

The time-honored common law rule as to incompatibility of offices may be found in Throop on Public Officers, Sections 33 and 34 wherein it is stated:

“Offices are said to be incompatible when from multiplicity of business in them they cannot be executed with care and ability, or when, their being subordinate and interfering with each other it induces a presumption that they cannot be exercised with impartiality and honesty.”

It follows that where one person is at the same time a member of the child welfare board and a county budget commissioner, he cannot in every instance exercise the duties of each office without having one office subordinate to or a check upon the other. As such, he is bound to review and in some manner pass upon estimates submitted by the welfare board of which he is a member through the county commissioners.

In view of this fact one person may not at the same time serve as budget commissioner and member of the county child welfare board.

In specific answer to your questions it is my opinion that,

1. No question of incompatibility of offices or violation of law arises when one person serves at the same time as member of the county child welfare board and member of a private welfare agency.

2. One person may not at the same time serve as budget commissioner and member of the county child welfare board as the duties of these offices make them incompatible.

Yours truly,

HERBERT S. DUFFY,

Attorney General.

3441.

BOARD OF EDUCATION—BOND ISSUE—PREPARATION OF RESOLUTION, NOTICES, LEGAL PAPERS, ETC. NOT SUCH DUTIES AS IMPOSED BY SECTION 4761 G. C.—BOARD HAS AUTHORITY TO EMPLOY AND COMPENSATE PERSON FOR SUCH WORK—CITY SOLICITOR MAY BE SO EMPLOYED—EXPENSE—TRIPS—HOW PAID—SERVICE FUND.

SYLLABUS:

1. *The preparation of a resolution, notices, certificates and other necessary legal papers that are required to be prepared in order for the*

board of education to proceed with the issuance of bonds for the city school district are not such duties as are imposed on a city solicitor by the provisions of Section 4761, General Code.

A board of education has authority to employ a person to prepare such resolutions, notices, certificates and other necessary legal papers that are required to be prepared in order for the board of education to proceed with the issuance of bonds for the city school district, and compensate such employed person therefor.

There is not anything in the law to prevent the board of education of the city school district from employing the city solicitor to perform this work and compensate the city solicitor for such services.

2. *The board of education of a city school district may pay from its service fund the expenses of the city solicitor on trips occasioned by his duties as legal advisor of the board of education if: (1) the clerk of the board of education of the city school district on the third Monday of January or on the Monday preceding the close of the school year, certified to the board of education the number of pupils enrolled in the public schools in the city school district; (2) the board of education duly adopted a resolution that set aside a sum that did not exceed five cents for each child enrolled and earmarked such amount of money as the "service fund"; (3) the city solicitor actually incurred the expenses when he was sent out of the city school district for the performance of duties imposed upon him by the provisions of Section 4761, supra, and that the duties performed by him were for the purpose of promoting the welfare of the schools of the city school district; (4) the city solicitor furnished a statement to the board of education at its last meeting of the month held by the board of education after the expenses were incurred.*

COLUMBUS, OHIO, December 22, 1938.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN: This will acknowledge receipt of your communication, which reads as follows:

"The city solicitor of a certain city, not operating under a charter form of government, prepared a resolution, notices, certificates and other necessary legal papers in order to perfect legislation necessary for a bond issue for a city school district.

We respectfully request your opinion upon the following questions:

Are such services included in his duties to the school board, as provided by Section 4761, General

Code, or may the board of education compensate said solicitor for preparing such bond legislation?

May the board of education of a city school district pay from its service fund the expenses of the city solicitor on trips occasioned by his duties as legal advisor of the board of education?"

Section 4761, General Code, reads as follows:

"Except in city school districts, the prosecuting attorney of the county shall be the legal advisor of all boards of education of the county in which he is serving. He shall prosecute all actions against a member or officer of a board of education for malfeasance or misfeasance in office and he shall be the legal counsel of such boards or the officers thereof in all civil actions brought by or against them and shall conduct such actions in his official capacity. When such civil action is between two or more boards of education in the same county, the prosecuting attorney shall not be required to act for either of them. In city school districts, the city solicitor shall be the legal adviser and attorney for the board of education thereof, and shall perform the same services for such board as herein required of the prosecuting attorney for other boards of education of the county."

From a reading of Section 4761, *supra*, it is obvious that the city solicitor is required to act as "legal adviser" for the board of education of the city school district, to prosecute all actions against a member or officer of such board for malfeasance or misfeasance in office; and, to act as the legal counsel of the board of education of the city school district or the officers thereof in all civil actions brought by or against it.

