

**Note from the Attorney General's Office:**

1947 Op. Att'y Gen. No. 47-1905 was modified by 1965 Op. Att'y Gen. No. 65-150.

1905

- 1 INCOMPATIBLE OFFICE—SUPERINTENDENT OF COUNTY CHILDREN'S HOME—LOCATED WITHIN TERRITORIAL LIMITS OF SCHOOL DISTRICT—MEMBER OF BOARD OF EDUCATION OF THAT SCHOOL DISTRICT.
- 2 MEMBER OF BOARD OF EDUCATION OF CITY SCHOOL DISTRICT—IPSO FACTO VACATES OFFICE WHEN HE ACCEPTS POSITION OF SUPERINTENDENT OF COUNTY CHILDREN'S HOME LOCATED WITHIN TERRITORIAL LIMITS OF SCHOOL DISTRICT.

SYLLABUS:

1. The positions of superintendent of a county children's home located within the territorial limits of a school district and member of the board of education of that school district are incompatible .

2. A member of a board of education of a city school district who accepts the position of superintendent of a county children's home located within the territorial limits of said school district ipso facto vacates his office as member of said board of education.

Columbus, Ohio, May 20, 1947

Hon. Earl Henry, Prosecuting Attorney, Guernsey County  
Cambridge, Ohio

Dear Sir :

I have before me your request for my opinion, which reads as follows :

“I desire your opinion upon the question stated as follows :

Mr. William T. King who has been a member of the Cambridge City Board of Education since January 1st, 1946, on

March 31, 1947, was appointed Superintendent of the Guernsey County Children's Home and he entered upon his duties as such Superintendent April 1, 1947. His wife is serving as Matron at the Children's Home.

Will you please render your opinion as promptly as possible advising whether or not the two positions are inconsistent and whether or not the office of Superintendent of the Children's Home is incompatible with his office as a member of the Board of Education?

Would the acceptance by Mr. King of the position of Superintendent of said Children's Home ipso facto vacate his office as member of said School Board?"

In the absence of constitutional or statutory provisions permitting or prohibiting contemporaneous tenure by one individual as member of a city board of education and superintendent of a county children's home, I turn to the common law rule on incompatibility set forth in L. R. A. 1917A at page 216, in the following language:

"The settled rule of the common law prohibits a public officer from holding two incompatible offices at one time. This rule has never been questioned, and its correctness and propriety are so well established as to be assumed without discussion in practically every case in which the matter of common-law incompatibility arises. While some authorities say that the law does not favor the multiplication of offices in one person, they mean no more than that one person cannot hold two incompatible offices at one time. 'The doctrine of the incompatibility of offices,' says one court, 'is bedded in the common law, and is of great antiquity. At common law two offices whose functions are inconsistent are regarded as incompatible. The debatable question is: What constitutes incompatibility? This question has been answered by the courts with varying language, but generally with the same sense.' "

The common-law rule has been recognized and followed by courts in this state. *State, ex rel. Attorney General v. Gebert*, 12 O. C. C. (N. S.) 274, 31 O. C. C. 355; *State, ex rel. Wolf v. Shaffer*, 6 O. N. P. (N. S.) 219, 18 O. D. N. P. 303, affirmed by circuit court without opinion, *State, ex rel. Louthan v. Taylor*, 12 O. S. 130; *Mason v. State*, 58 O. S. 30; *State, ex rel. Henry v. City of Newark*, 6 O. N. P. 523, 8 O. D. N. P. 344; *State, ex rel. Doren v. Oglevee*, 37 O. S. 142; *State, ex rel. Baden v. Gibbons*, 40 O. L. Rep. (App.) 285, 17 O. L. Abs., 341.

Although our courts have distinguished between public office and public employment in cases turning upon the question whether a certain posi-

tion was a public office against the incumbent of which quo warranto would lie, in cases resolved solely upon the question of incompatibility our courts have not seen fit to countenance incompatibility even where one or both of the positions involved might not be public offices against the incumbent of which quo warranto would lie. State, ex rel. Henry v. City of Newark, 6 O. N. P. 523, 8 O. D. N. P. 344; State, ex rel. Baden v. Gibbons, 40 O. L. Rep. (App.) 285, 17 O. L. Abs. 341; State, ex rel. Doren v. Oglevee, 37 O. S. 142.

