

2423.

INCOMPATIBLE OFFICES — MEMBER PUBLIC HEALTH COUNCIL — CLINIC PHYSICIAN, VENEREAL DISEASE CONTROL PROGRAM.

SYLLABUS:

A person may not serve as a member of the public health council and at the same time serve as clinic physician in the Venereal Disease Control program, for the reason that the positions are incompatible.

Columbus, Ohio, June 18, 1940.

Honorable R. H. Markwith, Director, Department of Health,
Columbus, Ohio.

Dear Sir:

This will acknowledge receipt of your letter of recent date in which you request an opinion upon the following question:

"Will you please advise me if it is permissible for a member of the Public Health Council to receive a monthly check from the Ohio Department of Health for a part-time position as a Clinic Physician in the Venereal Disease Control program."

Section 154-33, General Code, provides :

"The department of health shall have all powers and perform all duties vested by law in the state department of health, the commissioner of health, the public health council, or in the commissioner of health and the public health council acting jointly or otherwise, and the state inspector of plumbing; and also those vested in the secretary of state and the state registrar of vital statistics with respect to the registration of vital statistics as provided in sections 197 to 234, both inclusive, of the General Code."

Section 154-44, General Code, provides :

"The public health council provided for by section 1234 of the General Code shall continue to exist in the department of health as hereby created, and shall exercise all powers vested in it by law."

Section 1232, General Code, creating the state department of health and setting forth generally its powers and duties provides :

"There is hereby created a state department of health, which shall exercise all the powers and perform all the duties now conferred and imposed by law upon the state board of health and all such powers, duties, procedure and penalties for violation of its sanitary regulations shall be construed to have been transferred to the state department of health by this act. The state department of health shall exercise such further powers and perform such other duties as are herein conferred. The state department of health shall consist of a commissioner of health and a public health council."

Section 1233, General Code, prescribing the duties of the director of health provides :

The director of health shall perform all executive duties now required by law of the state board of health and the secretary of the state board of health, and such other duties as are incident to his position as chief executive officer. He shall administer the laws relating to health and sanitation and the regulations of the state department of health. He shall prepare sanitary regulations for consideration by the public health council and shall submit to said council recommendations for new legislation."

Section 1234, General Code, creating the public health council provides :

“There shall be a public health council to consist of six members to be appointed by the governor. Not less than three of such members shall be physicians who are licensed to practice medicine in the state of Ohio. Of the members first appointed one shall hold office until July 1st, 1940, one until July 1st, 1941, one until July 1st, 1942, one until July 1st, 1943, one until July 1st, 1944, and one until July 1st, 1945, and the term of office of members thereafter appointed, except to fill vacancies, shall be for six years. Vacancies shall be filled by appointment by the governor for the unexpired term. No two members of the public health council shall be appointed from the same congressional district. At the time when this law becomes effective the terms of office of the members of the present public health council shall automatically expire and a new public health council shall be appointed by the governor. The public health council shall meet four times each year and may meet at such other times as the business of the council may require. The time and place for holding regular meetings shall be fixed in the by-laws of the council. Special meetings may be called upon the request of any four members of the council or upon request of the director of health, and may be held at any place deemed advisable by the council or director. Four members of the public health council shall constitute a quorum for the transaction of business. The public health council shall, on or before July 1st of each year, designate the member who shall act as its chairman for the ensuing year. The director of health shall upon request of the public health council detail an officer or employe of the state department of health to act as secretary of the public health council, and shall detail from time to time such other employes as the public health council may require. The members of the council shall receive ten dollars a day while in conference and shall be reimbursed their necessary and reasonable traveling and other expenses incurred in the performance of their regular duties.”

Section 1235, General Code, defining the powers and duties of the public health council provides:

“It shall be the duty of the public health council and it shall have the power:

(a) To make and amend sanitary regulations to be of general application throughout the state. Such sanitary regulations shall be known as the sanitary code.

(b) To take evidence in appeals from the decision of the director of health in a matter relative to the approval or disapproval of plans, locations, estimates of cost or other matters coming before the director of health for official action. In the hearing of such appeals the director of health may be represented in person or by the attorney general.

(c) To conduct hearings in cases where the law requires

that the state department of health shall give such hearings; to reach decisions on the evidence presented, which shall govern subsequent actions of the director of health with reference thereto;

(d) To prescribe by regulations the number and functions of divisions and bureaus and the qualifications of chiefs of divisions and bureaus within the state department of health;

(e) To enact and amend by-laws in relation to its meetings and the transaction of its business;

(f) To consider any matter relating to the preservation and improvement of the public health and to advise the state director of health thereon with such recommendations as it may deem wise.

