

Note from the Attorney General's Office:

1922 Op. Att'y Gen. No. 22-3741 was overruled by
1965 Op. Att'y Gen. No. 65-150.

3741.

OFFICES INCOMPATIBLE—DEPUTY SHERIFF—COUNTY ATTENDANCE OFFICER—ALSO COURT CONSTABLE—COUNTY ATTENDANCE OFFICER.

1. *The positions of deputy sheriff and county attendance officer may not be held by one and the same person at the same time.*

2. *The position of court constable (1692 G. C.) and the position of county attendance officer cannot be held by one and the person at the same time.*

COLUMBUS, OHIO, November 20, 1922.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Acknowledgement is made of the receipt of your letter requesting the opinion of this department upon the following:

“Are the following offices or positions compatible; and may the same person hold both at the same time:

(1) Deputy sheriff and county attendance officer.

(2) Court constable and county attendance officer.”

There being no statutory inhibition against the holding of the two offices by the same person, an examination of their duties must be made to ascertain whether they come within the rule of incompatibility. This rule is laid down in 28 Cyc., 1381, as follows:

“It may be laid down as a rule of the common law that the holding of one office does not in and of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. But at common law two offices whose functions are inconsistent are regarded as incompatible.”

Also it is said in Dillon on Municipal Corporations, page 166 (note):

“Incompatibility in office exists where the nature and duties of the two offices are such as to render it improper from consideration of public policy for one incumbent to retain both.”

“In the absence of express provisions, disqualification to hold two or more offices is limited to offices the duties of which are necessarily incompatible.” (State ex rel. vs. Kinney, 20 O. C. C., 325.)

“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.” (State vs. Gebert, 12 C. C. (n.s.) 275.)

As the position of county attendance officer is mentioned in both cases in your inquiry, attention will be given first to the duties of that officer, to whom he is responsible and who has control of his time.

Section 7769-1 G. C. reads in part as follows:

"Every county board of education shall employ a county attendance officer, and may employ or appoint such assistants as the board may deem advisable. The compensation and necessary traveling expenses of such attendance officer and assistants shall be paid out of the county board of education fund. With the consent and approval of the judge of the juvenile court, a probation officer of the court may be designated as the county attendance officer or as an assistant. * * * * * *The county attendance officer and his assistants shall work under the direction of the county superintendent of schools.* * * * * *"

The duties of the attendance officer employed by the county board of education appear in sections 7769-2, 7770, 7771, 7773, 7773-1, 7774, 7777 and 7780 of the General Code.

Section 7769-2 G. C. reads:

"An attendance officer * * * may investigate any case of non-attendance at school or part-time school * * * and *may take such action in accordance with law as the superintendent of schools may direct* or as he himself may deem proper *in the absence of specific directions.*"

Section 7770 G. C. reads:

"The attendance officer * * * shall be vested with police powers and the authority to serve warrants * * * and (may) do whatever may be necessary in the way of investigation or otherwise to enforce the laws relating to compulsory education and the employment of minors. The attendance officer or assistant may also take into custody any youth * * * not legally employed * * * who is not attending school * * *"

Section 7771 G. C. reads:

"The attendance officer shall institute proceedings against any officer, parent, guardian, person, partnership or corporation violating any provision of the laws relating to compulsory education and the employment of minors * * * and *perform such other service as the superintendent of schools or board of education of the district by which he is employed may deem necessary* to preserve the morals and secure the good conduct of school children, and to enforce the provisions of the above mentioned laws.

"He shall * * * report to the superintendent (of schools) discrepancies between these lists (enrollment) and the enumeration.

"The attendance officer * * * shall cooperate with the industrial commission of Ohio in enforcing the conditions and requirements of the laws of Ohio relating to the employment of minors. * * * * He must keep a record of his transactions for the inspection and information of the superintendent of schools and the board of education; and shall make reports to the superintendent of schools as often as required by him."

Section 7773:

"On request of the superintendent of schools or the board of education *** the attendance officer shall examine into any case of supposed truancy within his district, ***. Upon the failure of the parent, guardian or other person in charge of the child to do so (bring about attendance of child), the attendance officer shall make complaint against the parent, guardian or other person in charge of the child in any court of competent jurisdiction."

Section 7773-1:

" *** If the parent, guardian or other person in charge of such child fails thereupon to cause his attendance *** the attendance officer shall make complaint against the parent, guardian or other persons in charge of the child in any court of competent jurisdiction."

Sections 7774 and 7780 G. C. also bear upon the matter of the attendance officer being the complainant before the judge of the juvenile court of the county, which court shall "six times when he shall hear the questions whether each such child *** shall be required to be sent for instruction to one of the state institutions."

Section 7780 further provides that the judge of the juvenile court shall issue an order on the parents, guardian or other person to appear before him at such hearing and "a copy of which order must be served personally on the proper person by the attendance officer ***."

