Hon. Clement T. Malan,
State Superintendent of
Public Instruction,
State House,
Indianapolis, Indiana.

Dear Sir:

This will acknowledge receipt of your letter of June 12th, requesting an official opinion in answer to the following question:

"Can a person at the same time hold the position of assistant postmaster and be a member of a city school board, drawing a salary from both positions at the same time?"

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. Provided, That offices in the militia to which there is attached no annual salary, and the office of Deputy Postmaster where the compensation does not exceed ninety dollars per annum, shall not be deemed lucrative: And provided, also, that counties containing less than one thousand polls, may confer the office of Clerk, Recorder, and Auditor, or any two of said offices, upon the same person."

The above provision of the Constitution of Indiana has been under consideration upon numerous occasions. In the case of Chambers v. State ex rel. Barnard, Prosecuting Attorney, 127 Ind. 365, 11 L. R. A. 613, it was held that the office of
city or town school trustee is a lucrative office within the meaning of the above section of the Constitution. A similar result was reached in the case of Wells v. State, ex rel. Peden, 175 Ind. 380, in which case the court said at page 383 of the opinion:

"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 next question is whether an assistant postmaster is a lucrative office. At this point I call attention to the fact that the term "deputy postmaster" in the constitutional provision above quoted does not mean a deputy of a local postmaster but was applied to and considered, in our present day use of terms, a local postmaster. This question was under consideration in the case of Bishop v. State ex rel. Griner, 149 Ind. 223, where it was so decided. It has been held in this state that a postmaster is an office within the meaning of the above constitutional provision.

Foltz v. Kerlin, 105 Ind. 221;
Bishop v. State ex rel. Griner, 149 Ind. 223;
Wood v. State ex rel. Dodson, 130 Ind. 364.

In the Foltz case and in the Bishop case it was held that the offices of township trustee and postmaster could not be held by the same person as within the constitutional prohibition. In the Wood case it was held that the offices of school trustee and postmaster could not be held by the same person as within said prohibition. The question then is whether an "assistant postmaster" would be in the same category.

The case of Foltz v. Kerlin, supra, contains a discussion of what constitutes a lucrative office under the Constitution. I quote from page 223 of the opinion, as follows:

"* * * There is in our minds no doubt that the Constitution applies to all lucrative National and State offices of whatsoever class, except deputy postmasters whose compensation does not exceed ninety dollars per annum, since any other ruling would render nugatory the plain words of the instrument and make the provision respecting deputy postmasters either meaningless or absurd."
"It is quite evident that the framers of the Constitution intended that postmasters should be regarded as Federal officers, but, on principle, independent of the language of that instrument, there can be no contrariety of opinion upon this subject. They are officers within the definition given by the authorities. 'An office,' says the Supreme Court of the United States, 'is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument and duties.' United States v. Hartwell, 6 Wall. 385.

"In Henly v. Mayor, etc., 5 Bing. 91, Best, C. J., said: 'In my opinion, every one who is appointed to discharge a public duty, and receives a compensation in whatever shape, whether from the crown or otherwise, is constituted a public officer.' In various forms this definition is given in many cases. Case of Wood, 2 Cowen 29, note; People v. Common Council, 77 N. Y. 503 (33 Am. R. 659). But there are cases directly declaring that postmasters are public officers. Rodman v. Harcourt, 4 B. Mon. 224; Hoglan v. Carpenter, 4 Bush, 89; Patterson v. Miller, 2 Met. (Ky.) 493; High Extra. L. Rem., section 95.

"In all the decisions upon constitutional provisions similar to ours that we have been able to find, it is laid down for law that one who holds a Federal office, great or small, to which compensation is attached, can not at the same time be lawfully the incumbent of a lucrative office under the statutes of the State. * * *"

In Wells v. State, 175 Ind. 380, the court in considering whether a deputy auditor was a public officer said at page 384:

"* * * 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 inhere within the legislative, judicial or executive departments of the government, and emolument is a usual, but not a necessary element thereof. * * *"
The Supreme Court in the above case then pointed out that a deputy auditor performed the duties of the auditor and could administer oaths in the performance of his duties. The Court also said, "Persons who are appointed deputies under a statute are public officers."

You will note that the Court in the above case looked both to the source of authority for his appointment and to the nature of his duties as to whether the deputy auditor exercised some of the functions pertinent to sovereignty in determining whether he was holding office or was an employee only.

As an assistant postmaster is a Federal position, I have investigated the Federal law and authorities in an attempt to determine whether an assistant postmaster is an officer or only an employee under the Federal laws, rules and regulations and their construction by the Federal Courts.

There seems to be a dividing line marked by the Federal Constitution itself between officers and employees. The Constitution of the United States, Article 2, Section 2, provides as follows:

"He (the President) shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments."

In construing this section of the Federal Constitution the Court, in United States v. Germaine, 99 U. S. 508, held that a surgeon appointed by the commissioner of pensions was not a public officer because he was not appointed by the head of a department.

