

July 16, 2001

OPINION NO. 2001-027

The Honorable Michael K. Allen
Hamilton County Prosecuting Attorney
William Howard Taft Building
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202-2151

Dear Prosecutor Allen:

You have requested an opinion whether a person who is appointed as an assistant prosecuting attorney for the exclusive purpose of handling criminal cases pending before the appellate courts¹ may serve simultaneously as a township trustee within the same county. You also wish to know whether such simultaneous service is permitted if the township has adopted a limited home rule government pursuant to R.C. Chapter 504.

The prevailing seven questions for determining whether a person may serve simultaneously in two public positions are as follows:

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 employment in another public position or the holding of another public office?
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 a conflict of interest between the two positions?

¹ You have informed us that the assistant prosecuting attorney is only responsible for performing criminal appellate work before the Ohio Supreme Court, Ohio's courts of appeals, and federal courts. The duties of the assistant prosecuting attorney do not include any matters related to the prosecution of criminal cases at the trial court level.

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

2000 Op. Att’y Gen. No. 2000-025 at 2-166 and 2-167.

The sixth and seventh questions focus on the applicability of charter provisions, resolutions, ordinances, and federal, state, and local departmental regulations. There are no applicable charter provisions, ordinances, or state or federal regulations in this instance. Whether there is an applicable local departmental regulation or township resolution is a matter for local officials to determine. We will assume, for purposes of this opinion, that there is no such regulation or resolution.

The first question of the compatibility analysis requires that we consider the application of R.C. 124.57 to each of these positions. R.C. 124.57 is the statute that prohibits certain officers and employees in the classified civil service from taking part in a variety of activities that occur as part of the regular political process and are partisan in nature.² *See generally Heidtman v. City of Shaker Heights*, 163 Ohio St. 109, 126 N.E.2d 138 (1955); *see also Gray v. City of Toledo*, 323 F. Supp. 1281 (N.D. Ohio 1971). According to the express language of the statute, “[n]o officer or employee in the classified service of the state, the several counties, cities, and city school districts thereof, and civil service townships” shall engage in the activities thereafter described. R.C. 124.57(A). *See* note two, *supra*.

We must first determine, therefore, whether a township trustee or assistant prosecuting attorney is a position within the classified civil service as described by the language of R.C. 124.57. If neither position is within the classified civil service as so described, then R.C. 124.57 will not apply so as to prohibit a person from holding both of those positions at the same time.

² Division (A) of R.C. 124.57 thus reads as follows:

No officer or employee in the classified service of the state, the several counties, cities, and city school districts thereof, and civil service townships, shall directly or indirectly, orally or by letter, solicit or receive, or be in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political party or for any candidate for public office; nor shall any person solicit directly or indirectly, orally or by letter, or be in any manner concerned in soliciting any such assessment, contribution, or payment from any officer or employee in the classified service of the state and the several counties, cities, or city school districts thereof, or civil service townships; nor shall any officer or employee in the classified service of the state, the several counties, cities, and city school districts thereof, and civil service townships, be an officer in any political organization or take part in politics other than to vote as the officer or employee pleases and to express freely political opinions. (Emphasis added.)

The position of township trustee is in the unclassified civil service because it is an elected position. *See* R.C. 124.11(A)(1); R.C. 505.01. The position of assistant prosecuting attorney is also in the unclassified civil service. R.C. 124.11(A)(11). Because neither position is a classified employment within the terms of R.C. 124.57, the prohibition set forth in that statute does not apply, and so does not operate to prevent a person from holding both of those positions at the same time.

