

OPINION NO. 94-013**Syllabus:**

An individual who serves as township trustee and represents his township as a member of a board of fire district trustees pursuant to R.C. 505.371 may hold simultaneously the position of village administrator. As township trustee or member of a board of fire district trustees, however, such individual should not participate in discussions, negotiations, or votes concerning a contract for the purchase of surplus water under R.C. 505.37(A) and R.C. 743.18 with the village that appoints him village administrator. Further, as township trustee, said individual should not participate in discussions or votes concerning whether to expend, pursuant to R.C. 5535.08, township moneys for road construction, improvement, or repair upon roads inside the village that appoints him village administrator.

To: Jim Slagle, Marion County Prosecuting Attorney, Marion, Ohio
By: Lee Fisher, Attorney General, March 28, 1994

You have requested an opinion concerning the compatibility of the positions of township trustee and village administrator. You have stated that the township trustee represents the township on the board of fire district trustees that governs the joint fire district that encompasses the territory of the township and village.¹ Consequently, you wish to know whether a township

¹ Pursuant to R.C. 505.371, the boards of township trustees of one or more townships and the legislative authorities of any one or more municipal corporations within or adjoining such townships may create a joint fire district comprising the municipal corporations and all or any portions of the townships as are mutually agreed upon. Any joint fire district created shall be governed by a board of fire district trustees. R.C. 505.371. With respect to the board's composition, R.C. 505.371 states: "The governing body of the joint fire district shall be a board of fire district trustees, which shall include one representative from each board of township trustees and one representative from the legislative authority of each municipal corporation in the district." "[T]his language requires that a board of fire district trustees include at least one township trustee from each participating township." 1985 Op. Att'y Gen. No. 85-071 at 2-277 and 2-278; see 1992 Op. Att'y Gen. No. 92-002; 1979 Op. Att'y Gen. No. 79-082. Compare R.C. 505.371 (providing that the governing board of a joint fire district shall include one representative from each participating board of township trustees) with R.C. 505.71 (providing that the governing body of a joint ambulance district "shall include one representative appointed by each board of township trustees"). Thus, since R.C. 505.371 requires a township trustee to be a member of the board of fire district trustees of the joint fire district comprising all or any portion of the township, the positions of township trustee and member of the board of fire district trustees of the joint fire district comprising all or any of the territory of the township are compatible. Cf., e.g., *State ex rel. D'Alton v. Ritchie*, 97 Ohio St. 41, 119 N.E. 124 (1917) (since the General Assembly requires the judges of the court of common pleas and the judge of the probate court of Lucas County to select one of themselves to act as the judge of the court of domestic relations, the judge so selected is not in violation of the constitutional provision providing no judge shall hold any other office of profit or trust under the authority of this state).

trustee who represents his township on a board of fire district trustees may serve simultaneously as a village administrator for a village located within the joint fire district.

Compatibility Analysis

1979 Op. Att'y Gen. No. 79-111 provides the following test for determining the compatibility of two public positions:

1. Is either of the positions a classified employment within the terms of R.C. 124.57?
2. Do the empowering statutes of either position limit the outside employment permissible?
3. Is one office subordinate to, or in any way a check upon, the other?
4. Is it physically possible for one person to discharge the duties of both positions?
5. Is there a conflict of interest between the two positions?
6. Are there local charter provisions or ordinances which are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

Op. No. 79-111 at 2-367 and 2-368. The sixth and seventh questions of the analysis raise issues of local concern, and it is assumed, for purposes of this opinion, that there are no local departmental regulations, charter provisions, or ordinances that limit the holding of outside employment by the township trustee, member of the board of fire district trustees, or village administrator. There are no applicable state or federal regulations.

