

1159.

APPROVAL—BONDS OF CITY OF TOLEDO, LUCAS COUNTY,
OHIO, \$10,000.00.

COLUMBUS, OHIO, September 14, 1937.

State Employes Retirement Board, Columbus, Ohio.

GENTLEMEN :

RE: Bonds of Toledo, Lucas County, Ohio,
\$10,000.00.

The above purchase of bonds appears to be part of an issue of bonds of the above city dated February 1, 1924. The transcript relative to this issue was approved by this office in an opinion rendered to the Teachers Retirement System under date of June 8, 1934, being Opinion No. 2799.

It is accordingly my opinion that these bonds constitute a valid and legal obligation of said city.

Respectfully,

HERBERT S. DUFFY,

Attorney General.

1160.

PROSECUTING ATTORNEY—DUTIES IN RELATION TO
BOARDS OF EDUCATION—DIRECTOR OF LAW, CITY AT-
TORNEY, EX REL. CITY SCHOOL DISTRICT—COUNSEL
FOR BOARD OF EDUCATION IN CIVIL ACTION—VIL-
LAGE SOLICITOR AND MEMBER OF BOARD OF EDUCA-
TION ARE INCOMPATIBLE, WHY?

SYLLABUS:

1. *There is no official in Ohio who serves in a capacity similar to that of prosecuting attorney and is required to perform the same duties and services for the county board of education and the boards of education of all the exempted village school districts, village school districts and rural school districts, as are required by the provisions of Section 4761, General Code, of the prosecuting attorney for such boards of education in the county.*

The director of law, city attorney, and any other officials who serves as the duly elected or appointed legal counsel and attorney for the city, are such officials as serve in a capacity similar to that of city solicitor, and by virtue of the provisions of Section 4762, General Code, such officials are the legal advisers and attorneys for the boards of education of city school districts, and must perform the same services for such boards of education as are required by the provisions of Section 4761, General Code, of the prosecuting attorney for other boards of education within the county.

2. *One who is employed as counsel to represent a county board of education or a board of education of an exempted village school district, or of a village school district, or of a rural school district in a civil action between any such board of education and another board of education in the county, or to represent such board of education in any other litigation or matter involving legal controversy, is not such an official as serves in a capacity similar to that of prosecuting attorney for the territory wherein the school district which he was employed to represent is situated.*

3. *A village solicitor is not an official acting in a similar capacity to that of city solicitor, and is therefore, by the express provisions of Section 4762, General Code, not prevented from being a member of the board of education of the village school district.*

However, the duties imposed upon a member of the board of education of a village school district are incompatible with those of a village solicitor, and both positions may not therefore be held by the same person.

COLUMBUS, OHIO, September 15, 1937.

HON. FRANK T. CULLITAN, *Prosecuting Attorney, Cuyahoga County, Cleveland, Ohio.*

DEAR SIR: This will acknowledge receipt of your recent communication which reads as follows:

"In one of the Villages in Cuyahoga County a question has arisen which involves an interpretation of Sections 4761 and 4762, of the General Code, Section 4762 reads in part, as follows:

'WHEN OTHER OFFICERS MAY ACT; RESTRICTIONS:

The duties prescribed by the preceding section shall devolve upon any official serving in a capacity similar to that of prosecuting attorney or city solicitor for the territory wherein a school district is situated, regardless of his official designation.

No prosecuting attorney, city solicitor or other official acting in a similar capacity shall be a member of the board of education.'

1. Under this Section 4762 G. C. what official serves in a capacity similar to that of Prosecuting Attorney or Solicitor for a territory wherein a school district is situated?

2. Does Section 4762 mean that the duties prescribed by the preceding section shall devolve upon some official only in the event that there is a civil action between two or more boards of education in the same county, as mentioned in Section 4761 G. C.?

3. Does 4762 G. C., prevent or prohibit a member of the board of education of a village acting as village solicitor?

I might add that in the particular situation involved, the school district and the village coincide as to territory."

