February 10, 2003

The Honorable Jeffrey A. Strausbaugh
Defiance County Prosecuting Attorney
414 Third Street
Defiance, Ohio 43512

SYLLABUS: 2003-006

A person may serve simultaneously as a township clerk and county commissioner within the same county, provided that as a township clerk he does not prepare or present the township's tax budget to the county budget commission or explain to the county budget commission the township's need for moneys from the undivided local government fund and the undivided local government revenue assistance fund. As county commissioner, he may not participate in any deliberations, discussions, negotiations, or votes concerning annexation or detachment proceedings involving the township, a contract between the county and township, or an alternative method of apportioning the undivided local government fund and the undivided local government revenue assistance fund. (1932 Op. Att'y Gen. No. 4885, vol. III, p. 1528, syllabus, paragraph four, clarified.)

February 10, 2003

OPINION NO. 2003-006

The Honorable Jeffrey A. Strausbaugh
Defiance County Prosecuting Attorney
414 Third Street
Defiance, Ohio 43512

Dear Prosecutor Strausbaugh:

You have requested an opinion whether the positions of township clerk and county commissioner within the same county are compatible.[1] You have informed us that 1932 Op. Att'y Gen. No. 4885, vol. III, p. 1528 addressed this issue and advised that these two positions are compatible. Because this opinion was issued over seventy years ago, you have asked us to reexamine the compatibility of these positions.

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?

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[1] Ohio Const. art. XVII, § 1, which prescribes the time for holding elections for various public offices, provides, in part: "Elections for state and *county officers* shall be held on the first Tuesday after the first Monday in November in *even numbered* years; and all elections for *all other elective officers* shall be held on the first Tuesday after the first Monday in November in the *odd numbered* years." (Emphasis added.) Because a county commissioner is a county officer, *see State ex rel. DeChant v. Kelser*, 133 Ohio St. 429, 14 N.E.2d 350 (1938), "a person seeking party nomination as a candidate for the position of county commissioner would do so at the primary election held in an even-numbered year, and, if successful, would seek election to that position in the general election held in that same even-numbered year." 1993 Op. Att'y Gen. No. 93-052 at 2-251. The position of township clerk, however, is a township position. *See* R.C. 507.01. Because elections for the office of township clerk are held only in odd-numbered years, Ohio Const. art. XVII, § 1, a person will not compete for the offices of township clerk and county commissioner during the same general election. 1993 Op. Att'y Gen. No. 93-052 at 2-251.

3. Is one position subordinate to, or in any way a check upon, the other?

4. Is it physically possible for one person to discharge the duties of both positions?

5. Is there a conflict of interest between the two positions?

6. Are there local charter provisions, resolutions, or ordinances which are controlling?

7. Is there a federal, state, or local departmental regulation applicable?

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

The sixth and seventh questions concern the applicability of charter provisions, resolutions, ordinances, and federal, state, and local regulations. In this instance, there are no applicable charter provisions, or state or federal regulations. Whether there is an applicable local departmental regulation, resolution, or ordinance is a matter for local officials to determine. For the purpose of this opinion, it is assumed that there is no local departmental regulation, resolution, or ordinance that prevents someone from serving in these two positions at the same time.

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.

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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.)

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 county commissioner or township clerk is a position that is subject to the prohibition set forth in R.C. 124.57. R.C. 124.11(A)(1) provides that the unclassified service of a county and civil service township includes "[a]ll officers elected by popular vote or persons appointed to fill vacancies in such offices." The offices of county commissioner and township clerk are filled by popular vote, R.C. 305.01; R.C. 507.01, and so a person who serves as a county commissioner or township clerk is in the unclassified service. 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 simultaneously.

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 county commissioner and township clerk. 1932 Op. Att'y Gen. No. 4885, vol. III, p. 1528, at 1531. 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 county commissioner is elected by, and responsible to, the citizens of the county. R.C. 305.01. The positions thus serve different constituencies and are not subordinate to each other. Moreover, the positions operate independently of each other, and neither is required to assign duties to, or supervise, the other. Accordingly, neither position is subordinate to, or in any way a check upon, the other. *See* 1932 Op. Att'y Gen. No. 4885, vol. III, p. 1528, at 1531.

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 county commissioner, as elected officers, are required to perform duties imposed by statute and, where the nature of such duties requires that the clerk or commissioner be present at a particular time or place, or act in a particular manner, the clerk or commissioner must be able to do so. *See, e.g.*, R.C. 305.06(A) ("[t]he board of county commissioners shall conduct at least fifty regular sessions each year, at an office provided for the board in the county seat or at another location as provided in [R.C. 305.06(B)]. Each of these sessions shall be conducted at a specific time fixed in advance"); 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). 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.

