OPINION 9

Hot Asphaltic Concrete base and surface and Bituminous Coated Aggregate base and surface (cold asphaltic), each being listed and specified as a distinct type.

As is seen in the emphasized portion of Burns' 36-170, supra, "bids will be received on one [1] of the types of highways approved by the commission."

It is my opinion, therefore, that since separate Standard Specifications are provided for both hot mixed surface and cold mixed surface, each being considered a distinct type of highway, bids should be received and based on either one or the other type but not on both types for the same project.

OFFICIAL OPINION NO. 9

February 5, 1960

Hon. Albert A. Steinwedel
Auditor of State
238 State House
Indianapolis, Indiana

Dear Mr. Steinwedel:

This is in reply to your letter of January 26, 1960, which reads as follows:

"It has been called to my attention that a member of the General Assembly has been appointed as a Deputy Prosecuting Attorney. I am requesting your official opinion in regard to the following:

"1. Is the office of Deputy Prosecuting Attorney a lucrative office?

"2. If the office is considered a lucrative office, then upon acceptance of that position did he vacate his seat in the General Assembly?"

In any question pertaining to the legal right of an individual to 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?

42
(2) Is such holding in violation of the provision for the distribution and separation of powers provided in the Indiana Constitution, Art. 3, Sec. 1?

(3) Are the offices incompatible with each other?

(4) Would such holding be against public policy?

First: Let us consider your first question on the basis of a possible "lucrative office" status. The Indiana Constitution, Art. 2, Sec. 9, 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: 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 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." (Our emphasis)

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 this 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.

A public office within the meaning of the Indiana Constitution, Art. 2, Sec. 9, supra, was defined in the case of Shedmadine v. City of Elkhart (1920), 75 Ind. App. 493, 495, 129 N. E. 878, as follows:

"A public officer may be defined as a position to which a portion of the sovereignty of the state attaches for the time being, and which is exercised for the benefit of the public. The most important characteris-
tic which may be said to distinguish an office from an employment is, that the duties of the incumbent of an office must involve an exercise of some portion of the sovereign power."

In the case of State ex rel. Black v. Burch (1948), 226 Ind. 445, 456, 80 N. E. (2d) 294, the Court said:

"In performing their respective jobs none of these relators were vested with any of the functions pertaining to sovereignty. "* * * An office is 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 thereof.' Wells v. State (1911), 175 Ind. 380, 94 N. E. 321."

The fact that a member of the Indiana General Assembly is the holder of a lucrative office under the Indiana Constitution, Art. 2, Sec. 9, supra, is well established. See my 1953 O. A. G., page 445, No. 96 and my 1954 O. A. G., page 258, No. 70, and authorities cited therein.

In a determination of the "lucrative office" status of a deputy prosecuting attorney, we look first to the scope of authority and duties of his principal, namely, the prosecuting attorney. In Indiana Law Encyclopedia, Vol. 24, pp. 18, 20, is found the following:

Page 18.

"A prosecuting attorney is a judicial officer charged with the administration of justice. He is not only the State's legal representative, but an officer of the court.

"* * * The office of prosecuting attorney is a constitutional office * * * ."

Page 20.

"The statute, in general terms, prescribes the duties of a prosecuting attorney and the Legislature may in-
crease or diminish at will such duties, since the Constitution does not prescribe them.” (Our emphasis)

In my 1956 O. A. G., page 23, No. 6, at page 24 it is stated that:

“A prosecuting attorney is a constitutional judicial officer, State ex rel. Stanton v. Murray, Judge (Stanton v. State of Indiana) (1952), 231 Ind. 223, 234, 108 N. E. (2d) 251. The prosecuting attorney is elected in each judicial circuit by the voters thereof, Indiana Constitution, Art. 7, Sec. 11, and is commissioned by the Governor, 1 R. S. 1852, Ch. 19, Sec. 1, Burns’ Indiana Statutes (1951 Repl.), Section 49-201. A prosecuting attorney is an officer of the judicial circuit. The State ex rel. Howard v. Johnston (1884), 101 Ind. 223, 229.”

In the case of State ex rel. Spencer v. Criminal Court, Marion County (1938), 214 Ind. 551, 556, 15 N. E. (2d) 1020, it is said:

“* * * The prosecuting attorney is a constitutional judicial officer, elected by the people, and removable only by impeachment. In him is vested discretionary judicial power to investigate and determine who shall be prosecuted and who shall not be prosecuted. * * *”

(Our emphasis)

Under our form of government in Indiana, the prosecuting attorney has the responsibility of enforcement, by prosecution, of the criminal statutes of the state within his judicial circuit. Numerous statutory provisions can be cited relative to the authority, powers, responsibilities, and scope of duties of prosecuting attorneys in Indiana. However, in order to test such provisions for the opportunity and necessity of exercising sovereignty, we need only look to the following:

