Question. May the clerk of a village be employed as clerk of the board of public affairs and receive the compensation provided for each of the offices if the two offices have not been merged by action of the village council as provided in Sec. 4281 G. C.?"

After the opinion of the Attorney General to which you first refer was rendered, section 4281, General Code, was amended permitting the council of a village to merge the duties of the clerk of the board of trustees of public affairs with the duties of the clerk of such village, which section, as amended, is quoted in your letter. Section 4360, General Code, was also amended and reads as follows:

"The board of trustees of public affairs shall organize by electing one of its members president. Unless the office of clerk of said board has been consolidated with the office of clerk of the village as authorized by section 4281 of the General Code, it may elect a clerk, who shall be known as the clerk of the board of trustees of public affairs."

These statutes, as they now read, give express permission to merge the duties of these two offices, provided the council of a village deems it advisable. In Opinions of the Attorney General for 1929, Vol. II, page 958, it is said:

"Prior to the amendment of these two sections * * * the law provided for a clerk for the council of a village and a clerk for the board of trustees of public affairs in the village, each with duties pertaining strictly to the affairs of the body or board for whom he acted.

The manifest purpose of the amendment, as above noted, is to permit one person to perform the duties of both positions, when the village council deems such action advisable."

Consequently, when the council of a village has not deemed such action advisable, the board of trustees of public affairs of such village may not elect the village clerk to the office of the clerk of such board, since these two offices have been held to be incompatible and, without statutory permission, may not be held by the same person at the same time. Section 4281, General Code, has given the authority to merge the duties of these two offices to the village council and not to the board of trustees of public affairs.

I am therefore of the opinion that the clerk of a village may not be employed as clerk of the board of trustees of public affairs where the duties of the two offices have not been merged by action of the village council as provided in section 4281, from which conclusion it necessarily follows that such clerk may not receive the compensation provided for each of said offices.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4018.

CONSERVATION COUNCIL—MAY NOT PROMULGATE RULE PERMITTING FEDERAL GOVERNMENT TO ESTABLISH FISH HATCHERIES IN OHIO—POWER RESTS WITH LEGISLATURE.

SYLLABUS:

The legislature of Ohio has not specifically granted to the United States Commissioner of Fisheries the right to establish and maintain fish hatcheries in

this state, which grant of authority is required by the act of Congress appropriating money for the establishment of such hatcheries. Rules and regulations of the Conservation Council can not be construed as a grant of legislative authority within the meaning of the act of Congress.

COLUMBUS, OHIO, February 2, 1932.

HON. I. S. GUTHERY, *Director of Agriculture, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your letter which reads as follows:

> "I am attaching herewith correspondence from the Department of Commerce, Bureau of Fisheries which is self-explanatory.
>
> At a meeting of the Conservation Council on February 26 resolution was adopted requesting me to ask you if the present Ohio statutes would conflict with the request of the Bureau of Fisheries in according them the right to conduct fish cultural operations and scientific investigations in the waters of this State.
>
> The letter of the Department of Commerce, Bureau of Fisheries of the United States government, reads in part as follows:
>
> 'No part of an appropriation made under authority of sections 1, 2, 3, 4, or 5 shall be expended in the construction, purchase, or enlargement of a station or substation until the State in which such station or substation is to be located shall have by legislative action accorded to the United States Commissioner of Fisheries and his duly authorized agents the right to conduct fish hatching and fish culture and all operations connected therewith in any manner and at any time that may by the Commissioner be considered necessary and proper, any laws of the State to the contrary notwithstanding.'
>
> So far as this office is aware, the State laws at the present time do not accord this privilege, and I am therefore writing to ascertain if the Game and Fish Commission can issue a regulation covering this matter, or whether it will be necessary to request a special enactment by the Legislature. If the latter course is necessary I would request that you initiate such legislation at the earliest possible date."

