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OFFICES — COMPATIBLE — INCOMPATIBLE:

1. TOWNSHIP CLERK — MEMBER, BOARD OF DIRECTORS, COUNTY AGRICULTURAL SOCIETY — COMPATIBLE.
2. CLERK, COUNTY AGRICULTURAL SOCIETY AND CLERK OF CITY BOARD OF EDUCATION — COMPATIBLE.
3. TEACHER, CITY HIGH SCHOOL — MAY LEGALLY HOLD OFFICE OF CLERK OF CITY COUNCIL.
4. COUNTY SERVICE OFFICER — MEMBER BOARD OF ELECTIONS — INCOMPATIBLE — VIOLATION, SECTION 486-23 G. C.
5. DEPUTY CLERK, BOARD OF ELECTIONS — SOLDIERS RELIEF COMMISSION — COMPATIBLE.
6. CITY COUNCILMAN — TOWNSHIP CONSTABLE — INCOMPATIBLE — SECTION 4207 G. C.

SYLLABUS:

1. The positions of township clerk and member of the board of directors of a county agricultural society are not incompatible.
2. The positions of clerk of a county agricultural society and clerk of a city board of education are not incompatible.
3. A teacher in a city high school may legally hold the office of clerk of the city council at the same time.
4. A county service officer may not concurrently therewith hold the office of member of a board of elections without violating Section 486-23, General Code.
5. The offices of deputy clerk of a board of elections and member of the soldiers relief commission are not incompatible.
6. Section 4207, General Code, by prohibiting a city councilman from holding any other public office or employment, except that of notary public or member of the state militia, prohibits such councilman from holding, at the same time, the office of township constable.

February 1, 1952

Hon. George M. Monahan, Prosecuting Attorney
Auglaize County, Wapakoneta, Ohio

Dear Sir:

This will acknowledge receipt of your letter of recent date, which reads in part as follows:

“Kindly advise me if the following positions are compatible:

1. Township Clerk and Member of the Fair Board.
2. Clerk of the Fair Board and Clerk of the city Board of Education.
3. Teacher in the city high school and Clerk of the City Council.
4. County Service officer and Member of the Board of Elections.
5. Deputy clerk of the Board of Elections and member of the Soldiers & Sailors Relief Commission.
6. Township constable and city councilman. (This man ran for councilman and was elected and written in for constable, a position he now holds.)”

In answering your request, I will consider the questions relating to the various offices in the order in which you have presented them.

1. The governing body of county and independent agricultural societies is the board of directors sometimes popularly designated as a “fair board.” Section 9884-2, General Code, provides for the election of such a board of directors and the term of office of its members. Neither this section nor any other applicable section prohibits a member of the board of directors from holding a public office concurrently with membership on the board.

The election of township clerks and the duties pertinent to such office are provided for in Section 3299 et seq., General Code. I can find no restriction in these provisions against a clerk being at the same time a member of a board of directors of an agricultural society. Finding no statutory prohibition on holding the two positions simultaneously, it be-

comes necessary to determine whether such positions are incompatible under the common law rule.

It has been said that at common law, two offices whose functions are inconsistent are to be regarded as incompatible. One of the tests for determining when there is such an inconsistency in functions is stated in 32 Ohio Jurisprudence, p. 908, as follows:

“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 in any way a check upon the other * * *.”

The doctrine of incompatibility however, relates only to public offices and has no application where one of two positions is not in fact a public office. There can be little doubt that the office of township clerk is a “public office” as that term is defined, but I think there is considerable doubt as to whether a member of a board of directors, or fair board, holds a public office. In defining a “public office,” it is stated in 32 Ohio Jurisprudence, p. 859:

“In accordance with these characteristics, it is generally held that authority and power relating to public interests, conferred by statute, and vested in an individual *by election or appointment, create an office.*” (Emphasis added.)

