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THE POSITIONS OF MUNICIPAL AUDITOR AND A MEMBER OF A BOARD OF LIBRARY TRUSTEES ARE NOT INCOMPATIBLE—AN APPOINTED PERSON WHO IS INELIGIBLE TO HOLD SAID POSITION IS A *DE FACTO* OFFICER UNTIL HIS TITLE IS ADJUDGED INSUFFICIENT—§§3375.63, 3375.36, R.C.

SYLLABUS:

1. The positions of municipal auditor, held pursuant to Section 733.10, Revised Code, and member of a board of library trustees, held pursuant to Chapter 3375., Revised Code, are not incompatible.

2. A person holding a position under color of a known appointment that is void because of the person's ineligibility to hold that position is a *de facto* officer and his acts are valid, insofar as they involve the interests of the public and of third persons, until his title to office is adjudged insufficient.

Columbus, Ohio, March 16, 1962

Hon. Walter Brahm, State Librarian, The State Library
65 South Front Street, Columbus 15, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"May we have your official opinion on two questions about which local libraries have asked the advice of the State Library?

"1. Is the auditor of a municipal corporation an 'officer', and is the holder of such an office disqualified from serving as a member of a board of public library trustees?

"In an opinion of your office issued in 1959, No. 999, you ruled that Ohio law permits public employees to serve on library boards, but that holders of certain official positions, specifically mayor or a member of a county budget commission, are not authorized by statute to serve as members of boards of public library trustees, that the common law test of incompatibility shows such positions to be incompatible, and therefore such officers are ineligible to serve on boards of public library trustees.

"Would not a city auditor also be an 'officer', an individual who takes an oath of office and becomes responsible to the public for his own official acts and those of his subordinates? Would not the interests of his office as the fiscal agent of a municipality competing with a public library for funds from a common source, the classified property tax, be in direct conflict with the interests of the board of public library trustees?

"2. If a member of a board of public library trustees is ineligible to serve as a member of such board, either because of statutory prohibition, common law incompatibility, or residence outside the subdivision under which the library is organized, what is the legal status of the actions of such board when an ineligible member continues to serve and participate in such actions? Are contracts entered into by the board null and void only if the ineligible member's presence or vote had been used to qualify a quorum or a majority vote, or would the recording of his presence and voting in the minutes of the board render the board illegally constituted?"

The types of public libraries provided for in Ohio law are county free public libraries under Section 3375.06, Revised Code, township public libraries under Section 3375.10, Revised Code, municipal free public

libraries under Section 3375.12, and school libraries under Sections 3375.14 and 3375.15, Revised Code.

Of these statutes, Section 3375.14, Revised Code, is pertinent on the subject of compatibility; it prohibits a board of education from appointing anyone who is, or for the year prior to appointment was, a member of the board of education. The only other statute pertinent to the subject of compatibility is Section 3375.63, Revised Code, which applies to all categories of public libraries; it reads:

“No person shall be ineligible for membership on a board of public library trustees because of his *employment* by a school district or other political subdivision, provided that a majority of the members of each board of public library trustees shall be persons not employed by school districts, or other political subdivisions.”

(Emphasis added)

The question that arises, therefore, is whether the auditor of a municipal corporation is an employee. (As you do not specifically state what form of municipal government is involved, I assume that the municipality is one under the general statutory form rather than under the alternative statutory forms of government or under a home rule charter.) The position of auditor is provided for by Section 733.10, *et seq.*, such sections showing him to be an elected official having duties prescribed by statute. It is my opinion that a municipal auditor is a public officer as described in 44 Ohio Jurisprudence 2d, “Public Officers,” Section 2, pages 483-84. Accordingly, he is not an employee, and Section 3375.63, *supra*, does not apply.

