

3385.

OFFICES COMPATIBLE—STATE VETERINARIAN AND MEMBER OF VETERINARY EXAMINERS—MEMBER OF BOARD OF VETERINARY EXAMINERS AND UNCLASSIFIED SERVICE EMPLOYEE IN DIVISION OF ANIMAL INDUSTRY, DEPARTMENT OF AGRICULTURE.

SYLLABUS:

1. *A state veterinarian, who by virtue of section 1177-16, General Code, is ex officio secretary of the board of veterinary examiners, may be appointed as a member of the board of veterinary examiners.*

2. *A veterinarian employed by the division of animal industry who is not in the classified service of the state is eligible for and may be appointed a member of the board of veterinary examiners.*

COLUMBUS, OHIO, June 30, 1931.

HON. I. S. GUTHERY, *Director of Agriculture, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge the receipt of a letter of recent date from G. H. Pierce, Chief, Division of Animal Industry, which reads in part as follows:

“A number of requests have come to my office from veterinarians in the practice of their profession in Ohio for information with regard to the manner in which the present Board of Veterinary Examiners was appointed; also information as to whether or not such appointments by former Governor Cooper are regular.

The Veterinary Practice Act designated as H. B. No. 429 passed March 27, 1925, provides in Sec. 1, among other things that a board of examiners shall be appointed by the Governor and it gives the number of years for the tenure of office for each appointee etc. Also it provides that ‘the state veterinarian shall be ex-officio the secretary of the board of veterinary examiners.’

The records will show that Dr. C. McCandless, who was appointed as state veterinarian on or about February 1, 1929, automatically became the secretary ex-officio of the board appointed by Governor Donahey; that Governor Cooper did not appoint a board of veterinary examiners until the closing days of his administration; and then appointed as one of the three members of the board Dr. C. McCandless, who was at that time already secretary ex-officio and state veterinarian. The question arising is, could the Governor legally appoint Dr. C. McCandless as a member of the board until he first resigns his office as State Veterinarian. Can he properly be a member of the examining board, also secretary ex-officio and state veterinarian at the same time? It appears to some members of the profession that the appointment was irregular, and that Dr. McCandless could not have been appointed to the six year term until he first resigns as state veterinarian which automatically would also vacate the office of secretary ex-officio which he held.

Another question arising is as follows: one of the members of the examining board serving now with Dr. McCandless was at the time of his appointment an employe of the Department of Agriculture, and the

other member of the board serving with him at the present time is in the employ of the department at this time and receives a salary from the state of Ohio. Is such an appointment proper in view of the fact that he is compensated for his time while performing duties in connection with services on the examining board?"

Section 1177-16, General Code, reads as follows:

"There shall be a state board of veterinary examiners consisting of three men, one to be appointed by the governor for two years, one for four years and one for six years, and biennially thereafter one shall be appointed to serve for a term of six years. They shall be graduates of reputable but different, veterinary schools or colleges, and be persons skilled in their profession and of good moral character. They shall conduct an examination for those who wish to engage in the practice of veterinary medicine, surgery, and dentistry and issue certificates therefor. Such an examination shall be held in July of each year.

They shall meet in Columbus in rooms furnished by the director of agriculture, and elect from their number a president. The state veterinarian shall be ex-officio the secretary of the board of veterinary examiners. It shall be the duty of said secretary to keep an accurate record of the business transacted and of the certificates issued.

He shall pay into the state treasury, to the credit of the general revenue fund, the fees received from applicants for examination, keep accurate account of the moneys received and disbursed, and perform such other duties as the director of agriculture may prescribe. At the end of each fiscal year, said board of examiners shall make a report to the director of agriculture, which report shall contain a full and complete statement of the official acts of the board with an itemized account of all moneys received and paid out.

It shall also be the duty of the secretary of the board of veterinary examiners to report each violation of the laws relating to the practice of veterinary medicine, veterinary surgery, and veterinary dentistry to the board of examiners and render assistance in securing indictments and convictions for such violations. Provided, that none of the provisions of this section shall in any manner interfere with the present tenure of office of the members of said board heretofore appointed."

