

Note from the Attorney General's Office:

1931 Op. Att'y Gen. No. 31-3513 was questioned by
1999 Op. Att'y Gen. No. 99-046.

3512.

APPROVAL, LEASE TO LAND IN CARLISLE TOWNSHIP, LORAIN COUNTY, OHIO, FOR GAME REFUGE PURPOSES.

COLUMBUS, OHIO, August 18, 1931.

HON. JOHN W. THOMPSON, *Commissioner, Division of Conservation, Columbus, Ohio.*

DEAR SIR:—You have submitted Lease wherein the Sisters of Charity of St. Augustine, Inc. grant two hundred and fifty seven acres of land, situated in the township of Carlisle, county of Lorain to the State of Ohio for state game refuge purposes. Said lease is for a term of five years.

Finding said lease executed in proper legal form, I have accordingly endorsed my approval thereon, and return the same herewith.

Respectfully,

GILBERT BETTMAN,
Attorney General.

3513.

OFFICES INCOMPATIBLE—CLERK OF COUNTY COMMISSIONERS AND BOOKKEEPER OF COUNTY MEMORIAL HOSPITAL.

SYLLABUS:

The clerk of the board of Lake County Commissioners appointed under the resolution of the county commissioners, by virtue of authority of section 2409, General Code, may not act as bookkeeper at the Lake County Memorial Hospital while serving as clerk.

COLUMBUS, OHIO, August 20, 1931.

HON. J. FRANK POLLOCK, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—Your recent communication reads as follows:

“Under the provisions of Section 2409 of the General Code, the County Commissioners some years ago passed a resolution that it was necessary for the Clerk of the Board of County Commissioners to devote his entire time to the discharge of the duties of that office, and following this resolution appointed a clerk to devote his entire time to the office. It now seem desirable to have him act as bookkeeper for the Lake County Memorial Hospital, which is a county institution. May the same person hold both positions, if it is possible to properly discharge the duties of both offices?”

Section 2409, General Code, to which you refer in your communication, provides as follows:

“If such board finds it necessary for the clerk to devote his entire time to the discharge of the duties of such position, it may appoint a clerk in place of the county auditor and such necessary assistants to such clerk as the board deems necessary. Such clerk shall perform the duties required by law and by the board.”

Under the provisions of the above statute, the county commissioners are only permitted to appoint a clerk of the board when it is necessary for the person who is to discharge the duties of said clerk to devote his entire time to the discharge of the duties of such position. The language of the said statute clearly prevents the clerk from holding any other public office or position at the same time. This construction was given to the above section in an opinion of the Attorney General reported in the Annual Report of the Attorney General for 1913, Vol. II, page 1096. The syllabus of that opinion held:

"Section 2409, General Code, authorizes the commissioners to appoint a clerk in place of the county auditor, only when it is necessary for such clerk to devote his entire time to the discharge of the duties of such position. As this is the only authority empowering the commissioners to appoint a clerk and as such clerk is obliged thereby to devote his entire time to the duties of such position, he may not at the same time act as deputy county auditor."

In the foregoing opinion, the facts show that one of the deputies in the county auditor's office was appointed clerk of the board of county commissioners, and the question arose as to whether said clerk could still act as a deputy auditor, even though he might accept no compensation in such capacity as deputy auditor. It was held that he could no longer act as deputy auditor.

In the last paragraph of the opinion, the then Attorney General used the following language:

"In direct answer to your question, therefore, the only authority permitting county commissioners to appoint a clerk, is section 2409, General Code, and this section authorizes the appointment of such clerk only when it is necessary for the clerk to devote his entire time to the discharge of his duties as such clerk; and under the terms of this statute, when such appointment is made, the clerk must serve in place of the county auditor. *Inasmuch as the clerk is obliged to devote his entire time to the duties of such position, he cannot in contemplation of this statute, also serve as deputy county auditor.*"

(Italics the writer's.)

You state in your communication that it is desired that the clerk perform the duties of bookkeeper at the Lake County Memorial Hospital. From the fact that you say it is a county institution, I assume that said hospital is a general county hospital established under sections 3127, et seq., General Code. Section 3137, General Code, provides for the organization of a board of trustees for such a hospital and reads in part as follows:

"* * * Such board shall employ a superintendent, and, upon the nomination by such superintendent, shall confirm the employment of such physicians, nurses *and other employes as may be necessary* for the proper care, control and management of such hospital and its inmates; and shall fix their respective salaries and compensation * * *"

(Italics mine.)

Under provisions of the above statute, it is obvious that, if it is necessary to have a bookkeeper for the hospital, it is the duty of the board of trustees of the hospital, on nomination by the superintendent, to employ one and fix his compensation.

