
February 18, 1937.

OPINION NO. 1651

DELINQUENT TAX BUREAU; NATURE AND PURPOSE.

The delinquent tax bureau is a bureau created for the administration and collection of delinquent taxes. It is not authorized to administer or collect current taxes.

TAXATION, GENERALLY; DELINQUENT TAXES.

Delinquent taxes are such assessed taxes as remain unpaid after the time set by law for their payment.

SAME; COLLECTION OF TAXES.

The collector of delinquent taxes and his assistants do not, by virtue of their appointments, possess the powers of collectors or assistant collectors appointed under section 1906, R. L. 1935, or of assessors or assistant assessors and are only authorized to administer and collect delinquent taxes.

PUBLIC OFFICERS; INCOMPATIBILITY OF OFFICES.

Offices are incompatible and may not be held by the same person when their functions are inconsistent, their performance resulting in antagonism and a conflict of duty so that the incumbent of one cannot discharge with fidelity and propriety the duties of both.

TAXATION, GENERALLY; DELINQUENT TAXES.

When collected and after the deduction of the amounts payable into the delinquent tax bureau expense fund, delinquent taxes, if a county realization, are payable to the county in accordance with sections 1921-1922, R. L. 1935, as amended, and if a territorial realization, are deposited in the general fund of the Territory.

PUBLIC OFFICERS; ELIGIBILITY.

The office of supervisor of the County of Hawaii and the office of assistant to the delinquent tax bureau (if an office) are not incompatible offices and one person may hold both offices at the same time.

Honorable Sukuichi Sakai,
Supervisor, County of Hawaii,
Kohala, Hawaii.

Sir:

This will acknowledge receipt of your letters of the 3rd and 12th instances.

We understand that you were appointed and for the past two years have acted, not as assistant collector of taxes for the District of North Kohala, as stated in your letter, but, as stated by the Honorable William Borthwick, Tax Commissioner, as assistant to the collector of taxes of the delinquent tax bureau.

The collector of the delinquent tax bureau was appointed under section 1966, R. L. 1935, and your appointment, as such assistant, was made under section 1968, R. L. 1935.

The delinquent tax bureau is a bureau created for the administration and collection of *delinquent taxes*. Section 1965, R. L. 1935. It does not administer *current taxes*. Its head is a collector of delinquent taxes. The collector of delinquent taxes is given entire charge of the bureau and is "responsible to the Commissioner for the collection and general administration of *all delinquent taxes*". In addition to an attorney for the bureau, the Tax Commissioner is authorized to appoint "twelve assistants to the bureau whose duties shall be determined by the collector of delinquent taxes under the direction of the commissioner."

Delinquent taxes are such assessed taxes as remain unpaid after the time set by law for their payment. See sections 1957, 2046, 2109 (as amended) and 2126, R. L. 1935; section 17 of Act 131, L. 1935, and section 6 of Act 141, L. 1935. On or before December 1 of each year each collector, appointed under section 1907, R. L. 1935, is charged with the preparation of a delinquent tax list for his district. See section 1962, R. L. 1935.

The collector is only authorized and empowered to administer and collect delinquent taxes. He is not a collector appointed under section 1906, R. L. 1935. He does not possess the powers nor can he, by virtue of his appointment under said section 1966, perform the duties of such a collector. The "assistants to the bureau" can possess no greater powers than those vested in the collector. Hence their powers and duties are confined to the collection of delinquent taxes.

For the same reasons that prevent the collector of delinquent taxes and the said assistants from exercising the powers of a regular collector or assistant collector, they are each prevented from exercising the authority, provided by sections 1923-1935, R. L. 1935, of an assessor or assistant assessor.

We understand that you were recently elected and on January 1, 1937, qualified as a member of the Board of Supervisors of the County of Hawaii.

On the ground that the office of supervisor is incompatible with the office or position of assistant to the collector of delinquent taxes, the auditor has refused to issue to you a salary warrant as such assistant for the month of January 1937 and has based such decision upon the authority of the case of *Woods v. Treadway*, 31 Haw. 792.

In *Woods v. Treadway*, the Supreme Court of Hawaii decided that the offices of supervisor of the County of Hawaii and deputy assessor of taxes for the District of North Kohala were incompatible and that one person could not hold the two offices at the same time. This result was based upon the ground that a supervisor's duty to determine the annual financial requirements of a county was incompatible with a deputy assessor's duty to determine the full cash value of real and personal property within his district. Although the reasoning and general principles stated in the *Woods v. Treadway* case are applicable to the facts here presented, the result

reached is not applicable for the reason that the offices of assessor or assistant assessor of taxes, on the one hand, and the offices of collector of delinquent taxes or assistant to such collector, on the other hand, are separate and different offices with unlike and different duties.

In reaching its conclusion the Supreme Court of Hawaii stated the test of incompatibility of office in this language:

“At common law offices were deemed to be incompatible when their functions were inconsistent. 46 C. J. 941, 942. ‘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.’ *Ib.*, 942. ‘The principal difficulty that has confronted the courts in cases of this kind has been to determine what constitutes incomparability of offices and the consensus of judicial opinions seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. * * * It is held that incompatibility in offices exists ‘where the nature and duties of the offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both’. *State v. Wait*, 92 Neb. 313, 323, 324. ‘Public offices are incompatible, when their functions are inconsistent, their performance resulting in antagonism and a conflict of duty, so that the incumbent of one cannot discharge with fidelity and propriety the duties of both.’ *State v. Sword*, 157 Minn. 263, 264.” p. 794.