Section 9884-2, *supra*, reads in part as follows:

“Only persons holding membership certificates at the close of the fair, or at least fifteen calendar days before the date of election, as may be fixed by the board of directors, shall be entitled to vote, unless such election is held during the time of the holding of the annual county fair. If the said election is held on the fairgrounds during the continuance of the county fair, then all persons holding membership certificates of the date and hour of the election shall be entitled to vote.”

It will be seen that a member of the board of directors is not elected at a public election, where the electors of a county generally are eligible to vote, but at a private election in which the electors are persons holding membership certificates in such agricultural societies. In an opinion rendered by one of my predecessors in office, Opinion No. 2530, Opinions of the Attorney General for 1934, p. 495, it was concluded that “a director

of a county agricultural society is not a public officer but is the agent of a private corporation." In the body of the opinion, it was stated at p. 498:

"I cannot feel that the office of director of a county agricultural society, which is filled not by election of the people or by appointment of any public official, but merely by election of those private individuals who happen to be members of the society, is a public office or employment."

I think the conclusion reached in the above cited opinion is the correct one and it is therefore my opinion that a member of the board of directors of an agricultural society is not a public officer and that such position is compatible with the office of township clerk.

2. I think the conclusion reached in the above instance is determinative of the question you have presented in item two of your request.

I can find no express provision in the statutes or the rules for the organization and management of county and independent agricultural societies expressly creating the position of clerk of the fair board but I assume that such a position has been created under authority of Section 9884-3, General Code. That section provides that at an annual meeting, the board of directors shall elect a president, vice-president and "such other officers as it may deem proper." If, as concluded above, members of such a board of directors are not public officers, I think it is clear that a person elected by such directors to the position of clerk of the board would not be a public officer or public employee. It is my conclusion, therefore, that there can be no question of incompatibility in this instance and, as I can find no statutory provision which would prevent a clerk of a city board of education from also being a clerk of a fair board, it is my opinion that such positions are compatible.

3. Next in order of consideration are the positions of city high school teacher and clerk of the city council. Teachers are, under Section 486-8 (7), General Code, placed in the unclassified civil service. Under the same section of the code, the legislature in enumerating those positions in the unclassified service, included therein:

"All officers and employees elected or appointed by either or both branches of the general assembly, *and such employees of the city council as are engaged in legislative duties.*"

(Emphasis added.)

The underscored provision would seem to embrace the office of clerk of the city council. In an opinion rendered by one of my predecessors in office, Opinion No. 326, Opinions of the Attorney General for 1927, p. 558, it was concluded that a clerk of a city council was in the unclassified civil service. This opinion quoted from an earlier opinion, Opinion No. 647, Opinions of the Attorney General for 1919, p. 1160, as follows:

“The General Assembly is conclusively presumed to have known that the city council is the municipal law-making body and, as such, could not delegate its law-making power to its clerk and the use of the term ‘legislative duties’ must be construed as to mean clerical duties pertaining to and in connection with the legislative function of council.”

I concur in the reasoning, and the conclusions expressed in those opinions.

Both offices being in the unclassified civil service, I can find nothing in the statutes which would prevent one person from holding the two offices concurrently. Neither can I see where either office is a check upon the other office in any way, rendering such offices incompatible at the common law. It is therefore my opinion that the positions of teacher in a city high school and clerk of a city council may legally be held by the same person.

4. The office of county veterans’ service officer is created by Section 2933-3, General Code, and in general the duties of such office are to advise and assist members of the armed forces and their families and veterans and their families in presenting claims or obtaining benefits under any law of the United States or this state. The position of such service officer not being listed in the unclassified civil service under Section 486-8, General Code, it must be concluded that it is within the classified civil service. This conclusion was reached by one of my predecessors in office also, in Opinion No. 4130, Opinions of the Attorney General for 1948, page 594.

It is expressly provided in Section 486-8, *supra*, that election officers shall be in the unclassified service. Section 486-23, General Code, partially provides:

“* * * nor shall any officer or employee in the classified service of the state, the several counties, cities and city school districts thereof, be an officer in any political organization *or take part in politics other than to vote as he pleases and to express freely his political opinions.*” (Emphasis added.)

