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SUPERVISORS, COUNTY BOARD OF: Compatibility of office of members with other offices.

PUBLIC OFFICES AND OFFICERS: Compatibility of members of board of county supervisors and various city and township offices.

Members of the legislative body of a city may not also serve simultaneously as a member of the county board of supervisors elected pursuant to Act 261, P.A. 1966, because of the incompatibility of those offices. The same is true of a mayor, assessor, and city attorney.

Likewise, township officers who are members of the township board may not serve as a member of the county board of supervisors.

The offices of township superintendent of a charter township and a member of the county board of supervisors are also incompatible.

No. 4658

October 31, 1968.

Honorable Blair G. Woodman
State Representative
Capitol Building
Lansing, Michigan

You have requested my opinion as to whether the offices of township superintendent of a charter township and a member of the county board of supervisors elected pursuant to Act 261, P.A. 1966, M.C.L.A. § 46.401, et seq.; M.S.A. 1968 Cum. Supp. § 5.359(1), et seq., are compatible.

In letter opinion issued under date of June 3, 1968, to James M. Hare, Secretary of State, (see appendix) it was held that both the offices of township supervisor and member of the legislative body of a city were incompatible with that of member of the county board of supervisors elected under the above cited act. Such holding was based on the potential conflict between the functions and duties of the two offices due to authority to contract between a county and either a township or a city.

Similar rulings have been issued with respect to the office of mayor, city attorney and assessor. It has also been held that whether the office of city clerk is incompatible with that of county supervisor depends on the nature of the duties of the clerk as provided in a particular city charter. (see appendix)

The township board of a township is vested with legislative and administrative powers. *Township of Dearborn v. Dearborn Township Clerk*, 334 Mich. 673, 686 (1952). Hence, the reasoning of the holding would likewise apply to the remaining members of the township board, which are the township clerk, treasurer, and trustees.

Townships with a minimum population of 2,000 may incorporate as charter townships. Act 359, P.A. 1947, M.C.L.A. § 42.1, et seq.; M.S.A. 1961 Rev. Vol. and M.S.A. 1968 Cum. Supp. § 5.46(1), et seq. The voting members of a township board of a charter township are the same as other townships. Sec. 5. That board likewise exercises legislative powers. However, in general its power and authority are increased by virtue of

various provisions of said act over that of the township board of an ordinary township.

The board is authorized to appoint a township superintendent. Sec. 10, Act 359, P.A. 1947, supra. Among the functions and duties which the board may delegate to the township superintendent are:

1. To see that all laws and township ordinances are enforced;
2. To manage and supervise the operation of all township utilities;
3. To see that all terms and conditions imposed in favor of the township or its inhabitants in any public utility franchise or in any contract are faithfully kept and performed;
4. To attend all meetings of the township board with the right to take part in discussions, but without the right to vote;
5. To be a member ex officio of all committees of the township board; and
6. To perform such other duties as may be prescribed by this act or required of him by ordinance or by direction of the township board and which are not assigned to some other official in conformity with the provisions of this act.

Such functions and duties, uness delegated to the township superintendent, are to be exercised and performed by the township supervisor.

It will be seen from the foregoing that the powers and duties which may be delegated by the board to the township superintendent are closely akin to those exercised by the supervisor in other townships, and particularly, those in charter townships which either do not have a township superintendent or in which such duties are not delegated to the superintendent.

The statutory authority for delegating such functions and duties to the township superintendent results in a potential conflict of interest between the powers and duties of that office and that of member of the board of county supervisors, which renders the two offices incompatible. As pointed out in the letter opinion of June 3, 1968, to Secretary of State Hare, while an actual conflict between the powers and duties of the two offices might arise but infrequently, it is the existence of the potential conflict which is controlling and which renders the offices incompatible. *Attorney General, ex rel. Moreland, v. Common Council of the City of Detroit*, 112 Mich. 145, 168 (1897). It follows that one person may not hold both offices simultaneously.

FRANK J. KELLEY,
Attorney General.

APPENDIX

June 3, 1968.

