

OFFICERS: Duties of prosecuting attorney and those of trustee of a county health center of the same county are repugnant or inconsistent to each other. Said offices are incompatible and one person may not hold both at the same time. Duties of county superintendent of schools and those of trustee of a county health center of same county are not repugnant or inconsistent to each other. Said offices are compatible and one person may hold both at same time.

June 28, 1954



Honorable J. Patrick Wheeler
Prosecuting Attorney
Lewis County
Monticello, Missouri

Dear Sir:

This department is in receipt of your recent request for a legal opinion, which reads in part as follows:

"May any County Officer elected at a general or special election, or appointed officer of the county serve in the capacity as a member of the Board of Trustees of the County Health Council, such council having been formed under the provisions of Chapter 205 R. S. Mo. 1953?"

The inquiry appeared to be very general and broad enough to inquire whether any county officer could, during the term for which he was elected or appointed, also serve as a trustee of a county health center of his county. We asked you to make your inquiry more specific by having it refer only to the county officer in which you are interested.

Your reply was to the effect that you are interested in the offices of prosecuting attorney and county superintendent of schools. Said reply read in part as follows:

"I can understand that the question is too general for an opinion. I would like to have the question answered concerning the Prosecuting Attorney and the County School Supt."

Honorable J. Patrick Wheeler

We construe your inquiries to be: (1) Are the offices of prosecuting attorney and trustees of the county health center compatible, so that one person may hold both at the same time in the same county? (2) Are the offices of county superintendent of schools and trustee of the county health center compatible, so that one person may hold both at the same time in the same county?

Before attempting to answer the inquiries, we must first correctly answer the following preliminary question: Is a trustee of a county health center a public officer, and if so, is he a county officer?

In the case of *State ex rel. Pickett v. Truman*, 333 Mo. 1018, a definition and some of the attributes of a public officer were given. At l.c. 1022, the court said:

"(2) In *Mechem on Public Officers*, page 1 and 2, section 1, it is said: 'A public office is the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer.' We have approved this definition in *State ex rel. v. Bue*, 135 Mo. 325, 331, 332, 36 S. W. 636; *State ex rel. v. Hackmann*, 254 S. W. 53, 55, 300 Mo. 59; and *Hasting v. Jasper County*, 282 S. W. 700, 701, 314 Mo. 144, and it appears to be in harmony with the great weight of authority. (*State ex rel. v. Bond (W. Va.)*, 118 S. E. 276, 278, 279; *State ex rel. v. Board of Commissioners (Ohio)*, 115 N. E. 919, 920; *Bunn et al. v. People ex rel.*, 45 Ill. 397, 409.) The Ohio decision states that it is no longer an open question in that state that to constitute a public office 'it is essential that certain independent public duties a part of the sovereignty of the State, should be appointed to it by law.' Illustrative of what is meant by 'sovereignty of the State,' in the same opinion it is said: 'If specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the State, if the appointee is invested with independent power in the disposition of public property or with power to incur financial obligations upon the part

Honorable J. Patriok Wheeler

of the county or State, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the State."

In the case of *State ex rel. v. Imel*, 242 Mo. 293, and at l.c. 300, the court defined the terms "county officers" as follows:

"The words 'county officers' have two well defined meanings. In their most general sense, they apply to officers whose territorial jurisdiction is coextensive with the county for which they are elected or appointed. In a more precise and restricted sense, those words mean officers 'by whom the county performs its usual political functions, its function of government.' (*Sheboygan County v. Parker*, 70 U. S. 93, l.c. 96.)"

Section 205.050 RSMo 1949 states the purpose for which a county health center is established and reads as follows:

"The public health center is established, maintained and operated for the improvement of health of all inhabitants of said county or counties."

Section 205.031 RSMo Cum. Supp. 1953 gives the qualifications, appointment, and terms of trustees of a county health center. It is noted that under the provisions of this section the county court makes the original appointment of trustees of the newly established health center. After the original appointments, successor trustees are elected by the voters of the county in the manner provided by Section 205.041 RSMo Cum. Supp. 1953, except when vacancies occur, which the county court shall fill in the manner provided by said section. Section 205.031 reads as follows:

"1. The county court shall appoint five trustees chosen from the citizens at large with reference to their fitness for such office, all residents of the county, not more than three of the trustees to be residents of the city, town or village in which

Honorable J. Patrick Wheeler

the county health center is to be located, who shall constitute a board of trustees for said county health center.

