

OPINION NO. 71-017

Syllabus:

1. A member of a city council, governed by Section 731.02, Revised Code, may not serve as a member of a municipal charter commission created under Article XVIII, Section 8 of the Constitution of Ohio.

2. In the absence of any specific constitutional or statutory prohibition, a municipal officer, of the types listed in Section 733.01, Revised Code, may serve as a member of a municipal charter commission created under Article XVIII, Section 8 of the Constitution of Ohio.

To: David A. Cutright, Ross County Pros. Atty., Chillicothe, Ohio
By: William J. Brown, Attorney General, April 8, 1971

Your request for my opinion reads as follows:

"1) Is the office of a city councilman compatible with being a member of a commission to frame a charter pursuant to authority of Section 8 of Article XVIII of the Ohio Constitution?

"2) Is the office of any other municipal public official incompatible with being a member of a commission to frame a charter pursuant to authority of Section 8 of Article XVIII of the Ohio Constitution?"

Your questions involve the characteristics of a commission established to frame a municipal charter, which commission is similar to a constitutional convention and is charged with formulating a governmental structure. Like such conventions it is not an on-going body but is dissolved when it has completed, adopted, and submitted a draft to the affected electors for their approval or disapproval.

The provision respecting municipal charter commissions is contained in Article XVIII, Section 8 of the Ohio Constitution. Section 8 states:

"The legislative authority of any city or village may by a two-thirds vote of its members, and upon petition of ten per centum of the electors shall forthwith, provide by ordinance for the submission to the electors, of the question, 'Shall a commission be chosen to frame a charter.' The ordinance providing for the submission of such question shall require that it be submitted to the electors at the next regular municipal election if one shall occur

not less than sixty nor more than one hundred and twenty days after its passage; otherwise, it shall provide for the submission of the question at a special election to be called and held within the time aforesaid. The ballot containing such question shall bear no party designation, and provision shall be made thereon for the election from the municipality at large of fifteen electors who shall constitute a commission to frame a charter; provided that a majority of the electors voting on such question shall have voted in the affirmative. Any charter so framed shall be submitted to the electors of the municipality at an election to be held at a time fixed by the charter commission and within one year from the date of its election, provision for which shall be made by the legislative authority of the municipality in so far as not prescribed by general law. Not less than thirty days prior to such election the clerk of the municipality shall mail a copy of the proposed charter to each elector whose name appears upon the poll or registration books of the last regular or general election held therein. If such proposed charter is approved by a majority of the electors voting thereon it shall become the charter of such municipality at the time fixed therein."

Notwithstanding its relatively short life span, the role of a charter commission is a very important one. A member of a county charter commission was described in The State, ex rel. Bricker, v. Gessner, 129 Ohio St. 290, 295 (1935), as follows:

"He is chosen by vote of the people. He exercises independent prerogatives and is not amenable to superior authority. His tenure is reasonably definite in that his duties must be fully accomplished within ten months after election. His participation in framing or amending a charter is in the performance of sovereign powers. The nature of his work possesses legislative qualities. His acts are in the public service. While he is not required to take an oath of office, gives no bond, and receives no compensation, these are lesser indicia of public office and lose significance when compared with the other more important criteria which have been noted."

It was held in that case that such member occupied "a public office of trust". Consequently, membership on it by a judge of the court of common pleas was precluded by the restrictions of Article IV, Section 14 of the Ohio Constitution, prohibiting such judge from holding "any other office of profit or trust".

The constitutional provisions respecting municipal charter commissions, supra, and county charter commissions, are fundamentally comparable in this respect. The latter, outlined in Article

X, Section 4 of the Ohio Constitution, reads, in pertinent part, as follows:

"The legislative authority of any charter county or the board of county commissioners of any other county may by a two-thirds vote of its members, or upon petition of ten per cent of the electors of the county shall forthwith, by resolution, submit to the electors of the county the question, 'Shall a county charter commission be chosen?' The question shall be voted upon at the next general or primary election, occurring not sooner than sixty days thereafter. The ballot containing the question shall bear no party designation, and provision shall be made thereon for the election from the county at large of fifteen electors as such commission if a majority of the electors voting on the question shall have voted in the affirmative. Candidates for such commission shall be nominated by petition of one per cent of the electors of the county, which shall be filed with the election authorities not less than forty days prior to such election. Candidates shall be declared elected in the order of the number of votes received, beginning with the candidate receiving the largest number; but not more than seven candidates residing in the same city or village may be elected. Within ten months after its election such commission shall frame a charter for the county or amendments to the existing charter, and shall submit the same to the electors of the county, to be voted upon at the next general election occurring not sooner than sixty days after such submission."

It must be concluded that a member of a municipal charter commission occupies "a public office of trust" just as does a member of a county charter commission.

When considered in this light, it becomes apparent that a city councilman may not be a member of a municipal charter commission because he is forbidden, by Section 731.02, Revised Code, to hold any other "public office".

The pertinent language of Section 731.02, supra, reads as follows:

"Each member of the legislative authority shall be an elector of the city, shall not hold any other public office, except that of notary public or member of the state militia, and shall not be interested in any contract with the city, and no such member may hold employment with said city."

