

pend funds for the purpose of preventing and correcting pollution conditions in the streams of Ohio, rather than the prosecution of cases.

In view of the above and in specific answer to your inquiry, I am of the opinion that by virtue of Section 1438-1, General Code, the Division of Conservation and Natural Resources has the authority to spend its funds for the purpose of preventing and correcting the pollution of streams in Ohio where such pollution will affect the fish life in such streams.

Respectfully,

THOMAS J. HERBERT,  
*Attorney General.*

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1524.

INCOMPATIBLE OFFICE—VILLAGE CLERK AND TRUSTEE OF FIREMEN'S RELIEF AND PENSION FUND—WHERE A MUNICIPAL CORPORATION HAS TWO FULL TIME MEMBERS OF FIRE DEPARTMENT, IT IS THEIR DUTY TO SERVE AS MEMBERS, BOARD OF TRUSTEES, FIREMEN'S RELIEF AND PENSION FUND—SECTIONS 4600, 4600-1 G. C.

**SYLLABUS:**

1. *A village clerk, being the auditing official of the municipality, is required to keep a check upon the expenditures of all departments, including the firemen's relief and pension fund, and his position as village clerk is, therefore, incompatible with that of a citizen member of the board of trustees of such relief and pension fund.*

2. *Where there are only two full time regular members of the fire department of a municipal corporation, under the provisions of Sections 4600 and 4600-1, General Code, as amended by the 93rd General Assembly, it is the duty of such full time regular members to serve as members of the board of trustees of the firemen's relief and pension fund.*

COLUMBUS, OHIO, December 7, 1939.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN: I have your request for my opinion in which you ask if the offices of Village Clerk and member of the Board of Trustees of the Firemen's Pension Fund are incompatible, and whether members other than full time regular members are eligible to serve as members of such Board of Trustees. The statement of facts upon which your request is based is as follows:

“The village of Oberlin passed recently, as an emergency measure, an ordinance creating a Firemen’s Relief Pension Board as set up under section 4600-4631 of the General Code.

The fire department of the village is composed of twenty-eight members, two of whom are full time paid members, being drivers of the apparatus. The balance of the department are part time members. The two full time members have refused to serve on the pension board, or draw any benefits therefrom, preferring to remain in the State Employes Association and draw benefits from that organization. The department then elected two other members to serve as trustees on this board.

The question has been raised upon the eligibility of these elected members to serve as trustees upon the board under the qualifications as set up under section 4600-1 G. C.

The council elected two trustees for the board from their membership. They in turn selected as their resident member, as per section 4600 G. C. the clerk of the village.

The question has been raised upon the eligibility of the village clerk to serve as trustee under the qualifications as set up under section 4600 G. C. It is thought that the duties of the village clerk are not compatible with those of trustees of the Pension Board.

The question of eligibility of these trustees having been raised, it has been impossible to organize a Firemen’s Relief Pension Board and adopt rules and regulations for the distribution of Pension funds.”

I am informed that the village of Oberlin is operating under the “City Manager Plan” for which provisions are made in Sections 3515-19 to 3515-28, inclusive, General Code.

Section 3515-24 authorizes the council of a municipality, when operating under this plan, to appoint a clerk or auditor, and further provides that “provision may be made by ordinance for the performance of the duties of \* \* \* clerk and auditor, by the same person.”

By the terms of Section 13, Article XVIII of the Constitution of Ohio, the Legislature is authorized to “provide for the examination of the vouchers, books and accounts of all municipal authorities”. Pursuant to this constitutional grant of power the Legislature has enacted Sections 4283 and 4284 of the General Code which respectively provide as follows:

Sec. 4283. “In the following provisions of this chapter, the word ‘city’ shall include ‘village’, and the word ‘auditor’ shall include ‘clerk’.”

Sec. 4284. "At the end of each fiscal year, or oftener if required by council, the auditor shall examine and audit the accounts of all officers and departments. He shall prescribe the form of accounts and reports to be rendered to his department, and the form and method of keeping accounts by all other departments, and, subject to the powers and duties of the state bureau of inspection and supervision of public offices, shall have the inspection and revision thereof. Upon the death, resignation, removal or expiration of the term of any officer, the auditor shall audit the accounts of such officer, and if such officer be found indebted to the city, he shall immediately give notice thereof to council and to the solicitor, and the latter shall proceed forthwith to collect the indebtedness."

As stated in 32 O. Jur., 908, 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 principal duties, or is subject to supervision or control by the other,—as an officer who presents his personal account for audit and at the same time is the officer who passes upon it,—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."

Applying this test to the facts submitted by you, it is clear that the offices or positions of village clerk and member of the board of trustees of the firemen's pension fund are incompatible.

Members of the board of trustees of the fund in question are authorized by Section 4611, General Code, to invest the moneys received by them in the kinds of securities prescribed by this section, and are required by Section 4612-4 to adopt rules and regulations providing for the distribution of the fund which it is their duty to administer. In addition, such members are required to pass upon expenditures made by the board of trustees from the fund under consideration. By the express terms of Section 4284, it is the duty of the village clerk at the end of each fiscal year, or oftener if required by council, to examine and audit the accounts of the board of trustees. Clearly, under the test above laid down, the two offices or positions are incompatible, the one being a check upon the other.

Substantially the same question was passed upon in opinion No. 1331, Opinions, Attorney General Vol. III, 1927, Page 2412, in which the then Attorney General held as follows:

"A village clerk, being the auditing official of the municipality, is required to keep a check upon the expenditures of all departments, including the village planning commission, and his

position is, therefore, incompatible with that of a citizen member of such planning commission.”

