

1249.

MUNICIPAL CORPORATION—CITY AUDITOR—WHEN OFFICE INCOMPATIBLE WITH OTHER OFFICES OR EMPLOYMENTS—IN NON-REGISTRATION CITY, CITY AUDITOR AND CLERK OF BOARD OF DEPUTY STATE SUPERVISORS OF ELECTION NOT INCOMPATIBLE—CANDIDATE CANNOT LEGALLY ACT AS CLERK OF BOARD OF DEPUTY STATE SUPERVISORS.

1. *The office of city auditor is incompatible with any and all offices or employments which receive or pay out funds of the city, or where such offices or employments make a certificate to the city auditor for the payment of claims, and the city auditor cannot fill a second position when the duties of such second position or office require the incumbent to account for, receive or expend moneys or funds of the city or to certify claims to the auditor for payment, except in those cases specifically provided by statute.*

2. *In a non-registration city, there being no incompatibility in the duties of the city auditor and clerk of the board of deputy state supervisors, a person holding the office of city auditor may also perform the duties of clerk of the board of deputy state supervisors of elections in the county in which such municipality is located, when such person is not a candidate for nomination or election.*

3. *Section 4967 G. C. makes the provisions of section 5092 G. C. applicable to primary elections and to candidates for nomination at such primary elections, and a candidate for nomination at a primary election or a candidate for election at the general election or a special election, cannot legally act as clerk of the board of deputy state supervisors at such election. If a candidate so serves, his nomination at such primary election, or his election at any general or special election, whether nominated by petition or otherwise, would be illegal and void if such person was a clerk in the employ of the deputy state supervisors of elections while a candidate.*

COLUMBUS, OHIO, May 14, 1920.

HON. LEWIS F. HALE, *Prosecuting Attorney, Bellefontaine, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your letter in which you request the opinion of this department on the question as to whether the office of city auditor and the office of clerk of the deputy state supervisors of elections are incompatible.

In reply to your request it will be presumed that you have in mind the case of a city auditor in a non-registration city, there being no registration cities located in your county and the duties of city auditor differing somewhat in non-registration cities and those cities having registration, at least as regards the conduct of elections.

Section 4284 reads in part as follows:

“At the end of each fiscal year, or oftener if required by council, the auditor shall examine and audit the accounts of all officers and departments. \* \* \* ”

Section 4285 G. C. reads in part:

“The auditor shall not allow the amount set aside for any appropria-

tion to be overdrawn, or the amount appropriated for one item of expense to be drawn upon for any other purpose, or unless sufficient funds shall actually be in the treasury to the credit of the fund upon which such voucher is drawn. \* \* \*

Section 4286 reads in part:

"On the first Monday of each month, detailed statements of the receipts and expenditures of the several officers and departments for the preceding month shall be made to the auditor by the heads thereof. \* \* \*

The above sections show the city auditor to be the fiscal officer of the city government, and it is apparent, therefore, if such city auditor could be the head of any of the other city departments, even though it is physically possible, he would thus be a check upon himself.

The rule of incompatibility in office is stated in the case of *State vs. Gebert*, 12 C. C. (n. s.) 275, in the following language:

"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 one person to discharge the duties of both."

This rule states two conditions of incompatibility, first, when one office is subordinate to or is in any way a check upon the other; second, when it is physically impossible for one person to discharge the duties of both offices.

Commenting upon the fact that the city auditor should not hold another city office, the attorney-general in an opinion appearing at page 750 of the Annual Report of the Attorney-General for 1910, used the following language:

"No person connected with any of the departments of the city government \* \* \* should serve as city auditor. The duties of the city auditor constitute checks upon the exercise of the powers of all the administrative officers and it would be against public policy for the same person to serve as city auditor and in connection with any of the administrative authorities of the municipal governments."

In opinion 621, appearing at page 351, Vol. 1, Report of the Attorney General for 1912, the following language appears:

"Therefore, the city auditor is a check upon every officer of the city who has charge of any accounts of the city, or who receives or pays out funds of the city, or who makes a certificate to the auditor for the payment of claims. The office of city auditor would be incompatible with any and all of such offices.

" \* \* \* the city auditor cannot also fill a position in the service of the city, when the duties of such other office require the incumbent to account for, receive or expend moneys or funds of the city, or to certify claims to the auditor for payment."

The office of clerk of the board of deputy state supervisors of elections is not a municipal office and therefore does not fall within any departments of the city government. The duties of the clerk of such board are largely ministerial in their

nature, he attending to the detail work of such board at the times throughout the year when such work is necessary. A different condition obtains in different counties of the state as regards the volume of work performed in the office of the board of deputy state supervisors of elections in the smaller counties and the board of deputy state supervisors and inspectors of elections in the larger counties.

