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OFFICIAL OPINION NO. 1

January 5, 1967

**GENERAL ASSEMBLY—OFFICERS, STATE—Dual
Office Holding—Eligibility of Municipal Housing
Authority Director to Serve as Legislator.**

Opinion Requested by House of Representatives, Indiana
General Assembly.

Gentlemen :

This is in response to your request for an Official Opinion on the right of Ben Lesniak, Jr. of East Chicago, Indiana, to be seated as a member of the House of Representatives of the 95th Session of the General Assembly after his election at the last general election.

Prior to his election he was appointed Executive Director of the Housing Authority of East Chicago, and is presently serving without compensation. The Authority was created by a resolution of the city council in 1965, under the Housing Authorities Act, Burns § 48-8104.

The first question arising from your request is whether Mr. Lesniak's serving as a legislator and with the Housing Authority violates Art. 2, § 9, Constitution of Indiana, providing :

“No person holding a lucrative office or appointment under the United States or under this State, shall be eligible to a seat in the General Assembly; nor shall any person hold more than one lucrative office at the same time, except as in this Constitution expressly permitted: Provided, that offices in the militia to which there is attached no annual salary, and the office of Deputy Postmaster where the compensation does not

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exceed ninety dollars per annum, shall not be deemed lucrative: And provided, also, that counties containing less than one thousand polls, may confer the office of Clerk, Recorder, and Auditor, or any two of said offices, upon the same person.”

Membership in the General Assembly is a lucrative office under Art. 2, § 9 of the Constitution. 1961 O.A.G., p. 87. The question, therefore, essentially becomes one of whether the position of Executive Director of the Housing Authority is an office within the meaning of Art. 2, § 9.

It has long been the law in Indiana that a position or job that is wholly and purely municipal in its character is not an office within the context of Art. 2, § 9, since it does not involve the exercise of the State's sovereignty. *State ex rel. Platt v. Kirk*, 44 Ind. 401 (1873). *Chambers v. State ex rel. Barnard*, 127 Ind. 365, 26 N.E. 893 (1891). It has, therefore, been held that a city attorney is not an officer within the meaning of Art. 2, § 9, of the Constitution. 1964 O.A.G., p. 48. Nor does it apply to a city fireman, 1964 O.A.G., p. 304, a city policeman, 1961 O.A.G., p. 20, or a city councilman, 1949 O.A.G. No. 6, p. 29. See also 1966 O.A.G., p. 228, and p. 268.

The Housing Authority of East Chicago is treated, as a matter of law, as a City department exercising a proprietary matter of law, as a city department exercising a proprietary function. 1952 O.A.G., p. 248.

If the position of city attorney is not an office within the meaning of Art. 2, § 9, it could hardly be said that the position of executive director of a municipal housing authority is an officer. Certainly there is more inclination for the city attorney to exercise state sovereignty than the executive of the housing authority. Where there is no exercise of state sovereignty, there is no officer within the meaning of Art. 2, § 9.

The position of director of the housing authority is, however, even one step further removed from the exercise of state sovereignty since the housing authority is performing a function proprietary in nature and not purely governmental. 1952 O.A.G., p. 248.

Mr. Lesniak, through his position with the Housing Authority, does not exercise the state's sovereignty. His position is solely that of a municipal employee. In my opinion there is no violation of Art. 2, § 9.

Even assuming *arguendo* that the holding of the two positions by Mr. Lesniak was contrary to Art. 2, § 9, it would not prevent his taking his seat as a member of the forthcoming General Assembly.

It is a well established rule that where one holds a lucrative office and thereafter assumes another lucrative office, he automatically vacates the first office when he assumes the duties of the second. 1960 O.A.G., p. 42. Therefore, if Mr. Lesniak's position with the Housing Authority was a lucrative office, he would automatically vacate that office upon his assumption of legislative office. This raises the question of when does a member of the Legislature take office and assume his duties. The question involves the relationship of Art. 4, § 3 and Art. 15, § 4 of the Indiana Constitution.

