August 19, 2002

The Honorable David Kelley
Adams County Prosecuting Attorney
110 West Main Street
Courthouse
West Union, Ohio 45693

SYLLABUS: 2002-021

A person may serve simultaneously as clerk-treasurer of the Village of Manchester and clerk of Manchester Township, provided that he does not prepare competing annual tax budgets for the village and township and present those budgets to the county budget commission.

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OPINION NO. 2002-021

The Honorable David Kelley
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Dear Prosecutor Kelley:

You have requested an opinion whether the positions of clerk-treasurer of the Village of Manchester and clerk of Manchester Township are compatible. You have informed us that the Village of Manchester is a nonchartered village[1] located within Manchester Township.

The following seven questions are used for determining whether a person may serve simultaneously in 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 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?

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[1] Ohio Const. art. XVIII, § 2 authorizes the General Assembly to enact general laws to provide for the incorporation and government of municipal corporations, which are cities and villages, Ohio Const. art. XVIII, § 1; R.C. 703.01. If a municipal corporation should prefer a form of government different from those authorized by the General Assembly, the municipal corporation may frame and adopt a charter for its government pursuant to Ohio Const. art. XVIII, § 7 and may, subject to the provisions of Ohio Const. art. XVIII, § 3, exercise under such charter all powers of local self-government. 1954 Ohio Att'y Gen. No. 4244, p. 475. Thus, general laws enacted by the General Assembly prescribe several forms of government for nonchartered villages, while the form of government for villages that adopt a charter is established by the charter. *See* 1989 Op. Att'y Gen. No. 89-050 at 2-213 and 2-214.

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, 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.

Questions six and seven concern the applicability of charter provisions, resolutions, ordinances, and federal, state, and local regulations. In this instance, there are no applicable charter provisions, resolutions, ordinances, or state or federal regulations. Whether there is an applicable local departmental regulation is a matter for local officials to determine. It is assumed, for the purpose of this opinion, that there is no such local departmental regulation.

The first question concerns the application of R.C. 124.57 to each of these positions. R.C. 124.57 is the statute that prohibits an officer or employee in the classified service of the state, or of a county, city, city school district or civil service township from taking part in a variety of activities that occur as part of the regular political process and are partisan in nature.[2] In simple terms, R.C. 124.57 does the following: it prohibits an officer or employee in the classified service from running for or holding a partisan political office, or engaging in other partisan political activities, and it prevents a partisan political officeholder from serving simultaneously as an officer or employee in the classified service. 2001 Op. Att'y Gen. No. 2001-034 at 2-203; *see* 2 Ohio Admin. Code 123:1-46-02(C); *see also Heidtman v. City of Shaker Heights*, 163 Ohio St. 109, 126 N.E.2d 138 (1955).

We must first determine, therefore, whether a village clerk-treasurer or township clerk is a position that is subject to the prohibition of R.C. 124.57. R.C. 124.57 applies only to officers

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[2] R.C. 124.57(A) provides, in part, 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 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.)

and employees in the service of "the state, the several counties, cities, and city school districts thereof, and civil service townships." It does not expressly refer to officers and employees in the service of a village. 2001 Op. Att'y Gen. No. 2001-036 at 2-216. R.C. 124.57's prohibition, therefore, does not apply to a person who serves as a village clerk-treasurer. *See id*.

We have been informed that Manchester Township is not a "civil service township" as that phrase is used in R.C. 124.57. *See generally* R.C. 124.01(G) (for purposes of R.C. Chapter 124, "'[c]ivil service township' means any township with a population of ten thousand or more persons residing within the township and outside any municipal corporation, which has a police or fire department of ten or more full-time paid employees, and which has a civil service commission established under [R.C. 124.40(B)]"). As stated above, R.C. 124.57 applies only to officers and employees in the service of "civil service townships." It does not expressly refer to officers and employees in the service of a township that is not a civil service township. R.C. 124.57's prohibition thus does not apply to a person who serves as clerk of Manchester Township. *See* 1999 Op. Att'y Gen. No. 99-046 at 2-286; 1999 Op. Att'y Gen. No. 99-019 at 2-134. Accordingly, the prohibition of R.C. 124.57 does not apply to either of these positions, and so does not operate to prevent a person from holding both of these 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 statute prohibits a person from serving simultaneously in the positions of township clerk and village clerk-treasurer. 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 clerk, as an elected officer, R.C. 507.01, serves and is responsible to the township's electorate. A village clerk-treasurer is elected by, and responsible to, the citizens of the village. R.C. 733.261; *see also* R.C. 733.26; R.C. 733.42. The positions thus serve different constituencies, and neither is required to assign duties to, or supervise, the other.[3]