Section 4761, General Code, reads as follows:

"Except in city school districts, the prosecuting attorney of the county shall be the legal adviser of all boards of education of the county in which he is serving. He shall prosecute all actions against a member or officer of a board of education for malfeasance or misfeasance in office, and he shall be the legal counsel of such boards or officers thereof, in all civil actions brought by or against them, and shall conduct such actions in his official capacity. When such civil action is between two or more boards of education in the same county, the prosecuting attorney shall not be required to act for either of them. In city school districts, the city solicitor shall be the legal adviser and attorney for the board of education thereof, and shall perform the same services for such board as herein required of the prosecuting attorney for other boards of education in the county."

It is not necessary to set forth the provisions of Section 4762, General Code, as the section is quoted verbatim in your communication.

The classification of school districts in Ohio is contained in Section 4679, General Code, which reads as follows:

"The school districts of the state shall be styled, respectively, city school districts, exempted village school districts, village school districts, rural school districts and county school districts."

It is to be observed from a reading of Section 4761, supra:—that the city solicitor is required to act as the “legal adviser” and attorney for the city school district; that, the prosecuting attorney is the “legal adviser of all boards of education of the county” except boards of education of city school districts, and it therefore follows that he is required to act as legal counsel for the county board of education and the boards of education of all exempted village school districts, village school districts and rural school districts within his particular county but that he is not required to act as such legal counsel in a civil action between two or more boards of education within the county which he serves as prosecuting attorney.

In an opinion rendered by a former Attorney General, in the Annual Report of the Attorney General for the year 1912, Vol. I, page 487, Section 4762, supra was discussed and interpreted. The then Attorney General held:

“The language refers to ‘county solicitors’, ‘directors of law’, and ‘corporation counsel’, (all of which offices existed at the time of the passage of Section 4762, General Code) and to such other similar offices as might be created in the future.”

On page 490, of said Annual Report, the reasoning by which such conclusion was reached, is set forth, as follows:

“It readily appears that, at that time, there was an official other than the prosecuting attorney who had similar duties and probably the general assembly was mindful of the fact that some future legislature might see fit to designate the officer by a still different name, whose duty would be similar to that of the prosecuting attorney.

So, too, it has happened in certain cities, under a semi-federal or other plan of government, instead of city solicitors the duties of that office developed upon what was known as ‘a director of law.’ In other municipalities the legal officer was known as ‘corporation counsel.’

And, thus, it is readily seen that it could not be foretold what new name might not be attached to the law department; and, seeking to have the duties pertaining to school boards to attach to that office, the legislature was wise in providing that any official serving in a capacity similar to that of prosecuting attorney or city solicitor, regardless of the official designation, was required to perform the duties theretofore referred to.”

Upon consideration of said opinion, I concur in the conclusion therein reached.

In Ohio at the present time, there is no provision for employment of "county solicitors" or any other official to serve in a capacity similar to that of prosecuting attorney. As stated hereinabove, the prosecuting attorney is required to act as legal counsel for the county board of education and the boards of education of all exempted village school districts, village school districts and rural school districts in the county, except in any civil action that might exist between any two or more boards of education, regardless of whether the boards of education involved in the civil action are of an exempted village school district, village school district, rural school district, or the board of education of the county school district.

There is no provision in the statutes wherein any particular person or official is designated, or any authority given to employ any particular person or official to represent the boards of education in any civil action between two or more boards of education. A board of education is empowered and authorized by the provisions of Section 2918, General Code, to employ counsel other than the prosecuting attorney, to represent it in litigation or matters involving legal controversy. This section reads in part, as follows:

"Nothing in the preceding two sections shall prevent a school board from employing counsel to represent it, but such counsel, when so employed, shall be paid by such school board from the school fund."

Section 2918, *supra*, was construed and interpreted by the Supreme Court of Ohio, in the case of *Knepper vs. French Co. Aud.*, 125 O. S., 613, as giving power and authority to a "board of education to employ counsel other than the prosecuting attorney to represent it in litigation or matters involving legal controversy."

It is therefore obvious that in a case where a civil action is between two or more boards of education in the county and the statute itself makes provision that the prosecuting attorney shall not be required to act for either of them, that under the provisions of Section 2918, *supra*, boards of education involved in such civil action have authority to employ counsel to represent them.

