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HEALTH, BOARD OF—GENERAL HEALTH DISTRICT—MEMBER—THE OFFICE AND MEMBER OF COUNTY BOARD OF ELECTIONS NOT INCOMPATIBLE—SUBMISSION TO ELECTORS QUESTION OF TAX LEVY TO RAISE FUNDS TO MEET EXPENSES OF GENERAL HEALTH DISTRICT—SECTIONS 1261-18, 1261-40a, 4785-8 G. C.

SYLLABUS:

The offices of member of a board of health of a general health district, appointed under the provisions of Section 1261-18, General Code, and member of a county board of elections, appointed under the provisions of Section 4785-8, General Code, are not made incompatible merely by reason of the provision in Section 1261-40a, General Code, for the submission to the electors of a tax levy designed to raise funds to meet the expenses of such general health district.

Columbus, Ohio, August 12, 1952

Hon. Luther L. Liggett, Prosecuting Attorney
Union County, Marysville, Ohio

Dear Sir:

I have before me your request for my opinion, which reads as follows:

“The Board of Health of the Union County Health District has passed a resolution certifying that the amount necessary to meet the current expenses of said Health District will not be forthcoming to said Board because the amount of taxes to be

raised during the ensuing year within the ten mill limitation will be insufficient. Said resolution was passed and certified to the Board of County Commissioners of Union County, Ohio under the authority of Section 1261-40a of the General Code. The Board of County Commissioners undoubtedly will submit the question of levying a tax under this section to the electors of Union County at the November 4, 1952 general election. A member of the Board of Health is also a member of the Union County Board of Elections.

“My specific question is, in the above described situation is the office of a member of a county Board of Elections and member of the Board of Health of a county Health District incompatible.”

There are, of course, no constitutional or statutory provisions in Ohio relative to incompatibility of public offices generally. 32 Ohio Jurisprudence, 906, Section 46. Moreover, I find no express or implied provisions as to the incompatibility of the two offices in the instant case in any of the special statutes relating to them. In this situation, resort must be had to the common-law rule on the subject. This rule is stated in 32 Ohio Jurisprudence, 909, Section 48, as follows:

“* * * One of the most important tests as to whether offices are incompatible is found in the principle that incompatibility is recognized whenever one office is subordinate to the other in some of its important and principal duties, or is subject to supervision or control by the other—as an officer who presents his personal account for audit and at the same time is the officer who passes upon it,—or is in any way a check upon the other, or where contrariety and antagonism would result in an attempt by one person to discharge the duties of both.”

Further, in *State, ex rel. Attorney General v. Gebert*, 12 O.C.C. (N.S.) 274, it is held that “Offices are considered incompatible * * * when it is physically impossible for one person to discharge the duties of both.”

With these rules in mind, we may note certain of the statutory duties and functions of the two offices with which we are presently concerned.

Members of boards of elections are appointed under the provisions of Section 4785-8, General Code, which reads as follows:

“There shall be in each county of the state, a board of elections consisting of four qualified electors of the county, who shall be appointed by the secretary of state, as representatives of the

secretary of state, to serve for the term of four years and until their successors have been appointed and have qualified. On the first day of March in even numbered years the secretary of state shall appoint two of such board members, one of whom shall be from the political party which cast the highest number of votes in the state for the office of governor at the last preceding state election, and the other shall be from the political party which cast the next highest vote for governor at such election. All vacancies filled for unexpired terms and all appointments to new terms shall be made from the political party to which the vacating or outgoing member belonged, unless there is a third political party which cast a greater number of votes in the state at the last preceding state election for the office of governor than did the party to which the retiring member belonged, in which event the vacancy shall be filled from such third party."

Certain restrictive provisions relative to eligibility for membership on boards of elections are found in Section 4785-16, General Code. This section provides:

"No person shall serve as a member, clerk, deputy clerk, assistant clerk, or employee of the board of elections who is a candidate for an office to be filled at an election, except the office of delegate or alternate to a convention or a member of a party committee. No person who is a candidate for an office or position to be voted for by the electors of a precinct shall serve as a precinct election officer in said precinct."

The duties of boards of elections are set out in Section 4785-13, General Code, which reads in part as follows:

"The boards of elections within their respective jurisdictions by a majority vote shall exercise, in the manner herein provided, all powers granted to such boards in this act, and shall perform all the duties imposed by law which shall include the following:
* * * e. To make and issue such rules, regulations and instructions, not inconsistent with law, or the rules established by the chief election officer, as they may deem necessary for the guidance of election officers and voters.

* * * j. To investigate irregularities, non-performance of duties, or violations of laws by election officers and other persons; to administer oaths, issue subpoenas, summon witnesses, and compel the production of books, papers, records, and other evidence in connection with any such investigation; and to report the facts to the prosecuting attorney.

