May 6, 1994

OPINION NO. 94-022

The Honorable Lynn Alan Grimshaw
Scioto County Prosecuting Attorney
Scioto County Court House, Room 310
Portsmouth, Ohio 45662

Dear Prosecutor Grimshaw:

You have requested an opinion regarding the simultaneous holding of the positions of welder in the county engineer's office and officer in the union[1] that represents the engineer's employees. You state that the welder also holds the position of township trustee. Accordingly, you wish to know whether a welder in the county engineer's office, who also holds the position of township trustee, may serve simultaneously as an officer in the employee organization that represents the engineer's employees.

Resolution of your specific inquiry turns on the following questions:

1. Are the positions of township trustee and welder in the county engineer's office compatible?

2. May an individual hold simultaneously the positions of township trustee and officer in an employee organization that represents the employees in a county engineer's office?

3. May an individual hold simultaneously the positions of welder in the county engineer's office and officer in the employee organization that represents the engineer's employees?

All three questions must yield an answer in favor of compatibility before it may be concluded that an individual may hold simultaneously the positions of welder in the county engineer's office, township trustee, and officer in the employee organization that represents the engineer's employees.

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[1] It appears that the use of the term "union" in your request letter denotes an employee organization formed to bargain collectively on behalf of the employees of the county engineer, as authorized in R.C. Chapter 4117. Accordingly, this opinion will use the term "employee organization" to refer to the legal entity that represents the county engineer's employees.

I.The Positions of Township Trustee and Welder in the County Engineer's Office Are Compatible

The first question to be addressed is whether the positions of township trustee and welder in the county engineer's office are compatible. 1979 Op. Att'y Gen. No. 79-111 sets forth the following seven question format for analyzing and determining whether two public positions are compatible:

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?

Op. No. 79-111 at 2-367 and 2-368. Questions six and seven address, in large part, matters of local concern, and it is assumed, for purposes of this opinion, that there are no departmental regulations, charter provisions, or ordinances that limit the holding of outside employment by a township trustee or welder in the county engineer's office. Further, there are no state or federal regulations that are applicable to these two positions.

A.R.C. 124.57

Question number one asks whether either of the positions is a classified employment within the terms of R.C. 124.57. Pursuant to R.C. 124.57, an individual in the classified service of the state, the several counties, cities, and city school districts thereof, and civil service townships is prohibited from participating in partisan politics other than to vote or freely express his political beliefs. *Accord* 2 Ohio Admin. Code 123:1-46-02. A township trustee, as an elected officer, serves in an unclassified position. *See* R.C. 124.11(A)(1); R.C. 505.01. A welder in the county engineer's office is in the classified service of the county. *See* R.C. 124.11(B) ("[t]he classified service shall comprise all persons in the employ of the ... several counties ... not specifically included in the unclassified service"). "Prior opinions of the Attorney General have concluded that _R.C. 124.57 does not prohibit a classified civil servant from also serving as a township trustee, as long as he is appointed trustee or seeks that office in a non-partisan election._" 1993 Op. Att'y Gen. No. 93-051 at 2-245 and 2-246 (quoting 1988 Op. Att'y Gen. No. 88-020 at 2-76); *accord* 1978 Op. Att'y Gen. No. 78-022. Thus, if a welder in the county engineer's office is appointed township trustee, or is elected to the position of township trustee in a nonpartisan election, R.C. 124.57's prohibition does not bar the

welder from serving simultaneously as a township trustee. *See* Op. No. 93-051 at 2-245 and 2-246.

B.Outside Employment

Question number two asks whether the empowering statutes of either position limit outside employment. No provision in the Revised Code limits the possible outside employment of a township trustee or a welder in the county engineer's office. Thus, these positions are not statutorily incompatible.

C.Subordination or Control

Question number three 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, is responsible to the electors who elected him. Op. No. 88-020 at 2-77. A welder in the county engineer's office is employed by, and subject to the control of, the county engineer. Thus, a township trustee and welder in the county engineer's office serve different masters and are not subordinate to each other. *See* Op. No. 93-051 at 2-246; 1993 Op. Att'y Gen. No. 93-016 at 2-87; Op. No. 88-020 at 2-77.