A municipal auditor could, however, be prohibited from holding the position of library trustee if the positions are incompatible according to the common law rule concerning compatibility. The rule most broadly stated is found in 44 Ohio Jurisprudence 2d, “Public Officers,” Section 37, pages 524-25, reading:

“* * * The courts have, however, discussed certain tests by which incompatibility of public offices either may or may not be judged. Thus, it has been held that the test of incompatibility is not that it is physically impossible for the officer to perform the duties of one office because he is at that time elsewhere performing the duties of the other, but the test is rather in the inconsistency of the functions of the offices. One of the most important tests as to whether offices are incompatible is found in the principle that incompatibility is recognized whenever one office is subordinate to the other in some of its important and principal duties, or is

subject to supervision or control by the other—as in the case of an officer who presents his personal account for audit and at the same time is the officer who passes upon it—or is in any way a check upon the other, or where a contrariety and antagonism would result from an attempt by one person to discharge the duties of both. * * *

Your argument that a municipal auditor as the fiscal agent of the municipality would be competing with a library for funds from a common source does not, upon the facts, appear to be well taken. I find no statute putting a duty upon a municipal auditor to seek public funds. According to Section 733.11, Revised Code, a municipal auditor must keep the books of a city; according to Section 733.12, Revised Code, he must audit all accounts of city departments; according to Section 733.13, Revised Code, he has the duty to prevent appropriations from being overdrawn. Thus, it can be seen that a municipal auditor has the duty to keep track of funds a municipality has on hand rather than with securing additional funds.

Concerning funds held by public libraries, Section 3375.36, Revised Code, which applies to all categories of public libraries, reads:

“The clerk of the board of library trustees of a free public library shall be the treasurer of the library funds. All moneys received by such clerk for library purposes shall be immediately placed by him in a depository designated by the board. Such clerk shall keep an account of the funds credited to said board upon such forms as are prescribed and approved by the bureau of inspection and supervision of public offices. Such clerk shall render a statement to the board monthly showing the revenues and receipts from whatever sources derived, the disbursements and the purposes for such disbursements, and the assets and liabilities of the board. At the end of each fiscal year the clerk shall submit to the board a complete financial statement showing the receipts and expenditures in detail for the entire fiscal year.”

It can be seen from this that library funds, even those of a municipal library, are completely separate from municipal funds. Thus, conflicting interests due to one position being a check upon the other are not likely to arise.

In my Opinion No. 999, Opinions of the Attorney General for 1959, page 686, I did hold both the office of mayor and of a county budget commissioner to be incompatible with the office of member of a public library board of trustees. As to the mayor, I found a conflict because of Section 721.22, Revised Code, which allows a municipal corporation to transfer

property to a public library. As to the member of the county budget commission, I found a conflict because of the role of such member in regards to tax budgets of subdivisions in the county. Neither conflict is pertinent in the instant question, and said Opinion No. 999 is not applicable.

Your second question concerns the status of actions of a board of library trustees when an ineligible member continues to serve and participate in its actions. In 44 Ohio Jurisprudence 2d, "Public Officers," Section 198, page 699, it is stated:

"* * * a person is a *de facto* officer where the duties of the office are exercised * * * (3) under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public; * * *"

It is my opinion, therefore, that a person who is ineligible for an appointment to a board of library trustees, but who is appointed and serves, is a *de facto* officer until his removal is accomplished.

The legal status of actions performed by a *de facto* officer is set forth in 44 Ohio Jurisprudence 2d, Section 213, page 712, reading:

"The general rule is that the acts of a *de facto* officer are to be upheld as valid, in so far as they involve the interests of the public and of third persons, until his title to the office is adjudged insufficient. Third persons are not supposed to know whether an officer has taken every necessary step to qualify himself, and therefore it is sufficient for them to show that he is at least an officer *de facto*. The acts of a *de facto* officer, however, must comply with the requirement of applicable law, to the same extent and in the same manner as the valid acts of *de jure* officers.

"One important consequence of the rule that the acts of a *de facto* public officer are valid as far as the public and third persons are concerned is that the official acts of a *de facto* officer cannot be collaterally attacked."

In answer to your specific questions, it is my opinion and you are advised:

1. The positions of municipal auditor, held pursuant to Section 733.10, Revised Code, and member of a board of library trustees, held pursuant to Chapter 3375., Revised Code, are not incompatible.

2. A person holding a position under color of a known appointment that is void because of the person's ineligibility to hold that position is a *de facto* officer and his acts are valid, insofar as they involve the interests of the public and of third persons, until his title to office is adjudged insufficient.

Respectfully,

MARK MCELROY

Attorney General