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[3] Prior opinions of the Attorney General have advised that the position of county auditor is incompatible with any other public position that is responsible for depositing, disbursing, managing, or accounting for county moneys. *See, e.g.,* 2002 Op. Att'y Gen. No. 2002-005; 1949 Op. Att'y Gen. No. 963, p. 610; 1920 Op. Att'y Gen. No. 1778, vol. II, p. 1280. In such a situation, the position of county auditor acts as a check upon the other position. For the following reasons the same is not true when a person holds the positions of township clerk and village clerk-treasurer simultaneously.

A township clerk is not responsible for managing, spending, disbursing, or accounting for any village moneys. A township clerk also is not required to collect and deposit any village moneys with a village clerk-treasurer. Similarly, a village clerk-treasurer is not responsible for managing, spending, disbursing, or accounting for any township moneys, nor is he required to collect and deposit any township moneys with a township clerk. Consequently, a township clerk

Accordingly, neither position is subordinate to, or in any way a check upon, the other. *See generally* 1915 Op. Att'y Gen. No. 1075, vol. III, p. 2339, at 2341-42 (the positions of township clerk and village clerk or village treasurer are not subordinate to, or in any way a check upon, each other).[4]

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 at the local level because they may more precisely determine the time constraints imposed by each position. 2000 Op. Att'y Gen. No. 2000-025 at 2-168.

It should be noted, however, that both a township clerk and a village clerk-treasurer, as elected officials, are required to perform duties imposed by statute and, where the nature of such duties requires that the clerk or clerk-treasurer be present at a particular time or place, or act in a particular manner, the clerk or clerk-treasurer must do so. *See, e.g.,* R.C. 507.04 (requiring the township clerk to keep an accurate record of the proceedings of the board of township trustees at all its meetings); R.C. 733.27 (requiring the village clerk-treasurer to attend all meetings of the village's legislative authority and keep a record of its proceedings). Thus, in order to serve simultaneously in these two positions, a person must be certain that he will be able to carry out the duties of both positions in a competent and timely manner. This means that there may not be a direct conflict between the times when the person is needed to carry out the responsibilities of each of these positions. *See* 1915 Op. Att'y Gen. No. 1075, vol. III, p. 2339, at 2341-42.

The fifth question asks whether there is a conflict of interest between the two positions.[5] 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

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does not act as a check upon a village clerk-treasurer and a village clerk-treasurer does not act as a check upon a township clerk.

[4] R.C. 733.261 authorizes the legislative authority of a village to "combine the duties of the clerk and the treasurer into one office, to be known as the clerk-treasurer." *See generally* 1953-1954 Ohio Laws 94 (Am. H.B. 277, eff. Oct. 2, 1953) (enacting R.C. 733.261). In addition, recently enacted R.C. 733.262, *see* H.B. 245, 124th Gen. A. (2001) (eff. Feb. 1, 2002), authorizes the legislative authority of a village to "combine the duties of the clerk and treasurer into one appointed office, to be known as the village fiscal officer." R.C. 733.262(A).

[5] The Ohio Ethics Commission is authorized to issue advisory opinions concerning the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43. R.C. 102.08. In accordance with this grant of authority, we believe that it is proper to refrain from interpreting such provisions by way of a formal opinion, and recommend that you consult with the Ohio Ethics Commission for advice and interpretations concerning these provisions in the situation in which a person serves simultaneously as village clerk-treasurer and township clerk. *See* 2000 Op. Att'y Gen. No. 2000-025 at 2-170 at n.4.

which may prevent his decisions from being completely objective." 1980 Op. Att'y Gen. No. 80-035 at 2-149.

In order to determine whether a person who holds two public positions simultaneously is subject to a conflict of interest, we must review the powers, duties, and responsibilities conferred upon the person in each position. 1999 Op. Att'y Gen. No. 99-001 at 2-2. This review will enable us to determine whether the person will confront an impermissible conflict of interest when he exercises the powers, duties, and responsibilities in either or both positions. *Id*. at 2-2 and 2-3. If this review discloses any such conflicts of interest, we must then determine the immediacy of each conflict. 2000 Op. Att'y Gen. No. 2000-025 at 2-170. Where it can be demonstrated that the conflicts may be sufficiently avoided or eliminated entirely, the person may serve in both positions. *Id*. 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*.

