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COMPATIBLE-INCOMPATIBLE POSITIONS—DEPUTY SHERIFF AND INSPECTOR OF NUISANCES—COMPATIBLE—MAY BE HELD BY SAME PERSON UNLESS PHYSICALLY IMPOSSIBLE FOR ONE PERSON TO FAITHFULLY AND EFFICIENTLY DISCHARGE DUTIES OF BOTH EMPLOYMENTS.

SYLLABUS:

The positions of deputy sheriff and inspector of nuisances are compatible and may be held by the same person unless it is physically impossible for one person to discharge faithfully and efficiently the duties of both employments.

Columbus, Ohio, August 20, 1943.

Hon. Harold K. Bostwick, Prosecuting Attorney,
Chardon, Ohio.

Dear Sir:

Your request for my opinion reads in part as follows:

"I have the situation of a regular appointed and acting deputy sheriff who was also appointed inspector of nuisances by the county commissioners under Section 12661.

This deputy receives his salary as deputy and presents a bill once a month to the commissioners covering whatever work he does as nuisance inspector. His charge as nuisance inspector is very nominal as he uses his county car, for which of course he makes no charge.

As nuisance inspector he works out of my office as most of the calls come to me and I approve his charges before they are turned over to the county commissioners for payment.

This situation has proved very successful and the least expensive to the county and can easily be handled by the deputy in his time off. * * *

It is physically possible for this deputy to fill both of these offices and he is extremely efficient in performing the services necessary in both positions. There is certainly no inconsistency in the functions of the two offices as they practically go right along together; neither office is subordinate to the other nor subject to supervision or control by the other nor in any way a check by the one on the other.

It is therefore my opinion that these two offices are not incompatible and therefore the county has a perfect right to pay this officer as deputy sheriff and also his charge for services as nuisance officer.

Will you please give me your opinion in this regard?"

Section 11, General Code, to which you have referred in your letter, provides:

"No person shall hold at the same time by appointment or election more than one of the following offices: sheriff, county auditor, county treasurer, clerk of the court of common pleas, county recorder, prosecuting attorney, probate judge, and justice of the peace."

It will be observed the effect of this legislative enactment is to make the person who holds the office of sheriff ineligible to hold one of the other offices therein mentioned at the same time. It merely creates a statutory inhibition against a person holding two or more of the offices *therein* mentioned at the same time. It will be observed, however, this section does not make specific reference to a deputy sheriff, nor to one

who serves as an inspector of nuisances, and therefore would have no particular significance with respect to your matter.

The dual holding of the positions of deputy sheriff and inspector of nuisances not being prohibited by statutory or constitutional provision, if any prohibition exists it must therefore be by reason of the common law. Incompatibility of offices can be said to exist when the duties and functions are inherently inconsistent or repugnant so that because of the contrariety and antagonism which would result from an attempt of one person to discharge faithfully and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both.

In the case of *State ex rel. v. Shaffer*, 6 O. N. P. (N.S.) 219 (affirmed by the Circuit Court without opinion), it is stated at page 221 that :

“* * * And it was early held that the test of incompatibility was not that it was physically impossible for the officer to perform the duties of one office because he was at that time elsewhere performing the duties of the other, but the distinction was in an inconsistency in the functions of the offices.”

Several years thereafter (1909) the Circuit Court of Franklin County, in the well known case of *State ex rel. v. Gebert*, 12 O. C. C. (N.S.) 274, 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.*”
(Emphasis added.)

It may be of some interest to note the remarks of the court in the case of *People ex rel. Ryan v. Green*, 46 Howard (New York) 169, at page 170, where it is stated :

“According to an early authority incompatibility as to office is divided into two classes. ‘Offices are said to be incompatible and inconsistent so as to be executed by the same person, first, when, from the multiplicity of business in them, they cannot be executed with care and ability; or, second, when, their being subordinate and interfering with each other, it induces a presumption that they cannot be executed with impartiality and honesty.’ * * * Among the multitude of cases reported containing adjudications as to what constitutes incompatibility in offices, illustrations are found of the latter class, *and none whatever in the former.*”
(Emphasis added.)

