

3652

INCOMPATIBLE OFFICE — COUNTY AUDITOR, MEMBER
COUNTY CHILD WELFARE BOARD — MAY NOT LEGALLY BE
HELD BY ONE PERSON AT SAME TIME.

SYLLABUS:

The positions or employments of deputy county auditor and member of the county child welfare board are incompatible and may not legally be held by one person at the same time.

Columbus, Ohio, April 5, 1941.

Hon. Ray Bradford, Prosecuting Attorney,
Batavia, Ohio.

Dear Sir:

I am in receipt of your letter requesting an opinion as to whether the position of deputy county auditor is incompatible with being a member of the child welfare board of the same county.

Section 2565, General Code, reads as follows:

“No judge or clerk of a court, county commissioner, county recorder, county surveyor, county treasurer or sheriff shall be eligible to the office of county auditor.”

Section 3092, General Code, reads in part as follows:

“* * * Provided that in each case such dependent or neglected children shall be duly committed to the aforesaid institution or association or placed in the care of a private family by the juvenile court as provided by law; or with the approval of the division of charities, department of public welfare, when in the judgment of the county commissioners the best interests of the dependent and neglected wards of the county will be subserved thereby, they may appoint a county child welfare board of five members to serve without compensation, such appointments to be subject, as far as applicable, to the provisions of sections 3081 and 3082 of the General Code. Such board shall have the same powers and duties relative to dependent and neglected children as are now given to trustees of county children’s homes, so far as applicable, particularly relating to the appointment of visitors for the finding and supervision of family homes for such children. Such a county child welfare board shall appoint a suitable person to serve as executive officer of the work under its supervision and upon such terms of remuneration as available funds will warrant.”

Sections 3081 and 3082, General Code, referred to in Section 3092, supra, deal with the manner of appointment and removal and do not contain any requirements as to qualifications. From the foregoing sections it is apparent that there is no incompatibility by reason of statutory provisions between being a member of a county child welfare board and a county auditor.

The same qualifications with respect to compatibility and incompatibility of the officers apply to their deputies.

“The disability of a city auditor to hold certain positions would pass to his deputy who has the right to act for and in the place of his principal as to his official duties.” Annual Reports of the Attorney General for 1914, page 383.

See also Opinions of the Attorney General for 1929, page 1984; Opinions of the Attorney General for 1931, page 1072.

However, there is a well recognized common law rule of incompatibility of public offices. This rule is stated in *State ex rel v. Gebert*, 12 O.C.C. (N.S.) 274, 275, as follows:

“Offices are incompatible when one is subordinate to or in any way a check upon the other, or when there is physical

impossibility for one person to discharge the duties of both.”

By the terms of Section 5625-19, General Code, the county auditor is made a member of the budget commission. In Opinions of the Attorney General for 1931, page 1419, it was held that the deputy county auditor may serve in place of his superior on the county budget commission. It is the duty of said commission to draw up the budget for the county and to apportion the income among the various functions of the county government entitled to share in the county funds. It was held in Opinions of the Attorney General for 1931, page 1417, that the position of city auditor and deputy county auditor are incompatible because the city auditor is under a duty to make out the budget of the city for the ensuing year and to present the same to the county budget commission and the duty of the county budget commission members to apportion county funds among the organizations and subdivisions entitled to share therein.

See also: 1931 Opinions of the Attorney General, page 1072.

Sections 3104 and 3105, General Code, provide as follows:

Section 3104.

“The board of trustees shall report annually to the commissioners of the county the condition of the home, and make out and deliver to the commissioners a carefully prepared estimate, in writing, of the wants of the home for the succeeding year. Such estimate shall specify separately the amounts required for each of the following purposes, to-wit: First maintenance. Second repairs. Third special improvements.”

Section 3105.

“At their regular quarterly meeting at which such estimate is presented to them, the commissioners shall carefully examine the estimate, and if, in their judgment, it is reasonable and rateably within the assessment for the support of the home for the current year, or so much thereof as they deem reasonable and within such assessment, the board of commissioners shall allow and approve, and shall appropriate and set apart such amount for the use of the home. Upon the order of the trustees of the home, the county auditor shall draw his warrant upon the county treasurer, who shall pay such warrant from the fund so appropriated and set apart.”

Under the provisions of Section 3092, supra, the county child welfare

board has the same duties with respect to dependent and neglected children as have the trustees. This would include a duty to submit to the county commissioners a carefully prepared estimate of their financial wants for the ensuing year with respect to the cost of maintaining the children within their care in private homes or in children's homes of other counties.

Section 5625-20, General Code, provides in part as follows:

"On or before the 15th day of July in each year, the taxing authority of each sub-division or other taxing unit shall adopt a tax budget for the next succeeding fiscal year. To assist in its preparation, the head of each department, board or commission, and each district authority entitled to participate in any appropriation or revenue of a sub-division shall file with the taxing authority thereof, or in the case of a municipality with its chief executive officer, before the first of June in each year, an estimate of contemplated revenue and expenditures for the ensuing fiscal year in such form as shall be prescribed by the taxing authority of the sub-division, or by the bureau. * * *"

Section 5625-1, General Code, paragraph c, defines "taxing authority" in the case of any county as the county commissioners.

It is apparent that the annual report provided for in Section 3104, General Code, will comply with the requirements of Section 5625-20, General Code, as to the submission of annual reports to the "taxing authority" on or before the first of June for the purpose of making up the budget. In making out the county budget it is possible, if not probable, that some of the estimates will have to be adjusted to come within the amount of funds prospectively available for the county. Such being the case it is apparent that the deputy county auditor would be subject to two duties if he were also a member of the child welfare board of the county.

In Opinions of the Attorney General for 1933, page 1819, it is held that a mere contingency which would create inconsistent interests is sufficient to cause offices to be declared incompatible.

"The question might arise whether or not, when the incompatibility between offices or public employments would not exist except upon the happening of certain contingencies, the positions would be said to be incompatible before the contingencies arise or only after the happening of the occurrences upon

which the contingency hinges. I do not find that this question has ever been considered by the courts or text writers.

It would seem apparent to me, however, that when an officer was elected or appointed for a definite time, as are teachers, principals and superintendents of the schools in local districts, if there be a possibility of the contingency arising during the term of office or during the time which the contract of employment covers, which would make a position incompatible, the rule of incompatibility would apply.

In an early English case, *Rex vs. Tizzard*, 9 B & C 418, Judge Bailey in speaking of incompatibility of offices uses this language:

'I think that the two offices are incompatible when the holder cannot in every instance discharge the duty of each.'"
Opinions of the Attorney General for 1927, page 2325, 2326.

Since it is possible that the deputy county auditor might have to serve as a member of the budget commission and as a member of that commission pass upon the appropriation sought by the county child welfare board, it is apparent that the positions or employments of deputy county auditor and member of the county child welfare board are incompatible and may not legally be held by one person at the same time.

THOMAS J. HERBERT,
Attorney General.