The public health council shall not have nor exercise executive or administrative duties."

Section 1236-4, General Code, providing for removal of the director of health provides:

"The director of health may be removed from office by the governor, only upon recommendation of the public health council; provided, that charges against him have been submitted in writing, and, after hearing, the public health council shall find, by a majority vote of the entire council, such charges to be true in fact, and their nature such that, in its opinion, the best interests of the state shall demand such removal. A member of the public health council may be removed by the governor for incompetence or gross neglect of duty."

From a study of the statutes above quoted it will be noted that the public health council has a dual function, namely that of being quasi judicial and quasi legislative in its operation. Section 1235, General Code, expressly denies to the public health council any executive or administrative functions.

It shall be assumed that the Venereal Disease Control program mentioned in your letter has been duly prescribed.

The vital issue involved in your inquiry is whether or not the position of a member of the public health council and the position of clinic physician in the Venereal Disease Control program are incompatible.

In the case of *State of Ohio, ex rel George W. Louthan v. James Taylor*, supra, the Court held that the office of a member of the board of directors of a county infirmary and the office of superintendent of the county

infirmary were incompatible, the Court holding in essence that since the superintendent was answerable to the board and the superintendent being a member of the board, he was in effect answerable to himself, and the Court says at page 135 of the opinion:

“To permit a man thus to be ‘judge in his own cause’, would be to convert the very checks and safeguards which the law has provided against fraud and speculation, into potent instruments of corruption and iniquity.”

In the case of *State of Ohio, ex rel Attorney General v. Frank Gebert*, 12 C. C. (N. S.) 274, the Court lays down a categorical rule as to what offices should be considered incompatible. At page 275 the Court says:

“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.”

Since under the provisions of section 1234, General Code, a position as a member of the public health council could not be considered as a full time position, it may be concluded that it would be physically possible for a member of the council to also act efficiently in the discharge of his duties as a clinic physician in the Venereal Disease Control program.

It may be now considered as to whether or not there is a subordination between the two offices.

Section 1235, General Code, paragraph (b), grants to the public health council the right to take evidence upon appeals from the decision of the director of health upon matters coming before the director for official action. Under this paragraph the appeal proceedings are adverse in their nature as evidenced by the statute, which expressly authorizes the director of health to be represented at the hearings, by the Attorney General. In reaching a decision upon the appeals mentioned in paragraph (b), the clinic physician who is, as such, a subordinate to the director of health, sitting as a member of tribunal and as such member may through his own views and vote, which vote may be the deciding vote, have the power to reverse and nullify the decision of his superior, the director of health, theretofore made.

Section 1235, General Code, paragraph (c) grants to the public health council the right to conduct hearings, where the law requires that the state department of health shall give such hearings. The decision of the public

health council upon the evidence presented shall be binding upon the director of health and in the words of the statute, "shall govern subsequent actions of the director of health thereto." Again the clinic physician has a potent power of check and control over his superior, the director of health.

Section 1235, General Code, *supra*, paragraph (d) states in setting forth the powers and duties of the public health council:

"To prescribe by regulations the number and functions of divisions and bureaus and the qualifications of chiefs of divisions and bureaus within the state department of health."

From an analysis of this section it would appear that the public health council could by its own force create a Venereal Disease Control program, prescribe its own functions and the qualifications of its chiefs.

To permit these two offices to be compatible would be in effect giving the clinic physician a vote, which might be the deciding vote at a meeting of the public health council in which regulations are adopted, creating a job for himself and prescribing his own duties.

It may be further noted that under the provisions of section 1233, General Code, defining the duties of the director of health it is stated:

" * * * The director of health shall sit at meetings of the public health council but shall have no vote."

From this statement by the legislature, it may be considered that it was not intended that the director should have any powers in regulating the actions of the public health council, but that his presence at the meeting is permitted for the purpose of suggestion and advice. It would appear further that an unhealthy situation would be created by having the director present at a meeting of the public health council with one of his own subordinates, the clinic physician, sitting in judgment upon the director's advice, suggestions, and proposed new legislation.

Further, under the provisions of section 1236-4, General Code, *supra*, the director of health can only be removed by the Governor upon the recommendation of the public health council after a hearing in which the council finds that the facts of the charges against the director are true, and for that reason he should be removed.

Again, the clinic physician would be sitting in judgment in deciding the fate of his own superior and the same clinic physician could by his own vote cause a recommendation to be issued to the governor to either remove or retain the director.

It is, therefore, concluded that a person may not serve as a member of the public health council and at the same time serve as clinic physician in the Venereal Disease Control program, for the reason that the positions are incompatible.

Respectfully,

THOMAS J. HERBERT,
Attorney General.