OPINION 33

OFFICIAL OPINION NO. 33

December 6, 1966

EDUCATION—Community School Corporation—County Board of Public Welfare—Same Person Appointed to Both Bodies—Dual Office Holding.

Opinion Requested by Hon. William H. Herring, State Representative.

Your letter has been received and the applicable portion thereof reads as follows:

> "1. Can a person who is a member of the Board of School Trustees of a community school corporation organized under the recent School Re-Organization Act also serve as a member of the County Board of Public Welfare?
>
> "2. If such person can serve on each of such boards, is he entitled to the per-diem allowance of not more than $10.00 for attendance at any regularly called meeting of the Welfare Board?"

You identify the "community school corporation" to which your questions refer as one "organized under the the recent School Re-Organization Act." The most recent original enactment in reference to school reorganization is The School Corporation Reorganization Act of 1959, Acts 1959, ch. 202, as amended, Burns IND. STAT. ANN., §§ 28-6101 to 28-6131. School corporations formed under that act are called "community school corporations." Members of boards of school trustees considered in this Opinion will be only those of community school corporations reorganized under the said 1959 Act.

(1) The first question which must be considered is whether such office holding violates Art. 2, § 9 of the Constitution of Indiana, 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: . . ." (Emphasis added.)

A position is a "lucrative office" under said provision when the holder is charged with duties under the general laws of this state or the United States, and the position is lucrative. *Chambers v. State ex rel. Barnard,* 127 Ind. 365, 26 N.E. 893 (1891).

In *Wells v. State ex rel. Peden,* 175 Ind. 380, 94 N.E. 321 (1911), the court said, at page 383 of 175 Ind., at page 322 of 94 N.E.:

> "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."

The Supreme Court has more recently defined the word "office" as used in another section of the Constitution:

> "In our opinion the word 'office' as used in Art. 5, § 24, of the Constitution of Indiana means a public position or employment, the duties of which are prescribed by law, and the appointment or election to which is for a given period during which an individual is vested with some part of the sovereign functions of State Government to be exercised by him for the benefit of the public, where emolument is a usual, but not an essential element thereof. *State ex rel. Black v. Burch* (1948), 226 Ind. 445, 456, 80 N.E. 2d 294, 299; *Wells*

> *v. State ex rel., supra* (1911), 175 Ind. 380, 384, 94 N.E. 321, 322."
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> *Book v. State Office Bldg. Comm'n,* 238 Ind. 120, 153, 149 N.E. 2d 273, 290 (1958).

The office of city or town school trustee was held to be a lucrative office within the meaning of Art. 2, § 9, of the Constitution of Indiana, in *Chambers v. State ex rel. Barnard, supra.*

A member of the board of school trustees of a community school corporation reorganized under the 1959 Act, as amended, exercises at least the same portions of the sovereign functions of the State of Indiana concerning education as do the city, town or township school trustees under earlier statutes. Compare:

> Ind. Acts 1899, ch. 192, § 1, as amended, as found in Burns IND. STAT. ANN., § 28-2410 (town, city or township school trustees), with
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> Ind. Acts 1931, ch. 94, § 1, as amended, as found in Burns IND. STAT. ANN., § 28-2301 (Indianapolis); and
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> Ind. Acts 1959, ch. 202, § 9, as amended, as found in Burns IND. STAT. ANN., § 28-6120 (community school corporations).

Therefore, it is clear that such position is an office within the meaning of Art. 2, § 9, of the Constitution.

However, it must also be determined whether the office is a lucrative one. In the *Chambers* case, *supra,* there was no mention of compensation, or lack of compensation, to the school trustees there concerned. In the *Wells* case it is specified that the school trustee was receiving sixty dollars ($60.00) per annum compensation for his services as school trustee.

In the case of *Book v. State Office Bldg. Comm'n, supra,* the Supreme Court said, at pages 151 and 152 of 238 Ind., at page 289 of 149 N.E. 2d:

" 'Lucrative office' as the term is used in Art. 2, § 9, of the Constitution of Indiana has been considered and defined by this court since the year 1846 as an *office to which there is attached a compensation for services rendered.* . . .

"While members of the State Office Building Commission are charged with certain duties under the Act creating the Commission, *they receive no compensation for their services,* and under the above definition adopted by this court *membership on the Commission does not constitute a lucrative office.*" (Emphasis added.)

See also 1960 O.A.G. 255, No. 45.

