

2933.

APPROVAL, BONDS OF GRANDVIEW HEIGHTS EXEMPTED VILLAGE SCHOOL DISTRICT, FRANKLIN COUNTY—\$20,000.00.

COLUMBUS, OHIO, November 28, 1928.

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

---

2934.

OFFICES COMPATIBLE—PROSECUTING ATTORNEY AND OHIO NATIONAL GUARD OFFICER.

*SYLLABUS:*

*The fact that a person elected to the office of Prosecuting Attorney of a county in this state holds a commission as an officer in the Ohio National Guard, does not affect his right to qualify for said office of Prosecuting Attorney and to hold and perform the duties of the same.*

COLUMBUS, OHIO, November 28, 1928.

HON. FORREST E. ELY, *Prosecuting Attorney Elect, Batavia, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication which reads as follows:

"I am the newly elected Prosecuting Attorney of Clermont County, Ohio, and wish to know whether or not I would be incapacitated from taking the oath of office on January 7th, 1928, by reason of being the Commanding Officer of an infantry company of Ohio National Guards. If there is any conflict whatsoever I will resign my commission in the National Guard immediately."

The question here presented is whether you will be disqualified from acting as prosecuting attorney pursuant to your recent election to this office, by the fact that you hold a commission as an officer in the Ohio National Guard.

Touching this question, Sections 11 and 2910 of the General Code, provide as follows:

Sec. 11. "No person shall hold at the same time by appointment or election more than one of the following offices: sheriff, county auditor, county treasurer, clerk of the court of common pleas, county recorder, prosecuting attorney, probate judge, and justice of the peace."

Sec. 2910. "No person shall be eligible as a candidate for the office of prosecuting attorney, or be elected thereto, who is not an attorney and counsellor at law, duly licensed to practice in this state. No prosecuting attorney shall be a member of the General Assembly of this state, or mayor of a city or village. No county treasurer, county auditor, county recorder, county surveyor, or sheriff, shall be eligible as a candidate for, or elected to, the office of prosecuting attorney."

These are the only statutes which make any special provision with respect to qualifications to the right of such officer to hold any other office; and it is readily seen that there is nothing in the provisions of these sections which disqualify any person from acting as prosecuting attorney of a county by reason of the fact that he is at the same time an officer in the Ohio National Guard. It remains to be seen, however, whether the nature and functions of said offices present any such inconsistency as makes the same incompatible.

Officers in the Ohio National Guard are appointed by the Governor upon the recommendation of the commanding officers of the organization to which such officers are to be assigned for duty. Section 5180, General Code.

In this connection I note that it has been held an officer in the National Guard of the state is not a public officer. *State vs. Coit*, 8 O. D. (N. P.) 62. However, there are other decisions to the contrary; and I note that in an opinion under date of October 28, 1919, found in Opinions, Attorney General, 1919, Vol. II, page 1354, this department held that an officer in the Ohio National Guard was the holder of an office of trust and profit under the provisions of Section 14 of Article IV of the State Constitution, which provides that:

"the judges of the Supreme Court, and of the Court of Common Pleas \* \* \* shall receive no fees or perquisites, nor hold any other office of profit or trust, under the authority of this state, or of the United States."

In said former opinion of this department above referred to, it was held that by reason of the constitutional provision above quoted, the acceptance by a Common Pleas judge in Ohio of a commission as an officer in the National Guard would have the effect of vacating his office as Common Pleas judge.

The opinion of October 28, 1919, was approved and followed in Opinion No. 2669, rendered under date of October 5, 1928, to the Adjutant General of Ohio, which held as follows:

"By the terms of Section 2251, General Code, a judge of the Court of Appeals is prohibited while holding such position as judge, from being an officer on the active list in the Ohio National Guard. This ineligibility to hold these two offices does not prevent an officer in the National Guard from being a candidate for judge of the Court of Appeals, and if elected to the judgeship, he may qualify for the same upon resigning from his office in the National Guard."

In Opinion No. 2669 the following excerpt from the opinion of 1919 was quoted:

"Is an office in the National Guard comprehended within this language? The authorities seem to warrant a clear, affirmative answer. Such officer receives compensation, exercises an authority conferred upon him by virtue of the acts of congress under its power to raise and maintain an army, and assist in the performance of a sovereign function of government."

It was then pointed out in Opinion No. 2669 that in support of the conclusions reached in the 1919 opinion the cases of *State vs. Mayor of Jersey City*, 42 Atl. 782; *Kerr vs. Jones*, 19 Ind. 351, and *State vs. De Gross*, 53 Tex. 387, were cited, and it was said that :

"To these authorities might be added the case of *Chisholm vs. Coleman*, 43 Ala. 204 wherein it was held, under a similar constitutional provision, that a judge of the Circuit Court forfeited his office by accepting a commission as colonel in the Confederate Army."

There is no constitutional provision affecting the question presented in your communication ; nor are there any statutory provisions to be considered other than Sections 11 and 2910, supra, above noted.

With respect to the question of compatibility in the functions of the two offices, it is quite apparent that there is no question here presented with respect to your physical ability to perform the duties of each of said offices. Of course, while you are in active performance of your duties as commanding officer of a company in the Ohio National Guard, you may to that extent be prevented from performing some of the duties devolving upon you as prosecuting attorney of the county. As to this, however, it is quite clear that in the absence of facts showing an abandonment by an elected officer of the office to which he has been elected, the mere fact that he fails to perform some or all of the duties of the office does not in any way affect his right to said office or to the emoluments of the same. *Bryan vs. Cattell*, 15 Iowa, 538; *Fekete vs. City of East St. Louis*, 315 Ill. 58.

Inasmuch as it further appears that neither of the offices here in question are in any way subordinate to the other, and neither is a check upon the other, it follows that said offices are not incompatible ; and you are accordingly advised, by way of specific answer to your question, that the fact that you are commanding officer of a company in the Ohio National Guard would in no wise affect your right to qualify for the office of prosecuting attorney to which you have been elected, by taking the oath of office and giving the bond required by law.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

---

2935.

TAX AND TAXATION—VILLAGE WATER WORKS—AUTHORITY OF COUNCIL TO LEVY A TAX FOR OPERATION OF SAME—REQUIRES VOTE OF PEOPLE.

**SYLLABUS:**

*Under the provisions of Section 4362, General Code, the council of a village is unauthorized to levy a tax not to exceed five mills on each dollar valuation of the taxable property listed for taxation in such village for the purpose of paying the expenses made in operating the waterworks plant in the village and to place said tax outside the fifteen mill limitation without a vote of the people of such village.*