The second question asks whether the empowering statutes of either position limit a person from being employed in another public position or holding another public office. No statutory provision prohibits a person from serving simultaneously in the positions of township trustee and assistant prosecuting attorney. *Cf.* R.C. 3.11 (“[n]o person shall hold at the same time by appointment or election more than one of the following offices: sheriff, county auditor, county treasurer, clerk of the court of common pleas, county recorder, prosecuting attorney, and probate judge”); R.C. 309.02 (“[n]o prosecuting attorney shall be a member of the general assembly of this state or mayor of a municipal corporation”); R.C. 3313.13 (“no prosecuting attorney ... shall be a member of a board of education”). This question thus 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. A township trustee, as an elected official, *see* R.C. 505.01, serves and is responsible to the people who elected him. An assistant prosecuting attorney, on the other hand, is appointed by and serves at the pleasure of the prosecuting attorney. *See* R.C. 309.06. *See generally* 1991 Op. Att’y Gen. No. 91-011 at 2-58 (“individuals in the unclassified service hold their positions at the pleasure of their appointing authority, and are subject to dismissal from their positions without cause”). The positions thus serve different masters and neither is required to assign duties to, or supervise, the other. Accordingly, neither position is subordinate to, or in any way a check upon, the other.³

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 answered by the interested persons because they may more precisely determine the time constraints imposed by each position. 1999 Op. Att’y Gen. No. 99-027 at 2-177. It seems likely, however, that the duties of these two positions can be discharged competently by the same person if there is no direct conflict in the working hours of each position.

The fifth and final question asks whether there is a conflict of interest between the two positions.⁴ A person is prohibited from holding two public positions simultaneously if he would

³ See the discussion, however, on conflicts of interest, *infra*.

⁴ The Ohio Ethics Commission is authorized to render opinions concerning the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43. *See* R.C. 102.08(A). The authority to interpret the rules and canons set forth in the Supreme Court Rules for the Government of the Bar of Ohio and the Code of Professional Responsibility is vested in the

be subject to divided loyalties and conflicting duties or be exposed to the temptation of acting other than in the best interest of the respective agencies or offices he serves. 2000 Op. Att’y Gen. No. 2000-025 at 2-168.

In 1988 Op. Att’y Gen. No. 88-049 the Attorney General advised that, because of an impermissible conflict of interest between the positions of township trustee and prosecuting attorney, the positions of assistant prosecuting attorney appointed by such prosecuting attorney and township trustee are incompatible. In this respect, the opinion stated at 2-223 and 2-224:

[B]ecause an assistant prosecuting attorney is empowered to act for, and in place of, the prosecuting attorney in most matters, ... the assistant is subject to the same limitations as the prosecuting attorney and may not hold any office that the prosecuting attorney may not hold. Thus, statutory, as well as common law, restrictions on a prosecuting attorney’s outside activities have been held applicable to assistant prosecuting attorneys. Accordingly, if the positions of prosecuting attorney and township trustee are incompatible, the positions of assistant prosecuting attorney and township trustee are, as a general matter, also incompatible....

....

It is readily apparent that a prosecuting attorney who also serves as a township trustee will, in that circumstance, be subject to a conflict of interest. In this regard, the prosecuting attorney is designated by [R.C. 309.09] to serve as legal counsel to the board of township trustees. Prior [A]ttorney [G]eneral opinions have concluded that an individual who functions as the legal adviser to a particular public board of which he is also a member would be subject, *inter alia*, to conflicting duties and interests in both capacities....⁵ Thus, a prosecuting

Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court. Ohio Gov. Bar R. V § 2(C); *see* R.C. 102.08(A). In light of this grant of authority, we believe that it is proper to refrain from interpreting such ethical provisions, canons, and rules by way of a formal opinion. 1987 Op. Att’y Gen. No. 87-033 (syllabus, paragraph three). It is, therefore, recommended that you contact these agencies for advice and interpretations concerning the ethical and professional responsibilities that will confront an assistant prosecuting attorney who also serves as a township trustee.

