

4162.

WILBERFORCE UNIVERSITY—MEMBER OF BOARD OF TRUSTEES OF C. N. AND I. DEPARTMENT, MAY NOT BE SELECTED AS SUPERINTENDENT UNTIL HE RESIGNS AS TRUSTEE—MUST BE APPROVED BY CONTROLLING BOARD BEFORE HE RECEIVES COMPENSATION.

SYLLABUS:

1. *A member of the Board of Trustees of the Combined Normal and Industrial Department of Wilberforce University is not eligible to the position of Superintendent of such department, without having first tendered his resignation to such Board of Trustees, and such resignation having been accepted by that Board.*

2. *Compensation cannot legally be paid from the state treasury for the salary of a superintendent of the Combined Normal and Industrial Department of Wilberforce University unless the selection of such superintendent has been approved by the controlling board.*

COLUMBUS, OHIO, March 18, 1932.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion which reads:

“Mr. R. C. Bundy, Superintendent of the Combined Normal and Industrial Department at Wilberforce University died on the 9th day of March, 1932, and funeral services were held March 11th at Wilberforce at 2:00 o'clock P. M. The members of the Board of Trustees of the C. N. & I. Department out of due deference and respect for the deceased went to Wilberforce on said date to attend the funeral. It so happened that all of the nine members of the Board of Trustees were in attendance.

It seems that it was suggested by some of the members of the Board that a meeting should be held by the Board to discuss the situation in the C. N. & I. Department since the death of the Superintendent. The Chairman of the Board stated that as a majority of the Board of Trustees had not previously to March 11, 1932, determined and fixed that date, for a meeting of the Board, he doubted seriously not only the propriety but the legality of the meeting of the Board at this time. The majority of the Board, however, decided that it had a right to meet at any time, with or without notice of the time and place of the meeting and that it was not necessary a call should be issued by the President of the Board to hold a meeting. The vote to hold the meeting was—seven for and one against—one of the members of the Board was at that time temporarily absent from the building. The trustees also voted to elect Mr. X, who was an A. M. E. church member of the Board of Trustees, as the acting superintendent of the C. N. & I. Department.

It appears that Mr. X, a member of the Board, was a candidate for the position of Superintendent of the State Department and he was told that he should resign as a member of the Board of Trustees before he could be considered and voted for, but this he refused to do, and he was elected by the vote as above indicated.

The Board of Trustees, or a majority of them, voted to pay Mr. X a salary of \$4,000 per year, or on the same basis as the deceased Superintendent was being paid at the time of his death, although Mr. X is a minister and the pastor of a large congregation in Cleveland, Ohio.

The President of the Board raised the question as to whether Mr. X would expect any compensation inasmuch as he could not give his full time and talent to the office in the C. N. & I. Department, but the majority of the Board seemed to have taken the position that because the Board had made an allowance for the payment to Mr. Bundy a part of his salary during the time he was sick, that it was perfectly proper for the Board to pay to Mr. X his salary, as Mr. X was a well man regardless of whether or not he was able to give his full time to the C. N. & I. Department.

The sections of the General Code applicable to the questions to be decided under the facts set forth are Sections 7980 and 7981. The former section provides for two meetings of the Board of Trustees during the year and other meetings as the majority of the Board of Trustees may determine.

The latter section provides for the election of the Superintendent of the State Department and provides in part that the Board shall select a superintendent whose selection shall be approved by the Controlling Board.

Please render me your official opinion on the following matters:

1. Was Mr. X. eligible for the position of Superintendent of the C. N. & I. Department, without having first tendered his resignation as a member of the Board of Trustees, and his resignation accepted by said Board?
2. Was the meeting held on March 11th, 1932, in accordance with Section 7980, General Code, and legal?
3. Is it lawful to pay money out of the State Treasury for the salary of the Superintendent of the C. N. & I. Department for Mr. X until his selection by the Trustees has been approved by the Controlling Board?
4. Can Mr. X. perform any legal or official acts, as superintendent of such department, which will bind the institution under the circumstances above stated?"

Section 7975, General Code, reads:

"A combined normal and industrial department shall be established and maintained at Wilberforce university, in Greene County, Ohio."

Section 7980, General Code, to which you refer, reads as follows:

"The board of trustees so created shall meet in regular session at the university twice a year. The first meeting shall be on the third Thursday in June, and the second on the first Thursday in November of each year. Other meetings may be held at such places and times as a majority of the board determines. The trustees shall receive no compensation, but shall be reimbursed their traveling and other reasonable expenses and necessary expenses out of appropriations under this sub-division of this chapter."

