

OPINION NO. 87-025**Syllabus:**

1. A county home physician is an independent contractor and is not a county employee under R.C. 5155.27.
2. Because a county home physician is not a county employee, a compatibility analysis is inappropriate in determining whether a county coroner may concurrently serve as county home physician. (1929 Op. Att'y Gen. No. 790, vol. II, p. 1208, reconsidered.)
3. Because R.C. 102.08 grants the Ohio Ethics Commission the authority to render advisory opinions interpreting R.C. 2921.42, the Attorney General will not also render opinions construing R.C. 2921.42.
4. No statute prohibits the board of county commissioners from forming a contract with a county home physician that could allow the county home physician compensation in addition to his salary.

To: Michael F. Boller, Shelby County Prosecuting Attorney, Sidney, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, May 21, 1987

I have before me your request for my opinion concerning a county coroner who wishes to serve as the county home physician. Specifically, you ask:

1. May the county coroner, an elected official, serve also as a county employee hired to provide medical services for a county home?
2. If not, may a doctor who is also the county coroner contract with the county to provide medical services for a county home?
3. Should it be determined proper for a county coroner to also be a county home employee, providing medical services, then may such a physician in his status as a county home employee receive compensation consisting of a fixed salary coupled with the receipt of all or a percentage of the difference between his salary and the amount received by the home as reimbursement for his services?

R.C. Chapter 5155. governs county homes. More specifically, R.C. 5155.27 provides for medical care for county home residents:

The board of county commissioners may contract with one or more competent physicians to furnish medical relief and medicines necessary for the residents of the county home, but no contract shall extend beyond one year. Medical statistics shall be kept by the facility. Such statistics shall show the nature and extent of the services rendered, to whom rendered, and the character of the diseases treated. The board may discharge any such physician for proper cause. No medical relief shall be furnished by the county to persons in their own homes, except for persons who are not residents of the state or county for one year, or of a township or city for three months, and except under section 5155.22 of the Revised Code.

This statute is the only statute that gives the county commissioners authority to provide medical services for county home residents. One of my predecessors was asked whether a county home could contract with a medical school to provide county home medical services in 1960 Op. Att'y Gen. No. 1230 p. 201. He concluded that they could, noting that the contract "must comply with the provisions of Section 5155.27, Revised Code." Id. at syllabus, paragraph 2. My predecessor also noted "[s]ince...Section 5155.27 provides authority for the employment of physicians I believe that any such employment must be done in accordance with that section." Id. at p. 204. Although R.C. 5155.01 provides that "[t]he superintendent or administrator [of the county home] may employ...necessary personnel," R.C. 1.51 provides that a special statute prevails over a general statute. Accordingly, I conclude that any physicians hired by the county commissioners for the county home must be hired in accordance with R.C. 5155.27.

Thus, to answer your first question I must determine whether a physician employed by a county home under R.C. 5155.27 qualify as a county employee. I conclude that he would not. A county home physician enters into a contract with the board of county commissioners to "furnish medical relief and medicines necessary for the residents of the county home." R.C. 5155.27. The physician's contract may not extend beyond one year. Id. The Ohio Supreme Court has developed a test to determine the difference between an employee and an independent

contractor. The court has determined that if the employer retains the right to control the mode and manner of doing the work contracted for, the relationship is that of principal and agent, master and servant, or employer and employee. If the employer does not retain control of the mode and manner of doing the work contracted for, but is interested merely in the ultimate result to be accomplished, the relationship is that of employer and independent contractor. See Councell v. Douglas 163 Ohio St. 292, 126 N.E.2d 597 (1955) (syllabus, paragraph 1). In the situation you describe, it does not appear that the county commissioners have control of the "mode and manner" in which the county home physician will accomplish his task. Thus, I conclude that the relationship of the county home physician to the county commissioners is that of an independent contractor to an employer rather than that of an employee to an employer. See also Ohio Ethics Commission Advisory Op. No. 75-012 (noting that independent contractors of public agencies are not included in that class of persons described by the phrase "employed by" as used in R.C. 102.04, and that if the person employed has a distinct occupation or business, his relationship with the employing public authority is more likely to be that of an independent contractor).

In your second question, you ask whether a county coroner may contract with the county to provide medical services for the county home. An answer to this question may require an analysis of the compatibility of the two positions. Such an analysis is appropriate, however, only if both positions are public positions. See 1979 Op. Att'y Gen. No. 79-111 (a compatibility analysis must be applied where a person holds two public offices or a public office and a public employment). The question of compatibility does not arise where a person holds but a single public office or employment. See 1984 Op. Att'y Gen. No. 84-087; 1981 Op. Att'y Gen. No. 81-078.

One of my predecessors analyzed the compatibility of a coroner and a county home physician in 1929 Op. Att'y Gen. No. 790, vol. II, p. 1208. He concluded that a county coroner may be employed by the county commissioners as a physician for the county home. My predecessor stated, without comment or further explanation, that "an examination of the sections authorizing the appointment or employment of a physician for the county home...discloses that there is no incompatibility...with the office of county coroner." Id. at 1210. I believe, however, that this conclusion must be reconsidered.

The county coroner is clearly a public officer. He is elected to office by popular vote, R.C. 313.01, and must give a bond conditioned for the faithful performance of the duties of his office. R.C. 313.03. The coroner's duties are set forth by statute. R.C. Chapter 313. See generally 1978 Op. Att'y Gen. No. 78-063. However, as I have already noted, a county home physician is not a public employee, but an independent contractor. Thus, a compatibility analysis is not appropriate in this case.