⁵ The rationale supporting the conclusion that a prosecuting attorney may not serve as a member of a board or agency for which he also serves as statutory legal counsel is that the prosecuting attorney would be able to advise the board or agency in his own interest. 1988 Op. Att’y Gen. No. 88-049 at 2-224; 1983 Op. Att’y Gen. No. 83-030 at 2-113; 1948 Op. Att’y Gen. No. 4130, p. 594, at 597. As explained in 1948 Op. Att’y Gen. No. 4130, p. 594, at 597:

It appears very clear that the person who is by law the legal adviser of a board could not be appointed by that board to a responsible position without

attorney may not serve upon a board of township trustees for which he also acts as legal adviser and counsel pursuant to R.C. 309.09(A) [now R.C. 309.09(B)]. Similarly, it follows that an assistant appointed by such prosecuting attorney pursuant to R.C. 309.06 also may not serve upon such board of township trustees. (Citations omitted and footnote added.)

More recent opinions, however, have questioned the proposition that an assistant prosecuting attorney may not hold a position that the prosecuting attorney is prevented from holding. Instead, these opinions have determined that, “the fact that an assistant prosecuting attorney may be authorized to act for and in the place of the prosecuting attorney is insufficient in and of itself to find that an assistant prosecuting attorney may not hold a position that the prosecuting attorney may not hold.” 1999 Op. Att’y Gen. No. 99-027 at 2-176 and 2-177; *see* 1997 Op. Att’y Gen. No. 97-044; 1997 Op. Att’y Gen. No. 97-034; 1992 Op. Att’y Gen. No. 92-041; *see also* *Rose v. Village of Wellsville*, 63 Ohio Misc. 2d 9, 613 N.E.2d 262 (C.P. Columbiana County 1993); 1986 Op. Att’y Gen. No. 86-035; 1954 Op. Att’y Gen. No. 3930, p. 307. As explained in 1999 Op. Att’y Gen. No. 99-027 at 2-175 and 2-176:

[A]n assistant prosecuting attorney does not act for or stand in the place of the prosecuting attorney in a particular matter unless so authorized and directed by the prosecuting attorney. An assistant prosecuting attorney is not, by virtue of his appointment to that position, conferred all of the powers, duties, and responsibilities of the prosecuting attorney. Nor is he empowered to act for or in the place of the prosecuting attorney in all matters. Rather, an assistant prosecuting attorney may perform only those duties or functions that the prosecuting attorney assigns to him. Thus, it is only with regard to those duties assigned to him by the prosecuting attorney that an assistant prosecuting attorney acts for or in the place of the prosecuting attorney.

Our review of the case law of Ohio and other jurisdictions also discloses no authority for the more general proposition that statutory restrictions upon the outside employment of a public officer are applicable to his assistants. The general principles of law that govern the conduct of assistants of public officers other than prosecuting attorneys thus do not compel the conclusion that an assistant of a public officer is not permitted to hold a position that his appointing officer is statutorily prohibited from holding. Accordingly, there is no antecedent or contemporary legal support for concluding that an assistant prosecuting attorney may not hold a position that the prosecuting attorney may not hold. (Citations and footnote omitted.)

violating the generally accepted rules as to incompatibility of offices. As such legal adviser it would manifestly be within his power to advise the board in his own interest and while he could not be said to hold a direct check or control over himself, as such officer, he would be subjected to the temptation to mold his advice to further his own interests.