The question now presents itself: Is an attorney who is employed by a board of education under the authority of Section 2918, *supra*, to represent it in a civil action between it and another board of education in the county, or in any other litigation or matter involving legal controversy, such an official as serves in a capacity similar to that of a prosecuting attorney?

First, it is important to note the language of Section 2918, *supra*, which explicitly provides for employment of counsel, when it states, “employing counsel to represent it” and “such counsel, when so employed.” The very language of the statute negatives any other conclusion than that of a board of education employed counsel to represent it in a civil action between it and other boards of education in the county or in any other litigation or matter involving legal controversy, it would be a contractual relationship wherein counsel agreed to render professional services in a particular legal controversy and the board of education to pay for such services rendered. The fact that the board of education is a “political subdivision” does not result in every person who enters into a contract with the board becoming an “official.” There is no particular rule by which to determine whether or not one is an “official” of a subdivision. In the case of *State, ex rel., Attorney General vs. Jennings, et al.*, 57 O. S., 415, in defining who is an “official” it was said:

“(a) The incumbent must exercise certain independent public duties, a part of the sovereignty of the State.

(b) Such exercise by the incumbent must be in virtue of his election or appointment to the office.

(c) In the exercise of the duties so imposed, he cannot be subject to the direction and control of a superior officer.”

State vs. John H. Gibson, 1 O. N. P. (N. S.), 565, sets forth the following test:

“In order to constitute such person an officer within the constitution, he must perform some sovereign functions continuously and not transiently or incidentally. His position must have the attributes of tenure and duration peculiar to public office, and should be not merely an employment for a definite and particular purpose.”

State, ex rel. J. A. B. Srofe, a Taxpayer vs. William Vance et al., 18 O. N. P. (N. S.), 198, at page 202, sets up this test:

“Are his duties prescribed by law without any direction or control over them by the appointing power, and to be exercised in a governmental function in the interest of the public as contradistinguished from those created by contract and subject to control and direction of an employer?”

Applying the conclusions in the hereinabove cases as tests in determining who is and who is not an "official", we find:—that, a person employed as counsel to represent a board of education in a particular legal controversy is not required to give bond or take an oath of office; that, no term or fixed tenure of employment or salary is prescribed by statute; that by the provisions of Section 2918, General Code, a board of education is authorized to employ counsel, and counsel's employment and appointment is left entirely to the will and pleasure of the board of education, as are matters relating to salary, and the period of time for which he is employed; that the status of such counsel is that of an employe; that, it appears from the statute that the intention of the legislature was to give boards of education the right to employ counsel to represent them; that, said counsel's only authority to act is by reason of his contract of employment, oral or written, which he entered into with the particular board of education which he represents, and he is limited to act only in legal controversies in which he was employed to act; that, the relationship between counsel employed and the board of education employing him, is contractual, is in no sense an office, but is merely an employment, and such counsel cannot be said to be an "official."

Therefore, it can be said that if one who is employed as counsel to represent a county board of education or a board of education of an exempted village school district, or a village school district or a rural school district in a civil action between any such board of education and another board of education in the county, or in any other litigation or matter involving legal controversy, he is not such an "official" as serves in a capacity similar to that of prosecuting attorney for the territory wherein a school district is situated.

It therefore appears: that, at the present time there is no official in Ohio who serves in a capacity similar to that of prosecuting attorney and is required to perform the same duties and services for the county board of education and the boards of education of all the exempted village school districts, village school districts and rural school districts in the county as are required by the provisions of Section 4761, supra, of the prosecuting attorney for such boards of education in the county.

By the provisions of Section 4305, General Code, the city solicitor is the legal counsel and attorney for the city. In many cities that have adopted a charter and become home rule cities, the legal counsel and attorney for the city is designated by a title other than city solicitor. For instance, in Cleveland and Youngstown, such an official is designated as "director of law"; in Columbus as city attorney. The director of law and the city attorney serve in a capacity similar to that of city

solicitor. Therefore, it can be said: that, by the provisions of Section 4672, supra the duties prescribed by Section 4761, supra, for a city solicitor devolve upon the director of law and city attorney; that such director of law or city attorney is the legal adviser and attorney for the board of education of the city school district and must perform the same services for such board as, by the provisions of Section 4761, supra, are required of the prosecuting attorney for the other boards of education of the county.

