

OPINION 9

OFFICIAL OPINION NO. 9

February 29, 1956

Dr. A. C. Offutt, M. D.
State Health Commissioner
Indiana State Board of Health
1330 West Michigan Street
Indianapolis 7, Indiana

Dear Dr. Offutt:

Your request for an Official Opinion dated January 30, 1956, presents the following questions, to-wit:

- "1. Is the part-time city health officer a public officer in the government of the municipality in the legal sense?
- "2. Is it mandatory that part-time city health officers reside within the corporate limits of the city?
- "3. Is it mandatory that the members of a city board of health reside within the corporate limits of the city?"

With respect to Question No. 1, concerning the definition of "public officers," I submit the following:

"A public officer may be defined as a position to which a portion of the sovereignty of the state attaches for the time being, and which is exercised for the benefit of the public. The most important characteristic which may be said to distinguish an office from an employment is, that the duties of the incumbent of an office must involve an exercise of some portion of the sovereign power."

Shelmadine v. City of Elkhart et al. (1921), 75 Ind. App. 493, 495, 129 N. E. 878.

In *State ex rel. Black et al. v. Burch*, Auditor of State of Indiana (1948), 226 Ind. 445, 456, 80 N. E. (2d) 294, the Court quoted with approval the following:

"* * * An office is a public charge or employment, in which the duties are continuing, and prescribed by law and not by contract, invested with some of the functions pertinent to sovereignty, or having some of the

powers and duties which inhere within the legislative, judicial or executive departments of the government, and emolument is a usual, but not a necessary element thereof.' *Wells v. State* (1911), 175 Ind. 380, 94 N. E. 321."

The powers of a part-time city health officer as provided by the Public Health Code of Indiana in the Acts of 1949, Ch. 157, Sec. 505, as found in Burns' Indiana Statutes (1949 Repl.), Section 35-610, include:

"* * * immediate control and direction of the city sanitarians, of the city meat and dairy inspectors and of the city plumbing inspectors. He shall have charge of the municipal laboratory and he shall require and superintend, in relation to sanitary condition of the city, such chemical, histological, bacteriological and pathological investigations as shall be deemed advisable by the board; he shall have charge of the office occupied by the board and carry out and perform all such orders and directions as it may require; he shall devote such time to the duties of his office as the board shall deem necessary, for the proper performance of his duties."

It is apparent that while some of the functions of a part-time city health officer are subject to the control of the local board of health, yet other duties required of him by law require the exercise of some degree of sovereignty. Accordingly, a part-time health officer, in a legal sense, is a "public officer."

In regard to your Question No. 2, pertaining to the subject of residence requirements as related to part-time city health officers, the following is pertinent:

It is well settled that "residence" is primarily a matter of intent. A person may have a home within the corporate limits of a city, and also another home outside the city limits. A person may not have two residences but he may elect which of two "domiciles" he shall consider his legal residence.

Question No. 2 calls for the interpretation of the applicable provisions of the Public Health Code of Indiana, a state constitutional provision and also a statutory provision.

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Insofar as residence requirements are concerned, the Public Health Code is not particularly helpful except that it establishes that both full-time and part-time health officers must hold an unlimited license to practice medicine in the State of Indiana. It may be presumed from this code provision that a person to be eligible to hold such a license must be a resident of Indiana.

Having established that a part-time health officer is in a legal sense, a "public officer," it becomes necessary to consider the provisions of the Acts of 1905, Ch. 129, Secs. 43 and 83, as amended, as found in Burns' Indiana Statutes (1950 Repl.), Sections 48-1242 and 48-1505 and the Indiana Constitution, Art. 6, Sec. 6, which relate to residence requirements of municipal officers.

The Acts of 1905, Ch. 129, Sec. 43, as amended, *supra*, provides in part:

"No person shall be eligible to any city office unless he shall have been a resident of such city for at least one [1] year immediately preceding his election, * * *."

This provision of the law obviously relates to "elected" city officials, and therefore is not applicable to the questions herein raised which concern "appointed" city officials.

The Acts of 1905, Ch. 129, Sec. 83, *supra*, which appears to be a provision of the law particularly pertinent to your inquiry reads in part as follows:

"No person shall be appointed, as the head of any department, or as a member of any board herein provided for, unless he shall have been a resident and elector of such city for one [1] year immediately prior thereto.
* * *"

This statute clearly provides that to be eligible for appointment as a member of a municipal board the subject must have been a resident and elector of the city for one [1] year immediately prior to his appointment.

