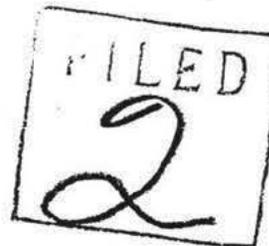


INCOMPATIBILITY OF OFFICES: -Mayor or city clerk of 4th class
COUNTY HOSPITAL TRUSTEE: city or member of board of public
CITY OFFICERS: works of special charter city
CITIES, TOWNS AND VILLAGES: may be member of Board of Trustees
PUBLIC OFFICERS: of county hospital when hospital
MAYORS: is not located in any of such
CITY CLERKS: cities.

March 2, 1961



Honorable A. J. Anderson
Prosecuting Attorney
Cass County
Harrisonville, Missouri

Dear Mr. Anderson:

This is in response to your letter dated January 24, 1961, requesting an official opinion of this office. Your letter reads as follows:

"Pursuant to your telephone conversation with the County Clerk, we are making this request for an Attorney General's Opinion.

Last fall Cass County, a third class county voted a \$400,000.00 bond issue for the construction of a county hospital. After the first of the year the county court appointed the five hospital trustees. Three of these trustees are office holders in three of the cities in Cass County, one is the mayor of Drexel, Missouri, a fourth class city; another the City Clerk of Belton, a fourth class city; and the third is a member of the Board of Public Works of Pleasant Hill, Missouri, which is a special charter city.

We could not see how the county office (if it is classed as an office) of hospital trustee would be incompatible with any one of three offices. The only statute that we know of relative to this is Section 73.500, V.A.M.S., 1949. This statute is in the chapter pertaining to first class cities so it is questionable as to whether or not it would apply to any

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other class of city, particularly when considered with Article 6, Section 15, of the Missouri Constitution.

"We would certainly appreciate it if you would expedite this and give us an opinion at your first convenience since it is imperative that we ascertain this at once, for you can readily see the confusion that may result if these gentlemen resign their respective city positions."

You further advised this office that the site of the new hospital has been established within the city limits of a city different from the cities in which these officers hold their offices.

Your precise inquiry is whether the office of trustee of Cass County Hospital is incompatible with the office of the mayor of a fourth class city, the city clerk of a fourth class city or a member of the Board of Public Works of a special charter city? You inferentially raise the collateral issue of whether the office of county hospital trustee is truly a "public office"? This preliminary issue is sufficiently answered in a prior opinion written by this office on June 28, 1954, and addressed to Mr. J. Patrick Wheeler, Prosecuting Attorney of Lewis County. This earlier opinion held that a trustee of a county health center is a public officer. In view of the fact that those statutes which set forth the powers and duties of trustees for county health centers are substantially identical to those relating to trustees of county hospitals, the conclusion reached in the prior opinion applies with equal force to your preliminary question.

There appears to be no constitutional or statutory prohibition forbidding a mayor, city clerk or member of the Board of Public Works from holding the office of trustee of the county hospital. However, Missouri courts recognize the common law doctrine prohibiting a public officer from holding two incompatible offices at the same time. State ex rel Walker v. Bus 135 Mo. 325, 36 S. W. 636, 33 L.R.A. 616; State ex rel Gragg v. Barrett, 352 Mo. 1076, 180 SW2d 730 and State ex rel McGaughey v. Grayston, 349 Mo. 700, 163 SW 2d 335. The doctrine is well imbedded in the common law and is of great antiquity, however a perusal of the cases gives little help in deciding what constitutes incompatibility in any specific factual situation. Each case turns on its particular circumstances.

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The classical definition of the doctrine is found in Bacon's Abridgment, Vol. 7, tit. Offices and Officers, K., page 313.

"Offices are said to be incompatible and inconsistent so as to be executed by the same person, when from the multiplicity of business in them they cannot be executed with care and ability; or when, their being subordinate and interfering with each other, it induces a presumption they cannot be executed with impartiality and honesty."