(a) Burns’ (1951 Repl.), Section 49-2503 reads as follows:

“Whenever any prosecuting attorney shall receive information of the commission of any felony or misdemeanor, he shall cause process to issue from a court
having jurisdiction to issue the same (except the circuit court), to the proper officer, directing him to subpoena the person therein named likely to be acquainted with the commission of such felony or misdemeanor, and shall examine any person so subpoenaed before such court touching such offense; and if the facts thus elicited are sufficient to establish a reasonable presumption of guilt against the party charged, said court shall cause so much of said testimony as amounts to a charge of a felony or misdemeanor to be reduced to writing and subscribed and sworn to by such witness, whereupon such court shall cause process to issue for the apprehension of the accused, as in other cases.” [2 R. S. 1852, Ch. 3, § 3, p. 385.]

(b) Burns’ (1951 Repl.), Section 49-2504 reads as follows:

“Such prosecuting attorneys, within their respective jurisdictions, shall conduct all prosecutions for felonies or misdemeanors and all suits on forfeited recognizances; resist applications for changing names, protect the interests of all persons of unsound mind, and superintend, on behalf of counties or any of the trust funds, all suits in which the same may be interested or involved, and shall perform all other duties required by law.” [2 R. S. 1852, Ch. 3, § 4, p. 385.]

It is clear to me that the office of prosecuting attorney meets the necessary requisites of a lucrative office under the state. In so far as a deputy prosecuting attorney is concerned, the following statement is found in the Indiana Law Encyclopedia, Vol. 24, p. 24:

“Prosecuting attorneys may appoint such deputies as may be necessary for the proper discharge of the duties imposed by law. A deputy prosecuting attorney may perform all the official duties of his principal, including the signing of an indictment, but he can have no greater power and authority than the prosecuting attorney.” (Our emphasis)

The authority for the appointment of deputy prosecuting attorneys is 1 R. S. 1852, Ch. 28, Sec. 1, p. 256, as amended
and found in Burns’ (1959 Supp.), Section 49-501, which reads, in part, as follows:

“The * * * prosecuting attorney * * * may appoint deputies, when necessary or when required, if provision shall have been made for paying such deputies for their services from the funds of the state or of the county or from fees received for their services. * * *”

Deputy prosecuting attorneys are also included within the application of 1 R. S. 1852, Ch. 28, Sec. 2, p. 256 as found in Burns’ (1951 Repl.), Section 49-502, which reads as follows:

“Such deputies shall take the oath required of their principals, and may perform all the official duties of such principals, being subject to the same regulations and penalties.”

See also the Acts of 1959, Ch. 277, Secs. 1 and 2, as found in Burns’ (1959 Supp.), Sections 49-2601 and 49-2602, which provide, in part, for the appointment and compensation of prosecuting attorneys and deputy prosecuting attorneys.

It is interesting to note the following statement by the Indiana Supreme Court in the case of Hil v. State (1937), 212 Ind. 692, 697, 11 N. E. (2d) 141, where the authority of a deputy prosecuting attorney was under consideration:

“* * * He is a public officer and appointed to discharge the duties of the particular office. His acts are the acts of his principal. Wells v. State (1911), 175 Ind. 380, 94 N. E. 321.” (Our emphasis)

In McNulty v. State (1905), 37 Ind. App. 612, 615, the following statement is made:

“Assuming that the office of deputy prosecuting attorney is a lucrative office, by the acceptance of which the appointment of Carey as a notary was vacated * * *.” (Our emphasis)

Therefore, in answer to your first question, it is my opinion that the office of a deputy prosecuting attorney is a lucrative office under the state, within the meaning of the Indiana Con-
stitution, Art. 2, Sec. 9, supra, and as heretofore stated it is also true that a member of the Indiana General Assembly is the holder of a lucrative office under the state.

Your second question is as follows:

"2. If the office is considered a lucrative office, then upon acceptance of that position did he vacate his seat in the General Assembly?"

The Supreme Court of Indiana, in the case of Bishop v. The State ex rel. Griner, Prosecuting Attorney (1898), 149 Ind. 223, 232, 48 N. E. 1038, 39 L. R. A. 278, 63 Am. St. 279, considered the Indiana Constitution, Art. 2, Sec. 9, supra, wherein the matter of two lucrative offices was involved. The Court made the following statement:

"* * * It could not be presumed that appellant intended to violate the constitution by accepting and holding the office of postmaster if it was beyond the exception in question, when he was the occupant of that of township trustee, and the result to be implied from his act in doing so, under such circumstances, would be that he intended completely to surrender and vacate the latter office, and the law would attribute such a surrender as the necessary consequences of the act. 19 Am. and Eng. Ency. of Law, p. 562b; Mechem on Public Officers, section 429; Dickson v. People, 17 Ill. 191; State v. Buttz, 9 S. C. 156; In re Corliss, 11 R. I. 638, 23 Am. Rep. 538; State v. DeGress, 53 Tex. 387; Davenport v. Mayor, 67 N. Y. 456; Hoglan v. Carpenter, 4 Bush. (Ky.) 89." (Our emphasis)

In 1947 O. A. G., page 142, No. 30, at page 149, the following statement is found:

"* * * It is generally held that the acceptance, by a person holding a lucrative office, of a second lucrative office within the meaning of the constitutional provision, automatically operates as a vacation of the office first held.

