OFFICERS: Duties of prosecuting attorney and member of county library board of fourth class county are so repugnant or inconsistent as to render offices incompatible. One person cannot legally hold both offices at same time in same county.

FILED 15

March 21, 1955

Honorable Robert L. Carr
Prosecuting Attorney
Washington County
Potosi, Missouri

Dear Sir:

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

> "Washington County, Missouri, a county of the fourth class maintains a county library district established under the provisions of Section 182.010, Revised Statutes of Missouri, 1949.
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> "I am the Prosecuting Attorney of Washington County, having been elected in the general election of 1954.
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> "A vacancy in the county library board has occurred, by reason of the death of a former member. I have been asked if I will accept appointment to the county Library board, under the provisions of Section 182.050, Revised Statutes of Missouri, 1949, and I will greatly appreciate the opinion of your office as to the legality of my accepting such appointment."

We construe the inquiry to be whether or not there is such incompatibility between the duties of the prosecuting attorney of a fourth class county and those of a county library board member of the same county to legally prohibit one person from serving in both capacities at the same time.

Before attempting to answer the inquiry we must first determine whether the prosecuting attorney and library board member are public officers within the commonly accepted meaning

of the terms "public office" and "public officer," as there can be no incompatibility such as to prohibit one person from holding the two positions at the same time unless they are public offices. We therefore find it necessary to refer to the statutes and any applicable court decisions in determining this preliminary question.

Chapter 56, RSMo 1949, is entitled "Circuit and Prosecuting Attorneys and County Counselors." Section 56.010 of said chapter provides for the election of a prosecuting attorney in each county of the state in the year 1880, and every two years thereafter. Said section gives the qualifications, and states that the person elected shall hold his office for two years and until his successor is elected, commissioned and qualified.

Various sections of Chapter 56 prescribe the official duties of the prosecuting attorney, but we shall only call attention to those relating to the inquiry of the opinion request.

Section 56.060 gives the general duties of the prosecuting attorney, and 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 record 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 as other claims are audited and paid by the county court of such county, and in such cities by the proper authorities of the city."

Section 56.070 requires the prosecuting attorney to represent the county and state respectively in all civil and criminal matters in which the interests of either are involved. Said section 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 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."

From the provisions of the above-quoted sections we believe there is no doubt that it was the legislative intention to create a public office to be known as prosecuting attorney for each county in the state, and we find it unnecessary to cite further authorities to the effect that legally the prosecuting attorney is a public officer.

The legislative intent does not appear so clearly from the statutes dealing with county library districts that the lawmakers intended to create a governing body of the district known as a county library board, and that the position held by each member of the board was to be a public office, as in the case of statutes relating to prosecuting attorneys. However, it is our contention that it was the legislative intent to create a public office known as county library board member. We believe that our contention is based upon sufficient legal authority, which we shall presently cite.

We call attention to Chapter 182, RSMo 1949, entitled "County and City Libraries."

Section 182.010 of said chapter prescribes the method of procedure in the organization of a county library district:

> "When over one hundred taxpaying citizens of any county, outside of the territory of all cities and towns now or hereafter maintaining, at least in part by taxation, a public library, shall in writing petition the county court, asking that a county library district of the county, outside of the territory of all such aforesaid cities and towns, be established and be known as ' _____ county library district,' and asking that an annual tax be levied for the purpose herein specified, and shall specify in their petition a rate of taxation not to exceed two mills on the dollar; then the county court shall, if it finds said petition was signed by the requisite number of qualified petitioners, enter of record a brief recital of such petition, including a description of such proposed county library district, and of its finding aforesaid, and shall order that the propositions of such petition be submitted to the voters of such proposed district at the next annual election to be held the first Tuesday in April, and that the clerk of the county court shall cause to be published the proposition or propositions of such petition, and said county clerk shall cause said proposition or propositions to be published in the manner, as near as may be, with the publication of 'the nominations to office,' as provided in section 120.580, RSMo 1949. Such order of court and such notice shall specify the name of the county and the rate of taxation mentioned

> in said petition, and such county clerk shall make and file in his office, return of service of such notice, and every voter within said proposed county library district may, in his proper district vote
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> "'For establishing ____county library district'
> or
> 'Against establishing ____county library district.'
> and may vote
> 'For _____mills tax for a free county library.'
> or
> 'Against _____mills tax for a free county library.'
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> provided, that in case the boundary limits of any city or town herein mentioned are not the same with the school district of such city or town, and such school district embraces territory outside the boundary limits of such city or town, then all voters, otherwise qualified and residing in such school district and outside the limits of such city or town, shall be eligible to vote on any proposition or matter of such library district, submitted to the voters at such election, and may cast a vote thereon, at the nearest and most convenient district schoolhouse within said county library district."

Section 182.020 requires the county court of a county in which a library district has been established to levy a tax for the county library fund, and reads as follows:

> "And if from returns of such election, which shall be certified to the county court, the majority of all the votes cast on such propositions at such election shall be
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> 'For establishing ___county library district.'
>
> and for the tax for a free county library, the county court shall enter of record a brief recital of such returns and that there has been established
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> '_____county library district.'
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> and thereafter such

> '_____county library district'
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> shall be considered and held to be established, shall be a body corporate, and known as such, and the tax specified in such notice shall subject to provisions herein below of this section, be levied and collected, from year to year, in like manner with other taxes in the rural school districts of said county. The proceeds of such levy, together with all interest accruing on same, with library fines, collections, bequests and donations in money shall be deposited in the treasury of the county and be known as the 'county library fund,' and be kept separate and apart from other moneys of such county, and disbursed by the county treasurer only upon the proper authenticated vouchers of the county library board herein mentioned, provided, that such taxes shall cease, in case the regular voters of any such district shall so determine by a majority vote at any annual election held therein, after petition, order of court, and notice of such election and of the purpose thereof, first having been made, filed and given, as in the case of establishing such county library district."

Section 182.050 provides for the appointment of county library boards and their removal, and we quote said section as follows:

> "For the purpose of carrying into effect sections 182.010 to 182.130, in case a county library district is established and a free county library authorized, as provided in section 182.010, there shall be created a county library board which shall consist of five members, the county superintendent of schools and four other members to be appointed by the county court; said superintendent to serve as ex officio during his term of office, and the other members to be appointed for terms of four years each, except that the members of the first board shall be appointed for one, two, three and four years, respectively. The county court may remove any member from the board for misconduct or neglect of duty. Vacancies in the board occasioned by removal, resignations or otherwise

> shall be reported to the county court and be filled in like manner as original appointments. No member of the board shall receive compensation as such."

Section 182.060 gives the library board authority to organize, and is as follows:

> "Said board, immediately after the appointment by the county court of the four members of the board, shall meet and organize by the election of one of their number as president and by the election of such other officers as they may deem necessary, shall make and adopt such bylaws, rules and regulations for their own guidance as may be expedient, not inconsistent with law, shall adopt such reasonable rules and regulations as shall render the use of said county library of the greatest benefit to the greatest number, shall, in case such library district establishes its own free county library, appoint a properly qualified librarian and necessary assistants, subject to the provisions of sections 182.010 to 182.130; and shall in general carry out the spirit and intent of sections 182.010 to 182.130 in establishing and maintaining such free county library and branches thereof."

Section 182.070 provides the power of a library district which is to be exercised through its board, and reads:

> "Said '_____county library district' as such body corporate, by and through said county library board, shall have power to sue and be sued, to complain and defend, and to make and use a common seal, to purchase or lease grounds, to lease, occupy or to erect an appropriate building or buildings for the use of said county library and branches thereof, and to sell and convey real estate and personal property for and on behalf of the county library and branches thereof, to receive gifts of real and personal property for the use and benefit of such county library and branch libraries thereof, the

> same when accepted to be held and controlled by such board, according to the terms of the deed, gift, devise or bequest of such property."

Section 182.090 requires the county library board to file its annual report with the county court, and reads as follows:

> "The said county library board shall make on or before the second Monday in June of each year, an annual report to the county court, stating the condition of their trust on the first of May of that year, a copy of which report shall, at the same time, be submitted to the Missouri state library. Said report shall be framed in accordance with the laws governing public libraries."

In the case of State ex rel. McKittrick v. Bode, 342 Mo. 162, Director Bode of the Missouri Conservation Commission was sued at the instance of the Attorney General in quo warranto proceedings to oust the director from office upon the ground that he had failed to comply with the legal requirement that officers were required to live within the state one whole year next preceding their appointment. It was claimed the director was not a public officer, but an employee of the Conservation Commission, and that he was exempt from the requirement as to residence within the state. The court was of the opinion that, although the director was appointed by the Commission, he was a public officer, and at l.c. 165-167, in discussing some of the characteristics and determining factors as to whether the director was a public officer, said:

> "It is not possible to define the words 'public office or public officer.' The cases are determined from the particular facts, including a consideration of the intention and subject matter of the enactment of the statute or the adoption of the constitutional provision. In other words, the duties to be performed, the method of performance, end to be attained, depository of the power granted, and the surrounding circumstances must be considered. In determining the question it is not necessary that all criteria be present in all the cases. For instance, tenure, oath, bond, official designation, compensation and dignity of position may be considered. However, they are not conclusive. It should be noted that the

courts and text writers agree that a delegation of some part of the sovereign power is an important matter to be considered. The question is considered at length in 46 Corpus Juris, page 924. In determining that a deputy sheriff was a public officer, we stated the rule as follows:

"'A public office is defined to be "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." (Mechem, Pub. Offices, 1.) The individual who is invested with the authority and is required to perform the duties is a public officer.

"'The courts have undertaken to give definitions in many cases, and while these have been controlled more or less by laws of the particular jurisdictions, and the powers conferred and duties enjoined thereunder, still all agree substantially that if an officer receives his authority from the law and discharges some of the functions of government he will be a public officer. (State v. Valle, 41 Mo. 30; People ex rel. v. Langdon, 40 Mich. 673; Rowland v. Mayor, 83 N.Y. 376; State ex rel. v. May, 106 Mo. 488.)

"'Deputy sheriffs are appointed by the sheriff, subject to the approval of the judge of the circuit courts; they are required to take the oath of office, which is to be indorsed upon the appointment and filed in the office of the clerk of the circuit court. After appointment and qualifications they "shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff." (R. S. 1889, secs. 8181 and 8182.)

"'The right, authority and duty are thus created by statute; he is invested with some portions of the sovereign functions of the

> government to be exercised for the benefit of the public and is, consequently, a public officer within any definition given by the courts or text writers.
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> "'It can make no difference that the appointment is made by the sheriff, or that it is in the nature of an employment, or that the compensation may be fixed by contract. The power of appointment comes from the State, the authority is derived from the law, and the duties are exercised for the benefit of the public. Chief Justice MARSHALL defines a public office to be "a public charge or employment." (U. S. v. Maurice, 2 Brock, 96.) Whether a public employment constitutes the employee a public officer depends upon the source of the powers and the character of the duties * * *'
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> "It would not be possible for respondent to direct, regulate, guide, manage and superintend the matter of conservation without exercising some part of the sovereign power. Indeed, he is the chief administrator of all conservation matters. It follows that respondent, as director of conservation, is a public officer."

The above-quoted statutes prescribe the qualifications, appointment, terms and duties of members of the county library board, and in view of the provisions of said statutes, and also the definition and characteristics given of a public officer in the case of State ex inf. McKittrick v. Bode, supra, we feel that it would be difficult, if not impossible, to describe or classify a member of a county library board in any other manner than as a public officer. It is believed that the intent of the lawmakers in the enactment of statutes relating to county libraries is that members of such library boards were to be public officers, and we are unable to construe said sections in any other manner. Therefore, in view of the foregoing, it is our thought that members of county library boards are public officers within the commonly accepted meaning of the terms, "public office," and "public officer," and we are unable to construe said sections in any other manner.

We have determined that prosecuting attorneys and county library board members are public officers, and the question remaining for our final determination is whether or not the duties of the two officers in a fourth class county are so inconsistent or repugnant to each other as to render them incompatible, so that one person cannot legally hold both at the same time in the same county.

Compatibility and incompatibility of offices is a common-law doctrine which was discussed in the leading Missouri case of State ex rel. Walker v. Bus, 135 Mo. 325, l.c. 338, where the court said:

> "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.
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> "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.'"

It will be noticed that Section 56.070, supra, requires the prosecuting attorney to represent his county in all civil, criminal, or other matters in which the interests of the county are involved. Section 56.100, supra, also requires him to give his free legal opinion upon questions of law when requested by the county court of his county. From what has already been stated, we believe that the affairs of a county library district and its board are matters in which the interests of the county are vitally concerned, and which might require the services of the prosecuting attorney of that county. In this connection we desire to call attention to at least a few instances regarding county library boards when the prosecutor's services are needed and when the furnishing of legal advice or other assistance becomes the official duty of the prosecuting attorney.

It will be recalled that Section 182.090, supra, requires the library board to file its annual report with the county court, giving the condition of the trust of said board. In the event the court requires the legal opinion of the prosecuting attorney upon any matter shown in the report, or pertaining to same, it will be the prosecuting attorney's duty to so advise the court.

Again, if the library board has misappropriated any part of the tax funds collected for the support of the library, it would be the official duty of the prosecuting attorney to institute criminal proceedings against the offending board members, as well as to institute civil proceedings against such board members for the recovery of the funds for the benefit of the library district.

Should any board member be found guilty of misconduct in office and the county court should attempt to remove him under the provisions of Section 182.050, supra, and such board member would refuse to vacate the office, it would then be the duty of the prosecuting attorney to bring quo warranto proceedings against such board member to oust him from office.

In all such instances the county's interests would be involved, and we repeat that the prosecuting attorney's services

would be needed to safeguard the county's interests. We feel that such instances are not extreme examples, but rather those which might be reasonably expected to happen during the term of office of any prosecuting attorney.

In view of the foregoing, it is our thought that the duties of prosecuting attorney and those of a member of a county library board of a fourth class county are so repugnant or inconsistent to each other that said offices are incompatible, and one person cannot legally hold both offices at the same time in the same county.

CONCLUSION

It is the opinion of this department that the duties of prosecuting attorney and those of a member of a county library board of a fourth class county are so repugnant or inconsistent as to render said offices incompatible. One person cannot legally hold both offices at the same time in the same county.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON
Attorney General

PNC:ma:ml