Honorable James M. Hare
Secretary of State
Treasury Building
Lansing, Michigan

Dear Mr. Hare:

The recent decision of the Michigan Supreme Court, *Advisory Opinion*

re Constitutionality of P.A. 1966, No. 261 (Upon Reconsideration), . . . Mich. . . ., decided May 8, 1968, has, as the Court held, the effect of lifting Section 7 of Article VII out of the Michigan Constitution of 1963, and as the Court stated, the further effect of " * * * leaving the rest of article 7 intact with the legislature left free to implement it in the same manner as if no section 7 had ever appeared therein." By virtue of that decision, it is now clear that Act 261, P.A. 1966, [1] which provides for

This decision has triggered numerous requests to this office from various state and local officials concerning the compatibility of the present offices of township supervisor and membership on a city council with that of the office of county supervisor as provided in Act 261. In order to expedite the resolution of this problem, I am addressing this letter, dealing with the most pressing of these inquiries, to you and am sending copies to all persons making inquiry and to all prosecuting attorneys and county clerks.

These questions are:

1. May a township supervisor run for the board of supervisors and, if elected, retain his township office?
2. May a member of a city council or city commission be elected to the board of supervisors and still retain his membership on the city council or city commission?
3. What effect does the repeal of Section 27 of the so-called home rule cities act of 1909² by Act 261 have on the status of representatives of cities on current county boards of supervisors?

The first two questions arise as a further effect of the *Advisory Opinion*, supra, was to remove the authority by which a township supervisor was, as a matter of constitutional law, entitled to sit as a member of a county board of supervisors, and the authority by which city officials, as a matter of statutory law, were permitted to sit as members of the county board. *Attorney General ex rel. Lodge v. Bryan* (1914), 182 Mich. 86.³ Consequently, there are no longer any provisions of the Constitution or of a statute either permitting or prohibiting the same person from holding both of the offices of township trustee or city councilman and county supervisor. In the absence of such authority the common law rule of incompatibility of offices is applicable. *Northway v. Sheridan* (1896), 111 Mich. 18. That rule as stated by the Michigan Supreme Court, quoting Mechem, is that two offices are incompatible if the "nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both." *Attorney General, ex rel. Moreland, v. Common Council of City of Detroit* (1897), 112 Mich. 145, 168.

¹ M.C.L.A. § 46.401 et seq.; M.S.A. 1968 Cum. Supp. § 5.359(1) et seq. the apportionment of county boards of supervisors on a one man-one vote basis, is viable and its provisions must be followed forthwith.

² Sec. 27, Act 279, P.A. 1909, as amended, M.C.L.A. § 117.27, M.S.A. 1949 Rev. Vol. § 5.2106.

³ As stated in *Bryan*, city officials were permitted to represent the city on the county board by virtue of Sec. 27 of the home rule cities act. That section is expressly repealed by Act 261.

In *People ex rel. Kraemer v. Bagshaw* (1942), 55 C.A. 2d 940, 130 P 2d 243, the Court held that the duties of the offices of city councilman and county supervisor were incompatible. Among the conflicting duties cited as the basis of that holding was the authority of the county board to contract with the city council for various purposes. Similarly in *McDonough v. Roach* (1961), 35 NJ 153, 171 Atl 2d 307, 309, the Court held the office of the mayor of a city and that of member of the board of chosen freeholders of a county were incompatible. The basis of that decision was that the legislature of New Jersey had authorized the county to contract with the city with respect to sundry subjects, the Court speaking of the nature of the conflict at page 309 as follows:

"In all of these matters the terms upon which the project is to be pursued are left to the agreement of the public bodies. In the negotiations the county board is bound to consider the interests of all of its citizens while the local governing body has a like obligation to the citizenry of the municipality alone. No man, much less a public fiduciary, can sit on both sides of a bargaining table. He cannot in one capacity pass with undivided loyalty upon proposals he advances in his other role. * * * The offices are accordingly incompatible. * * *"

In my opinion the rationale of these two cases is persuasive.

In Michigan there is in addition to statutes which authorize counties to contract with either townships or cities for particular purposes,⁴ Act 35, P.A. 1951,⁵ which authorizes a county to contract with either a city or township or any other municipal corporation "for the ownership, operation, or performance, jointly, or by any 1 or more on behalf of all, of any property, facility or service which each would have the power to own, operate or perform separately."⁶

Thus as in *Bagshaw* and *Roach*, supra, if the same person holds both offices, there is a potential conflict in the duties between the office of township supervisor or city councilman and the office of county supervisor. As held in those cases, that potential conflict is against the public policy. I emphasize that while the actual conflict of duties may arise but infrequently, it is the existence of the power, not the remoteness of its exercise, that is controlling. *Attorney General, ex rel. Moreland v. Common Council of City of Detroit*, supra.

