

May 19, 2009

The Honorable Morris J. Murray
Defiance County Prosecuting Attorney
607 West Third Street
Defiance, Ohio 43512

SYLLABUS:

2009-018

A person may serve simultaneously as the chief probation officer of a juvenile court and president pro tempore of a village legislative authority, provided the person, as president pro tempore, does not exercise the law enforcement powers conferred upon a village mayor or participate in deliberations, discussions, negotiations, or votes concerning conveyances or contributions of property or money to the county for use by the juvenile court or contracts with the juvenile court to provide services for children on probation. (1911 Op. Att'y Gen. No. 241, vol. II, p. 1180, overruled.)



RICHARD CORDRAY
OHIO ATTORNEY GENERAL

May 19, 2009

OPINION NO. 2009-018

The Honorable Morris J. Murray
Defiance County Prosecuting Attorney
607 West Third Street
Defiance, Ohio 43512

Dear Prosecutor Murray:

You have requested an opinion whether a person may serve simultaneously as the chief probation officer of a juvenile court and president pro tempore¹ of a village legislative authority when the village is located within the territorial jurisdiction of the juvenile court.

The following seven-question test is used to determine whether a person may hold two public positions concurrently:

1. Is either of the positions a classified employment within the terms of R.C. 124.57?
2. Does a constitutional provision or statute prohibit the holding of both positions at the same time?
3. Is one position 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 an impermissible conflict of interest between the two positions?

¹ You also wish to know whether a person may serve simultaneously as the chief probation officer of a juvenile court and member of a village legislative authority. Because the president pro tempore of a village legislative authority is a member of the legislative authority, R.C. 731.10, it is unnecessary for us to separately consider the compatibility of the positions of chief probation officer of a juvenile court and member of a village legislative authority.

6. Are there local charter provisions, resolutions, or ordinances which are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

2009 Op. Att’y Gen. No. 2009-010, slip op. at 1-2; *see also* 2 Ohio Admin. Code 123:1-46-02.

The first question asks whether either of the positions is a classified employment within the terms of R.C. 124.57. This statute prohibits, except as provided therein, persons in the classified service of “the state, the several counties, cities, and city school districts of the state, [and] the civil service townships of the state” from holding partisan political offices. *See* rule 123:1-46-02(C)(1), (6). The statute does not, however, apply to officers and employees in the service of villages. R.C. 124.57’s prohibition thus does not apply to a person who serves as president pro tempore of a village legislative authority. *See* 2001 Op. Att’y Gen. No. 2001-036 at 2-216.

The statute also does not apply to a person who serves as a chief probation officer of a juvenile court since the position of chief probation officer is in the unclassified service for purposes of R.C. 124.57. *See* R.C. 2151.13; 1939 Op. Att’y Gen. No. 1123, vol. II, p. 1642. Accordingly, R.C. 124.57 does not operate to prevent a person from serving in the positions of chief probation officer of a juvenile court and president pro tempore of a village legislative authority at the same time.

The second question asks whether a constitutional provision or statute prohibits a person from holding both positions at the same time. R.C. 731.12 prohibits the president pro tempore of a village legislative authority from holding “any other public office,” except that of “notary public, a member of the state militia, or a volunteer fireman of said village, provided that [he does] not receive any compensation for his services as a volunteer fireman of the village in addition to his regular compensation” as president pro tempore.² A president pro tempore of a village legislative authority who violates this provision of R.C. 731.12 “shall forfeit” his seat on the legislative authority. R.C. 731.12.

The criteria for determining whether the position of chief probation officer of a juvenile court is a public office for purposes of R.C. 731.12 are as follows:

² A charter village through its powers of local self-government may establish qualifications for the president pro tempore of its legislative authority that are different from those provided in R.C. 731.12. *See State ex rel. Bindas v. Andrish*, 165 Ohio St. 441, 136 N.E.2d 43 (1956) (syllabus, paragraph 2). *See generally* 2008 Op. Att’y Gen. No. 2008-032 at 2-330 and 2-331 (in charter cities a statute concerning a matter of local self-government involving procedure applies unless there is either (1) a conflicting charter provision or (2) a charter provision that reserves home rule authority to permit enactment of legislation at variance with the statute and accompanying legislation that conflicts with the statute).

(1) the incumbent must exercise certain independent public duties, a part of the sovereignty of the state; (2) such exercise by the incumbent must be by virtue of his election or appointment to the office; (3) in the exercise of the duties so imposed, he can not be subject to the direction and control of a superior officer.

1963 Op. Att’y Gen. No. 3548, p. 58, 61; *accord State ex rel. Landis v. Bd. of Comm’rs of Butler County*, 95 Ohio St. 157, 159-60, 115 N.E. 919 (1917); *State ex rel. Attorney General v. Jennings*, 57 Ohio St. 415, 49 N.E. 404 (1898) (syllabus, paragraph 2).

In light of these criteria, it follows that the chief probation officer of a juvenile court is a public employee, rather than a public officeholder for purposes of R.C. 731.12. R.C. 2151.13 authorizes a juvenile court judge to appoint a chief probation officer. A chief probation officer performs the duties assigned to him by, and serves at the pleasure of, the juvenile court judge. R.C. 2151.13. A chief probation officer thus performs his duties and responsibilities under the direction and control of the juvenile court judge, and, as such, a chief probation officer does not act independently in the performance of a governmental function in the exercise of his duties. Consequently, the position of chief probation officer of a juvenile court is not a public office for purposes of R.C. 731.12. *See State ex rel. Gordon v. Zangerle*, 136 Ohio St. 371, 381-82, 26 N.E.2d 190 (1940) (under the common law test for determining whether a position is a public office or employment, the position of probation officer is not a public office).

This means that R.C. 731.12 does not prohibit the president pro tempore of a village legislative authority from holding the position of chief probation officer of a juvenile court.³ Therefore, the second question may be answered in the negative.

The third question asks whether one position is subordinate to, or in any way a check upon, the other. As stated above, the chief probation officer of a juvenile court is appointed and removed by, and subject to the direction and control of, a juvenile court judge. R.C. 2151.13. The president pro tempore of a village legislative authority, as an elected village officer, *see* R.C. 731.09, serves and is responsible to the electors of the village. Thus, neither position is responsible for appointing or removing a person from the other position. The positions also

³ 1911 Op. Att’y Gen. No. 241, vol. II, p. 1180 determined that, insofar as G.C. 4218 (now R.C. 731.12) prohibits members of village legislative authorities from holding any other public office or employment, such members may not serve as probation officers for juvenile courts. Because R.C. 731.12 does not currently prohibit a member of a village legislative authority from holding an employment position with another governmental entity, R.C. 731.12 does not operate to prohibit a person from serving simultaneously as a member of a village legislative authority and chief probation officer of a juvenile court. *See generally* 1956 Op. Att’y Gen. No. 6674, p. 447 (syllabus, paragraph 1) (R.C. 731.12, “as amended by the 101st General Assembly in Amended Senate Bill No. 320, does not prohibit a member of village council from holding other public employment so long as such employment is not with said village”). We, therefore, overrule 1911 Op. Att’y Gen. No. 241, vol. II, p. 1180.

operate independently of each other, and neither is required to assign duties to, or supervise, the other. Therefore, neither position is subordinate to, or in any way a check upon, the other.

The fourth question asks whether it is physically possible for one person to perform the duties of both positions. This is a factual question that is best addressed at the local level since the time constraints and demands imposed upon the chief probation officer of a juvenile court and president pro tempore of a village legislative authority may be determined more accurately by village and county officials. *See* 2008 Op. Att’y Gen. No. 2008-020 at 2-213.

We caution, however, that the president pro tempore of a village legislative authority, as an elected village officer, is required to perform duties imposed by statute and, where the nature of such duties requires him to be present at a particular time or place, or act in a particular manner, he must be able to do so. *See generally* R.C. 3.17 (“[a]ny member of a board, commission, council, board of trustees of an institution of higher education, or other public body of the state, except a member of the general assembly or a judge of any court in the state, who fails to attend at least three-fifths of the regular and special meetings held by that board, commission, council, board of trustees, or public body during any two-year period forfeits the member’s position on that board, commission, council, board of trustees, or public body”). Also, if the president pro tempore of a village legislative authority who is employed as a chief probation officer of a juvenile court is required to perform his duties as president pro tempore during his regular work hours as the chief probation officer, the president pro tempore must take approved vacation or personal leave or leave without pay for the time he is absent from his duties as chief probation officer.

The fifth question asks whether there is a conflict of interest between the two positions.⁴ A person may not hold two public positions concurrently if the “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.

A review of the powers, duties, and responsibilities of the respective positions discloses several potential conflicts of interest between the positions. First, a village legislative authority may convey or contribute property or money to a county for use by the juvenile court or contract with the juvenile court to provide services for children on probation. *See* Ohio Const. art. XVIII,

⁴ The Ohio Ethics Commission, rather than the office of the Attorney General, is the appropriate state entity for addressing the application of the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43. R.C. 102.08. We will, therefore, refrain from interpreting and applying these provisions by way of a formal opinion. *See* 1987 Op. Att’y Gen. No. 87-033 (syllabus, paragraph 3). Questions concerning the interpretation and application of these provisions to a situation involving a person serving simultaneously as the chief probation officer of a juvenile court and president pro tempore of a village legislative authority should instead be directed to the Ohio Ethics Commission.