Section 1176-16, subsections a, b, c, d, e and f enumerate the duties and the powers of the board of veterinary examiners in regard to the examination of applicants, and the issuance and revocation of licenses to practice veterinary medicine and surgery. These subsections also enumerate the duties of the secretary of the board of veterinary examiners.

Your inquiry raises several questions, the first of which is whether or not a person can hold at one time more than one office in the state of Ohio. That question in turn depends on whether or not there are any constitutional or statutory inhibitions or whether or not the positions are incompatible. There is nothing in the constitution of this state which prohibits a person from occupying the office of state veterinarian and at the same time being a member of the board of veterinary examiners. An examination of the statutes discloses that there is no provision in our law which prohibits the state veterinarian from holding more than one office at the same time. It is apparent therefore that Dr. McCandless,

as state veterinarian, was not disqualified by reason of constitutional or statutory provisions to be appointed to and act as a member of the board of veterinary examiners and at the same time hold his other office.

However, there is a further question to be considered and that is whether or not the two offices are incompatible. It is stated in 46 C.J. 941 that:

“At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. But where the functions of the two offices are inconsistent they are regarded as incompatible. The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other or to audit the accounts of the other. The question of incompatibility does not arise when one of the positions is an office and the other is merely an employment.”

In the case of *State ex rel. McAllister, v. Dunn*, 277 Mo. 38, it was held that:

“Public offices are incompatible when their functions are inconsistent, their performance resulting in antagonism and in conflict of duty, so that the incumbent of one cannot discharge with fidelity and propriety the duties of both.”

The state veterinarian, under section 1109, General Code, is chargeable with such duties as may be prescribed by the secretary of agriculture whose powers and duties are now conferred upon the director of agriculture by section 154-42, General Code. The principal functions of the board of veterinary examiners are to conduct examinations of applicants seeking to practice veterinary medicine or surgery in the state of Ohio, and to conduct investigations and to revoke the licenses of veterinarians found guilty of violating any of the provisions contained in section 1177-16e, General Code. The statutes relating to these two offices indicate that there can be no conflict between them; that it is not physically impossible for one person to discharge the duties of the various offices; that neither of the offices is subordinate to the other; that the functions and duties of the board of veterinary examiners do not conflict with nor are they inconsistent with those of the state veterinarian. It follows from what I have said that there is no incompatibility of offices by reason of a person holding the office of state veterinarian and being a member of the board of veterinary examiners at the same time.

The next question is whether or not Dr. McCandless was ineligible to be appointed to the board of veterinary examiners by reason of being *ex officio* secretary of the board of veterinary examiners. *Ex officio* is defined as follows in 25 C.J. 169:

“By virtue of the office without any other warrant or appointment than that resulting from the holding of a particular office.”

Section 1177-16, General Code, provides that the board of veterinary examiners shall consist of only three persons who are qualified and licensed to practice

veterinary medicine and surgery in the state of Ohio and that the state veterinarian shall be ex officio secretary of the board of veterinary examiners. It must be kept in mind that the position of secretary to the board of veterinary examiners is one that attaches to the office of the state veterinarian by reason of statutory provision and is not a position that requires a separate appointment. In other words, the state veterinarian is secretary of the board of veterinary examiners by reason of his holding a state office, which office is separate and distinct from the board of veterinary examiners. The secretary of the board of veterinary examiners is not a member of the board nor has he any voice in its proceedings or decisions. It is the duty of the secretary to record and keep a record of the meetings, decisions and business transactions of the board of veterinary examiners. The state veterinarian as ex officio secretary to the board is neither elected nor appointed to his position. I can not perceive where there would be any conflict of positions by reason of a person being secretary of the board of veterinary examiners and at the same time being a member of that board. It is a well known fact that many administrative and deliberative bodies, both public and otherwise, appoint or elect one of their own members as secretary to record the proceedings of their meetings. There certainly can be no incompatibility of positions merely by reason of a person being secretary of the board of veterinary examiners and at the same time being a member, since the secretary of the board has no voice in the deliberations of the board of veterinary examiners and whatever duties devolve upon him as secretary are such as require no discretion upon his part and are ministerial, which is not the case when one is a member of the board because a member of the board of veterinary examiners does exercise discretion and does have a voice in the deliberations of that body.

