

time the new budget law was passed there were many sections, of which 9894 was but one, creating fixed and inescapable liabilities of the county, such as salaries of county officers, and it is unthinkable that it was the purpose of the Legislature to make any claims of this character subject to the action or nonaction of the county commissioners. Such a construction would impose legislative functions on the commissioners and render the act of doubtful constitutionality."

In my opinion the cases referred to above are dispositive of the questions submitted by you. I am therefore of the opinion in specific answer to your questions:

1. The obligation of a school district to receive into its schools high school pupils from other districts, where circumstances are such that a duty fixed by law rests on the board of education of the pupil's residence to pay the tuition of those pupils as provided by Sections 7747 and 7748, General Code, is not dependent on the issuance of a certificate by the clerk of the board of education of the pupil's residence, under Section 5625-33, General Code, to the effect that money has been appropriated and is in the treasury or in the course of collection unencumbered, with which to pay the child's tuition.

2. The obligation of a board of education of a school district wherein a high school is not maintained, to pay the tuition of resident high school pupils who attend high school in other districts, as fixed by Sections 7747 and 7748, General Code, is an obligation fixed by law and is not contractual in its nature.

3. Foreign tuition cannot be paid without an appropriation. It cannot be said that an unpaid balance due for foreign tuition at the beginning of a fiscal year automatically constitutes an encumbrance upon the funds of the school district against which the claim exists.

Respectfully,
JOHN W. BRICKER,
Attorney General.

1571.

OFFICES COMPATIBLE—OFFICIAL SHORTHAND REPORTER OF COMMON PLEAS COURT, AND COUNTY EMPLOYED STENOGRAPHERS NOT IN CLASSIFIED SERVICE MAY REPORT HEARINGS BEFORE TAX COMMISSION IN SUCH COUNTY.

SYLLABUS:

1. *An official shorthand reporter of a court of common pleas of a county may report Hearings before the Tax Commission of Ohio in such county and draw compensation for such providing that it is physically possible for such county stenographer to properly perform and discharge the duties of both positions.*

2. *Assuming that other county employed stenographers are not in the classified civil service, they may report Hearings before the Tax Commission of Ohio in such county and draw compensation for such providing that it is physically possible for them to properly perform and discharge the duties of both positions.*

COLUMBUS, OHIO, September 18, 1933.

HON. VERNON L. MARCHAL, *Prosecuting Attorney, Darke County, Greenville, Ohio.*

DEAR SIR:—I am in receipt of your request which reads as follows:

“I wish you would render this office an opinion as to whether or not an official short-hand reporter or any other stenographer who is an employee of the County could report Hearings before the Tax Commission of Ohio in this County and draw their per diem and compensation for transcripts.”

For the purpose of clarity I will deal first with your inquiry as it relates to the official shorthand reporter. Section 1546, General Code, provides for the appointment of the Official Court Stenographer. It reads:

“When in its opinion the business requires it, the court of common pleas of a county may appoint a stenographic reporter as official shorthand reporter of such court, who shall hold the appointment for a term not exceeding three years from the date thereof, and until a successor is appointed and qualified, unless removed by the court, after a good cause shown, for neglect of duty, misconduct in office, or incompetency. Such official shorthand reporter shall take an oath to faithfully and impartially discharge the duties of such position.”

Section 1547, General Code, authorizes the appointment of assistant stenographers, and other sections, which need not be quoted, refer to the duties of such court stenographers. Section 1550, General Code, which relates to the Compensation of the court stenographers, provides:

“Each such stenographer shall receive such compensation as the court making the appointment shall fix, not exceeding three thousand dollars each year in counties where two or more judges of the common pleas court hold court regularly, and in all other counties not exceeding two thousand dollars. Such compensation shall be in place of all per diem compensation in such courts. Provided, however, that in case such appointment shall be for a term less than one year, such court may allow a per diem compensation not exceeding the sum of fifteen dollars per day for each day such shorthand reporter shall be actually engaged in taking testimony or performing other duties under the orders of such court, which allowance shall be in full for all services so rendered. * * *”

Under Section 486-8, General Code, exceptions are made to classified Civil Service. Sub-section 10 of this Section provides:

“Bailiffs, constables, *official stenographers* and commissioners of courts of record, and such officers and employees of courts of record as the commission may find it impracticable to determine their fitness by competitive examination.” (Italics the writer's.)

Under this Sub-section "official stenographers" obviously includes the "official shorthand reporter" mentioned in your inquiry, and consequently such person is not within the classified Civil Service. The reason for the plural term "official stenographers" instead of "stenographer" is evidently because of Section 1520, General Code, which provides for the appointment of the official shorthand reporters of each court of appeals. A reading of Section 1546, General Code, *supra*, makes it clear that the court of common pleas of a county has only one "official shorthand reporter."

Since the "official shorthand reporter" is not within the classified Civil Service, it becomes necessary to see whether or not a position of official court reporter is incompatible with the position of reporting Hearings before the Tax Commission of Ohio. The statutes do not provide any positive inhibition against such court stenographer performing services in addition to the duties as such court stenographer and receiving compensation therefor. The rule of incompatibility in Ohio, as stated in the case of *State ex rel., vs. Gebert*, 12 O. C. C. (N. S.), 274 is as follows:

"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 person to discharge the duties of both."

