

999

POSITIONS OF SUPERINTENDENT OF SCHOOLS, SCHOOL TEACHER, EMPLOYEES OF BOARD OF EDUCATION, MUNICIPAL CORPORATION OR COUNTY—NOT INCOMPATIBLE WITH OFFICE OF MEMBER OF LIBRARY BOARD OF TRUSTEES—UNLESS APPOINTMENT OF ANY SUCH EMPLOYEE TO SUCH BOARD WOULD CONTRAVENE RESTRICTION OF—§§3375.15, 3375.63, R.C.—S. B. No. 68, 103rd General Assembly.

SYLLABUS:

1. Under the provisions of Sections 3375.15 and 3375.63, Revised Code, as amended by Senate Bill No. 68 of the 103rd General Assembly, effective September 14, 1959, the positions of superintendent of schools, school teacher, and of employees of a board of education, a municipal corporation or of a county, are not incompatible with the office of a member of a library board of trustees, unless the appointment of any such employee to such board would contravene the restriction of Section 3375.63, Revised Code, that "a majority of the members of each board of public library trustees shall be persons not employed by school districts or other political subdivisions," provided that in case of a school district library organized prior to September 4, 1947, by resolution of a board of education of such district, such employees are also barred from service as trustees of such library board if they are or have been, for a year previous to their appointment, members of the board of education making such appointment.

2. Both the office of mayor and the office of member of a county budget commission are incompatible with the office of member of a public library board of trustees.

Columbus, Ohio, December 4, 1959

Hon. Walter Brahm, Secretary, State Library Board and State Librarian  
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"The State Library Board has instructed me to request your opinion regarding the effect of recently enacted S. B. 68. Your opinion will aid me in furnishing advice and information to librarians and boards of trustees of public libraries as required by Sec. 3375.02 of the Revised Code of Ohio.

"What is the effect of S. B. 68, enacted by the 103rd General Assembly effective September 14, 1959, upon the incompatibility of the position of a member of a board of public library trustees under whatever subdivision organized, and any one of the following positions of public employment when held by the same person: a superintendent of schools, a teacher or other employee of a board of education; a mayor or other employee of a municipality; a member of a county budget commission, or other employee of a county?

"Does the common law test of incompatibility governing the decision on these positions no longer hold as the result of S. B. 68?

"If S. B. 68 does eliminate the common law test of incompatibility for certain persons is there a distinction between a position of public employment and a position of public office or trust? S. B. 68 applies to those 'employed by a school district or other political subdivision.' Would not a person holding an elective or appointive office be more than an employee and the statutory permission for membership on a board of library trustees expressed in S. B. 68 therefore not apply to public office holders?

"Prior to 1957 the only statutory prohibition relating to appointment of a library trustee was that such trustee could not be a member of the appointing authority. There were occasional opinions of the Attorney General such as Opinion 993, 1939 holding that under the common law test of incompatibility the positions of mayor of a village and library trustee were incompatible and Opinion 2549, 1947 which held that neither a city auditor nor a deputy auditor could serve as clerk of a board of municipal library trustees. Opinion 3162, 1934 held that no statutory prohibitions against teachers existed but the common law test of incompatibility was not at issue in this opinion.

"In 1957 Amended H. B. 27 passed by the 102nd General Assembly amended Sec. 3375.15 Revised Code of Ohio, making employees of boards of education ineligible for appointment to school district public library boards. This was a statutory prohibition applying only to public library boards organized under the subdivision of the school district, but it did raise the question of the potential incompatibility of employees of boards of education and membership on any public library board under whatever subdivision organized. As a result an opinion on the incompatibility of such positions, regardless of the absence of any statutory prohibition, was requested.

"Your predecessor, in Opinion 1245 issued November 4, 1957, consistent with the earlier ruling of his predecessor and based on the same reasoning by which a mayor was held ineligible for library board membership, ruled that the positions of school superintendent, teacher, or other employee of a board of education and membership on a board of library trustees under whatever subdivision organized, were incompatible.

"Amended S. B. 68 passed by the 103rd General Assembly restored Sec. 3375.15 Revised Code of Ohio to its original language prior to the passage of Am. H. B. 27, 102nd General Assembly, and enacted a new section, Sec. 3375.63 which reads as follows:

" 'No person shall be ineligible for membership on a board of public library trustees because of his employment by a school district or other political subdivision, provided that a majority of the members of each board of public library trustees shall be persons not employed by school districts or other political subdivisions.'