Thus, the question as to whether two or more offices are incompatible “must be determined largely from a consideration of the duties of each having, in so doing, a due regard for the public interest”. Offices are incompatible when “their *functions* are inconsistent, their performance resulting in antagonism and a *conflict of duty* so that the incumbent of one cannot discharge with fidelity and propriety the *duties* of both”. The purpose of the law in recognizing and enforcing the principle relating to incompatibility of offices, as stated in the Supreme Court, is “to see to it that a public officer shall feel at liberty to exercise his opportunities and his abilities in that office wholly uninfluenced, consciously or unconsciously, by any *conflicting interest or duty*”.

Therefore, in order to resolve the instant question,

we must examine into the respective duties of a supervisor and of an assistant to the collector of delinquent taxes and then determine whether the performance of the duties of both offices by the same person might possibly result in “*antagonism and a conflict of duty*”.

An examination of Chapter 61, R. L. 1935 will show that the duties of a collector of delinquent taxes or assistant to such collector do not commence until after the boards of supervisors have submitted their budgets, the budgets have been approved, the assessor has performed his duty of valuing each parcel of property, the assessment lists have been prepared and filed, appeals from assessments, if any, have been taken and disposed of, the tax rate has been determined by the treasurer, the regular collectors have attempted to collect all current taxes according to the assessment lists, the tax rolls have been prepared from the district assessment lists, bills have been mailed to taxpayers, and, upon the dates fixed for the payment of the several kinds of taxes, taxes have remained unpaid and have become delinquent. Thus, before the collector of delinquent taxes or his assistants commence the performance of their duties, taxes are already final in respect to valuation, rate and amount and have become delinquent.

When such taxes have become delinquent the collector of delinquent taxes or his assistants are authorized to proceed, by any of the methods provided by law, to enforce payment. Their duty is to collect all delinquent taxes and accurately account to the treasurer for such moneys as they receive. As heretofore pointed out they are not, by virtue of their appointment under said sections 1966-1968, authorized to perform the duties of a regular collector or assistant collector of taxes.

Upon the collection of delinquent taxes and after the deduction of the amounts payable into the delinquent tax bureau expense fund (section 1970, R. L.

1935, as amended) the surplus, if a county realization, is payable to the county in accordance with sections 1921 and 1922, R. L. 1935, as amended by Act 191, L. 1935. All other delinquent taxes, after the satisfaction of the above charge, are deposited in the general fund of the Territory. If such taxes are payable to the county, after the satisfaction of any deficiency in the collection of taxes for the preceding year, they are used to meet the county's requirements for the current year and any excess is used to reduce the tax rate in the succeeding year.

It is in accord with the interests of the Territory that all delinquent taxes, including such as are county realizations, be diligently collected because territorial officers are charged with their administration and collection. Clearly it has no interest which might oppose their collection. It is to the interest of the county that such taxes be collected, because, as to such part as are county realizations, they are used to meet prior deficiencies in tax collections or current county requirements or to reduce the county tax rate. As to such part as are not county realizations, the county has no interest which might be adverse to their collection. Thus, it is in accord with the interests of the Territory and the interests of the several counties that all delinquent taxes be fully and promptly collected.

We have carefully examined the duties of a supervisor and have found nothing that might conflict with your duty to collect delinquent taxes. We are therefore of the opinion that the functions of the two offices in question are not inconsistent. Their occupancy by the same person could not, therefore, result in such antagonism and conflict of duty that the incumbent of one could not discharge with fidelity and propriety the duties of both. Inasmuch as the offices are not incompatible we are of the opinion that your salary for the month of January 1937 is lawfully due and payable.

It has been stated that, although you were only appointed an assistant to the collector of delinquent taxes and only qualified as such by giving a bond for the discharge of the duties of such assistant and have been paid out of the delinquent tax bureau expense fund, you have also assessed taxes and collected current taxes. No appointment as an assessor or assistant assessor or collector or assistant collector has been made. As heretofore shown the offices of assessor or assistant assessor or collector or assistant collector are different offices (with different duties) from that of collector of delinquent taxes or assistant to such collector. Without considering the validity of your purported acts as an assessing officer or regular collecting officer, it is suffice, for the purposes of this opinion, to state that the question of incompatibility of offices must be determined from the legal incidents and duties of the offices to which you were appointed or elected. The question cannot be determined from the functions of offices to which you were not appointed but in respect to which you have undertaken to act. Under the decision of *Woods v. Treadway* there is no doubt but that the offices of county supervisor and assessor or assistant assessor are incompatible. However, you have never been appointed to or qualified for the offices of assessor or assistant assessor. No opinion is expressed as to whether the offices of county supervisor or collector or assistant collector (appointed under section 1906, R. L. 1935) are incompatible for it does not appear that you have been appointed to or qualified for either of the latter offices.

Respectfully,

J. V. HODGSON,
First Deputy Attorney General.

APPROVED:

S. B. KEMP,
Attorney General.