Accordingly, it is my opinion in answer to the first two questions that the offices of township supervisor and member of a city council or commission and county supervisor are incompatible. While a duly elected township supervisor or city councilman is not prohibited from running for the office of county supervisor, if he were to be elected to and accept

⁴ For example, see Act 150, P.A. 1923, as amended, M.C.L.A. § 123.921 et seq., M.S.A. 1958 Rev. Vol. § 5.2351 et seq. (joint public buildings). Act 129, P.A. 1945, as amended, M.C.L.A. § 123.231 et seq., M.S.A. 1958 Rev. Vol. and 1968 Cum. Supp. § 5.2769(1) et seq. (joint sewage and sewage disposal system).

⁵ M.C.L.A. § 124.1 et seq., M.S.A. 1958 Rev. Vol. § 5.4081 et seq.

⁶ Sec. 2, Act 33, P.A. 1951, *ibid.*

that post, he would vacate *ipso facto* his prior office. *Weza v. Auditor General* (1941), 297 Mich. 686.

In answering the third question, I point out first that it is a fundamental rule of statutory construction that the legislative intent is arrived at by a consideration of an act in its entirety. *Klopfenstein v. Rohfling* (1959) 356 Mich. 197.

Act 261, when read as a whole, reveals a scheme by which the present system of representation on the county board of supervisors will be replaced by a new system of representation whereby supervisors are elected from single member districts by a one man-one vote basis. The act establishes the machinery to effectuate this change and provides a time schedule for implementing it. This schedule was partially disrupted by the rendition of *Advisory Opinion re Constitutionality of P.A. 1966, No. 261* (1967), 379 Mich. 55, which cast a cloud of unconstitutionality over Act 261. However, as stated above, that cloud has now been lifted and the machinery is back in motion. For purposes here the important fact to note is that Act 261 expressly recognizes that the process of making a change will take a certain period of time. In order to institute a new system it was necessary to repeal the existing system which Act 261 accomplished by repealing Section 27 of the home rule cities act of 1909. In reading Act 261 as a whole, it is clear that this repeal was intended to have prospective operation, i.e., it did not *ipso jure* divest representatives of cities presently serving on county boards of supervisors of their offices.

The office of member of county board of supervisors is a *de jure* public office recognized by Article VII, Sections 8 and 9 of the Michigan Constitution of 1963. Persons lawfully occupying such offices are entitled to be recognized as having the status of *de facto* officers if not *de jure* officers. The repeal of Section 27 of the home rule act by Act 261 did not vacate the offices occupied by representatives of cities upon county boards of supervisors.

“* * * Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with evidence of such offices and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. * * *”

Norton v. Shelby County (1886), 118 US 425, 441-442, 30 L. ed. 78.

Accordingly, it is my opinion in answer to the third question that representatives of cities presently serving on county boards of supervisors have not by virtue of the repeal of Section 27 of the home rule cities act by Act 261, been divested of their offices and may continue to serve until the new county supervisors elected as provided in Act 261 at the 1968 general election take office.

FRANK J. KELLEY,
Attorney General.

July 1, 1968.

Mrs. Marshall Teunis
533 Pine Street, Box 199
Ferrysburg, Michigan

Dear Mrs. Teunis:

You have inquired as to whether an appointed city assessor may seek the office of county supervisor and if elected, simultaneously hold both offices.

While this office has not rendered a written opinion on your specific question, other inquirers asking that same question have been advised that it is the opinion of the Attorney General that the offices of city assessor and county supervisor are incompatible.

The basis of that holding is that at the common law, which is here controlling, two officers are incompatible if one office has a reviewing power over that of the other. In such instances the manifest conflict between the duties makes it improper from considerations of public policy for one person to hold both offices. *Attorney General ex rel. Moreland v. Common Council of City of Detroit*, 112 Mich. 145, 168 (1897). The duties of county supervisor and city assessor are thus incompatible as a county supervisor as a member of the county board has the duty of annually reviewing the work of the city assessor in order to determine whether the real and personal property in the cities and townships of the county have been equally and uniformly assessed at true cash value, Section 34, Act 206, P.A. 1893, as amended, being M.C.L.A. § 211.34; M.S.A. 1968 Cum. Supp. § 7.52.

