January 22, 1996

OPINION NO. 96-008

The Honorable Rebecca J. Ferguson
Preble County Prosecuting Attorney
Courthouse, Third Floor
Eaton, Ohio 45320

Dear Prosecutor Ferguson:

You have requested an opinion regarding the compatibility of the public positions of clerk-treasurer of a non-charter village and clerk of a joint township fire district. After reviewing the powers and duties of the respective positions, I believe that the positions are compatible.

In 1979 Op. Att'y Gen. No. 79-111, one of my predecessors set forth seven questions that must be answered in the negative before it may be concluded that two public positions are compatible. The seven questions set forth in that opinion 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 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?

Id. at 2-367 and 2-368.

Questions six and seven are of a local nature, and it is assumed, for purposes of this opinion, that there are no local charter provisions, ordinances or regulations that restrict the outside employment by a clerk-treasurer of a village or clerk of a joint township fire district. There are no

applicable state or federal regulations. In addition, question four, which relates to an individual's ability to physically discharge the duties of both positions, requires the resolution of factual questions that are best answered by the concerned parties. It appears, however, that it is physically possible for one person to carry out the duties of both a clerk-treasurer of a village and a clerk of a joint township fire district.

Question number one asks whether either of the positions is a classified position 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. Since R.C. 124.57 does not apply to officers and employees in the service of a village or joint township fire district, *see* 1994 Op. Att'y Gen. No. 94-013 at 2-58; 1989 Op. Att'y Gen. No. 89-069 at 2-315, the prohibition set forth therein does not apply to the officers and employees of these political subdivisions.

Question two asks whether the empowering statutes of either position limit outside employment. I am aware of no statutory provision that would prohibit the simultaneous holding of the positions of clerk-treasurer of a village and clerk of a joint township fire district.

Question three asks whether one position is subordinate to, or in any way a check upon, the other. Villages and joint township fire districts are separate political subdivisions. It does not appear that an officer or employee of one subdivision would be subordinate to, or act as a check upon, an officer or employee of the other subdivision. Neither subdivision oversees the operations of the other in any way. Village clerk-treasurers are elected by, and responsible to, the public. *See* R.C. 733.26. A clerk of a joint township fire district is employed by, and responsible to, the board of fire district trustees. *See* R.C. 505.371. Neither position is subordinate to, or a check upon, the other position.

Question five asks whether there is a conflict of interest between the two positions. An individual may not serve simultaneously in 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.

Pursuant to R.C. 5705.28-.32, the taxing authority of each subdivision must prepare, adopt, and submit an annual tax budget to the county budget commission. For purposes of R.C. Chapter 5705, both a village and a joint township fire district are defined as a "subdivision" and the council or other legislative authority of a village and the board of fire district trustees are "taxing authorities." R.C. 5705.01. The county budget commission revises and adjusts the estimate of balances and receipts from all sources for each fund within each subdivision's tax budget. R.C. 5705.32; *see* R.C. 5705.31. Based on the revised and adjusted estimates, the county budget commission then adjusts the levies of the village and joint township fire district within the limits of the law. R.C. 5705.31. The determination of the county budget commission directly affects the potential revenue of each subdivision. 1988 Op. Att'y Gen. No. 88-011.

Each subdivision is permitted to participate in the determinations of the county budget commission. R.C. 5705.32(E)(2) authorizes the participation of the village and joint township fire district by stating: "Before the final determination of the amount to be allotted to each subdivision from any source, the commission shall permit representatives of each subdivision ... to appear before it to explain its financial needs."

The work of the county budget commission contemplates significant input from the village and joint township fire district. The clerk-treasurer of a village and clerk of a joint township fire district, as the fiscal officers of their respective subdivisions, R.C. 5705.01(D), may be called upon to assist in or to make the presentation to the county budget commission on behalf of the village legislative authority or the board of fire district trustees, respectively. Prior opinions of the Attorney General have determined that a potential conflict of interest is present where one person who owes loyalty to two governmental entities must advocate a position on behalf of one to the potential detriment of the other. 1993 Op. Att'y Gen. No. 93-048 at 2-236; 1992 Op. Att'y Gen. No. 92-053 at 2-217. An argument that a subdivision is entitled to a certain level of funds means a reduced level of funds are available for other subdivision's use. Thus, your situation raises a potential conflict with regard to distribution of a limited pool of funds, in this case inside millage, generated by the unvoted property tax.

In addition to the potential conflict resulting from the competition for funds generated by inside millage, a clerk-treasurer of a village and a clerk of a joint township fire district are both required to determine the validity of all warrants to be paid from their respective subdivisions. Both a clerk-treasurer of a village and a clerk of a joint township fire district have a duty to render unbiased determinations. If an individual who simultaneously holds the positions of clerk-treasurer of a village and clerk of a joint township fire district were required to determine the validity of a village warrant made payable to the joint township fire district, or a warrant of the joint township fire district made payable to the village, the individual would be subject to influences that may prevent him from making a completely objective determination. This presents a potential conflict of interest. *See* 1980 Op. Att'y Gen. No. 80-035 at 2-149 (a potential conflict of interest occurs when an individual'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").

In 1979 Op. Att'y Gen. No. 79-111, one of my predecessors stated that the mere possibility of a conflict of interest does not automatically render two public positions incompatible. Rather, each potential conflict must be viewed in light of "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.* at 2-372.

With respect to your specific inquiry, it is only speculative whether the individual in question will be ordered to appear before the county budget commission to defend the budget of the village or joint township fire district, or that he will be required to determine the validity of a village warrant

made payable to the joint township fire district or a warrant of the joint township fire district made payable to the village. It is generally unlikely that a clerk-treasurer of a village and a clerk of a joint township fire district will be required to defend their subdivision's tax budget since neither exercises decision-making authority with respect to the preparation of their subdivision's budget. It is also unlikely that the village and joint township fire district will issue warrants that are payable to the joint township fire district or the village, respectively. In addition, the defense of a subdivision's budget, and the determination of the validity of warrants would constitute only a small fraction of the duties of the respective positions. Thus, the potential conflicts of interest do not involve the primary duties of each position.

Although a clerk-treasurer of a village may be required to defend the village's tax budget before the county budget commission or determine the validity of a warrant payable to the joint township fire district, the possibility that he would not use his best judgment in defending the budget or determining the validity of the warrant merely because he is employed as the clerk of the joint township fire district is too remote to render the positions incompatible. This is especially true in light of the fact that while each taxing authority submits a tentative budget, it is the county budget commission which actually allocates money to the various subdivisions after adjusting the rates of taxation, fixing the amount of taxes to be levied, and adjusting the estimates of balances and receipts from available sources, *see* R.C. 5705.31-.32, and the fact that the act of determining the validity of a warrant is ministerial in nature, *see, e.g., State ex rel. Reynoldsburg v. Banks*, 37 Ohio St. 2d 56, 307 N.E.2d 260 (1974). The same analysis applies to a clerk of a joint township fire district. Moreover, given that the conflicts are likely to be rare, the fact that the conflicts involve budgetary matters is not sufficient in and of itself to find that the conflicts are not remote and speculative. It appears, therefore, that the potential conflicts of interest are remote and speculative, and that such potential conflicts do not render the positions about which you ask incompatible.

Based on the foregoing, it is my opinion, and you are hereby advised that the positions of clerk-treasurer of a non-charter village and clerk of a joint township fire district are compatible.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

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SYLLABUS: 96-008

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