OFFICIAL OPINION NO. 29

August 29, 1967

OFFICERS—DUAL OFFICE HOLDING—Member of Metropolitan School Board Serving also as County Health Officer.

Opinion Requested by Mr. Richard L. Worley, Chief Examiner, State Board of Accounts.

I am in receipt of your recent request for an opinion concerning the payment of a salary to a County Health Officer who is also a member of a Metropolitan School Board. Your letter sets out the following facts:

1. A resident of Wells county was appointed to membership on the Bluffton-Harrison Metropolitan School Board for a three-year term commencing July 1, 1964, and expiring June 30, 1967;

2. The same resident was appointed to the position of Director of the Wells County Health Board (County Health Officer) on July 1, 1964, for a four-year term expiring July 1, 1968;

3. That resident has since served in both of the above capacities;

4. As a member of the School Board the resident receives an annual salary of $200, paid by the treasurer of the School Board, and as County Health Officer he receives an annual salary of $2,400, paid by the County Auditor;

5. That resident has been reappointed to the School Board and began his present term on that Board on July 1, 1967.

You inquire whether, in view of the situation as described above, the Auditor of Wells County should refuse to issue

warrants to that resident in compensation for services performed as County Health Officer subsequent to June 30, 1967.

The answer to your question requires a determination of whether both positions are "lucrative offices" and, if they are, a further determination of the effect of accepting re-appointment to the School Board.

Article 2, section 9, of the Indiana Constitution provides in part:

> "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. . . ."

That a member of a school board who receives or is entitled to receive some compensation for his services is the holder of a "lucrative office" as that term is used in the above constitutional provision has been affirmatively decided too frequently to need further discussion here. See *Chambers v. State ex rel. Barnard,* 127 Ind. 365, 26 N.E. 893 (1891); *Wells v. State ex rel. Peden,* 175 Ind. 380, 94 N.E. 321 (1911); 1953 O.A.G., p. 156; 1962 O.A.G., p. 66; 1966 O.A.G., p. 228.

On the other hand, the status of a County Health Officer in this regard has not as yet been determined in either a decision of the Supreme or Appellate Court or an Official Opinion of the Attorney General, and so that position must now be examined.

In *Wells v. State ex rel. Peden,* 175 Ind. 380, 383, 94 N.E. 321, 322 (1911) the Indiana Supreme Court said:

> ". . . The office of school trustee has been held to be a lucrative office. *Chambers v. State, supra*; *Creighton v. Piper,* 14 Ind. 182 In *Howard v. Shoemaker,* 35 Ind. 111, the office of mayor of a city is held to be a lucrative office. The reasons pointed out in those cases are that these officers are charged with duties delegated to them under the state government, with duties imposed upon them by statute, and are subject to legislative control. . . .

"... It is said in *Indianapolis, etc., Co. v. Claypool et al.*, 149 Ind. 193, 48 N.E. 228: 'An office is a position or station in which a person is employed to perform certain duties, or by virtue of which he becomes charged with the performance of certain duties, public or private; a place of trust.' It is said in that case that whether there is a provision for compensation does not determine the question whether the office is public. It is said by Webster that an office is 'a special duty, trust, or charge conferred by authority and for a public purpose; an employment undertaken by the commission and authority of the government, as civil, judicial, executive, legislative, and other offices.' 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 of an office. *Foltz v. Kerlin,* 105 Ind. 221, 4 N.E. 439, 5 N.E. 672, 55 Am. Rep. 197; *State v. Hocker,* 39 Fla. 477, 22 South. 721, 63 Am. St. Rep. 174; *Shelby v. Alcron,* 36 Miss. 273, 72 Am. Dec. 169 (1858)."

Using the above criterion there can be little doubt but that the County Health Officer holds a lucrative office.

The office of County Health Officer is established under and regulated by Acts 1949, ch. 157, as amended, commonly known as the Public Health Code of Indiana, the same being Burns Title 35. That Act both imposes duties upon and grants powers to County Health Officers, and even an incomplete listing of such powers and duties will suffice for the present purpose.

