

414.

## PARK TRUSTEE—MAY RESIGN TO BECOME PARK SUPERINTENDENT.

*SYLLABUS:*

*A member of a board of park trustees appointed under the provisions of Section 4068 of the General Code, may resign and immediately thereafter be legally appointed park superintendent.*

COLUMBUS, OHIO, May 18, 1929.

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

GENTLEMEN:—Your recent communication reads:

“The syllabus of Opinion No. 3233, page 530, Opinions of the Attorney General for the year 1922, reads:

‘Under the provisions of Section 12912, General Code, a member of council of a municipality may, upon the expiration of his term of office as councilman and within the one year limitation prescribed by the section, qualify and act as director of public service of the same city, said section prohibiting such an officer only from acting as commissioner, architect, superintendent or engineer in work undertaken or prosecuted by the corporation during the term for which he was elected or for one year thereafter.’

QUESTION: May a member of a board of park trustees, appointed under the provisions of Section 4068, General Code, resign and immediately thereafter be appointed park superintendent by such board of trustees?”

Section 12912 of the General Code, which was under consideration in the opinion of the Attorney General to which you refer, provides:

“Whoever, being an officer of a municipal corporation or member of the council thereof or the trustee of a township, is interested in the profits of a contract, job, work or services for such corporation or township, or acts as commissioner, architect, superintendent or engineer, in work undertaken or prosecuted by such corporation or township during the term for which he was elected or appointed, or for one year thereafter, or becomes the employe of the contractor of such contract, job, work, or services while in office, shall be fined not less than fifty dollars nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both, and forfeit his office.”

It will be noted that the section above quoted refers, among other things, to persons who are officers of municipal corporations. In examining the provisions of Section 4068 of the General Code and its related sections, there seems to be no doubt but that a member of the board of park trustees is a municipal officer. Said section provides for four resident electors to constitute such board of park trustees to be appointed by the trustees of the sinking fund.

Section 4069, General Code, provides that such board shall have the right to apply, control or invest funds arising from Section 4067 of the General Code, which authorizes gifts, devises or bequests for park purposes.

Section 4072, which further relates to the powers of such board, provides among other things that:

"Such trustees shall have the control and management of parks, park entrances, parkways, boulevards and connecting viaducts and subways, children's playgrounds, public baths and stations of public comfort located in such parks, of all improvements thereon and the acquisition, construction, repair and maintenance thereof. The board shall exercise exclusively all the powers and perform all the duties in regard to such property, vested in and imposed upon the director of public service."

Section 4073 authorizes such board to make contracts for the improvement of the grounds, erection of bridges and structures, etc. Section 4075 provides that the board may employ such superintendents, landscape gardeners and other employes as it deems necessary for the execution of its duties.

From the foregoing it appears to be clear that a member of a board of park trustees is a municipal officer. The question now presented is whether Section 12912, supra, inhibits a municipal officer from being appointed to the position of superintendent of parks within a period of one year after the termination of his official services. In this connection your attention is directed to an opinion of the Attorney General, No. 2176, issued to your Bureau under date of May 29, 1928, the syllabus of which reads:

"The provisions of Section 12912, General Code, do not preclude a director of public service of a city from resigning and immediately thereafter being appointed by his successor as foreman in charge of street construction and repair."

This opinion contains a comprehensive discussion of said Section 12912, supra, and refers to a number of former opinions of the Attorney General.

Reference is made to an opinion found in Opinions of the Attorney General for the year 1917, page 10, which in substance held that the former director of public service may act as street inspector within one year after his term of office expires, irrespective of whether his compensation was paid by the city or the contractor.

Said 1928 opinion also refers to an opinion of the Attorney General found in the Annual Report for the year 1912, page 1743, the syllabus of which reads:

"There is nothing in the statutes to prohibit a councilman of a city from resigning and immediately receiving an appointment as street commissioner, under the public service department."

Said 1928 opinion also refers to the opinion of the Attorney General for the year 1922, the syllabus of which you quote in your communication.

The holding in Opinion No. 2176 is in accord with Opinion No. 1863 for the same year, wherein it was held that a member of a village council who resigned from such body may immediately be appointed street commissioner for the village.

It is apparent that if the opinions hereinbefore mentioned are correct in the conclusions therein reached, the same by analogy dispose of the inquiry which you submit. Obviously, for the purpose of this opinion, there is no valid distinction between a member of a council resigning and becoming street commissioner for a village, and a member of a board of park trustees resigning and becoming superintendent of parks. If there is any distinction, the same would be more favorable to the latter than to the former.

In this connection it will be observed that Section 12912, supra, is a criminal section and, therefore, must be strictly construed in favor of one who may be charged with this violation.

Quite obviously the statute was designed primarily to prevent a municipal officer, as such, committing the municipality to the prosecution of some special project involving the expenditure of money and then resigning and, in a private capacity, reaping profit from the very work he helped to initiate. This can have no application to the present case and I therefore feel that there is a violation of neither the letter nor the spirit of the law.

Based upon the foregoing citations and discussion, in specific answer to your inquiry, it is my opinion that a member of a board of park trustees, appointed under the provisions of Section 4068 of the General Code, may resign and immediately thereafter be legally appointed park superintendent.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

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415.

MOTOR VEHICLE FUEL—IMPORTED INTO OHIO AND SOLD IN ORIGINAL CONTAINERS—PURCHASER DEEMED DEALER.

*SYLLABUS:*

*Under the provisions of Section 5526, General Code, when a person, firm, association, partnership or corporation, imports motor vehicle fuel into this state and sells such motor vehicle fuel in tank car lots or in its original containers to any purchaser for use, distribution or sale and delivery in this state, such purchaser and not the seller shall be deemed the dealer as to the motor vehicle fuel contained in such tank car lots or original containers.*

COLUMBUS, OHIO, May 18, 1929.

*The Tax Commission of Ohio, Columbus, Ohio.*

GENTLEMEN:—This will acknowledge receipt of your recent communication, which reads:

“We find that registered refiners are selling motor vehicle fuel to non-registered dealers. In this case, would it be within the statute to collect the excise tax from the seller, if in our judgment the person to whom they sold the motor vehicle fuel was not responsible?”

For your information, we have just discovered that the S. Refining Company (who are registered dealers), have sold from August 15, 1928, to April 14, 1929, twenty-four (24) cars of gasoline to the M. C. Oil Company, of L., Ohio. To make our request for an opinion clear, shall we endeavor to collect the tax from the S. Refining Company or the M. C. Oil Company?”

At my request for additional information, you supplemented the foregoing by stating that the S. Refining Company imported said motor vehicle fuel and sold the same in tank car lots or in its original containers to purchasers for use, distribution or sale and delivery in this state.

Section 5526, General Code, reads in part as follows:

“‘Dealer’ shall include any person, firm, association, partnership or corpo-