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GENERAL ASSEMBLY — MEMBER — OFFICE COMPATIBLE
WITH MEMBER, CITY BOARD OF EDUCATION.

SYLLABUS:

There is no incompatibility between the offices of member of the General Assembly and member of a city board of education.

Columbus, Ohio, December 15, 1955

Hon. Charles H. Anderson, Prosecuting Attorney
Trumbull County, Warren, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“I would very much appreciate your opinion with respect to the compatibility of the office of a member of the General Assembly and a member of a city board of education. In other words, could a representative of the state legislature also serve as a member of a city board of education?”

"I have read with considerable interest your 1927 Opinion No. 531, found on page 881. In that opinion it was held that a member of the General Assembly could also serve as a member of a county board of education. One of the controlling points was that a member of the county board of education was paid expenses as distinguished from compensation. However, R. C. 3313.12 provides that the board of any school district, other than the county school district, may provide for compensation of its members in an amount not to exceed three dollars per member for regular meetings attended not exceeding twelve meetings in any one year."

In Article II, Section 4, Ohio Constitution, it is provided :

"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."

A somewhat similar limitation is found in Section 101.26, Revised Code, as follows :

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

"* * * (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.

"* * * This section does not apply to school teachers, township officers, justices of the peace, notaries public, or officers of the militia."

The basic questions thus presented are (1) whether membership on a city board of education is a "lucrative office" or (2) whether such membership is an "office * * * which provides other compensation than actual and necessary expenses."

Section 3313.12, Revised Code, referred to in your inquiry, reads as follows :

"Each member of the County board of education shall be paid five dollars a day and mileage at the rate of twelve cents a mile one way to cover the actual and necessary expenses incurred during his attendance upon any meeting of the board not exceeding twelve meetings in any one year. Such expenses and the expenses

of the county superintendent, itemized and verified, shall be paid from the county board of education fund upon vouchers signed by the president of the board.

“The board of any school district other than a county school district may provide by resolution for the compensation of its members, provided that such compensation shall be paid out of current operating funds derived from a local tax which is in excess of the tax levy required for participation in additional aid from the state public school fund and that such compensation shall not exceed three dollars per member for regular meetings attended not exceeding twelve meetings in any one year.”

The second paragraph in this section was formerly set out in Section 4832-11, General Code, and earlier still was found, in analogous form, in Section 4715, General Code. This latter section, until amended in the enactment of House Bill No. 8, Ninety-Second General Assembly, 117 Ohio Laws, 50, (1937) provided a uniform per diem allowance to members of all rural boards of education. In the 1937 enactment, however, this provision was changed to the authorization, now found in the statute, for boards other than county boards to provide by resolution a per diem allowance from funds raised by local taxation.

Although the present statute refers to the provision of “compensation” for members of such boards, when this provision was amended as a portion of former Section 4832-11, General Code, in House Bill No. 199, Ninety-Eighth General Assembly (123 Ohio Laws, 508) (1949) the title of the act effecting such change was as follows:

“To amend sections 4832-11 and 4844-1 of the General Code relative to *traveling expenses* and *mileage allowance* of superintendents of schools and members of boards of education.”
(Emphasis added.)

Language used in the title of an act is not controlling, of course, but may be referred to for aid in cases of ambiguity. It is believed that such ambiguity is present in the instant case by reason of the provision in the initial paragraph of Section 3313.12, *supra*, relative to “actual and necessary expenses.” This language was under scrutiny in Opinion No. 531, Opinions of the Attorney General for 1927, p. 881, the syllabus in which reads:

“There is no constitutional or statutory inhibition preventing a member of a county board of education from serving at the same time as a member of the General Assembly.”

In that opinion the writer quoted with approval certain language in Opinion No. 1118, Opinions of the Attorney General for 1920, p. 373, in which the following statements are made:

“It is possible that you have in mind the amendment to section 4734 G. C., effective September 22, 1919, which amendment stated a specific sum that should be allowed to the members of the county board of education as their expenses for attendance upon any meetings of the county board of education.

“When the opinion herein quoted from was issued by the attorney-general, section 4734 G. C. read as follows:

“‘Each member of the county board of education shall be paid his actual and necessary expenses incurred during his attendance upon any meeting of the board. Such expenses, and the expenses of the county superintendent, itemized and verified shall be paid from the county board of education fund upon vouchers signed by the president of the board.’

“Under the above reading of section 4734, the attorney general pronounced the office of member of the county board of education as not a lucrative office. Section 4734, which was construed in the original opinion herein given, now reads as follows: (108 O. L. 707)

“‘Each member of the county board of education shall be paid three dollars a day and mileage at the rate of ten cents a mile one way, to cover his actual and necessary expenses incurred during his attendance upon any meeting of the board. Such expenses, and the expenses of the county superintendent, itemized and verified shall be paid from the county board of education fund upon vouchers signed by the president of the board.’

“It would appear therefore that there has been no material change in the language of section 4734 G. C., except that the necessary expenses incurred had a limitation put upon them after September 22, 1919; that is, three dollars per day, and nowhere in such section is there any indication that such three dollars is to be considered as compensation.

“Since the section provides for the expenses of the member of the county board of education, and not for his compensation, it must be held that the office of member of the county board of education is not a lucrative office and therefore is not one of those offices which fall within those named in Article II, section 4 of the constitution of Ohio, which latter offices, where they are lucrative ones, are prohibited from being held by a member of the general assembly.”

The pertinent language thus construed is substantially identical with that now appearing in the initial paragraph of Section 3313.12, Revised Code, and the reasoning in the 1920 opinion is equally applicable thereto.

It will be noted that the per diem allowance in the case of county board members under the present law is five dollars per meeting not exceeding twelve meetings in any year; and that a mileage allowance is provided in addition. These allowances substantially exceed the allowable amounts as to members of other boards of education. This circumstance considered in light of the placing of such latter provision in the same section with a provision for "actual and necessary expenses," and considered also in light of the language in the title of House Bill No. 199, supra, seriously suggests an intent only to recompense such members for expenses incurred in the discharge of their duties, despite the designation of such allowance as "compensation."

A further reason for the recognition of this intent is found in Article II, Section 20, Ohio Constitution, which provides in part:

"The General Assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; * * *"

In *Schwing v. McClure*, 120 Ohio St., 335, it was held:

"Members of a board of education of a school district are public officers, whose duties are prescribed by law. * * *"

It is thus to be seen that there is serious doubt of the constitutional validity of the provision here involved if it be determined that it relates to compensation rather than allowance for expenses.

It is elementary that as between two possible interpretations of legislative language, that is to be preferred which avoids any conflict with constitutional limitations. In the instant case it is not necessary to resolve this question, however, for in either case there would be no resulting incompatibility either under Article II, Section 4, or Section 101.26, supra. This is true for the reason that (1) if the per diem provided by resolution of the board under Section 3313.12, supra, is deemed to be an *expense* allowance, then the office is not a lucrative one within the meaning of Article IV, Section 4, nor does it fall within the inhibitions of Section 101.26, Revised Code; and (2) if such per diem is deemed an allowance of *compensation* then the statutory provision in question is invalid under

Article II, Section 20, and the office is thus neither a lucrative one nor one which provides compensation in addition to actual and necessary expenses.

For these reasons it is my opinion that there is no incompatibility between the offices of member of the General Assembly and member of a city board of education.

Respectfully,

C. WILLIAM O'NEILL
Attorney General