I am unable to find where the duly elected or appointed legal counsel and attorney for any other city in Ohio is designated or referred to by any title other than city solicitor, director of law or city attorney. However, if such a case exists, regardless of by what title or appellation said official is designated or referred to, he is the legal counsel and attorney for the city, and is subject to perform all duties imposed by statute upon the city solicitor.

It therefore appears: that, the director of law, city attorney or any other official who serves as the duly elected or appointed legal counsel and attorney for the city, are such officials as serve in a capacity similar to that of city solicitor, and that by virtue of the provisions of Section 4762, General Code, such officials constitute the legal advisers and attorneys for the boards of education of the city school districts, and must perform the same services for such boards of education as are required by the provisions of Section 4761, General Code, of the prosecuting attorney for other boards of education in the county.

The discussion in answer to your first question contains the answer to your second question. I am of the opinion that your second question requires no further discussion, as from what has already been stated, it can be said: that, Section 4762, supra, does not "mean that the duties prescribed by the preceding section shall devolve upon some official only in the event there is a civil action between two or more boards of education in the same county;" that as hereinbefore stated, in a civil action between two or more boards of education in the same county, a county board of education and a board of education of an exempted village school district, or of a rural school district, or of a village school district are authorized by Section 2918, supra, to employ counsel to represent the board of education in such civil action; that, such "employed counsel" is not an "official"; that he is authorized to represent a board of education only in the legal controversy for which he was employed to act, and is not required or authorized to perform for the employing board of education the same services or duties as are required by the provisions of Section 4761, General Code, of the prosecuting attorney.

The third question presents the query: Does a village solicitor come within the prohibition of Section 4762, supra, that "no prosecuting

attorney, city solicitor or other official acting in a similar capacity shall be a member of the board of education." The answer to this question depends upon whether or not a village solicitor is *an official acting in a similar capacity to that of a city solicitor*.

The question was presented in an opinion rendered by a former Attorney General and appearing in the Annual Report of the Attorney General for 1912, Volume I, page 487, wherein the then Attorney General held:

"The village solicitor being appointed by contract, fulfilling only contractual duties, serving for an indefinite term and not being obligated to take oath or give bonds, is not an 'official' within the meaning of Section 4762, General Code, which stipulates that these duties shall fall upon 'any official serving in a similar capacity, to that of prosecuting attorney or city solicitor.'"

Upon consideration of that opinion, I concur in the conclusion therein reached, based upon the following reasoning:

"So, whether the village 'provides' (and since he is not an officer enumerated in Section 4248 they could only provide by employing) a legal advisor, either for the village or for any department or official thereof, it is a mere hiring, and such legal advisor, so hired, is but an employe. The contract entered into by the village and the legal counsel, either specifically or impliedly, contains all the provisions of the employment. The legal counsel is only bound to the performance of the things he has contracted to do and perform, and he is justified in relying on the letter of his contract. He would have no official duties for no matter how similar to the work of a city solicitor his obligations are contractual.

As stated by Gilmore J., in *State vs. Wilson*, 29 O. S., 345, let us examine to determine whether 'some of the indicia' of an officer may be found. Is he appointed for a definite term? No, he is hired by contract, and the hiring may be for one case, or for one month, or for any other time, so long as it does not exceed the limitation two years fixed by law. Must he take an oath of office or give a bond? No, no more than any other mere employe of the village. Must he be an elector of the village? Not at all; many cases have come to my notice where, by reason of there being no attorney at law in a village, or for some other good and sufficient cause, legal counsel have been employed

from neighboring jurisdictions. In fact, I cannot find any legal necessity for his being an elector at all, nor (though I do not pass upon the question) would I see any objection to the employment of an alien or a woman counsel, if the village council saw fit. It does not appear to me that this position is such an 'office' as, under Article XV, Section 4, of the constitution, would render it necessary for the person to be possessed of the qualifications of an elector. The duties of village counsel are not prescribed by statute but fixed by contract. If he die or resign, his duties are not cast upon a successor; a new contract is necessary, with a new party."

