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Data Processing is not a part of the new Budget Agency or subordinate to the new Budget Committee. As the executive authority of the State of Indiana, however, you have it in your power to require a practical solution to the problem of direct conflict between the acts by directing that the Department of Data Processing be functionally operated under or as the data processing division of the Department of Administration, subordinating the Director of the Division of Data Processing to the Commissioner of the Department of Administration.

7. The phrase "subject \* \* \* to other laws not inconsistent therewith" in Section 4 of the Department of Administration Act was intended to point out that there is other legislation which must be considered as supplementary to this act, not in conflict therewith, and that the General Assembly did not intend that the Commissioner of this new Department of Administration should look only to the provisions of this act for the blueprint of all the phases of his duties and the legal requirements affecting the actions and operations of his Department.

8. There is an existing Department of Administration at this time, which can employ persons and plan for the operation of the Department, but its powers and duties in regard to the administration of governmental functions are not in effect until July 1, 1961.

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### OFFICIAL OPINION NO. 25

May 24, 1961

Mr. Arthur Campbell, Chairman  
Department of Correction  
804 State Office Building  
Indianapolis 4, Indiana

Dear Mr. Campbell:

This is in answer to your request for my Official Opinion on the following questions:

"1. Do the statutes preclude a duly appointed Chief Adult Probation Officer from supervising juvenile probationers?"

“2. Under the conditions set forth in question 1, is there a maximum salary established for a Chief Adult Probation Officer?”

The answer to your first question involves the application of certain tests pertaining to the legal right of an individual to hold, simultaneously, more than one “lucrative office” under state government. In the instant case these tests would be:

- (1) Is each position a “lucrative office” within the meaning of the Indiana Constitution, Art. 2, Sec. 9?
- (2) Are the offices incompatible with each other?
- (3) Would such holding be against public policy?

The Indiana Constitution, Art. 2, Sec. 9, provides, in part, as follows:

“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: \* \* \*.” (Our emphasis)

To qualify any position under this state as a “lucrative office,” within the above constitutional prohibition, the following are necessary elements: (a) an exercise of some portion of the sovereign power and (b) the provision for some form of compensation for services rendered. The words “lucrative office” do not apply to one who is merely an employee.

See: State *ex rel.* Black v. Burch (1948), 226 Ind. 445, 456, 80 N. E. (2d) 294.

Our statutes make provisions for “probation officers,” “chief adult probation officer” and “chief probation officer,” with the last above named designation being used only in connection with probation officers for juvenile courts. Your questions refer specifically to *chief adult probation officers*, and whether such officers may, in addition to their regular duties, supervise juvenile probationers.

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In a determination of whether a chief adult probation officer is in a position to exercise a portion of sovereignty under the state, we look to the scope of his duties and authority. The Acts of 1927, Ch. 210, Secs. 2, 3 and 5, as found in Burns' (1956 Repl.), Sections 9-2210, 9-2211 and 9-2213, are in point on duties of probation officers, generally. These sections read, in part, as follows:

9-2210     *"The court placing a defendant on probation shall impose such conditions as it may deem best. The court may subsequently revoke or modify any condition of probation or may change the period of probation. \* \* \*"* (Our emphasis)

9-2211     *"At the close of the probation period, or whenever directed to do so, by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereafter discharge the probationer from probation, or may extend the probation period, as shall seem advisable. At any time within the probation period, the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest. Thereupon, the probationer shall forthwith be taken before the court for hearing. \* \* \* If it shall appear that the defendant has violated the terms of his probation or has committed another offense, the court may revoke the probation or the suspension of sentence and may impose any sentence which might originally have been imposed."* (Our emphasis)

9-2213     *"Every probation officer shall investigate all cases referred to him for investigation by any court in which he is serving and shall report thereon to the court. The probation officer shall furnish to each person released on probation under his supervision a written statement of the conditions of probation and shall instruct him regarding the same. Such officer shall keep informed concerning the conduct and condition of each person on probation under his supervision, by visiting, the requiring of reports and in other ways, and shall report thereon at least*

