June 17, 2011

The Honorable John H. Hanna
Henry County Prosecuting Attorney
822 Oakwood Avenue
P.O. Box 605
Napoleon, Ohio 43545

SYLLABUS: 2011-023

1. A person may serve simultaneously in the positions of Napoleon city mayor and Henry County deputy engineer, provided that as deputy county engineer he does not perform duties related to county engineer's projects within the City of Napoleon.

2. A person may serve simultaneously in the positions of Napoleon City Council member and Henry County deputy engineer, provided that as a member of the City Council he does not participate in deliberations, discussions, negotiations, or votes upon a contract entered into between the county and the municipal corporation for services or projects involving the county engineer's office, and that as deputy county engineer he does not perform duties related to county engineer's projects within the City of Napoleon.

MIKE DEWINE
OHIO ATTORNEY GENERAL

Opinions Section
Office 614-752-6417
Fax 614-466-0013

30 East Broad Street, 15th Floor
Columbus, Ohio 43215
www.OhioAttorneyGeneral.gov

June 17, 2011

OPINION NO. 2011-023

The Honorable John H. Hanna
Henry County Prosecuting Attorney
822 Oakwood Avenue
P.O. Box 605
Napoleon, Ohio 43545

Dear Prosecutor Hanna:

You have requested an opinion whether the positions of Henry County deputy engineer and part-time elected mayor or city councilman of the charter city of Napoleon are compatible. The following seven questions are used to determine 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. 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?

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 2009-018, at 2-127 to 2-128; 1979 Op. Att'y Gen. No. 79-111, at 2-367 to 2-368.

Question one asks whether either of the positions is a classified employment within the terms of R.C. 124.57, which prohibits those in the classified service of the state or certain of its subdivisions from participating in partisan political activity. A city mayor and a member of the legislative authority of a city, as elected officials, hold unclassified civil service positions. *See* R.C. 124.11(A)(1); R.C. 731.01; R.C. 733.02. You have informed us that the position of Henry County deputy engineer is in the unclassified service. Thus, insofar as none of the positions with which you are concerned is a

classified employment, R.C. 124.57 does not apply to prohibit a Henry County deputy engineer from serving as Napoleon city mayor or Napoleon City Council member.

Question two asks whether there is a constitutional provision or statute prohibiting the holding of both positions at the same time. We find no constitutional provision barring a city mayor or a member of a city legislative authority from serving simultaneously as a deputy county engineer. We also find no statutory provision prohibiting a city mayor from serving simultaneously as a deputy county engineer. R.C. 731.02, however, generally prohibits members of city legislative authority from holding "any other public office." A charter city may set forth qualifications for members of its legislative authority that differ from those provided in R.C. 731.02. Ohio Const. art. XVIII, §§ 3 and 7; *State ex rel. Bindas v. Andrish*, 165 Ohio St. 441, 136 N.E.2d 43 (1956) (syllabus, paragraph 2); *see also* 2008 Op. Att'y Gen. No. 2008-037, at 2-379 to 2-380 (in charter cities, a statute regarding a matter of local self-government involving procedure applies unless there is a conflicting charter provision).

The Charter of the City of Napoleon ("Napoleon Charter" or "Charter") establishes qualifications for both the city mayor and members of the city legislative authority.[1] Napoleon Charter, §§ 2.02; 3.02. The Charter provides that neither the city mayor nor a member of the City Council "shall hold any other elected public office or employment with the City." Napoleon Charter, §§ 2.02(A); 3.02(A). The Charter provisions further specify that "'employment with the City' shall mean, employed by the City of Napoleon and being compensated from [Napoleon]'s treasury; and, 'elected public office' shall mean, 'elected public office of this Municipality.'" *Id.*

Regarding a member of a city legislative authority holding another public office, the Napoleon Charter sets forth a narrower scope of prohibition than R.C. 731.02. The Charter provision thus expressly conflicts with the statutory prohibition and accordingly, the prohibition in R.C. 731.02 does not apply. Ohio Const. art. XVIII, §§ 3 and 7; *State ex rel. Bindas v. Andrish*, 165 Ohio St. 441, 136 N.E.2d 43 (1956) (syllabus, paragraph 2); 2008 Op. Att'y Gen. No. 2008-037, at 2-379 to 2-380. We therefore do not consider whether a deputy county engineer is a "public office" for purposes of R.C. 731.02. We only must determine whether a deputy county engineer is an "elected public office of [Napoleon]" or an "employment with [Napoleon]" for purposes of the Charter. As a county government position, deputy county engineer is neither an employment nor a public office of the City of Napoleon.

Because no constitutional provision prohibits a person from holding the positions of deputy county engineer and city mayor or city legislative authority member simultaneously, and because the narrower language of the Napoleon Charter, rather than R.C. 731.02, governs the prohibition on holding another public office, question two may be answered in the negative.