Section 4220, General Code, which authorizes a village council to provide legal counsel, reads as follows:

"When it deems it necessary, the village council may provide legal counsel for the village, or any department or official thereof, for a period not to exceed two years, and provide compensation therefor."

It is to be observed from the provisions of Section 4220, *supra*; that, the appointment of legal counsel for the village is left entirely to the will and pleasure of the village council, as are matters of compensation; that, it appears from the statute that the only intention of the legislature was to give the village council the right to employ, when it deemed necessary, some person to act as legal counsel for the village, or any department or official thereof; that, if the council of a village employs legal counsel, such legal counsel has authority to act only by reason of his contract of employment, oral or written, which he enters into and that, such authority may be limited to acting as legal counsel for a certain department or a certain official representing the village in a certain case. Applying the decisions in the hereinbefore mentioned cases as tests in determining whether or not one is an official, it can be said that the provisions of Section 4220, *supra*, clearly provide for a contractual relationship between the village council and any legal advisor it may deem necessary to appoint, and, in no sense is an office, but merely an employment.

I am of the opinion that a comparison between the provisions of Sections 4246 and 4248, General Code, clearly indicates that a village solicitor is not an official.

Section 4245, General Code, provides:

“The executive power and authority of cities shall be vested in a mayor, president of council, auditor, treasurer, solicitor, director of public service, director of public safety, and such other officers and departments as are provided by this title.”

Section 4248, General Code, provides:

“The executive power and authority of villages shall be vested in a mayor, clerk, treasurer, marshal, street commissioner, and such other officers and departments thereof as are created by law.”

It is to be observed:—that, both sections enumerate the “officers” who are vested with “exclusive power and authority”; and that Section 4246, *supra*, includes the solicitor among the officers named, and Section 4248, *supra*, names certain officers, but does not mention the village solicitor.

It might be contended:—that, since a city solicitor is the legal adviser of the city, the language in Section 4762, *supra*, “acting in a similar capacity to that of city solicitor,” means one acting as a legal adviser; and that, since the village solicitor acts for the village or for any department or official thereof, in the capacity of a legal adviser, the prohibition contained in Section 4762, *supra*, applies in the case of a village solicitor. There might be some merit to such an argument if the language read, legal counsel “acting in a similar capacity to that of city solicitor,” and was not limited to “an official” so acting.

It therefore appears that a village solicitor is not an official acting in a similar capacity to that of city solicitor and therefore, by the express provisions of Section 4762, *supra*, is prevented from being a member of the board of education of the village school district.

However, it is still necessary to determine whether or not under the common law test of incompatibility, the office of member of a village school district board of education is compatible with that of a village solicitor. This test of incompatibility is well expressed in the case of *State ex rel. vs. Gebert*, 12 O. C. C. (N. S.), at page 275, 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.”

As hereinbefore stated, Section 4761, *supra*, makes the prosecuting attorney of the county the legal adviser of boards of education of village school districts in the county in which he is serving. This is

consistent with Section 4220, supra, which authorizes a village council to provide legal counsel if it deems it necessary "for the village, or any department or official thereof"; such language cannot be construed as authorizing the village council to provide legal counsel for the board of education of the village school district, as the board of education cannot be included within either the terms of "department" or "official." It would appear:—that, it will not be necessary for the solicitor so employed to render legal advice to the board of education of the village school district; and that, the duties imposed on a member of the board of education of a village school district and those imposed on a village solicitor are in no way subordinate to each other.

