

Note from the Attorney General's Office:

1933 Op. Att'y Gen. No. 33-0161 was questioned by
1999 Op. Att'y Gen. No. 99-046.

161.

CLERK OF COUNTY COMMISSIONERS—MAY NOT HOLD ANY OTHER PUBLIC OFFICE—ACCEPTANCE OF SECOND INCOMPATIBLE OFFICE IS AN ABANDONMENT OF FIRST OFFICE.

SYLLABUS:

1. *A clerk of a board of county commissioners, appointed under authority of Section 2409, General Code, may not legally hold any public office at the same time and receive the salary attached to such office.*

2. *When a deputy clerk of a county board of elections accepts an appointment as clerk of a board of county commissioners under authority of Section 2409, General Code, he thereby vacates the office of deputy clerk and may not legally receive any salary thereafter attached to said office, even though he may continue to perform the duties of same.*

COLUMBUS, OHIO, February 21, 1933.

HON. LESTER S. REID, *Prosecuting Attorney, Chillicothe, Ohio.*

DEAR SIR:—Your letter of recent date is as follows:

"Inclosed please find copy of letter received from the Board of Elections of Ross County, Ohio. I have rendered my own opinion in this matter stating that the offices are not incompatible and that the Deputy Clerk is entitled to his salary as Deputy Clerk of the Board of Elections for the month of January, even though he is drawing a salary as Clerk of the County Commissioners; it appearing that he did not resign as such Deputy Clerk of Elections until January 31, 1933. The Board of Elections is apparently not satisfied with my opinion and therefore requesting an opinion from you."

The letter inclosed with your communication reads as follows:

"The Board of Elections of Ross County, Ohio, request an opinion from the Attorney General of the State of Ohio based upon the following facts, to-wit:

"Mr. C. C. Yost has been employed by the said Board as Deputy Clerk. On January 1st, 1933, under the provisions of Section 2409, G. C., he was employed as clerk by the Board of County Commissioners of Ross County, Ohio.

"The specific question is this: Is Mr. Yost under the foregoing statement of facts entitled to a salary as Clerk of the County Commissioners and also as Deputy Clerk of the Board of Elections, for the month of January, 1933, having tendered his resignation as such Deputy Clerk, effective January 31st, 1933."

Section 2409, General Code, reads as follows:

"Appointment of Clerk. If such board (board of county commissioners) finds it necessary for the clerk to devote his entire time to the discharge of the duties of such position, it may appoint a clerk in place of the county auditor and such necessary assistants to such clerk as the board deems necessary. Such clerk shall perform the duties required by law and by the board." (Words in parenthesis, the writer's.)

It may be observed from a reading of the above statute that county commissioners are only allowed to appoint a clerk of the board when it is necessary for the person who is to perform the duties of said clerk to devote his entire time to the discharge of the duties of such employment.

This office has, in at least three opinions, concluded that the clerk of a board of county commissioners appointed under the foregoing section, is prevented from holding any other public office or position simultaneously.

The first opinion is reported in Annual Report of the Attorney General for 1913, Volume II, page 1096. The syllabus of said opinion reads:

“Section 2409, General Code, authorizes the commissioners to appoint a clerk in place of the county auditor, only when it is necessary for such clerk to devote his entire time to the discharge of the duties of such position. As this is the only authority empowering the commissioners to appoint a clerk and as such clerk is obliged thereby to devote his entire time to the duties of such position, he may not at the same time act as deputy county auditor.”

The foregoing opinion was reviewed in an opinion appearing in Opinions of the Attorney General for 1931, Volume II, page 1098. This opinion held, as disclosed by the syllabus:

“The clerk of the board of Lake County Commissioners appointed under the resolution of the county commissioners, by virtue of authority of Section 2409, General Code, may not act as bookkeeper at the Lake County Memorial Hospital while serving as clerk.”

The third opinion is to be found in Opinions of the Attorney General for 1917, Volume II, page 1435. The first paragraph of the syllabus of said opinion reads:

“A clerk appointed by the county commissioners, under the provisions of Section 2409, G. C., is not authorized to perform the duties provided for in Section 2342, G. C.”

While there have been at least two opinions expressing a contrary conclusion to that set forth in the three opinions heretofore mentioned, yet I feel that the better view is that a clerk of the board of county commissioners appointed under Section 2409, General Code, may not hold any other public office or position at the same time.

The two contrary holdings are set forth in Opinions of the Attorney General for 1916, Volume I, page 216 at page 217, and Opinion No. 4884, rendered January 9, 1933. A reference to pages 1436 and 1437 of the 1917 opinion, however, shows that the 1916 opinion was practically overruled, and a reference to Opinion No. 4884 of my immediate predecessor shows that it was to a great extent based on the 1916 opinion and furthermore said Opinion No. 4884 did not mention therein the well considered opinions of 1913 and 1931.

It is a well recognized principle of law, needing no citation of authority, that the salary pertaining to an office is an incident of the office. However, for authority on this principle, I may cite 46 Corpus Juris 1014, 1015, Section 233. Hence if the clerk of the board of county commissioners may not legally hold any public

office while serving as clerk, it follows that he would not be entitled to any salary or compensation which would be attached to any office. A deputy clerk of a board of elections is appointed by the board under terms of Section 4785-15, General Code. In Opinion No. 4862, rendered January 6, 1933, it was determined that the position of deputy clerk of a county board of elections was an office.

Under the facts disclosed in the letter of the clerk of the board of elections, it appears that the deputy clerk was appointed clerk of the board of county commissioners on January 1, 1933. Therefore, on that date, it became unlawful for said clerk to hold any other office or employment, under the construction given to Section 2409, General Code, as already pointed out. It is stated in 21 R. C. L. 418, Section 63, as follows:

“Although it has been held that the acceptance of an office by one disqualified to hold it by reason of holding an incompatible office is not necessarily a resignation of the prior office in the absence of a special statutory or constitutional provision giving it that effect, *the general rule is that the acceptance of a second office, incompatible with one already held, vacates the first. * * **” (Italics the writer’s.)

Also, it is stated in 43 Corpus Juris 631, Section 1035, as follows:

“If a person already holding an office is elected or appointed to another incompatible with the one which he holds and he accepts and qualifies as to the second, *such acceptance and qualification operate ipso facto as a resignation of the former office.* But if the duties of the second office are not incompatible either by nature or statute, with those of the first, the officer may occupy both offices.” (Italics the writer’s.) See further 46 C. J. 947, Section 55, citing *State vs. Mason*, 61 O. S. 513, 56 N. E. 468; *State vs. Hiddleston*, 8 Ohio Dec. (Reprint) 77, 5 Cin. L. Bull. 502.

While the clerk of the board of county commissioners is only an employe, yet I believe the principle cited above from Corpus Juris and Ruling Case Law, applies to an office and employment, as well as to two offices.

If the acceptance by the clerk on January 1, 1933, of the position of clerk of the board of county commissioners vacated the office of deputy clerk theretofore held by him, it follows from my statement in a preceding paragraph that salary is incident to an office, that the right to salary was forfeited when the office was vacated.

In view of the above considerations, I am of the opinion, in specific answer to the question raised in the letter of the clerk of the county board of elections, that the clerk of the board of county commissioners under consideration, would not be entitled to receive the January, 1933, salary attached to the office of deputy clerk of the county board of elections, and also the salary received as clerk of the board of county commissioners for the month of January, 1933.

Respectfully,

JOHN W. BRICKER,
Attorney General.