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DEPUTY CLERK OF BOARD OF ELECTIONS NOT INCOMPATIBLE WITH POSITION OF DEPUTY SHERIFF.

SYLLABUS:

A deputy clerk of the board of elections may at the same time serve as a deputy sheriff, provided it is physically possible to properly perform the duties of both offices.

Columbus, Ohio, November 16, 1959

Hon. Theodore Lutz, Prosecuting Attorney
Richland County, Mansfield, Ohio

Dear Sir:

Your recent letter requesting my opinion reads as follows:

“Richland County officers in charge of payroll have requested the obtainment of an opinion from you upon the following facts:

“A deputy clerk of the Richland County Board of Elections was hired to serve as a deputy in the Richland County Sheriff’s Department. As a deputy clerk in the Board of Elections the employee has the usual duties and works five days per week Monday through Friday from about 8:00 A.M. until Court House closing at 4:00 P.M. He does such work and serves such hours as are necessary in the usual operation of County Boards of Elections for registration of voters, tallying votes, etc.

“The employment as deputy sheriff requires his attention and service Friday nights, Saturdays and Sundays in each week and the rate of pay is \$14.00 per day as such deputy sheriff. The Richland County Court House is closed on Saturdays and Sundays and the Board of Elections closes its office at 4:00 P.M. each Friday to reopen at 8:00 A.M. each Monday.

“Are these two positions compatible in your opinion?”

A concise statement in regard to incompatibility of public offices is given in *State ex rel. Gebert*, 12 O.C.C. (N.S.) 274, where it is said:

“* * *

“Offices are considered incompatible when one is subordinate to, or in any way a check upon, the other; or when it is physically impossible for one person to discharge the duties of both. * * *”

As stated in your letter, the usual hours of work of the deputy clerk of the board of elections are from 8:00 A.M. to 4:00 P.M. Monday to Friday. A part-time deputy sheriff in Richland County is required to be on duty Friday nights, Saturdays and Sundays of each week. When elections—either regular, primary, or special—are held, the deputy clerk of the board of elections apparently has to remain at his post of duty beyond his regular hours, when necessary, to expedite the business of the board. Whether or not this circumstance creates a situation in which it becomes physically impossible for one person to perform the tasks of both offices is a question of fact, to be weighed and determined by the board of elections and by the office of sheriff, for it is not inconceivable that a situation may arise, at election time, in which the services of a deputy sheriff could not be dispensed with.

Further consideration of the question under discussion leads me to an examination of the statutes which created the two positions and by which they are governed.

Under the provisions of Section 3501.06, Revised Code, the secretary of state is required to appoint a board of elections consisting of four qualified electors of the county. The two numerically strongest parties, as shown by the number of votes cast for the office of governor at the last preceding regular state election, are to have equal representation on the board.

Section 3501.09, Revised Code, provides in part:

“Biennially, within five days after the appointments to the board of elections are made by the secretary of state, the members of the board shall meet and organize by selecting one of their number as chairman, who shall preside at all meetings. * * * All such officers shall continue in office for two years. * * * The clerk shall first be selected by the votes of at least three members. If, after five ballots, no person is agreed upon as clerk, the names of all persons voted for on the fifth ballot, together with the names of the board members who nominated them, shall be certified to the secretary of state, who shall designate therefrom one of such persons to serve as clerk, *and, in counties containing a registration city, another such person to serve as deputy clerk.* The clerk and deputy clerk shall be of opposite political parties, and each such officer shall have been nominated by a board member of the political party to which he belongs, *but in any county containing a registration city the board may decide by the affirmative vote of*

*at least three members that the services of a deputy clerk are unnecessary and such deputy clerk then shall not be employed. * * **
(Emphasis added)

Registration city is defined in Section 3503.06, Revised Code, as one having a population of more than sixteen thousand according to the last preceding federal census, or a city having a smaller population but electing to become such by ordinance.

Statutory provisions with respect to deputy sheriffs are contained in Section 311.04, Revised Code:

“The sheriff may appoint, in writing, one or more deputies. If such appointment is approved by a judge of the court of common pleas, the approval, at the time it is given, shall be endorsed on such writing by the judge. Thereupon such writing and endorsement shall be filed by the sheriff with the clerk of the court of common pleas, who shall enter it upon the journal of such court. The clerk’s fees for such filing and journal entry shall be paid by the sheriff. Each deputy so appointed shall be a qualified elector of such county. No judge of a county court or mayor shall be appointed a deputy.”

It appears that the office of deputy clerk of the board of elections and that of a deputy sheriff have two things in common—the holders of both must be qualified electors of the county, and both are appointive. As to conflict between them, or subordination of one to the other, I can discern neither in the light of applicable statutes. Thus, physical impossibility of fulfilling the duties of both such offices at the same time, as already pointed out herein, remains the only possible bar to the holding of them by the same person.

Therefore, it is my opinion and you are advised that:

A deputy clerk of the board of elections may at the same time serve as a deputy sheriff, provided it is physically possible to properly perform the duties of both offices.

Respectfully,
MARK MCELROY
Attorney General