

of the mental health program authorized by the act and cannot surrender the grant to another public or private agency and allow it to operate the program without violating Article IX, Section 18 of the Michigan Constitution of 1963. *Detroit Museum of Art v. Engel*, supra.

With respect to Question IIA, it makes no difference where the private corporation is incorporated.

As to the purchase of service from a profit corporation, it does not appear that Act 54 contemplates the purchase of any service from such a corporation no matter where incorporated for the reason that a corporation incorporated for profit is not a "social service agency" such as is contemplated by Section 12(c).

Question IIB. Section 1(f) of Act 54 provides for the making of grants by the State to purchase services including inpatient diagnostic and treatment services, and Section 12, contemplates that each community mental health board will implement working agreements with other social service agencies both public and private.

It is conceivable that inpatient psychiatric services may be purchased from a local legally incorporated Michigan or Wisconsin hospital. The particular pattern of such agreements should be considered on a case-by-case basis with care being taken to insure that the local community mental health board does not abrogate its responsibility for the operation of the program.

FRANK J. KELLEY,  
*Attorney General.*

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**CONSTITUTIONAL LAW: Separation of Powers.**  
**PUBLIC OFFICES AND OFFICERS: Incompatibility – Justice of the peace and member of board of education.**

The offices of justice of peace and member of the board of education of a local school district being in different branches of the government, dual holding of the two offices is prohibited by Section 2 of Article III of the constitution. Common law incompatibility also exists between the two offices by reason of the jurisdiction vested in the justice of peace over certain civil actions against a school district.

No. 4467

September 20, 1965.

Honorable Gerald R. Dunn  
State Senator  
State Capitol  
Lansing, Michigan

You have requested my opinion as to whether an individual may serve simultaneously as justice of peace and member of the board of education

of a local school district. There is no statutory provision expressly prohibiting the same. However, the constitution<sup>1</sup> specifies:

“The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.”

Former attorneys general have held that the corresponding provisions of the 1908 constitution prohibit the simultaneous holding of the office of justice of peace and the following other executive and legislative offices:

Alderman in a fourth class city. O.A.G. 1928-30, p. 373.

Village clerk. O.A.G. 1943-44, No. 25141, p. 261.

Township trustee. O.A.G. 1955-56, Vol. 1, No. 2085, p. 228.

Village councilman. O.A.G. 1957-58, Vol. 1, No. 3101, p. 449.

The Michigan supreme court referred<sup>2</sup> to the basic separation of powers between the three branches of government:

“And that there is such a broad general principle seems to us very plain. Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and within their respective spheres of action equally independent. One makes the laws, another applies the laws in contested cases, while the third must see that the laws are executed. This division is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others. The executive is forbidden to exercise judicial power by the same implication which forbids the courts to take upon themselves his duties.”

That the framers of the 1963 constitution entertained similar concept of the effect of Section 2 of Article III is evidenced by the statement of the reasons<sup>3</sup> for the adoption of such provision at the time this section was reported in its original form as a Committee Proposal in the constitutional convention:

“The doctrine of the separation of powers prevents the collection of governmental powers into the hands of 1 man, thus protecting the rights of the people. It is as old as our American governmental system, and was devised by our founding fathers, greatly influenced by the French political theorist, Montesquieu. Desirous of protecting a free people, their idea was that if, somehow, the powers of government could be divided, it could not grow so large as to enslave them.

“Basically the doctrine means that he who makes a law shall not

<sup>1</sup> Section 2 of Article III which is a revision of Sections 1 and 2 of Article IV of the 1908 constitution.

<sup>2</sup> *The People ex. rel. John Sutherland v. The Governor*, 29 Mich. 320, 324-25, quoted with approval in *Germaine v. Governor*, 176 Mich. 585, 590.

<sup>3</sup> *Official Record, Constitutional Convention of 1961, Vol. I, p. 601.*

enforce it, nor sit in judgment upon it; that he who enforces a law shall not make or change it nor shall be judge of its violation; and he who sits in judgment shall have neither made the law nor enforced it.

"This doctrine is so much accepted in our system, that it is unexpressed in the Constitution of the United States and in at least 10 of our sister state constitutions. Without exception, the doctrine is found within those constitutions, from the structure of government created.

"It may be conceded, therefore, that the substance of article IV of the Constitution of 1908 could be excluded from a new constitution without risk of weakening the doctrine. But the doctrine has been expressed in all of Michigan's earlier constitutions and it is the recommendation of the committee that it should be reexpressed in a new one.

"The committee has substituted the word BRANCH for the word DEPARTMENT, for the reason that in modern usage the word "department" means a division of the executive branch, as the department of state, treasury department, department of conservation, etc."

Any suggestion that such prohibition is applicable only to state government as distinguished from municipalities or political subdivisions of the state is negated by the decision of the supreme court holding that part of the statute providing for membership of justices of peace upon the township board to be unconstitutional because of violation of such provision.<sup>4</sup> The court stated:

"Even assuming that a local government may be given authority to set up a governmental structure which in some respect may not strictly conform to the doctrine of separation, and that indeed this is done in the case of many local governments, the instant case is not such a one. The organization of the township and that of the office of justice of peace are directly under the purview of the legislature and the Constitution of the State and are subject to the provisions of the latter. The individual townships are given no power over the structure of their own governments; we are, instead, dealing with the exercise of legislative power delegated to them and which is subject to the provisions of the State Constitution."