Thus, these opinions have advised that the resolution of the compatibility issue of conflict of interest “in the case of an assistant prosecuting attorney who wishes to hold another public position requires a factual analysis of the particular duties and responsibilities assigned to and to be performed by the individual in each of the two positions.” 1997 Op. Att’y Gen. No. 97-034 at 2-198 and 2-199; *accord* 1999 Op. Att’y Gen. No. 99-027 at 2-178; 1997 Op. Att’y Gen. No. 97-044 at 2-273 and 2-274. And where the facts in a particular situation demonstrate that an assistant prosecuting attorney performs, on behalf of the prosecuting attorney, duties that are confined to certain categories of cases or matters, or certain clients of the prosecuting attorney, that in no way conflict with any of the duties and responsibilities the assistant undertakes in the other position, then the assistant may hold the other position even though the prosecuting attorney would otherwise be prohibited from serving in that position. 1992 Op. Att’y Gen. No. 92-041 at 2-164; 1986 Op. Att’y Gen. No. 86-035 at 2-184 n.2; *see also* 1999 Op. Att’y Gen. No. 99-027; 1997 Op. Att’y Gen. No. 97-044; 1997 Op. Att’y Gen. No. 97-034; 1988 Op. Att’y Gen. No. 88-086. *But cf.* 1970 Op. Att’y Gen. No. 70-053 (an assistant prosecuting attorney, even though he serves in a limited capacity as a special assistant prosecutor may not hold the position of mayor of a municipality since the prosecuting attorney is prohibited by statute from serving as mayor).

1988 Op. Att’y Gen. No. 88-049 advised that an assistant prosecuting attorney may not serve upon a board of township trustees for which the prosecuting attorney acts as legal adviser and counsel pursuant to R.C. 309.09. In so concluding the opinion did not evaluate the issue of conflict of interest from the standpoint of the particular duties and responsibilities assigned to and to be performed by the assistant prosecuting attorney. It is, therefore, appropriate to reexamine the compatibility of the positions of township trustee and assistant prosecuting attorney within the same county.

R.C. 309.09(B) provides, in part:

The prosecuting attorney shall be the legal adviser for all township officers, boards, and commissions, unless the township has adopted a limited home rule government pursuant to [R.C. Chapter 504] and has not entered into a contract to have the prosecuting attorney serve as the township law director, in which case the township law director, whether serving full-time or part-time, shall be the legal adviser for all township officers, boards, and commissions. When the board of township trustees finds it advisable or necessary to have additional legal counsel, it may employ an attorney other than the township law director or the prosecuting attorney of the county, either for a particular matter or on an annual basis, to represent the township and its officers, boards, and commissions in their official capacities and to advise them on legal matters.

A prosecuting attorney thus is required by R.C. 309.09(B) to provide legal advice to a board of township trustees within his county, and to prosecute and defend any action that may affect the board, unless the board provides otherwise. *Kline v. Board of Township Trustees*, 13 Ohio St. 2d 5, 7-8, 233 N.E.2d 515, 517 (1968). In order to discharge this responsibility, a prosecuting attorney may assign to one or more assistant prosecuting attorneys the task of directly advising the board on specific legal questions and representing the board as legal counsel in specific legal matters. R.C. 309.06(A); 1999 Op. Att’y Gen. No. 99-027 at 2-173 and 2-174. *See generally* 1945 Op. Att’y Gen. No. 184, p. 163, at 164 (“[i]t is obvious that in a county where a number of assistants are required, a great many of the duties devolving upon the prosecuting attorney under the law must be performed by his assistants”). When such an assignment occurs, the assistant prosecuting attorney acts for the prosecuting attorney. 1999 Op. Att’y Gen. No. 99-027 at 2-175 and 2-176; 1945 Op. Att’y Gen. No. 184, p. 163, at 166.

In regard to your specific inquiry, you have informed us that the assistant prosecuting attorney is responsible for representing the State of Ohio in criminal cases pending before the appellate courts.⁶ *See* note one, *supra*. As an assistant prosecuting attorney he does not provide legal advice to, or represent the township in any suit or action involving, the township or its officers, boards, or commissions. In addition, you have stated that “most of the township[’]s legal affairs are handled by a private attorney for the township who is not employed as an assistant prosecuting attorney.” *See generally* R.C. 309.09(B) (a board of township trustees may employ an attorney other than the prosecuting attorney to represent the township).