"Amended S. B. 68, 103rd General Assembly thus eliminated any statutory prohibition against employees of a board of education being appointed to a school district library board and any statutory prohibition that might conceivably apply to employees of other subdivisions or to the library boards organized under other subdivisions.

"However I assume that Am. S. B. 68 in no way affects the incompatibility of such positions under the common law test of incompatibility. Enactment of a statute which merely states that a causative factor of incompatibility shall be ignored does not remove the incompatibility unless or until the laws or situations creating the conflict are likewise removed. The power to contract and negotiate with each other which are given in the statutes to library boards and other political subdivisions, the competing interests which libraries and subdivisions have in the distribution of the classified property tax, and which formed the basis for the incompatibility of the positions, were in no way altered or amended by S. B. 68.

“Notwithstanding the passage of Am. S. B. 68 therefore, does the position of school superintendent, teacher, or other employee of a board of education and membership on a board of public library trustees under whatever subdivision organized continue to be incompatible; likewise the position of mayor or other employee of a municipality; and the position of a member of the county budget commission or other employee of the county?”

“Several situations have developed recently where conflict of interest clearly shows the incompatibility of such positions:

“The Cleveland Public Library and the Cleveland Board of Education in 1959 negotiated a \$600,000 contract, amid much controversy. The question at issue was the amount each would pay for the library service to schools. In such a situation how could the superintendent of the Cleveland Board of Education, or a teacher or other employee of the Board of Education, serving as a member of the Public Library Board, serve the best interests of both the contracting parties?”

“The Clermont County District Library Board for the past several years has annually been forced to appeal to the State Board of Tax Appeals against the action of the Clermont County Budget Commission. The appeals, which were decided in favor of the Library, reduced the amount of funds which went from the classified property tax to the county general fund, administered by the county commissioners, and the amounts which went to the various municipalities and villages in the county. Certainly therefore a member of the Budget Commission, or an employee of the county commissioners, the mayor of a municipality or other employee such as the city finance director would be serving two positions in which one would be a definite check upon the other.

“County commissioners, a mayor or city council have the same powers as boards of education to contract with public library boards for library service. They also receive funds from the classified property tax, after libraries have received their allocation. The amount that a board of library trustees therefore requests from the classified property tax affects the amount left for distribution to the county and city. An employee of the county or city sitting on a library board would be in a position of voting for a budget for the library which in turn would *directly* affect the amount of money remaining to operate his own department of government from which he earns his livelihood.

“Sec. 5707.05 provides that the residue of the undivided classified property tax shall be distributed to any board of public library trustees and the school districts of the county with the budget commission given authority to determine the amounts to be distributed to each participant from the residue.

“Thus a superintendent or other employee of a school district also would be in the same competitive situation with the library as employees of a city or county.

“In your opinion No. 447 issued May 12, 1959 holding that the position of county recorder is incompatible with that of a supervisor of a soil conservation district you state:

“ ‘In connection with the preparation of the above mentioned budget, Section 5705.30. Revised Code, requires that the board of county commissioners shall hold at least one public hearing thereon. It is conceivable that at such a hearing, the heads of departments and districts may be called upon to defend their estimates of contemplated expenditures or face a cut in their share of the appropriation. A cut in the share of the appropriation allocated to one department or district might well mean that more funds would be available for distribution to other departments and districts. *Where the same person participates in the preparation and defense of estimates for two such departments or districts, his impartiality in the matter may be questionable. This, in my opinion, reveals such a “contrariety and antagonism” as will make the offices in question incompatible.*’ (Emphasis added).

“In an earlier opinion on incompatibility issued by your office No. 386 April 24, 1959 you state:

“ ‘Should the budget commission be inclined to make certain adjustments in the village budget as provided in this section, it is impossible to suppose that the village mayor would not be keenly interested in the matter. Accordingly, should a reduction be contemplated by the commission, it could well be that the mayor would wish to appear before the commission to defend the estimates submitted. In this situation it is apparent that the same person will have an interest in the budget of the village on the one hand and in the appropriation for the local civil defense organization on the other. Even though the civil defense director has no authorization to appear before the budget commission to defend his budget, the mere fact that his appropriation will come, if at all, from a subdivision which may well be competing for funds with the village which this same person serves as mayor, makes the two offices clearly inconsistent and repugnant and therefore incompatible.’

“Would not the same ‘contrariety and antagonism’ result when employees of school districts, municipalities and counties serve also as a member of a board of library trustees?

“If S. B. 68 does eliminate the common law test of incompatibility for employees of political subdivisions, then are such elected officials as mayors, members of county budget commissions more than employees and still subject to the common law test of incompatibility?”

