3747

1. CORONER—OFFICE—NOT INCOMPATIBLE WITH EMPLOYMENT AS HEALTH COMMISSIONER—SECTION 3709.11 RC.

2. BOARD OF HEALTH—MUST DETERMINE IF HEALTH COMMISSIONER EMPLOYED BY BOARD UNDER CONTRACT TO GIVE FULL TIME WOULD VIOLATE CONTRACT BY SERVING AS CORONER.

3. CORONER ENTITLED TO RECEIVE COMPENSATION AS PROVIDED BY LAW FOR SERVICE AS CORONER WHEN PERMITTED BY BOARD TO ENGAGE IN BOTH EMPLOYMENTS.

SYLLABUS:

1. There is no incompatibility between the office of coroner and employment as health commissioner as authorized by Section 3709.11 of the Revised Code.

2. Whether a health commissioner employed by a board of health under a contract wherein the officer is to give his "full time" to the work of such office, is violating such contract by serving as coroner, is a matter for the determination of the board of health.

3. Where a coroner, duly elected and serving in such office is employed by a board of health as health commissioner "on a full time basis", and is permitted by said board to continue, while serving as health commissioner, to perform his duties as coroner, he is entitled, in addition to his compensation as health commissioner, to receive his compensation as provided by law for his service as coroner.

Columbus, Ohio, April 23, 1954

Hon. Robert G. Tague, Prosecuting Attorney
Perry County, New Lexington, Ohio

Dear Sir:

I have before me your communication, in which you request my opinion as to the legal right of a duly elected coroner to act as health commissioner of his county and of an adjoining county under contracts of employment by such counties which require him to give his full time to his duties as health commissioner. The statement of facts reads as follows:

> "Dr. M., the coroner of Perry County, has occupied this position for many years and was last elected thereto in 1952. For many years prior to 1953, he also served by appointment, as jail and county home physician, and prior to July, 1952, he also acted again by appointment, as part time health officer for Perry County. Until July, 1952, it would seem that there was no conflict among these various capacities, and he was accordingly paid from county funds.
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> "In July, 1952, with the approval of the State Director of Health and the federal authorities, the Boards of Health of Perry and Morgan Counties concluded an agreement to provide health services for the two counties, incident to which Dr. M. was employed as Health Commissioner, according to July 14, 1952 minutes of the Perry County Board, '* * * on a *full time* cooperative basis * * *' by the two counties. (Underscoring ours). Dr. M. entered upon the performance of these duties immediately and began receiving the specified salary therefor in August, 1952, and this employment has continued uninterruptedly to date.
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> "Meanwhile, through December, 1952, Dr. M. also performed the functions and drew compensation as Perry County coroner and as the county jail and county home physician. In January, 1953, Dr. M.'s responsibilities as county jail and county home physician were terminated, and, of course, he has drawn no compensation therefor since. However, following his election thereto in November, 1952, he qualified as county coroner and has performed the functions and has acted as such official during all of 1953 and to date, in 1954.
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> "As coroner, Dr. M. was paid through February, 1953, at which time his pay was suspended * * *."

Your letter appears to me to raise two questions: (A) Whether the office of coroner is incompatible with the employment as health commis-

sioner, and (B) Whether the provisions of the contracts of employment as health commissioner calling for "full time" service prevent the officer in question from holding the office of coroner at the same time. Your letter does not make it clear how the contract or contracts of employment are drawn, but since there is no authority in the law for two general health districts to enter into a joint contract, I must assume that they have contracted *separately,* with doubtless an understanding that the person employed is to act for both districts.

We may start with the proposition that where either the Constitution of the State or the statutes forbid certain specific offices to be held by the same person, they are necessarily incompatible. I find nothing in the Constitution or in the statutes relative to the two offices here under consideration which expressly forbids them to be held by the same person. While the courts have hesitated to announce a comprehensive definition of incompatibility, yet there are certain well recognized principles that are inherited from the common law, which by the consensus of authority do render certain offices incompatible. Quoting from 32 Ohio Jurisprudence, page 908, we find the following statement:

> "It was early held that the test of incompatibility was not that it was physically impossible for the officer to perform the duties of one office because he was at that time elsewhere performing the duties of the other, but the distinction was in an inconsistency in the functions of the office. One of the most important tests as to whether offices are incompatible is found in the principle that incompatibility is recognized whenever one office is subordinate to the other in some of its important and principal duties, or is subject to supervision or control by the other, as an officer who presents his personal account for audit and at the same time is the officer who passes upon it, or is in any way a check upon the other, or where a contrariety and antagonism would result in an attempt by one person to discharge the duties of both."

