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PUBLIC OFFICES AND OFFICERS: Compatibility of the elective offices of Detroit city clerk and member of the board of governors of Wayne State University.

MUNICIPALITIES: Compatibility of the elective offices of Detroit city clerk and member of the board of governors of Wayne State University.

The fact that the duties of the clerk pertain extensively to election matters does not disqualify him as candidate for election to another office. Whether incompatibility exists is dependent upon the duties of the office of city clerk as specified in the city charter.

The board of governors of Wayne State University is authorized to contract with the city of Detroit regarding certain matters. The common council is authorized to approve any such contract on behalf of the city. The city clerk is the clerk of the common council and as such has the duty of recording and preserving the record of its proceedings but under the city charter the clerk is not a voting member of the council. Hence, the office of city clerk is not incompatible with that of member of the board of governors of the university.

No. 4686 June 29, 1970.

Hon. James G. Fleming
State Senator
Capitol Building
Lansing, Michigan

Your recent letter requests my opinion on the question:

> "May an individual holding the elective office of trustee of a state university at the same time hold the elective office of city clerk?"

Specifically you note that the city clerk deals extensively with election matters and suggest that incompatibility might result therefrom. You have also advised that your inquiry pertains to the offices of city clerk of the city of Detroit and member of the board of governors of Wayne State University. Both of them are elected offices. The powers and duties of the board of governors of Wayne State University are set forth in Article VIII, Sections 4 and 5, of the Michigan Constitution and Act No. 183, P.A. 1956 [M.C.L.A. §§ 390.641 et seq.; M.S.A. 1968 Rev. Vol. §§ 15.1350(1) et seq.]. The campus of that institution is within the city limits of the city of Detroit.

The city clerk is clerk of the common council and as such is required to attend its meetings and, inter alia, make and preserve the record of its proceedings. Title 4, Chapter 4, § 7(b); Title 3, Chapter 1, § 9, Detroit City Charter. However, the clerk does not have a vote upon the council. Title 3, Chapter 1, §§ 1, 8.

A candidate for nomination or election to any office is disqualified to serve as a precinct election inspector at such election [M.C.L.A. § 168.677; M.S.A. 1970 Cum. Supp. § 6.1677]. However, there is no comparable statutory provision disqualifying a city clerk from performing his duties as such in connection with an election at which he is a candidate for

nomination or election to a given office. Were he so disqualified, a city clerk could not perform those duties at an election during his incumbency at which he is a candidate even to succeed himself as clerk. As was recognized by O.A.G. 1967-68, No. 4658, pp. 317, 323, whether the office of city clerk is incompatible with another office depends on the nature of the duties of the office. The second office involved in that opinion was a member of the county board of supervisors. Because of the authority to contract between the city and county, that opinion held various city offices, such as mayor and member of the legislative body, to be incompatible with that of member of the county board of supervisors. However, the opinion differentiated as to the office of clerk, stating in the appendix at page 323:

> "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,* 212 111.638, 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.
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> "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."

There being neither any constitutional or statutory bar to the city clerk holding a second office, the test of incompatibility thereof is dependent upon the common law. A frequently quoted statement of that rule is:

> ". . . The question of incompatibility of necessity depends on the circumstances of the individual case. Although there is authority holding that offices are incompatible when it is physically impossible that they may be performed properly by the same person, the general rule is that the inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power of appointment as to the other office, or the power to remove the incumbent of the other, or to audit the accounts of the other, the question being whether the occupancy of both offices by the same person is detrimental to the public interest or whether the performance of the duties of one interferes with the performance of those of the other. Thus, in determining incompatibility, the permanency of the position, the power granted, and the functions actually performed should be considered. It is not the performance, or the prospective right of performance, of inconsistent duties only that gives rise to incompatibility, but the acceptance

of the functions and obligations growing out of the two offices; until tenure in the sense of term of office exists, there can be no incompatibility of official duty. The offices may be incompatible even though the conflict in the duties thereof arises on but rare occasions. . . ." C. J. S., Officers, § 23, pp. 135-36.

An example of the application of such common law rule is found in *People, ex rel. Ryan, v. Green,* (1874) 58 NY 295, 304, in which the issue of incompatibility arose as to the offices of member of the state assembly and deputy clerk of the court of special sessions of the city and county of New York:

> "It may be granted that it was physically impossible for the relator to be present in his seat in the assembly chamber, in the performance of his duty as a member of that body, and at the same time at his desk in the court doing his duty as deputy clerk thereof. But it is clearly shown in those opinions, that physical impossibility is not the incompatibility of the common law, which existing, one office is *ipso facto* vacated by accepting another. Incompatibility between two offices, is an inconsistency in the functions of the two; as judge and clerk of the same court—officer who presents his personal account subject to audit, and officer whose duty it is to audit it. The case of *Bryant* (4 T.R., 715, and 5 id., 509), cited by appellant, does not conflict with this view. It was decided upon the meaning of the particular statute, which required the personal presence of the officer at the prison. Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, *per se,* have the right to interfere, one with the other, before they are incompatible at common law. . . ."

The governing body of each of the three largest state universities has general supervision of its institution and the control and direction of the expenditures of the institution's funds. Article VIII, Section 5 of the Michigan Constitution, which section is the successor to several sections of Article XI of the 1908 Constitution.

In *Lucking v. People,* (1948) 320 Mich. 495, 504, the court recognized the statutory authority of the board of regents of the University of Michigan and the city of Ann Arbor to contract for the furnishing of certain services by the latter and rejected the application of a taxpayer for issuance of its writ of mandamus, stating:

"It is not for the court to consider the propriety of a contract between the city of Ann Arbor and the board of regents for the city to furnish police or fire protection or other public facilities for State property within the corporate limits. . . ."

The board of governors also has authority to contract with the city for the disposal of sewage, as well as the joint construction and operation of a sewage disposal plant [M.C.L.A. § 17.74; M.S.A. 1969 Rev. Vol. § 4.194].

The council is vested with the authority to approve any such contract upon behalf of the city. Title 3, Chapter 1, § 13(b); Title 6, Chapter 7, §§ 1, et seq. However, as above pointed out, his duties and authority as clerk of the common council are limited to making and preserving the record of its proceedings. He is not a voting member of that body. Accordingly his office as city clerk is not incompatible with his office as member of the board of governors of Wayne State University.

FRANK J. KELLEY,
Attorney General.

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EDUCATION, STATE BOARD OF: Rule-making power.
SCHOOL DISTRICTS: Power of board of education to suspend or expel students.

State Board of Education is authorized to promulgate rules prescribing the procedural safeguards to be employed by local school boards in the process of suspending or expelling students.

State Board of Education may review decisions of local boards concerning suspensions and expulsions for misconduct and may adopt rules prescribing the manner for taking such appeals.

No. 4705 July 7, 1970.

Dr. John W. Porter
Acting Superintendent of Public Instruction
Department of Education
Lansing, Michigan

You have requested my opinion on two questions which may be phrased as follows:

1. Does the State Board of Education possess the authority, either by constitutional grant or legislative enactment, to adopt rules governing the procedural safeguards to be employed by school boards in suspending or expelling students for misconduct?

2. Does the State Board of Education possess the authority, either by constitutional grant or legislative enactment, to review the decisions of school boards concerning student suspensions and expulsions for misconduct?