of fees by a justice of the peace, and there is no statute giving the power to a justice of the peace to suspend judgments as has been given to city and magistrate courts; it is therefore, my opinion that justices of the peace do not have the power to suspend fines and fees.

OFFICIAL OPINION NO. 39

December 20, 1966

CITY OFFICERS—Employees of Municipal Corporations—City Police Officer as Employee, Rather Than Officer, of City—Employment During Off-Duty Hours.

Opinion Requested by Hon. George W. Dye, State Senator.

I am in receipt of your recent letter requesting an opinion as to the legality and the propriety of a city employing a city policeman during off-duty hours for street department work. You state that a city in your district has found it impossible to obtain part-time street employees, thus creating an emergency, and that the city, therefore, contemplates employing a willing city policeman during his off-duty hours.

You have directed my attention to an Official Opinion of my predecessor in office, 1964 O.A.G. No. 56, p. 304, which you state indicates that such employment of a city police officer under such circumstances would be valid.

As you are aware, the particular Opinion you cite was rendered in response to an inquiry relating to the legality of the employment by the city of a city fireman to engage in work relating to street repairs. The fireman was to perform such work under the supervision of the city engineer.

Since your letter clearly indicates that you are familiar with the former Attorney General's Opinion cited above, and

so as not to overburden this Opinion, only those parts of the cited Opinion which appear pertinent to answering your inquiry will be considered.

Accordingly, I direct your attention to that portion of the Attorney General's Opinion wherein he stated, in part, as follows:

> "In any such situation pertaining to the legal right of an individual to simultaneously hold more than one position under state government, the following tests should be taken into consideration, namely:
>
> "(1) Is each position a 'lucrative office' within the meaning of the Indiana Constitution, Art. 2, Sec. 9?
>
> "(2) Would such holding be in violation of the Acts of 1905, Ch. 129, Sec. 46, as amended, and found in Burns' (1963 Repl.), Section 48-1247?
>
> "(3) Are the offices incompatible with each other?
>
> "(4) Is there a conflict of interests?
>
> "(5) Would such holding be against public policy?"

The prior Opinion then stated, in substance, that the constitutional provision was inapplicable in that instance since it is well settled in Indiana that a city fireman is merely an employee and not an officer within the meaning of the constitutional provision, and hence a city fireman performing, during off duty hours, work on the streets under the supervision of the city engineer would not be in violation of the Indiana Constitution, Art. 2, § 9.

That Opinion then proceeded to consider the provisions of Acts 1905, ch. 129, § 46, as amended and found in Burns IND. STAT. ANN., § 48-1247, made a rather exhaustive analysis of that statute, and arrived at the conclusion that the statute likewise did not prohibit the city engineer from employing a city fireman for work involving street repairs. The Attorney General concluded that the responsibility rested with the appointing authority to determine whether such employment

would be against public policy, or whether the duties of the two positions would be incompatible or if such employment created a conflict of interest.

Although the previous Opinion was directly concerned with a city fireman, it is by analogy applicable to a police officer being employed for emergency street work. I so conclude because a police officer, like a city fireman, has been classified as an "employee" by the Indiana Supreme Court.

It was stated in *City of Evansville v. Maddox,* 217 Ind. 39, 45, 46, 25 N.E. 2d 321, 323 (1940), as follows:

> "It is well settled by the decisions in this state that a member of the police force is merely an employee of the city and is not an officer. . . ."

and it was further stated in the case of *State ex rel. Palm v. City of Brazil,* 225 Ind. 308, 315, 73 N.E. 2d 485, 488, 74 N.E. 2d 917 (1947), as follows:

> "The policemen and firemen involved in this law suit were not officers but were employees. Their relations to the city were entirely contractual."

Notice should also be taken of another Opinion of the Attorney General, 1961 O.A.G. No. 4, p. 20, wherein the following question was asked:

> " 'Can a city police officer be appointed a part-time probation officer without violating the provisions of the Indiana Constitution pertaining to one individual holding more than one lucrative office at the same time?' "

The Attorney General's Opinion stated, in part, as follows:

> "Inasmuch as a city police officer is merely an employee, it thus becomes unnecessary to determine whether or not a part-time probation officer is an officer or employee. Therefore, in answer to your question, in my opinion, the simultaneous holding by one individual of the two positions in question, one of which is not an office would not be in violation of the Indiana

Constitution, Art. 2, Sec. 9, *supra,* regardless of the character of the second position."

