

1962

COMPATIBILITY—CLERK, BOARD OF COUNTY COMMISSIONERS AND MEMBER, CITY COUNCIL—INCOMPATIBLE—BUDGET PREPARATION AND SUBMISSION—§5705.28 R.C.—924 OAG 1949, p. 555, OVERRULED.

SYLLABUS:

The position of clerk of the board of county commissioners is incompatible with the office of member of city council because of the possibility of inconsistent loyalties imposed on each in carrying out the provisions of Section 5705.28, Revised Code. Opinion No. 924, Opinions of the Attorney General for 1949, p. 555, overruled.

Columbus, Ohio, April 15, 1958

Hon. Thomas A. Beil, Prosecuting Attorney
Mahoning County, Youngstown, Ohio

Dear Sir:

I have for consideration your request for my opinion which reads as follows:

“The Board of County Commissioners has requested that I obtain from you your opinion on the following:

- “1. May the same person, at the same time, occupy the position as Clerk of the Board of County Commissioners and Councilman of the City of Youngstown?
- “2. Is it possible for the same person to hold these two positions if he accepted no compensation for his services as Councilman?”

I invite your attention to former Section 731.02, Revised Code, which reads as follows :

“Members of the legislative authority at large shall have resided in their respective cities, and members from wards shall have resided in their respective wards, for at least one year next preceding their election. Each member of the legislative authority shall be an elector of the city, *shall not hold any other public office or employment*, except that of notary public or member of the state militia, and shall not be interested in any contract with the city. A member who ceases to possess any of such qualifications, or removes from his ward, if elected from a ward, or from the the city, if elected from the city at large, shall forthwith forfeit his office.” (Emphasis added)

This section was amended effective September 16, 1957, to read as follows :

“Members of the legislative authority at large shall have resided in their respective cities, and members from wards shall have resided in their respective wards, for at least one year next preceding their election. Each member of the legislative authority shall be an elector of the city, *shall not hold any other public office*, except that of notary public or member of the state militia, and shall not be interested in any contract with the city, *and no such member may hold employment with said city*. A member who ceases to possess any of such qualifications or removes from his ward, if elected from a ward, or from the city, if elected from the city at large, shall forthwith forfeit his office.” (Emphasis added)

The clerk of the board of county commissioners is not considered a public officer. *State ex rel. Landis v. Butler County*, 95 Ohio St., 157. Accordingly, that portion of the section dealing with “any other public office” will not be pertinent to our discussion here.

It is proper, however, to note that the word “employment” was removed from the phrase “shall not hold any other public office or employment,” in the former section, and was placed in a different position in the present section with the added words “*with said city*.” The implication is unmistakable that the legislature in rewriting and rearranging this section, intended to remove a portion of the disability previously placed upon city councilmen. This being true, there seems to be no prohibition in this statute of a city councilman occupying other employment so long as it is not with the city which he serves.

There is no express statutory or constitutional prohibition against one person holding the two offices here in question. However, even in the absence of such express provision, it seems to be a well settled rule of the common law that a public officer cannot hold two offices at the same time which are in their nature incompatible. Offices are considered incompatible where the duties and functions of each are inherently inconsistent and repugnant so that because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for one person to retain both offices. 42 American Jurisprudence, 935.

Considering now the duties and functions of the two offices here in question, I direct your attention to Section 5705.28, Revised Code. Under the provisions of this section, the taxing authorities of each subdivision in the state are under a duty to prepare budgets for their respective subdivisions each year and file them with the county auditor, who in turn presents them to the budget commission of the county as provided for in Sections 5705.30 and 5705.31, Revised Code.

In Section 5705.01, Revised Code, the following definitions are found:

“(A) ‘Subdivision’ means any county, municipal corporation, township, township fire district, township waste disposal district, or school district, except the county school district.

“(C) ‘Taxing Authority’ or ‘bond issuing authority’ means, in the case of any *county*, the *board of county commissioners*; in the case of a *municipal corporation*, the *council* or other legislative authority of such municipal corporation; in the case of a school district, the board of education; in the case of a township, the board of township trustees; and in the case of a township fire district or township waste disposal district, the board of township trustees of the township in which such district is located. * * *”
(Emphasis added)

In connection with the preparation of the above mentioned budgets or the possible revision thereof, it frequently happens that the taxing authorities of these subdivisions appear before the budget commission to present arguments relative to adjustments or revisions benefiting their subdivisions, and it may well be that such adjustments or revisions contended for in connection with one subdivision would be detrimental to the other subdivision, and where the same person participates in the preparation of two such

budgets there may be a conscious or unconscious bias or prejudice on his part.

In Opinion No. 2999, Opinions of the Attorney General for 1953, p. 391, my predecessor in office held the office of mayor incompatible with that of chief deputy of the county auditor. Part of the reasoning is embodied in the following language found at pp. 392, 393:

“In the event that the budget commission should be inclined to make certain adjustments in a village budget, as provided in this section, it is impossible to suppose that the village mayor would not be keenly interested in the matter since it is under his executive supervision that a considerable portion of the village revenues are expended. Accordingly, if the commission should propose to reduce such budget below the amounts requested by the village authorities, it could well happen that the mayor would wish to appear before the commission to defend the estimates originally submitted. In this situation it is apparent that the office of county auditor is a check on that of the mayor and that the two are clearly incompatible. * * *”

Admittedly, the clerk of the board of county commissioners holds a ministerial position, but this does not preclude situations wherein such clerk might assist in the preparation of the county budget or influence its compilation and attempted justification in other ways. Indeed, it is common practice for such clerk to appear before the commission in such budget hearings. This being true, his interests as clerk would directly conflict with his interests as councilman inasmuch as both subdivisions are competing for available funds. For this reason, if for no other, the offices are incompatible. To this extent I can no longer agree with Opinion No. 924, Opinions of the Attorney General for 1949, p. 555, wherein the writer said at page 558:

“On the basis of the Holzemer case and the Opinion of the Attorney General for 1934, number 3605, p. 1721, a deputy county treasurer may in the absence of the treasurer, serve as a member of the budget commission. The question is thus presented, that since the budget commission must approve the budget of the board of elections, is this fact sufficient to declare the offices of the clerk of the board of elections and deputy county treasurer incompatible? I am of the opinion that it is not.

“In the first place, *the office of clerk of a county board of elections is a ministerial one: he has no duties as to the preparation of a budget or to advocate the adoption of a budget. He will never have to present arguments relative to adjustment or revision of the budget.*” (Emphasis added)

For the reasons set forth above, I feel it necessary to overrule Opinion No. 924, Opinions of the Attorney General for 1949, p. 555, since indirect influence may be just as repugnant as direct.

In specific answer to your question it is my opinion and you are advised that the position of clerk of the board of county commissioners is incompatible with the office of member of city council because of the possibility of inconsistent loyalties imposed on each in carrying out the provisions of Section 5705.28, Revised Code, Opinion No. 924, Opinions of the Attorney General for 1949, p. 555, overruled.

Respectfully,

WILLIAM SAXBE

Attorney General