There are, however, several instances in which the position of township trustee may be subordinate to, or act as a check upon, a position in the county engineer's office. *See* R.C. 5541.03; R.C. 5543.01; R.C. 5543.06; R.C. 5543.09-.10; R.C. 5549.03; R.C. 5571.05; R.C. 5573.01; R.C. 5575.01; Op. No. 93-051 at 2-247; Op. No. 93-016 at 2-87 through 2-89; Op. No. 88-020 at 2-77 and 2-78. It seems unlikely, however, that the duties of a welder in the county engineer's office would place the welder under the control of township trustees, or place the trustees in a position subservient to that of the welder. Accordingly, the positions of township trustee and welder in the county engineer's office are not subordinate to, or in any way a check upon, each other.

D.Physical Constraints

Question number four asks whether it is physically possible for one person to perform the duties of both positions. This is a factual question, and is best answered by the interested persons because they may more precisely determine the demands of each position. *See, e.g.,* Op. No. 93-051 at 2-247; Op. No. 93-016 at 2-89. It seems likely, however, that these two positions can be filled by the same person if there is no direct conflict in their working hours.

E.Conflict of Interest

The final question asks whether there is a conflict of interest between the two positions. "One person may not simultaneously hold 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.

Prior opinions of the Attorney General have found several potential conflicts of interest between the positions of township trustee and employee in the county engineer's office. *See* Op. No.

93-051 at 2-248; Op. No. 93-016 at 2-89 and 2-90; Op. No. 88-020 at 2-78. These potential conflicts of interest are explained in Op. No. 93-051 as follows:

> A board of township trustees is authorized to "construct, reconstruct, resurface, or improve any public road or part thereof under its jurisdiction or any county road, intercounty highway, or state highway within its township." R.C. 5571.01(A); *see also* R.C. 5571.02 ("[t]he board of township trustees shall have control of the township roads of its township and shall keep them in good repair"). Pursuant to R.C. 307.15, a board of county commissioners may enter into a contract with a board of township trustees, whereby the board of county commissioners is authorized "to exercise any power, perform any function, or render any service, in behalf of the contracting subdivision or its legislative authority, which such subdivision or legislative authority may exercise, perform, or render." A board of township trustees and board of county commissioners thus may enter into a contract whereby the county agrees to construct, reconstruct, resurface, or improve a public road within the township.
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> In addition, R.C. 164.15 and R.C. 5555.43 authorize a county and township to enter into a contract concerning the payment of engineering services. R.C. 164.15 provides a board of township trustees "may enter into a contract with the county engineer under which the board agrees to pay all or any part of the cost of engineering services to be provided to or obtained for the township by the county engineer that are necessary for projects awarded under [R.C. Chapter 164 (aid to local government improvements)]." Similarly, R.C. 5555.43 provides the board of county commissioners may contract with a board of township trustees of the township in which a road improvement is situated, whereby the county and township apportion the costs of such improvement. Finally, pursuant to R.C. 5543.13 and R.C. 5543.17, if the county engineer enters into an agreement with an owner of land as to compensation or damages already sustained or to be sustained by the owner of the land, the board of township trustees is required to approve the agreement.
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> If a township and county enter into any of the contracts mentioned above, a township trustee who is employed by the county engineer will be involved in a contract between the township which he represents and the county which employs him. This may present a conflict of interest for that individual. *See* Op. No. 93-016 at 2-90; Op. No. 91-036 at 2-195 and 2-196; Op. No. 88-020 at 2-78. For example, a township trustee's ability to exercise clear and independent judgment on behalf of the township in negotiating or voting upon a contract between the county and township could be called into question because it could be difficult for such individual, as trustee, to set aside his loyalty to his employer, the county engineer. Furthermore, the trustee may not vote in the township's best interest for fear of reprisals, in his position of house numbering coordinator, by the county engineer.

Op. No. 93-051 at 2-248. It thus appears that when an individual simultaneously holds the positions of township trustee and welder in the county engineer's office, several potential conflicts of interest exist because the individual is subject to influences that may prevent him from discharging

objectively and in completely disinterested fashion the duties of township trustee.