A township clerk is responsible for recording the proceedings of the board of township trustees, R.C. 507.04, notifying the board of elections of vacancies in township offices and of township boundary changes, R.C. 507.051, administering oaths and certifying affidavits, R.C. 507.06, and recording bonds, R.C. 507.08. A township clerk also is the township's fiscal officer, *see* R.C. 133.01(L)(9); R.C. 5705.01(D), and in that capacity is responsible for handling various financial matters on behalf of the township. *See, e.g*., R.C. 133.19 (certifies to the board of township trustees the estimate of the maximum maturity of bonds for permanent improvements and that all permanent improvements have an estimated life or period of usefulness of at least five years); R.C. 133.27(A)(4) (signs R.C. Chapter 133 securities issued on behalf of the township); R.C. 507.04 (keeps a record of all the accounts and transactions of the board of township trustees); R.C. 507.07 (prepares an annual statement of township receipts and expenditures); R.C. 507.11 (countersigns all orders for payment of township moneys); R.C. 5705.03 (receives the proceeds of any township tax levy from the county); R.C. 5705.41 (certifies that the amount of money required to be paid by the township under a contract or order has been lawfully appropriated and is in the treasury or in the process of collection).

The executive power of a village is vested in, *inter alia*, its clerk-treasurer. R.C. 733.23. The responsibilities of a village clerk-treasurer include notifying the board of elections of vacancies in village offices and of village boundary changes, R.C. 709.011, certifying to the court of common pleas the election of certain officers, R.C. 733.15, recording the proceedings of, and all the rules, bylaws, resolutions, and ordinances passed or adopted by, the village's legislative authority, R.C. 733.27, serving on the village's board of trustees of the sinking fund, R.C. 739.02, and recording a plat of all grounds for cemetery purposes, R.C. 759.44. A village clerk-treasurer may be required to serve as the clerk of the village's board of trustees of public affairs, R.C. 733.28, the clerk of the village's board of park trustees, R.C. 755.24, or the clerk of the village's board of hospital trustees, R.C. 749.23.

A village clerk-treasurer also serves as the village's fiscal officer, *see* R.C. 133.01(L)(2); R.C. 5705.01(D), and in this capacity is required to perform a multitude of duties related to the finances of the village. *See, e.g.*, R.C. 133.19 (certifies to the legislative authority the estimate of the maximum maturity of bonds for permanent improvements and that all permanent improvements have an estimated life or period of usefulness of at least five years); R.C. 133.27(A)(4) (signs R.C. Chapter 133 securities issued on behalf of the village); R.C. 733.12 (audits the accounts of all village officers and departments); R.C. 733.14 (countersigns all orders for payment of village moneys); R.C. 733.28 (keeps a record of all of the village's property and the moneys received and expended by the village); R.C. 733.43-.46 (receives and disburses village moneys and keeps an account of the moneys received and disbursed); R.C. 733.44 and R.C. 5705.03 (receives tax proceeds); R.C. 5705.41 (certifies that the amount of money required to be paid by the village under a contract or order has been lawfully appropriated and is in the treasury or in the process of collection).

Our review of the powers, duties, and responsibilities of the respective positions discloses that a potential conflict of interest exists because of the competition over tax moneys generated within the ten-mill limitation.[6] Both Manchester Township and the Village of Manchester may prepare, adopt, and submit an annual tax budget to the county budget commission. R.C. 5705.28-.32. *See generally* R.C. 5705.01(A) (defining both a township and village as a "subdivision" for purposes of R.C. Chapter 5705 (tax levy law)). After the annual tax budgets are submitted, the county budget commission revises and adjusts the estimate of balances and receipts from all sources for each fund within the township's and village's tax budget, R.C. 5705.32; *see* R.C. 5705.31, and adjusts the levies of the township and village within the limits of the law, R.C. 5705.31. Because revisions and adjustments made by the county budget commission directly affect the amount of tax money generated within the ten-mill limitation that will be allotted to Manchester Township and the Village of Manchester, each of these subdivisions is permitted to have representatives appear before the county budget commission to explain its financial needs. R.C. 5705.32(E)(2).

