

Note from the Attorney General's Office:

1949 Op. Att'y Gen. No. 49-1076 was overruled in part by 1963 Op. Att'y Gen. No. 63-502 and overruled by 1965 Op. Att'y Gen. No. 65-150.

1076

COMPATIBLE—INCOMPATIBLE :

1. SHERIFF, DEPUTY—EMPLOYED FULL TIME—MAY NOT LEGALLY BE EMPLOYED AS COUNTY ATTENDANCE OFFICER—OPINIONS ATTORNEY GENERAL, 1922, OPINION 3741, PAGE 947, APPROVED AND FOLLOWED.
2. DEPUTY SHERIFF EMPLOYED FULL TIME—MAY NOT LAWFULLY BE EMPLOYED AS PROBATION OFFICER OF JUVENILE COURT—OPINIONS ATTORNEY GENERAL, 1913, OPINION 633, PAGE 1439, APPROVED AND FOLLOWED.

SYLLABUS :

1. A deputy sheriff employed full time, as such, may not legally be employed as a county attendance officer. (Opinions of Attorney General for 1922, Opinion No. 3741, page 947, approved and followed.)

2. A deputy sheriff employed full time, as such, may not lawfully be employed as a probation officer of the juvenile court. (Opinions of Attorney General for 1913, Opinion No. 633, page 1439, approved and followed.)

Columbus, Ohio, October 6, 1949

Hon. Harold D. Roth, Prosecuting Attorney,
Wyandot County, Upper Sandusky, Ohio

Dear Sir :

Your request for my opinion reads as follows :

“The County Superintendent of Wyandot County has submitted to me the following question :

“ ‘Is it legal for the County Board of Education to employ and pay the Deputy Sheriff as the County School Attendance Officer?’

“Section 4852-1 of the General Code authorizes the County Board of Education to employ a County Attendance Officer but the question of compatibility with reference to the employment of the Deputy Sheriff as attendance officer is not mentioned.

“The Judge of the Juvenile Court of Wyandot County has submitted to me the question of whether or not the Deputy Sheriff can be lawfully employed as a Probation Officer of the Juvenile Court.”

I have been unable to find any express statutory or constitutional prohibition against one person holding the two positions in question. However, even in the absence of such express provision, it seems to be a well settled rule of the common law that two positions with functions which are inconsistent are regarded as incompatible. An examination of the court decisions of the various states shows that the courts, when it comes to stating what constitutes incompatibility, are prone to avoid the formulation of a general definition and content themselves with discussions of specific cases and particular facts which have been looked upon as creating incompatibility. They have laid down certain rules and tests for determining the matter, but it is difficult to find one sufficiently clear to be decisive in every case. One of the rules laid down by the court is found in the case of *State v. Gebert*, 12 O.C.C. (N.S.) 275, 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 person to discharge the duties of both.”

Keeping the above thought in mind, it becomes necessary to reword your questions, as follows: Are the positions of deputy sheriff and county school attendance officer compatible, and, are the positions of deputy sheriff and probation officer compatible?

The question of compatibility of positions has been the subject of numerous opinions of this office and specifically the very questions raised by you in your communication.

Your attention is directed to Opinions of Attorney General for 1922, Vol. 2, p. 947, Opinion No. 3741, in which the then Attorney General held:

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

with which opinion I fully concur for the reason that no substantial changes have been made in the laws so far as same relate to the duties and responsibilities of persons holding such positions since the rendition of same.

In answer to your second question, I wish to direct your attention to Opinions of the Attorney General for 1913, Vol. 2, p. 1439, Opinion No. 633. The syllabus reads:

“Where a deputy sheriff is paid for such service 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."

This opinion (1913) was later discussed and followed in Opinions of Attorney General for 1917, Vol. 2, p. 1804, Opinion No. 663, with which opinions I fully concur.

Therefore, in view of the foregoing, and in specific answer to your questions, you are advised that :

1. A deputy sheriff employed full time, as such, may not legally be employed as a county attendance officer.
2. A deputy sheriff employed full time, as such, may not lawfully be employed as a probation officer of the juvenile court.

Respectfully,

HERBERT S. DUFFY,
Attorney General.