Art. 4, § 3, provides:

“Senators shall be elected for the term of four years, and Representatives for the term of two years, from the day next after their general election: . . .”

Art. 15, § 4, provides:

“Every person elected or appointed to any office under this constitution, shall, before entering on the duties thereof, take an oath or affirmation, to support the Constitution of this State, and of the United States, and also an oath of office.”

It is my opinion that a member of the Legislature cannot take office and assume his official duties until he takes the oath of office. Under Art. 4, § 3, a new Legislature is created “the day next after their election.” It exists, however, in embryo until activated by a call to session. If a special session were to be called before the commencement of the official session in January, they would assume their duties upon taking the oath. The oath required by Art. 15, § 4, is, however, a prerequisite to the assumption of official duties. *Minnick v.*

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State ex rel. Steele, 154 Ind. 379, 56 N.E. 851 (1900). The first office cannot be vacated until the second office has been assumed. The second office cannot be assumed until the oath has been taken. Therefore, the vacation of the first office does not occur until the oath has been taken as required by Art. 15, § 4.

Therefore, it is my opinion that Mr. Lesniak's serving in the Legislature while simultaneously serving as Executive Director of the Housing Authority of East Chicago does not violate Art. 2, § 9 of the Indiana Constitution, but even assuming *arguendo* that it would, it would not prevent his taking his seat in the General Assembly, for upon taking the oath as a member of the General Assembly he would automatically vacate his prior position with the Housing Authority.

The raising of this question by the leadership of the House of Representatives emphasizes a continuing problem facing the members of the Legislature and the citizens of Indiana. Historically, each Attorney General has been faced during his tenure with numerous questions concerning duality in office, and the underlying philosophy that prompted the framers of the 1851 Constitution to draw clear lines of demarcation between the various spheres of our state government. As these questions have become more numerous, they have passed from Attorney General to Attorney General as a continuing legacy, creating a body of cumulative opinions concerning a range from the office of Governor to membership on the Egg Control Board. It must be noted in passing that as the government has become more complicated in the State of Indiana and various municipal, county and state offices have proliferated, the clearly defined lines of demarcation that were present in 1851 have become more vague and cloudy with each passing generation. This is a bane not only to the members of the Legislature and other governmental bodies but creates confusion in the minds of the electorate. A great public service could therefore be performed by a legislative undertaking which would carefully examine the underlying principles of the separation of powers and the continuing existence of our tripartite form of government resulting in proper legislation which would clearly, as far as possible, redefine the lines of demarcation between the executive branch,

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the legislative branch and the judicial branch. While it is true that the government of 1967 is far more complicated in Indiana than was the government of 1851, the manifold precedents established in this area could be carefully analyzed. A public policy could then be enunciated which would ease the minds of members of the Legislature who might be serving on some non-paying body in a local community as a public service or some minimal position such as a notary public in furtherance of business necessities. Even more important, the citizenry would then have a further test when measuring the qualification of any person who stands for elective office, not only in the General Assembly but in any other division of our state, county or municipal government.

OFFICIAL OPINION NO. 2

January 18, 1967

**STATE OFFICERS—Governor as Having Power
to Alienate State-Owned Realty.**

Opinion Requested by Hon. Roger D. Branigin, Governor.

This is in response to your request for an Official Opinion concerning the power of the federal government to acquire the Indiana Dunes State Park.

The United States has the power under the Supremacy Clause of Art. 6, of the Constitution of the United States to condemn lands owned by a state even though such lands are already dedicated to a public use. *United States v. Carmack*, 329 U.S. 230, 91 L. Ed. 209, 67 S. Ct. 252 (1946), *United States v. Certain Parcels of Land*, 314 F. 2d 825 (7th Cir. 1963), *Linning v. United States*, 328 F. 2d 603 (5th Cir. 1964), *United States v. South Dakota*, 212 F. 2d 14 (8th Cir.