

871

1. SOLDIERS' RELIEF COMMISSION, MEMBER—APPOINTMENT AS COUNTY VETERANS' SERVICE OFFICER—NOT TO BECOME EFFECTIVE UNTIL APRIL 1, 1949—RESIGNED AS COMMISSION MEMBER PRIOR TO THAT DATE—NOT DISQUALIFIED AS SERVING AS SUCH SERVICE OFFICER.
2. MEMBER WHO TENDERED RESIGNATION TO COMMON PLEAS COURT JUDGE AFTER ACCEPTANCE OF EMPLOYMENT AS COUNTY VETERANS' SERVICE OFFICER—NOT DISQUALIFIED FROM SERVING AS SUCH SERVICE OFFICER.

## SYLLABUS:

1. A member of "the soldiers' relief commission, whose appointment as 'county veterans' service officer" was not to become effective until April 1, 1949 and who resigned as said commission member before this time, is not disqualified from serving as such "service officer."

2. A member of "the soldiers' relief commission" who tendered his resignation to the common pleas judge after he accepted employment as "county veterans' service officer" is not disqualified from serving as such "service officer."

Columbus Ohio, August 18, 1949

Hon. Stanley N. Husted, Prosecuting Attorney,  
Clark County, Springfield, Ohio

Dear Sir:

I am in receipt of your request for opinion which reads as follows:

"I hereby request your opinion on the following matter:

"A member of the Soldiers' Relief Commission was appointed 'County Veterans' Service Officer' on March 25, 1949, prior to his resigning as a member of such Commission. His employment as such Service Officer commenced on the first day of April, 1949, and at the time of this employment, he had not submitted his resignation to the Judge of the Common Pleas Court of this county.

"The statute which governs the employment of such Service Officer is Section 2933-3 of the General Code of Ohio. The

questions which are presented under the statement of facts are as follows:

- “(1) Would the fact that a Commission member was appointed as ‘County Veterans’ Service Officer’ prior to his resigning as a member of the Commission disqualify him as serving as such Service Officer, even though his employment was not to commence until April 1, 1949, and he had resigned from such Commission?
- “(2) Would the fact that his resignation was not tendered to the Judge of the Common Pleas Court until after April 1, 1949, disqualify him from serving as such Service Officer?
- “(3) Under the facts which I have presented, is his employment as Service Officer legal or illegal?

“I would appreciate an early reply, as this is a question which is of great interest to the veterans’ organization in this County.”

There is no question that employment as a County Veteran Service Officer and the office of a member of the Soldiers’ Relief Commission are incompatible. Section 2933-3, General Code, reads in part as follows:

“\* \* \* No county commissioner or member of the soldiers’ relief commission shall be employed as service officer. \* \* \*”  
In 32 O. Jur. 1039, it reads in part as follows:

“As a general proposition, the term of office may be said to commence only from the time that the right to enter upon its duties begins.”

I believe that this proposition is applicable here and that the appointment was not to be effective until April 1, 1949, when the person was to start his employment as service officer. By that time he had resigned from the commission. The statute merely prevents a member of the commission from being employed as service officer. If he has resigned before becoming the service officer, the statute section 2933-3, General Code, is not applicable.

In 1947, O. A. G. 255 at page 257, it was decided that it is unnecessary to determine whether the positions in question are offices or employments. There it quoted *State, ex rel. Baden v. Gibbons*, 40 O. L. Rep. (App.) 285, 17 O. L. Abs. 341, which held that two positions of public employment may be incompatible.

Therefore, I believe a commission member, whose appointment as service officer was to become effective April 1, 1949, and who resigned

as a commission member before this time, is not disqualified from serving as such service officer.

In *Mechem on Public Offices and Officers*, Section 420, it says :

“It is a well settled rule of the common law that he who while occupying one office, accepts another incompatible with the first, ipso facto absolutely vacates the first office and his title is thereby terminated without any other act or proceeding.”

Also, in 42 *Am. Jur.* page 940, it reads as follows :

“At common law, and under constitutional and statutory prohibitions against the holding of incompatible offices, a person who accepts and qualifies for a second and incompatible office is generally held to vacate, or by implication resign, the first office, so that no judicial proceedings are necessary to determine the title.”

In 100 *A. L. R.* at page 1164, it reads as follows :

“It is a well settled rule of the common law that a person cannot at one and the same time rightfully hold two offices which are incompatible, and, thus, when he accepts appointment to the second office, which is incompatible, and qualifies, he vacates, or by implication resigns, the first office.”

The general rule stated above is subject to certain exceptions. One of the exceptions is stated in 42 *Am. Jur.* at page 942 and reads as follows :

“The rule above stated, that the acceptance of a second office vacates one already held, prevails where the law declares the two offices incompatible or inconsistent. The effect is quite different where it is expressly provided by law that a person holding one office shall be ineligible to another. Such a provision is held to incapacitate the incumbent of an office from accepting or holding a second office, and to render his election or appointment to the latter office void or voidable. The rule is applicable to members of a legislature who are forbidden during their term or for a designated period thereafter to acquire another specified office.”

An early Ohio case applied the general rule as stated above in *State, ex rel. Moore v. Heddleston*, 8 *O. Dec. Rep.* 77.

The exception to the general rule was applied in *State ex rel. v. Kearns*, 47 *O. S.* 566, and in *State ex rel. v. Craig*, 69 *O. S.* 236. In these cases the statute in question, Section 1717 of the Revised Statutes,

specifically said that "no member of council *shall be eligible* to any other office \* \* \*." (Emphasis added.) Again, in *State ex rel. v. Gillen*, 112 O. S. 534, the exception was applied. Here it dealt with Section 4 of Article II of the Ohio Constitution which reads in part 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; \* \* \*." (Emphasis added.)

It should be noted that a specific statement of ineligibility is present in this constitutional section. Also, it should be noted that Section 2933-3, General Code, *supra*, does not say that a member of the commission is ineligible. In 1947 O. A. G. No. 1533, the distinction between ineligibility and incompatibility of offices is considered in detail and I am in full accord with its reasoning. Also see the Annotation in 100 A. L. R. 1162 for a good discussion of this distinction.

In view of the above, I do not believe it was necessary for the individual in question to resign formally as commission member. Immediately upon his acceptance of the job as service officer, he impliedly vacated his office. It is my opinion that he is not disqualified from serving as service officer.

In summation, it is my opinion that if a person resigned his position as commission member before accepting his position as service officer, as stated in your first question, he is not disqualified from serving as such service officer. Further, it is my opinion that even if he tendered his resignation as commission member after he accepted employment as service officer, he is not disqualified to serve as such service officer. His acceptance of the second job acted as an automatic resignation of the former in this situation. Also, I believe from the facts given in your inquiry that the person's employment as service officer is legal.

Respectfully,

HERBERT S. DUFFY,  
Attorney General.