Because the assistant prosecuting attorney will not be representing or providing legal advice to the township’s board of trustees, he will not be subject to the impermissible conflict of interest that exists for either the prosecuting attorney, or for an assistant prosecuting attorney who is assigned to advise and represent the board. Thus, with respect to your specific situation, the conflict of interest that occurs when a person is required to advise a board of which he is a member does not exist. Accordingly, if a person who serves simultaneously in the positions of assistant prosecuting attorney and township trustee within the same county does not serve as the

⁶ For the purpose of this opinion we will presume that the assistant prosecuting attorney will not be responsible for prosecuting any criminal actions against himself as a township trustee, the other trustees with whom he serves, or other township officials or employees, *see, e.g.*, R.C. 2921.41 (defining the criminal offense of theft in office), and that his exercise of prosecutorial discretion is supervised by either the prosecuting attorney or another member of the prosecuting attorney’s office. *See generally State ex rel. Speeth v. Carney*, 163 Ohio St. 159, 126 N.E.2d 449 (1955) (syllabus, paragraph ten) (“[i]n the absence of evidence to the contrary, public officials, administrative officers, and public authorities, within the limits of the jurisdiction conferred upon them by law, will be presumed to have properly performed their duties in a regular and lawful manner and not to have acted illegally or unlawfully”); 1999 Op. Att’y Gen. No. 99-027 at 2-181 (“[a]s an assistant prosecuting attorney, the person has an ethical duty to withdraw from any matter or proceeding in which he might not be able to act in the best interest of his employer or client”).

legal adviser to the board of township trustees, no conflict of interest exists to render those two positions incompatible.⁷

Let us next consider a conflict of interest that the assistant prosecuting attorney may confront in conjunction with his service as a township trustee. A township trustee may have to discuss, or to deliberate, negotiate, or vote upon, whether to “employ an attorney other than ... the prosecuting attorney of the county, either for a particular matter or on an annual basis, to represent the township and its officers, boards, and commissions in their official capacities and to advise them on legal matters.” R.C. 309.09(B). In such a situation, it may be difficult for the township trustee to set aside his loyalty to the prosecuting attorney that employs him. Such a predisposition of loyalty could prevent the township trustee from making completely objective decisions. *See* 1997 Op. Att’y Gen. No. 97-044 at 2-274. Moreover, the township trustee may be unable to perform his duties with respect to such a matter in a completely objective manner because of the employment relationship he has with the prosecuting attorney. *See id.* at 2-277.

However, it does not necessarily follow that a person who wishes to serve in two public positions is prohibited from such dual service simply because he may face a conflict of interest in that capacity. As our prior compatibility opinions have advised, consideration of various factors may demonstrate that the conflict of interest may be sufficiently avoided or eliminated entirely, thus making possible service by the same person in two or more positions. *See, e.g.*, 2000 Op.

⁷ Because the impermissible conflict of interest that results when a person advises a board of which he is a member does not exist to render the positions of assistant prosecuting attorney and township trustee within the same county incompatible if the assistant prosecuting attorney does not advise the board of township trustees, 1988 Op. Att’y Gen. No. 88-049 is hereby clarified to the extent that it concluded otherwise. The opinion, however, remains valid insofar as it concluded that, if a person who serves simultaneously in the positions of assistant prosecuting attorney and township trustee is required by the prosecuting attorney to serve as the legal adviser to the board of township trustees, the conflict that results from such service as the board’s legal adviser renders the positions incompatible.

In addition, the following opinions have found the position of assistant prosecuting attorney incompatible with another position because the prosecuting attorney was statutorily required to provide legal representation and advice to the other position: 1983 Op. Att’y Gen. No. 83-030 (assistant prosecuting attorney and member of a county board of mental retardation and developmental disabilities are incompatible); 1971 Op. Att’y Gen. No. 71-037 (assistant prosecuting attorney and administrative assistant to a board of county commissioners are incompatible); 1963 Op. Att’y Gen. No. 25, p. 113 (assistant prosecuting attorney and township legal counsel are incompatible); 1957 Op. Att’y Gen. No. 1380, p. 715 (assistant prosecuting attorney and veterans service office are incompatible). Again, because we have concluded that there is no conflict of interest when an assistant prosecuting attorney is not required to advise a board of which he is a member, we question the conclusions reached in these opinions, but do not summarily overrule them since their conclusions may be warranted on other grounds.