*monthly to the court placing such person on probation. Such officer shall use all suitable methods, not inconsistent with the conditions imposed by the court, to aid and encourage persons on probation and to bring about improvement in their conduct and condition. Such officer shall keep a detailed record of his work; shall keep accurate and complete accounts of all moneys collected from persons under his supervision; shall give receipts therefor, and shall report to the court thereon; and shall perform such other duties as the court may direct. A probation officer shall be required to give a bond if the court shall so direct in such sum as may be fixed by the court. \* \* \* A probation officer shall have, in the execution of his duties, the powers of a constable or county sheriff, in so far as such powers may be necessary to carry out the provisions of this act.” (Our emphasis)*

The powers and duties of probation officers for juvenile courts are set forth in the Acts of 1945, Ch. 347, Sec. 19, as found in Burns' (1956 Repl.), Section 9-3119, which reads as follows:

*“The chief probation officer, under the direction of the judge, shall have charge of the work of the probation department. The probation department shall make such investigations as the court may direct, keep a written record of such investigations and submit the same to the judge or deal with them as he may direct. The department shall furnish to any person placed on probation a written statement of the conditions of probation and shall instruct him regarding them. The department shall keep informed concerning the conduct and conditions of each person under its supervision and shall report thereon to the judge as he may direct. Each probation officer shall use all suitable methods to aid persons on probation and to bring about improvement in their conduct and condition. The department shall keep full records of its work; shall keep accurate and complete accounts of money collected from persons under its supervision, shall give receipts therefor and shall make reports thereon as the judge may*

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*direct.* Probation officers for the purposes of this act [ §§ 9-3101—9-3124 ] shall have the powers conferred upon sheriffs by law. \* \* \* ” (Our emphasis)

The position of probation officer, in the scope of duties and authority, bears certain similarity to those prescribed for the chief investigator for a prosecuting attorney as provided by the Acts of 1935, Ch. 305, Sec. 1, as amended and found in Burns' (1959 Supp.), Section 49-2514. In my 1954 O. A. G., page 51, No. 16, I considered whether such an investigator held an "appointive office." On page 54, of said Opinion, I stated:

“\* \* \* *From the provisions of the above statute, such investigators work under the supervision and direction of the prosecutor and the only thing indicia of an office is the fact they are required to give bond, their salary is fixed, the manner of their appointment is provided for, and they are given 'the same police powers within the county authorized by law to all police officers.'*” (Our emphasis)

My conclusion in 1954 O. A. G., page 51, No. 16, *supra*, was that a chief investigator for a prosecuting attorney did not hold an "appointive office."

The Attorney General in his 1946 O. A. G., pages 275, 276, No. 72, in considering whether a probation officer came within the provisions of the Indiana Constitution, Art. 2, Sec. 9, *supra*, stated as follows:

“In any event, in view of the authorities holding firemen and policemen are employees, *it is difficult to see how it could be held that a probation officer is a public officer and exercising any of the sovereign powers of government.*” (Our emphasis)

An examination of the foregoing statutes, Burns' 9-2210, 9-2211, 9-2213 and 9-3119, *supra*, all indicate that probation officers work under the supervision and direction of their respective courts. Where the above statutes provide for the exercise of sovereignty, that authority is vested in the court and not in the probation officer. For example, it is the court that imposes the conditions of probation; it is the court that

may subsequently revoke or modify any condition of probation or may change the period of probation. The Acts of 1927, Ch. 210, Sec. 6, as found in Burns' (1956 Repl.), Section 9-2214, provides:

“A court may transfer a person on probation under its jurisdiction from the supervision of one probation officer to that of another probation officer. \* \* \*”

Thus it appears that the intent of the Legislature in each of the above acts is to make a probation officer an employee of the appointing court rather than an officer thereof. Therefore, inasmuch as a probation officer is merely an employee, as distinguished from an officer, the simultaneous holding of the positions of chief adult probation officer and probation officer for juvenile probationers would not be in violation of the “lucrative office” provisions of the Indiana Constitution, Art. 2, Sec. 9, *supra*.

