

Note from the Attorney General's Office:

1958 Op. Att'y Gen. No. 58-1705 was questioned by 1979 Op. Att'y Gen. No. 79-111 and overruled by 1979 Op. Att'y Gen. No. 79-112.

1705

COMPATIBILITY — OFFICE OF COUNTY COMMISSIONER
AND MEMBER, BOARD OF TRUSTEES OF PUBLIC AFFAIRS
OF A VILLAGE INCOMPATIBLE.

SYLLABUS:

The office of county commissioner is incompatible with that of a member of the board of trustees of public affairs of a village, and it is not possible under the law for one and the same person to hold both offices at the same time.

Columbus, Ohio, February 11, 1958

Hon. William E. Didelius, Prosecuting Attorney
Erie County, Sandusky, Ohio

Dear Sir:

I have before me your request for my opinion reading as follows:

“One of the members of the Board of County Commissioners of Erie County also is a member of the Board of Trustees of Public Affairs of the Village of Huron in this county.

“The question has arisen whether these two public offices may be held at the same time by the same person. This question has arisen at this particular time by reason of the existence of the following circumstances :

“The Board of County Commissioners contemplates the creation of a sewer district under the provisions of Section 6117.01 of the Ohio Revised Code, the territory of which will be adjacent to the Village of Huron. It is further contemplated that the Board of County Commissioners will acquire or construct a water distribution system within the sewer district; and that the Board will endeavor to conclude a contract with the Village of Huron, under the terms of which the village will furnish a supply of water for the water distribution system in the sewer district.”

Your question is whether or not the offices of county commissioner and a member of the board of trustees of public affairs of a village may be held by one and the same person.

There is no express statutory or constitutional prohibition holding the two offices here in question incompatible. In the absence of an express provision, it seems to be a well settled rule that offices are 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.

The initial approach to your question, as such, would hardly warrant the conclusion that the offices involved would be incompatible with each other, inasmuch as one office is not subordinate to the other, it would be physically possible for one person to discharge the duties of both, and ordinarily one would not be a check upon the other.

Sections 735.28 and 735.29, Revised Code, read as follows:

Section 735.28:

“In each village in which a water works, electric light plant, artificial or natural gas plant, or other similar public utility is situated, or when the legislative authority thereof orders a water works, electric light plant, natural or artificial gas plant, or other similar public utility, to be constructed, or to be leased or purchased from any individual, company, or corporation, or when such legislative authority determines to establish a schedule of rates or charges of rents for use of the sewerage system and

sewage pumping, treatment, and disposal works of the village, such legislative authority shall establish a board of trustees of public affairs, which shall consist of three members, residents of the village, who shall each be elected for a term of two years.

“When the legislative authority establishes such board, the mayor shall appoint the members thereof, subject to the confirmation of the legislative authority. The successors of such appointed members shall be elected at the next regular election of municipal officers held in the village.

“In case of a vacancy in such board from death, resignation, or otherwise, it shall be filled for the unexpired term by appointment by the mayor, subject to confirmation by the legislative authority.

“The board shall organize by electing one of its members president. Unless the office of clerk of the board has been consolidated with the office of clerk of the village, as authorized by section 733.28 of the Revised Code, it may elect a clerk, who shall be known as the clerk of the board of trustees of public affairs.”

Section 735.29:

“The board of trustees of public affairs appointed under section 735.28 of the Revised Code shall manage, conduct, and control the water works, electric light plants, artificial or natural gas plants, or other similar public utilities, furnish, supplies of water, electricity, or gas, collect all water, electric, and gas rents, and appoint necessary officers, employees, and agents.

“The board may make such by-laws and regulations as it deems necessary for the safe, economical, and efficient management and protection of such works, plants, and public utilities. Such bylaws and regulations, when not repugnant to municipal ordinances or to the constitution or laws of this state, shall have the same validity as ordinances.

“For the purpose of paying the expenses of conducting and managing such water works, plants, and public utilities or of making necessary additions thereto and extensions and repairs thereon, the board may assess a water, light, power, gas, or utility rent, of sufficient amount, and in such manner as it deems most equitable, upon all tenements and premises supplied therewith. When such rents are not paid the board may certify them to the county auditor to be placed on the duplicate and collected as other village taxes, or it may collect them by actions at law in the name of the village.