The clerk of Manchester Township and the clerk-treasurer of the Village of Manchester, as the fiscal officers of their respective subdivisions, *see* R.C. 5705.01(D), may be required to assist in preparing their subdivision's annual tax budget and in explaining it to the county budget commission. *See* 1999 Op. Att'y Gen. No. 99-046 at 2-289; 1996 Op. Att'y Gen. No. 96-008 at 2-33. If a person were to assist in the preparation and presentation of both Manchester Township's and the Village of Manchester's annual tax budget to the county budget commission,

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[6] Ohio Const. art. XII, § 2 provides that no property may be taxed in excess of one percent of its true value in money for all state and local purposes, except when approved by the voters or provided for by charter of a municipal corporation. 1999 Op. Att'y Gen. No. 99-015 at 2-115 n.2. This is known as the "ten-mill limitation." 2001 Op. Att'y Gen. No. 2001-019 at 2-107 n.1; *see* R.C. 5705.02; R.C. 5705.03; R.C. 5705.07. R.C. 5705.03(A) authorizes the taxing authority of a subdivision to levy within the ten-mill limitation property taxes for the purpose of paying the current operating expenses of the subdivision. 2001 Op. Att'y Gen. No. 2001-019 at 2-107.

that person might be subject to influences that could prevent him from making completely objective, disinterested decisions. *See* 1999 Op. Att'y Gen. No. 99-046 at 2-289.

We believe, however, that this conflict of interest can be sufficiently avoided or mitigated. First, it is unlikely that this person in either position will be required to prepare an annual tax budget and present it to the county budget commission. Neither the clerk of Manchester Township nor the clerk-treasurer of the Village of Manchester is required by statute to prepare an annual tax budget or present it to the county budget commission. Instead, R.C. 5705.28 requires the taxing authority of the township and village to adopt an annual tax budget. As used in R.C. Chapter 5705, "taxing authority" means the board of township trustees in the case of the township and the legislative authority in the case of the village. R.C. 5705.01(C). Thus, it appears that this conflict does not involve a primary function of either the clerk of Manchester Township or the clerk-treasurer of the Village of Manchester. *See* 1999 Op. Att'y Gen. No. 99-018 at 2-132; 1996 Op. Att'y Gen. No. 96-008 at 2-33 and 2-34.

Moreover, decision-making authority with regard to the preparation and presentation of the township's and village's annual tax budget is vested in the board of township trustees and the legislative authority of the village, respectively. *See* R.C. 5705.28. The clerk of Manchester Township and clerk-treasurer of the Village of Manchester thus do not exercise independent decision-making authority in the preparation and presentation of annual tax budgets. Accordingly, the conflicts of interest arising because of the competition over tax money generated within the ten-mill limitation are insufficient to render the positions of clerk of Manchester Township and clerk-treasurer of the Village of Manchester incompatible, so long as a person who holds these two positions does not prepare competing annual tax budgets for the township and village and present those budgets to the county budget commission.

A second potential conflict of interest may also exist because Manchester Township and the Village of Manchester may enter into contracts with one another. *See, e.g.*, R.C. 9.60 (authorizing a township and village to enter into a contract whereby the township or village provides fire protection to the other); R.C. 505.43 and R.C. 505.50 (a township may enter into a contract with a village in order to obtain police protection or to obtain additional police protection); R.C. 701.07 (authorizing a municipal corporation and a township to enter into a cooperative economic development agreement); R.C. 709.192 (authorizing a municipal corporation and township to enter into an annexation agreement); R.C. 737.04 (a village may enter into a contract with a township in order to obtain police protection or to obtain additional police protection). If the township and village were to enter into a contract that requires either subdivision to pay the other for a service, either the township clerk or the village clerk-treasurer, as the fiscal officers of their respective subdivisions, R.C. 5705.01(D), would be required to certify that the amount of money payable under the contract has been lawfully appropriated and is in the treasury or in the process of collection. R.C. 5705.41. In addition, either the township clerk or village clerk-treasurer would be responsible for disbursing from the township's or village's treasury, respectively, moneys payable under the contract. *See* R.C. 507.04; R.C. 507.11(B); R.C. 733.14; R.C. 733.43-.46.