The School Corporation Reorganization Act of 1959, as originally enacted, did not contain a specific provision concerning the compensation of school trustees. This statute was interpreted to mean (1) that the county committee for the reorganization of school corporations could provide, as a part of the comprehensive plan, either a specific compensation for school board members, or a provision that the school board could fix its own compensation in a reasonable amount; (2) if there is no such provision made in the comprehensive plan, the trustee must serve without compensation unless the committee classified the school corporation, in which case the trustees would have their compensation fixed as provided by law for trustees of that classification of school corporation, 1962 O.A.G. 154. The 1959 Act was amended by the next General Assembly immediately succeeding the issuance of that Attorney General's Opinion, to read as follows:

"The county committee in formulating a preliminary plan shall, with respect to each of the community school corporations which are a part of the reorganization plan, determine the following: . . .

"(d) The compensation, if any, of the members of the regular and interim board of school trustees, which shall not exceed five hundred dollars [$500] per year. If no compensation is provided in any plan, adopted after the effective date of this amendatory act, such

> members shall be entitled to no compensation." Acts 1959, ch. 202, Acts 1963, ch. 381, § 1(4), Burns IND. STAT. ANN., § 28-6107.

The effective date of the 1963 amendment was March 15, 1963. It thus appears that for any school corporation reorganized under the 1959 Act, it is necessary to examine the preliminary plan (for those corporations reorganized subsequent to March 15, 1963) or the comprehensive plan (for those reorganized previously), for that school corporation to determine whether its trustees are entitled to compensation for their services and thus hold lucrative offices.

If no compensation has been provided for any of the members of a community school corporation board of school trustees, the members of that particular board do not hold lucrative offices, and are not barred by § 9 of Art. 2 of the Indiana Constitution from also holding a lucrative office in the administrative or executive department of government. Members of those boards of school trustees for whom compensation has been provided, however, may not serve as members of a county board of public welfare if the latter position is a lucrative office under the Constitution.

County boards of public welfare were established by the Welfare Act of 1936, Acts 1936 (Spec. Sess.), ch. 3, § 19, as last amended by Acts 1965, ch. 430, § 1, and as found in Burns IND. STAT. ANN., § 52-1118, which reads, in part, as follows:

> "The county board of public welfare shall consist of five [5] members, who . . . shall be appointed by the judge of the circuit court: Provided, That no elective county official shall serve as a member of the county board of public welfare. . . . The members of the county board shall serve without salary, but shall be entitled to receive the sum of ten cents [10c] per mile for each mile actually and necessarily traveled, in performance of their official duties. They shall also be entitled to expenses for hotel and meals if their official duties require their travel outside of their counties. The per diem cost for hotel and meals shall not, however, be paid beyond the sum set by law for state em-

> ployees. *Any member not holding other elective or appointive office may receive a per diem allowance of not more than ten dollars [$10.00] for attendance at any regularly called meeting of the board.*" (Emphasis added.)

That a member of the County Welfare Board is an officer rather than an employee was decided by the Supreme Court in the case of *State ex rel. Newkirk v. Sullivan Cir. Ct.*, 227 Ind. 633, 637, 88 N.E. 2d 326, 327, 328 (1949), wherein the court made the following statement:

> ". . . The duties of the county board are defined by § 52-1119 Burns' 1933, and of the county department by § 52-1120, Burns' 1933. From our reading of the foregoing statutes, we are of the opinion that a member of the county welfare board is a public officer as distinguished from an employee."

Since a county welfare board member is a public officer, it now remains to be determined whether compensation is attached to such office, making it a lucrative one within the meaning of the Constitution.

One of my predecessors has ruled that a member of a county board of public welfare is a holder of a lucrative office, and that the holder of such office is forbidden by the Constitution of Indiana, Art. 2, § 9, from holding another lucrative office at the same time. 1958 O.A.G. 92, No. 21; 1957 O.A.G. 54, No. 12.

The statute interpreted in each of those opinions, Acts 1955, ch. 227, § 1, amending § 19 of the 1936 Welfare Act, as amended, authorized a per diem allowance for meeting attendance, as does the statute as amended in 1965, Burns IND. STAT. ANN., § 52-1118. Such per diem was interpreted in the opinions to be compensation within the constitutional provision, making the office a lucrative one.

Acts 1936 (Spec. Sess.), ch. 3, § 19, as last amended prior to 1965, by Acts 1961, ch. 315, § 1, provided that no elected county official should serve on the county welfare board, that one member should be a township trustee, and further that

the per diem allowance could be received only by "any member not holding other elective or appointive office."

The 1965 amendment to § 19 of the 1936 Act, as quoted *supra,* is now in effect. The provision that "no elective county official shall serve as a member of the county board" remains, but it is no longer necessary that a township trustee be appointed to the board. The provision restricting per diem allowances to "any member not holding other elective or appointive office" was not changed. Thus the Act as rewritten by the 1965 Legislature does not require that any specified elective or appointed officer be appointed to the board, but it does prohibit members of the board holding other elective or appointive offices from receiving the state per diem. Does this language in effect affirmatively authorize the holder of a lucrative office to serve in addition as a non-compensated member of the county board of public welfare?

