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COMPATIBLE — INCOMPATIBLE — OFFICE, PROSECUTING ATTORNEY AND MEMBER BOARD OF COUNTY HOSPITAL TRUSTEES — INCOMPATIBLE — PROSECUTING ATTORNEY ACTS AS CHECK UPON BOARD OF HOSPITAL TRUSTEES— SECTIONS 2921, 5625-19 G. C.

SYLLABUS:

The offices of prosecuting attorney and member of the board of county hospital trustees are incompatible and cannot be held by the same person simultaneously for the reason that under the provisions of Sections 2921 and 5625-19, General Code, the prosecuting attorney acts as a check upon the board of hospital trustees.

Columbus, Ohio, August 29, 1951

Hon. Leon C. McCarty, Prosecuting Attorney
Morrow County, Mount Gilead, Ohio

Dear Sir:

I am in receipt of your recent request for my opinion which is quoted as follows:

“Would you please advise me whether or not a prosecuting attorney may also be a member of a county hospital board appointed under General Code 3131, 3132, 3134, 3137?”

Since there are no statutes which govern the answer to your question, it will be necessary to examine the common law. The common law rule is that when offices are incompatible they can not be held by the same person. The remainder of this opinion, therefore, will contain an analysis of this rule as it applies to your request.

An excellent definition of incompatibility is found in the Circuit Court case of *The State of Ohio, ex rel. Attorney General, v. Frank Gebert*, 12 C. C. (M. S.), 274, and is quoted as follows:

“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 to discharge the duties of both.”

That rule, when applied to your proposed dual role of prosecuting attorney and county hospital trustee poses this question, among others: Is the office of prosecuting attorney in any way a check upon the office of county hospital trustee? The answer to this question will appear in the paragraphs to follow:

Section 2921, General Code, describes a prosecuting attorney's duty to protect public funds and is stated as follows:

“Upon being satisfied that funds of the county, or public moneys in the hands of the county treasurer or belonging to the county, are about to be or have been, misapplied, or that such public moneys have been illegally drawn, or withheld from, the county treasury, or that a contract in contravention of law has been, or is about to be entered into, or has been or is being executed, or that a contract was procured by fraud or corruption, or that any property, real or personal, belonging to the county is being illegally used or occupied, or is being used or occupied

in violation of contract, or that the terms of a contract made by or on behalf of the county are being or have been violated, or that money is due the county, the prosecuting attorneys of the several counties of the state may apply, by civil action in the name of the state, to a court of competent jurisdiction, to restrain such contemplated misapplication of funds, or the completion, or to recover, for the use of the county all public moneys so misapplied or illegally drawn or withheld from the county treasury, or to recover, for the benefit of the county, damages resulting from the execution of such illegal contract, or to recover, for the benefit of the county, such real or personal property so used or occupied, or to recover, for the benefit of the county, damages resulting from the nonperformance of the terms of such contract, or to otherwise enforce it, or to recover such money due the county."

It will be noted from reading this code provision that the various prosecutors may seek, by appropriate action, to restrain the misapplication of moneys or the completion of illegal contracts and to recover moneys already misapplied or damages resulting from an illegal contract already executed. In order to do this they have to pass impartially upon information of which they have knowledge for the purpose of determining whether there exists in the eyes of the law either a probable misapplication of public moneys or a probable illegal contract. It necessarily follows, therefore, that a prosecutor, by virtue of his activity under this section, acts as a check upon the financial and contractual operations of other county officials, including county hospital trustee. (Sections 3131, 3132, 3134, 3137 and 3138, General Code, set forth the financial and contractual powers and duties of county hospital trustees.

You are referred to Opinion No. 748, Opinions of the Attorney General for 1912, Vol. II, at page 1523, which dealt with a problem similar in nature to yours. The following portion of that opinion is quoted:

"The rule is fundamental that an officer may not be placed in a position which requires him to act as a judge in his own case, and inasmuch as section 4761, G. C. provides that the prosecuting attorney shall prosecute all actions against members or officers of a board of education for malfeasance or misfeasance in office, it is clear that considerations of public policy will not permit one individual to hold both those offices at the same time."

I concur with the reasoning in that opinion and feel that such reasoning is equally applicable to your question.

A prosecuting attorney acts as a check upon county hospital trustees in another respect. Those trustees, as part of their task of operating said hospital, certify each year "the amount necessary for the ensuing year" to the county commissioners, see Section 3138, General Code. The commissioners, acting in their capacity as the taxing authority for the county, then take this amount, or an amount similar thereto, and submit it, as part of their adopted tax budget, through the proper channels to the county budget commission. At this point the county budget commission, of which the prosecuting attorney is a member, either approves or revises that tax budget, see Section 5625-19, et seq., General Code. In this way a prosecuting attorney is required to act as a check upon the financial requests of county hospital trustees.

For support of this conclusion see Opinion No. 1547, Opinions of the Attorney General for 1924, Vol. I, at page 324. It was the opinion of the then Attorney General that a member of the budget commission could not also be a member of the board of health because the two positions were incompatible.

These requests for funds are subject to revision or approval by the budget commission only while the trustees are operating a county hospital. During the period that the trustees are building a county hospital they do not make any requests for money because their financial needs are supplied from a bond issue or tax levy approved by the people in accordance with Section 3127, General Code. This fact reveals, then, that a prosecuting attorney, while performing his duty as budget commissioner does not act as a check upon hospital trustees until a hospital is completed. It is not necessary for purposes of this opinion to apply this fact in deciding whether a prosecuting attorney can also serve as trustee during the time a hospital is being built in light of the preceding discussion of a prosecutor's duty to protect public funds under Section 2921, General Code. It should be noted, however, that Section 3131, General Code, as amended by Amended Substitute House Bill No. 392, which became effective on June 13, 1951, provides that the same hospital trustees are to perform the functions both of building and of operating a county hospital if their terms of office extend from the construction period into the operation period of said hospital. The last paragraph of that section points this out and is quoted as follows:

"The board of county commissioners together with the probate judge of said county and the common pleas judge of said

county senior in point of service shall appoint a board of county hospital trustees in the manner set forth in section 3131 of the General Code as herein amended within ten days after the effective date of this act who shall immediately appoint the administrator as provided in section 3137 of the General Code and shall assume and continue the operation of such hospital upon its completion."

This fact indicates that the legislature did not intend to have a man appointed trustee who could not lawfully carry out his duties as said trustee upon the completion of a county hospital.

For the reasons hereinbefore stated, it is my opinion and you are accordingly advised that, the offices of prosecuting attorney and member of the board of county hospital trustees are incompatible and cannot be held by the same person simultaneously for the reason that under the provisions of Sections 2921 and 5625-19, General Code, the prosecuting attorney acts as a check upon the board of hospital trustees.

Respectfully,

C. WILLIAM O'NEILL
Attorney General