It is to be noted that your inquiry seeks a determination as to whether a part-time health officer must "live" within the corporate limits of the city; whereas, the statute last quoted refers

to the *residence requirements for appointment*, and does not necessarily concern *residency requirements after appointment*.

This distinction brings up the possible application of the Indiana Constitution, Art. 6, Sec. 6, which provides:

“All county, township, and town officers, shall reside within their respective counties, townships, and towns; and shall keep their respective offices at such places therein, and perform such duties, as may be directed by law.” (Our emphasis)

The term “town” as used in the foregoing constitutional provisions is generic and is employed therein as comprehending cities.

City of Indianapolis v. Higgins (1895), 141 Ind. 1, 40 N. E. 671.

The Attorney General in an Official Opinion, cited as 1944 O. A. G., page 242, No. 58, rendered an opinion on the question as to whether a township trustee who moves from the township in which he was elected into an adjoining township of the same county, may continue to serve as township trustee in the township in which he was elected.

Here the Attorney General was dealing with a question involving an “elected” public officer rather than one who was “appointed.” However, since the above cited constitutional provision makes no distinction between appointed and elected officers it may be assumed that the Indiana Constitution, Art. 6, Sec. 6 applies with equal force to both.

The above cited opinion of the Attorney General quotes with approval the Official Opinion of the Attorney General issued March 6, 1907, the concluding paragraphs of which read as follows:

“A mere temporary removal or absence for a limited time by the officer from the township to which his residence has been restricted by law, with no intention to abandon his office, will not result in terminating his title to the office, but when he actually removes from the township with the intention to change his residence he surrenders his right to longer hold his office.

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“It is therefore my opinion that a person serving as township trustee in Indiana by removing from the township in which he is an officer thereby surrenders his right to the office.”

Residence requirements as applied to county commissioners is stated with clarity in the case of *Relender v. The State ex rel. Utz*, Prosecuting Attorney (1898), 149 Ind. 283, 288, 49 N. E. 30, which case had under consideration the Indiana Constitution, Art. 6, Sec. 6, and held as follows:

“* * * Members of a board of commissioners are certainly county officers, and, by the positive command of the constitution, they are required to reside within the county where they serve as such officers, and perform such duties as the law may direct. The provision of our fundamental law which restricts the residence of a county officer to his county must be construed as requiring him to be a resident thereof, not in the general sense of that term, but he is required to actually reside therein during the time he is the incumbent of the office. This holding is fully supported by the decision in the appeal of *State v. Allen*, 21 Ind. 516.

“That the title of a public officer may be terminated and his office vacated by abandonment is a rule of the law settled beyond controversy. As the constitution exacts of a county officer the duty to actually reside in the county in which he holds his office, if he violates this provision of the law, by voluntarily ceasing to reside therein, during his term, it will operate as an abandonment of the office, and, *ipso facto*, a surrender of all of his right and title to the office. *State v. Allen, supra*; *Yonkey v. State*, 27 Ind. 236; *Gosman v. State*, 106 Ind. 203, p. 208; *Osborne v. State*, 128 Ind. 129; *Mechem Pub. Officers*, sections 437, 438 and 439; 19 Am. and Eng. Ency. of Law, p. 562c*; *Bishop v. State, ante*, 223.

“Of course, there is a well affirmed exception to this general rule, which is that a merely temporary removal or absence for a limited time by the officer from the county or district to which his residence has been re-

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stricted by law, with no intention to abandon his office, or cease to discharge the duties thereof, will not result in terminating his title. * * *"

In consideration of your Question No. 3 it would appear that since both members of the city board of health and part-time city health officers are "public officials," in the strict legal sense, and no distinction is otherwise made between them insofar as residency requirements are concerned, the discussion relative to Question No. 2 would be applicable to Question No. 3.

In view of the foregoing authority, I am of the opinion:

1. That a part-time city health officer is, in a legal sense, a public officer.

2. It is mandatory that a part-time health officer reside within the corporate limits of the city where he is appointed to serve.

3. It is mandatory that the members of a city board of health reside within the corporate limits of the city where appointed to serve.

4. It is my further opinion that if either a part-time city health officer or a member of the city board of health exercising sovereign powers, removes or absents himself temporarily from his place of appointment with no intention of changing his residence therefrom, may be considered a resident of such place and his status as a "public officer" would remain unaltered.

OFFICIAL OPINION NO. 10

March 14, 1956

Honorable Donald M. Ream
State Senator
R. F. D. 14, Box 348
Indianapolis, Indiana

Dear Senator Ream:

I am in receipt of your request for my Official Opinion in answer to a number of questions concerning the powers and