

3476.

OFFICES INCOMPATIBLE—MEMBER OF GENERAL ASSEMBLY AND BOARD OF PAROLE—OFFICES COMPATIBLE—MEMBER OF GENERAL ASSEMBLY AND OF WATERWAYS BOARD CREATED BY SENATE JOINT RESOLUTION NO. 19, 89TH G. A.—CONDITION NOTED.

*SYLLABUS:*

1. *A member of the 89th General Assembly is not eligible to appointment on the board of parole created by Substitute Senate Bill No. 149 until after December 31, 1933.*

2. *A member of the 89th General Assembly may lawfully be appointed on the board created to make a survey of the waterways of the state by Amended Senate Joint Resolution No. 19, and may, at the same time, hold his seat in the General Assembly providing it is determined by the governor that no compensation other than actual and necessary expenses be fixed for the members of said commission. If, however, it is determined by the governor that compensation, other than actual and necessary expenses, shall be paid to the members of said commission, a member of the 89th General Assembly who is appointed to and accepts membership on said commission must, forthwith, resign his seat in the General Assembly.*

COLUMBUS, OHIO, August 4, 1931.

HON. GEORGE WHITE, *Governor of Ohio, Columbus, Ohio.*

MY DEAR GOVERNOR:—This will acknowledge receipt from you of the following request for my opinion:

“Article 2, Section 19 of the Constitution of Ohio is as follows:

‘No Senator or Representative shall, during the term for which he shall have been elected, or for one year thereafter, be appointed to any civil office under this State, which shall be created or the emoluments of which, shall have been increased, during the term, for which he shall have been elected.’

Two questions have arisen in this office which makes it necessary for us to ask you for a construction on this section.

A member of the Senate, a Republican by the way, has submitted his name for consideration as a member of the new Board of Paroles. Could he accept this appointment?

The Second question has reference to the appointments for membership on the Commission to make a survey of the waterways of the state. This Commission is to be appointed under Senate Joint Resolution No. 19, by Mr. Farnsworth, relative to a survey, examination and report upon riverways and resources, of the state of Ohio.

The Governor has under consideration several members of the General Assembly for places on this Commission. Could he legally appoint these members or would such appointments be in violation of this section of the constitution?”

The board of parole, and the board created to examine and report to the governor upon the river-ways and water resources of the State of Ohio, to which you refer, were both created by the 89th General Assembly of Ohio.

The board of parole was created by Substitute Senate Bill No. 149 of the 89th General Assembly, which bill is entitled: "An act providing for the establishment of a board of parole and defining its powers and duties and repealing sections 89 \* \* \* of the General Code of Ohio."

The board to examine and report to the Governor on the river-ways and water resources of the State of Ohio was created by Amended Senate Joint Resolution No. 19, of the 89th General Assembly of Ohio.

The senators and representatives comprising the membership of the 89th General Assembly were each elected for a term beginning January 1, 1931, and ending December 31, 1932. Manifestly, therefore, if membership on either of the boards mentioned constitutes the holding of a "civil office", as the term is used in the constitutional provision quoted by you, no senator or representative who has been elected to membership in the 89th General Assembly is eligible to membership on either of said boards until after December 31, 1933.

The term "civil office", as it appears in the constitutional provision referred to, has never received a judicial construction by the courts of this state, so far as I have found. The same term occurs in the constitution of the United States, Article II, section 4. As there used, it has been held to apply to any officer of the United States who holds his appointment under the national government, whether his duties are executive or judicial, with the exception of officers of the army and navy. See Bouviers Dictionary. Rawles 3d revision, page 498.

I am of the opinion that the term "civil office", as used in Article II, section 19, of the constitution of Ohio, is meant to be used in contradistinction to a military office, and includes all public offices, at least those that are filled by appointment. Whether or not it includes elective as well as appointive offices, it is not necessary for the purposes of this opinion to determine.

It becomes important therefore to consider what constitutes a public office. This question, and its correlative, who is a public officer, has been the subject of many judicial findings, not entirely reconcilable. The precise line of demarcation between a public officer and a governmental agent, employee or contractor, is difficult to draw.