Your inquiry raises the question of whether or not the Conservation Council can promulgate a rule or regulation which will permit the United States government to establish and maintain fish hatcheries in Ohio, under the legislative grant of power authorizing the Conservation Council to make and establish rules and regulations.

The legislative authorization enabling the Conservation Council to make and establish rules and regulations is contained in that part of section 1438-1, General Code, which is as follows:

> "The conservation council may make and establish such rules and regulations not inconsistent with law governing its organization and procedure and administration of the division of conservation as it may deem necessary or expedient."

The power to make rules and regulations contained in that section is in addition to that contained in section 1438-2, but which section has no bearing on your question.

It is a universal rule of law, for which I need not cite any authority, that the legislature can not delegate its law making functions and power to any administrative body, board or officer or other political branch of the government. However, on the other hand, the courts have held that the legislature can empower an administrative body, board or officer to make rules and regulations relating to the administration and enforcement of laws. Such a grant of power is not considered by the courts as being violative of the principle of law which holds that the legislature can not delegate its law making power.

In the case of *Public Service Commission* vs. *Mobile Gas Company* (Alabama), 104 So. 538, the rule was stated as follows:

> "The legislature has power to authorize administrative officers and boards created by it to make necessary rules and regulations, and clothe them with administrative powers to enforce the provisions of the law."

The same ruling has been made where an act of the legislature has delegated to some officer or board the power to determine certain facts or to determine the happening of a certain contingency upon which determination the operation of a statute already enacted depends. The difficulty encountered in cases involving a determination of whether or not an act of an administrative body or officer is a legislative act or an administrative rule or regulation is not in the rule of law, which is well established, but rather in its application to a particular case. As stated in the case of *United States* vs. *Graumad,* 220 U. S. 506:

> "It is difficult to define the line which separates legislative power to make laws from administrative authority to make regulations."

The Supreme Court of Ohio recently discussed this problem in the case of *State, ex rel.,* vs. *Akron Metropolitan Park District,* 120 O. S. 464, at page 478. wherein the court said:

> "It is a maxim in constitutional law that power conferred by a Constitution upon a Legislature to make laws cannot be delegated by such body to any other body or authority, unless the authority to so delegate is given by the Constitution itself, either expressly or by implication. The legislative prerogative is one which involves judgment, wisdom, and discretion of a high order, and the trust thus imposed cannot be shifted to other shoulders; neither can the judgment and discretion of any other body be substituted for that of the Legislature itself.
>
> This principle is well settled and is no longer the subject of controversy. Its application is one of the greatest difficulty in certain classes of cases, more especially in legislation involving the exercise of the police power.
>
> In the complexity of our advancing civilization, in the wide differences in conditions in different localities in the same state, and in the ever-changing conditions in a given locality, the Legislature has found it necessary to content itself with declaring the principles governing a general public purpose, and to confer upon existing local officials, or upon local boards to be created in a designated manner, the authority to provide, within definite limitations, rules and regulations to execute the general purpose expressed in the law itself. It does not argue

against the completeness of the law that a given locality or district may or may not at its option avail itself of the provisions of the law. Statutes are sometimes pre-emptory and mandatory, and sometimes optional and permissive. One locality may have no need of governmental activity along a given line, while another locality in the same state may have an urgent need. That need must be ascertained and declared by means and methods prescribed by the law itself, which must be scrupulously followed. *While the Legislature may not delegate to any other power the right to declare principles and standards, or general public policy, it may delegate to other competent agencies the power to determine whether or not they will avail themselves of the privileges conferred, and also delegate to certain named executive or administrative agencies authority involving discretion in relation to the execution of the law.*

The Legislature having declared the governmental policy, and having fixed the legal principles which are to govern, an administrative agency may be given power to ascertain the facts and conditions to which the policies and principles apply." (Italics the writer's.)

