

3430.

APPROVAL, AGREEMENT FOR ELIMINATION OF GRADE CROSSING  
IN THE VILLAGE OF DELTA, FULTON COUNTY, OHIO.

COLUMBUS, OHIO, July 15, 1931.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

3431.

APPROVAL, AGREEMENT FOR ELIMINATION OF GRADE CROSSING  
IN BLAINE, BELMONT COUNTY, OHIO.

COLUMBUS, OHIO, July 15, 1931.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

3432.

OFFICES COMPATIBLE—PROBATION OFFICER OF COMMON PLEAS  
COURT AND COUNTY ATTENDANCE OFFICER.

## SYLLABUS:

*In the event it is physically possible, the positions of probation officer of the court of common pleas and county attendance officer may be concurrently held; and the person so holding may receive compensation for both positions from appropriate funds.*

COLUMBUS, OHIO, July 16, 1931.

HON. MARION F. GRAVEN, *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication which reads:

“The county board of education requests an opinion of the Attorney General on whether the positions of probation officer under the common pleas court and the county attendance officer may be held by one and the same person at the same time and whether he can legally draw two compensations, that is one for acting as probation officer and a separate salary as county attendance officer.

“In this connection reference is made in Section 7769-1 of the General Code. The Attorney General in 1922, page 947, Opinion No. 3741, ruled that the position of deputy sheriff and county attendance officer may not be held by one and the same person at the same time, and also that the position of court constable and position of county attendance officer cannot be held by one and the same person at the same time.

“The question in this case arises because the attendance officer for

the county school board is also probation officer for the common pleas court and is drawing a salary from both positions.

"The probate judge in this county is the judge of the juvenile court and his probation officer is not involved in this case. I merely mention this because of reference made to the probation officer of the juvenile court in Section 7769-1.

"It is desired to know whether or not Section 7769-1 and the opinion of the Attorney General already referred to also apply to the probation officer of the common pleas court, and if it be determined that the probation officer can act as attendance officer whether or not he can receive compensation from both positions."

The two positions of probation officer of the common pleas court and county attendance officer are entirely independent of each other. The appointment to each, the fixing of the compensation for each, and the manner of paying that compensation are regulated by different statutes.

The probation officer of the court of common pleas is appointed by said court (Section 1554-1, General Code) while the county attendance officer is appointed by the county board of education (Section 7769-1, General Code).

In an opinion found in the Opinions of the Attorney General, 1921, page 961, it was held as disclosed by the syllabus:

"A probation officer designated under section 7769-1 G. C. as a county attendance officer, cannot legally draw two compensations, that is, one for acting as probation officer and a separate salary as county attendance officer, for the reason that section 7769-1 does not provide a salary for the county attendance officer where such county attendance officer is also a probation officer of the juvenile court. Where a probation officer is designated as county attendance officer, only his expenses as attendance officer is to be paid from the county board of education fund, which is disbursed by the county board of education."

From the foregoing it would appear that while the positions of probation officer of the juvenile court and county attendance officer are compatible, no compensation other than expenses could be paid such attendance officer from the county board of education funds. Section 7769-1, General Code, after the rendition of the opinion, was amended to read:

"Every county board of education shall employ a county attendance officer, and may employ or appoint such assistants as the board may deem advisable. The compensation and necessary traveling expenses of such attendance officer and assistants shall be paid out of the county board of education fund. With the consent and approval of the judge of the juvenile court, a probation officer of the court may be designated as the county attendance officer or as an assistant. The compensation of the probation officers of the juvenile court so designated shall be fixed and paid in the same manner as salaries of other probation officers of the juvenile court; their traveling expenses as attendance officers which would not be incurred as probation officers shall be paid out of the county board of education fund. *In addition to the compensation herein provided the county board of education may pay such additional compensation as it may deem advisable, to any probation officer designated as attendance officer and such additional amount shall be paid from the county board of*

*education fund.* The county attendance officer and assistants shall work under the direction of the county superintendent of schools. The authority of such attendance officer shall extend to all the village and rural school districts which form the county school district. But this section shall not be interpreted to confine their authority to investigate employment of that within the county school district."

(Italicised matter interposed by amendment.)

The objection to the probation officer of the juvenile court receiving compensation as county attendance officer arose from the language of the statute before amendment and was peculiar to the probation officer of such court (1921 Opinion of the Attorney General above cited) and so need not be here considered.

