

OPINION NO. 879**Syllabus:**

1. An appointive officer of a charter city is ineligible by force of Article II, Section 4, of the Ohio Constitution, to serve as a member of the general assembly during such appointment.

2. A department head of a municipality whose office requires him to make administrative decisions is ineligible under Article II, Section 4, of the Ohio Constitution, to serve as a member of the general assembly.

3. A clerk or one who performs clerical duties within a department of a municipality who is in the unclassified service may also serve as an elected member of the general assembly. No opinion is rendered as to such clerk who is in the classified service of a municipality.

4. A member of the general assembly is ineligible under Section 101.26, Revised Code, to serve as deputy for a county officer.

5. A member of the general assembly is ineligible under Section 101.26, Revised Code, to serve as an assistant county prosecutor.

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To: John S. Ballard, Summit County Pros. Atty., Akron, Ohio
By: William B. Saxbe, Attorney General, February 18, 1964

Your request for my opinion reads in substance as follows:

"1. Can an appointive officer of a charter city in the unclassified service serve as an elected member of the State Legislature at the same time he retains his position and duties for the charter city?

"2. Is the answer the same if the position held involves administrative decisions as head of a department or if the position held is only that of clerical duties within the department?

"3. Is your opinion different if the position is in the unclassified service of a county, such as a deputy officer or assistant prosecuting attorney?"

In response to your first question it is necessary to refer to Article II, Section 4, of the Ohio Constitution. That provision is as follows:

"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."

In construing this provision, Opinion No. 236, Opinions of the Attorney General for 1913, page 46, states in the syllabus that:

"Under Article 2, Section 4 of the constitution, a member of the general assembly may not during his term, hold a city office
* * * "

This opinion further states that this "constitutional provision is one of several safeguards thrown about the legislative department to prevent undue influence in performing the solemn and important governmental function of legislating for the state."

The city involved in that Opinion was, at that time, a non-charter city. I see no basis, however, for distinguishing between a non-charter city and a charter city under this section of the constitution. While it might be reasoned that in a charter city offices are created pursuant to charter and are held under authority of the charter, it is nonetheless true that the adoption of a charter is authorized by Section 7, Article XVIII, Constitution of Ohio, and it follows that an office of a charter city is held under the authority of the Ohio Constitution which is "the authority of this state" within the meaning of Article II, Section 4. Under the facts you have stipulated for question number one, I must answer in the negative.

Regarding question number two, you will note that the constitutional prohibition only extends to those who hold an "office." What constitutes an office under this provision was before the Ohio Supreme Court in State ex rel. Allen v. Mason, 61 Ohio St., 62 (1899). The court stated in its syllabus that:

"A clerk in the United States pension agency serving by appointment for a period not exceeding three months, and compensated with money of the United States appropriated for that purpose by congress, having no duties defined by law nor discretion to act independently of the direction of the pension agent, is not 'holding an office * * *' within the meaning of Section 4 of Article 2. of the constitution of the state which renders persons so holding office ineligible to membership in the general assembly."

(Emphasis added)

The court in a very short opinion elaborated upon what constitutes an "office" under this constitutional provision by stating at page 72 that:

"Since the relator performs no duties ex-

cept such as by law are charged upon his superior, the pension agent, his position is not an office but merely an employment."

In answer to your second question then, it is my opinion that the head of the department as you have defined it holds an "office" as that term is so used in Article II, Section 4 of the Ohio Constitution, while one who performs mere clerical duties in the unclassified service within the department does not hold an "office" within this provision. For a good discussion of what constitutes an "office" see also State ex rel vs. Brennan, 49 Ohio St., 33 (1892) at page 37.

In reference to question number three, the constitutional prohibition of Article II, Section 4, also applies in certain circumstances. Thus, in Opinion No. 687, Opinions of the Attorney General for 1914, page 28, it is stated that the office of a county coroner (in the unclassified service of a county) is a lucrative office under the authority of the state and therefore within the constitutional provision.

In Official Opinions of the Attorney General, Vol. 4, 1846 - 1906, at page 746, an opinion was rendered on January 4, 1897, which states that Section 1268, Revised Statutes, (Section 309.02, Revised Code) also applies to an assistant prosecuting attorney, Section 309.02, Revised Code, provides that "no prosecuting attorney shall be a member of the general assembly." The opinion goes on to state that:

"Viewing it from the statutory prohibition, if the office of prosecuting attorney, and member of the General Assembly are incompatible, for the many reasons that might be suggested, independent of statute, by a parity of reasoning, an assistant prosecutor having all the duties of a prosecutor, would be ineligible as a member of the Legislature."

It is important to note, however, that the ruling rested on a specific prohibition in the statute and did not decide whether this position was within Article II, Section 4, of the Ohio Constitution.

In Opinion No. 4366, Opinions of the Attorney General for 1935, page 730, the then Attorney General stated:

"With reference to the constitutional provision, quoted supra, it is clear that the inhibition only extends to a lucrative 'office' held under authority of this state. It has been held that a 'deputy' of a county treasurer is not an 'officer', but merely an employe. See State vs. Meyers, 56 O.S. 340, 349; Theobald vs. State, 10 C.C. (N.S.) 175, affirmed without opinion, 78 O.S. 426, and 11 Ohio Jurisprudence, 270, 271, section 31, under the topic 'Counties.' Also, it was held in the Theobald case, supra, at page 176, that 'deputies, assistants, bookkeepers, clerks and other employes' appointed by the county officers under section 2981, General Code, are 'employes.' Hence a 'clerk' in

the office of a county treasurer or surveyor and a road foreman or laborer under the county surveyor, are 'employees' and not officers. Thus Article II, Section 4, Ohio Constitution, has no bearing on the facts set forth in your communication."

It was specifically concluded that a deputy in the office of the county treasurer or surveyor was not such an officer as contemplated by Article II, Section 4, of the Ohio Constitution. It was further concluded, however, that notwithstanding the inapplicability of Section 4, Article II, a deputy in the office of the county treasurer was prohibited from being at the same time a member of either house of the general assembly by the force of Section 101.26, Revised Code. Section 101.26, provides in material part:

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

"* * * * * * * * *"

"(C) Accept any appointments, 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.

"Any such appointee, officer, or employee who accepts a certificate of election to either house shall forthwith resign as such appointee, officer, or employee and in case he fails or refuses to do so, his seat in the general assembly shall be deemed vacant. * * *"

Opinion No. 4366 went on to state that the position of deputy to a county treasurer was an "employment" from an administrative branch of the state and that Section 101.26, supra, applies to employments under a county as well as the state since counties are administrative agencies of the state.

Therefore, it is my opinion and you are accordingly advised that:

1. An appointive officer of a charter city is ineligible by force of Article II, Section 4, of the Ohio Constitution, to serve as a member of the general assembly during such appointment.

2. A department head of a municipality whose office requires him to make administrative decisions is ineligible under Article II, Section 4, of the Ohio Constitution, to serve as a member of the general assembly.

3. A clerk or one who performs clerical duties within a department of a municipality who is in the unclassified service may also serve as an elected member of the general

assembly. No opinion is rendered as to such clerk who is in the classified service of a municipality.

4. A member of the general assembly is ineligible under Section 101.26, Revised Code, to serve as deputy for a county officer.

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