The preparation of a resolution, notices, certificates and other necessary legal papers in order to perfect legislation necessary for a bond issue of the city school district was not the performance of any duty as required by the city solicitor by the provisions of Section 4761, *supra*. Although Section 2293-30, General Code, imposes a duty upon the clerk of the board of education to furnish to the successful bidder for the bonds issued by the board of education, a true transcript certified by him to all resolutions, notices and other proceedings had with reference to the issuance of such bonds, the statutes are silent as to who shall prepare the resolution, notices, certificates and other necessary legal papers that are required to be prepared in order for the board of education to proceed with the issuance of bonds for the city school district.

In 1915, an opinion was rendered by the then Attorney General, which appears in Volume II, page 1911, wherein it was held as follows:

“It is the duty of prosecuting attorneys to prepare bond issues and transcripts for boards of education of which they are legal advisers.”

In the body of the opinion, at page 1912, it was said:

“You state in your letter that it has been necessary for you to prepare the resolutions, proceedings and transcript thereof, for the reason that the members offering the resolutions were unable to properly prepare the same and that the clerk was not able to spread the minutes of the meeting upon his record correctly nor to make a transcript of the proceedings for the bonding company. While that may be true, nevertheless, if it is not the duty of the prosecuting attorney as legal adviser of the board to prepare the proper resolutions, minutes, etc., it was the duty of the members of the board of education and the clerk so to do, your bill should therefore not be against the board of education for performing the duties which should have been performed by the members and clerks, but against the members themselves, if they were unable so to do.”

In an opinion appearing in Opinions of the Attorney General for the year 1923, Volume I, page 508, it was held that although it was not the work of the city solicitor to prepare abstracts of title of property for the board of education, the board could compensate the city solicitor for such work. The syllabus of that opinion reads as follows:

“In view of a former opinion of this department in which sections 4761 and 4762, General Code, are considered and the conclusion reached that while the city solicitor is the legal adviser and attorney of the city board of education he is not obligated to prepare abstracts of title of property for such board, such city board of education could legally compensate a person holding the office of city solicitor for his services in preparing an abstract of title.”

It is interesting to note that in the 1923 opinion, *supra*, the work related to preparing an abstract of title of property. This is usually considered as work that requires the services of an attorney and which a clerk of a board of education ordinarily would be unable to do.

In the opinion appearing in Opinions of the Attorney General for the year 1926, page 555, the 1923 opinion, *supra*, was followed. It was held therein:

“A city board of education may not legally contribute a part of the city solicitor’s salary for services rendered to them by said solicitor which he is required to perform as a part of his duties. The same would be true of his assistant. However, it has been held that when the solicitor performs work for the board of education which is no part of his duties in his official capacity, he may be compensated therefor. See Opinions of the Attorney General for 1923, page 508.”

The opinion appearing in Opinions of the Attorney General for the year 1930, Volume II, page 1142, went further than the preceding opinions. It recognized that the work of preparing a transcript was the duty of the clerk of the board of education by virtue of the provisions of Section 2293-30, General Code, but that a board of education had authority for employing an assistant to the clerk for the purpose of aiding the clerk in preparing the transcript and that it was incumbent upon the prosecuting attorney to render any and all legal advice that the board of education or clerk may require in order to understand how to prepare such transcript. The syllabus of the 1930 opinion reads as follows:

“Under the provisions of Section 4761, General Code, the prosecuting attorney is the legal adviser of all boards of education of his county except city boards of education, and as such it is his duty to render such legal advice as may be requested of him in connection with the proceedings necessary for the issuance of bonds. The board may, however, if it sees fit, employ an assistant to the clerk for the purpose of aiding the clerk in the preparation of such transcript, but such assistant may not be employed as a legal adviser.”

In the body of the opinion, on page 1145, it was said in regard to the preparation of a bond transcript, as follows:

“It is work that is not, strictly speaking, the giving of legal advice, nor is it, of course, conducting a case in court. In order that the various statutory steps be properly taken so that bonds to be issued may be valid and marketable, it is frequently necessary that a considerable amount of legal advice be given. Such advice it is clearly the duty of the prosecuting attorney to give to the board of education or to the clerk of the board.”

Therefore, from the foregoing, no conclusion can be reached other than that it is not the duty of a city solicitor to prepare the resolution, notices, certificates and other necessary legal papers that are required to be prepared in order for the board of education to proceed with the issuance of bonds for the city school district; but that a board of education has authority to employ a person to prepare such resolution, notices, certificates and other necessary legal papers that are required to be prepared in order for the board of education to proceed with the issuance of bonds for the city school district and compensate such employed person therefor, and that there is nothing in the law to prevent the board of education of the city school district from employing the city solicitor to perform this work and compensate the city solicitor for such services.