Of the many attempts to define a public office by the courts of Ohio, the one which seems to have met with most favor, perhaps, is that an office is a public position to which a portion of the sovereignty of the country attaches and which is exercised for the benefit of the public. Without a satisfactory definition of what is, and what is not, the "sovereignty of the country" this definition seems to fail to adequately define. *State v. Hunt*, 84 O. S. 143-9. See also *State, ex rel, v. Brennan*, 49 O. S. 33; *State, ex rel. Attorney General, v. Jennings*, 57 O. S. 415; *State, ex rel. Armstrong, v. Halliday*, 61 O. S. 171; *Palmer v. Zeigler*, 76 O. S. 210; *State, ex rel. Landis, v. Commissioners of Butler County, et al.*, 95 O. S. 157; *State, ex rel, v. Callan*, 110 O. S. 367; *Wright v. Clark*, 119 O. S. 462.

In the case of *State, ex rel, v. Callan*, supra, Chief Justice Marshall, after citing a number of earlier authorities dealing with this subject, among which are several of the cases cited above, is prompted to say: "A careful analysis of all these cases prompts the remark that it will be difficult to fully harmonize them. One of the features running through these cases, where they were held to be public officers, was the fact of their having to perform independent duties."

What seems to be a very satisfactory statement of what constitutes a public office, is made by Judge Jones in the course of his opinion in *State, ex rel. Landis, v. Board of Commissioners of Butler County, et al.*, supra, as follows:

"The usual criteria in determining whether a position is a public office are durability of tenure, oath, bond, emoluments, the independency of the functions exercised by the appointee, and the character of the

duties imposed upon him. But it has been held by this court that while an oath, bond and compensation are usually elements in determining whether a position is a public office they are not always necessary. \* \* \* The chief and most-decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law. If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office and not an employment. \* \* \* It is no longer an open question in this state that to constitute a public office, \* \* \* it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law."

In the light of the decided cases involving the question of what constitutes a public office, the position of a member of the parole board created by Substitute Senate Bill No. 149, clearly, in my opinion, measures up to the standards fixed for a public officer as to durability of term, oath, emoluments, independency of action and character of duties. The act in question provides that the term of members of the board shall be four years and each member is required to give his entire time to his official duties on the board. Prior to the assumption of his duties on said board, each member thereof is required to "take the constitutional oath of office." Each member is to receive a salary of six thousand dollars per annum.

The board of parole is empowered "to exercise its functions and duties in relation to parole, release, pardon, commutation, or reprieve upon its own initiative or the initiative of the superintendent of a penal or reformatory institution." The board is authorized, subject to the limitations imposed by law, "to have full, continuous and exclusive power to determine the time when, the period for which and the terms and conditions in accordance with which any prisoner now or hereafter confined in a penal or reformatory institution may be allowed to go upon parole outside the premises of the institution to which he has been committed, assigned or transferred."

It seems clear that this board possesses independent public duties, a part of the sovereignty of the state, and the same are granted to it by law. It therefore follows that the members of this board are public civil officers and that members of the 89th General Assembly are ineligible to appointment on the board.

Coming now to the question of whether or not a member of the 89th General Assembly may be appointed on the waterways board created by Amended Senate Joint Resolution No. 19 of the 89th General Assembly:

An examination of this joint resolution discloses that the board thereby created, is to consist of six persons in addition to the conservation commissioner, the head of the civil engineering department of Ohio State University and the director of public works. In substance, the duties of the board are to make a survey, examination and report with special reference to the improvement of existing stream channels for the mitigation of floods, for standardized navigation by slack water for suitable draft, for the development of power, for industrial and domestic water supplies, for the betterment of sanitary conditions, for national-state water parks, for controlled drainage and the restoration of ground waters, for any allied benefits that may properly accrue to the nation, state or local communities interested, and to cooperate and work with any federal board or agency that is or may be engaging in such a survey or examination.

The usual definitions and comments of courts with reference to what constitutes a public office contain the statement that the office which the public officer

fills must be "created by law" and that his duties must be "fixed by law". It is well settled that a joint resolution is not an act of legislation; that it is not a law and cannot be effective for any purpose for which an exercise of legislative power is necessary. *Railroad Company v. State*, 85 O. S. 251-294. It is said in *Corpus Juris*, Vol. 46, page 934, "in creating an office no particular language is necessary, it being sufficient if the intent of the legislature is manifested by the language used. However, an office is created by law only as a result of an act passed for that purpose; it cannot be created by a mere concurrent resolution."

In support of the text above quoted, there is cited the case of *Columbus First National Bank v. State*, 80, Nebraska, 597, 114 N. W. 772.