In regard to possible incompatibility of the positions and whether such holding would be against public policy, the following statement made in my 1961 O. A. G., No. 4, dated February 9, 1961, is applicable in the instant case:

“Due to varying factual situations attendant upon a consideration of various positions, in any given instance, it is my opinion that the responsibility for a determination as to whether such employment or appointment would be against public policy, whether the duties of the two positions would be incompatible with each other, and whether there is a conflict of interests in such employment, rests with the appointing authority.”

Your question No. 2 is stated as follows:

“2. Under the conditions set forth in question 1, is there a maximum salary established for a Chief Adult Probation Officer?”

It is noted that in the beginning of your question No. 2, you use the words: “Under the conditions set forth in question 1.” I assume that this reference is to what the maximum pay may be for a chief adult probation officer, in the event it is legal

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for such an officer to also receive an additional appointment so that he may simultaneously serve as both an adult and a probation officer for juvenile probationers. I have stated above that such holdings, by probation officers, would not violate the constitutional prohibition against "lucrative office" holding. I have also stated that the additional appointment could be made, subject to a determination by the appointing authority that the positions are not incompatible with each other and not against public policy.

The maximum salary, or per diem, that may be paid any chief adult probation officer, in any one year, is found in the following acts:

(a) Acts of 1951, Ch. 316, Sec. 1, as found in Burns' (1956 Repl.), Section 9-2214d, which reads as follows:

"The maximum salary of any chief adult probation officer, regardless of the court to which he is attached, shall not be more than fifty percent (50%) of the salary of the circuit court judge of the county in which the officer is employed."

(b) Acts of 1951, Ch. 216, Sec. 1a, as added by Acts of 1959, Ch. 265, Sec. 1, and found in Burns' (1959 Supp.), Section 9-2214k, which reads, in part, as follows:

"(1) The salary paid to any adult probation officer may be paid either on an annual or per diem basis.

"(2) \* \* \* Provided, That the total amount of per diem pay received by any adult probation officer in any one (1) year shall not exceed the sum of four thousand dollars (\$4,000)."

In my 1959 O. A. G., pages 194, 196, No. 41, I held that the phrase "any adult probation officer" used in Burns' 9-2214k refers *only* to the chief adult probation officer.

In 1952 O. A. G., page 58, No. 12, the question of pay for probation officers was under consideration. On page 60 thereof it is said:

"\* \* \* it is clear that although Chapter 316 uses a somewhat ambiguous term 'chief adult probation offi-

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cer', that by that term it means a chief probation officer other than one dealing solely with juveniles under the Juvenile Court Act. \* \* \*'" (Our emphasis)

The salary provisions for probation officers dealing with juvenile probationers are set forth in the Acts of 1945, Ch. 347, Sec. 17, as amended and found in Burns' (1956 Repl.), Section 9-3117, and the Acts of 1945, Ch. 347, Sec. 17a, as added by the Acts of 1959, Ch. 275, Sec. 1, and found in Burns' (1959 Supp.), Section 9-3117b. The only reference in the above sections to a "chief adult probation officer" is found in Burns' 9-3117, *supra*, in the population range of not less than 100,000 nor more than 250,000 inhabitants, which reads, in part, as follows:

"\* \* \* The salary of the chief probation officer, chief adult probation officer, and other probation officers shall hereafter be fixed by the judge of the court to which such officers are attached, within limits prescribed by the county council. \* \* \*"

In view of the above it is my opinion that the fact that a chief adult probation officer has also been appointed to supervise juvenile probationers can be taken into consideration in determining the amount of salary he is to receive for *all* his work as a probation officer provided that this total does not exceed the maximum provided for a chief adult probation officer under Burns' 9-2214d and 9-2214k, *supra*.

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OFFICIAL OPINION NO. 26

June 15, 1961

Honorable William E. Babincsak  
State Representative  
1856 South River Drive  
Munster, Indiana

Dear Representative Babincsak:

You have requested my Official Opinion in regard to the following questions: