

(2) That any teacher who attained tenure status under the tenure act after its amendment in 1933, does not thereby have the *right to demand* continuance of employment after arriving at the age of 66 years; such teachers, while they may not be able to require employment after attaining the age of 66 years by virtue of their tenure contract, may *continue to be employed by the school corporation* until July 1, 1949, under the provisions of the 1947 amendment to the Teachers' Retirement Act.

OFFICIAL OPINION NO. 24

May 12, 1947.

Mr. C. E. Ruston, State Examiner,
State Board of Accounts,
Room 304, State House,
Indianapolis, Indiana.

Dear Mr. Ruston:

I have your letter in which you ask for an official opinion on the following questions pertaining to second class cities having a population of from 35,000 to 50,000 and operating one utility, namely a light plant:

"1. Can the clerk of the Board of Public Works and the City Clerk be one and the same person?

"2. If so, can the City Clerk receive not only his salary as set by statute, but also the salary as set for the appointive position of clerk of the Board of Public Works?

"3. If your answer to above questions are in the affirmative, would your answer be the same if the city owned and operated one or more public utilities?"

Section 48-1215 of Burns' 1933 (1945 Pocket Part) provides that in cities of the second class, except those having a population of more than 85,000 and less than 100,000, according to the last United States census, the elective officers shall consist of a mayor, a city clerk, a city judge and members of the common council. It is further provided

that in such cities the mayor shall appoint a city controller, city engineer, a city attorney, chief of the fire department, a chief of police, and other officers, employees, boards and commissions. It then provides in part as follows:

“In such cities of the second class the duties of the board of public works and the duties of the board of public safety as now provided by law shall be performed by a board to be known as the ‘Board of Public Works and Safety,’ which shall be composed of the city controller, the city civil engineer, and the city attorney; such officers shall serve as members of such board without additional compensation therefor, other than as hereinafter provided in section 21 (§ 48-1233). The mayor shall appoint a clerk of the board of public works and safety: Provided, This section shall not apply to cities of the second class owning and operating a municipal water-works and electric light plant.”

Prior to the enactment of the foregoing statute in 1933, as amended in 1943, the board of public works and board of public safety operated separately, and each appointed its own clerk. (Burns’ 1933, Sections 48-1901 and 48-6102). Section 48-1901, Burns’ 1933, provided that all actions of the board of public works shall be recorded by the clerk thereof who shall be the city clerk or his deputy except in cities of the first and second classes, where such clerks shall be appointed by the board.

From the foregoing statutes it is evident that it was not contemplated by the Legislature that in cities of the second class the city clerk should also serve as the clerk of the board of public works or the board of public safety, or now as clerk of the board of public works and safety, for the positions of city clerk and clerk of the board of public works and safety are separately treated and provided for by the Legislature. Moreover, there is no statute which combines these two positions or expressly authorizes one person to fill both positions in cities of the second class. It is significant that under Section 48-1901 of Burns’ 1933, above mentioned, the Legislature provided that the city clerk is the clerk of

the board of public works in all cities except cities of the first and second classes.

However, I find no constitutional or statutory prohibition against the same person holding both the position of city clerk and the position of clerk of the board of public works and safety in cities of the second class. It has been decided on several occasions that the office of city clerk is not an office under the State within the meaning of Section 16 of Article 7 of the Indiana Constitution (*Mohan v. Jackson*, 52 Ind. 599; 1943 Indiana O.A.G., page 693). Based on the same reasoning I do not believe that the office of city clerk, or the office of clerk of the board of public works and safety would be considered to be public offices within the meaning of Article 2, Section 9 of the Indiana Constitution prohibiting any person from holding more than one lucrative office at the same time. Thus, in answer to your first question it is my opinion that the clerk of the board of public works and safety and the city clerk may be one and the same person.

In answering your second question reference should be made to the following statutes. Section 14, Chapter 233 of the Acts of 1933, page 1042 (*Burns' 1933*, Section 48-1226) as amended by Section 2 of Chapter 372 of the Acts of 1947 provides as follows:

"In cities having a population of thirty-five thousand or over and less than fifty thousand, as shown by the last preceding United States census, the annual salaries for officers herein named shall be fixed by the common council as hereinafter provided, at not to exceed the following amounts; Mayor, fifty-five hundred dollars; controller, four thousand dollars; city clerk, three thousand dollars; county treasurer *ex officio* city treasurer, seven hundred twenty dollars; city judge, four thousand dollars; city attorney, thirty-six hundred dollars; city civil engineer, four thousand dollars; members of the common council, four hundred and eighty dollars each; county auditor, for service to civil cities, two hundred dollars."

Also, Section 48-1215 of *Burns' 1933* (1945 Pocket Part) provides in part as follows:

"In such cities of the second class the duties of the board of public works and the duties of the board of public safety as now provided by law shall be performed by a board to be known as the 'Board of Public Works and Safety,' which shall be composed of the city controller, the city civil engineer, and the city attorney; such officers shall serve as members of such board without additional compensation therefor, other than as hereinafter provided in section 21 (§ 48-1233). The mayor shall appoint a clerk of the board of public works and safety: Provided, This section shall not apply to cities of the second class owning and operating a municipal water-works and electric light plant."