Investigation will show that it is entirely physically possible for one to perform the duties of city auditor in a non-registration city and at the same time keep the minutes of the county board of elections and attend to the detail matters of such board in the lesser counties. An examination of the duties of the two positions under discussion indicates that in a non-registration city there is no point of contact in which either of the two positions of city auditor and clerk of the deputy state supervisors of elections would be subordinate to or a check upon the other, and this condition would obtain practically throughout the entire term of the city auditor in question, except for the provision which occurs in section 5092 G. C., which reads as follows:

"No person, being a candidate for an office to be filled at an election, other than for committeeman or delegate or alternate to any convention, shall serve as deputy state supervisor or clerk thereof, or as a judge or clerk of elections, in any precinct at such election. A person serving as deputy state supervisor or clerk thereof, judge or clerk of election contrary to this section shall be ineligible to any office to which he may be elected at such election."

An analysis of the above section shows that other elections than the November election necessarily were meant because of the reference to candidacies for committeemen, delegates and alternates to any convention, which places are always filled at a primary election and cannot be filled under existing law at any November election.

Attention is also invited to section 4967 G. C., which reads in part:

" \* \* \* All statutory provisions relating to general elections, including the requirement that part of such election day shall be a legal holiday, shall, so far as applicable, apply to and govern primary elections."

In holding that a candidate for nomination at a primary election cannot legally act as a deputy state supervisor of such election, in discussing the above section the attorney-general said:

"Section 4967, supra, makes the provisions for the governing of general elections applicable to primary elections. The board of deputy state supervisors has the same duties to perform in reference to a primary election that it has to perform at a general election. The same reasons that should prevent a candidate at a general election from acting as a deputy supervisor at such election, apply to primary elections and should prevent him from being both a candidate for nomination and a deputy supervisor.

"It is my opinion that section 4967, General Code, makes the provisions of section 5092, General Code, applicable to primary elections and to candidates for nomination at such primary election. In any event it would be against public policy to permit a candidate for nomination at a primary election to canvass the returns, make an official count, and certify to his own nomination.

"A candidate for nomination at a primary election cannot legally act as

deputy state supervisor at such election. If a candidate so serves his nomination at such primary election would be illegal and void."

(Opinion 220, Report of the Attorney-General, Vol 1, 1912, page 37.)

In the above opinion the conclusion arrived at by the attorney-general in 1912 was upon the simple question as to whether the member of the board of deputy state supervisors would be violating section 5092 G. C., heretofore quoted, but he could have included with equal force and for the same reasons the clerks connected with the board of deputy state supervisors and the judges and clerks in any precinct, because such persons are specifically mentioned along with the member of the deputy state supervisors in section 5092, which was being construed by the attorney-general at that time. That is to say, the prohibition which would lie against a member of the board of deputy state supervisors of elections in a county, as regards his being a candidate for nomination at a primary or a candidate for election at a special election or the November election, would apply with equal force to any and all of the persons occupying the positions in connection with the primary or the election, as enumerated in section 5092.

"A justice of the peace *who is not a candidate for election*, may hold the office of the clerk of the board of deputy state supervisors of elections."  
(Annual Report of the Attorney-General, 1909, page 684).

Should there be any incompatibility existing between the offices of city auditor in the non-registration city and the office of clerk of the board of deputy state supervisors of the county in which such city is situated, it would have to come within the sections of the statutes where such city auditor is required to certify certain papers or results to the board of deputy state supervisors of the county, as appears in section 5118, which reads as follows:

"In case of an election of the justice of the peace, the township clerk or *auditor of the municipality*, as the case may be, *shall certify* the result of such election *to the board of deputy state supervisors.*"

Attention is also invited to the operation of the initiative and referendum provisions of the statutes in municipalities, as covered by sections 4227-1 to 4227-13, all of which sections apply in cities of this state or in any municipality that has not adopted its own charter containing an initiative and referendum provision for its own ordinance and other legislative measures. (Section 4227-12.) Under the provisions of the sections indicated, it is found that in section 4227-1 a petition signed by ten per cent of the electors of such municipal corporation may initiate a proposed new ordinance or measure. This initiative petition is to be filed with the city auditor and by him certified to the board of deputy state supervisors of elections of the county wherein such municipality is located. The section then says that "said board shall submit such proposed ordinance or measure for the approval or rejection of the electors," etc. Here it will be noted it is the board of deputy state supervisors and not any of its ministerial employees who is to submit such proposed ordinance. Again, in section 4227-2 ten per cent of the electors of any municipal corporation may file with the city auditor of such municipal corporation a referendum petition asking for a vote upon any certain ordinance or other measure and the city auditor shall certify the petition to the board of deputy state supervisors of elections of the county and said board shall cause to be submitted to the electors of such municipal corporation such ordinance or measure, as named in

