

OPINION NO. 66-047**Syllabus:**

A prosecuting attorney may not legally be appointed as chief probation officer so long as he is serving in the capacity of prosecutor. Opinion No. 575, Opinions of the Attorney General for 1929, page 886, approved and followed.

To: Elmer Spencer, Adams County Pros. Atty., West Union, Ohio
By: William B. Saxbe, Attorney General, February 28, 1966

I have received your request for my opinion which reads as follows:

"During the past approximate seven and one-half years, I have served as Prosecuting Attorney of Adams County as well as Probation Officer but since there was no money involved and since the Court and I did not think the jobs would be incompatible I had not particularly researched the problem. However, this year a very small appropriation was made for part-time pay of a Probation Officer and since there is some degree of pay involved and in researching the problem, I note that a 1929 Attorney General's Opinion #575 says that Prosecuting Attorneys cannot be Chief Probation Officers so long as he is serving in the capacity of Prosecuting Attorney. However, I also note that 1963 Opinion #502 concerning a full time or part time Deputy Sheriff was held to be a compatible position so long as it was physically possible for one person to perform the duties of both offices and such opinion over-ruled the second branch of the syllabus of Opinion No. 1076, Opinions of the Attorney General for 1949, page 713.

"This County is not in any position to employ a full time Probation Officer and to this date it has not been possible to combine this office with several other offices open as to possibilities for combination but in light of the foregoing opinions, I would now request your opinion if a Prosecuting Attorney, who of course is a part-time official, to serve as a Probation Officer?"

The authority for and the method of creation of a

county department of probation is contained in Section 2301.27, Revised Code, which reads in pertinent part:

"The court of common pleas may establish a county department of probation. The establishment of such department shall be entered upon the journal of said court and the clerk of the court of common pleas shall thereupon certify a copy of such order to each elective officer and board of the county. Such department shall consist of a chief probation officer, and such number of other probation officers and employees, clerks, and stenographers, as are fixed from time to time by the court. The court shall make such appointments, fix the salaries of appointees, and supervise the work of appointees. No person shall be appointed as probation officer who does not possess such training, experience, and other qualifications as are prescribed by the adult parole authority created by section 5149.02 of the Revised Code. All positions within such department of probation shall be in the classified service of the civil service of the county."

(Emphasis added)

Section 2301.27, Revised Code, supercedes Section 1554-1, General Code, and the portion as underscored above is identical. The statute, therefore, is a prohibition against the employment, within the county department of probation, of any persons who are ineligible for the classified county civil service, which would include all elective public office holders.

In response to a substantially similar question in Opinion No. 575, Opinions of the Attorney General for 1929, page 886, the then Attorney General stated:

"Section 1554-1 of the General Code, to which you refer, authorizes the establishment by the Judge or judges of the Common Pleas Court, with the concurrence of the board of county commissioners, of a department of probation. Said section provides that such department shall consist of a chief probation officer and such other probation officers and employees as may be fixed from time to time by the judge or judges.

"Without further consideration of the provisions of Section 1554-1 and its related sections, suffice it to say that said section contains the following language:

"'All positions within such department shall be in the classified service of the civil service of the county.'

"In my opinion No. 544, rendered under date of June 19, 1929, to the Bureau of Inspection and Supervision of Public Offices, it was held, as disclosed by the syllabus:

"'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.'

"In my said opinion reference was made to an opinion of my immediate predecessor, found in Opinions of the Attorney General for 1928, Vol. II, 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.'

"Said opinion above referred to clearly holds that one may not hold a public office, whether elective or appointive, and at the same time be in the classified civil service of the state or county.

"In view of the foregoing, it is unnecessary to consider the relative duties of the chief probation officer and the prosecuting attorney, in view of the general rule with reference to incompatibility. The former opinions seem to be dispositive of the question.

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Therefore, it is my opinion and you are hereby advised that a prosecuting attorney may not legally be appointed as chief probation officer so long as he is serving in the capacity of prosecutor. Opinion No. 575, Opinions of the Attorney General for 1929, page 886, approved and followed.