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MAYOR OF CITY—OFFICE NOT PER SE INCOMPATIBLE WITH POSITION, DEPUTY CLERK, COURT OF COMMON PLEAS—PROVISO, DUTIES DO NOT INTERFERE WITH PROPER EXECUTION OF EACH OFFICE—SECTION 733.70 RC.

SYLLABUS:

The office of mayor of a city is not per se incompatible with the position of deputy clerk of the court of common pleas, but may become so if the duties of each are so numerous or arduous as to render unlikely a proper execution of both.

Columbus, Ohio, January 6, 1956

Hon. William H. Irwin, Prosecuting Attorney
Belmont County, St. Clairsville, Ohio

Dear Sir:

I have before me your request for my opinion as to whether the offices of mayor of a city and deputy clerk of the court of common pleas are

compatible. The dual holding of the offices you specify is not prohibited by constitutional or statutory provisions. If any incompatibility exists, therefore, it must be established by the application of common law principles.

The test most frequently applied by both this office and the courts is that formulated in *State ex rel., Attorney General v. Gebert*, 12 C.C. (N.S.) 274, 275, wherein it was stated that:

“Offices are considered incompatible when one is subordinate to, or in any way a check upon, the other, or when it is physically impossible for one person to discharge the duties of both.”

The performance of the duties of the deputy clerk of the court of common pleas are ministerial in nature. The mayor of a city has no direction or control over such deputy so as to render that position subordinate to his office.

Despite the fact that the offices in question concern separate political subdivisions, the question might still arise whether the deputy may act as a check upon the mayor under Section 733.70, Revised Code, which provides in pertinent part:

“* * * The mayors bond shall be approved by the legislative authority, or, if it is not legally organized, by the clerk of the court of common pleas of the county in which the municipal corporation or the larger part thereof is situated.”

Section 3.06, Revised Code, states in part:

“A deputy, when duly qualified, may perform any duties of his principal.* * *”

Thus it would appear that a person holding the office of mayor and the position of deputy clerk of courts might, in some remote instances, be in position to approve his own bond, and thus serve as a check upon himself.

The possibility that a deputy may approve a bond, however, is negated in *Davies v. State*, 11 C.C. (N.S.) 209, at page 212, where the court said:

“* * * we are quite clear in our view that the approval of an official bond is an act requiring such judgment of the officer attempting to exercise such approval that it can not be done by a merely ministerial officer, and we do not think that a deputy auditor is clothed with the power attempted here to be exercised.”

The question still remains if it is physically impossible for one person to discharge the duties of both offices. This problem is discussed in Opinion No. 3869, Opinions of the Attorney General for 1941, page 445, wherein it is said at pages 447, 448:

“Returning to the question of physical impossibility, there is the probability that if the clerk of the county engineer is hired for full time services it would be physically impossible for the same person to transact the duties of the office of village mayor. In view of what has been said, however, the test of physical impossibility is to be considered as one of fact rather than one of law to *be determined largely by the officers’ own sense of propriety tempered by a proper regard for the interests of the public.*”
(Emphasis added.)

In the present situation in which the mayor of a city instead of a village is involved, the duties might well be so numerous or arduous that it would be unlikely one person could properly execute both positions. This would be especially true if the deputy clerk of the court of common pleas were required to render full time services.

Accordingly it is my opinion that the office of mayor of a city is not per se incompatible with the position of deputy clerk of the court of common pleas, but may become so if the duties of each are so numerous or arduous as to render unlikely a proper execution of both.

Respectfully,
C. WILLIAM O’NEILL
Attorney General