

OFFICIAL OPINION NO. 9

February 12, 1953.

Mr. W. L. Wilkinson, Commissioner,
Bureau of Motor Vehicles,
State House,
Indianapolis, Indiana.

Dear Sir:

In answer to your letter of January 23, 1953, in which you request an Official Opinion on the following question, as stated in your letter:

“The question at issue is whether or not one Frances C. Hein of Beech Grove has a right to draw a stipend for duties as Clerk-Treasurer of Beech Grove while at the same time under contract as Manager of the Beech Grove License Branch of the Bureau of Motor Vehicles, from which she also derives income.”

This presents the issue governed by Section 9 of Article 2 of the Indiana Constitution, the part applicable being quoted as follows:

“* * * nor shall any person hold more than one lucrative office at the same time except as in this Constitution expressly permitted: * * *.”

There is no exception stated in the Constitution which would apply to the offices in question.

The test of whether or not an office is a lucrative office is determined by the question of whether or not the person holding the office exercises some function of the sovereign power of the State of Indiana. Our Supreme Court has said in the case of *Wells v. State ex rel.* (1911), 175 Ind. 380, 94 N. E. 321, Ann. Cas. 1913C, 86, at page 384:

“* * * An office is a public charge of employment in which the duties are continuing and prescribed by law and not by contract invested with some of the functions pertinent to sovereignty, or having some of the powers and duties which inhere within the legislative judicial or executive departments of the government, and emolument is a usual but not a necessary element thereof.”

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Foltz v. Kerlin (1886), 105 Ind. 221, 4 N. E. 439, 5 N. E. 672, 55 Am. Rep. 197.

In examining the statutes applicable to the office of Clerk-Treasurer of cities of the fifth class, such as Beech Grove, Indiana, the following statute is the controlling statute which is found in Burns' 1933 (1950 Repl.), Volume 9, Part 1, Section 48-1219, the pertinent part thereof being:

"* * * The office of city clerk and city treasurer of cities of the fifth class are hereby abolished. The clerk-treasurer shall perform all duties now provided by law for the office of city controller, and should perform all duties now provided by law for the office of city clerk and the office of city treasurer in such cities except that the county treasurer shall collect all civil and school city taxes and he shall make settlement for the same."

It should also be noted that Section 48-1219, *supra*, provides that the Clerk-Treasurer shall serve as clerk to the Board of Public Works and Safety without additional compensation therefor.

It should be noted that the Indiana Supreme Court has passed upon the question of whether or not city councilmen exercise sovereign power within the meaning of Section 9, Article 2, and has held that such position of city councilmen does not involve the exercise of sovereign powers. In the case of *The State ex rel. Platt v. Kirk* (1873), 44 Ind. 401, 406, it is said:

"The office of councilman is an office purely and wholly municipal in its character. He has no duties to perform under the general laws of the State. The State has enacted a law applicable to all cities which may organize under it. The inhabitants of the particular locality, after having taken the other necessary steps for an organization, elect the designated number of councilmen, who have the power to enact by-laws, and do such other acts and perform such other duties as pertain to their office in the municipality."

The Supreme Court of Indiana in the case of *Mohan v. Jackson* (1876), 52 Ind. 599, held under the authority of the

Platt case, *supra*, that the office of City Clerk is not an office "under the state" within the meaning of Section 16, Article 7 of the Indiana Statutes. Although the purpose of Section 16, Article 7 and that of Section 9 of Article 2 are different, nevertheless the same determination must be made as to whether or not the particular office in question is an office under the state.

It may be seen from an examination of the statutes pertaining to the office of city clerk that the office itself and the functions thereunder are municipal in their character.

I find no decision directly in point on a clerk-treasurer under the present statute. The question of whether a city office is only municipal in its character is frequently difficult to determine, but under the above decisions I am of the opinion that the clerk-treasurer of a fifth class city is municipal in character and is not an office under the state.