As recognized by that opinion, justices of peace are in the judicial branch. Members of the board of education of local school district are in the executive branch.<sup>5</sup>

*Township of Dearborn* is one of many examples of the application of such constitutional prohibition to strike down a statutory provision vesting powers belonging to one branch of government in members of another branch.<sup>6</sup>

<sup>4</sup> *Township of Dearborn v. Dearborn Township Clerk*, 334 Mich. 673, 691-692.

<sup>5</sup> *People ex rel. Simmons v. Anderson*, 198 Mich. 38, 48, citing *People v. Salisbury*, 134 Mich. 537, 548-49.

<sup>6</sup> For another, see *Local 170 Transport Workers Union of America v. Genesee Circuit Judge*, 322 Mich. 332.

That such provision also operates to prohibit an individual simultaneously holding offices in different branches is evidenced by the line of authority represented by decisions of courts of last resort in other jurisdictions as well as the above cited attorney general's opinions. Among such decisions is that of the Indiana court<sup>7</sup> holding employment of members of the legislature in administrative agencies to be prohibited by the following constitutional provision:

"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."<sup>8</sup>

After quoting from opinions of the federal and other state supreme courts, the opinion stated:

"In view of the fact that it is obvious that the purpose of all these separation of powers provisions of Federal and State Constitutions is to rid each of the separate departments of government from any control or influence by either of the other departments, and that this object can be obtained only if § 1 of Art. 3 of the Indiana Constitution is read exactly as it is written, we are constrained to follow the New York and Louisiana cases above cited. If persons charged with official duties in one department may be employed to perform duties, official or otherwise, in another department the door is opened to influence and control by the employing department."

The above cited opinions issued by my predecessors placed a similar interpretation upon the corresponding provisions of the 1908 constitution.<sup>9</sup> Consistent therewith is my opinion that simultaneous holding of the offices of justice of peace and member of local board of education is prohibited by Article III, Section 2 of the Michigan Constitution of 1963.

Aside from the constitutional inhibition, grounds exist for holding the two offices to be incompatible under the common law rule. R.J.A., Section 6605<sup>10</sup> vests in the justice of peace jurisdiction over certain civil actions against a school district. Membership upon the board of education by the justice of peace would result in obvious conflict in interests between the functions and duties of the two offices. As stated in an opinion<sup>11</sup> holding the offices of justice of peace and village councilman to be incompatible:

"It is not sufficient to rest upon the assumption that as justice of the peace he would disqualify himself, for incompatibility arises by reason of the antagonism which would follow upon attempt to dis-

<sup>7</sup> *State ex rel. Black, et al., v. Burch, Auditor of State of Indiana*, 226 Ind. 445, 463-64, 80 N.E. 2d 294, 302.

<sup>8</sup> Section I of Article III of the Indiana Constitution.

<sup>9</sup> Sections 1 and 2 of Article IV.

<sup>10</sup> C.L.S. 1961 § 600.6605; M.S.A. 1962 Rev. Vol. § 27A.6605.

<sup>11</sup> O.A.G. 1957-58, Vol. 1, No. 3101, pp. 449, 451.

charge impartially the functions of the offices. It is not merely a matter of voluntary non-exercise of a function of one office when it conflicts with the duty of the other office."

O.A.G. 1952-54, No. 1636, p. 127, is no longer to be followed in so far as it passed on the same question.

FRANK J. KELLEY,  
*Attorney General.*

650920.4

**TAXATION:** Personal property taxes, compromise of.  
**TOWNSHIPS:** Taxation – personal property.

Personal property taxes duly assessed and levied, cannot be compromised or settled by a township or any township officer.

No. 4471

September 20, 1965.

Mr. Walter T. Dartland  
Prosecuting Attorney  
416 Shelden Avenue  
Houghton, Michigan

You have requested an opinion from this office as to whether or not a township may compromise the amount of personal property taxes due in full settlement where there is a judgment and where there is no judgment.<sup>1</sup>

You indicate that you have researched this matter and can find no case or statutory law in point. However, you express your opinion by reference to

51 Am. Jur., Taxation §§ 999 and 1190  
Callaghan's Mich. Digest, Taxes, § 227  
28 A.L.R. 2d, pp. 1425-1434

that neither a political subdivision nor an officer thereof has the power to compromise or release a tax claim in the absence of statutory authorization and since there is no such authorization in Michigan, a township may not compromise personal property taxes.

While we have found no direct authority on this question, the entire detailed framework for the collection and return of property taxes dispels the idea that a township can enter into a settlement agreement. This conclusion is reinforced by the case of

*School District of City of Lansing v. City of Lansing*, 264 Mich. 272, and § 56a of the General Property Tax Law.<sup>2</sup>

Once personal property taxes have been spread on the tax rolls with a duly executed warrant attached, the treasurer is required to proceed with-

<sup>1</sup> You also request an opinion regarding the allocation of moneys received from a compromise settlement in the event a township has the power to compromise, which question requires no answer in view of the answer to your first question.

<sup>2</sup> Sec. 56a of Act No. 206, P.A. 1893, as amended [C.L. 1948, § 211.56a; M.S.A. § 7.100(1)].