Even though a compatibility analysis does not apply to the situation you have presented, the question of conflict of interest can apply even if only one of the positions is a public office. See 1981 Op. Att'y Gen. No. 81-078; 1970 Op. Att'y Gen. No. 70-168, overruled on different grounds, 1981 Op. No. 81-100. One of my predecessors has addressed the question of conflict of interest and stated:

Any public officer owes an undivided duty to the public. It is contrary to public policy for a public

officer to be in a position which would subject him to conflicting duties or expose him to the temptation of acting in any manner other than the best interest of the public. (Citation omitted.)

Op. No. 70-168 at 2-336; see also Op. No. 81-078. The duties of the county coroner do not conflict with the duties of the county home physician. R.C. 5155.27 provides that the county home physician shall "furnish medical relief and medicines necessary for the residents of the county home...." R.C. 313.12 provides that the jurisdiction of the county coroner is invoked "[w]hen any person dies as a result of criminal or other violent means, or by casualty...or suddenly when in apparent health, or in any suspicious or unusual manner." When the coroner is notified of such a death, he must take charge of the body and perform an autopsy if he believes one is necessary. See R.C. 313.13. If the coroner then decides that further inquiry is necessary, R.C. 313.17 empowers him to subpoena and question sworn witnesses before submitting a report indicating the cause of death.

Thus, there is no direct conflict between the duties of the county coroner and the duties of the county home physician. While it is true that the county coroner would be called upon to investigate any "suspicious" deaths -- including medically suspicious deaths -- that occur in the county home, this in itself should not create a conflict. The same situation would arise if a county coroner's private patient died under suspicious circumstances. Traditionally, coroners have been allowed to maintain their private practices. The coroner's salary in most counties makes it necessary or desirable for the county coroner to have another income. See R.C. 325.15 (Coroner's income can range from \$10,000 to \$35,500 annually).

Accordingly, I conclude that there is no common law conflict of interest problem in the situation you describe. R.C. 2921.42, however, may prohibit the county coroner from also acting as county home physician. R.C. 2921.42 prohibits a public official from having an unlawful interest in a public contract. Pursuant to R.C. 102.08, the Ohio Ethics Commission has the authority to render advisory opinions interpreting R.C. 2921.42. In light of this expressed statutory grant of power, my predecessors and I have taken the position that it would be inappropriate for the Attorney General to also render opinions construing R.C. 2921.42. This policy respects the jurisdiction of the Ethics Commission and prevents the possibility that the Attorney General and the Ethics Commission would render conflicting opinions on the same question. You or the county coroner may wish to contact the Ethics Commission for a more definitive analysis. I note that, pursuant to R.C. 102.08, if the Ethics Commission renders an advisory opinion concluding that there is no violation of R.C. 2921.42, the person to whom the opinion is addressed, as well as those similarly situated, may rely on that opinion, and be immune from criminal prosecution, civil action, and actions for removal for violating R.C. 2921.42.

Although I am unable to answer your second question, I will address your third question, concerning the salary for a county home physician, in the event that the county coroner is permitted to act as county home physician. To my knowledge, no statute explicitly authorizes or prohibits a contract between the county commissioners and the county home physician that allows the physician to receive compensation above and beyond his regular salary in the manner described in your question.

R.C. 5155.27, which governs the hiring of physicians for the county home, provides that the board of county commissioners may not form a contract for the services of a county home physician that extends beyond one year, but does not specify an amount or method of compensation. The language of the statute indicates that the county commissioners and the physicians are free to negotiate the other terms of the contract. For example, the board may agree to pay the physician a salary, a hourly wage, or some combination of a salary and hourly wage. R.C. 305.25 does restrict the board's freedom to contract¹ with the county home physician by providing that "[n]o contract entered into by the board of county commissioners...shall be valid unless it has been assented to at a regular or special session of the board, and entered in the minutes of its proceedings by the county auditor or the clerk of the board." I presume that the county commissioners will comply with these requirements, since they are similar to the requirements imposed on all public bodies by the so-called "Sunshine Law," R.C. 121.22, and the Public Records Law, R.C. 149.43.

Therefore, it is my opinion, and you are advised that:

1. A county home physician is an independent contractor and is not a county employee under R.C. 5155.27.
2. Because a county home physician is not a county employee, a compatibility analysis is inappropriate in determining whether a county coroner may concurrently serve as county home physician. (1929 Op. Att'y Gen. No. 790, vol. II, p. 1208, reconsidered.)
3. Because R.C. 102.08 grants the Ohio Ethics Commission the authority to render advisory opinions interpreting R.C. 2921.42, the Attorney General will not also render opinions construing R.C. 2921.42.

¹ I realize that R.C. 307.86 requires most county contracts to be let by competitive bidding. The statute specifically exempts physicians, however, providing in pertinent part:

Anything to be purchased, leased, leased with an option or agreement to purchase, or constructed, including, but not limited to, any product, structure, construction, reconstruction, improvement, maintenance, repair, or service, except the services of an accountant, architect, attorney at law, [a] physician, professional engineer, construction project manager, consultant, surveyor, or appraiser...shall be obtained through competitive bidding. (Emphasis added.)

In addition, I presume that the county commissioners will comply with the requirements of R.C. 5705.41. That statute provides, among other things, that the commissioners will spend only properly appropriated money and that the county fiscal officer must certify that the funds necessary for any contract will be available when needed.

4. No statute prohibits the board of county commissioners from forming a contract with a county home physician that could allow the county home physician compensation in addition to his salary.