

I, Edward C. Turner, Attorney General of the State of Ohio, do hereby certify that the foregoing is a fair and impartial synopsis of the proposed amendment of Section 14 of Article IV of the Constitution of Ohio, and is a truthful statement of the contents and purpose of such proposed amendment.

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In case you desire to adopt this synopsis, this opinion may be regarded as an official certification thereof.

In passing, your attention is directed to the fact that the words "Article II, Section XX" in the last line of the proposed amendment should read "Article II, Section 20."

Respectfully,  
 EDWARD C. TURNER,  
*Attorney General.*

2194.

OFFICES—TRUSTEE AND SUPERINTENDENT OR ACTING SUPERINTENDENT OF OHIO SOLDIERS' AND SAILORS' ORPHANS' HOME—INCOMPATIBLE.

*SYLLABUS:*

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

COLUMBUS, OHIO, June 4, 1928.

HON. M. R. LIMB, *President, Board of Trustees, The Ohio Soldiers' and Sailors' Orphans' Home, Xenia, Ohio.*

DEAR SIR:—This will acknowledge your letter of recent date which reads as follows:

"Enclosed you will find a copy of a letter from Mr. Brenneman, Secretary of the Ohio Budget Board.

May I request a ruling upon the legality as to whether Miss Bailey can be, by action of the Board, allowed the salary of the Assistant Superintendent of the Ohio Soldiers' and Sailors' Orphans' Home. She has served in this capacity since March 27th, but the Board is in doubt as to whether a member of the Board, acting as Superintendent can be paid for such services."

The letter of the Superintendent of the Budget, which you enclose, in so far as pertinent, reads:

"I presumed that your minutes would show that you were appointed Acting Superintendent at the salary appropriated for Superintendent. However, the minutes simply state, 'Miss Bailey was requested to remain at the Home and represent the Board until a Superintendent is employed.' This record would not be sufficient to authorize payment as covered by your voucher No. 548.

I took this matter up with Mr. Tracy, Auditor of State, and he was also of the opinion that there was not sufficient authority contained in the minutes to permit this payment.

There is also a legal question involved, as to whether the board of trustees can designate one of its own members as Acting Superintendent on a salary or compensation other than actual expenses. We all agree that you are entitled to compensation for your services, if payment can be legally made. However, we feel that the legality of the payment should first be definitely determined."

On April 13, 1927 (112 v. 163), the Legislature passed an act entitled:

"An Act—To amend Sections 1931-1, 1932, 1932-1, 1933, 1936, 1940, 1946, 1946-3 of the General Code, and to repeal Sections 1935, 1941, 1942 and 1946-4 of the General Code, relative to the Ohio Soldiers' and Sailors' Orphans' Home, Xenia, Ohio."

Section 1931-1, General Code, now reads in part as follows:

"There shall be a board known as the board of trustees of the Ohio Soldiers' and Sailors' Orphans' Home, who shall have charge and custody of the Ohio Soldiers' and Sailors' Orphans' Home at Xenia, Ohio, which said board shall consist of five members. The governor with the advice and consent of the senate shall appoint the members of such board \* \* \*. Such board shall govern, conduct and care for such home, the property thereof and the children therein as provided in the laws governing 'The Ohio Board of Administration' so far as the provisions thereof are not inapplicable and are not inconsistent with the provisions of the laws governing such home. Three members of such board shall constitute a quorum but any two may approve accounts for the payment of current expenses, salaries and open contracts previously entered into by the board. \* \* \*"

Section 1946, General Code, in so far as pertinent, provides:

"The board of trustees shall have complete control and supervision of the home and shall select and employ a superintendent \* \* \* and such other officers, assistants and employes as may be required or as they may deem necessary, and shall fix their compensation. \* \* \* No person, unless he shall have been in the actual military or naval service of the United States and shall have received an honorable discharge therefrom, shall be eligible to hold the position or office of superintendent. \* \* \*"