Section 401; Burns § 35-502:

"Local health officers shall enforce the health laws, ordinances, orders, rules and regulations of their own and superior boards of health."

Section 403; Burns § 35-504:

> "They shall collect, record and report the vital statistics of and within their respective areas and jurisdictions."

Section 408; Burns § 35-509:

> "They may enter upon and inspect private property, at proper times after due notice, in regard to the possible presence, source and cause of disease and, in connection therewith they may order what is reasonable and necessary for prevention and suppression of disease and in all reasonable and necessary ways protect the public health."

Section 409; Burns § 35-510:

> "Local health officers may order schools and churches closed and forbid public gatherings when deemed necessary to prevent and stop epidemics."

Section 410; Burns § 35-511:

> "No person shall institute, permit or maintain any conditions whatever which may transmit, generate or promote disease; and all health officers, upon hearing in any way of the existence of such unlawful conditions within their respective jurisdictions, shall order their abatement, in writing, if demanded, and specifying particularly wherein the conditions may transmit disease, and naming the shortest reasonable time for abatement. . . ."

Section 412; Burns § 35-513:

> "Any local health board or local health officer shall have power and authority to enforce any orders made by them by an action in the circuit or superior court at law or in equity and in such action the court or judge thereof in vacation shall have jurisdiction to enforce such order by prohibitory or mandatory injunction. . . ."

Clearly, the County Health Officer who receives or is entitled to receive compensation for his services is the holder of a lucrative office.

Equally clear is the result of an attempted holding of two offices, a result concisely stated by the court in *Foltz v. Kerlin* (1885), 105 Ind. 221, 225:

> "It is, doubtless, the general rule, that where a man accepts an office held under the State, he vacates another held under the same sovereignty. *Daily v. State, ex rel., supra* [8 Blackf. 329]; *Lucas v. Shepherd,* 16 Ind. 368; *Creighton v. Piper, supra* [14 Ind. 182]; *Howard v. Shoemaker,* 35 Ind. 111; *Cotton v. Phillips,* 56 N.H. 220; *Milward v. Thatcher,* 2 T.R. 81 [100 Emg. Rep. 45 (1787)]; *People v. Hanifan,* 96 Ill. 420; *Stubbs v. Lee,* 64 Maine 195; *Shell v. Cousins,* 77 Va. 328."

The case of *Howard v. Shoemaker,* 35 Ind. 111 (1871), cited in *Foltz, supra,* is especially pertinent to the situation you describe. In that case, one Levi Sparks was elected mayor of Jeffersonville in May, 1869. On January 11, 1871, before the expiration of his term as mayor, he was elected prison director by the Legislature. In May, 1871, he was again elected mayor of Jeffersonville and thereafter purported to act both as mayor and as prison director. The State Auditor refused to issue warrants in satisfaction of a claim for supplies allowed by Sparks as prison director. In refusing to mandate the Auditor to issue said warrants, the Indiana Supreme Court said, at 115 of 35 Ind.:

> ". . . Upon the other question, it is the opinion of a majority of the court that as the mayor of a city, under the act of 1867, has duties to perform, under the laws of the State, aside from those which are judicial and those of a purely municipal character, such as the taking and certifying of affidavits and depositions, the proof and acknowledgment of deeds and other instruments in writing, for which he is entitled to and may charge and receive fees, the office is a 'lucrative' one, within the meaning of sec. 9, art. 2, of the constitution of the State, that the office of director of the prison is also lucrative, and that the election of Sparks to the

> office of mayor in May, 1871, and his acceptance thereo vacated the office of director of the prison. . . ."

Thus, re-election (or reappointment) to a lucrative office operates to vacate a lucrative office accepted between the two elections (or appointments). The reappointment of the County Health Officer to the School Board, and his acceptance of that reappointment, operates as his resignation from the office of County Health Officer.