§ 3; Ohio Const. art. XVIII, § 7; R.C. 9.20; R.C. Chapter 721; R.C. 2151.151. If the president pro tempore of a village legislative authority who serves as the chief probation officer of a juvenile court were required to deliberate, discuss, negotiate, or vote on conveyances or contributions of property or money to the county for use by the juvenile court or contracts with the juvenile court to provide services for children on probation, it might be difficult for the president pro tempore to perform his duties and exercise his discretion in a completely objective and disinterested manner because of his position with the juvenile court.

Although a conflict of interest may arise between two positions, previous opinions of the Attorney General have determined that, if a person serving in both positions is able to remove himself from the conflict by abstaining from participating in deliberations, discussions, negotiations, or votes pertaining to the conflict, the person may serve in both positions at the same time. *See, e.g.*, 2009 Op. Att’y Gen. No. 2009-010; 2007 Op. Att’y Gen. No. 2007-023. With respect to your particular situation, we believe that any conflicts arising because of conveyances or contributions of village property or money to the county for use by the juvenile court or village contracts with the juvenile court to provide services for children on probation may be avoided.

No statute mandates such conveyances, contributions, or contracts. Thus, the occasions in which a person who serves as the president pro tempore of a village legislative authority and chief probation officer of a juvenile court would be required to discuss, deliberate, negotiate, or vote on such conveyances, contributions, or contracts should be infrequent. Also, as the president pro tempore, the person may remove himself from the conflicts should they arise without impairing the functioning of the legislative authority. *See* 1991 Op. Att’y Gen. No. 91-036 at 2-196. *See generally* 2003 Op. Att’y Gen. No. 2003-006 at 2-37 and 2-38 (in a matter in which the objectivity of a person is impaired, the person has a duty to abstain from participating in the matter). Accordingly, conflicts of interest that may arise because of a conveyance or contribution of village property or money to the county for use by the juvenile court or a village contract with the juvenile court to provide services for children on probation do not prohibit a person from serving simultaneously as a president pro tempore of a village legislative authority and chief probation officer of a juvenile court, provided the person does not participate in deliberations, discussions, negotiations, or votes concerning such conveyances, contributions, or contracts. *See* 2009 Op. Att’y Gen. No. 2009-010.

Other conflicts of interest arise when the person, as president pro tempore, becomes the acting mayor of the village.⁵ *See* R.C. 731.10; R.C. 731.43; R.C. 733.25. As acting mayor, the

⁵ The president pro tempore of a village legislative authority, as acting mayor, is required to comply with the applicable provisions of the Ohio Code of Judicial Conduct. *See* Ohio Traf. R. 16; Ohio Code of Judicial Conduct, Compliance Section, division (A). The authority to issue advisory opinions regarding the provisions of the Ohio Code of Judicial Conduct is vested in the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court. R.C.

president pro tempore “shall have the same powers and perform the same duties as the mayor.” R.C. 731.10. Under R.C. 2901.01(A)(11)(c), a person holding the position of president pro tempore of a village legislative authority is a law enforcement officer for purposes of the Revised Code when acting in the “mayor’s capacity as chief conservator of the peace within” his village. *See* R.C. 733.24; R.C. 1905.20(A). The chief probation officer of a juvenile court is likewise a law enforcement officer for purposes of the Revised Code. R.C. 2901.01(A)(11)(b); *see* R.C. 2151.14(B). Thus, a person holding the positions of chief probation officer of a juvenile court and president pro tempore of a village legislative authority holds two law enforcement positions at the same time when the person, as president pro tempore, acts in the mayor’s capacity as chief conservator of the peace within his village.

Prior Attorney General opinions have determined that a person may not hold two law enforcement positions with overlapping jurisdiction because the person will be expected to follow different law enforcement standards, policies, and techniques in the positions. *See, e.g.*, 1996 Op. Att’y Gen. No. 96-017; 1989 Op. Att’y Gen. No. 89-044. However, if the person does not discharge any law enforcement duties in one of the positions, the common law prohibition against the holding of dual law enforcement positions does not apply. *See* 1992 Op. Att’y Gen. No. 92-024; *see also* 1991 Op. Att’y Gen. No. 91-037.

Pursuant to the language of R.C. 2901.01(A)(11)(c), the president pro tempore of a village legislative authority is a law enforcement officer only when the president pro tempore acts in the “mayor’s capacity as chief conservator of the peace within” his village. In other words, a president pro tempore is not deemed a law enforcement officer unless he exercises the powers conferred upon a village mayor as chief conservator of the peace within the village.

