

1953 O. A. G.

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

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to be known as Chief Air Inspector in such bureau. However, Section 53, Ch. 129 of the Acts of 1905, same being Burns' 48-1407, grants to city councils the authority to enact ordinances including for a number of purposes:

"Seventh. To declare what shall constitute a nuisance, to prevent the same, require its abatement, authorize the removal of the same by the proper officers, and provide for the punishment of the person or persons causing or suffering the same, and to assess the expenses of its removal against such person or persons, and to provide for collecting such expenses either by causing them to be placed on the tax duplicate or by suit."

"Twenty-sixth. To regulate the construction of chimneys, smokestacks, hearths and ovens, the erection of stoves and stove-pipes, boilers and apparatus used in buildings or other places, and cause the same to be removed and made secure when considered dangerous; to authorize the chief of the fire force or his assistants, the mayor, members of the board of public safety or other designated officers or agents of any such city, at all reasonable hours, to enter into and examine all dwellings, outhouses, lots and yards in such city, and to inspect all places where fire is used or is liable to occur, and to take all necessary means to prevent danger therefrom; to compel owners and occupants of houses and other buildings to make scuttles in the roofs thereof, with stairs or ladders reaching to the same, and to compel the erection of fire escapes. Also to require and regulate the use of smoke consumers."

Pursuant to the above quoted excerpt it has been held that cities may declare the emission of dense black or gray smoke to constitute a nuisance. See *Bowers v. City of Indpls.* (1907), 169 Ind. 105, 81 N. E. 1097. Apparently, the City of East Chicago has exercised its sovereign power as granted by statute to declare that the emission of smoke constitutes a nuisance and in furtherance of the enforcement of said ordinance, provided machinery to effect the purpose of this ordinance.

It has been frequently held that in order for a position to constitute a lucrative office within the meaning of a constitu-

tional provision prohibiting the holding of more than one lucrative office, that the holder of the position must exercise some portion of the sovereign power of the state; *Shelmadine v. City of Elkhart* (1921), 75 Ind. App. 493, 495, 129 N. E. 878.

It should be noted that the office of City Councilman has been held by the Supreme Court of Indiana not to be a lucrative office. In considering the nature of the duties of City Councilmen and that of Chief Air Inspector in the Bureau of Air Pollution of East Chicago, it seems to be a valid analogy to follow the same reasoning that the court applied in determining whether or not a City Councilman was an officer exercising sovereign powers within the constitutional sense. In the case of *State ex rel. Platt v. Kirk* (1873), 44 Ind. 401, the Supreme Court of Indiana said at page 406:

“The office of councilman is an office purely and wholly municipal in 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. These powers and duties of councilmen are beyond and in addition to any acts, powers, and duties performed by officers provided for under the state government.”

And also, in the case of *Waldo v. Wallace* (1859), 12 Ind. 569, which doctrine is applicable to the present position in question, the court said:

“The powers which are exercised by a city government are, it thus appears, super added to those exercised by the State in the same locality. The people of towns and cities are governed that much more than are the people of the State generally. This is deemed a necessary incident to a dense population. The powers thus exercised, by the city governments are specified in their charters, * * *. Sometimes the state by charter, abdicates all power under a particular subject within the city limits, in favor of city government.”

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In the present situation, it appears the sovereign power of the state has been exercised by the Legislature in granting authority to the city council and by the city council exercising that authority in a particular way, i.e., smoke control.

The duty of inspecting, investigating and otherwise taking steps to effectuate the purpose of the city ordinance in question, in light of the holding in the Platt case, *supra*, appears to be merely ministerial duties incident to a prior exercise of the sovereign powers of the state. Thus, the position identified by you as Chief Air Inspector of the Bureau of Air Pollution of the City of East Chicago is not a lucrative office, inasmuch as a city ordinance is involved. There would appear to be merely an exercise of a ministerial duty involved as an employee. Thus, it is my opinion, on the basis of the Platt case, *supra*, that there is no conflict between your membership in the Legislature and your holding the position of Chief Air Inspector, under the circumstances which you specify in your letter. Such office in my opinion is not a lucrative office under the state within the prohibition of Article 2, Section 9, but that the exercise of said power under said ordinance would be wholly municipal in its nature.

OFFICIAL OPINION NO. 12

March 2, 1953.

Hon. John A. Van Ness,
President Pro Tem,
Indiana State Senate,
State House,
Indianapolis, Indiana.

Dear Senator Van Ness:

Your letter of January 22, 1953 requesting an official opinion has been received, which letter is as follows:

"I would appreciate having an official opinion from you as to whether there is anything in the statutes to prevent cities and towns from buying workmen's compensation insurance for firemen and policemen, where no other provision has been made, for injuries and medical care."