Section 48-1233 of Burns' 1933 (1945 Pocket Part) provides in part as follows:

"The common council of each and every city shall, by ordinance duly enacted on or before the first day of April of the year in which elections for the election of city officers are held, fix the annual salaries of all officers provided for in this act, and such salaries when so fixed shall not be changed by the common council during their respective terms of office. The salaries as herein authorized shall be in full for all services performed for the city: Provided, however, That in any city which owns or operates a sewage disposal plant or any other utility or utilities, the common council shall, by ordinance duly enacted, provide that the mayor, city attorney, city engineer, city controller, and city clerk or city clerk-treasurer of such city may receive, from the funds of such sewage disposal plant or other utility or utilities, a compensation in addition to the annual salary herein otherwise authorized, which additional compensation shall not exceed the sum total of one thousand two hundred dollars (\$1,200) per year; Provided, further, that in cities of the fifth class having three (3) utilities not including a sewage disposal plant said additional compensation shall not exceed \$1500.

* * *

From the foregoing statutes it appears that the Legislature has provided for annual salaries for the city clerk, city controller, city engineer and city attorney and has provided that in cities of the second class (except cities having a population of more than 85,000 and less than 100,000) the board of public works and safety shall be composed of the city controller, the city engineer and the city attorney, who shall serve on such board without additional compensation except as provided for in Section 48-1233 of Burns' 1933, above set forth, wherein the common council is authorized to pay an additional compensation not exceeding \$1,200 per year to such city controller, city engineer, city attorney and city clerk.

While there is no constitutional or statutory prohibition against one person holding both the position of city clerk and the office of clerk of the Board of Public Works in the cities in question, we are confronted with the provision of Section 48-1233, quoted *supra*, which says:

“* * * The salaries as herein authorized shall
be in full for all services performed for the city
* * *”

It, therefore, becomes important to determine whether this provision prohibits such person from receiving compensation for acting as clerk of the Board of Public Works in addition to his salary as city clerk. In my opinion this prohibition does not go this far, but it extends only to the various duties imposed upon him as city clerk because he is such officer and relates only to the services performed by him for the city by virtue of holding the office of city clerk.

The act in question deals only with the salary which he receives as city clerk and the additional compensation which he may receive for that city as a public utility and would apply to all services which he may be called upon to render by virtue of holding that office and which may be added to or connected with the duties of such office. It does not have application to the situation where he holds a separate, distinct position which has its own duties and its own compensation.

In the case of *United States v. Saunders* (1886), 120 U. S. 126 the court said at page 129:

“* * * We are of opinion that, taking these sections all together, the purpose of this legislation was to prevent a person holding an office or appointment, for which the law provides a definite compensation by way of salary or otherwise, which is intended to cover all the services which, as such officer, he may be called upon to render, from receiving extra compensation, additional allowances, or pay for other services which may be required of him either by act of Congress or by order of the head of his Department, or in any other mode, added to or connected with the regular duties of the place which he holds; but that they have no application to the case of two distinct offices, places, or employments, each of which has its own duties and its own compensation, which offices may both be held by one person at the same time. In the latter case, he is in the eye of the law two officers, or holds two places or appointments, the functions of which are separate and distinct, and, according to all the decisions, he is in such case entitled to recover the two compensations. * * *”

A similar result was reached by the Attorney General in an opinion rendered to your predecessor on January 17, 1936. See Opinions Attorney General for that year page 43 at page 44, where it is said:

“I am confronted, however, with the provision of Section 21 of Chapter 233 of the Acts of 1933 which expressly provides that ‘the salaries as herein authorized’ (including the salary of the City Civil Engineer) ‘shall be in full for all services performed for the city including services for any public utility or utilities owned and operated by such city,’ with certain exceptions not material to the consideration of the present question. It becomes important, therefore, to determine whether this latter provision is so far prohibitive of additional compensation as to prevent the employment of the city of the City Civil Engineer to perform duties not required by law. I doubt whether the prohibition goes that far. I think it extends only to the various duties imposed upon the officer because

he is such officer. If the statute has provided that the City Civil Engineer is *ex officio* a member of the Plan Commission and by virtue of that office its Secretary, I think the prohibition in Section 21 *supra* would extend to such a case. However, he is not Secretary of the Commission by virtue of his office, that duty being imposed upon him by the appointment of the Commission only. He could refuse the appointment and the Commission would thereupon be required to employ someone else at a salary fixed by them. If, however, they choose to employ the City Civil Engineer, (and the duties required of him as Secretary of the Commission are not incompatible with his other duties) it seems to me that he would be entitled to receive compensation for his services in such amount as is fixed by the Commission under the statute. Your question is answered in the affirmative."

It is, therefore, my opinion that your second question should be answered in the affirmative.

Your third question is answered by the above discussion relative to the effect of the authority in the common council to pay additional compensation to the city clerk where the city owns and operates one or more public utilities. However, the payment of such additional salary is discretionary with the council.

City of Lebanon v. Dale (1942), 113 Ind.
App. 173.

OFFICIAL OPINION NO. 25

May 13, 1947.

Mr. Carter Bowser,
Fire Marshal,
State House,
Indianapolis, Indiana.

Dear Sir:

I have your letter of April 15, 1947, in which you ask my opinion relative to the various governmental respon-