This same general doctrine appears today in a modern treatise on the subject. In 42 Am Jur. Public Officers, Section 70 page 836 it states:

" * * * Incompatibility of offices exists where there is a conflict in the duties of the offices, so that the performance of the duties of the one interferes with the performance of the duties of the other. This is something more than a physical impossibility to discharge the duties of both offices at the same time. They are generally considered incompatible where such duties and functions are inherently inconsistent and repugnant so that, because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both. It is not an essential element of incompatibility of offices at common law that the clash of duty should exist in all or in the greater part of the official functions. If one office is superior to the other in some of its principal or important duties, so that the exercise of such duties may conflict, to the public detriment, with the exercise of other important duties in the subordinate office, then the offices are incompatible. * * *"

The leading pronouncement in Missouri on this subject is State ex rel Walker v. Bus, supra. The Supreme Court in that case held that the offices of deputy sheriff and school director

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were not incompatible. In so holding the court said at 36 S.W. 1.c. 639:

* * *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 others, is required to deal with, control, or assist him. It was said by Judge Folger (People v. Green, 58 N. Y. 295): '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 towards the incumbent of the other.* * *'

The difficulty or inability to draw a line which can reasonably separate those offices which are compatible from those which are not is well recognized by the courts. The consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. In the Grayston case, supra, the court held, on pages 339 and 340 of the reporter:

'* * *The respective functions and duties of the particular offices and their exercise with a view to the public interest furnish the basis of determination in each case. Cases have turned on the question whether such duties are inconsistent, antagonistic, repugnant or conflicting as where, for example, one office is subordinate or accountable to the other.* * *'

The question then remains whether the duties of the trustee of the county hospital board are inconsistent, antagonistic, repugnant or conflicting with those duties of a mayor or city clerk of a fourth class city, or with those duties of a member of the Board of Public Works of a special charter city.

Those statutes setting forth the duties of the trustees of a county hospital are as follows:

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Section 205.190:

1. The trustees shall, within ten days after their appointment or election, qualify by taking the oath of civil officers and organize as a board of hospital trustees by the election of one of their number as chairman, one as secretary, and by the election of such other officers as they may deem necessary, but no bond shall be required of them.

2. The county treasurer of the county in which such hospital is located shall be treasurer of the board of trustees, and in counties which have no treasurer the county collector shall be the treasurer of the board of trustees. The treasurer shall receive and pay out all the moneys under the control of the said board, as ordered by it, but shall receive no compensation from such board."

3. No trustee shall receive any compensation for his services performed, but he may receive reimbursement for any cash expenditures actually made for personal expenses incurred as such trustee, and an itemized statement of all such expenses and money paid out shall be made under oath by each of such trustees and filed with the secretary and allowed only by the affirmative vote of all of the trustees present at a meeting of the board.

4. The board of hospital trustees shall make and adopt such bylaws, rules and regulations for their own guidance and for the government of the hospital as may be deemed expedient for the economic and equitable conduct thereof, not inconsistent with sections 205.160 to 205.340 and the ordinances of the city or town wherein such public hospital is located. They shall have the exclusive control of the expenditures of all moneys collected to the credit of the hospital fund, and of the purchase of site or sites, the purchase or construction of any hospital buildings, and of the supervision, care and custody of the grounds, rooms or buildings purchased, constructed, leased or set apart for that purpose; provided, that all moneys received for such hospital shall be deposited in the treasury of the county to the credit of the hospital fund, and paid out only upon warrants ordered drawn by the county court of said county upon the properly authenticated vouchers of the hospital board.

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5. Said board of hospital trustees shall have power to appoint a suitable superintendent or matron, or both, and necessary assistants and fix their compensation, and shall also have power to remove such appointees; and shall in general carry out the spirit and intent of sections 205.160 to 205.340 in establishing and maintaining a county public hospital.

6. Such board of hospital trustees shall hold meetings at least once each month, shall keep a complete record of all its proceedings; and three members of said board shall constitute a quorum for the transaction of business.

7. One of said trustees shall visit and examine said hospital at least twice each month and the board shall, during the first week in January of each year, file with the county court of said county a report of their proceedings with reference to such hospital and a statement of all receipts and expenditures during the year; and shall at such time certify the amount necessary to maintain and improve said hospital for the ensuing year.

Section 205.280 RSMo 1949 [permits the board to make certain rules and regulations.]

