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INCOMPATIBLE OFFICE—COUNTY VETERANS SERVICE OFFICER—PROSECUTING ATTORNEY OF SAME COUNTY—MAY NOT LEGALLY BE HELD BY SAME PERSON.

SYLLABUS:

The offices of county veterans service officer and prosecuting attorney of the same county are incompatible, and may not legally be held by the same person.

Columbus, Ohio, December 17, 1948

Hon. Oscar O. Raberding, Prosecuting Attorney
Auglaize County, Wapakoneta, Ohio

Dear Sir:

I have before me your request for my opinion, reading as follows:

"I have had an inquiry from Arthur Katterhenrich, Treasurer of this county, concerning the payment of vouchers to the same individual for County Service Officer and Prosecuting Attorney of Auglaize County.

"The County Service Officer is appointed under Section 2933-3 of the General Code of Ohio and the Prosecuting Attorney is elective under Section 2910 of the General Code.

"My request for a ruling is whether the same individual may serve in the dual capacity of County Service Officer and as Prosecuting Attorney, and the Treasurer of this county honor both vouchers for payment by the county."

Section 2933-3, General Code, relating to the appointment of a "county veterans' service officer", reads in part as follows:

"The soldiers' relief commission is hereby empowered to employ a 'county veterans' service officer' who must be an honorably discharged veteran of the United States armed forces. The duties of such officer shall be to advise and assist persons in the armed forces of the United States, veterans of the United States armed forces of any war, and the wives, widows, children, parents, and dependents of any such, in presenting claims or obtaining rights or benefits under any law of the United States or of this state."

This section contains further provisions as to the compensation of the service officer and the appointment by the commission, of his assistants. Nothing is said as to his status in the classified or unclassified civil service, so we are bound to assume that under the provisions of Section 486-8, General Code, he is in the classified service, his position not being among those listed in that section, as being in the unclassified service.

In an opinion rendered by one of my predecessors, found in 1929 Opinions of the Attorney General, page 886, it was held that a prosecuting attorney might not legally be appointed chief probation officer as long as he is serving in the capacity of prosecutor. That opinion was based on the fact that Section 1554-1 of the General Code, authorizing the establishment of a department of probation and the appointment of a probation officer by a judge of the common pleas court contained the provision expressly placing such probation officer in the classified service of the civil service of the county. The attorney general therefore held that one may not hold an elective or appointive office without violating the provisions of Section 486-23, General Code, which prohibits any officer or employe in the classified civil service from taking part in politics. He cited in support of his views in this respect two former opinions, one in 1928 Opinions of the Attorney General, page 1119, in which it was held:

"A person in the classified civil service of the state cannot be a candidate for the office of village councilman or hold said

office by election or appointment without violating the provisions of Section 486-23, General Code."

Also, an opinion found in 1929 Opinions of the Attorney General, page 837, in which it was held:

> "A member of the city police department who is in the classified civil service may not legally hold the office of a member of the city board of health at the same time, without violating the provisions of Section 486-23, General Code, which prohibit any officer or employe in the classified civil service from taking part in politics other than voting as he pleases and expressing freely his political opinions."

I note another opinion in 1938 Opinions of the Attorney General, page 440, where it was held:

> "A prosecuting attorney who is not a candidate for an office to be filled at an election, other than the office of delegate or alternate to a convention or a member of a party committee, may be appointed and serve as clerk of the county board of elections if it is physically possible to perform the duties of both officers; but such prosecutor who is a candidate for an office to be filled at an election, excepting the office of delegate or alternate to a convention or member of a party committee, may not at the same time be clerk of the county board of elections."

The question of civil service did not enter into that opinion, inasmuch as by the provisions of Section 486-8, General Code, all elective officers and all employes and clerks appointed by them are specifically included in the unclassified service. In 1932 Opinions of the Attorney General, page 1479, it was held that the prosecuting attorney may at the same time serve as a city solicitor. In 1914 Opinions of the Attorney General, page 972, it was held that he may serve as a sinking fund trustee. In each of these opinions it was pointed out that there was nothing about these several offices that gave rise to a situation where one had any control over the other, and therefore there was no incompatibility in that respect.

On the contrary, it was held in 1924 Opinions of the Attorney General, page 324, that a prosecuting attorney could not at the same time be a member of the district board of health. This opinion was based on the fact that the prosecuting attorney is a member of the county budget commission and has a hand in reducing or adjusting the budget requested by the board of health.

Section 2917 of the General Code reads in part as follows:

> "The prosecuting attorney shall be the legal adviser of the county commissioners and all other county officers and county boards and any of them may require of him written opinions or instructions in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board may direct or to which it is a party, and no county officer may employ counsel or attorney at the expense of the county except as provided in section twenty-four hundred and twelve."

In 1940 Opinions of the Attorney General, page 1065, it was held:

> "The prosecuting attorney is the legal adviser to the members of the soldiers' relief commission for the county in which he holds office and for which such members have been appointed."

It appears very clear that the person who is by law the legal adviser of a board could not be appointed by that board to a responsible position without violating the generally accepted rules as to incompatibility of offices. As such legal adviser it would manifestly be within his power to advise the board in his own interest and while he could not be said to hold a direct check or control over himself, as such officer, he would be subjected to the temptation to mold his advice to further his own interests.

The general principle of public policy is thus expressed in 42 Am. Jur., page 936:

> "They are generally considered incompatible where such duties and functions are inherently inconsistent and repugnant so that, because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both. It is not an essential element of incompatibility of offices at common law that the clash of duty should exist in all or in the greater part of the official functions."

Specifically answering your question it is my opinion that the offices of county veterans service officer and prosecuting attorney of the same county are incompatible and may not legally be held by the same person.

Respectfully,

HUGH S. JENKINS,
Attorney General.