R.C. 124.57

The first question of the analysis asks whether either of the positions is a classified employment within the terms of R.C. 124.57, which prohibits employees or officers in the classified service of the state, the several counties, cities, and city school districts thereof, and civil service townships from participating in partisan political activities, other than to vote or express their political views. A township trustee, as an elected officer, is an unclassified position. 1993 Op. Att'y Gen. No. 93-016 at 2-85; *see* R.C. 124.11(A)(1); R.C. 505.01. The position of village administrator is not subject to R.C. 124.57's prohibition since that section does not apply to officers or employees in the service of a village. 1993 Op. Att'y Gen. No. 93-048 at 2-234; *see* 1989 Op. Att'y Gen. No. 89-069 at 2-315; *see also* Ohio Const. art. XV, §10; R.C. 124.01. Similarly, since R.C. 124.57 does not expressly include a joint fire district among the political subdivisions whose classified employees and officers are prohibited from engaging in partisan political activity, the statute does not apply to the position of member of the board of fire district trustees of a joint fire district. *Cf.* Op. No. 89-069 at 2-315 ("R.C. 124.57 does not expressly mention officers or employees in the service of a village or local school district; thus, the statute does not apply to such officers or employees"). *See generally* R.C. 5705.01(A) (classifying a joint fire district as a "subdivision" for purposes of R.C. 5705); 1985 Op. Att'y Gen. No. 85-071 at 2-276 ("[i]t is clear that a joint fire district created pursuant to R.C. 505.371 constitutes a legal entity, separate and distinct both from the bodies which join in its creation and from the county or counties within which it is located"). The prohibition set

forth in R.C. 124.57, therefore, does not prohibit a township trustee who represents his township on a board of fire district trustees from serving simultaneously as a village administrator.

Outside Employment

The second question of the analysis asks whether the empowering statutes of either position limit outside employment. No statute prohibits a township trustee or member of a board of fire district trustees from serving as a village administrator. Pursuant to R.C. 735.271, a village administrator is only prohibited from being "an elected official of the village at the time of his appointment or during his tenure in office." Insofar as neither a township trustee nor member of a board of fire district trustees is an elected official of the village, R.C. 735.271's prohibition does not apply. Accordingly, no statute expressly prohibits a village administrator from serving simultaneously as either a township trustee or member of a board of fire district trustees.

Subordination or Control

The third question of the analysis asks whether one position is subordinate to, or in any way a check upon, the other. As stated in Op. No. 93-048, a village administrator is appointed by the village mayor, and serves at the pleasure of the mayor and the village's legislative authority. Op. No. 93-048 at 2-234; *see* R.C. 735.271; *see also* R.C. 735.273 (a village administrator is under the general supervision and control of the village mayor). As an elected official, *see* R.C. 505.01, a township trustee is accountable to the people who elected him. A trustee chosen to represent his township on a board of fire district trustees of a joint fire district is responsible to the board of township trustees that appoints him. *See generally* 1992 Op. Att'y Gen. No. 92-017 at 2-59 ("R.C. 505.371 does not specify or designate a particular method by which such representatives and other individuals are to be selected for, appointed to, or removed from the board of fire district trustees. It has been stated, therefore, that such matters are to be entrusted to the discretion of the executive and legislative bodies of those political subdivisions that have decided to participate in the formation of the joint fire district"). The positions thus operate independently of each other and neither is subordinate to the other. *See generally Pistole v. Wiltshire*, 22 Ohio Op. 2d 464, 467, 189 N.E.2d 654, 657-58 (C.P. Scioto County 1961) (a township trustee is responsible to the electors who elected him and a deputy sheriff is responsible to the county sheriff who appointed him; neither position is subordinate to, or a check upon, the other). Additionally, there is no area in which the positions act as a check upon each other. *See generally Esler v. Summit County*, 39 Ohio Misc. 2d 8, 10, 530 N.E.2d 973, 975 (C.P. Summit County (1985) ("[n]either the chief county building inspector nor the township trustees have any direct responsibilities to or powers over the other.... [T]herefore, the occasion for one position to have a check on the other would be rare"). The positions of village administrator and township trustee therefore are not subordinate to, or in any way a check upon, each other. The positions of member of a board of fire district trustees and village administrator are also not subordinate to, or in any way a check upon, each other.

Physical Constraints

The fourth question of the analysis asks whether it is physically possible for one individual to perform the duties of both positions. The determination of whether an individual is physically able to adequately perform the duties of the positions in question requires the resolution of factual questions that are best answered by the concerned parties. *See, e.g.*, 1992 Op. Att'y Gen. No. 92-023 at 2-81. It seems probable, however, that the positions of township trustee, village administrator, and member of a board of fire district trustees can be filled competently by the same individual.

Conflict of Interest

The fifth question of the analysis asks whether there is a conflict of interest between the two positions. A person may not hold two public positions if he would be subject to divided loyalties and conflicting duties or be exposed to the temptation of acting other than in the best interest of the public. 1985 Op. Att'y Gen. No. 85-042 at 2-150. A conflict of interest occurs when a person's "responsibilities in one position are such as to influence the performance of his duties in the other position, thereby subjecting him to influences which may prevent his decisions from being completely objective." 1980 Op. Att'y Gen. No. 80-035 at 2-149; *see also State ex rel. Baden v. Gibbons*, 17 Ohio Law Abs. 341, 344 (Ct. App. Butler County 1934).

R.C. 735.273 sets forth the powers and duties of a village administrator. The responsibilities of a village administrator include managing the water works, electric light plants, artificial or natural gas plants, or other similar public utilities; furnishing supplies of water, electricity, or gas; collecting all water, electric, and gas rents; supervising the improvement and repair of streets, bridges, sewers and the like, in the village; and making such bylaws and regulations as he deems necessary for the safe, economical, and efficient management and protection of such works, plants, and public utilities. *Id.* The village administrator may also "make contracts for the building of machinery, water-works buildings, reservoirs, and the enlargement and repair thereof, the manufacture and laying down of pipe, the furnishing and supplying with connections all necessary fire hydrants for fire department purposes, keeping them in repair, and for all other purposes necessary to the full and efficient management and construction of water works," R.C. 743.07, make general or special rules and regulations for the protection of water works against abuse, destruction, and unnecessary use or waste of water, R.C. 743.10, make contracts with other municipal corporations to supply them or their inhabitants with water or electricity, R.C. 743.18, dispose of surplus water by lease or otherwise, *id.*, and make contracts "with any individual or an incorporated company for supplying water for fire purposes, or for cisterns, reservoirs, streets, squares, and other public places within [the village], or for the purpose of supplying the citizens of [the village] with water for such time, and upon such terms as is agreed upon," R.C. 743.24.

A township trustee's powers and duties are provided for in R.C. Chapter 505 and related provisions throughout R.C. Title 5 (townships). Township trustees are statutorily vested with various powers and duties associated with the government of the township. *See, e.g.,* R.C. 504.04(A) (if a township adopts the limited self-government form of government, a board of township trustees may adopt and enforce local police, sanitary, and other similar regulations); R.C. 505.10 (a board of township trustees may accept and sell township property); R.C. 505.17 (a board of township trustees may regulate engine noise and vehicle parking); R.C. 505.262 (a board of township trustees may issue notes of the township to finance purchases and construction); R.C. 505.27 (a board of township trustees may provide, maintain, and operate facilities for or contract for the collection, transfer, and disposal of solid wastes); R.C. 505.37 (a board of township trustees may provide for fire protection); R.C. 505.48 (a board of township trustees may provide police protection); R.C. 519.02 (a board of township trustees may regulate building and land use in unincorporated territory). A board of township trustees also has authority over township budgetary matters and pursuant to R.C. 5705.01(C) is designated the taxing authority of the township for purposes of R.C. Chapter 5705. In addition, a board of township trustees has specific powers and duties concerning the construction, reconstruction, resurfacing, improvement, maintenance, and repair of roads located within the boundaries of the township. *See, e.g.,* R.C. 5535.01(C) (a "board of township trustees shall maintain all [township] roads within its township"); R.C. 5535.08 (a township may "expend any funds available for road construction, improvement, or repair upon roads inside a village"). R.C. 5571.01(A) (a "board of township trustees may construct, reconstruct, resurface, or improve any

public road or part thereof under its jurisdiction or any county road, intercounty highway, or state highway within its township"); R.C. 5571.02 (a "board of township trustees shall have control of the township roads of its township and shall keep them in good repair").

As noted above, the township trustee also represents his township on a board of fire district trustees. *See* note one, *supra*. Pursuant to R.C. 505.37(A), the board of fire district trustees "may establish all necessary rules to guard against the occurrence of fires and to protect the property and lives of the citizens against damage and accidents, and may ... purchase or otherwise provide any fire apparatus, mechanical resuscitators, or other equipment, appliances, materials, fire hydrants, and water supply for fire-fighting purposes that seems advisable to the board." *See also* R.C. 505.371 (a "board of fire district trustees may exercise the same powers as are granted to a board of township trustees in sections 505.37 to 505.45 of the Revised Code"). In addition, a board of fire district trustees may levy a tax upon all taxable property in the fire district, R.C. 505.39, and is designated the taxing authority of the joint fire district for purposes of R.C. Chapter 5705, R.C. 5705.01(C).

An examination of the duties of the positions with which you are concerned discloses several potential conflicts of interest. Pursuant to R.C. 743.18, a village administrator may dispose of surplus water by lease or otherwise. Under R.C. 505.37(A), a board of township trustees or board of fire district trustees may purchase a water supply for fire-fighting purposes. It is conceivable that a board of township trustees or board of fire district trustees may enter into a contract with a village administrator for the purchase of surplus water from the village. A township trustee who serves as a village administrator, or a member of a board of fire district trustees who serves as a village administrator, would thus be required to participate on both sides of a contract for the purchase of surplus water. A public officer who participates on both sides of a contract is "exposed to conflicting loyalties and to the potential temptation of acting in a manner not in the best interest of the public." 1981 Op. Att'y Gen. No. 81-027 at 2-101.

A second potential conflict of interest exists because R.C. 5535.08 authorizes a township to "expend any funds available for road construction, improvement, or repair upon roads inside a village." As noted above, a village administrator is responsible for supervising the improvement and repair of streets, bridges, sewers and the like in the village. R.C. 735.273. *See generally* R.C. 715.19 (a village may establish and care for streets within the village); R.C. 717.01(P) (a village may "[o]pen, construct, widen, extend, improve, resurface, or change the line of any street or public highway"); R.C. 723.01 ("[e]xcept as provide in section 5501.49 of the Revised Code, the legislative authority of a municipal corporation shall have the care, supervision, and control of the public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the municipal corporation, and the municipal corporation shall cause them to be kept open, in repair, and free from nuisance"). Insofar as a township trustee may be required to discuss and vote on whether to provide township funds to a village for the construction, improvement, or repair of roads inside the village under R.C. 5535.08, an individual serving simultaneously in the positions of township trustee and village administrator is exposed to influences that may prevent him from making completely objective, disinterested decisions. As village administrator, the individual has, as a general matter, an interest in acquiring funding for the construction, improvement, and repair of roads inside the village. *See* R.C. 735.273 (village administrator is responsible for street improvement and repair). In light of this interest, the individual, as township trustee, may be predisposed to vote in favor of providing financial assistance for road improvement and maintenance to the village that employs him as village administrator. The potential for a conflict of interest is thus presented because the individual is subject to influences that may prevent him from discharging objectively and in a completely disinterested fashion the duties of township trustee.