"2. The trustees shall hold their offices until the next following general election, when five health center trustees shall be elected who shall hold their offices, three for two years and two for four years. The county court shall by order of record specify the terms of said trustees.

"3. At each subsequent general election the offices of the trustees whose terms of office are about to expire shall be filled by the election of health center trustees who each shall serve for a term of four years.

"4. Any vacancy in the board of trustees occasioned by removal, resignation or otherwise shall be reported to the county court and be filled in like manner as original appointments, the appointee to hold office until the next following general election, when such vacancy shall be filled by election of a trustee to serve during the remainder of the term of his predecessor.

"5. No trustee shall have a personal pecuniary interest, either directly or indirectly, in the purchase of any supplies for the health center, unless the same are purchased by competitive bidding."

Section 205.041 reads in part as follows:

"1. Each candidate for the office of health center trustee shall file with the county clerk an announcement of candidacy in writing not later than thirty days before the general election. The announcement shall indicate whether the individual is a candidate for a full or an unexpired term of a named predecessor. No filing fee shall be required to be paid upon the filing of any announcement. If announcements of a sufficient number of trustees are not filed, the county court shall appoint such trustee or trustees as may be necessary

Honorable J. Patrick Wheeler

to fill all vacancies on the board which result from the expiration of the term of any trustees and any such appointee shall serve until the next general election when a trustee shall be elected to fill the remainder of the unexpired term.

"2. The county court shall prepare a separate ballot containing the names of all candidates who have announced for trustee which shall not contain any designation of the political party affiliation of any candidate for trustee. The ballots shall designate the number of trustees to be elected and shall state whether any of the trustees is to be elected for an unexpired term, and shall be in form substantially as follows: * * *"

The Legislature enacted applicable statutes creating the position or office (if it is an office) known as trustee of the county health center and also provided that the health center program for the people of the county is to be carried on, or to have headquarters at a fixed location in the county known as the health center. The affairs of the health center are to be administered by trustees, and from the statutes quoted above, it is readily seen that the duties of such trustees are of a public, rather than of a private nature, and are county-wide in scope. The trustees are agents of the county and have been invested with the duty of exercising a portion of the police power of the state in regard to public health. It has long been the rule in Missouri that the State may, in the exercise of its police power, make regulations affecting public health for the protection and benefit of its citizens. This principle was held to be the law in the case of Bader Realty & Inv. Co. v. St. Louis Housing Authority, 358 Mo. 747. At l.c. 754 the court said:

" * * * As we read the 'Housing Authorities Law' (Mo. R.S.A. Sec. 7853 to 7875, inclusive), its underlying purpose is slum clearance, public safety, public health, and the prevention of crime and juvenile delinquency. Those matters present a proper field for the exercise of the state's police power. * * *"

Honorable J. Patrick Wheeler

None of the sections of Chapter 205 RSMo 1949 entitled "County Health and Welfare Programs" or those of Chapter 205 RSMo Cum. Supp. 1953, bearing the same title, specifically provide that health center trustees are public officers. However, it is believed that from the references made in these sections to such trustees that it was the intention of the Legislators that the trustees should be public officers. Paragraph 1, Section 205.042 supra, requires the newly elected or appointed trustee to qualify within ten days by taking the oath required of all civil officers. Said oath is prescribed by Article VII, Section 11, Constitution of Missouri 1945, and reads as follows:

"Before taking office, all civil and military officers in this state shall take and subscribe an oath or affirmation to support the Constitution of the United States and of this state, and to demean themselves faithfully in office."

When paragraph 1, Section 205.042 supra, is read and construed with other sections of the same Chapter, we feel that they clearly show the legislative intent to be that the trustees should be public officers, chosen by the people, the same as other county officers. Consequently, we must conclude that county health center trustees are public officers within the meaning of the definitions of public officers given above. Since they have only been given authority to perform their duties within the territorial limits of their respective counties, they are "county officers" within the meaning of the definition of these terms given in the case of *State ex rel. v. Imel supra*.

