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OFFICES INCOMPATIBLE—COUNTY DOG WARDEN AND DEPUTY SEALER OF WEIGHTS AND MEASURES—OFFICES COMPATIBLE—COUNTY DOG WARDEN AND HUMANE SOCIETY AGENT—AGENT OF HUMANE SOCIETY AND DEPUTY SEALER OF WEIGHTS AND MEASURES.

SYLLABUS:

1. *The county dog warden is prohibited by the civil service laws from accepting employment as deputy sealer of weights and measures. Accepting such public employment would amount to taking part in politics, in violation of section 486-23, General Code.*

2. *The county dog warden can legally act as agent for the humane society provided he is regularly appointed by the humane society and his appointment approved by the probate judge. Approval of the appointment by the probate judge does not make the appointment political. It is a fact to be determined whether or not public need requires that an individual be employed full time to perform the functions of each of the two employments.*

3. *The offices or employments of deputy sealer of weights and measures and agent for the humane society are compatible. It is a matter of fact to be determined whether it is physically possible for one person to perform the duties of both employments, and further, it is necessary that the appointing officials agree upon the appointment of the one individual who is to act in the different capacities. It will be necessary that the county auditor who appoints the deputy sealer of weights and measures, appoint the same individual as the humane society appoints as their agent and the appointment of the agent be approved by the probate judge.*

COLUMBUS, OHIO, March 23, 1933.

HON. PAUL A. FLYNN, *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion, which reads in part as follows:

“In the interest of economy it has been suggested that the position of dog warden, county sealer of weights and measures, and the agent for the humane society be combined, so that one man receiving one salary may perform the duties of the three offices and thereby reduce expenses. Will you please let me know whether or not any combination of these offices is illegal. In other words, may the three positions be held by one man, and if not, may any two of them be combined?”

It is not within the power of the county commissioners to abolish any office which has been created by an act of the legislature. The county commissioners have only those powers which have been expressly conferred upon them by statute. In the recent case of *Jenkins, Auditor, vs. State, ex rel Jackson, Co. Agri. Soc.* 40 O. App. 312, it was held that it was mandatory upon the county to make an appropriation to an agricultural society where the expenditure had been made imperative by statute. Mauck, J. in the opinion, at page 315, said:

“It may seem strange that an appropriation of this kind to a quasi private society should enjoy a preferred position, and be entitled to payment over flour for the county home or coal for the court house, but it is so written by the lawmakers.”

It therefore is not within the power of the county commissioners to abolish the office of county dog warden or office of county sealer of weights and measures.

Your inquiry is whether one person can legally hold two or more of the positions of dog warden, agent for the humane society or county sealer of weights and measures, or any combination of the offices. Section 5652-7 of the General Code provides for the appointment of county dog warden, and reads in part as follows:

“County commissioners shall appoint or employ a county dog warden and deputies to such number, for such periods of time, and at such compensation, as such county commissioners shall deem necessary to enforce the provisions of the General Code relative to the licensing of dogs, the impounding and destruction of unlicensed dogs, and the payment of compensation for damages to live stock inflicted by dogs.”

Section 2615, General Code, provides that by virtue of his office, the county auditor shall be the county sealer of weights and measures and shall be responsible for the enforcement of state laws relating to weights and measures and assist in the prosecution of all violations of such laws. Section 2616, General Code, prescribes his duties. Section 2622, General Code, requires the county sealer of weights and measures to appoint a deputy, prescribes his duties and provides for his salary which is to be fixed by the county commissioners. It is a matter of fact that it is the deputy county sealer of weights and measures, acting for the county sealer, who administers the laws relating to weights and measures.

Section 10062, General Code, provides for the organization of the Ohio Humane Society which, by virtue of said section, exists as a body corporate. Section 10065 provides for the appointment of agents and prescribes their powers and duties. Section 10071 provides for the approval of appointment of all agents made by the society, either by the mayor of the city or village, or if the society exists outside the city or village, by the probate judge. Section 10072 authorizes the payment of salary of agents appointed and approved by either the city or village, or if the agent is acting within the county, by the county commissioners.