Section 1554-1, General Code, reads as follows:

"The judge of the court of common pleas of a county, or the judges of such court in joint session, if they deem advisable, may with concurrence of the board of county commissioners establish a county department of probation. The establishment of such department shall be entered upon the journal of said court and the clerk thereof shall thereupon certify a copy of such order to each elective officer and board of the county.

"Such department shall consist of a chief probation officer, and such number of other probation officers and employes, clerks and stenographers, as may be fixed from time to time by the judge or judges. The judge or judges of the common pleas court shall appoint to positions within the department, fix the salaries of appointees within the amount appropriated therefor by the board of county commissioners and supervise their work; provided that no person shall be appointed as probation officer who does not possess such training, experience and other qualifications as may be prescribed by the department of public welfare of the state. All positions within such department shall be in the classified service of the civil service of the county.

"Probation officers shall, in addition to their respective salaries, receive their necessary and reasonable traveling and other expenses incurred in the performance of their duties. Such salaries and expenses shall be paid monthly from the county treasury in the manner provided by law for the payment of the compensation of other appointees of the judge or judges of the common pleas court."

It is to be noted that a probation officer may or may not be within the provisions of the civil service act. The first branch of the syllabus of an opinion found in the Opinions of the Attorney General, 1927, at page 462, reads:

"A chief probation officer appointed by the juvenile court under the provisions of Section 1662, General Code, is within the unclassified or classified service depending upon whether he is selected as one of the exemptions of the court under favor of sub-section 8 of Section 486-8a, General Code."

It should be noted that an employe of a county board of education, such as a county attendance officer, does not fall within the classified service of the county.

In an opinion found in Opinions of the Attorney General, 1922, at page 947, the then Attorney General, in holding the positions of deputy sheriff or court con-

stable incompatible with that of county attendance officer, after setting forth the statutes concerning the duties of the county attendance officer, stated:

"It is significant to note that in section 7769-1 G. C., supra, this privilege of designating one of these county employes to be a county attendance officer or assistant was limited solely to 'a probation officer of the court' and then the consent and approval of the judge of the juvenile court was necessary. From this it can well be inferred that if a deputy sheriff or a court constable was eligible to this appointment, the General Assembly would more than likely have said so instead of limiting the eligibility to probation officers and omitting any mention of other minor county officers."

I cannot agree with the inference contained in the above language that a probation officer other than that of the juvenile court may not concurrently hold the position of county attendance officer.

I believe that the reason for the insertion of the language in Section 7769-1, General Code, relative to the compensation of a probation officer of a juvenile court when appointed county attendance officer was for the purpose of dispelling any doubt which might arise as to payment for possible concurrent duties arising from the holding of both positions by the same person, viz: it might well be that the probation officer of the juvenile court would have the duty as such officer to see that a juvenile under his charge attend school, and the county attendance officer at the same time would be under the same duty in his capacity as attendance officer.

This conclusion is strengthened by a consideration of the language of the 1921 opinion above referred to, construing Section 7769-1, General Code, before amendment, which required that the salary of the probation officer of the juvenile court, if designated by the county board of education as county attendance officer, be paid from the same fund in the county treasury as his salary as probation officer and not from school funds.

The provision of Section 7769-1 confers a broad power of appointment upon the county board of education, viz:

"Every county board of education shall employ a county attendance officer, and may employ or appoint such assistants as the board may deem advisable. \* \* \*"

As stated in Lewis' Sutherland Statutory Construction, at page 672:

"The exception of the particular thing from the operation of the general words of the statute shows that in the opinion of the law makers the thing excepted would be within the general words had not the exception been made."

To hold that the prohibition of the payment of the county attendance officer's salary, when such officer is also the probation officer of the juvenile court, from school funds, bars any other county officer or employe from holding such office is directly antagonistic to the above principle.

Section 1663-1, General Code, which was enacted after Sections 7769-1 and 1554-1, reads:

"When a county department of probation has been established in the

county and the judge designated to exercise juvenile jurisdiction therein does not appoint a salaried probation officer, all powers and duties of the probation officer or officers provided for in this chapter shall vest in and be imposed upon such county department of probation."