Our answer to the preliminary question is that a trustee of a county health center is a public officer.

In order to determine whether the offices of prosecuting attorney and county health center trustee are compatible or incompatible, the statutory duties of the former office must be considered and compared with those of the latter office. However, before doing so, we call attention to the fact that there are no statutory prohibitions in Missouri against one person holding both of these offices at the same time. Unless the duties of one are inconsistent with those of the other, it appears that one person may legally hold both offices at the same time, since there was no such prohibition under the common law.

The common law doctrine of compatibility and incompatibility of different offices was discussed and compared in the leading case of *State ex rel. v. Bus*, 135 Mo. 325. The court had under

Honorable J. Patrick Wheeler

consideration the offices of deputy sheriff of the City of St. Louis and school director, and ruled these two offices to be incompatible and that they could not be held by the same person at the same time. We quote from l.c. 338:

"V. The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him.

"It was said by Judge Folger in People ex rel. v. Green, 58 N.Y. loc. cit. 304: 'Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other.' Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law.' * * *"

We have previously quoted those statutes setting out the duties of the trustees of a county health center and now we call attention

Honorable J. Patrick Wheeler

to those referring to the duties of the prosecuting attorney. We shall not attempt to give every section of the statutes relating to every duty of the prosecutor, but shall call attention only to those which give the general duties of said officer. Sections 56.060 and 56.070 RSMo 1949 prescribe the general duties of prosecuting attorneys in each county of the state. Section 56.060 reads as follows:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; and in all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses. When any criminal case shall be taken to the courts of appeals by appeal or writ of error, it shall be their duty to represent the state in such case in said courts, and make out and cause to be printed, at the expense of the county, and in cities of over three hundred thousand inhabitants, by the city, all necessary abstracts of records and briefs, and if necessary appear in said court in person, or shall employ some attorney at their own expense to represent the state in such courts, and for their services shall receive such compensation as may be proper, not to exceed twenty-five dollars for each case, and necessary traveling expenses, to be audited and paid by the county court of such county, and in such cities by the proper authorities of the city."

Section 56.070 reads as follows:

"He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in

Honorable J. Patrick Wheeler

which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before the magistrate courts, when the state is made a party thereto; provided, county courts of any county in this state owning swamp or overflowed lands may employ special counsel or attorneys to represent said county or counties in prosecuting or defending any suit or suits by or against said county or counties for the recovery or preservation of any or all of said swamp or overflowed lands, and quieting the title of the said county or counties thereto, and to pay such special counsel or attorneys reasonable compensation for their services, to be paid out of any funds arising from the sale of said swamp or overflowed lands, or out of the general revenue fund of said county or counties."

Section 56.070 supra, requires the prosecuting attorney to represent the county in all civil suits or other matters of law, in which the county is interested; to investigate all claims against the county, draw all contracts relating to the business of the county, and give his written opinion without fee upon any matters of law in which the county is interested to the county court when requested so to do by said court, or one of the judges of same.

The health center is an institution of the county, the expense of which are paid from a special fund raised by a county health center tax, and certainly the county is financially interested in the health center and all its activities. Therefore, in view of the provisions of Section 56.070 supra, and particularly those referred to in the preceding paragraph, it is the duty of the prosecuting attorney to represent his county in all matters in which the health center is involved.

An example of some of the statutory duties of the prosecuting attorney and which he might be called upon to perform in regard to the health center are referred to in paragraph 9, Section 205.042 RSMo Cum. Supp. 1953.

Said section authorizes the trustees of a county health center to enter into contracts and agreements with federal, state, county,

Honorable J. Patrick Wheeler

school and municipal governments, with private firms or individuals for the furtherance of the health activities, except as limited by another section of the same chapter.

Undoubtedly, such contracts would be a matter of county interest, and in all such matters it would be the prosecuting attorney's duties to draw, or at least to supervise the drawing of same, and to pass upon the legality of all such contracts, regardless of whether they were written by him, and before submission to the board of trustees for signing.

