OPINION 39

OFFICIAL OPINION NO. 39

November 22, 1967

CONSTITUTIONAL LAW—Dual Office Holding—Trustee of School Corporation as Lucrative Position.

Opinion Requested by Hon. Joseph W. Harrison, State Senator.

I am in receipt of your inquiry as to whether the simultaneous serving as a member of the Board of Trustees of the Attica Consolidated School Corporation and as the Fountain County Highway Supervisor would violate the constitutional prohibition against holding two lucrative offices.

Article 2, § 9, of the Indiana Constitution provides in part:

> "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. . . ."

That a school trustee is the holder of an "office" has been decided too frequently to need further discussion here. See *Chambers v. State ex rel. Barnard,* 127 Ind. 365, 26 N.E. 893 (1891); *Wells v. State ex rel. Peden,* 175 Ind. 380, 94 N.E. 321 (1911); 1953 O.A.G., p. 156; 1962 O.A.G., p. 66; 1966 O.A.G., p. 228.

You advise that the trustees of the Attica School Corporation are not presently receiving any compensation for their services and thus their office would not appear to be "lucrative."

Prior to the 1967 General Assembly, the question of whether the office is "lucrative" in the constitutional sense would have depended upon the Act under which the particular school corporation was organized, and even upon the manner in which it was organized under the Act. However, the question is fully settled by Acts 967, ch. 56, Burns § 28-6422, which provides:

> "SECTION 1. Acts 1965, c. 307, is amended by adding a new and additional section to be numbered Section 306 and to read as follows: Sec. 306. Compensation of Members of the Governing Body. Notwithstanding any other statute, the governing body of each school corporation by resolution shall have the power to pay each of its members a reasonable amount for service as such member, not to exceed Five Hundred Dollars ($500) per year, and all payments not in excess of such amount heretofore authorized are hereby legalized. Nothing in this section, however, shall reduce the compensation of any member of any governing body, permitted under any other act.
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> "SEC. 2. Whereas an emergency exists for the immediate taking effect of this act, the same shall be in full force and effect from and after its passage."

The 1965 Act being amended, and of which the first section of the 1967 Act is now a part, is the Indiana General School Powers Act which, in accord with its sections 102 and 103 (Burns §§ 28-6402, 28-6403), is applicable to all school corporations other than school townships.

In 1966 O.A.G., p. 228, I said, on p. 234:

> "As previously stated, the lucrative character of an office is determined by whether compensation is attached to the office. Whether compensation is actually paid to a particular individual who occupies an office does not, in my opinion, change the character of that office from lucrative to non-lucrative. Thus, an office with a compensation attached would remain lucrative even though a particular incumbent failed to collect compensation. As pointed out by the court in

the *Chambers* case, *supra,* an office is lucrative if the officer 'is *entitled* to compensation.' 127 Ind. at 367. The court quoted an earlier case holding the office of mayor to be a lucrative one because 'he is entitled to and *may* charge and receive fees.' One of my predecessors was of the opinion that a person could not hold one lucrative office and at the same time serve in another without drawing the compensation provided by statute:

> "'. . . The constitutional provision against the holding of more than one lucrative office at the same time goes to the character of the office rather than to whether the officer draws two salaries.' 1936 O.A.G. 155, 158."

While the Trustees of the Attica Consolidated School Corporation may not presently be receiving compensation for their services, such compensation is made available to them by the 1967 Act. There would appear to be little practical difference in availability of compensation between the holder of an office who chooses not to accept the compensation attached to that office and the several members of a board who choose not to adopt a resolution that would attach compensation to their office. In either case it is basically the actions of the office holders that determine their receipt of compensation.

There is, however, a more cogent reason for concluding that the Trustees now hold a lucrative office. If the 1967 statute were to be construed so that a member of a School Board did not possess a lucrative office unless the Board exercises its power to establish compensation, then a majority of the Board could use the statute as a weapon in retaining control of the Board. Specifically, the Board would be able to use that power to force the resignation of a given member, or to prevent a member-elect from taking office (if the members of that Board are elected). As an illustration of the latter result, consider what would happen if the holder of a lucrative office not incompatible with membership on the School Board, who represents a philosophy or political suasion different from the majority of the incumbent School

Board members, were to be elected to succeed one of the members of that majority on a School Board not receiving compensation. The Board could, on the day following the election, adopt a resolution establishing compensation and thereby render ineligible the member-elect (unless, of course, he wishes to resign from the other lucrative office which, in this example, we will consider his livelihood). Conversely, a majority of the Board could rescind a compensation resolution and thus make eligible a candidate of their suasion who would otherwise be ineligible.

Such a "now-it-is now-it-isn't" classification of School Board membership would certainly not be conducive to stable and politically honest management of the school system.

Therefore, it is my opinion that as a result of Acts 1967, ch. 307, every member of the governing body of every school corporation is the holder of a lucrative office, and specifically that a member of the Board of Trustees of the Attica Consolidated School Corporation holds a lucrative office.