the referendum petition. Similarly under the provisions of section 4225-5 petitioners may bring about a special election in the municipality on initiative or referendum petitions where twenty per cent of the electors file such petition, and in this case such petition shall be filed with the city auditor who shall certify the same to the board of deputy state supervisors of elections in the manner mentioned herein. In these cases the board of deputy state supervisors of the county receives the petition from the city auditor of the municipality located in the county and then the board of deputy state supervisors of elections acts upon such petition in arranging for its submission to the electors of the municipality. No person, except the members of the election board, has any voice in the matter of submitting the question to the electors of the municipality. The clerk of such board occupies a mere ministerial position in transcribing into the minutes the mandates of the board itself, and such clerk has no leeway or discretion on the question of submitting such petition. In fact, his views might be adverse to the board of elections, but the action of the board would govern and the clerk would be merely carrying out the orders of the board in arranging for the submission of the question. Since the petitions certified by the auditor are certified to the board of deputy state supervisors of elections, which consists of four citizens, two from each leading political party, and does not certify such petition to the clerk of the board of deputy state supervisors of elections, it would appear that no incompatibility exists in this particular instance where the city auditor makes his certification to a county board, under which county board the said city auditor might have a mere ministerial position.

It would thus appear that in a non-registration city there is no incompatibility between the duties of the two positions mentioned. Under certain circumstances and at some particular time when the person occupies both the position of clerk of the board of deputy state supervisors of elections and that of city auditor, a candidate for re-nomination or re-election for city auditor, or nomination or election to another office, would be ineligible under section 5092 G. C., supra to any nomination made at such nominating primary election, as well as being ineligible to any office to which he may be elected at any general or special election, whether nominated in a primary or by petition, if such person was the clerk in the employ of the deputy state supervisors of elections while a candidate for nomination or election. But where the person holding both employments is not a candidate, he can hold both at one and the same time.

From the above discussion, based upon the question submitted, it is therefore the opinion of this department that:

1. The office of city auditor is incompatible with any and all offices or employments which receive or pay out funds of the city, or where such offices or employments make a certificate to the city auditor for the payment of claims, and the city auditor cannot fill a second position when the duties of such second position or office require the incumbent to account for, receive or expend moneys or funds of the city or to certify claims to the auditor for payment, except in those cases specifically provided by statute.

2. In a non-registration city, there being no incompatibility in the duties of the city auditor and clerk of the board of deputy state supervisors, a person holding the office of city auditor may also perform the duties of clerk of the board of deputy state supervisors of elections in the county in which such municipality is located, when such person is not a candidate for nomination or election.

3. Section 4967 G. C. makes the provisions of section 5092 G. C. applicable to primary elections and to candidates for nomination at such primary election, and a candidate for nomination at a primary election or a candidate for election at the general election or a special election, cannot legally act as clerk of the

board of deputy state supervisors at such election. If a candidate so serves, his nomination at such primary election, or his election at any general or special election, whether nominated by petition or otherwise, would be illegal and void if such person was a clerk in the employ of the deputy state supervisors of elections while a candidate.

Respectfully,  
 JOHN G. PRICE,  
*Attorney-General.*

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1250.

APPROVAL, RESOLUTIONS FOR SALE OF CERTAIN ABANDONED OHIO CANAL LANDS IN FRANKLIN TOWNSHIP, ROSS COUNTY, FOR SUM OF \$200.

COLUMBUS, OHIO, May 18, 1920.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your letter of May 15th, transmitting in duplicate, resolutions providing for the sale of certain abandoned Ohio canal lands in Franklin township, Ross county, to James F. Blaine, of Chillicothe, Ohio, at private sale, for the sum of \$200.

I note that the land in question has been appraised by you at \$200, and upon examination I find the proceedings as set out in the resolutions to be correct and in accordance with law, and I am therefore returning said duplicate resolutions with my approval endorsed thereon.

Respectfully,  
 JOHN G. PRICE,  
*Attorney-General.*

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1251.

APPROVAL, LEASE TO THE JOSLIN-SCHMIDT COMPANY OF CINCINNATI, OHIO, FOR EIGHT-INCH PIPE IN MIAMI AND ERIE CANAL, ST. BERNARD, OHIO.

COLUMBUS, OHIO, May 18, 1920.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—I have your letter of May 15, 1920, in which you enclose the following lease, in triplicate, for my approval:

*Annual Rental.*

To The Joslin-Schmidt Company of Cincinnati, Ohio, for an  
 eight-inch pipe in the Miami and Erie canal at St. Bernard,  
 Ohio -----\$1536.00

I have carefully examined said lease, find it correct in form and legal, and am therefore returning the same with my approval endorsed thereon.

Respectfully,  
 JOHN G. PRICE,  
*Attorney-General.*