From the language of your question, I assume that the expenses referred to, are such, that were incurred by the city solicitor in making trips that were necessary in the performance of the duties imposed upon him by virtue of the provisions of Section 4761, *supra*. The answer to this question requires a construction of Section 7704, General Code, which reads as follows:

“On the third Monday of every January or on the Monday preceding the close of school each year, the clerk of the board of education of a city school district shall certify to the board of education of which he is clerk, the number of pupils enrolled in the public schools of that district, whereupon the board of such city school district may by resolution set aside from the contingent fund a sum not to exceed five cents for each child so enrolled, such sum of money to be known as the ‘service fund’ to be used only in paying the expenses of such members actually incurred in the performance of their duties, or of their official representatives when sent out of the city school district for the purpose of promoting the welfare of the schools under their charge; such payments to be made only on statement of the several members, or their official representatives, furnished at the last meeting held in each month.”

From the provisions contained in Section 7704, *supra*, in order for a city solicitor to receive from the service fund of the board of education of a city school district expenses for trips occasioned by his duties as legal advisor of the board of education, it is necessary that the following facts exist:

1. The clerk of the board of education of the city school district on the third Monday of January or on the Monday preceding the close of

the school year, certified to the board of education, the number of pupils enrolled in the public schools in the city school district.

2. The board of education duly adopted a resolution that set aside a sum that did not exceed five cents for each child enrolled and earmarked such amount of money as the "service fund."

3. The city solicitor actually incurred the expenses when he was sent out of the city school district for the performance of duties imposed upon him by the provisions of Section 4761, supra, and that the duties performed by him were for the purpose of promoting the welfare of the schools of the city school district.

4. The city solicitor furnished a statement to the board of education at its last meeting of the month held by the board of education after the expenses were incurred.

Therefore, in specific answer to your question it is my opinion that; the preparation of a resolution, notices, certificates and other necessary legal papers that are required to be prepared in order for the board of education to proceed with the issuance of bonds for the city school district are not such duties as are imposed on a city solicitor by the provisions of Section 4761, General Code, but that a board of education has authority to employ a person to prepare such resolutions, notices, certificates and other necessary legal papers that are required to be prepared in order for the board of education to proceed with the issuance of bonds for the city school district, and compensate such employed person therefor; and that there is not anything in the law to prevent the board of education of the city school district from employing the city solicitor to perform this work and compensate the city solicitor for such services.

The board of education of a city school district may pay from its service fund the expenses of the city solicitor on trips occasioned by his duties as legal adviser of the board of education if (1) the clerk of the board of education of the city school district on the third Monday of January or on the Monday preceding the close of the school year, certified to the board of education the number of pupils enrolled in the public schools in the city school district (2) if the board of education duly adopted a resolution that set aside a sum that did not exceed five cents for each child enrolled, and earmarked such amount of money as the "service fund" (3) if the city solicitor actually incurred the expenses when he was sent out of the city school district for the performance of duties imposed upon him by the provisions of Section 4761, supra, and that the duties performed by him were for the purpose of promoting the welfare of the schools of the city school district (4) if the city solicitor

furnished a statement to the board of education at its last meeting of the month held by the board of education after the expenses were incurred.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

3442.

APPROVAL, LEASE, CANAL LAND, STATE OF OHIO, THROUGH DIRECTOR OF PUBLIC WORKS, TO RALPH D. ZOOK, WALNUT CREEK, OHIO, ANNUAL RENTAL, \$15.00, ABANDONED OHIO CANAL PROPERTY, DESIGNATED AND DESCRIBED, OXFORD TOWNSHIP, COSHOCTON COUNTY, OHIO, FOR RESIDENTIAL AND AGRICULTURAL PURPOSES.

COLUMBUS, OHIO, December 22, 1938.

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

DEAR SIR: This is to acknowledge the receipt of your recent communication with which you submit for my examination and approval a canal land lease executed by you as Superintendent of Public Works and as Director of said department to one Ralph D. Zook of Walnut Creek, Ohio.

By this lease, which is one for a stated term of fifteen years and which provides for an annual rental of \$15.00, there is leased and demised to the lessee above named the right to occupy and use for residential and agricultural purposes, that portion of the abandoned Ohio Canal property, including the full width of the bed and banks thereof, located in Oxford Township, Coshocton County, Ohio, which is described as follows:

Beginning at a line drawn at right angles to the transit line of the G. F. Silliman Survey of said canal property through Station 3087+00 of said survey, and running thence westerly with the lines of said canal property, six hundred (600') feet, as measured along said transit line to a line drawn at right angles to said transit line through station 3093+00 of said survey, and containing two and eighty-four hundredths (2.84) acres, more or less, and excepting therefrom any portion of the above described property that may be occupied by a public highway.