

120

COMPATIBILITY—CLERK OF COURTS AND DIRECTOR,
COUNTY AGRICULTURAL SOCIETY—COMPATIBLE.

SYLLABUS:

There is no incompatibility between the office of clerk of courts and the position of director of a county agricultural society.

Columbus, Ohio, February 13, 1959

Hon. James I. Shaw, Prosecuting Attorney
Auglaize County, Wapakoneta, Ohio

Dear Sir:

I have before me your request for my opinion as to the compatibility of the office of clerk of courts of Auglaize County and membership on the board of directors of a county agricultural society more commonly known as the fair board.

A search of the statutes indicates none that specifically authorizes or specifically forbids such a combination of duties.

Various common law tests have been applied by the Ohio courts for the purpose of determining whether functions to be performed are inconsistent and incompatible.

An attempt to formulate a general definition was undertaken in the case of *State ex rel. Attorney General v. Gebert*, 12 C. C. (N.S.), 274, 275, wherein it was stated:

“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.”

Opinion No. 3869, Opinions of the Attorney General for 1941, p. 445, in a situation comparable to the one under consideration said:

“ * * * In view of what has been said, however, the test of physical impossibility is to be considered as one of fact rather than one of law to be determined largely by the officers' own sense of propriety tempered by a proper regard for the interests of the public. * * * ”

An opposite viewpoint was expressed by the Attorney General in Opinion No. 1547, Opinions of the Attorney General for 1924, p. 324. The question involved was whether a *county auditor* could likewise be a member of the county agricultural board. In an adverse opinion the Attorney General stated that since the auditor was a member of the budget committee which passed upon the appropriation for the county agricultural board it would violate the stipulation in *State ex rel. Attorney General vs. Gebert, supra*, that offices are only considered compatible when one is in no way subordinate to or subject to check by the other.

In a later ruling by the Attorney General in Opinion No. 4691, Opinions of the Attorney General for 1954, p. 697, the question is again raised as to whether a county auditor may also be a member of the county agriculture society. In spite of the Opinion 1547, *supra*, the Attorney General here follows a different line of reasoning, to-wit, that he doubted if a director of a county agricultural society could properly be classified as a public office. This point was first raised in Opinion No. 2530, Opinions of the Attorney General for 1934, p. 495, in which it is stated that:

“I cannot feel that the office of director of a county agricultural society, which is filled not by election of the people, or by appointment of any public official but merely by election of those

private individuals who happen to be members of the society, is a public office or employment. As pointed out in the case of *Lane vs. Minnesota, supra*, the state or county has no voice in the selection or control of its officers. * * *

“Therefore, I am of the opinion that :

“1. A director of a county agricultural society is not a public officer but is the agent of a private corporation.”

Later the question was raised again by the then prosecuting attorney of Auglaize County in an opinion rendered in 1952, See Opinion No. 1116, Opinions of Attorney General for 1952, p. 60. Your present question was answered by the Attorney General as follows :

“The governing body of county and independent agricultural societies is the board of directors sometimes popularly designated as a ‘fair board.’ Section 9884-2, General Code, provides for the election of such a board of directors and the term of office of its members. Neither this section nor any other applicable section prohibits a member of the board of directors from holding a public office concurrently with membership on the board.

“ * * * ”

Without going further into the opinion stated in 1934 and reiterated in 1954 that a director of a county agricultural society is not a public official, it is my opinion that *State ex rel. Attorney General v. Gebert, supra*, covers the question you raise. Applying the tests discussed there we cannot find that the office of clerk of courts and directorship on a county agricultural board are incompatible to wit, neither one is subordinate to or is in any way a check upon the other, nor is it impossible physically for one person to discharge the duties of both offices. It is accordingly my opinion that there is no incompatibility between the office of clerk of courts and the position of director of a county agricultural society.

Respectfully,

MARK McELROY

Attorney General