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1—OFFICE OF COUNTY ENGINEER OF ONE COUNTY INCOMPATIBLE WITH OFFICE OF THE COUNTY ENGINEER OR DEPUTY COUNTY ENGINEER OF AN ADJOINING COUNTY. 2—OFFICE OF COUNTY ENGINEER REQUIRED TO BE QUALIFIED ELECTOR OF STATE OF OHIO. §§ 315.04, R. C., OAG 1870, 1950.

SYLLABUS:

1. In the filling of a vacancy in the office of county engineer under Section 315.04, Revised Code, an elected county engineer of one county may not be appointed as county engineer of a neighboring county and hold the two offices at the same time.

2. An elected county engineer of one county may not be employed by the county commissioners of an adjoining county as deputy county engineer when there is a vacancy in the office of county engineer in such adjoining county.

3. When there is a vacancy in the office of county engineer, the county commissioners must appoint a suitable person to fill such vacancy, and the appointee need not be an elector of the county but must be a qualified elector of the State of Ohio. Opinion No. 1870, Opinions of the Attorney General for 1950, approved and followed.

Columbus, Ohio, October 7, 1959

Hon. George E. Schroeder, Prosecuting Attorney
Putnam County, Ottawa, Ohio

Dear Sir:

Your request for my opinion reads, in pertinent part, as follows:

“1. Can an elected county engineer of one county be appointed to the same position in a neighboring county?

“2. Can an elected county engineer of one county be hired by an adjoining county to perform the duties of deputy engineer when there is no duly acting county engineer in that county due to resignation and the inability to find another qualified engineer in the county for that post?

“My question is directed to the compatibility or incompatibility of the two positions.”

The organization and government of counties are based upon Section 1, Article X, of the Constitution of Ohio, which provides, in part, as follows:

“The General Assembly shall provide by general law for the organization and government of counties, and may provide by general law alternative forms of county government. * * *”

Pursuant to this constitutional mandate, the General Assembly provided by general law for the organization and government of counties, including the creation of county offices and the means of filling them. One of the offices thus created is that of county engineer, formerly known as county surveyor.

Section 315.01, Revised Code, provides :

“There shall be elected quadrennially in each county a county engineer who shall assume office on the first Monday in January next after his election and shall hold such office for four years.”

The clear import of the above section of the code is that a county engineer is an officer of the county, created by statute enacted pursuant to the Constitution, as a part of the organization and government of the county. The office is not one that the people of a county may have or not have, at their pleasure. On the contrary, it is mandatory that “There shall be elected quadrennially in *each* county a county engineer * * *.”

Section 315.02, Revised Code, sets forth the qualifications for eligibility as county engineer. It is unnecessary to detail these here but it is noted that residence in the county is not one of them. This is noted in view of the statement in your request that there is no “acting county engineer in that county due to * * * the inability to find another qualified engineer in the county for that post.”

One of my predecessors in office held in Opinion No. 1870, Opinions of the Attorney General for 1950, page 339:

“* * *

“2. Where the county commissioners made an appointment to fill a vacancy in the office of county engineer, there is no requirement in law that such appointee shall be a resident elector of the county in which such appointment is made.”

In view of this opinion the vacant office of county engineer can be filled by a qualified engineer in the state by appointment as provided by law.

Section 315.04, Revised Code, provides for filling a vacancy in the office of county engineer and reads as follows :

“If a vacancy occurs in the office of county engineer because of death, resignation, or otherwise, the board of county commissioners shall appoint a suitable person as engineer, who, upon giving bond and taking the oath of office required by section 315.03 of the Revised Code, shall enter upon the discharge of the duties of such office.

“A successor shall be elected for the unexpired term, at the first general election for the office which is vacant that occurs more than forty days after the vacancy shall have occurred; provided that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term.”

It will be observed from the above code sections that there is a mandatory duty on the county commissioners to fill a vacancy in the office of county engineer and that this vacancy can be filled in only one way; by the appointment of a suitable person to serve until a successor is elected.

In an opinion by one of my predecessors, Opinion No. 2503, Opinions of the Attorney General for 1947, page 616, in which I concur, it was held in the first and last paragraphs of the syllabus:

“1. In the event of a vacancy in the office of county engineer no one can perform the official duties imposed on the county engineer by statute.

“* * *

“4. The county commissioners may employ an engineer upon the written request of the county engineer. In the event of a vacancy in the office of county engineer, the county commissioners may not employ an engineer.”

Since the person appointed to fill a vacancy in the office of county engineer may only serve until a successor is elected and qualified, it should be noted that a candidate for election to county office must be an elector engineer of one county to be appointed county engineer of another county may accept private employment.

“* * * At the time fixed such election officials shall hear the protest and determine the validity or invalidity of the declaration of candidacy and petition. If they find that such candidate is not an elector of the state, district, county, or political subdivision in which he seek a party nomination or election to an office or position * * * his declaration of candidacy and petition shall be determined to be invalid and shall be rejected. * * *.”

