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CONSERVANCY DISTRICT, BOARD OF DIRECTORS — MAY HIRE SAME PERSON AS ATTORNEY AND SECRETARY — PRO-VISO, SECRETARY DOES NOT SERVE AS TREASURER.

SYLLABUS:

*The board of directors of a conservancy district may hire as an attorney the same person elected to serve as secretary to the district providing the secretary does not also serve in the capacity of treasurer of the district.*

Columbus, Ohio, August 4, 1941.

Bureau of Inspection and Supervision of Public Offices, State House Annex,  
Columbus, Ohio.

Gentlemen:

This will acknowledge receipt of your request for my opinion, which reads as follows:

“Does the Board of Directors of a Conservancy District have power, under the provisions of Section 6828-11, General Code, to hire one and the same individual for two official positions, paying two distinct salaries?”

The first appointment in this connection was that of secretary of the District at a salary of three hundred (\$300) per month, and the second appointment was that of attorney to the district, compensation in this connection being upon the basis of services performed.”

The board of directors of a conservancy district is empowered by Section 6828-9, General Code, to elect “some suitable person secretary, who shall not be a member of the board.”

The duties of the secretary, together with the powers of the board to employ attorneys, engineers and other agents and assistants are set forth in Section 6828-11, General Code, as follows:

“The secretary shall be the custodian of the records of the district and of its corporate seal and shall assist the board in such particulars as it may direct in the performance of its duties. It shall be the duty of the secretary to attest, under the corporate seal of the district, all certified copies of the official records and files of the district that may be required of him by the provisions of this chapter, or by any person ordering the same and paying the reasonable cost of transcription. And any portion of the record so certified and attested shall prima facie import verity. The secretary shall serve also as treasurer of the district, unless a treasurer is otherwise provided for by the board. The board may also employ a chief engineer; an attorney; and such other engineers, attorneys and other agents and assistants as may be needful; and may provide for their compensation, which, with all other necessary expenditures, shall be taken as a part of the cost of the improvement. The employment of the secretary, treasurer, chief engineer and attorney for the district shall be evidenced by agreements in writing, which, so far as possible, shall specify the amounts to be paid for their services. The chief engineer shall be superintendent of all the works and improvements, and shall make a full report to the board each year, or oftener if required, and may make such suggestions and recommendations to the board as he may deem proper. The board may require any officer or employee of the district to give bond for the faithful performance of his duties, in an amount prescribed by it, the expense thereof to be paid from the funds of the district.”

From the foregoing it is apparent that the board of directors in electing a secretary has a discretionary power qualified by the suitability of the person selected and limited only to the extent that the selectee shall not be a member of the board.

Whether the secretary, who is also employed as an attorney for the board, is a suitable person, or whether the combining of these two positions in the hands of one person constitutes an abuse of the board's discretion depends upon the applicability of the common law test as to incompatibility of offices.

In the case of *State, ex rel. Wolf vs. Shaffer*, 6 O.N.P. (N.S.) 219, it was held that the test of incompatibility was not that it was physically impossible for the official to perform the duties of one office because he was at that time elsewhere performing the duties of the other, but that the distinction was in the inconsistency of the functions of the offices.

Various tests for the determination of inconsistency have been espoused from time to time but the courts as a general rule, have evaded the formulation of an inclusive definition.

Incompatibility has been recognized, as a matter of law, whenever one office or position is subordinate or subject to supervision by the other, or where an antagonism would result in an attempt by one person to discharge the duties of both. *State, ex rel. Attorney General vs. Gebert*, 12 O.C.C. (N.S.) 274; *Attorney General vs. Detroit*, 12 Mich. 145; *State vs. Jones*, 130 Wis. 572; Notes: 86 A.S.R. 580; L.R.A. 1917a, 217; 2 Ann. Cas. 380.

Under the foregoing principles, positions have been deemed incompatible where the incumbent of one has the power to hire or remove the incumbent of the other, or where one position is a check upon the other.

In the case of *Mason vs. The State, ex rel. McCoy*, 58 O.S. 30, 54, it is stated:

“ \* \* \* A person may not hold incompatible offices, as an officer who presents his personal account for audit and (an) officer who passes upon it, \* \* \* .” (Parenthetical matter mine.)

In the instant case there does not appear to be any inconsistencies in the functions to be performed except when the secretary, serving as treasurer of the board in accordance with the provisions of Section 6328-11, *supra*, passes upon and audits the personal expense account submitted by the attorney under the contract of employment herein below set forth:

“MEMORANDUM OF AGREEMENT BETWEEN THE  
BOARD OF DIRECTORS OF MASSILLON CON-  
SERVANCY DISTRICT AND CHAS. N. HOS-  
TETTER AS ATTORNEY FOR SAID  
BOARD OF DIRECTORS

This memorandum of agreement, made this first day of March, 1939, by and between the Board of Directors of the Massillon Conservancy District and Chas. N. Hostetter, as Attorney for said Board of Directors, witnesseth; That, until further action by the Board, compensation for services of Chas. N. Hostetter, as Attorney for the Board of Directors of the Massillon Conservancy District shall be first approved by Judge Jos. L. Floyd, sitting as the Court of Common Pleas of Stark County to exercise the jurisdiction conferred by the Conservancy Act of Ohio as its provisions affect the Massillon Conservancy District; it to be considered that development or assistance in development of a system of appraisal of benefits and damages

arising from the organization of the district and the execution of the official plan to be part of the legal work to be done by Attorney Hostetter, also all work required of him by the directors toward securing contribution of work or funds by governmental and other agencies, or any other work which he may be designated to perform by order of the Board of Directors as Attorney for the Massillon Conservancy District, there be allowed to him in addition to compensation for actual work done by or through Chas. N. Hostetter as Attorney for the District as set by the Court, allowance for expenses not included in statement of services submitted to the court, such allowance for expenses to be in accord with allowances to secretary for expenses, all of the conditions stated in this memorandum being in accordance with action taken by the Board of Directors of the Massillon Conservancy District in a regular meeting of the Board on February 28, 1939, in which action it was specified that this memorandum of agreement be made and signed by Chas. N. Hostetter for himself, as Attorney, and by C. O. Finefrock, as President of the Massillon Conservancy District.

Chas. N. Hostetter

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Chas. N. Hostetter, as Attorney for  
the Board of Directors of Mas-  
sillon Conservancy District.

C. O. Finefrock

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C. O. Finefrock, President of  
Board of Directors of Massillon  
Conservancy District."

Upon examining the foregoing contract in the light of the statutes above quoted and the Mason case, supra, it is evident that an inconsistency would arise in connection with the positions in question if the board, in failing to provide for a treasurer, permitted the secretary to serve in that capacity.

The secretary serving as treasurer and passing upon the expense accounts submitted by the secretary when serving as attorney creates an antagonism of interests within the purview of the rule prohibiting the dual holding of incompatible positions.

In specific answer to your inquiry, therefore, it is my opinion that the board of directors of a conservancy district may hire as an attorney the same person elected to serve as secretary to the district providing the secretary does not also serve in the capacity of treasurer of the district.

Respectfully,

THOMAS J. HERBERT,  
Attorney General.