Section 205.060 RSMo Cum. Supp. 1953 places a limitation upon the use of the health center's facilities and it is the prosecutor's duty to see that the law is strictly enforced, so that such facilities shall not be used contrary to the provisions of the statute and only those persons are admitted to the institution for medical treatment who are entitled to be admitted under the provisions of said section. Section 205.070 RSMo Cum. Supp. 1953 provides that the health center may accept gifts of real or personal property from any of the donors mentioned. The title to all said gifts shall vest in the county for the benefit of the health center. The donation of such gifts to the county would be transactions in which the county is very much interested, and in such instances, it is the prosecuting attorney's duty to see that such transactions are properly handled so that the title to said gifts will vest in his county.

Section 205.090 RSMo Cum. Supplement 1953 requires the county health center trustees to file a yearly report of their proceedings with the county court and also a sworn statement of their receipts and expenditures during the preceding calendar year. In the event the trustees misappropriated any of the health center funds, it would be the duty of the prosecuting attorney to institute criminal proceedings against the guilty parties, as well as civil proceedings against them for the recovery of the health center funds.

From the instances given above involving the duties of the prosecuting attorney and his relationship to the county health center, it is obvious that the duties of the prosecuting attorney are repugnant, or inconsistent to those of the office of trustee of the county health center. Therefore, said offices are incompatible and one person cannot legally hold both at the same time in the same county, and our answer to the first inquiry of the opinion request is in the negative.

The second inquiry of the opinion request is whether or not the office of county superintendent of schools and trustees of

Honorable J. Patrick Wheeler

the county health center are compatible so that one person may hold both at the same time in the same county.

It will be noted that this inquiry is the same as the first one except that the office referred to is different.

We have previously stated that in our opinion a trustee of a county health center is a public (county) officer, and since the office of county superintendent of schools has been made a county office by statute, the remainder of our discussion will be in regard to the compatibility or incompatibility of the two offices in question.

The general duties of a trustee of a county health center have been noted from the statutes quoted above and it now remains for us to notice the duties of the county superintendent of schools and to compare them with those of the former office in order to reach a conclusion as to the compatibility or incompatibility of the two. Section 167.040 RSMo 1949 gives the general duties of the county superintendent of schools and reads as follows:

"The county superintendent shall have general supervision over all the schools of his county, except in city, town and village school districts employing a superintendent who devotes at least one-half of his time to the direct work of supervision. He shall visit each school under his jurisdiction at least once each year, and as many other times as practicable; he shall examine the classification of pupils, the methods of instruction, the manner of discipline, the order maintained, the results secured, and make such suggestions to teachers and school boards as he may deem advisable; he shall inspect the ventilation, note the condition of the building, furniture, apparatus, grounds and appurtenances thereto belonging, and report the same to the board in writing, with such suggestions as he may consider necessary to the health, comfort and progress of the pupils; he shall examine the teacher's register and the district clerk's record and see that they are kept according to law; he shall furnish, annually, statements to the district clerks showing the assessed valuation of their respective districts; he shall receive, and, if properly made, approve estimates and enumeration lists and turn same over to the county clerk; he shall assist the district clerks, when necessary, in making

Honorable J. Patrick Wheeler

their reports, and see that all warrants have been duly issued 'by order of the board,' either for services actually rendered or for material actually furnished."

Upon a comparison of the general duties of a health center trustee with those of county superintendent of schools given in the last quoted section, it is apparent that each office and its respective duties is in no way related to the other, and that each officer performs separate and distinct functions in an entirely different field of endeavor, and that either office is not subordinate to or in any way dependent upon the other.

What has previously been stated with reference to the common law rule, in effect in Missouri, which does not prohibit one person from holding more than one office at the same time, applies fully to the two offices of county superintendent of schools and county health center trustee. Since the offices or the duties of each are not inconsistent, and in the absence of any statutory provision against one person holding both, it is our thought that said offices are compatible, and that one person may hold both in the same county at the same time. Therefore, our answer to the second inquiry is in the affirmative.

CONCLUSION

It is the opinion of this department that the duties of the office of prosecuting attorney are repugnant or inconsistent to those of trustee of a county health center of the same county. Said offices are incompatible and one person may not hold both at the same time.

It is further the opinion of this department that the duties of the office of county superintendent of schools are not repugnant or inconsistent to those of trustee of a county health center of the same county. Said offices are compatible and may be held by one person at the same time.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul W. Chitwood.

Very truly yours,

JOHN M. DALTON
Attorney General