Your attention is directed to Opinion No. 557, dated June 2, 1927, addressed to the Superintendent of the Ohio Soldiers' and Sailors' Orphans' Home, the syllabus of which reads:

"Sections 1936 and 1946, General Code, as amended by Amended Senate Bill No. 162, effective on and after July 26, 1927, confer upon the board of trustees of the Ohio Soldiers' and Sailors' Orphans' Home complete control and supervision of the Home and vest in such board the power and duty to select and employ a superintendent, a chaplain, superintendent of schools, instructors and such other officers, assistants and employes, including teachers, as may be required or as the board deems necessary, and constitute the

superintendent of the Home the agent or active arm of the board to carry its mandates with respect to the employment and dismissal of all employes into execution.'

The following language appears in the opinion:

"While Section 1936 as amended, is in seeming conflict with the new Section 1946 in so far as the employment of teachers and instructors is concerned, it will be observed that the power to employ teachers and instructors is conferred upon the superintendent, subject to the regulations of the board of trustees and that the dismissal and discharge of any teacher or instructor by the superintendent is not effective until 'ratified by the board of trustees.' Reading the two amended sections together, it appears that the General Assembly intended to invest in the board the complete control and supervision of the home and to constitute the superintendent the agent or the active arm, so to speak, to carry out the mandates of the board. If this construction be followed, and it is my opinion that it is the correct one, any seeming inconsistency between the two sections disappears.

I am therefore of the opinion that Sections 1936 and 1946, General Code, as amended by Senate Bill No. 162, effective on and after July 26, 1927, confer upon the board of trustees of the Ohio Soldiers' and Sailors' Orphans' Home complete control and supervision of the Home and vest in such board the power and duty to select and employ a superintendent, a chaplain, superintendent of schools, instructors and such other officers, assistants and employes, including teachers, as may be required or as the board deems necessary, and constitute the superintendent of the Home the agent or active arm of the board to carry its mandates with respect to the employment and dismissal of all employes into execution."

It is stated in 29 Cyc. at page 1381:

"It is contrary to the policy of the law for an officer to use his official appointing power to place himself in office, so that, even in the absence of a statutory inhibition, all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint."

\* \* \*

It may be laid down as a rule of the common law that the holding of one office does not in and of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two officers in question. But at common law two offices whose functions are inconsistent are regarded as incompatible. The inconsistency which at common law makes offices incompatible does not consist in the physical impossibility to discharge the duties of both offices; but rather in a conflict of interest, as where the incumbent of one office has the power to remove the incumbent of another, or to audit the accounts of another, or to exercise a supervision over another as in the case of a judicial officer and his subordinate ministerial officer."

Your attention is directed to the case of *State ex rel. Louthan vs. Taylor*, 12 O. S. 130, the syllabus of which reads:

"Where a member of the board of directors of a county infirmary was, by said board, appointed to the office of superintendent of the county infirmary, he still continuing to hold the office of director—Held,

That the duties of the two offices are incompatible, and can not be legally held by the same person at the same time; and such appointment was, therefore, illegal and void."

The court in a brief opinion said:

"Concurring with counsel for the relators in their view of the law of the case, the judgment of the district court will be reversed. \* \* \*"

Counsel for the relators argued as follows, on page 153:

"It must be remembered, that he, in effect, appointed himself, by giving the casting vote in his own favor. It will no doubt be contended that, inasmuch as there is no statute expressly prohibiting this, the act was legal. And much will be sought to be inferred from the fact, that the act prohibiting any citizen of this state from holding, at the same time, more than one of certain specified offices, does not enumerate the two offices of infirmary director and superintendent. All, however, that can be inferred from this statutory silence, is, that any citizen of the state is capable of having conferred upon him, any two or more offices, the contemporaneous holding of which by the same person, is not prohibited; but this is far from saying that any citizen, under any circumstances, may confer upon himself, any office whatsoever. The word appoint, when used in connection with an office, *ex vi termini*, implies the conferring of authority upon another. It was not necessary, therefore, that the statute should, in express terms, prohibit the infirmary directors from appointing one of their own number superintendent; for the language, 'the board of directors shall appoint a superintendent,' necessarily means, that the person appointed shall be different from those who appoint."