It will be noted from the above sections, setting forth the duties of the county attendance officer, that he is at all times under the direction of the county superintendent of schools or the county board of education, and when a case reaches the judge of the juvenile court the attendance officer is then under the direction of the juvenile judge in the serving of the order from the court upon the proper persons. It would appear that the General Assembly in enacting the compulsory school law, from which the above sections are quoted, had in mind that this work as attendance officer might be performed in some instances by certain county employes like probation officers, deputy sheriffs or court constables. It is significant to note that in section 7769-1 G. C., supra, this privilege of designating one of these county employes to be a county attendance officer or assistant was limited solely to "a probation officer of the court" and then the consent and approval of the judge of the juvenile court was necessary. From this it can well be inferred that if a deputy sheriff or a court constable was eligible to this appointment, the General Assembly would more than likely have said so instead of limiting the eligibility to probation officers and omitting any mention of other minor county officers. It will be noted too that this probation officer when so designated can draw but one salary, that of probation officer, receiving only his expenses necessarily made when performing his duties as county attendance officer. Thus it was held in Opinion 2497, issued by this department on October 24, 1921, and appearing at page 961, vol. 2, Opinions of the Attorney General for 1921, in the first branch of the syllabus, as follows:

"1. A probation officer designated under section 7769-1 G. C. as a county attendance officer, cannot legally draw two compensations, that is, one for acting as probation officer and a separate salary as county attendance officer, for the reason that section 7769-1 does not provide a salary

for the county attendance officer where such county attendance officer is also a probation officer of the juvenile court. Where a probation officer is designated as county attendance officer, only his expenses as attendance officer is to be paid from the county board of education fund, which is disbursed by the county board of education."

From a reading of section 7769-1 G. C., it is apparent that it was not intended by the law-making body that the county attendance officer should receive the salary in full for that office and also the salary of another employment, such as deputy sheriff or court constable, because, as indicated above, even the probation officer so designated can receive only his traveling expenses as attendance officer when they are not incurred as a probation officer.

Bearing upon your first inquiry as to whether a deputy sheriff could also be employed as county attendance officer, attention is invited to section 2830 G. C., under which deputy sheriffs are appointed and which reads as follows:

"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 endorsed on such writing by the judge. Thereupon such writing and indorsement 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."

Section 2831 G. C. provides that the sheriff shall be responsible for neglect of duty or misconduct in office for each of his deputies and the general powers and duties of the sheriff are set forth in section 2833, too long to quote here. In some instances these deputy sheriffs are employed as annual employes, with their salary paid to them monthly, while in other instances they are paid for the services they perform throughout the year. Where the deputy sheriff is on an annual salary, it would appear that his entire time belongs to the sheriff's office and he would be in no position to accept or perform other employment. This condition might not obtain in those cases where a deputy sheriff was not a full-time employe, but, on the other hand, the deputy sheriff, when so employed and drawing the emoluments of such appointment, it is at all times under the direction of the sheriff, whose appointee or agent he happens to be.

"Where a deputy sheriff is paid for such services as he performs during the year, and his time is only partially taken up with his work as deputy sheriff, such an officer is eligible to appointment as probation officer, where the duties of both will not require all the time of the appointee, and there will be no conflict between the two positions. This does not apply to deputy sheriffs under a regular salary whose entire time is covered by his compensation." (Opinion 633, p. 1439, Vol. 2, 1913.)

At the close of the opinion just referred to the then Attorney General said:

"This opinion, it must be understood, applies only to deputy sheriffs under the conditions you state and must not be construed as applying to deputy

sheriffs generally, nor to *deputy sheriffs under a regular salary, whose entire time is covered by his compensation.*"

"A sheriff may not act as a probation officer or receive any compensation or fees of any kind in the capacity of a probation officer." (Opinion of the Attorney General, p. 446, 1910-1911.)

"Deputy sheriff of a county may legally serve as chief probation officer where he is appointed without salary and receives only his expenses, such as livery hire, etc." (Opinions of the Attorney General for 1917, Vol. 2, p. 1804.)

"The chief of police of a city may not serve as a deputy sheriff, as the duties of the chief of police are such as to require all his time, or to require him to be in readiness to respond to call at any time." (Opinions of the Attorney General for 1913, Vol. 1, 1913.)

While the duties of county attendance officer might not require the entire time of the person employed, yet under the sections of the law creating the office of county attendance officer and the sections defining his duties in such position, it would appear that the county attendance officer could be called upon at any time by the county superintendent or the county board of education to perform such duties as are required of him under the law, and to make "reports to the superintendent of schools as often as required by him." In certain cases the county attendance officer might be the complainant in a court of competent jurisdiction (7773) while at the same moment it might be his duty to be performing other duties about the court where the complainant, that is, the county attendance officer, was also a deputy sheriff, and this would equally be true where the county attendance officer was a court constable if connected with the court before whom the cause is being tried. In practical life the sheriff might issue an order to his deputy to perform certain duties or to be at a certain place at a given time, while, on the other hand, he might at the very same time be under orders from the superintendent of schools to be at another place or engaged on another duty. That is to say, the person holding both of these positions would have two masters or persons in control of his time and movements, and if he received orders from both of them at the same time a condition would arise as to which of the orders he should obey.