Aside from the question, however, of whether or not a public office may be created by a joint resolution, the terms of the resolution do not, in my opinion, create a public office. The members of this board do not have a fixed tenure, are not required to give bond or take an oath of office, have no fixed compensation provided for them in the resolution itself nor do they exercise any part of the sovereignty of the state. They merely examine, survey and report with recommendations. It seems clear, therefore, that they are not public offices and do not come within the inhibition fixed by Article II, section 19 of the constitution of Ohio, which is quoted by you in your letter.

Membership on this board, however, is a public position, created by the 89th General Assembly, and it therefore becomes necessary, in this connection, to note the terms of section 15 of the General Code of Ohio, which reads in part as follows:

"No member of either house of the general assembly except in compliance with the provisions of this act (G. C. §15) shall:

\* \* \* \* \*

Serve on any committee or commission authorized or created by the general assembly, which provides other compensation than actual and necessary expenses;

\* \* \* \* \*

Any such appointee, officer or employee who accepts a certificate of election to either house shall forthwith resign as such appointee, officer or employee and in case he fails or refuses to do so, his seat in the general assembly shall be deemed vacant. Any member of the general assembly who accepts any such appointment, office or employment, shall forthwith resign from the general assembly and in case he fails or refuses to do so, his seat in the general assembly shall be deemed vacant. But the provisions of this section shall not apply to school teachers, township officers, justices of the peace, notaries public or officers of the militia."

The question therefore arises as to whether or not membership on this waterways board is a position which is prohibited to members of the General Assembly by force of section 15 of the General Code of Ohio, supra. It is clearly a commission authorized or created by the General Code. It does not, however, by its own force, provide other compensation than actual and necessary expenses for the members of the board. It does authorize the fixing of such compensation by the governor. The specific provision of the joint resolution, with reference to this matter, is as follows: "That the compensation of the members of the board, unless otherwise provided for, shall be determined by the governor." It therefore follows, in my opinion, that if no compensation, other than necessary expenses, for the members of this board is determined by the governor, membership in the General Assembly does not preclude appointment on this commission, no other provision being made for compensation of the members of the board.

I am therefore of the opinion in specific answer to your questions: first, that no member of the 89th General Assembly is eligible to appointment on the board of parole created by Substitute Senate Bill No. 149 until after December 31, 1933; second, a member of the 89th General Assembly may be appointed on the board created to make a survey of the waterways of the state by Amended Senate Joint Resolution No. 19. If it is determined by the governor that the members of said commission shall receive compensation other than actual and necessary expenses, a member of the General Assembly who receives and accepts an appointment to membership on said board shall forthwith resign from the General Assembly. If no compensation is provided for the members of said waterways commission, a member of the 89th General Assembly may be appointed to said board and may also hold his office as a member of the General Assembly.

Respectfully,  
 GILBERT BETTMAN,  
*Attorney General.*

3477.

JURY DUTY—OHIO NATIONAL GUARD—EXEMPT.

*SYLLABUS:*

*Contributing members of the Ohio National Guard are, and will continue to be, exempted from jury duty until such time as the provisions of law providing for such exemption are repealed by an act of legislation.*

COLUMBUS, OHIO, August 4, 1931.

HON. R. S. CUNNINGHAM, *Prosecuting Attorney, Lancaster, Ohio.*

DEAR SIR:—This will acknowledge the receipt of your request for my opinion, which reads as follows:

“Section 5195 of the General Code exempts contributing members to the Ohio National Guard from jury duty. We ask your opinion whether or not the new jury code, effective August 2, 1931, repeals the former section so that contributing members to the Ohio National Guard, after August 2, will not be exempt from jury duty.”

The “Jury Code,” so-called, is an act of the 89th General Assembly known as Amended Senate Bill 184. This act, in effect, revises, supplements and recodifies the laws of Ohio relative to the method of summoning and selecting jurors. The act becomes effective August 2, 1931, although no jurors for service, selected in the manner provided for therein, will serve until the jury year beginning the first Monday in August, 1932.

Section 5195, General Code, which exempts contributing members of the Ohio National Guard from jury duty, was not, either specifically or impliedly, repealed by the terms of the said act. On the other hand, said section of the Code, as well as other general sections of the statutes pertaining to exemption from jury duty, was by the specific terms of the act retained in force.

Section 11419-14, General Code, which was enacted as a part of the act referred to, provides:

“The exemption of jurors shall be such as are prescribed by this act *and the general statutes of the state.*” (Italics the writer's.)