---

[1] In addition to its specific provisions concerning the mayor and City Council, the Napoleon Charter provides that "[a]ll laws of Ohio applicable to municipalities … and which are not inconsistent with or contrary to [the] Charter, or with ordinances, resolutions or other actions hereafter enacted or passed by Council, shall be applicable to the City." Napoleon Charter, § 10.04.

Question three considers whether one position is subordinate to, or in any way a check upon, the other position. Here, neither the Napoleon city mayor nor a member of the Napoleon City Council is responsible for appointing a person to or removing a person from the position of Henry County deputy engineer. Likewise, a deputy county engineer is not responsible for appointing or removing a city mayor or a member of a city legislative authority. Rather, the positions of city mayor and member of a city legislative authority are elected city officers and are responsible to the city's electorate. A deputy county engineer is hired at the discretion of the county engineer and is subject to the county engineer's control and direction. *See* R.C. 325.17 (the county engineer "may appoint and employ the necessary deputies, assistants, clerks, bookkeepers, or other employees" for the county engineer's office).

The Attorney General previously addressed whether the position of member of the legislative authority of a city is compatible with administrative assistant to the county engineer. 1993 Op. Att'y Gen. No. 93-016. The conclusions in that opinion are particularly relevant here because the job description of a Henry County deputy engineer includes the duties of an administrative assistant to the county engineer. In consideration of the third question of the compatibility test, the Attorney General found that:

> As an elected official, a member of the legislative authority of a city is responsible to the citizens who elected him. The administrative assistant is employed by the county engineer, and thus is responsible to the county engineer. The positions of member of the legislative authority of a city and administrative assistant therefore serve different masters, and neither position is subordinate to the other. Moreover, an examination of the powers and duties of each position discloses no area in which one position controls the other, either directly or indirectly. The positions of member of the legislative authority of a city and administrative assistant to the county engineer, thus, operate independently of each other, and neither position is subordinate to the other.

1993 Op. Att'y Gen. No. 93-016, at 2-87 (citations omitted). Similarly, the powers and duties of the Napoleon city mayor disclose no area in which the mayor exercises direct or indirect control over a deputy county engineer. A city mayor and a deputy county engineer operate independently of each other, and neither position is subordinate to the other. Therefore, neither a city mayor nor a member of a city legislative authority is subordinate to, or in any way a check upon, a deputy county engineer. Likewise, a deputy county engineer is not subordinate to or a check upon either the position of city mayor or member of a city legislative authority.

Question four 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 by local officials because they may determine more accurately the time constraints and demands imposed upon the positions in question. *See* 2009 Op. Att'y Gen. No. 2009-010, at 2-90.

We caution, however, that both a city mayor and a member of a city legislative authority, as elected city officers, are required to perform duties imposed by statute or by charter provision. When the nature of those duties requires the city mayor or member of a city legislative authority to be

present at a particular time or place, or act in a particular manner, he must be able to do so. *See generally, e.g.*, Napoleon Charter, § 3.04(C) ("Mayor shall be the ceremonial head of the City"); Napoleon Charter, § 3.04(E) ("Mayor should attend all Council meetings"); R.C. 3.17 (member of public body forfeits position if she fails to attend at least three-fifths of the regular and special meetings held during any two-year period). Further, a deputy county engineer should not perform duties as mayor or City Council member during his regular work hours as a county employee. If he is required to do so, he must take approved vacation leave, personal leave, or leave without pay for the time he is absent from his duties as deputy county engineer. *See* 2009 Op. Att'y Gen. No. 2009-010, at 2-90.

Question five considers whether there is an impermissible conflict of interest between the positions. A person may not hold two public positions concurrently 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. In order to determine whether conflicts of interest exist, we must review the powers, duties, and responsibilities of the Napoleon city mayor, a Napoleon City Council member, and a Henry County deputy engineer.[2] If the review discloses any conflicts of interest, we next consider the immediacy of the conflicts to determine whether the conflicts may be sufficiently avoided or eliminated so as to allow a person to serve in the two public positions simultaneously. 2006 Op. Att'y Gen. No. 2006-034, at 2-309. The factors weighed in making this determination include the probability of the conflicts, the ability of the person to remove herself from the conflicts should they arise, whether the person exercises decision-making authority in both positions, and whether the conflicts relate to the primary function of each position, or to financial or budgetary matters. *Id.*