Att’y Gen. No. 2000-025 at 2-170. Factors to be considered in that regard include the probability of the conflict, the ability of the person to remove himself from the conflict (should it arise), whether the person exercises decision-making authority in both positions, and whether the conflict relates to the primary functions of each position, or to financial or budgetary matters. *Id.*

It seems unlikely that a board of township trustees will find it necessary to consider the employment of an attorney other than the prosecuting attorney as a regular and continuing part of the board’s duties. R.C. 309.09(B) authorizes a board of township trustees, when it finds it advisable or necessary to have additional legal counsel, to employ an attorney other than the prosecuting attorney. The statute permits the board to retain the services of additional counsel either on an annual basis or for particular matters. Thus, the question of hiring additional counsel will generally be something that the board of township trustees will have to consider fairly infrequently. *See generally* 1974 Op. Att’y Gen. No. 74-024 (syllabus, paragraph two) (while a board of township trustees may employ legal counsel in addition to the prosecuting attorney, “such counsel may not act as the sole legal representative of the township and its officers”).

Further, when such a matter does come before the board, the township trustee who also serves as assistant prosecuting attorney will be able to remove himself from any deliberations, negotiations, or votes in the matter since the board of township trustees is capable of carrying out its duties when one of its members abstains from a matter. 2000 Op. Att’y Gen. No. 2000-025 at 2-170. *See generally* *Saxon v. Kienzle*, 4 Ohio St. 2d 47, 48, 212 N.E.2d 604, 605 (1965) (“[i]n the absence of a statute to the contrary, any action by a board requires that a quorum participate therein, and that a majority of the quorum concur”). In addition, the township trustee is under an obligation to abstain from participating in any matter in which his ability to carry out his duty in a completely objective fashion might be impaired. 2000 Op. Att’y Gen. No. 2000-025 at 2-170. Accordingly, the potential for this conflict of interest does not prohibit a person from serving simultaneously as a township trustee and assistant prosecuting attorney, provided that as a township trustee he does not participate in any deliberations, discussions, negotiations, or votes concerning the township’s employment of an attorney other than the prosecuting attorney.

You also have asked whether a person who is appointed as an assistant prosecuting attorney for the exclusive purpose of representing the State of Ohio in criminal cases pending before the appellate courts may serve simultaneously as a township trustee if the township has adopted a limited home rule government pursuant to R.C. Chapter 504. R.C. 504.01 authorizes a township to adopt a limited home rule government under which the township exercises limited powers of local self-government and limited police powers as authorized by R.C. Chapter 504. Pursuant to R.C. 504.04(A), a limited home rule government township may “[e]xercise all powers of local self-government within the unincorporated area of the township, other than powers that are in conflict with general laws,” and may “[a]dopt and enforce within the unincorporated area of the township local police, sanitary, and other similar regulations that are not in conflict with general laws or otherwise prohibited by [R.C. 504.04(B)].”

The board of township trustees of each limited home rule government township is required to appoint a township law director to be the township's legal adviser, unless the board enters into a contract with the prosecuting attorney whereby the prosecuting attorney serves as the township law director. R.C. 504.15. A potential conflict of interest thus exists in that the township trustees may have to discuss, or to deliberate, negotiate, or vote upon whether to hire someone other than the prosecuting attorney to act as township law director or to enter into an employment contract with the prosecuting attorney.⁸ In addition, if the board of township trustees contracts with the prosecuting attorney to serve as township law director, a potential conflict may exist because the board may have to discuss, or to deliberate, negotiate, or vote upon the exercise of enforcement powers by the prosecuting attorney, as township law director, under R.C. 504.08.⁹ In such situations, an assistant prosecuting attorney who serves as a township trustee is exposed to the temptation of acting other than in the best interest of the township when participating in deliberations, discussions, negotiations, or votes related to the township's employment of the prosecuting attorney as township law director or the exercise of enforcement powers by the prosecuting attorney, as township law director, under R.C. 504.08. And again, the township trustee may be influenced to perform his duties with respect to such matters in a less than completely objective manner because of the employment relationship he has with the prosecuting attorney. *See* 1997 Op. Att'y Gen. No. 97-044 at 2-277.