I am therefore of the opinion that there is no incompatibility of offices when the same person is both the secretary and a member of the board of veterinary examiners, nor are there any constitutional or statutory inhibitions to prevent a person from holding both positions at the same time.

The question of whether or not an employe in the division of animal industry is eligible for appointment as a member of the board of veterinary examiners is subject to the same rules of law as previously stated herein. In other words, your inquiry is whether or not the same person can hold a lucrative position or employment in a governmental capacity and also hold an office of trust or profit at the same time. There is no constitutional or statutory inhibitions to prevent a state employe from holding both a position of profit and one of trust at the same time. There is but one statutory inhibition relative to employes of the state and that relates to the number of hours that must be put in by such employes. This inhibition may be found in section 154-20, General Code, which reads as follows:

"All employes in the several departments shall render not less than eight hours of labor each day, Saturday afternoons, Sundays and days declared by law to be holidays excepted in cases in which, in the judgment of the director, the public service will not thereby be impaired.

Each employe in the several departments shall be entitled during each calendar year to fourteen days leave of absence with full pay. In special and meritorious cases where to limit the annual leave to fourteen days in any one calendar year would work peculiar hardship, it may, in the discretion of the director of the department, be extended. No employe in the several departments, employed at a fixed compensation, shall be paid for any extra services, unless expressly authorized by law."

The inhibition contained in section 154-20, General Code, is one going to the number of hours state employes must work. However, this section does not prevent a state employe from being eligible to appointment and acting as a member of the board of veterinary examiners. There is nothing in section 154-20 which disqualifies a state employe from accepting a position of honor such as membership on the board of veterinary examiners.

Your attention is also called to the fact that section 1177-16, General Code, merely requires that the board of veterinary examiners conduct an examination in Columbus in July of each year, which evidently would indicate that a state employe would not necessarily lose any time while acting as a member of the board of examiners and, as stated before in my opinion, I can not see wherein section 154-20, General Code, would prevent a state employe in the employment of the division of animal industry from accepting and holding the office of a member of the board of veterinary examiners. The board of veterinary examiners has no control nor supervision over employes in the division of animal industry and there can be, in my mind at least, no conflict between the office of a member of the board of veterinary examiners and the position of a veterinarian in the division of animal industry. The board of veterinary examiners is a permanent and continuing body which possesses power independent of that possessed by the division of animal industry. The board of veterinary examiners is clothed with and possesses quasi judicial and administrative powers. On the other hand, a veterinarian employed by the division of animal industry occupies or holds a position which is purely ministerial. He possesses no right of independent action and his powers and duties are dependent entirely upon the will and direction of the chief of the division of animal industry or any superior that that officer may select.

I am inclined to hold that an employe in the division of animal industry who is not in the classified service of the state is eligible for appointment to membership on the board of veterinary examiners providing such employe has the qualifications required by section 1177-16, General Code, namely, that he is qualified and licensed to practice veterinary medicine and surgery in the state of Ohio, inasmuch as there is neither constitutional nor statutory inhibitions nor common law incompatibility of office.

It is therefore my opinion that:

1. A state veterinarian, who by virtue of section 1177-16, General Code, is ex officio secretary of the board of veterinary examiners, may be appointed as a member of the board of veterinary examiners.

2. A veterinarian employed by the division of animal industry who is not in the classified service of the state is eligible for and may be appointed a member of the board of veterinary examiners.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3386.

APPROVAL, BONDS OF VILLAGE OF SHEFFIELD LAKE, LORAIN COUNTY, OHIO—\$15,270.51.

COLUMBUS, OHIO, June 30, 1931.

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