Note from the Attorney General's Office:

1930 Op. Att'y Gen. No. 30-2603 was overruled in part by 1992 Op. Att'y Gen. No. 92-013.

2600.

APPROVAL, BONDS OF THE VILLAGE OF WEST CARROLLTON, MONTGOMERY COUNTY, OHIO—$48,310.00.

COLUMBUS, OHIO, November 28, 1930.

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

2601.

APPROVAL, BONDS OF CITY OF IRONTON, LAWRENCE COUNTY, OHIO—$7,697.34.

COLUMBUS, OHIO, November 28, 1930.

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

2602.

APPROVAL, BONDS OF WASHINGTON TOWNSHIP RURAL SCHOOL DISTRICT, JACKSON COUNTY, OHIO—$1,140.00.

COLUMBUS, OHIO, November 28, 1930.

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

2603.

GENERAL HEALTH DISTRICT BOARD—RESIDENCE IN DISTRICT REQUIRED OF MEMBER THEREOF—MEMBERSHIP INCOMPATIBLE WITH OFFICE OF TOWNSHIP TRUSTEE.

SYLLABUS:

1. *The offices of township trustee and member of the board of a general health district are incompatible.*

2. *A member of a general health district board must reside within the boundaries of said district.*

COLUMBUS, OHIO, November 28, 1930.

HON. JAMES M. AUNGST, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—Acknowledgment is made of your recent communication, which reads:

"1. Three members of the Stark County District Board of Health are also township trustees. They are not chairmen of their board of trustees but have been duly elected, qualified, and are serving as trustees in their respective townships. Are these offices not incompatible?

2. One of the members of the Stark County District Board of Health is a legal resident of the city of Alliance and votes in Precinct 'D' of the first ward of that city. Section 1261-17 specifies that members of the board of health must be residents of the district. The city of Alliance is not in the general health district of Stark County. Can this man who resides out of the district serve as a member of the Stark County Board?"

After an examination of the provisions of the General Code in connection with your questions, I find that there is no statute which specifically precludes a person from holding simultaneously, the offices of health board member and township trustee. However, it becomes necessary to see whether said offices are incompatible, by reason of the common law.

The test of incompatibility of offices at common law is set forth concisely in 46 Corpus Juris, pages 941 and 942, as follows:

"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 two offices are inconsistent, they are regarded as incompatible."

In view of the above common law rule it is now necessary that the statutes be considered to ascertain if the duties and functions of said offices are in any way inconsistent.

Under the terms of Section 1261-40, General Code, the board of health of a general health district must file with the county auditor, by the first Monday in April of each year, an itemized estimate of amounts necessary for current expenses for the fiscal year beginning on January the first of the following year. This estimate is then submitted by the county auditor to the county budget commission, which may reduce but not increase any item. It is finally returned to the auditor who apportions the expenses among the villages and townships in the county, on the basis of taxable valuations.

Under the provisions of the new budget law, passed in 1927 and amended in part, in 1929 (Sections 5625-1, et seq.), a general health district is a district authority, receiving its funds from two subdivisions. See G. C. 5625-1 (j). Section 5625-5, General Code, makes provision for a general levy for current expenses to be made by the taxing authority of each subdivision yearly. By force of Section 5625-1(c), General Code, the township trustees are the taxing authority of a township. Furthermore said Section 5625-5 provides in part that "Without prejudice to the generality of the authority to levy a general tax for any current expense, such general levy shall include the amounts certified to be necessary * * * for boards and commissioners of health * * * . "

Obviously the township trustees are required to include the township's share of the general health district expenses in the general levy, and this amount is the amount apportioned by the county auditor under Section 1261-40, General Code.

Therefore it is apparent that if a township trustee were also a member of the board of a general health district, he would have to prepare budget items to submit to the county auditor and budget commission, and then later include portions of the amount of said items in the general levy for current expenses of his township. There might be a tendency for said township trustee acting as health board member to

make the amount of the request for funds less than they ordinarily should be, so that his township would not have to have apportioned to it as large an amount to levy for health district expenses.

It is clear from the foregoing, that the interests of the township and the general health district will be conflicting in that the amount of funds made available to the one subdivision will often be dependent in a measure upon the amount made available to the other. It would follow that one serving in both capacities might be influenced in his judgment as to the needs of the one subdivision by the consideration of the needs of the other.

This is further illustrated by a consideration of the provisions of Section 1261-41, General Code. The pertinent portion of said section reads:

> "In case of epidemic or threatened epidemic or during the unusual prevalence of a dangerous communicable disease, if the moneys in the district health fund of a general health district are not sufficient, in the judgment of the board of health of such district, to defray the expenses necessary to prevent the spread of such disease, such board of health shall estimate the amount required for such purpose and apportion it among the townships and municipalities in which the condition herein described exists, on the basis provided for in Section 25 (1261-40) of this act. * * * "

From the provisions of the above statute, it is obvious that in cases of epidemic, the general health district board must apportion the expenses necessary to prevent such epidemic among the townships and villages in such district, if the district health fund is depleted. As was pointed out in the preceding paragraphs, there might be a tendency for the township trustee member of the health district board to see that a lesser amount than what would be reasonable, is apportioned to his township.

In an early English case, *Rex.* vs. *Tizzard,* 9 B. & C. 418, Judge Bailey in speaking of incompatibility of offices uses this language:

> "I think that the two offices are incompatible when the holder cannot in every instance discharge the duty of each."

Consequently, I am of the opinion that the offices of township trustee and member of a board of health of a general health district are incompatible.

