

Note from the Attorney General's Office:

1949 Op. Att'y Gen. No. 49-924 was overruled by 1958 Op. Att'y Gen. No. 58-1962.

924

COMPATIBLE OFFICE—CLERK, COUNTY BOARD OF ELECTIONS AND DEPUTY COUNTY TREASURER—MAY LEGALLY BE HELD BY ONE AND SAME PERSON—PROVISO, PHYSICALLY POSSIBLE AND PERSON NOT A CANDIDATE FOR OFFICE TO BE FILLED AT AN ELECTION.

SYLLABUS:

The office of clerk of a county board of elections and the position of deputy county treasurer are compatible and may legally be held by one and the same person providing it is physically possible and he is not a candidate for an office to be filled at an election.

Columbus, Ohio, August 29, 1949

Hon. Glen W. Shellhaas, Prosecuting Attorney
Logan County, Bellefontaine, Ohio

Dear Sir:

Your request for my opinion is as follows:

“The Clerk of the Logan County Board of Elections is also a deputy in the office of the Treasurer of Logan County. Your opinion is requested as to whether such positions are compatible.

“A ruling of the Attorney General under date of December 31, 1920, held that the office of county auditor was incompatible with the office of clerk of an election board. However, the reasoning in that opinion does not in my opinion apply to the case of a deputy in the County Treasurer’s office.”

The question of compatibility of offices has been the subject of numerous opinions of this office. There is no express statutory or constitutional prohibition against one person holding the two offices in question, except Section 4785-16, General Code, which reads as follows:

“No person shall serve as a member, clerk, deputy clerk, assistant clerk, or employe 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.”

The person concerned, not being a candidate for an elective office, this section does not apply to him.

An examination of court decisions of the various states discloses that the courts, when it comes to stating what constitutes incompatibility, are prone to avoid the formulation of a general definition and content themselves with discussions of specific cases and particular facts which have been looked upon as creating incompatibility. They have laid down certain rules and regulations for determining the matter, but it is difficult to find one sufficiently clear to be decisive in every case. See generally, 2 Annotated Cases, 380 et seq. See also 42 Am. Jur., Public Offices, Sec. 70 et seq. One of the rules laid down by a group of cases is that offices are generally considered incompatible when the duties and functions of each are inherently inconsistent and repugnant, so that because of the contrariety and antagonism which would result from the attempt of one

person to discharge faithfully, impartially and efficiently the duties of both offices considerations of public policy render it improper for one incumbent to retain both offices.

This leads to a discussion of the duties and functions of the two offices in question. The clerk of a county board of elections is appointed by the board. He must be a resident elector of the county and may not be a member of the board. See Section 4785-10, General Code.

Section 4785-14, General Code, outlines the duties of the clerk. That section reads as follows:

“The clerk shall keep a full and true record of the proceedings of the board and of all monies received and expended, file and preserve in its office all orders and records pertaining to the administration of registrations, primaries and elections; receive and have the custody of all books, papers and property belonging to the board; and shall perform such other duties in connection with his office and the proper conduct of elections as the board shall from time to time determine. He shall subscribe to an oath before entering upon the duties of his office to perform all the duties of the clerk to the best of his ability, and to preserve all records, documents, and other property pertaining to the conduct of elections placed in his custody. He may administer oaths to such persons as are required by law to file certificates or other papers with the board, to judges and clerks of elections, and to witnesses who may be called to testify before the board, and to voters filling out blanks at the board’s offices. The records of the board and papers and books filed in its office shall be public records and open to inspection under such reasonable regulations as shall be established by the board.”

Section 4785-16, General Code, set out above, contains the only express statutory prohibition placed upon a clerk. As stated above, it does not apply.

Section 2637, General Code, provides for the appointment of deputies in the office of the county treasurer. That section reads as follows:

“Each county treasurer may appoint one or more deputies, and he shall be liable and accountable for their proceedings and misconduct in office.”

In the case of *State ex rel. Essinger v. Holzemer et al.*, 54 O. App. 477, the first paragraph of the syllabus reads as follows:

“By reason of Sections 9 and 2637, General Code, a deputy county treasurer has authority to perform any duties the county

treasurer is required to perform, including receiving and crediting payment of taxes.”

Section 5625-19, General Code, provides for the creation of a county budget commission, composed of the county auditor, county treasurer and prosecuting attorney of the county.

On the basis of the Holzemer case and the Opinion of the Attorney General for 1934, number 3605, p. 1721, a deputy county treasurer may in the absence of the treasurer, serve as a member of the budget commission. The question is thus presented, that since the budget commission must approve the budget of the board of elections, is this fact sufficient to declare the offices of the clerk of the board of elections and deputy county treasurer incompatible? I am of the opinion that it is not.

In the first place, the office of clerk of a county board of elections is a ministerial one; he has no duties as to the preparation of a budget or to advocate the adoption of a budget. He will never have to present arguments relative to adjustment or revision of the budget.

In the second place, in an opinion of this office, 1938 O. A. G., pages 440, it was held that a prosecuting attorney who is a member of the budget commission and who is not a candidate for an office to be filled at an election, may be appointed and serve as clerk of the county board of elections, if it is physically possible for him to perform the duties of both offices. The two offices are not subordinate to or in any way a check upon the other, nor are the functions of a deputy county treasurer and those of clerk of the board of elections inconsistent.

It is therefore my opinion that the office of clerk of a county board of elections and the position of deputy county treasurer are compatible and may legally be held by one and the same person providing it is physically possible and he is not a candidate for an office to be filled at an election.

Respectfully,

HERBERT S. DUFFY,
Attorney General.