In the case of *State, ex rel. Diehl, Pros. Atty. vs. Colwell*, 123 O. S. 535, the supreme court held that it was within the jurisdiction of a probate court to decide whether there was such a necessity for the services of a humane society agent as would justify the payment of the expenses out of the public treasury and such judge was authorized to issue an order dispensing with the salary paid such agent and to order his discharge.

In a former opinion of mine, being Opinion No. 140, rendered under date of February 14, 1933, it was held that the county commissioners could reduce the salary of a dog warden who was in the classified service of the county, providing the reduction in pay was made in good faith and not for improper motives.

Section 2622, General Code, authorizes the county commissioners to fix the salary of deputy sealer of weights and measures. In an opinion of my predecessor, rendered under date of June 29, 1932, being Opinion No. 4460, it was held that “it was the mandatory duty of the board of county commissioners to appoint a dog warden from the list certified by the Civil Service Commission.” The position of dog warden therefore being within the classified service of the state, it is necessary to look to the civil service laws to see whether there is any inhibition against a civil service employe holding another public office or employment. Section 486-23, General Code, relating to civil service, provides in part as follows:

"Nor shall any officer or employe 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."

It has been uniformly held that a person holding a position within the classified service may not hold a public office, whether elective or appointive, without violating the provisions of section 486-23 of the General Code. Holding any public employment amounts to taking part in politics and is prohibited by the above section. See also Opinions of the Attorney General, No. 4460, rendered June 29, 1932; Attorney General's Reports for 1929, pages 1619, 1904; Attorney General's Reports for 1928, pages 1119, 2054 and 2484.

The person holding the office of county dog warden is therefore prevented from holding any other public office which, in the particular case, would mean that the dog warden could not hold the office of deputy sealer of weights and measures.

In an opinion of the Attorney General, reported in the Attorney General's Reports for 1912, page 1614, it is said at page 1616:

"The status of a humane society agent appointed for a municipal corporation is peculiar * * * * I think, that the agent is not an officer of the municipal corporation at all, although his compensation is to be paid by the municipality. In the first instance he is an officer or agent of the society. Clearly, he is an appointee of the society and not of the municipality. The power of the mayor to be exercised in connection with his appointment, is not that of appointment, but that of confirmation."

In another opinion reported in the Reports of the Attorney General for 1914, page 503, at page 505 it was held:

"The humane agent being in the employ of the humane society, a corporation, * * * * he is not in my opinion in the service of the state, county, or of the city, within the meaning of section 1 of the Civil Service Act."

It has been held that agricultural societies although receiving financial aid from the county are, however, private corporations and not a branch of the government. Opinions of the Attorney General, 1930, page 1791. The Ohio Archaeological Society was held to be a private corporation, although the state had seen fit to aid and employ it for certain purposes, but strictly speaking it could not be considered a branch of the government. Opinions of the Attorney General, 1929, page 1163.

I can reach no other conclusion but that the status of a humane society is that of a private corporation and not an instrumentality of government. It performs certain public functions and receives compensation from the public treasury for performing these functions. An agent appointed by the society is a private agent and not a public officer. The confirmation of the appointment in the case of a county humane agent by the probate judge is a condition precedent to the drawing of compensation from the public treasury. The confirmation by the probate judge of the appointment of the particular agent does not make the em-

ployment public, neither does it make it political. The humane society is a private corporation in the same category as agricultural societies and the Ohio Archaeological Society. The county dog warden is therefore not prevented by the civil service laws from accepting the private employment of agent for the humane society.