It is well established, however, that public positions will not be considered incompatible where potential conflicts of interest are remote and speculative. Op. No. 79-111 at 2-372. Therefore, it must be determined whether the possibility that an individual, as township trustee, might have to participate in discussions, negotiations, or votes concerning a contract with the county for the construction, improvement, or repair of roads pursuant to R.C. 307.15, R.C. 164.15, or R.C. 5555.43, or an agreement entered into between the county engineer and an owner of land pursuant to R.C. 5543.13 or R.C. 5543.17, renders the positions of township trustee and welder in the county engineer's office incompatible.

Factors used in analyzing whether potential conflicts of interest render two positions incompatible include:

> 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.

Op. No. 79-111 at 2-372. Recent opinions of the Attorney General have applied these factors to the potential conflicts of interest presented when an individual holds simultaneously the positions of township trustee and employee in the county engineer's office, and concluded that, as a general matter, these potential conflicts of interest are too remote and speculative to render the positions of township trustee and employee in the county engineer's office incompatible. *See* Op. No. 93-051; Op. No. 93-016; Op. No. 88-020.

With regard to your specific inquiry, it is only speculative whether a township will enter into a contract pursuant to R.C. 164.15, R.C. 307.15, or R.C. 5555.43 with the county concerning the construction, improvement, or repair of roads, and whether a county engineer will enter into an agreement with the owner of land pursuant to R.C. 5543.13 or R.C. 5543.17 as to compensation or damages already sustained or to be sustained by the owner of land. Op. No. 93-051 at 2-249; Op. No. 93-016 at 2-91; *see* Op. No. 88-020 at 2-78 and 2-79. In addition, a contract with the county for the construction, improvement, or repair of roads, and an agreement with the owner of land as to compensation or damages already sustained or to be sustained by the owner of land, even where they did occur, would relate to only a small fraction of the duties of each position. Thus, the potential conflicts of interest do not concern the primary functions of each position. Moreover, the potential conflicts of interest do not pertain to budgetary controls.

A township trustee does exercise decision making authority with respect to the making of township contracts of the type described above, and agreements between the county engineer and an owner of land as to compensation or damages already sustained or to be sustained by the owner of land. Given that such situations are likely to be rare, however, a township trustee should be able to remove himself from any discussions, negotiations, or votes concerning a contract with the county

for road construction, improvement, or maintenance, or from any discussions or votes concerning an agreement entered into between the county engineer and the owner of land pursuant to R.C. 5543.13 or R.C. 5543.17. It follows, therefore, that the potential conflicts of interest are remote and speculative, and that such potential conflicts of interest do not render the positions of township trustee and welder in the county engineer's office incompatible.

In light of the foregoing, it appears that an individual may hold simultaneously the positions of township trustee and welder in the county engineer's office. As township trustee, however, such individual should not participate in discussions, negotiations, or votes concerning a contract with the county for road construction, improvement, or repair pursuant to R.C. 164.15, R.C. 307.15, or R.C. 5555.43. Further, as township trustee, said individual should not participate in discussions or votes concerning an agreement entered into between the county engineer and an owner of land pursuant to R.C. 5543.13 or R.C. 5543.17.

II. An Individual May Hold Simultaneously the Positions of Township Trustee and Officer in an Employee Organization that Represents the Employees in a County Engineer's Office

The second question to be addressed is whether an individual may hold simultaneously the positions of township trustee and officer in an employee organization that represents the employees in a county engineer's office. As noted above, questions of compatibility are answered by using the seven question analysis set forth in Op. No. 79-111. Because the position of officer in an employee organization that represents the employees in a county engineer's office is a private position, however, questions three and four, which represent the common law test of incompatibility, *see State ex rel. Attorney General v. Gebert*, 12 Ohio C.C. (n.s.) 274, 275, 21 Ohio C.C. Dec. 355, 356 (Cir. Ct. Franklin County 1909), are not applicable. *See* 1989 Op. Att'y Gen. No. 89-037 at 2-163; 1983 Op. Att'y Gen. No. 83-035 at 2-135. The remaining five questions of the compatibility analysis, however, provide a useful format for determining whether a public and private position may be held simultaneously. Op. No. 89-037 at 2-163. It is thus necessary to determine whether R.C. 124.57 or another applicable statute, local ordinance or regulation, or conflict of interest prohibits an individual from holding simultaneous the positions of township trustee and officer in an employee organization that represents the employees in the county engineer's office. *See, e.g.*, Op. No. 89-037; Op. No. 83-035.