"Kerr v. Jones (1862), 19 Ind. 351;

Foltz v. Kerlin (1885), 105 Ind. 222, at page 225;
Chambers v. State ex rel. (1890), 127 Ind. 365;
Bishop v. State ex rel. (1897), 149 Ind. 223;
1934 O. A. G. 334;
1938 O. A. G. 270 * * *.”

See also my 1957 O. A. G., page 54, No. 12.

Therefore, my answer to your second question is that if a member of the Indiana General Assembly accepts another lucrative office such as that of deputy prosecuting attorney, he automatically vacates his first lucrative office, namely, membership in the Indiana General Assembly.

Second: Notwithstanding the fact that both your questions have been fully answered above, in view of their importance and the concern of the public generally in government above reproach, I will discuss briefly dual office holding under the other tests initially outlined in the beginning of this Opinion.

Under this point is considered whether the dual holding is in violation of the constitutional provision on the distribution and separation of powers of government. The Indiana Constitution, Art. 3, Sec. 1, provides as follows:

“The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.”

A leading case in Indiana on a consideration of the separation of powers, is that of State ex rel. Black v. Burch, supra, wherein the Court said, in part:

“In order to properly determine the meaning of the said § 1 of Art. 3, we should consider the purpose which induced its adoption. 11 Am. Jur. Constitutional Law, § 62; 50 Am. Jur., Statutes, §§ 303, 305. It has to do solely with the separation of powers. Separation of powers has been one of the paramount purposes to be accomplished by our various State Constitutions and
our Federal Constitution. All of our State Constitutions, so far as we can discover, as well as the Constitution of the United States, contain provisions to guarantee the separation of powers similar to those contained in said Art. 3 of our Constitution.

* * *

"In the case of O'Donoghue v. United States (1933), 289 U. S. 516, 77 L. Ed. 1356, 53 S. Ct. 740, at page 1360 of the Law Edition, Mr. Justice Sutherland, speaking for the Court in words which cannot be surpassed, had this to say as to the distribution and separation of powers as provided by the Federal Constitution:

"'The Constitution in distributing the powers of government, creates three distinct and separate departments—the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, * * * namely, to preclude a commingling of these essentially different powers of government in the same hands. * * *

"'If it be important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should be kept completely independent of the others—indepedent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to the coercive influence of either of the other departments. James Wilson, one of the framers of the Constitution and a justice of this court, in one of his law lectures said that the independence of each department required that its proceedings "should be free from the remotest influence, direct or indirect, of either of the other two powers."

367. And the importance of such independence was similarly recognized by Mr. Justice Story when he said that in reference to each other, neither of the departments "ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers." (Our italics)

See also the case of Book v. State Office Bldg. Comm. (1958), 238 Ind. 120, 149 N. E. (2d) 273, 293, which contains an excellent consideration of separation of powers in connection with an interpretation of the Indiana Constitution, Art. 3, Sec. 1, supra.

An inspection of our statutory law will show that there are a great number of statutes particularly applicable to prosecuting attorneys covering an extensive range of subjects including appointments, duties, salaries and expenses. These statutes also concern a deputy prosecuting attorney when he acts for his principal, and there are, in addition, a number of statutes pertaining directly to deputy prosecuting attorneys.

I will cite only one example, of numerous ones available, showing the possible opportunity for coercive influence and proving the wisdom of adhering strictly to the separation of powers provided in the Constitution. This example is found in the Acts of 1959, Ch. 277, Sec. 19, as found in Burns' (1959 Supp.), Section 49-2619, which provides, in part, as follows:

"The compensation herein provided for the various prosecuting attorneys and their deputies shall be in full for all services required by law. * * * a prosecuting attorney's fee of ten dollars [$10.00] shall be allowed and taxed as costs in all criminal actions whether or not the prosecuting attorney or his deputy enters an appearance * * *. In all judicial circuits the prosecuting attorney, deputy prosecuting attorneys * * * shall be allowed mileage at the rate of eight cents [8¢] per mile for the miles necessarily traveled in the discharge of their duty, said mileage to be allowed by the board of county commissioners on a claim duly filed monthly by the prosecutor, deputy prosecuting attorneys and investigators itemizing the specific mileage traveled. The mileage of the prosecuting attorneys shall
be paid by the county in which the duty arose which necessitated the travel. * * *” (Our emphasis)

If it were right that one county of the state have its prosecutor or its deputy prosecutor as a member of the Indiana General Assembly, there would then be no reason why each of the 92 counties of this state might not also be entitled to such representation. If a controlling faction in the Legislature were composed of prosecutors and deputy prosecutors, it would be conceivable for the Legislature to materially increase salaries payable to prosecutors and their deputies, to authorize the appointment of additional unnecessary deputies and personnel and to enlarge the powers or diminish the duties of the office of prosecuting attorney.