* * * l. To receive the returns of elections, canvass the returns, make abstracts thereof and transmit such abstracts to the proper authorities provided by law. * * *

District boards of health are provided for in Section 1261-17, General Code, which reads in part as follows:

“In each general health district, except in a district formed by the union of a general health district and a city health district, there shall be a district board of health consisting of five members to be appointed as hereinafter provided and as provided in section 4406 of the General Code. * * *”

Members of boards of health in general health districts are appointed under the provisions of Section 1261-18, General Code. This section provides in part:

“Within sixty days after this act shall take effect the mayor of each municipality not constituting a city health district and the chairman of the trustees of each township in a general health district shall meet at the county seat and shall organize by selecting a chairman and a secretary. Such organization shall be known as the district advisory council. The district advisory council shall proceed to select and appoint a district board of health as hereinbefore provided, having due regard to the equal representation of all parts of the district. Where the population of any municipality represented on such district advisory council exceeds one-fifth of the total population of the district, as determined by the last preceding federal census such municipality shall be entitled to one representative on the district board of health for each fifth of the population of the district represented by the population of such municipality. Of the members of the district board of health, one shall be a physician. * * *”

The duties of a board of health in the matter of submitting to the electors a special tax levy to meet the budget requirements of its district are prescribed in Sections 1261-40 and 1261-40a, General Code. These sections provide in part:

Section 1261-40, General Code:

“The board of health of a general health district shall, annually, on or before the first Monday of April, estimate in itemized form the amounts needed for the current expenses of such districts for the fiscal year beginning on the first day of January next ensuing. Such estimate shall be certified to the county auditor and by him submitted to the budget commissioners which may reduce any item or items in such estimate but may not increase any item or the aggregate of all items. The aggregate amount as fixed by the budget commissioners shall be apportioned by the county auditor among the townships and municipalities composing the health district on the basis of taxable valuations in

such townships and municipalities. The district board of health shall certify to the county auditor the amount due from the state for the next fiscal year as provided in section 1261-39 of the General Code, which shall be deducted from the total of such estimate before an apportionment is made. * * *

Section 1261-40a, General Code:

“If the aggregate amount necessary to meet the current expenses of the general health district for the fiscal year beginning on the first day of January next ensuing, as set by the budget commissioners pursuant to section 1261-40 of the General Code, will not be forthcoming to the board of health of such district out of the district health fund because the amount of taxes to be raised during the ensuing year within the ten mill limitation will be insufficient, the board of health of the general health district shall certify the fact of such insufficiency to the county commissioners of the county in which such general health district is located who are hereby ordained to be a special taxing authority for the purposes of this section only, and notwithstanding any other provisions of law to the contrary, the board of county commissioners of any county in which a general health district is located shall be the taxing authority for such special levy outside the ten mill limitation. The county commissioners shall thereupon, at any time prior to September fifteenth of the year preceding that in which the insufficiency will exist, by vote of two-thirds of all the members of said body, declare by resolution that the amount of taxes which may be raised within the ten mill limitation will be insufficient to provide an adequate amount for the necessary requirements of such health district within the county, and that it is necessary to levy a tax in excess of such limitation in order to provide the board with sufficient funds to meet its current expenses. * * *

The precise question presented by your inquiry is whether, in a case where a board of health has initiated action designed to bring a special tax levy to a vote of the electors under the provisions of Section 1261-40a, supra, there would exist such a “contrariety and antagonism,” or such a division of loyalty, between the offices of member of such board and of the board of elections that one person could not properly discharge the duties of both.

From an examination of the provisions of Section 1261-40a, supra, it will be observed that the board of county commissioners is the taxing authority for the special levy for which provision is therein made, and it is this board, rather than the board of health, which is vested with the

authority to declare the necessity of the additional levy being put to a vote of the electors. Moreover, by referring to the quoted provisions of Section 1261-40, *supra*, we may observe that although a board of health may present a budget request in such amounts as it may think proper, final authority to fix the aggregate amount needed by such board for its current expenses is lodged in the county budget commission.

Despite these checks on the discretion of a board of health in the matter of bringing to a vote a special tax levy designed to raise funds for the operation of such board, it must be conceded that a member of such board would very likely, as to such election, find himself in a position of partisanship with reference to the issue thus presented to the electors. Is this circumstance such as to disqualify the individual concerned from the proper performance of the duties devolving on a member of a board of elections?

In the consideration of this question, regard must be had to the essential nature of our system by which elections are conducted and supervised. By reference to the statutory provisions already noted herein for the appointment of members of election boards, it is readily apparent that *all* of such members are representatives of one or the other of two major political parties. All of them are, therefore, in positions of partisanship with respect to the election of the candidates sponsored by the party which each represents. To a lesser, and perhaps a more mixed extent, the same would be true with respect to the "questions and issues" which from time to time are submitted to the electorate. Here it becomes evident that the General Assembly has frankly rejected any notion of attempting to provide non-partisan, unprejudiced or neutral membership for such boards, and has provided instead that the partisanship on such boards should be equally divided between the major parties. Purely as a political matter, it may be doubted whether any attempt to provide for membership on such boards on a non-partisan basis could be successful in a society in which political interest is as widespread as it is in our own. In any event, it is clear that under our present statutes, partisanship on the part of election board members is accepted as an essential feature of the state election machinery. This being the case, I am unable to see that a member of a board of health, merely by reason of his support of or opposition to a tax levy submitted to a vote, under the provisions of Section 1261-40a, General

Code, would thereby be placed in such a position of contrariety and antagonism, or involved in such a division of loyalty, as would make his office incompatible with that of member of a county board of elections.

Respectfully,

C. WILLIAM O'NEILL

Attorney General