It is my opinion that there is nothing in the law making either of the positions you mention subordinate to or a check upon the other, and if it is physically possible for the court stenographer to properly perform and discharge the duties of both positions, the same may be done and such court stenographer under such circumstances, would be entitled to receive the additional compensation. This is in line with the reasoning of a former opinion of this office, found in the Opinions of the Attorney General, 1920, volume I, page 205 which held as disclosed by the syllabus:

"A court stenographer may legally serve as a prosecuting attorney's stenographer, provided that it is physically possible to properly perform the duties of both positions, and such stenographer under such circumstances is entitled to receive additional compensation from funds allowed to the prosecuting attorney for the payment of a stenographer."

I come now to the consideration of "any other stenographer who is an employee of the county" mentioned in your inquiry. I find the following statutory provisions under the heading "Civil Service" in the General Code:

"Section 486-1. 1. The term 'civil service' includes all offices and positions of trust or employment in the service of the state and the *counties*, cities and city school districts thereof.

3. The term 'classified service' signifies a competitive classified civil service of the state, the several *counties*, cities and city school districts thereof." (Italics the writer's.)

Section 486-8 provides:

"The civil service of the state of Ohio and the several counties

cities and city school districts thereof shall be divided into the unclassified service and classified service.

(A). The unclassified service shall comprise the following positions, which shall not be included in the classified service, and which shall be exempt from all examinations required in this act.

* * *

8. Three secretaries, assistants or clerks and one personal stenographer for each of the elective state officers; and two secretaries, assistants or clerks and one personal stenographer for *other elective officers* and each of the principal appointive executive officers, boards or commissions, except civil service commissions, authorized by law to appoint such secretary, assistant or clerk and stenographer.

(B) The classified service shall comprise all persons in *the employ* of the state, the *several counties*, cities and city school districts thereof, not specifically included in the unclassified service, to be designated as the competitive class and unskilled labor class." (Italics the writer's.)

Section 486-23, General Code, provides inter alia:

"* * * nor shall any officer or employee in the classified service of the * * * several counties * * * take part in politics other than to vote as he pleases and to express freely his political opinions."

It is apparent from a reading of the above sections that it is impossible for me to ascertain whether or not the county employed stenographers you have in mind are in the classified civil service or not. Consequently I am assuming for the purpose of this opinion that the other county employed stenographers to which you refer in your inquiry are not in the classified civil service.

I express no opinion at this time whether or not if they were in the classified civil service the other public employment of reporting Hearings before the Tax Commission of Ohio would be "taking part in politics" under Section 486-23, General Code, as construed in other opinions of this office. See Opinions of the Attorney General, 1933, No. 338.

On the basis of the assumption that the county employed stenographers are not in the classified civil service, I am of the opinion that under the decision in the case of *State ex rel., vs. Gebert, supra*, defining the common law rule of incompatibility in Ohio, there is nothing in the law making the positions you mention subordinate to or a check upon the other, and if it is physically possible for such county employed stenographers to properly perform and discharge the duties of both positions, the same may be done. In an Opinion, No. 338, rendered March 23, 1933, I held that in all such cases the question of physical impossibility is a question of fact to be determined from all the circumstances.

Specifically answering your inquiries it is my opinion that:

1. An official shorthand reporter of a court of common pleas of a county may report Hearings before the Tax Commission of Ohio in such county and draw compensation for such providing that it is physically possible for such county stenographer to properly perform and discharge the duties of both positions.

2. Assuming that other county employed stenographers are not in the classified civil service, they may report Hearings before the Tax Commission

of Ohio in such county and draw compensation for such providing that it is physically possible for them to properly perform and discharge the duties of both positions.

Respectfully,
 JOHN W. BRICKER,
Attorney General.

1572.

BOARD OF ELECTIONS—UNAUTHORIZED TO PROVIDE TELEPHONE IN RESIDENCE OR PRIVATE BUSINESS OFFICE OF ITS CLERK.

SYLLABUS:

A board of elections is not authorized to provide a telephone in the residence or private business office of its clerk.

COLUMBUS, OHIO, September 18, 1933.

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

GENTLEMEN:—I acknowledge receipt of your communication which reads as follows:

"You are respectfully requested to furnish this department your written opinion upon the following:

Where an office for the county board of elections is furnished in the court house and equipped with telephone, at the expense of the county, may the board of elections provide a telephone in the residence or business office of the clerk of the board, at the expense of the county, such telephone being used both for private business of the clerk who is an insurance agent, as well as public business in connection with his office as clerk of the board of elections?"

Section 4785-17, General Code, reads as follows:

"The board in each county shall as an expense of the board provide suitable rooms for its office and records and the necessary and proper furniture and supplies for such rooms. Such offices and rooms in cities over two hundred thousand population shall be kept open daily during office hours, except Sundays and legal holidays. In counties containing a municipality or municipalities in addition to the county seat, the board may maintain a temporary branch office in each such municipality for such time prior to the election as necessity may require."

Section 4785-20, General Code, reads in part as follows:

"The expenses of the board in each county shall be paid from the county treasury in pursuance of appropriations by the county commissioners, in the same manner as other expenses are paid. If the county commissioners fail to appropriate an amount sufficient to provide for the necessary and proper expenses of the board, the board may apply to the court of common pleas within the county, which