OPINION 72

OFFICIAL OPINION NO. 72

August 22, 1951.

Honorable Edwin Steers, Sr.,
Member, State Election Board,
108 East Washington Building,
Indianapolis 4, Indiana.

Dear Mr. Steers:

Your request for an official opinion reads as follows:

"I have an inquiry, as Member of the State Election Board, as to whether or not one person can hold an appointment as a Member of a City School Board and at the same time hold the office of Commissioner of the Indiana Toll Bridge Commission.

"Will you please let me have an official opinion on this question? An early reply will be greatly appreciated."

The applicable provision of the Constitution of Indiana is Section 9 of Article 2, which provides as follows:

"No person holding a lucrative office or appointment under the United States or under this State, shall be eligible to a seat in the General Assembly; nor shall any person hold more than one lucrative office at the same time, except as in this Constitution expressly permitted * * *"

The above provision of the Constitution of Indiana has been under consideration in numerous decisions. It is well settled that the office of city or town school trustee is a lucrative office within the meaning of Section 9, Article 2 of the Constitution of Indiana. This was the holding of the court in the case of Chambers v. State ex rel. Barnard, Prosecuting Attorney (1890), 127 Ind. 365. In the case of Wells v. State ex rel. Penden (1911), 175 Ind. 380, the court said at page 383:

"The office of school trustee has been held to be a lucrative office. Chambers v. State, ex rel., supra; Creighton v. Piper (1860), 14 Ind. 182 * * *"
The Attorney General has stated in a number of opinions that the office of school trustee is a lucrative office. See page 256 of the Opinions of the Attorney General for the year 1944.

The next question is whether the office of Commissioner of the Indiana Toll Bridge Commission is a lucrative office within the meaning of the above section of the Constitution.

There is a distinction between a public office and a mere employment. The Appellate Court of Indiana in Shelmadine v. City of Elkhart et al. (1920), 75 Ind. App. 493, at page 195 said:

"A Public officer may be defined as a position to which a portion of the sovereignty of the state attaches for the time being, and which is exercised for the benefit of the public. The most important characteristic which may be said to distinguish an office from an employment is, that the duties of the incumbent of an office must involve an exercise of some portion to the sovereign power. * * *"

In Wells v. State (1911), 175 Ind. 380, at page 384, the Indiana Supreme Court said:

"* * * An office is a public charge or 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 is here within the legislative, judicial or executive departments of the government, and emolument is a usual, but not a necessary element thereof. * * *"

Section 1, Chapter 79, Acts of 1939, same being Section 36-3001, Burns' 1919 Replacement, created a body corporate under the name of Indiana State Toll Bridge Commission. This section provides in part as follows:

"* * * shall have power to contract and be contracted with, to sue and to be sued in that name and to adopt a seal and alter same at pleasure * * *

"The commission shall have the power to establish by-laws, rules and regulations for its own government
and to make and enter into all contracts or agreements and do all things necessary or incidental to the performance of its duties and the execution of its powers under this act. The commission may employ engineering, architectural and construction experts and inspectors and attorneys and such other employees as may be necessary in its opinion and fix their compensation, all of whom shall do such work as the commission shall direct. All expenses so incurred by the commission shall be paid solely from funds provided under the authority of this act.

"The members of the commission shall each receive as compensation for his services in the discharge of his duties, the sum of ten dollars ($10.00) per day for each day actively employed in the discharge of his duties, and shall be reimbursed for his actual expenses incurred in the discharge of his duties. All such compensation and expenses shall be paid solely from funds provided under the authority of this act."

On examining the powers, duties and functions of the commissioners of the Indiana State Toll Bridge Commission, it is clear that such commissioners are public officers and not employees.

It is a rule that where one accepts an office held under the State, he vacates another held under the same sovereignty. See Foltz v. Kerlin (1886), 105 Ind. 222, 223; Chambers v. State ex rel. Barnard (1890), 127 Ind. 365, 369.

Both the office and Member of a City School Board and the office of Commissioner of the Indiana State Toll Bridge Commission being lucrative offices, the acceptance of one office vacates the other.