Section 3375.15, Revised Code, as amended by Amended Senate Bill No. 68 of the 103rd General Assembly, effective September 14, 1959, reads as follows:

“In any school district in which a free public library has been established, by resolution adopted by the board of education of such school district, prior to September 4, 1947, such library shall be under the control and management of a board of library trustees consisting of seven members. No one is eligible to membership on such board of library trustees who is or has been for a year previous to his appointment a member of a board of education making such appointment. Such trustees shall be qualified electors of the school district and shall be appointed by the board of education of the school district. Such trustees shall serve for a term of seven years and without compensation. All vacancies on such board of library trustees shall be filled by the board of education by appointment for the unexpired term. Such board of library trustees shall organize in accordance with section 3375.32 of the Revised Code. Such board of library trustees shall have the control and management of the school district free public library and in the exercise of such control and management shall be governed by sections 3375.33 to 3375.41, inclusive, of the Revised Code. This section does not affect the term of any member of a board of library trustees of a school district free public library appointed prior to September 4, 1947.”

The newly enacted Section 3375.63, Revised Code, contained in Amended Senate Bill No. 68, effective September 14, 1959, provides:

“No person shall be ineligible for membership on a board of public library trustees because of his employment by a school district or other political subdivision, provided that a majority of the members of each board of public library trustees shall be persons not employed by school districts or other political subdivisions.”

Incompatibility of public offices at common law is spelled out in 32 *Ohio Jurisprudence*, page 908, in the following language:

“\* \* \* One of the most important tests as to whether offices are incompatible is found in the principle that incompatibility is recognized whenever one office is subordinate to the other in some of its important and principle duties, or is subject to supervision or control by the other, \* \* \*, or is in any way a check upon the other, or where a contrariety and antagonism would result in an attempt by one person to discharge the duties of both.”

The question arises, then, what is the status of common law principles relative to statutes enacted by the General Assembly of Ohio? In 9 *Ohio Jurisprudence* (2d) Common Law, page 555, it is stated:

“\* \* \* It has been rightly said that the common law has no force in this state, except insofar as it derives authority from judicial recognition in the practice and course of adjudication in our courts, but when natural justice requires, and reason prompts, the principles and rules of the common law are adopted in our theory of jurisprudence, *when they do not conflict with statute and are adaptable to our circumstances.*

“But the courts of Ohio have never hesitated to recognize that there are necessarily limitations upon the enforcement of common-law precepts. In general it may be stated that the courts are not bound to hold that a common-law rule is the law of Ohio, but they are left to determine the question according to their best light and judgment, as all English statutes grew out of peculiar exigencies, many of which are foreign to our conditions and habits. Consistent with such views it was held that the common law is necessary to give effect to and administer remedies and statutory enactments. *But wherever the legislature has, by statutory law, established a rule of either property or conduct, it has always been the policy in this state that the common law can neither add to nor take away from the statutory rules so established.* \* \* \*” (Emphasis added)

Also, it is stated in 9 *Ohio Jurisprudence* (2d) at page 557:

“\* \* \* When the people, through the legislative branch of the government, commit a rule of law, applicable to a specific situation, to the formalities of a written statute, *the court is obliged to give force to such statute according to its express terms and plain intent.*” (Emphasis added)

In the light of the foregoing authoritative statements to the effect that the express provisions of a statute prevail in the event of conflict with the principles and rules of the common law, it is plain that the questions propounded by you must be viewed and decided accordingly. Specifically, these questions are: Is the position of a member of a board of public library trustees compatible with that of:

- (1) A superintendent of schools?
- (2) A teacher or other employee of a board of education?
- (3) A mayor or an employee of a municipal corporation?
- (4) A member of a county budget commission or an employee of a county?

You will note that I have rephrased your questions designated above as questions (3) and (4) by substituting the word “an” for “other,” for

it is quite clear that mayors and members of county budget commissions cannot be considered as "employees" in the context of the question under consideration here. While the Constitution of Ohio does not employ the term "public officer," the term "officer" obviously means an individual who takes the oath of office and becomes responsible to the public for his own official acts and those of his subordinates. *32 Ohio Jurisprudence*, Section 2 page 853. Mayors and members of county budget commissions are clearly embraced within this definition.