The issue with which you are concerned is, of course, not whether the official acts of the County Health Officer will be valid or whether a new Health Officer should be appointed, but rather whether the County Auditor should issue warrnats on the County Treasury is favor of that officer as compensation for his services.

Whether a person who holds and performs the duties of an office (a *de facto* officer) has the right to claim the salary attached to that office was decided adversely to the *de facto* officer in an early Indiana case *(State ex rel. Worrell v. Carr, infra)*, and the decision in that case has been frequently reaffirmed. The opinion in *Edington v. Board of Comm'rs* 105 Ind. App. 156, 16, 3 N.E. 2d 895 (1938), describes the factual situation involved, and excerpts the opinion rendered in the *Worrell* case thusly:

> "The case of *State ex rel. Worrell v. Carr, Auditor* (1891), 129 Ind. 44, 28 N.E. 88, was an action in mandamus by the appellant, claiming to be the *de jure* Chief of the Indiana Bureau of Statistics, against the appellee as Auditor of State, to compel such auditor to draw his warrant on the Treasurer of State, payable to appellant, compensating him for the salary incident to the office, of which he claimed to be the rightful and lawful occupant. It appeared from the facts that the appellee as such auditor had issued a warrant for a portion of the salary claimed by the appellant to another person, who claimed to be the rightful occupant of the office. In that case, the appellant had been adjudged the *de jure* officer by proceedings in *quo warranto*.
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> "The decision of the court in that case has never been overruled nor limited in its effect as applied to analogous

facts and has been cited with approval by courts of other states and by recognized authorities. The facts involved were in many respects quite similar to the facts presented by the record in the instant case. The language of the court in the Worrell case is especially applicable here. The court said (pp. 49, 50, 55):

" 'Indeed, the later and better reasoned cases hold that the salary is an incident to the office, and belongs by law to the person holding the legal title to the office, and that he can sue and recover it regardless of the fact whether he is occupying and discharging the duties of the office or not, if he be willing to do so, but is kept out by another who is claiming to act as an officer *de facto*. . . .

" 'It is true, the State and the public are interested in having a public office filled; and when one holds an office, though without title, and acts as an officer *de facto*, and keeps out the *de jure* officer, and while so in possession discharges the duties of the office, the public good demands that the acts of such *de facto* officer, in so far as they affect third parties or the public, be declared valid; but there is no valid reason for declaring that, as between the *de jure* and *de facto* officer, the *de facto* officer is entitled to the salary, or that he, by excluding the *de jure* officer, can prevent him from receiving the salary, or for holding that where one charged with the duty of paying the salary, when with knowledge of all the facts he pays to the *de facto* officer, he shall be relieved from paying to the *de jure* officer. The disbursing officer can not be sued or compelled to pay a *de facto* officer. When the *de facto* officer sues for his salary he brings in question the title to the office, and he can not recover without establishing his legal right and title to the office. . . .

" ' "A *de facto* officer has no legal right to the emoluments of the office, the duties of which he performs under color of an appointment, but without legal title. He can not maintain an action for the salary. His action puts in issue his legal

> title to the office, and he can not recover by showing merely that he was an officer *de facto*. In *Nicholas v. MacLean,* 101 N. Y. 526, 54 Am. Rep. 730, the court says: 'It is abundantly settled by authority that an officer *de facto* can, as a general rule, assert no right of property, and that his acts are void, as to himself, unless he is also an officer *de jure*.' In Cro. Eliz. 699, the doctrine is tersely stated as follows: 'The act of an officer *de facto,* when it is for his own benefit, is void; because he shall not take advantage of his own want of title, which he must be conusant of; but where it is for the benefit of strangers or the public who are presumed to be ignorant of such defect of title, it is good.' " ' "

The final decision in *Edington* was that the officer claiming a salary was a *de facto* officer and not entitled to the same.