Section 205.330 RSMo, 1949, [gives the board the power to determine which patients shall be charity patients and to fix the price of compensation for patients able to assist themselves.]

The duties of the mayor of a fourth class city are enumerated in Section 79.110, RSMo 1949. This statute is as follows:

The mayor and board of alderman of each city governed by this chapter shall have the care, management and control of the city and its finances, and shall have power to enact and ordain any and all ordinances not repugnant to the constitution and laws of this state, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect, and to alter, modify or repeal the same.

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The mayor also has the power of veto over proposed ordinances, Section 79.140; to administer oaths, Section 79.180; to sign commissions and appointments of city officers, approve official bonds and to sign orders, drafts and warrants, Section 79.190; enforce all laws and ordinances for the government of the city, Section 79.200; communicate to the board of aldermen measures to promote public health and welfare, Section 79.210; and to remit fines and forfeitures and grant reprieves and pardons for offenses arising under city ordinances, Section 79.220; all such sections being within RSMo, 1949.

The duties of the city clerk of a fourth class city are briefly outlined in Section 79.320 RSMo, 1949, as follows:

The Board of aldermen shall elect a clerk for such board, to be known as 'the city clerk', whose duties and term of office shall be fixed by ordinance. Among other things, the city clerk shall keep a journal of the proceedings of the board of aldermen. He shall safely and properly keep all the records and papers belonging to the city which may be entrusted to his care; he shall be the general accountant of the city; he is hereby empowered to administer official oaths and oaths to persons certifying to demands or claims against the city.

The member of the Board of Public Works is governed by those powers and duties prescribed for such a board within the following applicable statutes:

Section 91.480 RSMo, 1949.

Whenever any such city mentioned in section 91.450 shall have by ordinance established a board of public works, as herein provided, such board so established in such city, town or village shall, during the existence of said board, have the power, and it shall be its duty, to take charge of and exercise control over any waterworks, gas works, electric light and power plant, steam heating plant or any other device or plant for furnishing light, power or heat, telephone plant or exchange, street railway or any other public transportation, conduit system or any other public utility whatever which may be owned by such city, town or village at the time such board is so established, or which may be thereafter established or acquired

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by such city, town or village, by purchase or otherwise, and all appurtenances thereto belonging, and shall enforce the performance of all contracts and work, and have charge and custody of all books, property and assets belonging or appertaining to such plant or plants.

Section 91.490 RSMo 1949:

"Said board shall also exercise such other powers and perform such other duties in the superintendence of public works, improvements and repairs constructed by authority of the common council or owned by the city as may be prescribed by ordinance. Said board shall make all necessary regulations for the government of the department not inconsistent with the general laws of this state, the charter of such city or the ordinances thereof."

Section 91.530:

"The doing of all work and the furnishing of all supplies for the waterworks, electric power and light plant, or any other plant or work which may be under its supervision or control, shall be let out by the board of public works in the same manner as other public works are let out, except in cases where it is not practicable to do such work or furnish material by contract; and all contracts shall be submitted to the common council for approval. Said board may have charge of the purchase of all supplies needed by the city in its several departments, under such restrictions and regulations as may be provided by ordinance."

Section 91.540:

"The assessment and collection of rates for water, electric power, electric light, gas, or for the product or service of any other plant or works which any such city, town or village may own or operate, shall be under the control and supervision of the board of public works, when such board has been established as herein provided, subject to the ordinances of such city, town or village."

A studied comparison of those statutory powers and duties listed above reveals that no conflict arises when a mayor or city clerk of a fourth class city, or a member of the Board of Public Works of a special charter city, holds concurrently the office of trustee of the county hospital. Serving in one capacity is not

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antagonistic or inconsistent with holding the other office. The duties of one office are not repugnant or incompatible to the duties of the other.

CONCLUSION

It is the opinion of this office that no incompatibility arises when a mayor or city clerk of a fourth class city, or a member of the Board of Public Works of a special charter city, simultaneously holds the position as trustee for the county hospital, when said hospital is located within a city other than those cities in which the above city officers hold office. The duties of the city offices are not repugnant or inconsistent with the duties of the trustee.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Eugene G. Bushmann.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

EGB:cr

Eac.