An examination of Section 3375.15, Revised Code, prior to the amendment by the 103rd General Assembly shows that the second sentence read as follows:

"\* \* \* No one is eligible to membership on such board of library trustees who is or has been for a year previous to his appointment a member of a board of education making such appointment, *or an employee of a board of education making such appointment.* \* \* \*"

The 103rd General Assembly chose to repeal the underscored words of Section 3375.15, *supra*, whereby the disqualification with reference to membership on boards of library trustees under said section is limited to persons who are, or have been for a year previous to their appointment, *members* of a board of education making such appointment; the further disqualification pertaining to *employees* of a board of education making such appointment has been removed. An examination of the new Section 3375.63, *supra*, discloses that the area of eligibility for membership on a board of public library trustees has been further extended by making eligible for such membership persons who are employed by a school district or other political subdivisions, provided a majority of such board are not so employed.

In order to clear the ground for the development of the several aspects of the questions involved, I must first determine whether Sections 3375.15 and 3375.63, Revised Code, are to be considered as being independent of each other, or are they to be viewed as complementary to each other.

It should be noted that Section 3375.15, *supra*, is part of Chapter 3375. Sections 3375.14 to 3375.26, inclusive, Revised Code, contain the statutes dealing specifically with school libraries established by resolution adopted by a board of education prior to September 4, 1947. School libraries are defined in Section 3375.14, Revised Code, as follows:



“The board of education of any city, exempted village, or local school district may provide for the establishment, control, and maintenance of school libraries for the purpose of providing school library service to the pupils under its jurisdiction. Such board of education may contract with any public board, association, or other organization operating a public library in a community to furnish such school library service, the board of education paying all or part of the expense thereof, including the salaries of school librarians, as compensation for the services rendered, \* \* \*.”

Section 3375.32, Revised Code, contains the provisions relative to procedure to be followed in the organization of boards of library trustees established under Section 3375.06, Revised Code, for county free public libraries; under Section 3375.10, Revised Code, for township libraries; under Section 3375.12, Revised Code, for municipal free public libraries; under Section 3375.14, Revised Code, for school libraries; under Section 3375.22, Revised Code, for a county library district and, under Section 3375.30, Revised Code, for regional library districts. Of some significance, I believe, is the fact that the organizational procedure for all the mentioned public libraries is dealt with collectively in Section 3375.32, Revised Code, and that the prescribed mode of organization for all is identical. It appears that Section 3375.63, Revised Code, enacted by Amended Senate Bill No. 68, *supra*, falls into the same category. Speaking as it does of “membership on a board of public library trustees,” without qualification, I therefore conclude that the provisions of said sections are applicable to trustees of all public libraries. It follows that Sections 3375.15 and 3375.63, Revised Code, are complementary to each other and should, therefore, be construed together.

Thus, viewing collectively the eligibility provisions of the sections under consideration, the practical effect may be summarized as follows:

No person shall be disqualified from serving as a trustee on the board of a public library by virtue of his employment by a school district or other political subdivision, provided a majority of such board is not composed of persons so employed; and as to free public libraries in school districts which have been established by the board of education of such school districts, prior to September 4, 1947, the fact that a person appointed to the board of such library is, or has been for a year previous to his appointment, a member of a board of education making such appointment, constitutes an additional disqualifying ground for such service. In plain language, except

for the exception with reference to school district libraries expressly mentioned in Section 3375.15, *supra*, the provisions contained in Section 3375.63, *supra*, constitute the basic test as to whether or not a person may lawfully serve as a trustee on any public library board, regardless of the subdivision under which such library may have been organized. To that test must be of course added the physical capability of an appointee to perform the duties of his office irrespective of any other position he may hold at the same time. In this regard, it is quite clear that physical impossibility is an element that must be always considered as bearing on the question of compatibility. *Sate ex rel v. Gebert*, 12 O.C.C. (N.S.) 274, 275.

Considering your specific question, it appears clear that a superintendent of schools and a teacher no less than employees of a board of education of a municipality, and employees of a county, all fall into the same class of persons for the purpose here under consideration since all are employees of various public bodies or political subdivisions of the state. It follows, therefore, that under the provisions of Sections 3375.15 and 3375.63, Revised Code, as amended by Amended Senate Bill No. 68, all such employees are eligible for membership on a board of trustees of a public library, unless their appointment would contravene the restriction of Section 3375.63, *supra*, that "a majority of the members of each board of public library trustees shall be persons not employed by school districts or other political subdivisions." Further in case of a school district library organized prior to September 4, 1947 by resolution of a board of education of such district, such an employee is ineligible for appointment for the further reason that he is or has been, for a year previous to his appointment, a member of the board of education making such appointment.

