

the enactment of Section 5327, General Code, and may therefore be deducted from accounts receivable for the purpose of determining the taxable credits.

Respectfully,

HERBERT S. DUFFY,

Attorney General.

3524.

COMPATIBLE OFFICE—ASSISTANT CLERK, BOARD OF COUNTY COMMISSIONERS MAY SERVE AS MEMBER COUNTY CHILD WELFARE BOARD—OPINION 3440, DECEMBER 22, 1938, OVERRULED IN PART.

SYLLABUS:

An assistant clerk of the Board of County Commissioners may at the same time serve as member of the County Child Welfare Board without violating the Common Law rule as to incompatibility of offices. (Opinion No. 3440 issued December 22, 1938, overruled in part.

COLUMBUS, OHIO, January 7, 1939.

HON. RALPH W. EDWARDS, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR: This will acknowledge the receipt of your recent communication. Your letter requesting reconsideration of an opinion recently issued by this office reads as follows:

“On December 22, 1938, an opinion was rendered by you, being No. 3440, holding that one may not serve as Budget Commissioner of the County and as member of the County Child Welfare Board, for the reason that the duties of these officers make them incompatible.

“We believe that we are correct in saying that this opinion has application to Cuyahoga County alone, in that for something like nine (9) years past, Mr. Joseph T. Sweeny, who is an employe of the Board as Assistant Clerk to the Board of County Commissioners, by acting as Budget Commissioner of the County, has at the request of and upon designation by the Board during such period of time, acted as its representative on the Child Welfare Board established by it.

“As a result of the holding that these positions are incompatible, it follows that in accepting the appointment as member of the Child’s Welfare Board, Mr. Sweeny, vacated his position as Assistant Clerk to the Board. While of course, Mr. Sweeny has continued to serve in that capacity, drawing his compensation, he is now by this opinion left in a position of having occupied his position as Assistant Clerk for nine (9) years without authority.

“May we suggest some considerations which indicate to us further consideration ought to be given to the question as to whether or not these two positions are in fact incompatible.

“1. The general rule of incompatibility applies as we are advised only to (offices) rather than to employments, and we are further advised that there are no holdings in Ohio in which employments other than offices have been held to be incompatible.

“2. That in Mr. Sweeny’s position as Assistant Clerk to the Board he is of course concerned about and advises with the board with the respect to appropriations made for Child Welfare purposes. However, Mr. Sweeny has no authority with respect to such matters. The Board of County Commissioners, itself is the appropriating body and determines in the like manner, all the information and advice given to it, what appropriations should be made for such purposes.

“3. The Board of County Commissioners could itself lawfully perform the functions which it has cast upon the Child Welfare Board, since therefore the board may perform both functions. May it be said that if the board commits part of the functions of the Child Welfare Board, that the respective functions in any sense become compatible with each other. It may be said in this connection that Mr. Sweeny who is in fact a representative of the Board of County Commissioners on the Child Welfare Board and in that capacity does things which the board, had it not created the Child Welfare Board, could well have committed to his care.

“One of the tests of incompatibility is that one office is subordinate to or a check upon the other. That manifestly can not be said of either of the employments above referred to, because Mr. Sweeny acting as Assistant Clerk has no power or authority to appropriate moneys to the use of the Child Welfare Board. But it is true he may advise the Board of County Commissioners with respect thereto, but so may

any other citizen, including other members of the Child Welfare Board. On the other hand, the acts of the Child Welfare Board are not subject to the control of the Board of County Commissioners, in any other respect than results from the limited appropriation made by the commissioners for the Board's use.

"In conclusion we would ask that in view of the fact that this condition has existed for a period of nine (9) years to the full knowledge of the Bureau of Inspection and its local representative, and in view of the fact that it is exceedingly embarrassing to the Board and Mr. Sweeny to have its action in this respect characterized as improper, we would ask for a reconsideration of the opinion in the light of the matter as herein set forth."

The Opinions of the Attorney General have for many years contained rulings to the effect that public offices and public employments are incompatible when made so by statute, or when by reason of the common law rule as to incompatibility they are rendered incompatible. (See 1928 O. A. G. 956.)

However, the new facts and information made available in your letter and interview as to the duties of the assistant clerk of the Board of County Commissioners have thrown an entirely different light upon the question under discussion. It appears that in all the nine years Mr. S. has served in both capacities, his duties as clerk have been purely routine and that he in no way actually performs the duties of a budget commissioner; that this wrongfully-applied title has no real bearing upon his duties. It also appears that Mr. S.'s duties as clerk in no way bear upon his duties as member of the County Child Welfare Board.

As a member of the County Child Welfare Board Mr. S. performs the duties set by Section 3092, General Code, and when he appears before the county commissioners in this capacity, he does so only as consultant, and, as such, is called as any other member of the Child Welfare Board. As a member of the Child Welfare Board his duties are in no way subordinate to or checked upon by his duties as assistant clerk to the Board of County Commissioners.

There is clearly no statutory prohibition which creates incompatibility between these two offices and the facts as to their duties being as they are, I am unable to see how the duties of the two offices fall within the Common Law rule as to incompatibility.

Also to be considered is the long period of time in which the set up in question has been permitted to exist. For nine years it has operated without objection. In view of the fact that the details

herein above discussed were not presented with the original request, I am constrained to overrule in part Opinion No. 3440, issued December 22, 1938, and it is therefore my opinion that an assistant clerk of the Board of County Commissioners may at the same time serve as member of the County Child Welfare Board without violating the Common Law rule as to incompatibility of offices. (Opinion No. 3440 issued December 22, 1938, overruled in part.)

Respectfully,

HERBERT S. DUFFY,
Attorney General.

3525.

APPROVAL, LEASE, CANAL LAND, STATE OF OHIO, THROUGH DIRECTOR OF PUBLIC WORKS, TO J. R. TIMBERMAN, LOCKLAND, OHIO, DESIGNATED LAND, MIAMI AND ERIE CANAL, CITY OF LOCKLAND, HAMILTON COUNTY, OHIO, ANNUAL RENTAL \$100.00, RIGHT TO OCCUPY AND USE FOR GENERAL BUSINESS PURPOSES

COLUMBUS, OHIO, January 7, 1939.

HON. CARL G. WAHL, *Director, Department of Public Works, Columbus, Ohio.*

DEAR SIR: You have submitted for my examination and approval a canal land lease in triplicate executed by you in your official capacity as Superintendent of Public Works to one J. R. Timberman of Lockland, Ohio.

By this lease, which is one for a stated term of fifteen years and which provides for an annual rental of \$100.00, payable in semi-annual installments of \$50.00 each, there is leased and demised to the lessee above named the right to occupy and use for general business purposes that portion of the abandoned Miami and Erie Canal located in the City of Lockland, Hamilton County, Ohio, described as follows:

Being a strip of land seventy (70') feet, more or less, in width, and beginning at the southerly line of Lock Street in said city, and extending in a southwesterly direction with the lines of said canal property, a distance of twelve hundred seventy-eight (1278') feet to the northerly bank of Mill Creek, same being at or near Station 10900 plus 82, of the Bert Beucler Survey of said canal property, and containing eighty-nine thousand, four hundred sixty (89,460) square feet, more or less.