Therefore, in my opinion, since the positions herein considered belong to two different departments, namely, membership in the Indiana General Assembly to the Legislative department and deputy prosecuting attorney to the Judicial department such holding is in violation of the Indiana Constitution, Art. 3, Sec. 1, supra, as construed in State ex rel. Black v. Burch, supra, and Book v. State Office Bldg. Comm., supra.

Third: Let us now examine the dual holding on the issue of whether such offices are incompatible with each other.

In my 1954 O. A. G., page 258, No. 70, the offices concerned were membership in the Indiana General Assembly and membership on the Marion County Plan Commission. In that Opinion, I said, in part:

“(b) It is also a general rule that a public officer is prohibited from holding two incompatible offices at the same time, the rule being founded on principles of public policy. (67 C. J. S. Officers, Section 23, p. 133.) In this regard offices are generally held to be incompatible where a conflict of interests exists, as where one is subordinate to the other and subject in some degree to the supervisory powers of its incumbent. In a case similar to the situation now under consideration, Weza v. Auditor General et al. (1941), 297 Mich. 686, 298 N. W. 368, the Supreme Court of Michigan considered the question as to whether the office of a member of the State Legislature was incompatible with
the office of County School Commissioner. The Court held that:

"* * * Clearly the office of county school commissioner is subordinate to that of a member of the legislature. The former owes its creation and continuation to legislative enactment and is completely subject to legislative control. Further, as a matter of sound public policy these two offices should be held incompatible. * * *

"The test of incompatibility is the character and relation of the offices; as where one is subordinate to the other, and subject in some degree to its revisory power, or where the functions of the two offices are inherently inconsistent and repugnant. In such cases it has uniformly been held that the same person cannot hold both offices." Attorney General v. Detroit Common Council, 112 Mich. 145, 168, 70 N. W. 450, 458, 37 L. R. A. 211."

It was concluded that the offices were incompatible and that a member of the Marion County Plan Commission could not continue to serve and be compensated for such service after being elected a member of the General Assembly. In my opinion, incompatibility exists between the offices of a member of the General Assembly and that of a deputy prosecuting attorney, inasmuch as the office of deputy prosecuting attorney owes its creation, authority and continuation to legislative enactment and is completely subject to legislative control, as an office under the state.

Fourth: Finally, we will look to whether or not such holding is against public policy.

The Supreme Court of Indiana, in the case of Hogston v. Bell (1916), 185 Ind. 536, 545, 112 N. E. 883, said:

"What the public policy of a state is must be determined from a consideration of its constitution, its statutes, the practice of its officers in the course of administration and the decisions of its court of last resort. * * *"
The 1951 O. A. G., page 168, No. 60 refers to a question of dual holding of a member of the Legislature serving as a member of the Indiana State Fair Board. The conclusion stated therein is as follows:

"In a summary of the related court decisions, it is quite apparent that the reasoning of the law would be in violation [violated] for the same person to hold two distinct offices such as these enumerated. It certainly must be a logical conclusion that the spirit of the law was intended by the framers of the Constitution in creating these prohibitions for the benefit of the citizens of the State. There is no question but that such holding could never be considered as a good public policy. Therefore, it is my opinion that it is contrary to the Constitution of the State of Indiana, as interpreted by the Supreme Court, for a member of the legislature to serve as a member of the Indiana State Fair Board." (Our emphasis)

See also my 1953 O. A. G., page 168, No. 60, at page 174. In my opinion the holding in the instant case is also against public policy.

In summary, it is my opinion that:

1. a. The offices of deputy prosecuting attorney and member of the Legislature are both lucrative offices under the state within the meaning of the Indiana Constitution, Art. 2, Sec. 9, supra.

   b. Inasmuch as both positions are lucrative offices under the state, the acceptance of the second office vacates the first.

2. The offices in question are under separate departments of state government and the simultaneous holding thereof by one individual is in violation of the Indiana Constitution, Art. 3, Sec. 1, supra.

3. The office of deputy prosecuting attorney, as an office under the state, is subordinate to and under the supervisory powers of the Legislature thus making the offices incompatible with each other.

4. The dual holding of the offices in question by one individual is against public policy.