As noted above, R.C. 124.57 prohibits an individual in the classified service from participating in partisan politics other than to vote or express his political opinions. Because a township trustee is not in the classified service, *see* R.C. 124.11(A)(1); R.C. 505.01, the prohibition of R.C. 124.57 does not prohibit a township trustee from serving simultaneously as an officer in an employee organization that represents the employees in the county engineer's office. In addition, no other statute, or state or federal regulation, prohibits the simultaneous holding of the positions of township trustee and officer in an employee organization that represents the employees in a county engineer's office. Moreover, whether there is an applicable local departmental regulation or ordinance is a matter of local concern; it is assumed, for purposes of this opinion, that there are no local departmental regulations or ordinances that prohibit an individual from serving simultaneously

in these two positions.

Finally, research discloses no areas in which the duties of a township trustee and officer in an employee organization that represents the employees in the county engineer's office directly conflict. It should be noted, however, that situations may arise where the individual, as township trustee, may be tempted to participate in deliberations, discussions, or voting on a matter concerning the interests of the employee organization, or to use his position as an officer in the employee organization with regard to the interests of the township on a matter. For example, where a county and township propose to enter into a contract concerning the construction or maintenance of roads, an individual who is also a member of the board of township trustees might be influenced in the manner in which he votes upon the contract as a result of particular duties or responsibilities that the contract imposes upon the employee organization that represents the employees of the county engineer. Moreover, as stated in your request letter, "the trustee/employee may use his [position as an officer in the employee organization] to influence the engineer as to matters relating to the township in question." Thus, a potential conflict of interest exists because the individual, as township trustee, may participate in deliberations, discussions, or voting on a matter concerning the interests of the employee organization, or use his position as an officer in the employee organization with regard to the interests of the township on a matter.

Although there exists the possibility for abuse in the situation posed in your letter, in the absence of evidence to the contrary, it must be assumed that the individual in question will act in good faith and in accordance with the law. *See* 1990 Op. Att'y Gen. No. 90-040 at 2-164; 1985 Op. Att'y Gen. No. 85-099 at 2-421. However, insofar as it is contrary to public policy for a public official or employee to expose himself to the temptation of acting in any manner other than in the public's best interest, the individual, as township trustee, is required to abstain from participating in deliberations, discussions, or voting on a matter concerning the interests of the employee organization, or using his position as an officer in the employee organization with regard to the interests of the township on a matter.[2] *See* R.C. 102.03(J) (a public official or employee who is a member of an organization is prohibited from participating, formally or informally, in deliberations, discussions, or voting on a matter or using his official position with regard to the interests of the organization on the matter if he has assumed a particular responsibility in the organization with respect to the matter or if the matter would affect his personal, pecuniary interests).[3]

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[2] Because the individual in question is employed by the county engineer, and is an officer of the employee organization by virtue of such employment, the individual is considered a public employee for purposes of the provisions of law concerning conflicts of interest. *See* R.C. 102.01(B) (for purposes of R.C. Chapter 102 (Ohio Ethics Law), "public employee" means any person who is employed by a county); *see also* R.C. 4117.01(D) ("_Employee organization_ means any labor or bona fide organization in which *public employees* participate and which exists for the purpose, in whole or in part, of dealing with public employers concerning grievances, labor disputes, wages, hours, terms and other conditions of employment" (emphasis added)).

[3] Under R.C. 102.08, the Ohio Ethics Commission is authorized to render advisory opinions on the applicability of the provisions of R.C. Chapter 102 and R.C. 2921.42 governing ethics and

In light of the above, it is apparent that an individual may hold simultaneously the positions of township trustee and officer in an employee organization that represents the employees in the county engineer's office. The individual, as township trustee, must, however, abstain from participating in deliberations, discussions, or voting on a matter concerning the interests of the employee organization, or using his position as an officer in the employee organization with regard to the interests of the township on a matter.