Section 3513.261, Revised Code, also provides in part:

“* * * Each nominating petition shall contain a statement of candidacy which shall be subscribed and sworn to by the candidate named therein. Such statement of candidacy shall contain a declaration that the candidate desires to be a candidate for the office named therein, *and that he is an elector qualified to vote for the office he seeks.* * * *” (Emphasis added)

It follows that since one person cannot be an elector of two counties at the same time, he could not run for county offices in two counties at the same time. Therefore, even if it were legal for the elected county engineer of one county to be appointed county engineer of another county to fill a vacancy caused by resignation or death, he could only hold the office by appointment until a successor could be elected, and he could not be a candidate for such election.

Under the present state of the law, a county engineer need not give his entire time to the duties of his office and under some circumstances may accept private employment.

One of my predecessors in office, in Opinion No. 6776, Opinions of the Attorney General for 1956, page 494, held:

“The requirement that a county engineer ‘shall give his entire time and attention to the duties of his office’ having been entirely deleted from the provisions of Section 325.14, Revised Code, by the amendment of that section, effective October 11, 1955, such officers may accept compatible *private* employment to the extent that such employment does not interfere with the proper exercise of official duty.” (Emphasis added)

An earlier opinion, rendered prior to the amendment of Section 325.14, Revised Code, held in Opinion No. 5261, Opinions of the Attorney General for 1955, at page 253:

“* * *

“A county engineer holding office in a county having a population of thirty thousand or less may accept *private* employment to the extent that it does not interfere with his official duties, and if a competent sanitary engineer he may be *employed in his private capacity as such by a board of county commissioners in accordance with the provisions of Section 6117.01*, Revised Code, and may be compensated therefor in the manner provided for by Chapter 6117, Revised Code.” (Emphasis added)

In each of the situations upon which the foregoing opinions were based, the question was one of employment, not appointment to public office. In Opinion No. 2503, Opinions of the Attorney General for 1947, page 616, heretofore cited, it was held that the county commissioners could employ an engineer, but only on the written request of the county engineer, and if there was a vacancy in the office of county engineer there could be no written request, and hence they were without authority to employ an engineer.

If at the time of the resignation of the county engineer there was a deputy county engineer, such deputy could continue to function as deputy but could not perform the official duties imposed by statute on the county engineer; but if there was no deputy engineer at the time of the resignation, none could be hired until a county engineer was appointed and qualified. This answers the second numbered paragraph of your request.

We come now to a consideration of the compatibility of the office of county engineer of one county and the same office of an adjoining county.

The test of compatibility is not clear-cut and comprehensive. The courts have almost invariably evaded the formulation of a general definition of the term "incompatibility" and have contented themselves with a discussion of specific cases and the particular facts which, in individual instances, have been looked on as creating incompatibility. (32 Ohio Jurisprudence, 908).

In the early (1909) case of *State, ex rel. Attorney General v. Gebert*, 12 C. C. (N.S.) 274, the circuit court of Franklin County said:

"* * *

"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 to discharge the duties of both.

* * *"

It is said in 42 American Jurisprudence, page 936, that:

"* * * Incompatibility of offices exists where there is a conflict in the duties of the offices, so that the performance of the duties of the one interferes with the performance of the duties of the other. This is something more than a physical impossibility to discharge the duties of both offices at the same time. They are generally considered incompatible where such duties and functions are inherently inconsistent and repugnant so that, because

of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both. * * *

In the administration of the government and business of a county, county commissioners frequently rely on the technical professional advice of the county engineer. It is not infrequent that the interests of a county and an adjoining county conflict in matters of joint concern, such as the maintenance, improvement and repair of county-line roads, ditches and bridges. In event of flood or other disaster of a nature affecting two adjoining counties the presence of the county engineers, even on an around-the-clock basis, might be an urgent necessity.

In such events the person who was attempting to serve such two adjoining counties would find himself handicapped by divided, and perhaps conflicting loyalties. By the same token, the people of the two counties, to each of whom he would owe a duty of full service and undivided loyalty, would be handicapped and forced to accept only partial service.

In view of all these considerations, and in view also of the fact that the appointment as county engineer in an adjoining county of a person already serving as the elected engineer of the other county would, at the best, be only a temporary and make-shift arrangement, good only until the next election, it is accordingly my opinion that the positions of elected county engineer in one county and appointed county engineer in another county are incompatible.

It is, therefore, my opinion and you are advised :

1. In the filling of a vacancy in the office of county engineer under Section 315.04, Revised Code, an elected county engineer of one county may not be appointed as county engineer of a neighboring county and hold the two offices at the same time.

2. An elected county engineer of one county may not be employed by the county commissioners of an adjoining county as deputy county engineer when there is a vacancy in the office of county engineer in such adjoining county.

3. When there is a vacancy in the office of county engineer, the county commissioners must appoint a suitable person to fill such vacancy,

and the appointee need not be an elector of the county but must be a qualified elector of the State of Ohio. Opinion No. 180, Opinions of the Attorney General for 1950, approved and followed.

Respectfully,
MARK McELROY
Attorney General