It is clear that the clerk of the board of county commissioners could not act as bookkeeper of the Lake County Memorial Hospital as part of his duties as clerk of the board of county commissioners, because section 2409, *supra*, states in the last sentence that "such clerk shall perform the duties required by law and by the board." The duties required by law are those clerical duties set out in General Code, Section 2406. See *State, ex rel., Spira, vs. Commissioners*, 32 O. A. R. 382, 386. Nowhere in this statute is it stated that the clerk of the county commissioners shall perform bookkeeping duties for the county hospital or for any other institution, for that matter. It is true that the clerk is also to perform duties required "by the board". However, the duties that the board may impose on the clerk are only those which relate to matters coming under the jurisdiction of the board. See *State, ex rel. Landis, vs. Commissioners*, 95 O. S. 157, 161. With respect to this matter the court in the *Spira* case, *supra*, also stated at page 387:

"It is undoubtedly the duty of the court to give full effect to every word of the statute. The meaning of the words 'by the board,' in defining the duties of a clerk, is obvious and plain, leaving no room for ambiguity or doubt. In order to give full effect to the language used in Section 2409, we are led to the conclusion that the words, 'such clerk shall perform the duties required * * * by the board,' were inserted intentionally for the reason that the Legislature felt that, in view of the many responsibilities and the varied and divers duties which are imposed on the board of county commissioners, it would be conducive to more efficient administration if the county commissioners are empowered to add to the duties imposed upon the clerk and his assistants by law, and thus assist the commissioners to more efficiently perform their duties."

Since, as the 1913 opinion held, it is necessary for the clerk to devote his entire time to the duties of such position, he cannot in contemplation of section 2409, General Code, serve as bookkeeper for the Lake County Memorial Hospital.

This conclusion is fortified by the case of *Spier vs. Peck*, 36 California App. 4, 171 Pacific Reporter 115. In that case, the facts show that a county probation officer had also acted as superintendent of the county detention home. Section 18 of the Juvenile Court Act of that state had provided that "All probation officers receiving a salary of seventy-five dollars or more per month shall devote their entire time and attention to the duties of their offices, and no such probation officer, while holding such office and receiving salary therefor, shall be a candidate for or seek nomination for any other public office or employment." The question arose as to whether the probation officer could hold the two positions and receive two salaries. The court held in the negative, as disclosed by the third paragraph of the syllabus, as follows:

"Section 18 of the Juvenile Court Act. (Stats. 1915, p. 1225), providing, among other things, that all probation officers receiving a salary of seventy-five dollars or more per month shall devote their entire time and attention to the duties of their offices, and no such probation officer while holding such office and receiving salary therefor shall be a candidate or seek the nomination for any other public office or employment, disqualifies a probation officer from being superintendent of the detention home and drawing the salary annexed to that position."

While it is true that the California statute in addition to stating that the probation officers shall "devote their entire time and attention to the duties of their

offices", also stated that no probation officer while holding such office shall "be a candidate or seek the nomination for any other public office or employment", the court in its opinion stated that the latter requirement was in aid of the former requirement, and strongly intimated that even without the latter requirement in the statute, a probation officer could not hold the position of superintendent of the detention home at the same time. The court said at page 9:

"In the present case we have a potent index to the legislative intent in using the words "be a candidate" and "seek the nomination," in the very language of section 18 of the Juvenile Court Act. In the same sentence in which these words are found, and preceding them, it is declared that probation officers "shall devote their entire time and attention to the duties of their offices." It is, therefore, manifestly in aid of this provision that probation officers shall not be candidates nor seek nominations for other offices or employments. But this plain legislative intent will be frustrated and the provision be reduced to an absurdity if the language employed is to receive a literal construction. The time to be expended by a probation officer in seeking or being a candidate for another office or employment would ordinarily be inconsiderable when contrasted with the time expended by him in occupying and discharging the duties of the new office or employment, if his seeking, or his candidacy, were successful. Moreover, a literal construction would serve to disqualify a probation officer who sought another office or employment successfully, but would not disqualify one who procured and occupied another post without actually or technically seeking it. We are convinced that the legislature did not intend such an anomaly to arise through the application of the provision now under examination. When probation officers were commanded not to seek other places, they were disqualified from occupying such places."

In view of the foregoing, I am of the opinion that the clerk of the board of county commissioners appointed under the resolution of the county commissioners by virtue of authority of section 2409, General Code, may not act as bookkeeper at the Lake County Memorial Hospital while acting as clerk.

Respectfully,
GILBERT BETTMAN,
Attorney General.

3514.

APPROVAL, DEED TO LAND IN GNADENHUTTEN, TUSCARAWAS COUNTY, OHIO.

COLUMBUS, OHIO, August 20, 1931.

The Ohio State Archaeological and Historical Society, Columbus, Ohio.

DEAR SIR:—This is to acknowledge the receipt of your communication to me under date of August 18, 1931, with which you enclose for my examination and approval a certain deed executed by The Gnadenhutzen Monument and Cemetery Association and by the directors thereof, to the State of Ohio by which there is conveyed to the State the following described property in Gnadenhutzen, Tuscarawas County, Ohio: