

PUBLIC OFFICERS: Office of Probate Judge and member of Board of Education not incompatible or in conflict and same party may hold both offices.

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January 15, 1935.



Hon. T. H. Harvey,
Judge of Probate Court,
Marshall, Missouri.

Dear Sir:

This department is in receipt of your letter of January 7 wherein you make the following inquiry:

"I was elected Judge of our Probate Court in the last election and I have been a member of our Board of Education for a number of years. I am writing you asking your opinion as to whether or not the office of Probate Judge and of School Director are incompatible, that is, whether or not there is any constitutional inhibition for holding the two positions."

It is a conceded fact that a Probate Judge is a public officer within the meaning of the law. It has likewise been held, in the case of State v. Whittle, 63 S.W. (2d), l.c. 102, that a member of a school board is a public officer. In that case the Court said:

*****Respondent next contends that a school director is not a public officer within the meaning of said section of the Constitution. We have ruled the question 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. Off. 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 ex rel. v. Bus, 135 Mo. 325, loc. cit. 331, 332, 36 S.W. 636, 637, 33 L.R.A. 616. To the same effect, State ex rel. Zevely v. Hackmann, 300 Mo. 59, loc. cit. 66, 67, 254 S.W. 53; Hasting v. Jasper County, 314 Mo. 144, loc. cit. 149, 150, 282 S.W. 700.

Thus it also appears that a school director is a public officer within the meaning of said section of the Constitution."

The holding of two offices, such as Probate Judge and School Director, is not expressly forbidden in counties and cities under 200,000 population by the Constitution of the State of Missouri.

We think your precise question is well answered in the case of State ex rel. v. Bus, 135 Mo., l.c. 338-339, wherein the Court said;

"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.'

You will note from the above decision that a question arose as to a deputy sheriff also holding the office of school director in the City of St. Louis. We believe there is no more inconsistency and incompatibility in the above case than there would be in your case, i.e., holding the office of Probate Judge and being a member of the Board of Education.

CONCLUSION

The office of School Director, or member of the Board of Education, is one without remuneration or emolument. It is a

gratuitous service rendered usually by the outstanding citizens of a community or city. The duties in no wise conflict or are inconsistent or incompatible with the duties of the office of Probate Judge, and it is the opinion of this department that you may hold both offices.

Respectfully submitted,

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APPROVED:

ROY MCKITTRICK,
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