The two cases of United States v. Hartwell, 73 U. S. 385, 18 L. A. 830, and United States v. Smith, 124 U. S. 525, 31 Law Ed. 5234, illustrate the application of this rule, making the character of the position to depend upon the source of
the appointing power. In the first case it was held that a clerk in the office of the Assistant Treasurer of the United States, appointed with the approval of the Secretary of the Treasury, who was the head of the department, was a public officer. In the second case it was held that a clerk of the Collector of Customs, appointed by the Collector, who was not the head of the department, was not an officer.

The question was again considered in United States v. Mount, 124 U. S. 303, 31 L. Ed. 463, and the same conclusion reached. The above test was adopted by the Supreme Court of Illinois in the case of Fekete v. City of East St. Louis, 145 N. E. 692, 693.

See also: McGrath v. United States, 275 Fed. 294.

Under the above authorities one of the principal tests applied by United States Courts in determining whether a person holds an office under the United States or is an employee only, is the source and authority of and for his appointment, I have therefore made an investigation of the postal laws and regulations and find the following:

The Post Office Department is created and established as an executive department of the United States government by Section 361, Title 5, U. S. C. A. By the same section the Postmaster General is made the head of said department.

Assistant postmasters in offices of the first and second classes are not appointed by the Postmaster General but are appointed by the First Assistant to the Postmaster General. They are thus not appointed by the head of the department. Assistant postmasters of third class offices are hired by the postmasters at those offices and are responsible directly to those postmasters. There is no recognized position of assistant postmaster at an office of the fourth class. While the clerk, to whom the duties of such a position may be entrusted by the postmaster, is sometimes referred to as assistant postmaster, he has no official status as assistant postmaster.

Sections 86 to 89 inclusive, United States Code, Title 39, provide for the compensation of assistant postmasters in offices of the first, second and third class. These sections refer to assistant postmasters as employees and Section 89, in reference to compensation, provides for the compensation of an assistant postmaster in an office of the third class, being
It appears to me from the information obtained from the postal laws and regulations, and from the post office department, that an assistant postmaster is not analogous to such positions as a deputy auditor or deputy county official in Indiana, and that he does not perform the sovereign duties of the postmaster, that he only acts for and in the place of the postmaster incidentally and upon temporary occasions, such as in the absence of the postmaster or in the event the postmaster dies or is removed, and then only until an acting postmaster, or successor, is appointed. For the purpose of obtaining further information upon this question we have made inquiry of the office of the Postmaster General. Our inquiry was referred to the solicitor of the post office department and his reply reads in part as follows:

"Since your inquiry comprises the office of postmaster, as well as the status of assistant postmasters, let me say at the outset that all postmasters are officers of the United States: whether they be postmasters of the fourth class or postmasters of the class commonly known as Presidential postmasters, which embraces first, second and third-class postmasters.

"Assistant postmasters at third-class offices are not officers. They are employees hired by the postmasters at those offices and responsible directly to such postmasters (5 A. A. G., P. O. D. 162).

"Assistant postmasters at first and second-class post offices are in a general sense employees of the Department and not officers. The compensation statutes which you cite (39 U. S. C. 86, et seq.) definitely define their status as that of employees. Section 446, paragraph 2, of the Postal Laws and Regulations, sets forth that an assistant postmaster at a second-class office is in the competitive classified service."

It is my opinion that assistant postmasters are not officers within the meaning of the provisions of the Indiana Constitution quoted above.

As you have expressed an interest in the position of the post office department upon this question we also quote the following paragraph from the letter of the solicitor of the department:
"The position of the Department with reference to the service of its officers or employees upon school boards is set forth in Section 39 of the Postal Laws and Regulations. Briefly stated, they are permitted to serve on school boards, either with or without compensation, when appointed to such boards, and when their service as members of such boards will not involve them in any way in political activities or political campaigns. In no circumstances are they permitted to hold elective office on school boards."

STATE BOARD OF TAX COMMISSIONERS: Taxation—Exemptions of Fraternal Organizations and Hospitals.

July 19, 1944.

Opinion No. 65

Hon. Charles H. Bedwell, Chairman,
State Board of Tax Commissioners,
State House,
Indianapolis, Indiana.

Dear Sir:

This will acknowledge receipt of your letter of June 22nd in which you request an opinion upon the following questions:

"1. Is the real and personal property of the Elks Lodge exempt from taxation, and if so, to what extent, and if exempt what particular statute grants the exemption.

"2. To what extent, if at all, is the property of other lodges and fraternal organizations, such as Masons, Odd Fellow, Knights of Columbus, K. of P. exempt from taxation.

"3. What are the requirements that would entitle a lodge to qualify as a ‘fraternal, beneficiary association’ under the provisions of clause 11 of Section 1, of Chapter 262 of the Acts of 1937, (Burns' R. S. 1943, Sec. 64-201).

"4. Under the provisions of Sec. 3 of Chapter 4 (294) of the Acts of 1937 (Burns' R. S. 1943, Sec. 64-