---

[2] R.C. 3.06(A) provides that "[a] deputy, when duly qualified, may perform any duties of his principal." This provision means that a deputy county engineer could be precluded from holding any other public position a county engineer is precluded from holding. This is because the deputy county engineer may perform any duty the county engineer may perform and thus potentially encounter all the same conflicts of interest as the county engineer. Notwithstanding R.C. 3.06, several Attorney General opinions have determined that when incompatibility is based on a conflict of interest, the facts may create an exception to the general rule that a deputy may not hold any position that her principal may not hold. That is, when the facts set forth specific, limited duties that the deputy may perform, such that "performance of those duties in no way renders his position subordinate to or a check upon the [other position] or conflicts with any of the duties and responsibilities he undertakes" in the other position, the two positions are not necessarily incompatible. 1986 Op. Att'y Gen. No. 86-035, at 2-184 n.2. *See* 1999 Op. Att'y Gen. No. 99-027, at 2-178 n.4; 1989 Op. Att'y Gen. No. 89-022, at 2-104. Thus, based on the information you have provided us concerning the duties and responsibilities of the deputy county engineer, we believe that the deputy county engineer in question is not subject to the same limitations the county engineer might be subject to with respect to holding another public position.

The legislative authority of a city is authorized to, *inter alia*, establish, improve, repair, and care for streets and other public ways within the city's territory. *See* R.C. 715.19; R.C. 723.01. R.C. 307.15 authorizes a board of county commissioners to enter into a contract with the legislative authority of a city "whereby the board undertakes, and is authorized by the contracting subdivision, to exercise any power, perform any function, or render any service, on behalf of the contracting subdivision or its legislative authority, that such subdivision or legislative authority may exercise, perform, or render." R.C. 307.15(A)(1). Further, "whereby the legislative authority of any municipal corporation undertakes, and is authorized by the board of county commissioners, [it may] exercise any power, perform any function, or render any service, on behalf of the county or the board, that the county or the board may exercise, perform, or render." *Id.*; *see also* R.C. 5535.08(C)(1) ("any political subdivision having authority to construct, reconstruct, resurface, improve, repair, and maintain roads or streets may enter into an agreement, under terms agreeable to all parties, with any other political subdivision having that authority to obtain or provide road or street construction, reconstruction, resurfacing, improvement, repair, or maintenance services"). Accordingly, the legislative authority of a city may enter into a contract with the board of county commissioners whereby the county agrees to establish, improve, repair, or care for a street or other public way within the city or whereby the city agrees to perform any road work the county is authorized to perform. A member of a legislative authority of a city may thus be required to participate in negotiations or vote upon a contract for road work between the city and the county.

This creates a potential conflict of interest because such a contract could require the member of the city legislative authority to perform work as a deputy county engineer, and voting on that contract might place the individual in a situation of divided loyalties in which an improper preference would be afforded one position. *See* 1993 Op. Att'y Gen. No. 93-016, at 2-90; *see also* 1991 Op. Att'y Gen. No. 91-036, at 2-195 to 2-196. In other words, when a county and city propose to enter into a contract for the construction or maintenance of roads or streets, an individual who is a member of the legislative authority of a city might be influenced in the manner in which he votes upon the contract as a result of particular duties or responsibilities that the contract will impose upon him in his capacity as deputy county engineer. 1993 Op. Att'y Gen. No. 93-016, at 2-90. An individual's ability as a member of a city legislative authority to exercise independent judgment on behalf of the city when negotiating or voting on such a contract may be questioned because it would be difficult for the individual to set aside his loyalty to the county engineer. *Id.*

Although a conflict of interest may arise between two positions, 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 related to the conflict, the person may serve in both positions at the same time. *See, e.g.*, 2009 Op. Att'y Gen. No. 2009-018; 2009 Op. Att'y Gen. No. 2009-010; 2007 Op. Att'y Gen. No. 2007-023. Accordingly, a member of the city legislative authority who is simultaneously serving as deputy county engineer should not participate in any deliberations, discussions, negotiations, or votes related to a contract with the board of county commissioners whereby the county agrees to establish, improve, repair, or care for a street or other public way within the city or whereby the city agrees to perform any road work the county is authorized to perform. If the member of the city legislative authority refrains from participating in such actions, we believe that any conflicts arising because of potential contracts

between the city and county under the authority of R.C. 307.15 or any other related statute may be sufficiently avoided.

We now consider the position of Napoleon city mayor. Our review of the mayor's duties reveals no direct conflicts between the positions of Napoleon city mayor and Henry County deputy engineer. Nonetheless, the Napoleon city mayor has several responsibilities pursuant to the Charter that could present a conflict of interest. First, the Napoleon city mayor has a duty to "execute all documents … issued by the City that may be required by law." Napoleon Charter, § 3.04(D). Insofar as this duty of the Napoleon city mayor might require the mayor to sign any contract entered into between the city and the county under R.C. 307.15 or R.C. 5535.08, for example, a conflict could arise. Opinions of the Attorney General have advised that this type of conflict is insufficient to render two public positions incompatible. 2003 Op. Att'y Gen. No. 2003-006, at 2-39 to 2-40 (a township clerk, when certifying the availability of or disbursing money payable under a public contract, is performing a ministerial duty that "'involves obedience to instructions or laws instead of discretion, judgment, or skill'" (quoting the definition of "ministerial" from *Black's Law Dictionary* 1011 (7th ed. 1999))). Thus, in executing any city document or contract pursuant to Section 3.04(D) of the Charter, the Napoleon city mayor does not exercise decision-making authority but rather acts pursuant to the obligations imposed upon him by the Charter. Because the Napoleon city mayor's actions in fulfilling this duty are ministerial, we believe any conflict of interest is sufficiently avoided.