Thus, if Manchester Township and the Village of Manchester enter into a contract with each other that requires either to pay the other for a service, a person who serves simultaneously as clerk of Manchester Township and clerk-treasurer of the Village of Manchester would be required to certify that the amount of money payable under the contract has been lawfully appropriated and is in the treasury or in the process of collection and to disburse the moneys payable under the contract. In such a situation, the person's responsibilities in one position could influence the performance of his duties in the other position, thereby subjecting him to a conflict of interest. *See* 1999 Op. Att'y Gen. No. 99-018 at 2-132; 1996 Op. Att'y Gen. No. 96-008 at 2-33.

With respect to your specific inquiry, there are currently no contracts between Manchester Township and the Village of Manchester. In addition, the township and village are not contemplating entering into any contracts at this time. There are thus no instances in which the person, as clerk of Manchester Township or clerk-treasurer of the Village of Manchester, will be required to certify the availability of money payable under a contract between the township and village and disburse moneys payable under the contract. Because a person who serves simultaneously as clerk of Manchester Township and clerk-treasurer of the Village of Manchester will not be subject to the aforementioned conflict of interest, the person is not prohibited from holding these two positions at the same time.

It should be noted, however, that, although there is currently no contract between Manchester Township and the Village of Manchester that requires either of the subdivisions to pay the other for a service, the township and village could enter into such a contract in the future. If this were to happen, the person, as clerk of Manchester Township or clerk-treasurer of the Village of Manchester, would be required to certify the availability of money payable under the contract and disburse moneys payable under the contract.

Although it is possible for this conflict of interest to occur, prior opinions of the Attorney General have determined that this conflict of interest is insufficient to summarily render two public positions incompatible. 1999 Op. Att'y Gen. No. 99-018 at 2-133; 1996 Op. Att'y Gen. No. 96-008 at 2-34. These opinions have stated that, when a township clerk or village clerk-treasurer certifies the availability of money payable under a public contract or disburses moneys payable under a public contract, the clerk or clerk-treasurer performs a ministerial duty. 1999 Op. Att'y Gen. No. 99-018 at 2-133; 1996 Op. Att'y Gen. No. 96-008 at 2-34; *see State ex rel. Ms. Parsons Constr. Inc. v. Moyer*, 72 Ohio St. 3d 404, 650 N.E.2d 472 (1995); *State ex rel. City of Reynoldsburg v. Banks*, 37 Ohio St. 2d 56, 307 N.E.2d 260 (1974); *State ex rel. Tele-Communications v. McCormack*, 44 Ohio App. 3d 49, 541 N.E.2d 483 (Cuyahoga County 1988), *appeal dismissed,* 38 Ohio St. 3d 713, 533 N.E.2d 782 (1988). In other words, a township clerk or village clerk-treasurer performs a duty that "involves obedience to instructions or laws instead of discretion, judgment, or skill." *Black's Law Dictionary* 1011 (7th ed. 1999) (defining "ministerial"). Accordingly, when a township clerk or village clerk-treasurer certifies the availability of money payable under a contract between a township and village or disburses moneys payable under the contract, the clerk or clerk-treasurer exercises no decision-making authority.

Moreover, there is a presumption that, in the absence of evidence to the contrary, a person who serves as township clerk and village clerk-treasurer will perform his ministerial duties in a regular and lawful manner. *See State ex rel. Speeth v. Carney*, 163 Ohio St. 159, 126 N.E.2d 449 (1955) (syllabus, paragraph ten); 1999 Op. Att'y Gen. No. 99-018 at 2-133. Hence, if Manchester Township and the Village of Manchester were to enter into a contract that requires either of the subdivisions to pay the other for a service, in the absence of evidence to the contrary, it is to be presumed that a person who serves simultaneously as clerk of Manchester Township and clerk-treasurer of the Village of Manchester will perform the ministerial duties of certifying the availability of money payable under the contract and disbursing moneys payable under the contract in a regular and lawful manner. Therefore, a person serving as clerk-treasurer of the Village of Manchester may also serve as clerk of Manchester Township, provided that he does not prepare competing annual tax budgets for the village and township and present those budgets to the county budget commission. *Cf.* 1999 Op. Att'y Gen. No. 99-018 (the positions of township clerk and city auditor are compatible).

Based on the foregoing, it is my opinion, and you are hereby advised that a person may serve simultaneously as clerk-treasurer of the Village of Manchester and clerk of Manchester Township, provided that he does not prepare competing annual tax budgets for the village and township and present those budgets to the county budget commission.

Respectfully,

BETTY D. MONTGOMERY
Attorney General