Obviously, if the duties of one office are so multitudinous they require all of the time of a person who holds the same, then it would be physically impossible to properly and efficiently discharge the duties of any other office. My attempt to find any reported case wherein designated offices have been declared incompatible for this reason, has been no more successful than that of the court in the above mentioned case.

Turning now to a consideration of the legislative enactments pursuant to which an inspector of nuisances may be appointed, and as to his powers and duties, Sections 12661 and 12662, General Code, respectively, provide:

Section 12661:

“The county commissioners, whenever there is a violation of any of the provisions of this subdivision of this chapter, are authorized to employ and reasonably compensate one inspector of nuisances who shall be vested with police powers and authorized to examine all cases of violation of such provisions.”

Section 12662:

“For such purpose, and for obtaining evidence thereof, the inspector of nuisances may enter upon any premises in any county, and shall make or cause to be made a complaint, and institute prosecution, against anyone violating any provision of this subdivision of this chapter. He shall not be required to give security for costs. The prosecuting attorney shall be the legal adviser of such inspector and the attorney in all such prosecutions.”

The duties of such inspector are with reference to the various acts or conditions that are declared to be nuisances by the law and as such affect public health. See Section 12646 et seq.

You have referred to a regularly appointed and acting deputy sheriff, by which I assume you have reference to one whose appointment has been made pursuant to the provisions of Section 2830, which reads:

“The sheriff may appoint in writing one or more deputies. If such appointment is approved by a judge of the court of common pleas of the subdivision in which the county of the sheriff is situated, such approval at the time it is made, shall be indorsed on such writing by the judge. Thereupon such writing and endorsement shall be filed by the sheriff with the clerk of his county, who shall duly enter it upon the journal of such court. The clerk's fees therefor shall be paid by the sheriff. Each deputy so appointed shall be a qualified elector of such

county. No justice of the peace or mayor shall be appointed such deputy."

No attempt can here be made to set forth the various duties of a deputy sheriff who is vested with authority to perform every ministerial act that can be performed by his principal. Suffice it to say there does not appear to be any statutory provision pursuant to which a sheriff is charged with performing any of the duties to be performed by an inspector of nuisances. In this connection it should be borne in mind a deputy sheriff necessarily receives his instructions and directions from the sheriff. As will be observed from Section 12661, supra, an inspector of nuisances is employed by the county commissioners, so that whatever instructions or directions that are given him would emanate from different sources. I do not see, therefore, how one employment would be subordinate to or in any way a check upon the other, or that any inconsistency could come about.

Coming now to a discussion of whether offices are incompatible because it is physically impossible for one person to discharge the duties of both, this would appear to be a question of fact rather than of law. You have stated in your letter the compensation paid for the services rendered as nuisance inspector is nominal, from which it may reasonably be inferred it is not necessary to devote much time to that employment. You have further stated it is physically possible for the deputy to fill both offices, and if that be the situation the offices would not be incompatible since, as previously stated, one is not a check upon or subordinate to the other. A deputy sheriff serves at the pleasure of his principal. Presumably in this instance the time which is required to be given to the position of nuisance inspector does not prevent such deputy from also performing his duties to the satisfaction of the sheriff. To say that the offices were incompatible under those circumstances would be tantamount to holding, as a matter of law, the entire time of the deputy belongs to the sheriff. I am unable to find any reported decision to that effect.

It is therefore my opinion, in specific answer to your question that: The positions of deputy sheriff and inspector of nuisances are compatible and may be held by the same person unless it is physically impossible for one person to discharge faithfully and efficiently the duties of both employments.

Respectfully,

THOMAS J. HERBERT,
Attorney General.