As in the case of the previously addressed conflict that occurs when a township trustee participates in deliberations, discussions, negotiations, or votes relating to the employment of an attorney other than the prosecuting attorney, it is only infrequently that the township trustee will

⁸ Provisions of the Ohio ethics law and R.C. Chapter 2921 address the circumstances in which a public official or employee is prohibited from using the authority or influence of his office or employment to secure anything of value that substantially and improperly influences the official or employee in the exercise of his duties, and from having an interest in a public contract. *See, e.g.*, R.C. 102.03(D) (no public official or employee shall use the authority or influence of office or employment to secure anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties); R.C. 2921.42(A)(4) (a public official may not knowingly "[h]ave an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected"). An assistant prosecuting attorney who also serves as a township trustee will wish to consider the application of these provisions should the board of township trustees contemplate entering into a contract with the county prosecuting attorney to provide legal services to the township. We would recommend that the assistant prosecuting attorney consult with the Ohio Ethics Commission for guidance and advice in that situation. *See* note four, *supra*.

⁹ Pursuant to R.C. 504.08, a board of township trustees may authorize the prosecuting attorney, as township law director, to enforce the township's resolutions by injunction or lien or to take any measure for the collection of an unpaid money judgment that is authorized in R.C. 504.07(D).

be required to participate in deliberations, discussions, negotiations, or votes concerning the township's employment of the prosecuting attorney as township law director or the exercise of enforcement powers by the prosecuting attorney, as township law director, under R.C. 504.08. Further, the township trustee is able to easily remove himself from any such deliberations, discussions, negotiations, or votes. Accordingly, this potential conflict does not bar a person from serving simultaneously as a township trustee of a township that has adopted a limited home rule government pursuant to R.C. Chapter 504 and assistant prosecuting attorney, provided that as a township trustee he does not participate in any deliberations, discussions, negotiations, or votes concerning the township's employment of the prosecuting attorney as township law director or the exercise of enforcement powers by the prosecuting attorney, as township law director, under R.C. 504.08.

Finally, if a prosecuting attorney serves as a township law director, an assistant prosecuting attorney who is appointed for the exclusive purpose of handling criminal cases pending before the appellate courts is not subject to any impermissible conflicts of interest when he serves as a trustee for that township.¹⁰ Therefore, a person who is appointed as an assistant

¹⁰ A prosecuting attorney who serves as a township law director is required to prosecute any violation of a township resolution adopted under R.C. Chapter 504. *See* R.C. 504.15; *see also* R.C. 504.07; R.C. 504.08. An assistant prosecuting attorney who serves as a township trustee would be subject to an impermissible conflict of interest if he were required to prosecute such violations since his actions as an assistant prosecuting attorney in enforcing the township's resolutions could benefit the township monetarily, and thus impair his judgment as an assistant prosecuting attorney. *See generally* R.C. 504.05 (a "board of township trustees may impose a civil fine for a violation of a resolution adopted pursuant to [R.C. Chapter 504]"); R.C. 504.07 (fines for violations of township resolutions are deposited into the township general fund); R.C. 504.08(B) (unpaid fines are to "be collected as other taxes, returned to the township, and placed in the township general fund"). Accordingly, an assistant prosecuting attorney who serves as a township trustee may not prosecute any violation of a township resolution adopted under R.C. Chapter 504. *See generally* 1985 Op. Att'y Gen. No. 85-052 at 2-193 (a person may not serve simultaneously as a member of a township zoning commission and township zoning inspector within the same township since the person "would be in the position of both making recommendations as to what the township zoning plan should say, and enforcing the provisions of that plan" (citations omitted)); 1952 Op. Att'y Gen. No. 1289, p. 257, at 259 ("[i]n the case of an arrest under [G.C. 3180-48 (now R.C. 519.23 and R.C. 519.99)], however, a member of the zoning commission acting in his capacity as justice of the peace might have to determine whether the offense had been committed and accordingly discharge the person arrested or bind him over to a court of competent jurisdiction as the case may be. In such a situation [the person's] interest in having the zoning regulation enforced as one who participated in its development and his duty ... to consider only the facts regarding the violation of the regulation might very well present [him] with conflicting considerations").