However, whether one position is a check upon the other should be determined by the test stated in McQuillin on Municipal Corporations, Vol. 2, page 104, Sec. 469:

"Incompatibility is not simply a physical impossibility to discharge the duties of both offices at the same time, it is an inconsistency in the functions of the two offices, as *where one is subordinate to the other, or where a contrariety and antagonism would result in the attempt by one person to discharge faithfully and impartially the duties of both. Two offices are said to be incompatible when the holder cannot in every instance discharge the duties of each.* Incompatibility arises, therefore, from the nature of the duties of the offices, when there is an inconsistency in the functions of the two, where the functions of the two are inherently inconsistent or repugnant, as where antagonism would result in the attempt by one person to discharge the duties of both offices, or *where the nature and duties of the two offices are such as to render it improper from considerations of public policy for one person to retain both.* The true test is whether the two offices are incompatible in their natures, in the rights, duties or obligations connected with or flowing from them." (Italics the writer's.)

One of the duties of the members of a village board of education consists of preparing and adopting the budget before the fifteenth day of July in each year, for the next succeeding fiscal year. It is presumed that the budget prepared and adopted by the board of education of a village school district, or any other subdivision, represents the required amount needed by the subdivision submitting the budget.

If, under the provisions of Section 4220, General Code, legal counsel, who is a member of the board of education of the village school district, is employed to represent the village as village solicitor, or,

specifically for the purpose of representing the village before the budget commission, in either case, he is charged with the duty of representing the village in such a manner as to secure the amount council requested in the budget.

It is common knowledge that it is usually impossible for the budget commission of the county to grant the taxing authorities of the various subdivisions in the county the entire amounts requested in the various budgets presented by the subdivisions. It was probably for this reason that Section 5625-24, General Code, gave the budget commission of the county such unrestricted power to revise the amounts of the estimates appearing in the presented budgets of the various subdivisions.

It is obvious that in a case where reductions must be made by the budget commission that it will appear to the members of the board of education of the village school district that the village proper, is in a better position to accept a reduction in the amount of its budget, while on the other hand it will appear to the officials of the village that the schools are in a better position to accept a reduction in their budget.

It therefore appears:—that, a village solicitor appearing before the budget commission and representing the village in its request for the entire amount of its budget, is an instance “where a contrariety and antagonism would result in the attempt by one person to discharge faithfully and impartially” the duties of a member of a board of education of a village school district and village solicitor; that, the nature and duties required by the members of the board of education of the village school district in regard to the budget and the duties required by a legal counsel representing the village before the budget commission “are such as to render it improper from considerations of public policy for one person” to hold both positions.

It was no doubt the consideration of “public policy” that induced the Legislature to prohibit by the provisions of Section 4762, supra, “a prosecuting attorney, city solicitor, or other official acting in a similar capacity” from being a member of the board of education. This consideration of public policy should be given great weight in determining the question of incompatibility of the same person performing the duties of village solicitor and member of the board of education of the village school district, in spite of the fact that a village solicitor cannot be included in the term “official.”

In view of the foregoing, it would appear that the duties imposed on a member of the board of education of a village school district are incompatible with those of a village solicitor, and both positions may not therefore be held by the same person.

In specific answer to your questions, it is my opinion :

1. At the present time, there is no official in Ohio who serves in a capacity similar to that of prosecuting attorney, and is required to perform the same duties and services for the county board of education and the boards of education of all the exempted village school districts, village school districts and rural school districts of the county as are required by the provisions of Section 4761, General Code, of the prosecuting attorney for such boards of education in the county.

The director of law, city attorney, and any other official who serves as the duly elected or appointed legal counsel and attorney for the city, are such officials as serve in a capacity similar to that of city solicitor, and by virtue of the provisions of Section 4762, General Code, such officials are the legal advisers and attorneys for the boards of education of city school districts, and must perform the same services for such boards of education as are required by the provisions of Section 4761, General Code, of the prosecuting attorney for other boards of education within the county.

2. Section 4762, *supra*, does not "mean that the duties prescribed by the preceding section shall devolve upon some official only in the event that there is a civil action between two or more boards of education in the same county, as mentioned in Section 4761, General Code.

3. Section 4762, General Code, does not "prevent or prohibit a member of the board of education of a village acting as village solicitor. However, the duties imposed upon a member of the board of education of a village school district are incompatible with those of a village solicitor, and both positions may not therefore be held by the same person.

Respectfully,

HERBERT S. DUFFY,

Attorney General.