FRANK J. KELLEY,
Attorney General.

July 23, 1968.

Mr. John F. Kowalski
Prosecuting Attorney
Court House
Alpena, Michigan

Dear Mr. Kowalski:

You have requested an opinion as to whether the offices of city assessor, city attorney and city clerk are compatible with the office of county supervisor.

The recent decision of the Michigan Supreme Court, *Advisory Opinion re Constitutionality of P.A. 1966, No. 261*, (upon reconsideration) 380 Mich. 554, decided May 8, 1968, held that Act 261 which provides for the apportionment of county boards of supervisors on a one man-one vote basis is constitutional. As Act 261, as amended, prospectively repeals Section 27 of the home rule cities act, as amended, being M.C.L.A. § 117.27; M.S.A. 1949 Rev. Vol. § 5.2106, the statutory authority by which city officials are presently permitted to sit as members of county board of supervisors is removed. In the absence of such authority the common law rule of incompatibility of offices is applicable. *Northway v. Sheridan*,

111 Mich. 18 (1896). That rule as stated by the Michigan Supreme Court, quoting Mechem, is that two offices are incompatible if the "nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both." *Attorney General ex rel. Moreland v. Common Council of City of Detroit*, 112 Mich. 145, 168 (1897).

Applying the rule of the offices of city assessor and county supervisor, this office has advised that those offices are incompatible. (See attached letter to Mrs. Marshall Teunis.)

Similarly, this office has held that the offices of city councilman and county supervisor are incompatible. (See attached letter to Secretary of State James M. Hare.). The rationale of that opinion is that there is a potential conflict between the duties of city councilmen and county supervisor as a county is authorized by law to contract with a city for various purposes. That conflict which would have the effect of putting a public fiduciary on both sides of a bargaining table was held to be against the public interest.

In general, the duties of a city attorney are to act as legal advisor to the city council and to represent the city in all legal proceedings. As legal advisor to the city council, the city attorney would be charged with the duty of taking an active role in the negotiation, preparation and execution of any contract to which the city was a party. Pursuing such activities he would be acting as the agent of the city council. *Fletcher v. Board of Education, School District, Fractional No. 5*, 323 Mich. 343 (1948).

Accordingly, if the same person were to hold both the office of city attorney and county supervisor, he would be subject to the same potential conflict of duties which this office held to be a basis for finding the offices of city councilman and county supervisor to be incompatible. Therefore, it is my opinion that the offices of city attorney and county supervisor are similarly incompatible.

The duties of the city clerk usually include the keeping of a journal of the city council meetings; keeping of records, ordinances, resolutions and regulations of the council; being custodian of the city seal; general duties relating to elections; and other similar duties. When the duties of a city clerk are so limited, he, like a county clerk, may be fairly characterized as a ministerial officer. *State ex rel. Tolls v. Tolls*, 160 or 317, 85 P 2d 366 (1938); *Cleveland, C. C. & St. L. R. Co. v. People*, 212 Ill. 638, 72 NE 725 (1904). These ministerial duties of a city clerk do not conflict with those of a county supervisor. Accordingly, it is my opinion that the offices of city clerk and county supervisors are generally not incompatible.

However, if the city clerk is by charter a voting member of the city council or is assigned duties relating to the negotiation of contracts, then he would be in the same position as a city councilman and his office would be incompatible with that of county supervisor.

FRANK J. KELLEY,
Attorney General.

June 28, 1968.

Mr. Steve Polgar
City Attorney
City of Livonia
15855 Farmington Road
Livonia, Michigan 48154

Dear Mr. Polgar:

By letter dated June 27, 1968 you inquire whether the office of Mayor of a city and the office of county supervisor provided for in Act 261, Public Acts of 1966, are incompatible.

In view of the fact that the deadline for filing for nomination to the office of supervisor is only several days away, this office will be unable to give you an answer in depth. However, on June 3, 1968 I directed a letter to Secretary of State James M. Hare, wherein the compatibility of certain city offices and the office of county supervisor was reviewed. I enclose herewith a copy of the letter to Mr. Hare inasmuch as the answer to your question is governed by the principles set forth therein. In my opinion the office of Mayor and the office of county supervisor are incompatible.

Yours very truly,

FRANK J. KELLEY,
Attorney General.

Encl.