Virtually the same tests are laid down in 42 American Jurisprudence, page 936. The editor of that work emphasizes the point made by the above quotation from Ohio Jurisprudence, that mere physical inability to perform the duties of both offices, does not constitute incompatibility. The same statement is made in 67 Corpus Juris Secundum, page 135.

An examination of the statutes relative to the duties of the office of coroner and health commissioner fails to reveal any feature which renders

these two offices incompatible when the tests above noted are applied. The duties of the coroner are set forth in Section 313.01 et seq., of the Revised Code, and it appears that his duties relate exclusively to investigations into the death of persons under circumstances that may give rise to suspicion of foul play or call for criminal action. Such investigation frequently requires an autopsy, and necessitates extended hearings, examination of witnesses, and preparation of findings.

The duties of a health commissioner of a city or general health district are defined in Sections 3701.53 and 3709.11, Revised Code, and clearly relate to the conservation and preservation of the health of the community. In my opinion there is no incompatibility in the duties of these two offices, arising either out of any statutory prohibition or any inconsistency in the duties of the two offices, measured by the principles hereinabove stated.

The question of physical inability of the same person to perform both the offices in question, while not having a proper place in the discussion of compatibility, does in my opinion have an important bearing on the situation described in your letter, by reason of the fact that the boards of health, in the case presented, have in their contracts of employment of the health commissioner stipulated that he shall give full time to his work as health commissioner. The question, therefore, arises whether a person so employed can fulfill this requirement of his contract of employment while at the same time holding the office and performing the duties of a county coroner.

What constitutes a full time office or employment has been the subject of judicial consideration in several cases. In Industrial compensation cases, the question arises as to compensation that is to be granted to "full time employes." Thus it was said in the case of Cote v. Bachelder-Worcester Co. (N.H.) 160 A. 101, 103:

> " 'Full time' in Compensation Law signifies normal and customary period of labor per day or week for kind of work employee performs (Pub. Laws 1926, c. 178, § 19.)"

In the case of American Tobacco Company v. Grider, 243 Ky., 87, which related to workmen's compensation, it was said:

> "The words 'at full time' are defined as necessarily meaning a full working day for six days in every week of the year, regardless of whether injured employee actually worked for all or part of the time. * * *"

I do not consider that these cases arising under a workmen's compensation law, satisfactorily dispose of the question that we have before us. Plainly, these employes may be considered full time employes, for the purpose of workmen's compensation, and at the same time may hold a public office or employment, the duties of which do not interfere with their working hours. Such, for instance, as mayor or clerk of a village, justice of the peace, etc. A case which appears to me to come a little closer to the problem here under consideration is Johnson v. Stoughton Wagon Co., 118 Wis. 438, where it appeared that a man was employed by a corporation, as its secretary and manager, under a contract whereby "he was to give his full time to the company's service." In that case, the court used the following language:

> "A provision in a contract of employment by which the employee was to give his 'full time to the company's service' is in its nature ambiguous. It does not require 24 hours a day nor every moment of his waking hours. On the other hand, it undoubtedly does require that he shall make that employment his business to the exclusion of the conduct of another business, such as usually calls for the substantial part of a manager's time or attention. Where the managing officer of a corporation devoted his entire business days, of approximately nine hours, and about one-half of his evenings, to the company's service, it could not be said that he failed to give his full time to the company, though he at the same time looked after his mother's estate and the finances of another company and occupied a place on the directory of a bank."

It will be noted that that case did not involve any public employment and that the officer in question manifestly was able to work in his outside interests at such times as suited his convenience and would not in any way conflict with the duties of his regular employment. Furthermore, neither his position as secretary and manager of the corporation, nor his outside interests were in any way subject to regulation by law as to their respective duties.

It appears to me that in the case you present, we have a somewhat different situation. The contracts of employment by the two boards of health made pursuant to an understanding between the two boards, are said to call for the full time of the health commissioner. The provisions of law for the appointment of the health commissioner of a general health district are found in Section 3709.11, Revised Code. This section provides in part, as follows:

> "The board shall appoint a health commissioner upon such terms, and for such period of time not exceeding two years, as may be prescribed by the board. Said appointee shall be a licensed physician and shall be secretary of the board and *shall devote such time to the duties of his office as may be fixed by contract with the board.* * * *" (Emphasis added.)