The position of County Highway Supervisor was created by Acts 1933, ch. 27, § 10, the same being Burns § 36-1110, which provides in part:

> "The board of county commissioners of any county of the State of Indiana shall have the right to employ any person other than the county surveyor as supervisor of county highways, such person to be known as county highway supervisor and who shall serve at the will of such board of county commissioners, and who shall perform the duties that are provided in this act to be performed by the county surveyor, and whose salary shall be fixed upon the same basis as is otherwise provided in this act. . . ."

(The same Act, described in its title as "concerning the maintenance and repair of county highways," abolished the predecessor position of County Highway Superintendent, which position was held to be an office in *Hastings v. Board of Comm'rs*, 205 Ind. 687, 188 N.E. 207 (1933)).

The 1933 Act also provides for the appointment of assistants, if necessary. In the case of *Keene v. Board of Comm'rs*

of Jasper County, 105 Ind. App. 641, 16 N.E. 2d 967 (1938), the appellant was such an assistant who had been injured while at work and was claiming workmen's compensation. The court stated the question (at 105 Ind. App. 643) thusly:

> "The principal controversy presented by the record is as to whether the said Burl Keene was an employee within the meaning of our Workmen's Compensation Law, or a public officer engaged in discharging his official duty when he was injured."

The court then set out portions of Acts 1933, ch. 27, relating to the duties of assistant highway supervisors and concluded, on p. 645:

> "When we consider all the provisions of the Acts of 1933, *supra,* as well as the Acts of 1935, ch. 195, (sic) [should be ch. 145, an Act concerning county road repair funds] p. 496, we think it clearly appears that 'assistants' whose designation by the board of commissioners of a county is provided for in each of said acts, are not employees within the meaning of that word as used in our compensation law, but are officers discharging duties to the public imposed upon them by statute. (See *Brinson v. Board of Commissioners, supra*; *Cheney v. Unroe* [1906], 166 Ind. 550, 553, 77 N.E. 1041; *Hastings v. Board of Commissioners* [1933], 205 Ind. 687, 690, 188 N.E. 207.)"

While *Keene* is concerned with the distinction between officer and employee in relation to the Workmen's Compensation Act, the basic ground used by the court in making its decision, that the assistant is discharging duties imposed by statute, is applicable to the question of lucrative office. In *Wells v. State ex rel. Peden,* 175 Ind. 380, 94 N.E. 321 (1911), the court said, at page 383 of 175 Ind.:

> "The office of school trustee has been held to be a lucrative office. . . . The reasons pointed out in those cases are that these officers are charged with duties delegated to them under the state government, with

> duties imposed upon them by statute, and are subject to legislative control."

See also *Book v. State Office Bldg. Comm'n,* 238 Ind. 120, 153, 149 N.E. 2d 273, 290 (1958).

The *Keene* case involved an assistant county highway supervisor rather than the county highway supervisor, but it would seem tautalogical that if the assistant is an officer the supervisor must be. However, this logical device is not necessary as the 1933 Act (section 10, Burns § 36-1110, *supra*) specifies that he "shall perform the duties that are provided in this act to be performed by the county surveyor."

The County Highway Supervisor performs duties prescribed by statute and is therefore an officer; he receives a salary (Acts 1933, ch. 27, § 10, Burns § 36-1110, *supra*) and therefore holds a lucrative office.

There is another question inherent in the instant situation that should be resolved, to wit: If the Legislature changes the character of a position to that of a lucrative office, does that affect the incumbents of that office, or may those incumbents who hold other lucrative offices complete their terms of office in the changed position?

Although I have been unable to find any authority on this point, I believe that analysis makes inevitable the conclusion that those incumbents who hold other lucrative offices are ineligible to continue in both offices.

To start, there is no doubt that the Legislature has the power to change the nature of an office. The Indiana Supreme Court, in *Rogers v. Calumet Nat'l Bank of Hammond.* 213 Ind. 576, 585, 12 N.E. 2d 261, 265 (1938) said:

> ". . . But 'offices are neither grants nor contracts, nor obligations which cannot be changed or impaired. They are subject to the legislative will at all times, except so far as the constitution may protect them from interference. . . . "Offices created by the legislature may be abolished by the legislature. The power that creates can destroy. The creator is greater than the creature. The term of an office may be shortened, the

> duties of the office increased, and the compensation lessened by the legislative will." ' State ex rel Yancey v. Hyde, 1891, 129 Ind. 296, 302, 28 N.E. 186, 187, 13 L.R.A. 79."

Thus the Legislature can make lucrative the office of member of the School Board though such action might be adverse to the continued tenure of some holders of that office.