Concerning the position of Manager of the License Branch of the Bureau of Motor Vehicles, it has been held when the bureau was under the office of the Secretary of State, that such managers were officers of the State in the character of Deputy Secretaries of State, and as such were performing sovereign duties of the State of Indiana and therefore were the holders of lucrative offices and within the meaning and subject to the provisions of Section 9 of Article 2, *supra*.

The case of *Wetzel v. McNutt* (1933), 4 Fed. Supp. 233, very much parallels the present situation in Indiana concerning the Bureau of Motor Vehicles and is applicable to the question involved. The Court in its reasoning on page 235 held as follows:

"The enactment of legislation governing the issues of license for automobiles originally placed the authority in the secretary. As an officer of the state, it was his duty to administer the law the Legislature thus enacted. Now the Legislature has said that, instead of granting such power to a particular officer, it will grant to the chief administrative officer power to determine which of his subordinate officers shall exercise it, and the Governor in pursuance of such power has transferred these administrative powers from the secretary

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to another department. The Legislature has, in effect, said that the Governor as chief administrative officer may designate which subordinate member of the administrative machinery created by the Legislature shall administer the automobile license law. This is not a delegation of legislative authority. It amounts ultimately to a transfer of supreme authority over automobile licenses from the secretary to the Governor, and to a grant of power to him to name the particular individual in his executive office or in his administrative family which shall exercise the same. This is a mere exchange or transfer from one administrative officer to another."

The court determined that a branch manager of the auto license bureau was a public officer and exercised sovereign power of the State of Indiana in claiming, accepting or in rejecting applications:

"But it is insisted by plaintiff that he is not an officer of the state but merely an employee, holding a private contract of employment. An officer is distinguished from an employee by determining whether his position or employment involves the exercise of any part of his sovereign power of the state. In other words, an office is a public station to which a portion of the sovereign power is attached for the time being and which is exercised for the benefit of the public. It implies a delegation of a portion of governmental power. Apparently, from the facts stated in the bill, plaintiff did hold an office of the State of Indiana exercising a part of the administrative authority of the state by examining applicants, determining their qualifications and making allowance or rejection of their applications. He became, then, an administrative officer exercising discretion and administrative power, and to such extent at least the nature of his duties were those of an officer of the state within the meaning of the word as commonly recognized." (4 Fed. Supp. 233.)

An Official Opinion of this office, 1952 O. A. G. No. 60, passes on this same question and affirms that a Branch Manager exercises sovereign power.

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Basing my opinion upon the above authorities and in reviewing the agreement entered into by the branch manager and the Bureau of Motor Vehicles, I am of the opinion that the position of Manager of the Beech Grove License Branch of the Bureau of Motor Vehicles is a lucrative office within the meaning of the Constitutional prohibition of Art. 2, Sec. 9, *supra*.

Having arrived at the conclusion that the Clerk-Treasurer of a fifth class city is not an officer under the state, in my opinion such Clerk-Treasurer may act as such for compensation and also act as Manager of a branch of the Bureau of Motor Vehicles.

OFFICIAL OPINION NO. 10
(Not Issued)

OFFICIAL OPINION NO. 11

February 26, 1953.

Senator Walter A. Baran,
State Senator
4835 Baring Avenue,
East Chicago, Indiana.

Dear Sir:

I have your request for an official opinion which reads in part as follows:

“I am requesting an official opinion regarding the legality of my membership in the Legislature as State Senator and simultaneously holding an appointive position in the city of East Chicago as Chief Air Inspector in the Bureau of Air Pollution. I am an appointee of the Mayor and have jurisdictional powers within the corporate limits of the city. The Bureau was created in 1949 under Ordinance No. 2490 as incorporated under Ordinance No. 2525 known as the ‘Municipal Code of East Chicago—1950’.”

An examination of the statutes of this state presently in force fails to disclose any statute specifically authorizing the creation by any city of a Bureau of Air Pollution or an office