act and, therefore, my answer to your question is that the act is invalid and void as not containing sufficient title, such as required in the constitutional section referred to.

As to your last suggestion that the act is unworkable because of the absence of a specific performance to apply to the assessor for a permit when a proper building inspector is non-existent and the other suggestions contained in that paragraph is answered by what I heretofore said about the constitutionality of the act. It will not therefore be necessary for me to comment on that part of your letter.

CHJ:aa

OFFICIAL OPINION NO. 98

October 10, 1949.

Mr. Alvan A. Sauer,
Superintendent Northern Indiana Childrens Hospital,
South Bend, Indiana.

Dear Sir:

I have your request for an official opinion which reads as follows:

“The Board of Trustees in its meeting of September 14 requests an opinion in regards to the relationship of one of its members serving as a member of the Board and receiving his $300.00 annual stipend as well as being appointed to the Active Staff and also receiving a yearly stipend for his services.

“Is it the usual custom and would he be acting within the laws of the State of Indiana by serving on the Board and the Staff and receive remuneration from both sources?”

Perhaps the first question to be considered is whether two (2) lucrative offices as provided by Article 2 of Section 9 of the Constitution of Indiana are involved. The pertinent parts of that provision are as follows:
"** nor shall any person hold more than one lucrative office at the same time, except as in this Constitution expressly permitted: **."

The exceptions stated in this section do not include the offices stated in your question.

We are confronted at once with, "What is contemplated by the Constitution by the term, 'lucrative office'?"

The Attorney General by his opinion of April 20, 1936, pages 155 to 159, said:

"* * * The constitutional provision against the holding of more than one lucrative office at the same time goes to the character of the office rather than to whether the officer draws two salaries."

There is a distinction between a public office and a mere employment. The Appellate Court of Indiana at Shelmadine v. City of Elkhart et al. (1921), 75 Ind. App. 493, at page 495 said:

"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. **"


Tucker v. State (1941), 218 Ind. 614.

I think it becomes apparent that position of a member of the Board of Trustees at the Northern Indiana Childrens Hospital is a lucrative office within the meaning of the Constitution. For closely analogous situations, see Chambers v. the State ex rel., Barnard 1890, 127 Ind. 365 and 1938 OAG 270 (concerning Superintendent of Muscatatuck Colony).

On the other hand, I think it is equally evident that position of "member of the active staff" is not a lucrative office within the meaning of the Constitution because as it is pointed
out in the definition above, to be a lucrative office, the holder
must exercise a portion of the sovereignty of the State. A
somewhat similar situation was presented in 1933 OAG 170
which holds that the Professor of Medicine, Indiana Uni-
versity, is not an officer.

Thus the situation you have outlined is not barred by the
Constitution provisions prohibiting the holding of two lucra-
tive offices.

It is to be noted that in the Acts of 1941, Chapter 139,
Section 41, same being Burns' 60-1341, which is a part of the
State Personnel Act, the following provision is included:

"* * * no person elected to public office shall during
the term for which he was elected be appointed to any
position in the classified service."

However, in view of Section 3 of Chapter 66 of the Acts
of 1949, concerning the Northern Indiana Childrens Hospital,
which reads as follows:

"By direction of the board of trustees and subject
to the provisions of the State Personnel Act, the super-
intendent shall employ personnel, other than the chief
of staff and members of the medical and surgical staff,
order and direct them, and see that they faithfully and
diligently discharge their respective duties, and main-
tain salutary discipline among employees, patients and
inmates, compel obedience to the rules and regulations,
discharge employees, subject to the provisions of the
State Personnel Act."

We need to determine the meaning of the section of the Per-
sonnel Act above quoted.

I would like to call attention to another statute dealing with
a somewhat collateral matter, that is, Section 1 of Chapter 16
of the Acts of 1941 prohibiting nepotism. That Section is as
follows:

"No person being related to any member of any
state board or commission, or to the head of any state
office or department or institution, as father, mother,
brother, sister, uncle, aunt, a husband or wife, son or
dughter, son-in-law or daughter-in-law, niece or
nephew, shall be eligible to any position in any such state board, commission, office or department or institution, as the case may be, nor shall any such relatives be entitled to receive any compensation for his or her services out of any appropriation now or hereafter provided by law."

Thus we can see that there are specific statutory prohibitions in a number of situations quite similar as the one outlined in your letter.

Although, I find no specific prohibitions, I feel that the above discussed statutes show public policy against holding two positions as outlined in your letter. In this connection it is to be noted that Section 2 of Chapter 66 of the Acts of 1949 provides in part as follows:

"The chief of staff may recommend, and it shall be the duty of the board to appoint such additional physicians and surgeons as are necessary to provide adequate surgical and medical care and treatment for patients admitted to the hospital: Provided, however, That such appointees shall meet all qualifications prescribed by the board. The board of trustees shall also prescribe the classifications, qualifications and duties of all other employees."

Thus we see, that in addition to other consideration, that the Board member would be in the unusual position of appointing himself to the position in question.

Section 517, Chapter 169 of the Acts of 1905, same being Burns' 10-3713, it might well be construed to prohibit the board from appointing one of its members to any position. That section is as follows:

"Officers interested in public contracts.—Any state officer, county commissioner, township or town trustee, mayor or a common councilman of any city, school trustee of any town or city, or their appointees or agents, or any person holding any appointive power, or any person holding a lucrative office under the constitution or laws of this state, who shall, during the time he may occupy such office or hold such appointing power
1949 O. A. G.

and discharge the duties thereof, be interested, directly or indirectly, in any contract for the construction of any state-house, court-house, schoolhouse, bridge, public building or work of any kind, erected or built for the use of the state, or any county, township, town or city in the state in which he exercises any official jurisdiction, or who shall bargain for or receive any percentage, drawback, premium, or profit or money whatever, on any contract, or for the letting of any contract, or for making any appointment wherein the state or any county, township, town or city is concerned, on conviction, shall be fined not less than three hundred dollars ($300) nor more than five thousand dollars ($5,000), and be imprisoned in the state prison not less than two (2) years nor more than fourteen (14) years, and disfranchised and rendered incapable of holding any office of trust or profit for any determinate period.”

For those reasons, I think it is very doubtful whether it would be within the laws of the State of Indiana or within the powers of the Board of Trustees to appoint one of its members as a member of the active staff. I am unable to ascertain any “usual custom” in this regard.

H VW/aa

OFFICIAL OPINION NO. 99

October 14, 1949.

Mr. Edwin Steers, Sr.,
Member of State Election Board,
102 N. Senate Avenue,
Indianapolis, Indiana.

Dear Sir:

Your letter has been received requesting an official opinion on the following question:

“Some controversy has arisen with reference to the construction of the constitutional amendment increasing the term of sheriffs as found in the Acts of 1947, Chapter 294.”