Coming now to your second question, it is to be noted that Article XV, Section 4 of the Ohio Constitution provides that "No person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector." The qualifications of an elector, referred to in said constitutional provision, are set forth in Section 1 of Article V of the Ohio Constitution, as well as Sections 4785-29, et seq., of the General Code. However, it is to be observed that Article XV, Section 4 of the Ohio Constitution does not provide that the person appointed to any office shall be an elector of the particular district for which he is appointed. There are sections of the Ohio General Code, enacted by the legislature, which provide that it shall be necessary for the incumbent of an office to reside in the district in which he serves. For instance, Section 4666, General Code, provides that each officer of a municipality shall be an elector within the corporation. Therefore, the particular statutes with respect to an office must be closely examined to see if the legislature has expressly or impliedly provided that the incumbent of an office must be a resident of his district in order to continue to hold office.

Sections 1261-16, et seq., provide for general health districts. You state in your communication that Section 1261-17, General Code, expressly provides that members of the board of health of a general health district must be residents of the dis-

trict. While I do not find that such section makes such an express provision, there is some implication to that effect. Said section reads as follows:

> "In each general health district, except in a district formed by the union of a general health district and a city health district, there shall be a district board of health consisting of five members to be appointed as hereinafter provided and as provided in Section 4406 of the General Code. The members of the board of health of a general health district shall receive no compensation for their services but shall be reimbursed for all necessary and lawful expenses incurred in attending meetings of the board. A vacancy in the membership of the board of health of a general health district shall be filled in like manner as an original appointment and shall be for the unexpired term. Provided, that when a vacancy shall occur more than ninety days prior to the annual meeting of the district advisory council the remaining members of the district board of health may select a resident of the district to fill such vacancy until such meeting. A majority of the members of the district board of health shall constitute a quorum."

It appears that the legislature provided by the foregoing statute that when there is a vacancy occurring more than ninety days prior to an annual meeting of the district advisory council, a resident of the district can only be appointed. However, such statute does not state that an originally appointed member must reside within the district.

On the other hand, Section 1261-18, General Code, provides that the district advisory council "shall appoint a district board of health as hereinbefore provided, *having due regard to the equal representation of all parts of the district.*" There is here an inference that a member of the general health district board should be a resident of the district, inasmuch as the statute seems to require district representation.

The implication in the foregoing statutes is fortified by a consideration of another section of the health board statutes. I refer to Section 1261-40a in Page's Ohio General Code, which is Section 2 of the act of the legislature passed on December 18, 1919 (108 O. L., Pt. 2, pgs. 1085-1093). This section, although it is not included in Throckmorton's Ohio General Code, has not been repealed. It appears that Sections 1261-16, et seq., were first passed on April 17, 1919 (108 O. L. Pt. 1, pgs. 236-251). Many of these statutes were revised in the same session of the legislature by an act passed on December 18, 1919, mentioned above. The original act had provided in Section 1261-16, that cities having over twenty-five thousand population should be municipal health districts, and that all other cities, villages and township territory in the county should be a general health district. Section 1261-18, provided that boards of health should be appointed in general health districts within sixty days after the act should take effect. Boards of health were appointed under this authority. When these sections were revised in part on December 18, 1919, Section 1261-16, was amended to provide that all cities would constitute a city health district and all villages and township territory within a county would constitute a general health district. Since boards had been appointed under the provisions of the act as originally enacted, Section 2 of the act was passed to make provision for their continuation. Said Section 2 (Section 1261-40a of Page's Ohio General Code) provides in part:

> " * * * Vacancies in boards of health in general health districts caused by *non-residence* shall be filled as provided by this act for other vacancies. * * * " .

In other words, the legislature clearly indicated that non-residence of a member of the general health district board, would create a vacancy.

Therefore, in specific answer to your second question, I am of the opinion that the member of the Stark County District Board of Health who resides in the city of Alliance has vacated his office by not residing within the confines of the Stark County General Health District.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2604.

MARATHON DANCE—WHEN IT MAY BE CONSIDERED A PUBLIC DANCE.

SYLLABUS:

Whether or not a marathon dance is a public dance or like entertainment within the meaning of Section 13393, *General Code, is a question of fact to be determined in each case.*

COLUMBUS, OHIO, November 28, 1930.

HON. ALFRED DONITHEN, *Prosecuting Attorney, Marion, Ohio.*

DEAR SIR:—This will acknowledge the receipt of your request for my opinion on the following question:

> "Will you please give me an opinion as to whether or not the Marathon Dance is within the scope of Section 13393, or is it rather a public entertainment, having no relation to this section?"

Section 13393, General Code, which you mentioned in your letter, reads as follows:

> "No person shall give a public dance, roller skating or like entertainment in a city, village or township without having previously obtained a permit from the mayor of such city or village if such public dance, roller skating or like entertainment is given within the limits of a municipal corporation, or from the probate judge if such public dance, roller skating or like entertainment is given outside a city or village, or permit another so to do. All permits issued under the authority of this section shall be subject to revocation at all times. The provisions of this section shall not apply to charter cities where the licensing authority is vested in some other officer than the mayor."

It should be noted that the above section was originally Section 6945a of the Revised Statutes. Such section was part of an act passed March 22, 1906 (98 O. L. 61), entitled:

> "To supplement Section 6945 of the Revised Statutes of Ohio by enacting Sections 6945a, 6945b and 6945c, relative to public dance halls and roller skating rinks."

Said Section 6945a read as follows:

> "No public dance, roller skating or like entertainment shall be permitted or given in any building, hall, room or rink within any city or village within