It is self-evident that if a councilman is forbidden to hold any other "public office", he is doubly barred from a "public office of trust". Accordingly, I conclude that a city councilman may not serve as a member of a charter commission.

Accordingly, I must answer your first question in the negative.

Your second question is not susceptible of precise answer because it pertains to "any other municipal public official". These may be defined in terms of Section 733.01, Revised Code, which describes the officers vested with executive power, as follows:

"The executive power of cities shall be vested in a mayor, president of council, auditor, treasurer, solicitor, director of public service, director of public safety, and such other officers and departments as are provided by Title VII of the Revised Code.

"* * *

* * *

* * *"

The category assumed in your question may be broader, however, as embracing those who "* * * exercise * * * a portion of the sovereignty of the state and hence the performance of an executive, legislative or judicial act * * *." (See Scotfield v. Strain, 142 Ohio St. 290, 292). If your question were to be so broadly understood, it would be infeasible to attempt an answer.

A limited answer, however, is in order, with respect to those officers listed in Section 733.01, supra, in terms of two applicable principles.

First, a person may not be a member of a municipal charter commission if he also holds an office which is restricted by a constitutional or statutory provision, prohibiting the occupant of the latter from holding another "office" of government, unless, of course, the restriction is couched in such limited way as not to be applicable to municipal charter commissions, supra.

In this connection, your attention is directed to Section 705.78, Revised Code, which, in "Federal Plan" cities (Sections 705.71 to 705.86, Revised Code), forbids the mayor and "heads of departments" to hold any other "office", as broadly defined therein. No comparable restrictive statutes, applicable to such officers, have come to my attention.

Second, other duties of an officer of government may constitute a conflict under the general common law principles of incompatibility. (State, ex rel. v. Wolven, 175 Ohio St. 114.) The opinion in that case discusses the principles extensively. Generally, common law incompatibility of offices arises where two or more public offices have a supervisory-subordinate relationship to each other or one has power to check the other, e.g., the cited decision proscribed contemporaneous membership on a local school district board of education and a county board of education where the latter had some supervisory power over the former.

No legal supervisory-subordinate relationship, or power by one to check the other, appears to exist as between the officers listed in Section 733.01, supra, and a municipal charter commission. The latter is of limited life span; is charged only with the preparation

of a draft charter; must submit the product to ratification by the electors; and is not charged with any governing powers during its existence. Any relationship between the deliberations of the commission and the concurrent or subsequent operation of the municipal government, is remote in a legal sense. (In this respect I concur with the reasoning of my predecessor, expressed in Opinion No. 1512, Opinions of the Attorney General for 1964.)

Some conflict of interest might be urged by suggesting that a charter proposal could be drafted to favor then current officeholders when such officeholders are members of the commission. Any such provisions, however, are subject to scrutiny by the voters at the time of its submission to them. Thus, such conflict, if any occurs, becomes a political matter. It is not a matter of legal conflict as that has been defined at common law.

It is noteworthy that the founding fathers, many of whom were students of philosophy, law and government, recognized no apparent incompatibility between contemporaneous membership in the Constitutional Convention of 1787 and in the Congress meeting pursuant to the Articles of Confederation. (At least fifteen of the thirty-nine who signed the Constitution were members of the Congress during the session of the latter from November 1786 to October 1787; Biographical Directory of the American Congress 1774-1961, at 38-41, Government Printing Office, Washington, D.C. (1961); Laws of the United States, Vol. 1, at 58-70 (1815)).

On these bases it would seem that common law principles do not operate to disqualify a public officer from serving in a constituent assembly, such as a municipal charter commission, engaged in designing a form of government.

Thus, officers cited in Section 733.01, supra, except in municipalities organized under the "Federal Plan", supra, or when some other specific statutory restriction applies, would not be barred from membership on a municipal charter commission.

In arriving at these conclusions, as noted above, I have been aware of the views expressed in Opinion No. 1512, supra. That Opinion had to do with procedural matters connected with the filing of petitions for the office of municipal charter commissioner, in relation to Article V, Section 7 of the Constitution of Ohio and Sections 3513.251 and 3513.257, Revised Code. No question is raised herein respecting the conclusion reached in that Opinion. Some of the arguments used to reach that conclusion, however, were stated more broadly than was necessary to support the result. To that extent the statement of the arguments are dicta. More precisely, the views stated in that Opinion were that such commissioners are not "municipal officers" while my conclusion is that they are "public officers", i.e., officers who may be chosen pursuant to specific constitutional mandate, and whose status, for the purposes herein considered, need not be further characterized.

In specific answer to your questions, it is my opinion that:

1. A member of a city council, governed by Section 731.02, Re-

vised Code, may not serve as a member of a municipal charter commission created under Article XVIII, Section 8 of the Constitution of Ohio.

2. In the absence of any specific constitutional or statutory prohibition, a municipal officer, of the types listed in Section 733.01, Revised Code, may serve as a member of a municipal charter commission created under Article XVIII, Section 8 of the Constitution of Ohio.