

1861

POSITION OF REPRESENTATIVE TO CONGRESS IS INCOMPATIBLE WITH THE POSITION OF MEMBER OF THE STATE BOARD OF EDUCATION—§3301.031., R.C.

SYLLABUS:

1. In view of the provisions of Section 3301.031, Revised Code, the position of representative to congress is incompatible with the position of member of the state board of education.

2. Where a person who is a member of the state board of education is elected to the office of representative in congress, and accepts and qualifies for that office, he vacates the position of member of the board upon such election, acceptance and qualification.

Columbus, Ohio, November 29, 1960

Hon. Michael V. DiSalle, Governor of the State of Ohio
Office of the Governor, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“May a member of the state board of education lawfully serve as a representative in Congress?”

“In November of 1955 Ward M. Miller of Portsmouth, Ohio, was elected to the State Board of Education. At the initial organization meeting he was selected to serve a six year term. In November of 1960 he was elected to the office of representative in congress from the sixth district for the unexpired term.

“Your attention is invited especially to section 3301.031 of the Revised Code of Ohio, which provides in pertinent part:

“ * * * A member of the board shall not during his term of office hold any other public position of trust or profit, or be an employee or officer of any public or private school, or a public or private college, university, or other institution of higher education * * * ”

Under the provision of Section 3301.03, Revised Code, which you have quoted in your request, a member of the state board of education may not during his term of office hold any other public position of trust or profit. The office of representative to congress being undoubtedly a public

position of profit, I must conclude that the two offices are incompatible. Still to consider, therefore, is the question whether the board member is ineligible to take the position of representative, or whether the taking of that position would vacate the board of education position.

In 44 Ohio Jurisprudence, Section 40, page 527, it is stated as follows :

“The acceptance of a second office which is incompatible with one already held vacates the first, and this is true whether the incompatibility is based on the common law, or on a constitutional or statutory provision that an office becomes vacant when the incumbent accepts and undertakes to discharge the duties of an incompatible office. This rule is based on the presumption of election as evidenced by the acceptance and incumbency of the second office, and it is immaterial whether the title to the second office is valid or invalid. Furthermore, when the officer has been once inducted into the second office, his subsequent resignation of the latter does not ordinarily restore his right or title to the first.

“Certain limitations and exceptions to the general rule have been recognized, however, and among such limitations or exceptions are the cases where the officer is, by law, compelled to accept the second position assigned to him; where the office first held cannot be resigned by the officer; where the second office is of a temporary character; and where the officer is ineligible to hold the second office. It is well settled that the appointment or election of one to an office to which he is ineligible because of an express statutory provision prohibiting an incumbent of one office from holding another named office is absolutely void. In other words, he holds the first office and is ineligible to the second.”

In applying the above noted rules of law to the instant situation, I am of the opinion that upon the election to, acceptance of, and qualification to the position of representative in congress, the individual automatically vacates his position as member of the state board of education. I believe this is the inevitable conclusion since Section 3301.031, *supra*, does not expressly prohibit a member of the board of education from being elected to an office such as representative, but merely states that a board member “* * * shall not during his term of office hold any other public position of trust or profit * * *.” Nor does the statute expressly state that a member of the board is *ineligible* to hold these other positions.

Regarding the rule of law applying as in the instant case, it is stated in *State, ex rel. Baden v. Gibbons*, 40 O.L.R., 285 at page 291 :

“The general rule is succinctly further stated in 22 R.C.L. 418. Section 63; ‘the acceptance of a second office, incompatible

with one already held, vacates the first, and this is true whether the incompatibility is based on the common law or by reason of a constitutional mandate, or because of an express statutory direction to the effect that an office becomes vacant when the incumbent accepts and undertakes to discharge the duties of another incompatible office.' In the case of a constitutional or statutory command it is not a question as to whether or not the offices or employments are incompatible in the light of the various definitions as to what makes offices incompatible, for our legislature in its wisdom has seen fit to declare that all public office and employment, other than that of a notary public or militiaman is incompatible with the office of councilman. Mecham in his work on Public Offices and Officers in Section 429 says:

"Where, however, it is the holding of two offices at the same time which is forbidden by the constitution or the statutes, a statutory incompatibility is created, similar in its effect to that of the common law, and, as in the case of the latter, it is well settled that the acceptance of a second office of the kind prohibited, operates ipso facto to absolutely vacate the first."

"No judicial determination is therefore necessary to declare the vacancy of the first, but the moment he accepts the new office the old one becomes vacant, as is said in one case 'His acceptance of the one was an absolute determination of his right to the other' and left him 'no shadow of title, so that neither quo warranto nor a motion was necessary.'" (Emphasis added)

The exception to the general rule was applied in *State, ex rel. v. Kearns, et al.*, 47 Ohio St., 566, and in *State, ex rel. Attorney General v. Craig*, 69 Ohio State., 236. In these cases, however, the statute in question, Section 1717, Revised Statutes, specifically held that "no member of council shall be eligible to any other office." Also, in *State, ex rel. Gettles v. Gillen*, 112 Ohio St., 534, the exception was applied, the question dealing with Section 4 of Article II, Ohio Constitution, reading in part:

"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; * * *." (Emphasis added)

It will be noted that a specific statement of ineligibility is present in this constitutional section, thus differing from the provision of Section 3301.031, *supra*, here concerned.

The old statute, Section 1717, Revised Statutes, and Section 4 of Article II, Ohio Constitution both deal with the factor of eligibility and

the cases under these laws all follow the same pattern. There would be no choice in these cases. The matter of eligibility was a plain fact, while in the instant case the acceptance of and qualification to another public office is evidence of choosing the new position and vacating the old (i.e. the position of member of the board of education).

Accordingly it is my opinion and you are advised:

1. In view of the provisions of Section 3301.031, Revised Code, the position of representative to congress is incompatible with the position of member of the state board of education.

2. Where a person who is a member of the state board of education is elected to the office of representative in congress, and accepts and qualifies for that office, he vacates the position of member of the board upon such election, acceptance and qualification.

Respectfully,
MARK McELROY
Attorney General