Prior opinions of the Attorney General have determined that the mere possibility that an individual is subject to conflicting duties or divided loyalties does not automatically prohibit the simultaneous holding of two public positions. Rather, each potential conflict of interest should be considered on its particular facts, and where the possibility of conflict is remote and speculative, the conflict of interest rule is not violated. Op. No. 79-111 at 2-372. Factors used in determining the immediacy of a conflict of interest include:

the degree of remoteness of a potential conflict, the ability or inability of an individual to remove himself from the conflict, whether the individual exercises decision-making authority in both positions, whether the potential conflict involves the primary functions of each position, and whether the potential conflict may involve budgetary controls.

Id.

Application of these factors to the potential conflicts of interest that result from the simultaneous holding of the positions with which you are concerned indicates that the potential conflicts of interest are remote and speculative. It is only speculative whether a township or joint fire district will enter into a contract with a village under R.C. 505.37(A) and R.C. 743.18 concerning the sale of surplus water, or that the township will expend, pursuant to R.C. 5535.08, township moneys for road construction, improvement, or repair upon roads inside a village. It is generally unlikely that the village will have surplus water to sell, that the township or joint fire district will need water from the village, and that the village's surplus water will be the only water available for purchase by the township or joint fire district. It is also unlikely that the township will have excess moneys to give to the village for road construction, improvement, or repair. As a practical matter, therefore, neither of these events is likely to occur very often. Moreover, the sale of surplus water by a village administrator, or its purchase by a board of township trustees or board of fire district trustees, and the expenditure of township moneys for the improvement and repair of village roads, even where they did occur, would constitute only a small fraction of the duties of each position. Thus, the potential conflicts of interest do not involve the primary functions of each position. The potential conflicts of interest also do not involve budgetary controls.

A township trustee does exercise decision-making authority with respect to the expenditure of township moneys for the construction, improvement, or repair of roads within a village, *see* R.C. 5535.08, and the purchase of surplus water from a village pursuant to R.C. 505.37(A) and R.C. 743.18. Given that such situations are likely to be rare, however, a township trustee should be able to remove himself from any discussions or votes concerning the expenditure of township moneys for the construction, improvement, or repair of roads inside the village, or from any discussions, negotiations, or votes concerning a contract for the purchase of surplus water from the village. The same analysis applies to a member of the board of fire district trustees. It appears, therefore, that the potential conflicts of interest are remote and speculative, and that such potential conflicts of interest do not render the positions about which you ask incompatible.

In light of the foregoing, it is reasonable to conclude that a township trustee who represents his township on a board of fire district trustees may serve simultaneously as a village administrator. However, insofar as it is contrary to public policy for a public officer to expose himself to the temptation of acting in any manner other than in the public's best interest, a township trustee or member of a board of fire district trustees should abstain from any discussions, negotiations, or votes concerning any contract relating to the purchase of surplus water by the township or joint fire district from the village that appoints him village

administrator. Furthermore, the individual, as township trustee, should also abstain from any discussions or votes concerning the expenditure of township moneys for the construction, improvement, or repair of roads inside the village that appoints him village administrator. *See generally* R.C. 102.03 (an individual must abstain from voting, deliberating, or participating in discussions with regard to matters which are of such a character as to manifest a substantial and improper influence on him with respect to his public duties).

Conclusion

Therefore, it is my opinion, and you are hereby advised, that an individual who serves as township trustee and represents his township as a member of a board of fire district trustees pursuant to R.C. 505.371 may hold simultaneously the position of village administrator. As township trustee or member of a board of fire district trustees, however, such individual should not participate in discussions, negotiations, or votes concerning a contract for the purchase of surplus water under R.C. 505.37(A) and R.C. 743.18 with the village that appoints him village administrator. Further, as township trustee, said individual should not participate in discussions or votes concerning whether to expend, pursuant to R.C. 5535.08, township moneys for road construction, improvement, or repair upon roads inside the village that appoints him village administrator.