

pose of paying a part of the compensation, damages and costs of the improvement of I. C. H. No. 276, Sandusky-Clyde road, section S.

GENTLEMEN :—Upon examination of the transcript of the proceedings of the county commissioners purporting to authorize the issuance of the above bonds I find that the proceedings for this improvement were commenced by the passing of a resolution applying for state aid prior to March 18, 1919. The actual date of the passage of this resolution is not given in the transcript, but it appears from the copy of the letter of the state highway commissioner approving said application, which is dated March 18, 1919, that said resolution was adopted prior to that date. The transcript also discloses that the bonds under consideration are to bear interest at the rate of six per cent per annum.

In the case of *State ex rel. Frank T. Andrews, et al. vs. Zangerle*, 101 O. S. 235, the supreme court held that county commissioners were without authority to issue bonds bearing a rate of interest in excess of five per cent for the cost and expense of road improvement, the proceedings for which were commenced prior to February 17, 1920.

Since the proceedings for the road improvement under consideration were commenced prior to that date as shown by the transcript, I am unable to approve the bonds issued in pursuance thereof, which bear a rate in excess of five per cent.

I am therefore of the opinion that the bonds under consideration are not valid and binding obligations of Erie county and advise the department of industrial relations not to accept the same.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2427.

APPROVAL, BONDS OF BLOOMFIELD TOWNSHIP RURAL SCHOOL DISTRICT, JACKSON COUNTY, IN AMOUNT OF \$27,000.

COLUMBUS, OHIO, September 19, 1921.

Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.

2428.

MUNICIPAL COURT OF ALLIANCE—OFFICES COMPATIBLE—MEMBER OF BOARD OF DEPUTY STATE SUPERVISORS AND INSPECTORS OF ELECTIONS AND ACTING JUDGE OF SAID COURT—ALSO DEPUTY CLERK OF BOARD OF DEPUTY STATE SUPERVISORS AND INSPECTORS OF ELECTION AND ACTING JUDGE OF SAID COURT, QUALIFIED—OFFICES INCOMPATIBLE—MEMBER OF BOARD OF DEPUTY STATE SUPERVISORS AND INSPECTORS OF ELECTION AND DEPUTY CLERK OF SAME BOARD.

1. *A member of the board of deputy state supervisors and inspectors of elections may perform the duties of acting judge of the municipal court of Alliance during the vacation of the regular judge, as these offices are compatible.*

2. *The position of deputy clerk of the board of deputy state supervisors and inspectors of elections and that of acting judge of the municipal court of Alliance, Ohio, are compatible, but it would not be physically possible to perform the duties of both places between the first day of September and the day preceding the first day of general registration (Sec. 4895 G. C.)*

3. *The positions of member of the board of deputy state supervisors and inspectors of elections and that of deputy clerk of the same board are incompatible, and may not be held by the same person at the same time because the clerk and deputy clerk of such board, under the provisions of section 4794 G. C., must be two resident electors of the county other than members of the board.*

COLUMBUS, OHIO, September 20, 1921.

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

GENTLEMEN :—Acknowledgment is made of the receipt of your recent request for the opinion of this department upon the following question:

“A member, being deputy clerk of the board of deputy state supervisors and inspectors of election, having the Alliance office in charge, receiving half of his salary from county funds and half from the city funds, has been appointed acting judge of the municipal court of Alliance, Ohio, to act during the vacation of the regular judge. Are these offices compatible?”

Provision for the appointment of an acting judge for the municipal court of Alliance appears in the following section of the General Code:

“Sec. 1579-229: * * * In case said judge shall be incapacitated from sitting in any case, or by reason of absence or inability be unable to attend sessions of said court, the mayor of the city of Alliance may appoint some attorney having the qualifications required by this act, to act in his stead until said judge is able to resume his said position. Such appointments shall be certified by the court or mayor as the case may be and entered upon the record, provided, however, that in the event an attorney at law receives the appointment, nothing contained in this act nor in other laws of Ohio, shall prevent the acting municipal judge from practicing as an attorney and counselor at law, in any other court in said state, in any and all matters of business not originated or pending in said municipal court.”

In propounding your question it is possible you have in mind the closing section of the act creating the municipal court of Alliance, reading as follows:

“The judge of the municipal court shall be subject to the same disabilities and may be removed from office for the same causes as the judge of the court of common pleas. The vacancies arising from any cause except as herein provided shall be filled by appointment by the governor of the state.”

This section says that the judge of the municipal court shall be subject to the same disabilities as the judge of the court of common pleas, and bearing upon the question of holding another office, the constitution of Ohio reads as follows, relative to judges of the common pleas court:

"The judges * * * of the court of common pleas * * * shall receive no fees or perquisites, nor hold any office of profit or trust, under the authority of this state or of the United States. * * * " (Sec. 14, Art. IV, Ohio constitution.)

In view of the language occurring in section 1579-229, supra, relative to the special provisions made for the appointment and qualifications of an acting judge, it is believed that the provisions of section 1579-232 General Code apply only to the regularly elected judge of the municipal court or the one having a permanent tenure, and not against the person who is appointed to serve during the vacation of the regular judge or who might be called upon to serve for several days where there was a vacancy or absence to be filled through appointment by the governor.

In your question you indicate that a member of the board of deputy state supervisors and inspectors of elections also serving as deputy clerk of the board of deputy state supervisors and inspectors of elections for Stark county, has been appointed acting judge of the municipal court of Alliance to act during the vacation of the regular municipal judge.