The phrase which I have emphasized, appears to suggest that the legislature contemplated that the board of health might either employ a health commissioner on part time or exact from him an agreement in the contract of employment that he will give his entire time to the duties of his position. To that end it might stipulate that he should give up his private medical practice, or, in the case before us, that he should resign his office of county coroner, either of which might be considered by the board as interfering unduly with the duties of his employment as health commissioner. The general character of the duties of the health commissioner is indicated by the concluding sentences of said Section 3709.11:

> "* * * He shall be charged with the enforcement of all sanitary laws and regulations in the district. The commissioner shall keep the public informed in regard to all matters affecting the health of the district."

Considering the general scope of the coroner's duties and the peremptory action which he must take in case of a death calling for his attention, it may be that a sudden call to a remote part of the county might interfere temporarily with his work as health commissioner, but it would not follow, as a matter of law, that he had neglected or failed to perform his full duties as health commissioner.

The question with which we are here dealing was the subject of an opinion by one of my predecessors, to wit, No. 790, Opinions of the Attorney General for 1929, page 1208, where it was held:

> "The office of county coroner and commissioner of a general health district may be held by one and the same person, except in cases wherein the contract of employment of such health commissioner is so drawn, under the provisions of Section 1261-19, General Code, as to require such health commissioner to devote full time to the duties of his office, which would result in such commissioner not being able to perform his duties as coroner."

In the course of the opinion, after quoting the statutes to which I have referred, relative to the employment of the health commissioner, and referring to the duties of a coroner, it was said:

> "* * * Logically, it follows that if a full time contract was so drawn as to prevent a coroner from complying with his statutory duties, there would be an incompatibility, since it would be physically impossible to perform the duties of the two positions."

I agree with that opinion, as expressed in the syllabus, in so far as it leads to the conclusion that the board of health would have the right to consider that their health commissioner in continuing his functions as coroner, is violating the terms of his contract with them. I cannot agree with any implication that might arise that the offices in question are *incompatible, or that the officer is unlawfully holding either office,* or that he is not entitled to his compensation for both offices, so long as the board of health is satisfied with his service and permits him to continue.

As already indicated, "full time service" is a variable and uncertain term, and I should hesitate to declare as a matter of law, that the employe in the case presented was definitely violating his contract by continuing to act as coroner, or that he has disqualified himself to receive his compensation for either of his positions. Whether he is fulfilling his contract satisfactorily must be left to the discretion and judgment of the boards who have employed him.

It would appear from the statement of facts above quoted, that Dr. M. had held the position of coroner for many years prior to his contract of employment as health commissioner in August, 1952; that he was reelected as coroner in November, 1952; and that he is still performing his duties as coroner, in addition to acting as health commissioner for the two counties. In so far as your letter discloses, his services have been satisfactory to the boards which have employed him, but his compensation as coroner was suspended at the end of February, 1953, by reason of a letter from the Bureau of Inspection and Supervision of Public Offices, in which the county auditor was advised that upon the basis of the Attorney General's Opinion of 1929, above referred to, the two offices were "incompatible," by reason of the "physical impossibility" of performing the duties of both offices. Both the opinion in question and the advice of the Bureau were grounded on the often cited case of State ex rel. Attorney General v. Gebert, 12 Ohio C. C., 274, where it was held, as indicated by the headnote:

> "The offices of mayor and member of Congress are not incompatible and may be held by one person."

The court in the course of the opinion, made this rather unfortunate comment:

> "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."
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> (Emphasis added.)

The court hastened to add that there was no element of physical impossibility present in the case before it. But that sentence, the latter part of which was pure dictum, has been quoted in many opinions of this office and given undue weight; but the writers have usually evaded the effect of the final clause, by pointing out that "physical impossibility" must be a question of fact in each case, and does not really constitute incompatibility as a legal proposition.

In my opinion there was no legal basis for the suspension of the coroner's salary, and he should be paid for the period during which he has served, since the suspension.

Accordingly, it is my opinion and you are advised:

1. There is no incompatibility between the office of coroner, and employment as health commissioner as authorized by Section 3709.11, of the Revised Code.

2. Whether a health commissioner employed by a board of health under a contract wherein the officer is to give his "full time" to the work of such office, is violating such contract by serving as coroner, is a matter for the determination of the board of health.

3. Where a coroner, duly elected and serving in such office, is employed by a board of health as health commissioner "on a full time basis" and is permitted by said board to continue, while serving as health commissioner, to perform his duties as coroner, he is entitled, in addition to his compensation as health commissioner, to receive his compensation as provided by law for his service as coroner.

Respectfully,
C. WILLIAM O'NEILL
Attorney General