

1031.

POSITION OF CLERK OF BOARD OF COUNTY COMMISSIONERS—COMPATIBLE WITH POSITION OF MEMBER OF LOCAL BOARD OF EDUCATION—SECTION 305.13, R.C.

SYLLABUS:

The position of clerk of a board of county commissioners appointed pursuant to Section 305.13, Revised Code, is compatible with the position of member of a local board of education of the same county provided it is physically possible for an individual to act in both capacities.

Columbus, Ohio, December 16, 1959

Hon. Robert L. Perdue, Prosecuting Attorney
Ross County, Chillicothe, Ohio

Dear Sir:

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

“I respectfully request an opinion from you regarding the following question:

‘Is the position of full time Clerk of a Board of County Commissioners (appointed under authority of Section 305.13

of the Revised Code of Ohio) compatible with the position of a board member of a local school district board of education?' ”

The question of compatibility of offices has been asked of this office numerous times and past Attorney General opinions are replete with various definitions and problem analyses in connection with this question. At this date, however, I am unable to find any Attorney General's opinion or court decision which specifically deals with a compatibility question on the offices set forth in your letter.

While there is no express statutory prohibition nor constitutional prohibition against a person holding the two offices in question, it is a well settled rule of common law that where two offices are incompatible, they may not be held by one individual.

The only judicial decision containing the elements of incompatibility of offices in the State of Ohio can be found in *State, ex rel. vs. Frank Gebert*, 12 C.C. N.S., 274. The court in the Gebert case said at page 275 :

“Offices are considered incompatible when one is subordinate to, or in any way a check upon, the other ; or when it is physically impossible for a person to discharge the duties of both.”

The position of clerk of the board of county commissioners is provided for in Section 305.13, Revised Code, which reads in part :

“* * * Such clerk shall perform the duties required by sections 305.10 and 305.11 of the Revised Code and by the board.”

Sections 305.10 and 305.11, Revised Code, clearly indicate that the clerk of the board of county commissioners is purely a ministerial position. Nowhere in these two sections is there any indication that the clerk of county commissioners in performing his duties would exercise any control over or be a check upon a local school district.

We next proceed to investigate the duties and obligations of a member of a board of education of a local school district. Section 3313.01, Revised Code, provides that a member of a board of education must be an elector residing in the territory composing the school district and must be elected at large. Section 3313.13, Revised Code, provides as follows :

“No prosecuting attorney, city solicitor, or other officer, acting in a similar capacity shall be a member of a board of education.”

Clearly the exclusion set forth in Section 3313.13 would have no application to a clerk of a board of county commissioners.

A former attorney general in ruling that the offices of city councilman and clerk of a board of county commissioners are incompatible (Opinion No. 1962, Opinions of the Attorney General for 1958, page 215) based his opinion on the fact that the city council is a "taxing authority" under the provisions of Section 5705.01, Revised Code, and that though the clerk of a board of county commissioners holds a ministerial position, he might "assist in the preparation of the county budget or influence its compilation and attempted justification in other ways." The writer then concluded that since the clerk of a board of county commissioners *might* aid in the preparation of the county budget to be filed in accordance with Section 5705.28, Revised Code, and since a city councilman is a member of a "taxing authority," which is required to prepare and submit a budget under the provisions of Section 5705.28, Revised Code, for the municipality, the two positions are incompatible. The very same reasoning could be applied to the two positions requested in your letter as a board of education is also a "taxing authority" required to submit a budget under the provisions of Section 5705.28, Revised Code. I am of the opinion, however, that, based upon the requirements set forth in the *Gebert case, supra*, the mere fact that an officer holding two positions *might* do an act in connection with one of these positions which, if done, would indicate a divided loyalty toward his *duty* in the other position, is not sufficient to declare the offices incompatible and I therefore am not considering the provisions of Chapter 5705., Revised Code, as applicable in this situation.

Upon examination of the statutes pertaining to the duties of a local board of education, as found in Chapter 3313., Revised Code, I am unable to find any clear legal duty of a member of a board of education which would require him to appear before the board of county commissioners or which would in any way make his office subordinate to the clerk of the board of county commissioners or a check upon the position of clerk of a board of county commissioners.

I am aware of the provisions of Section 3313.59, Revised Code, which provides that a local school district and a board of county commissioners *may* co-operate in connection with the management of educational, social, civic and recreational activities. Following this statute, *if* a local board of education desired to co-operate with the county commissioners and a hearing was had before the county commissioners, then the clerk of the

county commissioners, if he were also a member of such local board of education, might find it difficult, if not impossible, to perform his duty as a member of the board of education and at the same time his ministerial duty as the clerk to the commissioners in taking minutes of the meeting and so forth.

In accordance with my comments on Opinion No. 1962, Opinions of the Attorney General for 1958, I am of the opinion that such a contingency cannot be the basis for a ruling of incompatibility of offices for such a contingency "does not make these offices subordinate to or one a check upon the other" within the purview of the *Gebert case, supra*.

Although physical possibility is a question of fact and not of law, it must be considered since, should the duties of one of the offices in question consume a prohibitive amount of time or otherwise make it physically impossible for an individual to perform the duties of both, then it would be in the best interests of the public for one individual to hold both offices at the same time.

Regarding the clerk to the board of county commissioners, Section 305.13, Revised Code, provides:

"If the board of county commissioners finds it necessary for the clerk of the board to devote his entire time to the discharge of the duties of such position, it may appoint a full time clerk, in place of the county auditor, and such necessary assistants to the clerk as the board deems necessary. Such clerk shall perform the duties required by sections 305.10 and 305.11 of the Revised Code and by the board."

In interpreting said Section 305.13, Revised Code, a number of past opinions of this office have held that the clerk to the board of county commissioners could not legally hold any other public office and receive a salary therefor. See Opinion No. 161, Opinions of the Attorney General for 1933, page 187; Opinion No. 3513, Opinions of the Attorney General for 1931, page 1098, and Opinion No. 504, Opinions of the Attorney General for 1917, page 1435.

On the other hand, in Opinion No. 4884, Opinions of the Attorney General for 1932, page 1512, it was held that the clerk to the Board of county commissioners could serve at the same time as clerk of a building commission without compensation, such opinion being distinguished by the writer from prior holdings of this office on the basis of physical possibility. Also see Opinions of the Attorney General for 1916, Volume 1, page 216, at page 217.

The expression "entire time" and "full time" as used in Section 305.13, Revised Code, *supra*, and which has been the basis of past opinions holding incompatible the holding of two offices simultaneously by the clerk to the board of county commissioners may be regarded as equivalent. "Full time" is defined in Webster's New International Dictionary, Second Edition, as follows:

"The amount of time considered the normal or standard amount for working during a given period, as a day, week or month."

Normally this is interpreted to be an eight-hour day and a forty-hour week.

Section 121.16, Revised Code, as to state employees provides:

"Forty hours shall be the standard work-week for all employees whose salary or wage is paid in whole or in part by the state. * * *"

"Entire time" and "full time", therefore, in my opinion must be interpreted in accordance with the usual and ordinary meanings of the language used and, specifically, that these provisions require service for such period as is "*normal or standard.*" What is "normal" or "standard" for the position of clerk to the board of county commissioners must necessarily depend on the particular fact situation involved. As stated earlier, physical possibility is normally a question of fact to be resolved by the appointing authority.

It is therefore my opinion and you are advised that the position of clerk of a board of county commissioners appointed pursuant to Section 305.13, Revised Code, is compatible with the position of member of a local board of education of the same county provided it is physically possible for an individual to act in both capacities.

Respectfully,

MARK MCELROY

Attorney General