

OPINION 4

OFFICIAL OPINION NO. 4

February 9, 1961

Mr. Arthur Campbell, Chairman
Board of Correction
210 State House
Indianapolis, Indiana

Dear Mr. Campbell:

This is in answer to your recent request for an Official Opinion. Your question is:

“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?”

Your question is particularly directed toward the possible violation of the Indiana Constitution, Art. 2, Sec. 9, which provides 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)

Let us consider your question on the basis of a possible “lucrative office” status. You will note the following statement contained in my 1960 O. A. G., pages 42, 43, No. 9:

“There is a distinction in the application of the constitutional prohibition in that the Indiana Constitution, Art. 2, Sec. 9, *supra*, refers to a ‘lucrative office’ and does not therefore apply to one who is merely an employee. To be classed as the holder of a ‘lucrative office * * * under the State,’ one must be in a position to exercise a portion of the sovereignty of the State of Indiana. We must look to the scope of the duties and the authority vested in the position under examination to make a proper determination.”

See also:

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

Shelmadine v. City of Elkhart (1920), 75 Ind. App. 493, 495, 129 N. E. 878.

The law is well settled in Indiana that a city policeman or a city police officer is merely an employee and not an officer within the meaning contained in the Indiana Constitution, Art. 2, Sec. 9, *supra*.

State *ex rel.* Palm v. City of Brazil (1947), 225 Ind. 308, 315, 73 N. E. (2d) 485, 74 N. E. (2d) 917;

City of Huntington v. Fisher (1941), 220 Ind. 83, 85, 40 N. E. (2d) 699;

Kirmse v. City of Gary (1943), 114 Ind. App. 558, 561, 51 N. E. (2d) 883;

1954 O. A. G., pages 51, 54, No. 16.

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 should be noted, however, that in any dual office question such as you have presented the following additional tests as to propriety should be considered, namely:

- (1) Are the duties of the positions in question incompatible with each other?
- (2) Is there a conflict of interests?
- (3) Is this against public policy?

In my 1960 O. A. G., page 42, No. 9 and page 255, No. 45, I discussed, at considerable length, the various tests to be taken into consideration in any question pertaining to the legal right of an individual to hold more than one position under state government.

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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.

OFFICIAL OPINION NO. 5

February 10, 1961

Mr. Clinton Green, Chairman
State Highway Department
11th Floor, State Office Building
Indianapolis 4, Indiana

Dear Mr. Green:

This is in answer to a letter of December 16, 1960, wherein your predecessor requested an Official Opinion. The question is stated as follows:

“The State Highway Department of Indiana requests your opinion as to whether or not the State Highway Department has the legal authority to authorize the placing of pay telephone booths on State Highway Right-of-Way.”

The State Highway Department of Indiana has been vested with broad authority with respect to the establishment, construction, maintenance, repair and control of designated highways within the state system. All the rights, powers and duties, formerly vested in the State Highway Commission of Indiana have been continued in full force, transferred to and placed within the jurisdiction and powers of the State Highway Department of Indiana.

See: Acts of 1933, Ch. 18, Sec. 7, as amended, and found in Burns' (1949 Repl.), Section 36-107;

Acts of 1953, Ch. 225, Sec. 7, as found in Burns' (1959 Supp.), Section 36-173g.