

I am, therefore, of the opinion a person signing the petition referred to in your question could not withdraw his name therefrom after the time the petition is filed by the petitioners with the County Committee of their county, for the reason that the said committee's jurisdiction attached at the time of such filing.

How a person may withdraw his name from a petition prior to the time of such filing does not seem to have been specifically considered in this state. However, persons circulating a petition are generally considered the agents of the persons signing the same and the same law of agency would, therefore, be applicable. It would, therefore, seem that a person signing such petition and desiring his name to be withdrawn would only be required to notify the person in custody of the petition of his demand. Written notice of such request would be better evidence, but in my opinion would not be necessary. Whether a proper demand for withdrawal of a signature was made before the petition was filed with the County Committee would be a question of fact which only a court would have the right to judicially determine in an appropriate action thereon.

OFFICIAL OPINION NO. 30

July 11, 1961

Honorable Joseph D. Cloud
State Representative
Wayne and Union Counties
228 South 23rd Street
Richmond, Indiana

Dear Representative Cloud:

This is in answer to your request for an Official Opinion concerning the eligibility of a township trustee to hold office as a member of a county election board. In specific language your question is stated as follows:

“Is a township trustee qualified and eligible to hold office as a member of a county election board?”

Your question is particularly directed toward the possible violation of the Indiana Constitution, Art. 2, Sec. 9, which provides as follows:

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“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: * * *.” (Our emphasis)

In a question such as yours it is also necessary to consider the following additional tests:

- (1) Are the two positions incompatible with each other?
- (2) Is there a conflict of interest?
- (3) Is this against public policy?

First, let us consider whether a township trustee is the holder of a “lucrative office” under the provisions contained in the Indiana Constitution, Art. 2, Sec. 9, *supra*. To come within the constitutional prohibition against the holding of two lucrative offices, one must hold the title to an office wherein he is authorized to exercise some of the state’s sovereignty and so is an officer rather than a mere employee. In addition, it is a necessary element of a “lucrative office” that there be compensation attached for services rendered.

Chambers v. The State *ex rel.* Barnard, Prosecuting Attorney (1890), 127 Ind. 365, 367, 26 N. E. 893, 11 L. R. A. 613;

Book v. State Office Bldg. Comm. *et al.* (1957), 238 Ind. 120, 151, 152, 149 N. E. (2d) 273.

The Supreme Court of Indiana, in the case of Bishop v. The State *ex rel.* Griner, Prosecuting Attorney (1898), 149 Ind. 223, 232, 48 N. E. 1038, considered the Indiana Constitution, Art. 2, Sec. 9, *supra*, wherein the matter of two lucrative offices, one being a township trustee, was involved. The Court made the following statement:

“* * * The test to be applied is * * * whether the two offices held by the appellant * * * are * * * lucrative ones within the meaning of the constitution. That the office of township trustee is lucrative is settled beyond controversy. *Creighton v. Piper*, 14 Ind. 182; *Foltz v. Kerlin*, *supra* [105 Ind. 221].”

See also: Indiana Law Encyclopedia, Vol. 22, Officers, § 28, p. 216;

1949 O. A. G., pages 218, 220, No. 57.

Therefore, in my opinion, the law is well settled that a township trustee is the holder of a "lucrative office" within the meaning of the Constitution.

The Indiana Election Code, being the Acts of 1945, Ch. 208, in Section 17, as amended and found in Burns' (1961 Supp.), Section 29-3102, provides that appointments to the county election board "shall be made at least ninety [90] days prior to each primary in any year in which a general election is held * * *. Such appointees shall serve until their successors are appointed and qualify. * * *"

The Acts of 1945, Ch. 208, Sec. 24, as found in Burns' (1949 Repl.), Section 29-3109, authorizes compensation for services to county election board members in accordance with the population classification of the county wherein they serve. The members of a county election board are *ex officio* members of the county board of canvassers. See: Acts of 1945, Ch. 208, Sec. 291, as amended and found in Burns' (1949 Repl.), Section 29-5208. Additional compensation for their services as members of the county board of canvassers is provided in the Acts of 1945, Ch. 208, Sec. 293, as amended and found in Burns' (1961 Supp.), Section 29-5210, which reads, in part, as follows:

"* * * The members of any such board shall receive for their services as board of canvassers such amount as may be fixed by the board of county commissioners."

In my 1958 O. A. G., pages 88, 91 and 92, No. 20, in considering Burns' 29-3109 and 29-5210, *supra*, I stated that in my opinion the members of the county election board, other than the clerk of the circuit court, "* * * may receive compensation for serving on the county canvassing board in addition to their compensation as members of the county election board."

In a determination as to whether a member of a county election board exercises any portion of sovereignty under the state, we look to the scope of authority and duties prescribed

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for such board members, as provided in the Indiana Election Code. Sections of the Code which illustrate sovereignty vested in a county election board in the Acts of 1945, Ch. 208, Secs. 19, 20 and 22, as found in Burns' (1949 Repl.), Section 29-3104, Burns' (1961 Supp.), Section 29-3105, and Burns' (1949 Repl.), Section 29-3107, read, in part, as follows:

29-3104. *"The board is hereby vested with the power and charged with the duty of conducting all elections and administering the election laws within the county. It shall conduct primary, general, city, township, ward, and school city or district elections or elections in other divisions less than a county, except towns. It shall be the duty of the county election board to prepare ballots for the election of all officers to be voted for in such elections except town officers and those who are to be voted for by all the electors of the state. County election boards shall cause to be distributed state and local ballots except town ballots to all of the voting precincts in their respective counties. * * *"* (Our emphasis)

29-3105. *"Every county election board is hereby authorized to appoint and at pleasure remove clerks, custodians and such other employees as may be necessary in the execution of its powers, prescribe their duties and fix their rank. Each board may fix the salaries and other necessary compensation of its appointees.*

"Each board shall prepare annually a budget estimate in which it shall set forth an itemized list of its expenditures for the preceding year and an itemized estimate of the amount of money necessary to be appropriated for the ensuing year and submit the same at the time and in the manner and form other county budget estimates are now or may hereafter be required to be filed.

"All materials, supplies and equipment of any and every sort which are to be paid for out of the county treasury shall be purchased as now provided by law. Payment of same shall be upon

claims filed with and approved by the county election board, and the county auditor shall draw his warrant or warrants on the county treasurer in payment thereof.

“The books of all county election boards shall be audited as are those of other county officers.” (Our emphasis)

29-3107. *“The county election board may examine on oath any person touching any material matter connected with or bearing on the proper discharge of its duties. Any member of the board may administer such oath. Said board is given full power to send for persons and papers, and compel the witnesses to answer under oath touching any questions which may properly come before said board. * * *”* (Our emphasis)

See also: “Election Laws of Indiana,” 1960 Edition, pages 138-142, inclusive.

A public office within the meaning of the Indiana Constitution, Art. 2, Sec. 9, *supra*, was defined in the case of *Shelmadine v. City of Elkhart* (1921), 75 Ind. App. 493, 495, 129 N. E. 878, as follows:

“A public office[r] 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 of the sovereign power.”

I find no instance where the status of a member of a county election board has been considered or passed upon by the Supreme or Appellate Court of Indiana or has been heretofore the subject of an Official Opinion by any Attorney General of the state. However, an examination of the provisions of Burns' 29-3104 and 29-3105, *supra*, shows that a member of a county election board, in the exercise of his duties under the authority vested in him as such member, is clearly in a posi-

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tion to exercise a portion of the sovereignty of the state. Therefore, in my opinion, inasmuch as a member of a county election board does exercise a portion of the sovereignty of the state and is paid compensation therefor such member is the holder of a "lucrative office" within the meaning of the Indiana Constitution, Art. 2, Sec. 9, *supra*.

In my 1960 O. A. G., page 42, No. 9 and 1960 O. A. G., page 255, No. 45, I discussed, at considerable length, the various tests such as incompatibility, conflict of interests and public policy, to be taken into consideration in any question pertaining to the legal right of an individual to hold more than one position under state government.

In my 1961 O. A. G., No. 4, issued February 9, 1961, in connection with the three tests last above enumerated, I made the following statement:

"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."

In my 1959 O. A. G., pages 348, 351, No. 66, I considered the question of "*eligibility*" for office and stated as follows:

"In 22 Indiana Law Encyclopedia, Sec. 25, p. 210, it is stated that:

" "Eligibility" for office refers to the qualifications to hold an office, or competency to hold the office if chosen, and is synonymous with qualifications. The eligibility of a person to hold public office is to be determined as of the time the term of office begins unless otherwise provided by statute or by the Constitution.' "

"See also: State of Indiana *ex rel.* Handley v. Superior Court of Marion County (1958), 238 Ind. 407, 151 N. E. (2d) 508.

“An interpretation of the word ‘eligible’ is given in the case of Carson v. McPhetridge (1860), 15 Ind. 327, wherein it is said:

“The term eligible, as used in our Constitution, relates to capacity of holding, as well as capacity of being elected to, an office.’”

Therefore, in my opinion, since a township trustee and a member of a county election board are both holders of a “lucrative office” within the meaning of the Indiana Constitution, Art. 2, Sec. 9, *supra*, my answer to your specific question is that a township trustee is not qualified and eligible to hold office as a member of a county election board.

OFFICIAL OPINION NO. 31

July 19, 1961

Mr. B. B. McDonald
State Examiner
Indiana State Board of Accounts
912 Indiana State Office Building
Indianapolis 4, Indiana

Dear Mr. McDonald:

This is in response to your request for my Official Opinion concerning the preparation of specifications for public works. The length of your letter prevents me from quoting it in its entirety but each question will be set out and considered in the order presented.

The applicable statutory material is found, as indicated in your letter, in Acts of 1907, Ch. 243, as found in Burns' (1950 Repl.), Section 23-116 *et seq.*, and particularly Section 3 thereof, being Burns' 23-118, which reads, in part, as follows:

“Any and all schemes, designs, understandings, plans, arrangements, contracts, agreements or combinations to limit, restrain, retard, impede or restrict bidding for the letting of any contract for private or public work, directly or indirectly, or to in any manner combine or conspire to stifle or restrict free competi-