There is no statutory requirement that an individual be employed and devote his full time to each of the offices or employments in question. It is a question of fact to be determined whether it is physically possible for the same person to perform the duties of more than one of the offices. There are no express constitutional or statutory inhibitions against one individual holding more than one of the offices at the same time. One person may hold two or more offices unless they are in law incompatible. The compatibility of public offices is dependent upon the nature and character of the duties necessary to the proper exercise of the powers and functions of each office. The general rule upon compatibility of offices has been stated in the case of *State, ex rel. vs. Gebert*, 12 O. C. C. (N. S.) 274, as follows:

"Offices are considered incompatible when one is subordinate to, or in any way a check upon, the other; or when it is physically impossible for one person to discharge the duties of both."

Further, it is a well established rule that an officer can not be paid twice for performing the same duty. That is, an officer can not be paid a salary under another office for performing the same duties he is already required to perform by virtue of his first office. If the duties of the offices are incompatible, then the same person may not hold both offices.

Section 2615, General Code, provides that:

"It shall be the duty of the county auditor to see that all state laws relating to weights and measures be strictly enforced throughout his county and to assist generally in the prosecution of all violations of such laws. * * * *"

By section 2622, General Code, it is made the mandatory duty of the auditor to appoint a deputy sealer of weights and measures and it is the above duties which are assumed by the deputy sealer of weights and measures.

The agent for the humane society not being a public officer, his duties are not prescribed by statute. Section 10065, General Code, authorizes any duly appointed agent of the humane society to arrest any person found violating any law for the protection of persons or animals, or the prevention of cruelty thereto.

Section 5652, General Code, requires the county dog warden to enforce the provisions of the General Code relative to the licensing of dogs, the impounding and destruction of unlicensed dogs, and the payment of compensation for damages to live stock inflicted by dogs.

The duties of the several offices or employments are not inconsistent, neither are the duties overlapping. Applying the test of compatibility as set forth in the Gebert case, *supra*, the several offices or employments are not subordinate to each other, or is one in any way a check upon the other. Neither are the duties concurrent. The duties of each office consist in the enforcement of the laws relating to a particular subject matter. None of the officers are general peace officers, being required to enforce all laws.

There is no express statutory inhibition against one person holding more than one of the offices or employments of county dog warden, agent for the humane society and deputy sealer of weights and measures other than the inhibition imposed by the civil service laws. Neither are the respective offices incompatible at common law. It is a well established principal of law that if one individual performs the duties of the several offices, he is entitled to the salary of the several offices.

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

1. The county dog warden is prohibited by the civil service laws from accepting employment as deputy sealer of weights and measures. Accepting such public employment would amount to taking part in politics, in violation of section 486-23, General Code.

2. The county dog warden can legally act as agent for the humane society provided he is regularly appointed by the humane society and his appointment approved by the probate judge. Approval of the appointment by the probate judge does not make the appointment political. It is a fact to be determined whether or not public need requires that an individual be employed full time to perform the functions of each of the two employments.

3. The offices or employments of deputy sealer of weights and measures and agent for the humane society are compatible. It is a matter of fact to be determined whether it is physically possible for one person to perform the duties of both employments, and further, it is necessary that the appointing officials agree upon the appointment of the one individual who is to act in the different capacities. It will be necessary that the county auditor who appoints the deputy sealer of weights and measures, appoint the same individual as the humane society appoints as their agent and the appointment of the agent be approved by the probate judge.

Respectfully,

JOHN W. BRICKER,
Attorney General.

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DISAPPROVAL, NOTES OF TRIMBLE VILLAGE SCHOOL DISTRICT,
ATHENS COUNTY, OHIO—\$6,968.00.

COLUMBUS, OHIO, March 23, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

GENTLEMEN:—Re: Notes of Trimble Village School Dist., Athens County, Ohio, \$6,968.00.

I have examined the transcript of proceedings purporting to authorize the issuance of notes in anticipation of the receipt of state aid under authority of Amended Senate Bill No. 152 of the 90th General Assembly by the above school district. These proceedings have been taken by the county board of education under authority, as disclosed by the transcript, of Section 7610-1, General Code. This last mentioned section provides in so far as pertinent as follows:

“If the board of education in a district under the supervision of the county board of education fails to provide sufficient privileges for all the youth of school age in the district, or to provide for the continuance of