It would be an incongruity to conclude that a police officer could serve as a part-time probation officer but be forbidden to accept part-time employment in the much less remunerative employment as a street repairman.

Accordingly, it is my opinion that the employment by the city of a police officer to work as a street repairman would not be invalid or illegal. My opinion is further strengthened in view of the existence of the emergency situation you state is confronting the city involved.

However, I would like to repeat the admonition given in the earlier Attorney General's Opinion that in the consideration of any specific case involving the performance of extra services attention should be given to whether the municipality has any ordinance or regulation of the police department which prohibits such additional employment. Therefore, I too would strongly suggest that you determine whether there exists any rule or regulation of the police department that has been promulgated by those charged with the governing and administration of such department, or any ordinance of the Common Council, prohibiting a police officer from engaging in the type of activity which you have described in your letter. While such rules, regulations and ordinances are generally and usually enacted to prevent police officers from engaging in employment in private industry or for private persons, nevertheless the existence of such a rule or regulation or ordinance presents a problem even though the city is in the instant case to be the employer. If there is a general rule or regulation of the department prohibiting a police officer from engaging in any other employment and requiring his devoting his full time to his position as a police officer, it is doubtful if the police administrative board could waive such a rule or regulation, at least insofar as it would affect only one particular officer. (See 2 AM.JUR. 2d *Administrative Law,* § 309).

In the event such a prohibitive measure is found in a city ordinance, it is my opinion that it would be necessary before the city could employ a police officer under the circumstances

which you have stated, that such ordinance would necessarily have to be repealed. I base this conclusion upon the case of *Ristine v. Clements,* 31 Ind. App. 338, 348, 66 N.E. 924, 927, 928 (1903), wherein it is stated, in part, as follows:

> "An ordinance enacted with the formalities required by law has the same effect within the corporate limits and with respect to persons upon whom it lawfully operates that a legislative act has upon the people at large. . . . When the trustees, clothed with local and limited powers of sovereignty, have enacted an ordinance or local law, thus prescribing a general and permanent rule, they have no authority to set aside or disregard the ordinance except in some manner prescribed by law."

I believe I would be remiss if I did not draw your attention to two statutes related to your problem. Acts 1925, ch. 182, as found in Burns IND. STAT. ANN., § 48-6119, pertains to the appointment of the members of the police department of cities of the fifth class, such as the city with which you are concerned, and authorizes the mayor to appoint such members.

Acts 1905, ch. 169, as found in Burns IND. STAT. ANN., § 10-3713, forbids appointees of the mayor from being interested, directly or indirectly in public works, and imposes a criminal sanction.

Since the members of the police force of a city of the fifth class are appointees of the mayor a question might arise as to whether the criminal provisions of the latter statute would subject both or either the city officials and a police officer whom they employ to work upon street construction to the penalties provided.

It is my opinion that neither the city officials nor a police officer so employed are within the purview of the above cited statute.

I base this conclusion upon the very language of the statute itself (Burns § 10-3713), particularly that portion thereof which forbids either the mayor or his appointees to engage in, amongst other specified construction work, work of any kind

in which such appointee exercises any official jurisdiction. The operative phrase in this provision is "in which he (the appointee) exercises any official jurisdiction." (Parenthetical insert added.)

While it is true that the members of the police force in a fifth class city are appointees of the mayor, it would seem unreasonable to conclude that such police officers are "appointees" as that term is employed in the criminal statute. It would be more reasonable to assume the Legislature intended that statute to apply only to those "appointees" who would be officers exercising some of the sovereign authority of the governmental unit and not to police officer appointees who are mere "employees" and not "officers" in the legal connotation of that term.

OFFICIAL OPINION NO. 40

December 20, 1966

STATE BOARD OF HEALTH—Medicare Act Establishing Home Nursing Services—Agency Functioning in Relation to Public, Rather Than as to Individuals.

Opinion Requested by Dr. A. C. Offutt, State Health Commissioner.

I am in receipt of your request for an opinion concerning the authority of the State Board of Health in relation to the home nursing services described in the federal Medicare Act. You asked two specific questions, to-wit:

> 1. Is the Indiana State Board of Health or any local board of health authorized to establish a home health agency as described in Title XVIII of P.L. 89-97 (Medicare)?