It should be noted that if it were held that the probation officer of the common pleas court could not hold the office of county attendance officer, then Section 1663-1, *supra*, would be inoperative in so far as the probation officer of the court of common pleas could be appointed county attendance officer.

The 1922 opinion stressed the possible conflict which would occur if the person holding the office of deputy sheriff would be required to perform duties around the court and at the same time be a complainant in a case. The principle of no man being able to serve two masters would not, in the instant situation, apply to such a degree as to prohibit the appointment of the probation officer of a court of common pleas as a county attendance officer, if such employment is in other respects permissible.

I am not unmindful of the fact that Section 486-23, General Code, contains an inhibition against political activity on the part of a person within the classified service other than to vote as he pleases and express freely his political opinions. I do not believe that performing the duties of a county attendance officer is taking part in politics in its more restricted sense for the reason that a county attendance officer is not, precisely speaking, an executive officer in so far as the administration of the county or its schools is concerned since he does not exercise administrative and discretionary functions in the government of such subdivision. Nor can it be said that such a position is one through which policies and principles of party government may be achieved.

In order to determine compatibility of these two positions it is necessary to apply the rule as stated in the case of *State ex rel. v. Gebert*, 12 O. C. C. (n. s.) 274, that

"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."

An examination of the statutes pertaining to such appointments discloses no legislative inhibition against such dual employment, and neither is either of such positions a check upon the other. The question as to whether or not it is physically possible for one person to perform the duties of both positions concurrently is a question of fact to be determined in each particular case.

In view of the foregoing, I believe that the positions of probation officer of a court of common pleas and a county attendance officer are compatible.

Coming now to a consideration of the legality of the payment of the compensation of both offices to the same person, we read in 22 R. C. L., 535, which states the general rule applicable to situations of this kind, that:

"In the absence of express or implied statutory provisions to the contrary, an officer who holds two or more separate and distinct offices not incompatible with each other, to each of which a compensation is attached, may recover the compensation provided by law for each office. In the eyes of the law the same individual is two distinct officers and for this reason entitled to the compensation incident to each office."

See also *State ex rel. v. Lewis*, 10 O. D., 537; *State ex rel. v. Coughlin*, 18

O. D., 289; 1921 *Opinions of the Attorney General*, 317; 1927 *Opinions of the Attorney General*, 1175; and *U. S. v. Saunders*, 120 U. S., 126.

In view of the foregoing, I am of the opinion that in the event it is physically possible, the positions of probation officer of the court of common pleas and county attendance officer may be concurrently held by the same person; and the person so holding may receive compensation for both positions from appropriate funds.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

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3433.

APPROVAL, PETITION FOR AMENDMENT OF ARTICLE XVI OF THE  
CONSTITUTION OF OHIO.

COLUMBUS, OHIO, July 16, 1931.

CHARLES H. HUBBELL, ESQ., *Attorney at Law, Engineers Bldg., Cleveland, Ohio.*

DEAR SIR:—You have submitted to me a written petition signed by more than 100 qualified electors of the State, containing a proposed constitutional amendment and a synopsis thereof, for my examination under the provisions of Section 4785-176, General Code.

It is proposed to amend Article XVI of the Constitution of the State of Ohio by adding thereto Section 4, which section shall read as follows:

“Any one or more of the proposed amendments or laws to which reference is made in this section may contain provisions regarding the extension of the terms of office of elective or appointive state, county, municipal, school and/or other officers and/or provisions regarding any other related or unrelated subject matter or subject matters.

If there shall be two or more such proposed amendments and/or laws, any one or more of them may contain provisions either related or unrelated to the subject matter or subject matters contained in the other such proposed amendment or amendments and/or law or laws.

At each state-wide primary election and at each November election, whether in an even numbered year or in an odd numbered year, subsequent to the date this amendment goes into effect, there shall be submitted to the electors of the state, for their approval or rejection, any number of amendments to this constitution and/or any number of laws which, on or within ten days before the ninetieth day prior to the date of such primary or such November election, shall be proposed and filed with the secretary of state by any elector of this state who, if such amendment or amendments and/or law or laws shall be proposed and filed prior to the year one thousand nine hundred and thirty seven, shall have been a candidate for the office of judge of the supreme court at the November election held in the year one thousand nine hundred and thirty, and a candidate for any office mentioned in the group hereinafter named at each state-wide primary election for any such office and at each November election for any such office held in even numbered years subsequent to