In the case of State, ex rel. Baden v. Gibbons, supra, the Court of Appeals held that the positions of city commissioner and deputy county auditor are incompatible. In the course of its opinion the court said:

“It has long been the rule in this state that one may not hold two positions of *public employment* when the duties of one may be so administered and discharged that favoritism and preference may be accorded the other, and result in the accomplishment of the purposes and duties of the second position, which otherwise could not be effected. To countenance such practice would but make it possible for one branch of government or one individual to control the official act and discretion of another independent branch of the same government or of interlocking governments which are constructed so as to operate in conjunction with each other. If the possible result of the holding of two positions of public trust leads to such a situation, then it is the rule, both ancient and modern, that the offices are incompatible and are contrary to the public policy of the state.” (Emphasis added.)

Accordingly, it is unnecessary to determine whether the positions in question are offices or employments. I turn then to examine these positions with regard to their functions which if inconsistent will render the positions incompatible. 1917 A. L. R. A. 217; State, ex rel. Attorney General v. Gebert, 12 O. C. C. (N. S.) 274, 31 O. C. C. 355.

Section 4838-3, General Code, provides as follows:

“The inmates of a county, semi-public or district children’s home shall have the advantage of the privileges of the public schools. So far as possible such children shall attend such school or schools in the district within which such home is located. Whenever this is impossible and a school is maintained at the home, such school shall be under the control and supervision of the board of education of the district in which such home is located. Such board of education shall employ, with the approval of the superintendent of the home, necessary teachers, and provide books and educational equipment and supplies, and conduct

such school in the same manner as a public school within the district. The trustees of the home shall furnish necessary furniture, fuel and light.”

It is clear from this section that it is the duty of a board of education in a school district in which is located a county children's home either to maintain a school for the instruction of the children in the home, at the home, or to provide for their admission into the public schools of the district. 1939 Opinions of the Attorney General, No. 1013. I have been informed that the Guernsey County Children's Home is located within the territorial limits of the Cambridge City School District. Accordingly, it is apparent that upon the Cambridge City Board of Education rests the duty either to maintain a school at the Guernsey County Children's Home or to provide for the admission of the children in the home into the public schools of the Cambridge City School District. Section 4838-3, General Code, *supra*, indicates that the legislature has expressed as its preference that the board provide for the admission of children in the home into the public schools of the district rather than that it maintain a school at the home. Whether at the present time the Cambridge City Board of Education has deemed it possible to fulfill the expressed legislative preference or has found that to be impossible and is maintaining a school at the home is not pertinent to this inquiry as it is clear that either of these alternatives is within the scope of the board's authority.

It is also clear from Section 4838-3, General Code, *supra*, that the employment of a teacher or teachers in a school at the home is not complete without the approval of the superintendent of the home. 1923 Opinions of the Attorney General, page 37.

Viewing your inquiry in the light of this discussion of Section 4838-3, General Code, I am confronted with the possibility that the individual who is the subject of your inquiry may be called upon as superintendent of the county children's home to approve the action of the board of education of which he is a member. In this way his position as superintendent of the home is in a way a check upon his position as a member of the board of education and therefore these positions are incompatible. *State, ex rel. Attorney General v. Gebert*, 12 O. C. C. (N. S.) 274, 31 O. C. C. 355.

Turning to that phase of your inquiry regarding the question whether the acceptance by the individual in question of the position of superintendent of the county children's home would ipso facto vacate his office as

member of the city board of education, I direct your attention to Mechem on Public Offices and Officers, Section 420, where it is said:

"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."

(Emphasis added.)

The same principle is stated and discussed in an elaborate annotation found in 100 A. L. R., page 1162, where it is said:

"It is a well-settled rule of the common law that a person cannot at the 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."

At page 1167 of this annotation the principle underlying this general rule is thus stated:

"The doctrine that the acceptance by the incumbent of one office of another incompatible office vacates the first seems to be based on the presumption of an election between the two as evidenced by the acceptance and incumbency of the second office."

The general rule as to the effect of holding incompatible offices as expressed heretofore has been recognized and followed by the courts of our state. See 32 O. J. 909. Accordingly, the acceptance by a member of a board of education of the position of superintendent of a county children's home located within the territorial limits of the school district governed by that board of education ipso facto vacates the office of that member of the board of education.

In specific answer to your inquiry, it is my opinion that:

1. The positions of superintendent of a county children's home located within the territorial limits of a school district and member of the board of education of that school district are incompatible.

2. A member of a board of education of a city school district who accepts the position of superintendent of a county children's home located within the territorial limits of said school district ipso facto vacates his office as member of said board of education.

Respectfully,

HUGH S. JENKINS,

Attorney General.