In the body of the opinion, after quoting Sections 4283 and 4284, *supra*, it was said as follows at page 2413:

“It can scarcely be denied that the planning commission of a village is a department subject to audit by the village clerk. By the provisions of Section 4366-5 of the Code, the commission is authorized to employ architects, engineers and other subordinates and to pay therefor from appropriations made by council. The expenditure of these funds is necessarily subject to audit by the village clerk under the provisions of Section 4284 of the Code. I therefore feel that by reason of this duty the two positions are incompatible and that a village clerk may not be appointed a citizen member of the planning commission.”

Coming now to your second question, your attention is directed to Sections 4600 and 4600-1, which read as follows:

Sec. 4600. “In all municipal corporations having fire departments supported in whole or in part at public expense, and employing two or more full time regular members, there shall be established and maintained a firemen’s relief and pension fund. A board of trustees, the members of which shall be known as ‘trustees of the firemen’s relief and pension fund’ shall be established in each such municipality. Such board of trustees shall consist of six members who shall be chosen in the following manner: two members shall be chosen by the city or village council, or other legislative body from among its own members; two members shall be elected by the fire department from members of its own department; two other members shall be residents of the municipality and not members of the council or other legislative body or of the city or village fire department, one of whom shall be chosen by the two members chosen by the municipal council or other legislative body, and one shall be chosen by the two members elected by the members of the fire department. In the event of a tie vote on any matter whatsoever, the six members so chosen shall choose a seventh member, whose vote shall decide the question.”

Sec. 4600-1. “The trustees elected from the membership of the fire department shall be full time regular members of such department as distinguished from volunteer members except in municipalities where there are less than two full time members.

In such municipalities volunteer or part time members may be elected to the board of trustees.”

These sections were amended by the 93rd General Assembly in Amended Senate Bill No. 52, and became effective on August 10, 1939.

You will observe that the Legislature has clearly directed that the trustees elected from the membership of the fire department “shall be full time regular members of such department as distinguished from volunteer members, except in municipalities where there are less than two full time members.”

It is fundamental that a public officer who receives a stated salary cannot recover further compensation for extra duties germane to his office, imposed upon him by the Legislature, or even for incidental or collateral services which properly belong to or form a part of his main office. See 32 O. Jur. 1021. This principle applies with equal force to public employes, and since the Legislature has seen fit to make mandatory the creation of a firemen’s relief and pension fund in all municipal corporations employing two or more regular members, it is manifest that in municipalities where there are only two full time members, it is the duty of such full time members to serve on the board of trustees. In other words, it is just as much a part of the duty of such full time regular members to serve as trustees as to fight fires or perform any other duty lawfully imposed upon them as full time regular firemen.

In the statement of facts submitted with your request it is stated that the two full time regular members of the fire department in question prefer to remain in the public employes’ retirement system and draw benefits therefrom. In this connection, your attention is invited to Opinion No. 935, issued under date of July 25, 1939, the first branch of the syllabus of which reads as follows:

“Members of the public employes retirement system who become entitled to participate in a firemen’s relief and pension fund established pursuant to the mandatory provisions of Section 4600 and related sections of the General Code are, by the terms of Section 486-33c, excepted from the provisions of the public employees retirement act and are not eligible for membership in the public employes retirement system.”

In view of the foregoing, and in specific answer to your questions, it is my opinion that:

1. A village clerk, being the auditing official of the municipality, is required to keep a check upon the expenditures of all departments, including the firemen’s relief and pension fund, and his position as village clerk is, therefore, incompatible with that of a citizen member of the board of trustees of such relief and pension fund.

2. Where there are only two full time regular members of the fire department of a municipal corporation, under the provisions of Sections 4600 and 4600-1, General Code, as amended by the 93rd General Assembly, it is the duty of such full time regular members to serve as members of the board of trustees of the firemen's relief and pension fund.

Respectfully,

THOMAS J. HERBERT,  
*Attorney General.*

1525.

WATERWORKS, MUNICIPAL.—CITY MAY NOT USE FUNDS DERIVED FROM SUCH OPERATION TO PAY PORTION SALARIES OF MAYOR, DIRECTOR OF LAW, DIRECTOR OF FINANCE OR FOR OPERATING EXPENSES OF SUCH MUNICIPAL DEPARTMENTS—OPINIONS ATTORNEY GENERAL, 1937, VOLUME II, PAGE 1835, APPROVED.

**SYLLABUS:**

*A city, which operates a municipal waterworks, may not use the funds derived from the operation thereof in payment of a portion of the salaries of the mayor, director of law, director of finance of such city, and may not use such funds in payment of the operating expense of such municipal departments (2 O. A. G. 1937, p. 1835, approved).*

COLUMBUS, OHIO, December 7, 1939.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN: I am in receipt of your request for my opinion, which reads:

“Our examiners of the accounts of the City of Cleveland have submitted Voucher 62843, dated December 13, 1938, showing payment from the Water Department Revenue Fund to the General Fund in the amount of \$30,001.36. We quote from said voucher as follows:

‘Division of Water and Heat Portion of 1937 Expense for Mayor’s Office, Law Department and Finance Department, Based on Number of Requisitions issued during years 1932 to 1937, inclusive:

Total Requisitions	146,753
Water Division	14,864
Water Division Percent Total	.1012858