Section 7981, General Code, provides:

"The board of trustees shall take, keep and maintain exclusive authority, direction, supervision and control over the operations and conduct of such combined normal and industrial department, so as to assure for it the best attainable results with the aid secured to it from the state. The board shall determine the branches of industry to be pursued, select a superintendent whose selection shall be approved by the state controlling board and who shall not be removed except for cause after due hearing before said controlling board."

"Said superintendent shall be the fiscal officer of the department and shall attend all meetings of the board of trustees wherein matters affecting the revenues or expenditures of the department are involved. The expenditures of all moneys appropriated for carrying out the purposes and provisions of this subdivision of this chapter shall be made under such regulations as the board of trustees shall establish; but no contract, claim or voucher against any appropriation shall be valid until approved in writing by said fiscal officer. No money appropriated by the state shall be used for any purpose not in direct furtherance and promotion of the objects of the department."

Your first question relates to the compatibility of the positions of Trustee of the Combined Normal and Industrial Department of Wilberforce University and Superintendent of such department.

It is a well known rule in Ohio that, in the absence of statutory prohibition, offices are deemed to be 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 latter portion of Section 7981, General Code, above quoted, provides that the superintendent of the Combined Normal and Industrial Department of Wilberforce University, shall be the fiscal officer of such department and as such shall attend all meetings of the board of trustees wherein matters affecting the revenues or expenditures of the department are involved, etc. It is apparent that the two positions in question are incompatible in that the trustees are the controlling and supervising body of such department and as such act as a check upon the superintendent of such department, and there is no doubt but that the superintendent of the C. N. & I. Department of Wilberforce University is directly subordinate to the board of trustees of such department, and so the holding of both positions results in a conflict of interests.

A question similar to the one under discussion was considered by this office in 1928 Opinions of the Attorney General, 1366. The inquiry concerned the compatibility of a member of the board of trustees of the Ohio Soldiers' and Sailors' Orphans' Home concurrently holding the office of superintendent of such home. The statutes relative to the selection of a superintendent by the board of trustees in both instances are similar. It was held, as disclosed by the syllabus:

"A member of the Board of Trustees of The Ohio Soldiers' and Sailors' Orphans' Home cannot legally be appointed by such Board as Superintendent or 'Acting Superintendent' of said Home. The two positions are incompatible."

In view of the foregoing and in specific answer to your first inquiry, I am of the opinion that a member of the Board of Trustees of the Combined Normal

and Industrial Department of Wilberforce University is not eligible to the position of Superintendent of such department, without having first tendered his resignation to such Board of Trustees, and such resignation having been accepted by that Board.

Coming now to your second inquiry, it follows from the provisions of Section 7980, General Code, above quoted, that a majority of the board has authority to order a meeting to be held at such places and times as the majority determines. It is an elementary principle of law, however, that each member of a board such as the one under consideration is entitled to such notice of a meeting as would afford him a reasonable opportunity to attend.

The question as to whether or not reasonable notice was given of the meeting to the members of the board of trustees in the instant situation is one of fact to be determined in view of pertinent circumstances, and, since I am not fully informed as to all the facts concerning such meeting, it is impossible for me to categorically answer your second inquiry.

In answer to your third inquiry, it is necessary to consider Section 7981, General Code, above quoted. Such section provides that the board shall select a superintendent, "whose selection shall be approved by the state controlling board".

In view of the provisions of that section, it would seem that the word "shall" as used therein, following its usual general significance, is mandatory and, therefore, imposes a condition precedent to the appointment of a superintendent of the department in question. It follows that compensation cannot legally be paid from the state treasury for the salary of Mr. X. as Superintendent of the Combined Normal and Industrial Department until his selection has been approved by the controlling board.

In answer to your fourth inquiry, it would seem that since Mr. X. is not eligible to hold the position of Superintendent of the Combined Normal and Industrial Department of Wilberforce University, and, even if he were eligible since his selection as such superintendent has not been approved by the controlling board, he cannot perform any legal or official acts as such superintendent which will bind the institution. It should be noted, however, that I express no opinion as to the legality of acts done by him as a de facto officer.

Respectfully,

GILBERT BETTMAN,

Attorney General.

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APPROVAL, NOTES OF MAPLE HEIGHTS CITY SCHOOL DISTRICT,
CUYAHOGA COUNTY, OHIO—\$17,492.00.

COLUMBUS, OHIO, March 18, 1932.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.