Stark county has a board of deputy state supervisors and inspectors of elections rather than a board of deputy state supervisors of elections, because of the language of section 4788 G. C., which reads in part as follows:

"In each county of the state * * * which contains two or more cities in which registration is required by law, there shall be a board of deputy state supervisors and inspectors of elections, consisting of four members who shall be qualified electors of the county."

Section 4794 G. C. provides that within five days after the members of the board of deputy state supervisors and inspectors of elections are appointed, they shall meet and organize by selecting one of their number as chief deputy and "two resident electors of the county, other than members of the board, as clerk and deputy clerk respectively, all of which officers shall continue in office for two years."

Section 4795 provides for the election of the clerk and deputy clerk by the members of the board and says that:

"If, after five ballots, no person shall be agreed upon as clerk, the names of all persons so voted for on the fifth ballot, together with *the names of the deputies who nominated them*, shall be certified to the state supervisor and inspector, who shall designate therefrom one of such persons to serve as clerk and *another of such persons to serve as deputy clerk*. The clerk and deputy clerk shall be of opposite political parties, and each of such officers shall have been nominated by a deputy state supervisor and inspector of the political party to which he belongs."

From a reading of the provisions of sections 4794 and 4795, here cited, it is at once apparent that a member cannot be a deputy clerk of the board of deputy state supervisors and inspectors of elections, for these sections, in conjunction with sections 4797, 4798, 4799 G. C. and other sections of the law, clearly indicate that there is but one deputy clerk of the board of deputy state supervisors and inspectors of elections. You indicate that the deputy clerk in question has charge of the Alliance office of the board of deputy state supervisors and inspectors of elections and the time which he must spend in such office, under section 4873 G. C., appears as follows:

"In counties containing a registration city, the board of deputy state supervisors shall have a sufficient and suitable office and rooms in such city * * * which shall be in charge of the clerk thereof. * * * in quadrennial general registration cities such office shall be kept open at such times as the board may require."

Alliance is a quadrennial registration city and comes within the language of section 4783 G. C. The statutes do not set forth any particular time when the office of the deputy state supervisors and inspectors of elections, in a quadrennial registration city, shall be kept open, except as appears in sections 4895 and 4896 G. C., which read as follows:

"Sec. 4895. Between the first day of September and the day preceding the first of the days prescribed for the general registration, and no longer, the clerk of the board of deputy state supervisors shall act as registering officer in the cases only described in the following two sections."

"Sec. 4896: Any person resident of such city who will be lawfully entitled to vote therein at the next succeeding November election *may go before such clerk at the office of the board*, and, on making and subscribing an oath before him that he will necessarily and unavoidably be absent," etc.

It will thus be noted that the clerk of the board of deputy state supervisors and inspectors of elections in charge of the office of the board in a quadrennial registration city must be on duty at the office of the board (4896) during the time set forth in section 4895 General Code, that is, between the first day of September and the day preceding the first of the days prescribed for the general registration. It would therefore appear that during this period it would be physically impossible for one in charge of the office of the election board to perform judicial duties in another place or court room, because the section says that during this period electors "may go before such clerk at the office of the board", which carries with it the idea that the clerk would be there on duty at the office of the board to register those electors who indicated that they would be unavoidably absent on the regular registration days.

Bearing upon the question of compatibility as regards a person who is a member and the deputy clerk of the board of deputy state supervisors and inspectors of election performing the duties of the acting judge of the municipal court of Alliance during the vacation of the regular judge, the rule of incompatibility has been well stated as follows:

"In the absence of express statutory provisions, disqualification to hold two or more offices is limited to offices the duties of which are necessarily incompatible." (State ex rel. vs. Kinney, 20 O. C. C., 325.)

"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." (State vs. Gebert, 12 C. C. (n. s.) 275.)

"At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be

some inconsistency in the functions of the two; some conflict in the duties required of the officers, * * *." (State vs. Bus, 135 Mo., 325.)

"The force of the word (incompatibility) * * * is that, from the nature and relations to each other of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one toward the incumbent of the other." (Throop on Public Offices, section 34.)

As far as can be ascertained from a careful reading of the statutes and examination of the duties of a member of the board of deputy state supervisors and inspectors of elections and the duties of acting judge of the municipal court during a vacation period, no incompatibility appears because neither is subordinate to the other nor is one office a check upon the other. The same is also true as regards the deputy clerk of the deputy state supervisors and inspectors of elections, holding the office of acting judge during the vacation of the regular judge of the municipal court, inasmuch as neither of these offices is a check upon the other nor is one in any wise subordinate to the other. However, as heretofore pointed out, the clerk in charge of the office in a registration city would be prevented from performing the duties of acting municipal judge between the first day of September and the day preceding the first of the registration days, because of the language appearing in sections 4895 and 4896 G. C.

In answer to your question you are therefore advised as follows:

1. A member of the board of deputy state supervisors and inspectors of elections may perform the duties of acting judge of the municipal court of Alliance during the vacation of the regular judge, as these offices are compatible.
2. The position of deputy clerk of the board of deputy state supervisors and inspectors of elections and that of acting judge of the municipal court of Alliance, Ohio, are compatible but it would not be physically possible to perform the duties of both places between the first day of September and the day preceding the first day of general registration (Sec. 4895 G. C.).
3. The positions of member of the board of deputy state supervisors and inspectors of elections and that of deputy clerk of the same board are incompatible, and may not be held by the same person at the same time because the clerk and deputy clerk of such board, under the provisions of section 4794 G. C., must be two resident electors of the county other than members of the board.

Respectfully,
JOHN G. PRICE,
Attorney-General.