There are several cases holding that "where a *de facto* officer of a municipal corporation has received from the disbursing officers, in regular course, the salary attached to the office held by him for the time he occupied the same and performed the duties thereof, the municipality is not thereafter liable to the *de jure* officer for such salary." *City of Peru v. State ex rel. McGuire,* 210 Ind. 668, 672, 199 N.E. 151 (1936), and cases cited therein. The opinions in such cases employ language that would indicate that the *de facto* officer is entitled to the salary he receives even though he has no legal claim to the office. ("The exigency of society requires efficient performance of official duties, and to secure such performance, prompt payment therefor is an essential requisite." 210 Ind. at 673). If, however, the city officials are aware that the legal right to hold the office rests in the *de jure* officer the city will be liable to that officer for the salary even though the salary has been paid to a *de facto* officer. *Morton v. City of Aurora,* 96 Ind. App. 203, 182 N.E. 259 (1932). Such cases are concerned solely with the authority of the disbursing officer of a municipality and so are not decisive precedent on the authority of a County Auditor, the holder of an office created by the Indiana Constitution (Art. 6, § 2).

Each of the preceding cases involves both a *de facto* and a *de jure* officer and are concerned with their respective rights to receive the emoluments of the office. Your situation is somewhat different in that no *de jure* officer exists and your only concern is whether the County Auditor should issue warrants to the *de facto* officer.

1 R. S. 1852, ch. 8, § 4, the same being Burns § 49-3005, provides in part:

> "He [the County Auditor] *shall examine and settle all accounts* and demands chargeable against his county which are not directed to be settled and allowed by some other tribunal or person; and, for all such sums of money, settled and allowed by himself, such other tribunal or person, or where the same is fixed by law, he shall issue his orders on the treasurer of the county, *payable to the person entitled thereto. . . .*" (Emphasis added.)

The above statute directs the auditor to examine all demands before settlement. Under that authority auditors have successfully resisted orders of a lower court to pay jurors more than the statutory juror's fee (*Monroe v. State ex rel. Willard,* 157 Ind. 45, 60 N.E. 708 (1901)), to pay an attorney appointed by the Court to defend the constitutionality of a law (*Barr v. State ex rel. Reading,* 148 Ind. 424, 47 N.E. 829 (1897)), and to pay the county clerk of the circuit court a *per diem* for attending in court (*Rudisill v. Edsall,* 43 Ind. 377 (1873)). In *State ex rel. Behymer v. Perry,* 159 Ind. 508, 65 N.E. 528 (1902), an action to compel the county auditor, by mandate, to issue a warrant in payment of an allowance made by the board of commissioners but considered illegal by the auditor, the court used the last cited cases as authority for the proposition "that the auditor had the right to raise the question when it was sought to compel him to order the money paid out of the county treasury."

It is thus clear that the Auditor of a county, like the Auditor of State, has the authority to question the payment of salary and to withhold that payment when he believes the intended recipient is not entitled to receive the payment.

Therefore, in answer to your question, it is my opinion that a County Health Officer automatically vacates his office when he accepts an appointment or reappointment to a Metropolitan School Board whose members receive compensation. It is my further opinion that subsequent to his appointment or reappointment to the School Board he is not entitled to receive compensation as a County Health Officer and the Auditor of his county has the authority to refuse to issue warrants for such salary.

OFFICIAL OPINION NO. 30

August 30, 1967

OFFICERS—MUNICIPAL CORPORATIONS—City of Third Class Operating Public Utility—Setting Amount of Salaries—Function of Common Council.

Opinion Requested by Hon. Robert E. Mahowald, State Senator.

I am in receipt of your recent request for an opinion on the following questions:

> "1. If a city of the third class operates a municipally owned electric utility, what city officer or board establishes the salary of those utility officers and employees who receive an annual salary?
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> "2. If a city of the third class operates a municipally owned electric utility, what city officer or board establishes the wage scale of those utility employees who are paid an hourly wage?
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> "3. If a city of the third class operates a municipally owned electric utility, what city officer or board