“The board shall have the same powers and perform the same duties as are provided in sections 743.01, 743.05 to 743.07, inclusive, 743.10, 743.11, 743.18, 743.24, and 735.05 to 735.09,

inclusive, of the Revised Code, and all powers and duties relating to water works in any of such sections shall extend to and include electric light, power, and gas plants, and such other similar public utilities, and such board shall have such other duties as are prescribed by law or ordinance not inconsistent herewith."

In Section 743.18, Revised Code, we find the following:

"A municipal corporation which has water works or electric works may contract with any other municipal corporation to supply it or its inhabitants with water or electricity upon such terms as are agreed upon by their respective legislative authorities. A municipal corporation which has a water works may dispose of surplus water, for manufacturing or other purposes, by lease or otherwise, upon such terms as are agreed upon by the director of public service of a city or the board of trustees of public affairs of a village and approved by the legislative authority thereof. Moneys received for such surplus water in either case shall be applied to the payment of the principal and interest of the bonds issued for the construction of such water works, or for other expenses incident to the maintenance thereof, but no lease shall be made for a longer term than twenty years.

"The amount to be paid for such water supply shall be raised by the municipal corporation purchasing it, in the manner provided for the payment of the expense of conducting and managing water works constructed wholly by a municipal corporation. The amount so received by the municipal corporation furnishing such supply shall be applied to the payment of the interest on the sum borrowed for the construction of such water works, or to defray the expense of its management, as the director of public service or board of trustees direct."

By reason of the authority contained in Section 743.18, Revised Code, the board of trustees of public affairs of a village has authority to sell surplus water for manufacturing or other purposes under stated conditions.

In the situation presented in paragraph 3 of your letter, we would have the county commissioner involved contracting for water for the sewer district, with the Board of Trustees of Public Affairs of the Village of Huron, of which he is also a member, and the same person would be a member of each contracting board.

It is believed that this position would be untenable, and that each would be a check upon the other.

In an informal opinion rendered by my predecessor in office, Informal Opinion No. 133, Opinions of the Attorney General for 1952, p. 451, the following statement is found:

“Offices have been held incompatible, as a matter of common law, where one is subordinate to or in any way a check upon the other. *State, ex rel. v. Gebert*, 12 O. C. C. (N.S.) 274. The general rule of incompatibility is based on the premise that considerations of public policy render it improper for one incumbent to retain both offices where such offices have conflicting duties, since such conflict would present a contrariety or antagonism which would interfere with the faithful, impartial and efficient discharge of the duties of each office. 42 *American Jurisprudence*, page 935, et seq.; 32 *Ohio Jurisprudence*, page 906, et seq. While these basic principles are uniformly accepted, they sometimes are most difficult of application to individual cases.”

And in the same opinion it is also stated:

“It might be argued that the performance of such duties would be the exception, rather than the rule, and being only a remote possibility, no immediate conflict would be presented to preclude the holding of both positions at the same time. In Opinion No. 1289, Opinions of the Attorney General for 1952, issued March 26, 1952, a copy of which is here inclosed, I expressed the opinion that the fact that a conflict in interest is a mere possibility and not inevitable does not make the offices any the less incompatible. Reference was made to Opinion No. 1288, Opinions of the Attorney General for 1927, page 2326. I believe this statement to be in accord with the authorities as stated in 32 *Ohio Jurisprudence*, page 906.”

In Opinion No. 1289, Opinions of the Attorney General for 1952, p. 257, the following is stated at page 259:

“The fact that a conflict in interest is a mere possibility and not inevitable does not make the two offices any the less incompatible. Thus it was stated in an opinion by one of my predecessors in office, Opinion No. 1288, Opinions of the Attorney General for 1927, at page 2326:

“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 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.””

Therefore, in view of the foregoing, and in specific answer to your question, you are advised that the office of county commissioner is incompatible with that of a member of the board of trustees of public affairs of a village, and it is not possible under the law for one and the same person to hold both offices at the same time.

Respectfully,

WILLIAM SAXBE

Attorney General