

935.

OFFICES INCOMPATIBLE—JUSTICE OF THE PEACE AND COUNTY ATTENDANCE OFFICER.

SYLLABUS:

The offices of justice of the peace and county attendance officer are incompatible.

COLUMBUS, OHIO, September 28, 1929.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication, as follows:

“You are respectfully requested to render this department your written opinion upon the following inquiry:

Question: Are the offices of justice of the peace and county attendance officer compatible?”

Public offices and public employments are said to be incompatible when they are made so by statute, or when by reason of the common law rule of incompatibility they are rendered incompatible. The common law rule of incompatibility is stated by the court in the case of *State ex rel. vs. Gebert*, 12 O. C. C. (N. S.) 274, as follows:

“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.”

Section 7769-1, General Code, providing for the employment of county attendance officers by the county boards of education, reads as follows:

“Every county board of education shall employ a county attendance officer, and may employ or appoint such assistants as the board may deem advisable. The compensation and necessary traveling expenses of such attendance officer and assistants shall be paid out of the county board of education fund. *With the consent and approval of the judge of the Juvenile Court, a probation officer of the court may be designated as the county attendance officer or as an assistant.* The compensation of the probation officers of the juvenile court so designated shall be fixed and paid in the same manner as salaries of other probation officers of the Juvenile Court; their traveling expenses as attendance officers which would not be incurred as probation officers shall be paid out of the county board of education fund. In addition to the compensation herein provided the county board of education may pay such additional compensation as it may deem advisable, to any probation officer designated as attendance officer and such additional amount shall be paid from the county board of education fund. The county attendance officer and assistants shall work under the direction of the county superintendent of schools. The authority of such attendance officer and assistants shall extend to all the village and rural school districts which form the county school district. But this section shall not be interpreted to confine their authority to investigate employment to that within the county school district.” (Italics the writer’s.)

It is apparent that a probation officer of the Juvenile Court may serve as county attendance officer when the judge of a Juvenile Court consents. Section 1662 of the

General Code, provides for the appointment of probation officers of a Juvenile Court. Several opinions of this department have held that such officers are within the classified civil service except perhaps particular probation officers who, by designation of the judge, under Sub-section 8 of Section 486-8, General Code, or by determination of the State Civil Service Commission under Sub-section 10 of said section, were placed in the unclassified service. See Opinions of the Attorney General for 1917, Volume I, page 209, Opinions of the Attorney General for 1927, Volume I, page 462, and Opinion No. 25, rendered on January 25, 1929.

In view of the fact that such probation officers are civil service employes, it would follow that they could not hold at the same time any public office, since this department has held that under the provisions of Section 486-23, General Code, holding public office is taking part in politics, within the inhibition of said section. See Opinions of the Attorney General for 1928, Volume 2, page 1119, and Opinions Nos. 544 and 575, issued by this office under dates of June 19, 1929, and June 29, 1929, respectively. Hence it may be said that a situation might arise where the county attendance officer would be the probation officer who could not become a justice of the peace without giving up his employment as probation officer.

Section 12982-1, General Code, provides as follows:

"The attendance officer or any inspector of the Industrial Commission of Ohio shall when a violation of Sections 12976, 12977, 12978, 12979 or 12980, General Code, comes to his attention make complaint against the person or employer violating it in any court having jurisdiction."

Section 12981, General Code, reads as follows:

"Mayors, justices of the peace, police judges and judges of Juvenile Courts shall have final jurisdiction to try the offenses described in the seven next preceding sections. When complaint is made against a corporation for violating any provision of such sections, summons shall be served, appearance made, or plea entered as provided by law in cases when an indictment is presented against a corporation, except in complaints before magistrates, when service may be made by the constable. In other cases process shall be served and proceedings had as in cases of misdemeanor."

Obviously, a justice of the peace can entertain jurisdiction of the various offenses designated in Sections 12974 to 12980 of the General Code. Thus, the occasion might arise where the attendance officer would make a complaint which he would be required to consider as justice of the peace. This possibility would clearly cause a conflict of interest which would render the two offices incompatible.

In an opinion of the Attorney General, found in Opinions of the Attorney General for 1927, Volume 3, at pages 2325 and 2326, the following pertinent language was used:

"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 even 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 term or an employe was employed by contract 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.'

In view of the foregoing, and in specific answer to your question, I am of the opinion that the offices of justice of the peace and county attendance officer are incompatible.

Respectfully,

GILBERT BETTMAN,
Attorney General.

936.

COUNTY COMMISSIONERS—CO-OPERATING WITH HIGHWAY DIRECTOR ON STATE ROAD IMPROVEMENT—MAY PAY PORTION OR ALL OF COST OF RIGHT OF WAY.

SYLLABUS:

County commissioners, in co-operation with the Director of Highways, may lawfully acquire the right of way required in connection with the improvement or repair of any state highway, and may lawfully agree to and pay any agreed portion, or all, of the cost of such right of way.

COLUMBUS, OHIO, September 30, 1929.

HON. HARRY K. FORSYTH, *Prosecuting Attorney, Sidney, Ohio.*

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

"There is a bad right angle turn on State Highway No. 119 where it crosses the line between Auglaize and Shelby Counties. It is desired to purchase additional right of way at this point from abutting property owners in order to widen and straighten this turn.

The commissioners of this county have submitted to me the question whether or not they are permitted to spend county funds to make this purchase.

Section 1191 (House Bill 195) passed April 5, 1929, provides in part as follows:

'County commissioners of any county shall be authorized to co-operate with the Department of Highways in the cost of obtaining right of way required for or in connection with any state highway improvement or repair contemplated by the director.'

I am informed that the Director of Highways wishes this change made, but wishes the county to pay for the right of way.

The earlier part of this section in referring to county co-operation on a