The court in that case, in determining whether or not the power conferred by the legislature upon the board of park commissioners to levy taxes upon taxable property in a metropolitan park district was an attempted delegation of legislative power, seemed to decide that question by determining whether or not the power granted involved the right to declare principles and standards or general public policy.

Whether or not the United States government should be permitted to erect and maintain fish hatcheries in this state involves, in my mind, a determination and declaration of public policy. This is self-evident upon a reading of the various statutes enacted in the past by the legislature authorizing certain state bodies to cooperate or contract with the United States government. The citation of a few of those sections, I believe, will illustrate. Thus, section 1237-1 (the legislature accepted the provisions of an act of congress relating to the hygiene of maternity and designating the state board of health to cooperate with the United States government); section 1108 (authorizes the director of agriculture to cooperate with the bureau of animal industry in the eradication of diseases of animals); section 1118 (permits the director of agriculture to adopt the rules and regulations made by the director of agriculture of the United States government, under an act of congress, and to cooperate in the eradication of tuberculosis in cattle); section 2818 (permits surveyors of the United States government to enter upon lands of this state while engaged in a survey authorized by congress); section 1177-11 (empowers the board of control to cooperate with the department of agriculture of the United States government in reference to forestry work in Ohio); section 6828-23 (the board of directors of conservancy districts empowered to contract and cooperate with the federal government); the same power was granted by section 6602-56 to the board of directors of a sanitary district and the same authorization was given to the board of control of a canal district by the provisions of section 14219-41.

The Conservation Council, in order to make a rule permitting the United States government to establish hatcheries in this state, would be determining the general public policy of this state, which the Conservation Council has no authority to assume or the legislature to grant. In other words, if the Conservation Council could, under section 1438-1, make the rule and regulation in question, it would be usurping the power vested by the people in the General Assembly, by

virtue of article II, section 1 of the Constitution of Ohio. In addition to that conclusion, I am inclined to believe that the provisions of section 1438-1, quoted herein, can not be interpreted as granting to the Conservation Council the authority to make such a rule and regulation, since the provisions of that section only empower that body to make rules and regulations which it may deem necessary to the functioning of the Conservation Council and the administration of the conservation laws.

It is quite evident that the creation of fish hatcheries by the federal government in this state is not a necessary incident to the administration and enforcement of the conservation laws of Ohio. This conclusion finds further support by the very fact that the legislature of this state deemed it necessary and advisable to enact section 1447, which permits the director of agriculture to establish and maintain fish hatcheries in Ohio. If the Conservation Council had authority, by reason of its rule making power, to permit the erection and maintenance of fish hatcheries in this state, it would not have been necessary for the legislature to have enacted section 1447.

It is therefore my opinion that:

1. There is no statutory provision in Ohio which accords to the United States Commissioner of Fisheries the right to establish and maintain fish hatcheries in this state as is required by an act of Congress appropriating money for such purpose.

2. The Conservation Council can not promulgate a rule and regulation which will accord to the United States Commissioner of Fisheries the right to establish and maintain fish hatcheries in this state as is required by an act of Congress appropriating money for such purpose.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4019.

DELINQUENT LAND TAXES—RIGHT TO PAY IN INSTALLMENTS—LIMITED TO THOSE BECOMING DELINQUENT AT AUGUST, 1930, SETTLEMENT, AND THEREAFTER.

SYLLABUS:

Taxes and assessments on real property which became delinquent prior to 1930, *and which are delinquent at this time, may not be paid in installments in the manner provided by section* 2672, *General Code, as amended,* 114 *O. L.* 827; *but the right to make installment payments of delinquent taxes and assessments is limited to the payment of such taxes and assessments as first became delinquent at the August* 1930, *settlement, and thereafter.*

COLUMBUS, OHIO, February 2, 1932.

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

GENTLEMEN:—This is to acknowledge the receipt of your recent communication which reads as follows:

> "You are respectfully requested to furnish this department your written opinion on the following:
>
> Section 2672 of the General Code as amended in S. B. 326, provides