

2241

OFFICES COMPATIBLE—DIRECTOR OF DEPARTMENT OF NATURAL RESOURCES—MAY ALSO SERVE AS DIRECTOR OF CONSERVANCY DISTRICT—TWO OFFICES NOT INCOMPATIBLE.

SYLLABUS:

The Director of the Department of Natural Resources may during the time he holds that office also serve as the Director of a Conservancy District, and the two offices are not incompatible.

Columbus, Ohio, August 31, 1950

Hon. A. W. Marion, Director, Department of Natural Resources,
Columbus, Ohio.

Dear Sir:

Your request for my opinion reads as follows:

“I would appreciate receiving an Opinion as to the legality of my serving, during such time as I am Director of the Department of Natural Resources, in a Conservancy District as its Director. If there are legal obstacles which would necessarily prevent my acceptance to serve in the capacity of the Director of a Conservancy District, the information would be very helpful to me at the earliest possible date.”

Section 154-3 of the General Code, relative to the creation of the office of Director of the Department of Natural Resources, reads in part, as follows:

“The following administrative departments are created:

* * * “The department of natural resources, which shall be administered by the director of natural resources, hereby created. The director shall be appointed by the governor with the approval

of the natural resources commission and with the advice and consent of the senate, for a term of six (6) years. The governor may remove the director for inefficiency, neglect of duty, malfeasance, misfeasance, or non-feasance in office, giving to the director a copy of the charges against him and affording him an opportunity to be publicly heard in person or by counsel in his own defense upon not less than 10 days notice. If the director shall be removed, the governor shall file in the office of the secretary of state a complete statement of all charges made against such director and the governor's findings thereon, together with a complete report of the proceedings, and the governor's decision thereon shall be final * * *."

Section 6828-8 of the General Code, relative to the office of director of a conservancy district, reads as follows :

"Within thirty days after entering the decree incorporating said district, the court shall appoint three persons, at least two of whom shall be resident freeholders within the district, as a board of directors of the district—one for a term of three years, one for a term of five years and one for a term of seven years. At the expiration of their terms of office appointments shall be made for terms of five years. The court shall fill any vacancy which may occur on the said board for the unexpired term."

Your inquiry raises the question as to the compatibility of these two positions, i. e. whether the Director of the Department of Natural Resources may during his term of office serve also as a Director of a Conservancy District.

There is no general constitutional or statutory provision in Ohio in regard to the incompatibility of offices within the State of Ohio. In 32 O. Jur., p. 906, it is stated :

"There are no general constitutional or statutory provisions in regard to incompatibility of public officers applying to all offices within the state of Ohio. The usual constitutional and statutory provisions relate rather to ineligibility than to incompatibility. They merely declare that no person shall hold two named offices. * * *"

As the statutes creating the office of Director of Department of Natural Resources and Director of a Conservancy District (Sections 154-3 and 6828-8 of the General Code) do not contain express provisions which would disqualify the same person from holding both positions, it is necessary to refer to the two offices in order to ascertain if they are inherently compatible or incompatible.

The common law rule of incompatibility of offices is applicable in Ohio. It is stated in 32 O. Jur., p. 907, as follows:

“It was early settled at common law that it was not unlawful per se for a man to hold two offices, but if the offices were incompatible then it was equally well settled that one person could not legally hold both of them at the same time. This rule has never been questioned, and its correctness and propriety are so well established as to be assumed without discussion in practically every case in which the matter of common-law incompatibility arises. * * *”

While the courts of Ohio have failed to formulate a general definition of the term “incompatibility”, they have nevertheless established certain tests to aid them in the determination of when offices are compatible or incompatible. The most frequently used test is that of one office being subordinate to another office. In *State, ex rel. v. Gebert*, 12 O. C. C. (N.S.) 274, the rule is stated as follows:

“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.”

Referring again to the General Code, it will be noted that the Director of the Department of Natural Resources is the head of one of the administrative departments of the State of Ohio, that he is a member of the Governor’s cabinet and is appointed by the Governor, with the approval of the Natural Resources Commission and with the advice and consent of the Senate (Section 154-3 supra), while the Director of a conservancy district, an ad hoc corporate unit, created by court declaration, is appointed by the court. It is thus apparent that while these two offices have similar aims, they are in no way related to each other. Each office is a separate entity operating in its own established field. As neither office is subordinate to the other, the dual office holding is lawful and proper.

Another test of compatibility of offices is whether the one office is subject to the supervision or control of another office. The rule is stated in 42 Am. Jur., p. 937, as follows:

“One of the most important tests as to whether offices are incompatible is found in the principle that the incompatibility is recognized whenever one is subordinate to the other in some of its important and principal duties, and subject in some degree to its revisory power. Thus, two offices are incompatible where the

incumbent of the one has the power of appointment to the other office or the power to remove its incumbent, even though the contingency on which the power may be exercised is remote.”

A review of the applicable sections of the General Code reveals no area where the one office is subject to supervision or control by the other.

Another frequent test of incompatibility of offices is that of the officer who presents his personal account for audit being the same officer who passes upon the audit. Thus, in *Mason v. State ex rel McCoy*, 58 O. S. 30, it is said at page 54:

“A person may not hold incompatible offices, as an officer who presents his personal account for audit and officer who passes upon it, * * *”

Here again, a review of the applicable sections of the General Code, fails to reveal any area wherein either office here under consideration accounts to the other office, either directly or indirectly.

While it is true that some of the purposes for which these offices were created are similar in nature, the fact that they are carried out on different levels, tends to make them compatible.

After a careful review of the statutes relating to these two offices, it is my opinion that they are not incompatible and that the Director of the Department of Natural Resources may also serve as Director of a Conservancy District. The fact that the overall purpose of these two offices is similar does not affect their compatibility. It is also stated in 42 Am. Jur. p. 936:

“There is no incompatibility between offices in which the duties are sometimes the same, and the manner of discharging them substantially the same. Nor are offices inconsistent where the duties performed and the experience gained in the one would enable the incumbent the more intelligently and effectually to do the duties of the other.”

It is likewise settled in Ohio that the test of incompatibility of offices is not that it is physically impossible for the officer to perform the duties of one office because he is at the same time elsewhere performing the duties of the other office. In 32 O. Jur. p. 908, it is held:

“It was early held that the test of incompatibility was not that it was physically impossible for the officer to perform the

duties of one office because he was at that time elsewhere performing the duties of the other, but the distinction was in an inconsistency in the functions of the office.”

It is therefore my opinion that the Director of the Department of Natural Resources may during the time he holds that office also serve as the Director of a Conservancy District, and that the two offices are not incompatible.

Respectfully,

HERBERT S. DUFFY,
Attorney General.