Second, the Napoleon "Mayor shall serve as an ad hoc member of both the Finance and Budget Committee, and the Municipal Properties, Buildings, Land Use and Economic Development Committee, with full voting rights in both committees." Napoleon Charter, § 2.11. As a member of these committees, the Napoleon city mayor could encounter situations in which he must consider budget appropriations or other resolutions or decisions concerning contracts or other agreements between the city and the county. This could present a conflict of interest because such decisions could ultimately require the Napoleon city mayor to perform work as a deputy county engineer, and voting on those decisions and recommendations might place the Napoleon city mayor in a situation of divided loyalties in which an improper preference would be afforded one position over the other. Any conflict of interest that arises under these circumstances may be sufficiently avoided if the Napoleon city mayor refrains from participating in the relevant deliberations, discussions, negotiations, and votes.

Third, the Napoleon city mayor is required to approve and sign every ordinance and resolution of the Napoleon City Council. Napoleon Charter, § 2.15(D). The Charter also authorizes the Napoleon city mayor to veto an act of the City Council. *Id.* This could present a conflict of interest insofar as the mayor would be required to approve and sign, or veto, measures passed by the City Council to enter into an agreement with the county under the authority of R.C. 307.15 or R.C. 5535.08. Such ordinances or resolutions could require the Napoleon city mayor to perform work as a deputy county engineer, and the ability to either approve and sign or veto those acts of Council may place the Napoleon city mayor in a position of divided loyalties or a position in which preference may be afforded one position over the other. Any conflict of interest that arises under these circumstances may be sufficiently avoided if the city mayor refrains from participating in the relevant acts of the City Council. Further, the Charter provides for a process whereby an ordinance or resolution of the

Council may be enacted regardless of the city mayor's approval or veto, thus providing a check on the mayor's powers. *Id*.

Finally, as a general matter in his role as a public official, a city mayor must act ethically and lawfully pursuant to the provisions of R.C. Chapter 102 and R.C. 2921.42-.43 and may not use the influence or resources of the county engineer's office to benefit his city.[3]

We now consider the position of deputy county engineer. The circumstances under which the county engineer's office may interact with and perform work in a municipal corporation are too numerous to address individually. *See, e.g.*, R.C. 307.15; R.C. 315.08; R.C. 5535.08; R.C. 5591.02. Accordingly, a deputy county engineer who is simultaneously serving as a city mayor or member of a city legislative authority must take care to avoid any potential conflict of interest that may arise as a result of the deputy county engineer's involvement with a project in the municipal corporation where he serves as mayor or member of the legislative authority.

Questions six and seven concern the applicability of local charter provisions, resolutions, or ordinances, and federal, state, and local regulations. We find no federal or state regulation prohibiting a person from serving simultaneously in the positions in question. 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 traditionally left for local officials to answer. However, after reviewing the Napoleon Charter, we do not believe the Charter prohibits an individual from simultaneously holding the position of Napoleon city mayor or Napoleon City Council member and the position of deputy county engineer. Thus, absent a local resolution, ordinance, or departmental regulation rendering the positions of Napoleon city mayor or Napoleon City Council member and deputy county engineer incompatible, the positions are compatible.

In conclusion, it is my opinion, and you are hereby advised that:

1. A person may serve simultaneously in the positions of Napoleon city mayor and Henry County deputy engineer, provided that as deputy county engineer he does not perform duties related to county engineer's projects within the City of Napoleon.

2. A person may serve simultaneously in the positions of Napoleon City Council member and Henry County deputy engineer, provided that as a member of the City Council he does not participate in deliberations, discussions, negotiations, or votes upon a contract entered into between the county and the municipal

---

[3] The Ohio Ethics Commission is required by R.C. 102.08 to address the application of the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43. We therefore refrain from interpreting and applying these provisions by way of a formal opinion. 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph 3). Questions concerning the interpretation and application of these provisions to your particular situation should be directed to the Ohio Ethics Commission.

corporation for services or projects involving the county engineer's office, and that as deputy county engineer he does not perform duties related to county engineer's projects within the City of Napoleon.

Very respectfully yours,

MICHAEL DEWINE
Ohio Attorney General