III. An Individual May Hold Simultaneously the Positions of Welder in the County Engineer's Office and Officer in the Employee Organization that Represents the Employees of the County Engineer

The final question to be addressed is whether an individual may hold simultaneously the positions of welder in the county engineer's office and officer in the employee organization that represents the employees of the county engineer. Pursuant to R.C. 4117.19(C)(4), all members of an employee organization are eligible to seek office in the organization. Because a welder in the county engineer's office is statutorily authorized to be an officer in the employee organization that represents the engineer's employees, the positions of county welder and officer in the employee organization that represents the engineer's employees may be held by the same individual. *See, e.g.*, 1994 Op. Att'y Gen. No. 94-013, slip op. at 1 n.1 ("since R.C. 505.371 requires a township trustee to be a member of the board of fire district trustees of the joint fire district comprising all or any portion of the township, the positions of township trustee and member of the board of fire district trustees of the joint fire district comprising all or any of the territory of the township are compatible"); *cf., e.g., State ex rel. D'Alton v. Ritchie*, 97 Ohio St. 41, 119 N.E. 124 (1917) (since the General Assembly requires the judges of the court of common pleas and the judge of the probate court of Lucas County to select one of themselves to act as the judge of the court of domestic relations, the judge so selected is not in violation of the constitutional provision providing no judge shall hold any other office of profit or trust under the authority of this state).

IV. An Individual May Hold Simultaneously the Positions of Township Trustee, Welder in the County Engineer's Office, and Officer in the Employee Organization that Represents the Employees of the County Engineer

Because all three questions yield an answer in favor of compatibility, an individual may hold simultaneously the positions of welder in the county engineer's office, township trustee, and officer in the employee organization that represents the employees of the county engineer. However, insofar as it is contrary to public policy for a public officer to expose himself to the temptation of acting in any manner other than in the public's best interest, the individual, as township trustee,

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conflicts of interest with respect to public officials and employees. In light of this express statutory grant of power, it is inappropriate for the Attorney General to render opinions concerning these provisions. 1989 Op. Att'y Gen. No. 89-037 at 2-167; *accord* 1987 Op. Att'y Gen. No. 87-025 (syllabus, paragraph three).

should not participate in discussions, negotiations, or votes concerning a contract with the county for road construction, improvement, or repair pursuant to R.C. 164.15, R.C. 307.15, or R.C. 5555.43. Further, said individual, as township trustee, should not participate in discussions or votes concerning an agreement entered into between the county engineer and an owner of land pursuant to R.C. 5543.13 or R.C. 5543.17. *See generally* R.C. 102.03(J) (an individual must abstain from voting, deliberating, or participating in discussions with regard to matters which are of such a character as to manifest a substantial and improper influence on him with respect to his public duties).

V.Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised that, an individual may hold simultaneously the positions of welder in a county engineer's office, township trustee, and officer in an employee organization that represents employees of the county engineer, provided the individual is appointed township trustee, or is elected to that position in a nonpartisan election, and further provided that the individual, as township trustee, does not participate in discussions, negotiations, or votes concerning a contract for the construction, improvement, or repair of roads entered into between the county and his township pursuant to R.C. 307.15, R.C. 164.15, or R.C. 5555.43, or an agreement entered into between the county engineer and an owner of land pursuant to R.C. 5543.13 or R.C. 5543.17. The individual, as township trustee, must also abstain from participating in deliberations, discussions, or voting on a matter concerning the interests of the employee organization, or using his position as an officer in the employee organization with regard to the interests of the township on a matter.

Respectfully,

LEE FISHER
Attorney General

May 6, 1994

The Honorable Lynn Alan Grimshaw
Scioto County Prosecuting Attorney
Scioto County Court House, Room 310
Portsmouth, Ohio 45662

SYLLABUS: 94-022

An individual may hold simultaneously the positions of welder in a county engineer's office, township trustee, and officer in an employee organization that represents employees of the county engineer, provided the individual is appointed township trustee, or is elected to that position in a nonpartisan election, and further provided that the individual, as township trustee, does not participate in discussions, negotiations, or votes concerning a contract for the construction, improvement, or repair of roads entered into between the county and his township pursuant to R.C. 307.15, R.C. 164.15, or R.C. 5555.43, or an agreement entered into between the county engineer and an owner of land pursuant to R.C. 5543.13 or R.C. 5543.17. The individual, as township trustee, must also abstain from participating in deliberations, discussions, or voting on a matter concerning the interests of the employee organization, or using his position as an officer in the employee organization with regard to the interests of the township on a matter.