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.

The decision in the *Book* case that additional non-compensated duties may be imposed on an officer by the Legislature does not apply here. In that case, the officers were specifically

designated by statute to perform duties on the second board *ex officio* their first offices, not as individuals. In accord, see *State ex rel. Bateman v. Hart,* 181 Ind. 592, 105 N.E. 149 (1914). Under the 1936 Welfare Act, as amended in 1965, the Legislature no longer requires the *ex officio* services of any officer on the county board of public welfare. Each member serves in his individual capacity.

It is an elementary rule that the General Assembly cannot authorize any person to violate the Constitution of Indiana. Neither may the General Assembly achieve such a result by indirection or subterfuge. See *Protsman v. Jefferson-Craig Consol. School Corp.,* 231 Ind. 527, 539, 109 N.E. 2d 889, 893 (1953). Making the lucrative or non-lucrative nature of an office dependent upon whether a particular incumbent is drawing or is entitled to draw compensation would be a method of evading the constitutional prohibition which, in my opinion, the General Assembly may not utilize.

If the language of the statute can be interpreted to avoid an unconstitutional meaning, it must be so interpreted.

> " 'It is an elementary principle that where the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional and by the other it would be valid, the court should adopt the construction which would uphold it.' " *Book v. Board of Flood Control Comm'rs,* 239 Ind. 160, 169, 156 N.E. 2d 87, 92 (1959).

There are "offices" which are not "lucrative offices" within the constitutional prohibition in Art. 2, § 9, of the Constitution, either because they are not lucrative or are not the type of office included in the meaning of the constitutional section, *e.g.,* members of a board of school trustees for whom no compensation is authorized, offices which are purely and wholly municipal offices, such as city councilmen, 1949 O.A.G. 29, No. 6; see also *Chambers v. State ex rel. Barnard, supra.* The statutory language may be interpreted as denying a per diem allowance for attendance at a regularly called meeting of the county board of public welfare to those who hold an office which is not a lucrative office within the meaning of Art. 2,

§ 9, of the Constitution, such as those who are members of a board of school trustees to which office no compensation is attached. This interpretation removes any doubt concerning the constitutionality of the statute under Art. 2, § 9 of the Constitution of the State of Indiana. Therefore, the statute is not a legislative attempt to authorize the holder of one lucrative office to hold another lucrative office at the same time.

My conclusion, therefore, is that a member of a board of school trustees of a community school corporation organized under the School Corporation Reorganization Act of 1959, to which office compensation is attached, is forbidden by Art. 2, § 9 of the Constitution of Indiana from serving as a member of a county board of public welfare. A member of a board of school trustees of a community school corporation organized under the 1959 Act, to which office no compensation is attached, is not prohibited by Art. 2, § 9 of the Constitution from serving as a member of a county board of public welfare.

(2) However, the fact that a proposed dual office holding does not violate the constitutional provision construed above does not finally determine whether that dual office holding is permissible. It is necessary to consider additional tests, including public policy, incompatibility, or conflict of interest between the two offices, see 1961 O.A.G. 173, No. 30; see also 1960 O.A.G. 225, 261, No. 45.

Since such questions require a discretionary determination based upon the facts in each case, I agree with my predecessor, who stated:

> " 'Due to varying factual situations attendant upon a consideration of various positions, in any given instance, it is my opinion that the responsibility for a determination as to whether such employment or appointment would be against public policy, whether the duties of the two positions would be incompatible with each other, and whether there is a conflict of interests in such employment, rests with the appointing authority." 1961 O.A.G. at 178.

Therefore, whether the office of a member of a board of school trustees of a community school corporation to which office no compensation is attached is incompatible with membership on a county board of public welfare, and whether such dual office holding would create a conflict of interest or violate public policy are determinations which must be made by the officer with the authority to appoint a person to the second office.

(3) Your second question need not be answered as to those members of a board of school trustees who are not entitled to serve as members of a county board of public welfare. However, as to those members of a board of school trustees, if any, who may be properly appointed as members of a county board of public welfare, the Welfare Act of 1936, § 19, as amended, Burns § 52-1118, specifies that such school trustee, as the holder of another office, is not entitled to the per diem compensation provided by the statute.

OFFICIAL OPINION NO. 34

December 8, 1966

INDIANA STATE PERSONNEL BOARD—Employees' Right of Appeal in Matters of Employment Severance or Adjustment—Public Employee in no Less Favorable Position than Private Employee.

Opinion Requested by Mr. R. F. McElheny, Personnel Director, Department of Administration.

This is in response to your inquiries concerning appealable cases to the State Personnel Board. Your inquiry essentially concerns the scope of the appellate jurisdiction of the Board.