A village mayor exercises his powers as chief conservator of the peace within the village when he exercises his law enforcement powers. *See, e.g.*, R.C. 733.30; R.C. 1905.20(A); 2001 Op. Att’y Gen. No. 2001-026 at 2-145 and 2-146. While a village mayor has law enforcement powers, a mayor may choose not to exercise such powers in his individual capacity. Instead, a village mayor may elect to leave the day-to-day enforcement of the laws of the state and village within the village to those law enforcement officers employed by the village to enforce such laws. *See* R.C. 737.15; R.C. 737.16; R.C. 737.18; R.C. 737.19.

102.08; Ohio Gov. Bar R. V, § 2(C). In light of this explicit grant of authority, we believe that it is proper for us to refrain from interpreting and applying the provisions of the Ohio Code of Judicial Conduct by way of a formal opinion of the Attorney General. *See* 1987 Op. Att’y Gen. No. 87-033 (syllabus, paragraph 3). Instead, we recommend that you consult with the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court for guidance concerning the professional responsibilities that will confront a president pro tempore of a village legislative authority who serves as the chief probation officer of a juvenile court when he presides, in his capacity as acting mayor, over a mayor’s court.

In such a situation, a village mayor does not exercise any law enforcement duties, and, as such, does not hold a law enforcement position for purposes of the common law prohibition against the holding of dual law enforcement positions. This means that the president pro tempore of a village legislative authority may serve as the chief probation officer of a juvenile court when the president pro tempore does not, as acting mayor, exercise his law enforcement powers.

A person thus is not barred by conflicts of interest from serving simultaneously as the chief probation officer of a juvenile court and president pro tempore of a village legislative authority, provided the person, as president pro tempore, does not exercise the law enforcement powers conferred upon a village mayor or participate in deliberations, discussions, negotiations, or votes concerning conveyances or contributions of property or money to the county for use by the juvenile court or contracts with the juvenile court to provide services for children on probation.

The sixth and seventh questions concern the applicability of charter provisions, resolutions, or ordinances, and federal, state, and local regulations. No federal or state regulation prohibits a person from serving simultaneously in the positions in question.⁶ Whether an applicable local charter provision, resolution, ordinance, or departmental regulation prohibits a person from serving in two positions at the same time is a question for local officials to answer. Therefore, absent a local charter provision, resolution, ordinance, or departmental regulation rendering the positions of chief probation officer of a juvenile court and president pro tempore of a village legislative authority incompatible, the positions are compatible.⁷

⁶ Except as provided in 5 U.S.C.S. § 1502(c) and 5 U.S.C.S. § 1503, if a local officer or employee is employed principally in connection with an activity that is financed in whole or in part by loans or grants made by the federal government, and exercises some function in connection with that activity, the local officer or employee may not be a candidate for elective office. *See* 5 U.S.C.S. § 1501(4); 5 U.S.C.S. § 1502(a)(3); *see also* 5 C.F.R. § 151.101-.122. This prohibition is commonly referred to as the Hatch Act.

Whether the Hatch Act applies in your situation is a question of fact that must be addressed by local officials or, ultimately, the courts. *See* 2009 Op. Att’y Gen. No. 2009-010, slip op. at 6 n.6. Guidance in answering this question may be provided by the United States Office for Special Counsel. *See* 5 U.S.C.S. § 1504. We therefore recommend that you contact that entity for guidance in your particular situation.

⁷ A collective bargaining agreement entered into by a county and its employees pursuant to R.C. Chapter 4117 may contain language that might prohibit an employee covered by the agreement from holding another public position. *See* R.C. 4117.03(A)(4); R.C. 4117.08(A); R.C. 4117.10(A). Whether the provisions of a collective bargaining agreement apply in a given

In conclusion, it is my opinion, and you are hereby advised that a person may serve simultaneously as the chief probation officer of a juvenile court and president pro tempore of a village legislative authority, provided the person, as president pro tempore, does not exercise the law enforcement powers conferred upon a village mayor or participate in deliberations, discussions, negotiations, or votes concerning conveyances or contributions of property or money to the county for use by the juvenile court or contracts with the juvenile court to provide services for children on probation. (1911 Op. Att’y Gen. No. 241, vol. II, p. 1180, overruled.)

Respectfully,



RICHARD CORDRAY
Ohio Attorney General

instance must be addressed on a case-by-case basis by the parties to the agreement. *See* 1991 Op. Att’y Gen. No. 91-065 at 2-311.