As to the immediacy of the attachment of the disqualification, the language used in *Gosman v. State ex rel. Schumacher,* 106 Ind. 203, 6 N.E. 349 (1886), is appropriate. That case concerned the eligibility of a county clerk who had served two successive terms, a total of eight years, and whose elected successor had died before qualifying himself for office, to remain in office until a successor had been elected and qualified, as provided by the Indiana Constitution, Article 15, Section 3. In holding the incumbent ineligible the Supreme Court said (at page 207 of 106 Ind.):

> ". . . The section referred to affects the tenure of office; it has no relation to the qualifications or eligibility of the officer. Other sections provide who shall be eligible to the office of clerk, and prescribe the conditions upon which one, eligible to be elected, may become disqualified from continuing in the office. Primarily, it is required as a condition of eligibility to a county office, that the aspirant shall be an elector of the county, and that he shall have been an inhabitant thereof for one year previous to his election. It is also required of county officers that they continue to reside in the respective counties in which they are elected to office. They may not accept any other lucrative office except as expressly permitted by the Constitution, and in section 2, above quoted, which creates the office of clerk, it is expressly provided that no person shall be eligible to the office of clerk more than eight years in any period of twelve years.
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> "It can not be supposed that the provision regulating the tenure of the office was intended to affect in any degree the other provisions which relate to eligi-

bility to hold the office. Section 2, article 6, imposes an absolute disability to continue in the office of clerk for a longer period than eight consecutive years. This court has determined that the term 'eligible,' as there used, relates to the capacity of holding. *Carson v. McPhetridge,* 15 Ind. 327; *Smith v. Moore,* 90 Ind. 294. The result is that eight years of continuous holding renders the clerk incapable of holding longer. . . .

"The incapacity affects the right of the officer to hold over, precisely as it affects the right to hold the office at any other period. He can not look to the provision regulating the tenure of office to determine his eligibility to hold; on the contrary, in determining the right of tenure, regard must be had for those provisions which prescribe the conditions of eligibility. Whenever the conditions which destroy his capacity to hold arise, his tenure is at an end. This is so for the reason that his tenure, or right to continue in the office, is dependent at all times on his eligibility or capacity to hold.

"It might as well be held that the removal of the clerk to a distant county, notwithstanding the requirement that he shall reside in the county in which he was elected, had no effect upon his right to hold over, or that the right to continue in office until his successor was elected and qualified was not affected by the acceptance of another lucrative office, as to hold that the ineligibility resulting from eight years continuous holding had no application to his right to hold over.

"To have removed from the county, or accepted another lucrative office, would have authorized the body vested with the appointing power to treat the office as vacant. To have done either would have been, *ipso facto,* a vacation of the office."

Both the county clerk in *Gosman* and the incumbent School Board members who hold other lucrative offices are in exactly the same position; they are constitutionally ineligible to

remain in office "Whenever the conditions which destroy [their] capacity to hold arise."

Therefore, it is my opinion that the holder of two separate positions, one of which is a lucrative office, cannot continue to serve in both positions after the character of the second position is changed to that of lucrative office, and that continued service in the second position should be deemed a resignation from the first.

It is more difficult to determine whether the continuation of service that results in a resignation begins when the second office is made lucrative in character or when the incumbent is made aware of the change in character of the office. Applied to the present instance, the question is whether present school board members who hold another lucrative office should be deemed to have resigned from that office by having served as a school board member after March 4, 1967 (the effective date of the 1967 Act), or whether they should be deemed to have resigned from the other office only if they serve as a school board member subsequent to the issuance of this opinion.

Reason would dictate the latter alternative. There is a basic difference between the situation wherein an individual accepts a second lucrative office and the situation wherein an individual's second office is made lucrative, to wit: a person accepting an office should know, and has the opportunity to determine in advance, the nature of the office, whereas the nature of an incumbent's office can be changed by legislation of which he is unaware. To hold that a person who continues to serve in a position whose character has been changed without his knowledge (which can readily result from legislation containing an emergency clause that makes the change effective immediately, as in the present instance) thereby resigns from a simultaneously held lucrative office would be manifestly unjust. Further, the legislation changing the nature of the office (as in the instant case) might be of sufficient subtlety as to require the incumbent to seek advice as to whether the nature of the office has in fact been changed. To deny an incumbent the opportunity to seek clarification of the legislation would also be manifestly unjust.

The injustice is clear when one considers that a contrary ruling placing the time of resignation at an earlier date would in no way affect the validity of the past acts of the incumbent in either office, including decisions of the board dependent upon his vote, but would only deny him the right to receive or retain the salary derived from his other lucrative office since that earlier date. The incumbent would have held the other office under color of title and would therefore have been an officer *de facto*. The acts of a *de facto* officer are binding on third parties, but such officers do not have any right to the emoluments of the office. *State ex rel. Worrell v. Carr,* 129 Ind. 44, 28 N.E. 88 (1891); *Edington v. Board of Comm'rs,* 105 Ind. App. 156, 13 N.E. 2d 895 (1938).

In answer to your specific question, it is my opinion that the simultaneous serving as a member of the Board of Trustees of the Attica Consolidated School Corporation and as the Fountain County Highway Supervisor would now violate the constitutional prohibition against holding two lucrative offices.

OFFICIAL OPINION NO. 40

November 28, 1967

ELECTIONS—COUNTY OFFICERS—Effect Where Elected Candidates Dies Before Qualifying for Office—When Next Election May Be Held.

Opinion Requested by Hon. Wayne Timmons, Clerk, White Circuit Court.

I am in receipt of your recent inquiry as to who should occupy the office of Clerk of the White Circuit Court subse-