

6102

INCOMPATIBLE OFFICE—MEMBER OF GENERAL ASSEMBLY—EMPLOYMENT BY LOCAL SCHOOL DISTRICT AS A SCHOOL BUS DRIVER OPERATES TO VACATE MEMBER'S INDIVIDUAL LEGISLATIVE OFFICE—SECTION 101.26 RC—OAG 1935, OPINION 4366, PAGE 730, APPROVED AND FOLLOWED.

SYLLABUS:

The acceptance by a member of the General Assembly of employment by a local school district as a school bus driver operates to vacate such individual's legislative office as provided in Section 101.26, Revised Code (Opinion No. 4366, Opinions of the Attorney General for 1935, p. 730, approved and followed).

Columbus, Ohio, December 22, 1955

Hon. Sumner J. Walter, Prosecuting Attorney
Van Wert County, Van Wert, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"I have been asked to render an opinion as to whether a person may legally hold the position of Ohio State Legislator and school bus driver for a local school board.

"I find that Revised Code of Ohio, Section 101.26 prohibits state legislators from holding certain offices but excepts the position of school teacher. I also find that the Constitution of Ohio, Article 2, Section 4, prohibits legislators or members of the General Assembly from holding certain offices but does not except the position of school teacher.

"It is my belief that both a school teacher and a school bus driver would be employees of the local district school board and would be in much the same position legally, however, I am unable to resolve the apparent conflict between the statute and the Constitution. Would you therefore please render me your opinion as to whether a member of the General Assembly may also be employed as a school bus driver."

Article II, Section 4, Ohio Constitution, to which you refer, provides:

"No person holding office under the authority of the United States, or any lucrative office under the authority of this State,

shall be eligible to, or have a seat in, the General Assembly; but this provision shall not extend to township officers, justices of the peace, notaries public, or officers of the militia."

I have no hesitancy in concluding that the position here in question is a mere employment and not an "office" within the meaning of this limitation since the incumbent is obviously not "invested by law with a portion of the sovereignty of the state." See *State, ex rel. Milburn v. Pethel*, 153 Ohio St., 1; 42 Am. Jur. 890, Sec. 12. The inhibition in this section would thus be inapplicable in the situation here presented. Accordingly, it will be seen that there is no conflict between this constitutional provision and that portion of Section 101.26, Revised Code, which excepts the employment of school teacher from the application of that section, since a teacher is clearly an employee rather than a public officer.

Section 101.26, Revised Code, provides:

"No member of either house of the general assembly, except in compliance with this section, shall:

"(A) Be appointed as trustee or manager of a benevolent, educational, penal, or reformatory institution of the state, supported in whole or in part by funds from the state treasury;

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

"(C) Accept any appointment, employment, or office from any committee or commission authorized or created by the general assembly, or from any executive, or administrative branch or department of the state, 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. This section does not apply to school teachers, township officers, justices of the peace, notaries public, or officers of the militia."

The precise question here presented is whether the employment of school bus driver is one "from any * * * executive, or administrative branch or department of the state," as used in paragraph (C) of this section.

The term "state" is sometimes used in the narrow sense so as to indicate only the central agencies of the state government, but on other occasions the term may signify the whole governmental organization of the state, including the numerous local subdivisions therein. Thus, in *State, ex rel. Godfrey v. O'Brien*, 95 Ohio St., 166, it was held:

"County and township subdivisions are agencies of the state, and constituent parts of the plan of permanent organization of state government."

Likewise, it was said by Judge Price in *Board of Education v. Volk*, 72 Ohio St., 469 (480, 481):

"Boards of education * * * are arms or agencies of the state for the promotion of education throughout the state.
* * *"

In the case at hand the reference in the final sentence in Section 101.26, Revised Code, to the local officials therein designated is plainly indicative of the use of the term "state" in this section in its broader sense; and the reference therein to "school teachers" plainly shows the intent that the inhibition therein stated is to apply to the employees of boards of education.

A similar conclusion in this regard was reached in Opinion No. 4366, Opinions of the Attorney General for 1935, p. 730, the syllabus in which is as follows:

"A member of the General Assembly may lawfully accept any of the positions of clerk or deputy in the office of a county treasurer or surveyor, and road foreman or laborer under the county surveyor, during the period the legislature is not in session, but upon accepting such employment he is required by section 15, General Code, to forthwith resign his legislative office, and upon failure so to do such office becomes vacant.

"If a member of the General Assembly accepts any of the employments mentioned in syllabus 1 upon adjournment of the legislature from its regular session, the tender of his resignation from such an employment prior to reconvening of the legislature in a special session will not serve to reinstate him as a member of the General Assembly."

The writer said (pp. 731, 732):

"With reference to section 15, General Code, it is evident that paragraph 3 will have application. The positions you mention

are undoubtedly 'employments' from an administrative branch of the state, which employments provide other compensation than actual and necessary expenses. That paragraph 3 applies to employments under a county as well as the state, seems to be clear from a consideration of the last sentence of the section making certain exceptions but not excepting a county employe. At the time paragraph 3 was inserted in section 15, General Code, by amendment in 1914 (104 O. L. 252, 253) the last sentence of the section was also inserted with the exception of the words 'school teachers.' The Supreme Court of Ohio has held that 'counties' are administrative agencies of the state. See *State ex rel. vs. O'Brien*, 95 O. S. 166; and *County Commissioners of Portage County vs. Gates*, 83 O. S. 19, 30. Therefore, it would be necessary for a member of the General Assembly to resign upon acceptance of such employments, and in case he failed to do so, he would vacate his seat in the General Assembly automatically."

I concur in the conclusions thus stated and am impelled to a like conclusion in the instant case.

In your inquiry, however, you have presented the question of whether "a member of the General Assembly may also be employed as a school bus driver." There is no prohibition, either in the statute or the constitutional provision above mentioned of a member of the General Assembly accepting such employment; but the statute does forbid the individual concerned in such case to retain his membership in the General Assembly. It would appear, therefore, that if the individual here involved should accept the employment indicated his legislative office would become vacant.

Accordingly, in specific answer to your inquiry, it is my opinion that the acceptance by a member of the General Assembly of employment by a local school district as a school bus driver operates to vacate such individual's legislative office as provided in Section 101.26, Revised Code, (Opinion No. 4366, Opinions of the Attorney General for 1935, p. 730, approved and followed.)

Respectfully,
C. WILLIAM O'NEILL
Attorney General