Bearing upon your second question as to whether a court constable can be employed as a county attendance officer, it may be said that the reasons which lie against the deputy sheriff holding the position of county attendance officer would also obtain in the case of the court constable. In your inquiry you do not indicate exactly what kind of a court constable you have in mind and in a number of instances the court constables are appointed under special legislation affecting that court or that particular kind of court. For the purposes of this inquiry it is assumed you have in mind those court constables whose appointments are authorized by section 1692 G. C. (103 O. L., 405, 417) which reads as follows:

"When in the opinion of the court, the business thereof so requires, each court of common pleas, court of appeals, superior court, insolvency court, in each county of the state, and, in counties having at the last or any future federal census more than seventy thousand inhabitants, the probate court may appoint one or more constables to preserve order, attend the assignment of

cases in counties where more than two common pleas judges regularly hold court at the same time, and discharge such other duties as the court requires. When so directed by the court, each constable shall have the same powers as sheriffs to call and impanel jurors, except in capital cases."

The compensation of these court constables is set forth in section 1693, which was amended by the 84th General Assembly in House Bill 385 (109 O. L., 230) to read as follows:

"Each constable shall receive the compensation fixed by the judge or judges of the court making the appointment. In counties where four or more judges regularly hold court, said compensation shall not exceed two thousand two hundred and fifty dollars each year, in counties where two judges and not more than three judges hold court at the same time, not to exceed fifteen hundred dollars each year, and in counties where only one judge holds court, such amount, not to exceed thirteen hundred dollars each year, as may be fixed by the court, and shall be paid monthly from the county treasury on the order of the court. Such court constable or constables when placed by the court in charge of the assignment of cases may be allowed further compensation not to exceed one thousand five hundred dollars per year as the court by its order entered on the journal determines. In counties where only one judge holds court the constables provided for herein, when not attending the common pleas court, shall upon the order of the judge of such common pleas court, and without additional compensation attend the probate court and court of appeals of said county."

It will be noted in section 1693 that the salaries named for these court constables are annual salaries to "be paid monthly from the county treasury on the order of the court." The section further provides that in counties where only one judge holds court, the court constable, when not attending the common pleas court, shall attend the probate court (which is open throughout the year) and the court of appeals of said county, and this "upon the order of the judge of such common pleas court." It is clear from section 1692 and 1693 that the court constable is under the direction of the court and shall discharge such duties as the court requires. It has already been pointed out above that the county attendance officer is under the direction of the county superintendent of schools and the county board of education; the court constable appointed under section 1692 G. C. is at all times under the direction of the court and thus the same person holding both of these positions would have two masters, that is, be under the direction and orders of two separate functions and conflict would likely follow. In many instances the county attendance officer (receiving in one county of the state a salary of \$3,000 per year) is a full-time employe, paid an annual salary, and this is equally true of a great many deputy sheriffs and a great many court constables. Where an employe is paid an annual salary, the presumption is that he should be available at all times to perform the duties for which his annual salary is paid, and thus, from a legal standpoint, his entire time would be taken up.

In reply to your inquiry, then, you are advised that it is the opinion of this department:

1. The positions of deputy sheriff and county attendance officer may not be held by one and the same person at the same time,

2. The position of court constable (1692 G. C.) and the position of county attendance officer cannot be held by one and the same person at the same time.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3742.

APPROVAL, CORRECTED DEED, PREMISES SITUATED IN MORROW COUNTY, PERRY TOWNSHIP, RANGE AND TOWNSHIP 19, CONTAINING 40.43 ACRES OF LAND.

COLUMBUS, OHIO, November 20, 1922.

HON. HARRY L. DAVIS, *Governor of Ohio, Columbus, Ohio.*

DEAR SIR:—Mr. T. B. Mateer, Attorney-at-Law, has made an application for a corrected deed on behalf of his client, Harvey Carr, for the following described premises:

Situated in the County of Morrow and State of Ohio, and in the township of Perry, and known as being the north west quarter of the south east quarter of section twenty eight (28), township nineteen (19), range nineteen (19), containing 40.43 acres of land.

It is clear in said application that in the original conveyance by the State the south west quarter of the south east quarter of section 28 was conveyed, whereas the "north west quarter" was purchased and should have been conveyed.

After an examination of the records in the office of the Auditor of State, it is my opinion that the error was made as set forth in said application. The said Harvey Carr has further submitted evidence to my satisfaction that he is the present owner of said premises, subject to a mortgage held by Lelia Watson.

The said Harvey Carr has executed a Quit Claim deed covering the premises which were originally erroneously conveyed.

A deed has been prepared which is enclosed herewith which is believed to be proper under the circumstances. If you concur in my views upon this matter, kindly execute the deed and send to the Secretary of State for his counter signature to the end that it may be transmitted to the Auditor of State and by him delivered to the party entitled thereto.

The application, quit claim deed, affidavits, etc. relating to the evidence are herewith enclosed.

Respectfully,
JOHN G. PRICE,
Attorney-General.