prosecuting attorney for the exclusive purpose of handling criminal cases pending before the appellate courts may serve simultaneously as a township trustee within the same county, regardless of whether the township has adopted a limited home rule government pursuant to R.C. Chapter 504. However, as township trustee, he may not participate in any deliberations, discussions, negotiations, or votes concerning the township's employment of an attorney other than the prosecuting attorney, the township's employment of the prosecuting attorney as township law director, or the exercise of enforcement powers by the prosecuting attorney, as township law director, under R.C. 504.08.

Based upon the foregoing, it is my opinion, and you are hereby advised that a person who is appointed as an assistant prosecuting attorney for the exclusive purpose of handling criminal cases pending before the appellate courts may serve simultaneously as a township trustee within the same county, regardless of whether the township has adopted a limited home rule government pursuant to R.C. Chapter 504. However, as township trustee, he may not participate in any deliberations, discussions, negotiations, or votes concerning the township's employment of an attorney other than the prosecuting attorney, the township's employment of the prosecuting attorney as township law director, or the exercise of enforcement powers by the prosecuting attorney, as township law director, under R.C. 504.08. (1988 Op. Att'y Gen. No. 88-049, clarified; 1983 Op. Att'y Gen. No. 83-030; 1971 Op. Att'y Gen. No. 71-037; 1963 Op. Att'y Gen. No. 25, p. 113; 1957 Op. Att'y Gen. No. 1380, p. 715, questioned.)

Respectfully,

BETTY D. MONTGOMERY
Attorney General

No township resolution adopted pursuant to R.C. Chapter 504, however, creates a criminal offense or imposes criminal penalties. R.C. 504.04(B); *see* R.C. 504.07; R.C. 504.08. Therefore, an assistant prosecuting attorney who is appointed for the limited purpose of handling criminal cases pending before the appellate courts would not be required to prosecute any violation of a township resolution adopted under R.C. Chapter 504.

July 16, 2001

The Honorable Michael K. Allen
Hamilton County Prosecuting Attorney
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Cincinnati, Ohio 45202-2151

SYLLABUS:

2001-027

A person who is appointed as an assistant prosecuting attorney for the exclusive purpose of handling criminal cases pending before the appellate courts may serve simultaneously as a township trustee within the same county, regardless of whether the township has adopted a limited home rule government pursuant to R.C. Chapter 504. However, as township trustee, he may not participate in any deliberations, discussions, negotiations, or votes concerning the township's employment of an attorney other than the prosecuting attorney, the township's employment of the prosecuting attorney as township law director, or the exercise of enforcement powers by the prosecuting attorney, as township law director, under R.C. 504.08. (1988 Op. Att'y Gen. No. 88-049, clarified; 1983 Op. Att'y Gen. No. 83-030; 1971 Op. Att'y Gen. No. 71-037; 1963 Op. Att'y Gen. No. 25, p. 113; 1957 Op. Att'y Gen. No. 1380, p. 715, questioned.)