There is no restriction on the political activities of a person in the unclassified civil service. In *State, ex rel. Neffner v. Hummel*, 142 Ohio St., 324, the Supreme Court, in considering the effect of the underscored language in Section 486-23, supra, stated at page 332:

“A casual reading of the civil service code demonstrates clearly that the General Assembly created two classes of service. The rights and obligations of and restrictions upon persons in the classified service are wholly inconsistent with the rights and obligations of and restrictions upon persons in the unclassified service.

“As we read and construe the code, an employee in the classified service upon acceptance of an appointment to an elective office in the unclassified service thereby terminates his status as an employe in the classified service.”

While in this case the court was considering a position in the classified service and an elective office in the unclassified service, it would appear that the inconsistency in the rights and obligations of classified and unclassified service is still present in the instant case. This is true by reason of the fact that Section 4785-9, General Code, provides that after a vacancy occurs in the membership of a board of elections, the county executive committee of the party entitled to the appointment may recommend a qualified elector to the Secretary of State. By this provision the Legislature has expressly recognized the political nature of the office of member of a board of elections.

In Opinion No. 2545, Opinions of the Attorney General for 1928, page 2054, this problem was considered and it was there concluded that employes in the classified service may not hold office as a member or clerk of a board of elections without violating Section 486-23. I concur in this conclusion.

5. The fifth item in your request deals with the office of deputy clerk of a board of elections and member of the soldiers relief commission. Section 2930, et seq., General Code, provide for the appointment of a

soldiers relief commission for the relief of indigent soldiers, sailors, marines and their families. I can find no provision in these sections which would make a member of such commission ineligible to hold, at the same time, the position of a deputy clerk of elections.

Section 4785-15, General Code, makes provision for the appointment of a deputy clerk of a board of elections. I find nothing in the election laws which would prevent a deputy clerk of a board of elections from holding concurrently, with his position as such clerk, the office of member of the soldiers relief commission.

Nor do I see how the duties of the two offices could conflict in any way, or that one office is in any manner a check on the other office and, therefore, I must conclude that the two offices are not incompatible at common law.

6. Section 4207, General Code, prevents the same person from holding at the same time the offices of township constable and city councilman. It is provided therein :

“Councilmen at large shall have resided in their respective cities and councilmen from wards shall have resided in their respective wards, for at least one year next preceding their election. Each member of council shall be an elector of the city, *shall not hold any other public office or employment, except that of notary public or member of the state militia*, and shall not be interested in any contract with the city. A member who ceases to possess any of the qualifications herein required, or removes from his ward, if elected from a ward, or from the city, if elected from the city at large, shall forthwith forfeit his office.”

(Emphasis added.)

It seems clear that a township constable holds a public office within the meaning of this section and I can but conclude that a person who has been elected to both offices at the same election, or elected to one and re-elected to the other, can legally accept only one of such offices.

I have purposely avoided any discussion of the question of the physical possibility of discharging the duties of any two offices here involved in considering the compatibility of such offices. I have done this for the reason that this is a factual question and, therefore, one for determination as a political matter, and not as a question of law.

In specific answer to your inquiry, it is my opinion that:

1. The positions of township clerk and member of the board of directors of a county agricultural society are not incompatible.
2. The positions of clerk of a county agricultural society and clerk of a city board of education are not incompatible.
3. A teacher in a city high school may legally hold the office of clerk of the city council at the same time.
4. A county service officer may not concurrently therewith hold the office of member of a board of elections without violating Section 486-23, General Code.
5. The offices of deputy clerk of a board of elections and member of the soldiers relief commission are not incompatible.
6. Section 4207, General Code, by prohibiting a city councilman from holding any other public office or employment, except that of notary public or member of the state militia, prohibits such councilman from holding, at the same time, the office of township constable.

Respectfully,

C. WILLIAM O'NEILL
Attorney General