Your concern as to possible untoward consequence of the new situation created by amendments in favor of employees of boards of education, school districts and other political subdivisions as members of library boards is understandable. I must assume, however, that the General Assembly was not unmindful of these aspects of the situation and that it resolved the problem by the mandatory provision in the new Section 3375.63, Revised Code, that a *majority* of the members of each board of public library shall be persons not employed by school districts or other political subdivisions. In any event, it is well settled that where the language of a statute is clear and unambiguous, it is the duty of the courts to apply it as written, and not to question the wisdom or propriety of the legislature, as the legislature is presumed to act wisely in the enactment of a statute.

As to mayors and members of the county budget commissions, an examination of Amended Senate Bill No. 68 fails to disclose any provisions whereby their position with respect to service on boards of public library trustees is affected. In other words, as to these officials, all such elements as must be considered under the statutes and the common law as a test of incompatibility still apply, bearing in mind that the disqualification as to service on a school district free public library board under Section 3375.15, Revised Code, existed prior to the amendment of such section.

In Opinion No. 993, Opinions of the Attorney General for 1939, page 1403, it was determined that the offices of mayor of a village and member of the board of trustees of a school district library are incompatible. In that opinion Section 3711, General Code, was cited as the main ground for the incompatibility of said positions. However, a careful reading of that section, which is now Section 721.22, Revised Code, reveals that its provisions are broad enough to disqualify a mayor not only as the trustees of a school district library but as the trustee of any free public library. Section 721.22, *supra*, provides :

“A municipal corporation may, by ordinance, transfer, lease, or permit the use of any property, real or personal, suitable for library purposes, to the board of trustees of any free public library or any library association rendering free library service to the inhabitants of the municipal corporation, upon such lawful terms as are agreed upon between the municipal corporation and the trustees of such library or library association.”

It is stated in Opinion No. 99, *supra*, that a mayor, who was at the same time a library trustee, would have difficulty in exercising a totally impartial attitude in the event of negotiations between the municipality and the board of library trustees for the transfer of property under the provisions of Section 721.22, *supra*, and I concur with the reasoning of my predecessor in said opinion.

A county budget commission consists of the county auditor, the county treasurer, and the prosecuting attorney, Section 5705.27, Revised Code. Under the provisions of Section 5705.28, Revised Code, the taxing authority of any public library is required to prepare a tax budget on or before the 15th day of July for the next succeeding year. Public inspection of such budget is provided for in Section 5705.30, Revised Code. Section 5705.31, Revised Code, provides that the budget commission shall examine the tax budgets and ascertain the total amount proposed to be raised in the

county for the purpose of each subdivision and other taxing units therein. Section 5705.32, Revised Code, gives the budget commission the authority to adjust amounts required from the general property tax for each fund, as shown by such budgets, and to revise the estimate of balances and receipts from all sources for each fund, whereupon it shall determine the total appropriations that may be made therefrom. Section 5705.32, *supra*, also provides:

“\* \* \* The commission may fix the amount of proceeds of classified property taxes, collected within the county, to be distributed to each board of public library trustees which has qualified under section 5705.28 of the Revised Code for participation in the proceeds of such taxes based on the needs of such library for the construction of new library buildings, parts of buildings, improvements, operation, maintenance, or otherwise, and notwithstanding the fact that alternative methods of financing such needs are available, \* \* \*.”

It is self-evident, I believe, that a member of a county budget commission, in view of the duties and the authority of such office, would be faced with the problem of reconciling contrary interests of competing units for the tax dollar, and that such member would be placed in an extremely trying situation if he were at the same time a member of a library board of trustees; his impartiality could be questioned, even if not actually affected.

Accordingly, in answer to your specific questions, it is my opinion and you are advised:

1. Under the provisions of Sections 3375.15 and 3375.63, Revised Code, as amended by Senate Bill No. 68 of the 103rd General Assembly, effective September 14, 1959, the positions of superintendent of schools, school teacher, and of employees of a board of education, a municipal corporation or of a county, are not incompatible with the office of a member of a library board of trustees, unless the appointment of any such employee to such board would contravene the restriction of Section 3375.63, Revised Code, that “a majority of the members of each board of public library trustees shall be persons not employed by school districts or other political subdivisions,” provided that in case of a school district library organized prior to September 4, 1947, by resolution of a board of education of such district, such employees are also barred from service as trustees of such board if they are or have been, for a year previous to their appointment, members of the board of education making such appointment.

2. Both the office of mayor and the office of member of a county budget commission are incompatible with the office of member of a public library board of trustees.

Respectfully,

MARK MCELROY

Attorney General