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PROBATION OFFICER IN JUVENILE COURT AND EXECUTIVE SECRETARY OF CHILD WELFARE BOARD—OFFICES NOT INCOMPATIBLE—MUST BE PHYSICALLY POSSIBLE FOR ONE PERSON TO HOLD BOTH OFFICES.

SYLLABUS:

In the event it is found physically possible for one person to hold both offices, there is no incompatibility in the offices of probation officer in the juvenile court and executive secretary of the child welfare board, in the same county.

Columbus, Ohio, November 29, 1951

Hon. Fred A. Murray, Prosecuting Attorney
Hocking County, Logan, Ohio

Dear Sir:

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

“Is it lawful for one and the same person to be the Probation Officer in the Juvenile Court and Executive Secretary of the Child Welfare Board in the same county, in the event the Juvenile Court and the Child Welfare Board find it physically possible for such person to do so?”

The probation officer in the juvenile court is appointed by the judge of that court pursuant to Section 1639-18, General Code. His duties are prescribed by Section 1639-19, General Code, which reads in part, as follows:

“The chief probation officer, under the direction of the judge, shall have charge of the work of the probation department. The probation department shall make such investigations as the court may direct, keep a written record of such investigations and submit the same to the judge or deal with them as he may direct. The department shall furnish to any person placed on probation a statement of the conditions of probation and shall instruct him regarding them. The department shall keep informed concerning the conduct and condition of each person under its provision and shall report thereon to the judge as he may direct. Each probation officer shall use all suitable methods to aid persons on probation and to bring about improvements in their conduct and condition. * * *”

He is also given the power by the same section to make arrests for violation of the laws relating to children and to serve warrants and other process issuing out of the juvenile court.

The organization and powers of the child welfare board are set out in Section 3071-1 et seq. of the General Code. This law was a new enactment, becoming effective January 1, 1946. Section 3070-10 provides for a board of five members, four of whom are appointed by the county commissioners for terms of four years. The fifth member is the judge of the juvenile court, or he may "appoint one member to serve during the pleasure of the judge."

The board is authorized by Section 3070-12, General Code, to appoint an executive secretary who shall not be in the classified service, and "it shall not be incompatible for the executive secretary and the superintendent of the children's home to be one and the same person."

Section 3070-13, General Code, reads as follows:

"The executive secretary shall administer the work of the board, subject to the rules and regulations of the board. With the approval of the board he shall appoint all other employes, excepting that the board shall appoint the superintendent of any institution maintained by the board and the superintendent shall appoint all employes therein."

Section 3070-16, General Code, requires the executive secretary to submit to the board annually a report and to submit "such other reports as may be required by law, by the rules and regulations of the division (the division of social administration of the state department of public welfare) or by the board." (Words in parentheses, the writer's.)

In order to determine precisely what powers and duties of the board the executive secretary is required to administer, it seems necessary to quote at some length the provisions of Section 3070-17, General Code, which reads in part as follows:

"The child welfare board shall, subject to the rules, regulations and standards of the division, have the following powers and duties for and on behalf of children in the county deemed by the board to be in need of public care or protective services:

"(a) To make an investigation concerning any child reported to be in need of care, protection or service.

"(b) To enter into agreements with the parent, guardian or other person having legal custody of any child, or with the

division, or another department or any certified organization within or outside the county or any agency or institution outside the state, having legal custody of any child, respecting the custody, care or placement of any such child or any other matter, deemed to be in the interests of such child, provided that the permanent custody of a child shall not be transferred by a parent to the board without the consent of the juvenile court.

“(c) To accept custody of children committed to the board by a court exercising juvenile jurisdiction.

“(d) To provide care of all kinds which the board may deem to be for the best interests of any child whom the board may find to be in need of public care or service. * * *

“(g) To provide temporary, emergency care for any child deemed by the board to be in need thereof, without agreement or commitment. * * *

“(j) To acquire and operate a county children’s home or to establish, maintain and operate a receiving home for the temporary care of children or procure foster homes for this purpose. * * *”

Further powers and duties may be imposed on the executive secretary under Section 3070-19, General Code, where it is provided that he may be appointed as guardian or trustee of a ward of the court.

We have, therefore, two agencies created by the state, whose general purposes are substantially identical—the juvenile court and the child welfare board. Seemingly, the latter was intended to supplement and integrate the powers of all agencies that are charged with protecting and ministering to children who for any reason are in need of special care. The board purpose is strongly stated in the opening section of the law, Section 3070-1, General Code, which reads:

“The purpose of sections 3070-1 to 3070-35, inclusive, is to supplement, expand, modernize and integrate child welfare services and the care and placement of children in the several counties of the state, and to this end this act shall be liberally construed.”

When we observe that the juvenile court judge is made ex officio a member of the child welfare board, we certainly have a legislative determination that his position could not in any way be incompatible with membership on that board, or his powers and duties in any way inconsistent with the powers and duties of the board.

If, therefore, we find the position of the judge to be entirely com-

patible with his membership on the board, how can we conclude as a matter of law that his probation officer who might be considered as his right hand, could be considered as being in an incompatible position in serving as his representative as the executive officer of the board?

Under the law, Section 1639-18, General Code, the probation officer serves at the pleasure of the judge who appoints him, and therefore may be discharged at any time. Accordingly, it would seem absurd to assume that while acting in both capacities he would or could do any act that would bring him within the rules as to incompatibility. At any rate, it is safe to assume that his trespass as one such officer on the duties of the other would not long continue.

The familiar rules as to incompatibility of offices or positions as recognized by the common law and by the courts of our state are :

1. Physical inability to hold both offices. This of course becomes a question of fact in each case.
2. If one is a check upon the other.
3. If one officer has any control over the other. *State ex rel. Attorney General v. Gebert*, 12 O. C. C. (N. S.) 274.

The position of probation officer of the juvenile court has been considered by a number of opinions of this office and was held compatible in the following cases :

County attendance officer, 1921 Opinions, Attorney General, p. 961 ;

City relief director, 1941 id. p. 44 ;

Humane agent, 1914 id. p. 345 ;

Deputy clerk, probate court, 1917 id. p. 1126.

Specifically answering your question, it is my opinion that in the event it is found physically possible for one person to hold both offices, there is no incompatibility in the offices of probation officer in the juvenile court and executive secretary of the child welfare board, in the same county.

Respectfully,

C. WILLIAM O'NEILL

Attorney General