate to the time of election.

In Ruling Case Law, Section 238, it is stated:

"The rule that acceptance of one office vacates another office previously held by the person accepting the same when the two offices are incompatible applies to municipal offices. In such case the first office becomes vacant ipso facto upon the acceptance of the second, and no judicial proceeding is necessary to end the tenure of the incumbent."

It is further stated in Section 213 of the same volume:

"It is generally held that eligibility at the time of taking office is sufficient notwithstanding that the officer was ineligible at the time of his election or appointment. * * * In some jurisdictions, however, the constitutional or statutory requirements for eligibility are held to relate to the time of election and not to the time of taking office and the statutes sometimes expressly provide that the person chosen shall have certain qualifications at the time of his election or appointment."

Thus, in *Bradfield* vs. *Avery*, 16 Idaho, 769, it was stated in the syllabus:

"The provisions of Section 585, Rev. Codes, 'That no person shall be eligible to the office of county superintendent of public instruction except a first grade practical teacher of not less than two years experience in Idaho, one of which must have been while holding a valid first grade certificate issued by a county superintendent', relates to the time the person so elected is

inducted into office, and although the person so elected does not possess such qualifications at the time of election, still if the disqualification is removed and the person elected become qualified at the time he is inducted into office, such person is eligible to the office of county superintendent."

In *Smith* vs. *Moore*, 90 Ind. 294, it was held, in interpreting the words "eligible to any office", as contained in Section 16, Article 7, of the State Constitution, that the ineligibility or disqualification therein intended must exist at the time the term of office begins, and that the right of the claimant thereto was not affected by the fact that at the time of his election he was ineligible under the provisions of said section.

In the case of *The King* vs. *Parry*, 14 East's Reports, 548, the court held that the defendant, who was elected to the office of common councilman of a certain town, was disqualified under the corporation act, because he had not within one year preceding his election, taken the sacrament of the Lord's Supper according to the rites of the Church of England. It was further held in that case, that after his election, he might be freed of his disability and qualify himself for the office to which he had been elected, and thereby protect his title to the same by taking the scarament within the time allowed by the indemity act, which, among other things, granted immunity for the omission to take the Lord's Supper within the prescribed time.

It was held by the Supreme Court of Wisconsin that a candidate for public office, who at the time of his election was an alien, therefore not an elector, under the laws of that State, and consequently ineligible to the office to which he was elected, might lawfully hold and exercise the duties thereof if he removed his disability by naturalization before the beginning of his term of office (*State ex rel.* vs. *Smith*, 14 Wis., 497).

In *Privett* vs. *Bickford*, 26 Kansas, 52, the court said:

> "There is a marked distinction between a person who is ineligible or incapable of being elected and one who may hold the office. If a person may hold the office, he may be elected while he is under the disqualification, and, if he becomes qualified after the election and before the holding, it is sufficient."

In *Hoy* vs. *State*, 81 N. E., 509, the Supreme Court of Indiana held that where a statute provides: "No officer of any corporation * * * having any contract with a city shall be eligible to any office in the city", the disqualification, in order to be effective, must exist at the time the term of office begins, and that the right of a claimant thereto was not affected by the fact that at the time of his election he was ineligible under the statute if the disqualification was removed before the beginning of the term.

In the case of *Spear* vs. *Robinson*, 29 Maine, 531, it was held that "when a statute requires that certain town officers shall be freeholders, the choice of a person who is not a freeholder is merely void." It was pointed out in the opinion, however, that one Hoffses, who had been elected fish warden "was not, when chosen, and has not since been a freeholder."

In *State ex rel.* vs. *Newman*, 91 Mo., 445, it was held that where the law declares that no person shall be mayor unless he be an inhabitant of the city for one year next before his *election*, the election of a person who did not possess such qualifications gave him no right to hold the office.

Under the circumstances in the present case, the voters had the right to believe or assume that the candidate for council, by offering himself for the office in question and by accepting the place as candidate therefor on the official ballot, intended, if elected, to carry into effect the will of the majority of the voters by accepting the office, and that he would resign the office as member of the civil service commission before the commencement of his term of office as councilman, and thereby free himself of his disqualification.

Specifically answering your question, therefore, I am of the opinion that a person serving as member of a municipal civil service commission at the time of his election as councilman at large, may assume his seat in council if he resigns from the civil service commission before his term as councilman begins.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1330.

OFFICES INCOMPATIBLE—DEPUTY COUNTY AUDITOR AND MEMBER OF BOARD OF DEPUTY STATE SUPERVISORS OF ELECTIONS.

SYLLABUS:

The offices of deputy county auditor and member of the board of deputy state supervisors of elections are incompatible.

COLUMBUS, OHIO, December 24, 1929.

HON. JAY R. POLLOCK, *Prosecuting Attorney, Defiance, Ohio.*

DEAR SIR:—This acknowledges receipt of your request for my opinion which reads:

> "At the request of Walter N. Dean one of the State Examiners who is now examining the books and records of the office of Defiance County, I wish to submit for your opinion the following proposition.
>
> Mr. X. is a member of the County Board of Elections. He also holds the position of Deputy County Auditor.
>
> QUESTION: Are these two offices incompatible?"

Section 2563, General Code, providing for the appointment of deputy county auditors, reads:

> "The county auditor may appoint one or more deputies to aid him in the performance of his duties. The auditor and his sureties shall be liable for the acts and conduct of such deputy or deputies. When a county auditor appoints a deputy, he shall make a record thereof in his office and file a certificate thereof with the county treasurer, who shall record and preserve it. When a county auditor removes a deputy, he shall record such removal in his office and file a certificate thereof with the county treasurer, who shall record and preserve it."

Section 9, General Code, reads, in part:

> "A deputy, when duly qualified, may perform all and singular the duties of his principal."

In 1920 (Opinions of the Attorney General for 1920, Vol. II, page 1280), the then Attorney General held:

> "The office of county auditor is incompatible with any and all offices or employments which receive or pay out funds of the county, or where such