And on page 135:

"In conclusion, permit us to call attention to the utter inconsistency of permitting the offices of director and superintendent to be held by the same individual. Such a union of offices gives the defendant a vote, and it may be the deciding one, in fixing the amount of his own salary; in the adoption of rules defining his own duties, rendering them more or less onerous; in determining the amount and sufficiency of the security which he shall give for the faithful performance of his trust; and in deciding upon the duration of his own term of office: he is invested with visitatorial power over himself; and, finally, he is made an inspector of his own books and accounts. 3 Curwen's St. 2431, secs. 4 and 5. To permit a man thus to be 'judge in his own cause,' would be to convert the very checks and safeguards which the law has provided against fraud and speculation, into potent instruments of corruption and iniquity.

In support of the proposition, that 'a visitor can not visit himself, and inquire into and decide upon the propriety of his own conduct,' see Ang. & Ames on Corp., sec 688."

See also the case of *State ex rel. Henry vs. City of Newark*, 6 O. N. P. 523, the headnote to which reads:

"A member of the board of health can not be appointed by the board sanitary policeman and hold both positions at the same time. Such appoint-

ment is illegal and void and the party is not entitled to compensation for his services as such sanitary policeman."

In view of the foregoing sections of the General Code and the authorities quoted, I am of the opinion that a member of the board of trustees of The Ohio Soldiers' and Sailors' Orphans' Home can not legally be appointed by such board as Superintendent or "Acting Superintendent" of said home. The two positions are incompatible.

The Eighty-seventh General Assembly, in its act to make general appropriations, appropriated the sum of Twenty-Five Hundred Dollars (\$2,500.00) per year as salary for the Superintendent of the Ohio Soldiers' and Sailors' Orphans' Home.

The question then presents itself whether or not Miss B., having performed the duties of Superintendent, is entitled to receive the amount of money appropriated by the Legislature for such office for the period of time she so served.

You inform me that the minutes of the Board state that "Miss B. was requested to remain at the Home and represent the Board until a Superintendent is employed." It is readily apparent from this statement that Miss B. was not appointed to any additional position or office for which compensation is provided for by law.

I know of no lawful authority to permit Miss B. to receive the compensation provided by law for the office of Superintendent of such home. It may be that the sundry claims heard, upon the presentation of a proper claim therefor, might allow the claim of Miss B. as a claim against the State of Ohio for the payment of which no moneys have been appropriated and recommend to the General Assembly the allowance of compensation to Miss B. for the services performed by her.

Respectfully,

EDWARD C. TURNER,  
*Attorney General.*

2195.

APPROPRIATION—FOR CITY PLANNING COMMISSION—COMMISSION CANNOT HIRE ENGINEERING FIRM WITHOUT SPECIFIC APPROPRIATION—HOME RULE PROVISIONS OF ARTICLE XVIIII, OHIO CONSTITUTION, CONFER NO EXTRATERRITORIAL AUTHORITY.

**SYLLABUS:**

1. *By the terms of Section 4366-5, General Code, the council of a city is without authority to make an appropriation in a lump sum to cover the necessary expenses and to pay the compensation of the employes of a city planning commission created and operating under the provisions of Sections 4366-1 et seq., General Code.*

2. *A city planning commission created and operating under the provisions of Section 4366-1 et seq., General Code, is not a special appropriating authority, as that term is defined in Section 5625-1, General Code.*

3. *Where the council of a city appropriates a lump sum for the use of a city planning commission created and operating under the provisions of Sections 4366-1, et seq., General Code, for all purposes, such planning commission may not employ an engineering firm without a specific appropriation from which the expenditure to pay the compensation of such employes may be made.*

4. *The home-rule provisions of the Ohio Constitution found in Article XVIIII do not confer any extraterritorial authority.*