The fifth question asks whether there is a conflict of interest between the two positions.[3] 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 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 inability 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 board of township trustees); 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).

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[3] 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 township clerk and county commissioner. *See* 2000 Op. Att'y Gen. No. 2000-025 at 2-170 at n.4.

A board of county commissioners is responsible for governing the county. *See generally* R.C. Chapter 307 (setting forth the general powers and duties of a board of county commissioners). The responsibilities of a board of county commissioners include, *inter alia*, procuring group insurance for county employees, R.C. 305.171, administering oaths, R.C. 305.21, compounding or releasing debts, judgments, fines, or amercements due the county and for the use thereof, R.C. 305.26, providing offices for county officers, R.C. 307.01; R.C. 307.02, and providing ambulance, emergency medical and nonemergency patient transport services, R.C. 307.05.

A board of county commissioners also handles fiscal and budgetary matters on behalf of the county. *See, e.g.,* R.C. 135.33(C) (awards the county's active moneys to eligible institutions); R.C. 135.35 (invests the county's inactive moneys). A board of county commissioners is designated as the taxing authority of the county for purposes of R.C. Chapters 133 (uniform public securities law) and 5705 (tax levy law). *See* R.C. 133.01(NN)(1); R.C. 5705.01(C). As a taxing authority, a board of county commissioners is responsible for issuing securities for the purpose of providing funds with which to pay one or more final judgments rendered against the county, R.C. 133.14, issuing securities for the purpose of paying all or any portion of the costs of any permanent improvement that the county is authorized to acquire, improve, or construct, R.C. 133.15, preparing the county's annual tax budget, R.C. 5705.28, and levying taxes, R.C. 133.56; R.C. 5705.03; R.C. 5705.19.

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.[4] Except as provided in R.C. 5705.28(B) or R.C. 5705.281,[5] the taxing authorities of counties and townships are required to prepare, adopt, and submit annual tax budgets to the county budget commission. R.C. 5705.28(A); *see also* R.C. 5705.29-.32. *See generally* R.C. 5705.01(A) (defining both a county and township as a "subdivision" for purposes of R.C. Chapter 5705 (tax levy law)). As used in R.C. Chapter 5705, "taxing authority" means the board of county commissioners in the case of the county, and the board of township trustees in the case of the township. R.C. 5705.01(C).

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[4] 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.

[5] R.C. 5705.28(B)(2)(a) provides that "[t]he taxing authority of a taxing unit that does not levy a tax is not required to adopt a tax budget pursuant to [R.C. 5705.28(A)]." R.C. 5705.281 authorizes the county budget commission to waive the requirement that the taxing authority of a subdivision adopt a tax budget pursuant to R.C. 5705.28(A).

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 county's and townships' tax budgets, R.C. 5705.32; *see* R.C. 5705.31, and adjusts the levies of the county and townships 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 a county and townships, both of these categories of subdivisions are permitted to have representatives appear before the county budget commission to explain the county's or townships' financial needs. R.C. 5705.32(E).

In addition, a potential conflict of interest exists because of the competition between a county and township for moneys in the undivided local government fund and the undivided local government revenue assistance fund. R.C. 5747.50-.55 and R.C. 5747.61-.63 set forth provisions governing the creation and operation of the undivided local government fund and the undivided local government revenue assistance fund, respectively. Because both a county and township are included within the definition of "subdivision," for purposes of R.C. 5747.50-.55 and R.C. 5747.62-.63, *see* R.C. 5747.01(Q)(1); R.C. 5747.62(A), each may be apportioned moneys from the undivided local government fund and the undivided local government revenue assistance fund. *See* 2000 Op. Att'y Gen. No. 2000-025 at 2-171; 1988 Op. Att'y Gen. No. 88-033 at 2-150.

R.C. 5747.51 and R.C. 5747.52 set forth the method by which the moneys in the undivided local government fund are to be allocated to subdivisions. Provisions pertaining to the disbursement of moneys from the undivided local government revenue assistance fund are set out in R.C. 5747.62. Pursuant to R.C. 5747.51(B) and R.C. 5747.62(B), both counties and townships are given the opportunity to have representatives appear before the county budget commission to explain and establish their need for moneys from the undivided local government fund and the undivided local government revenue assistance fund.

As a county commissioner, this person may be required to participate in the preparation and adoption of the county's annual tax budget. R.C. 5705.28(A). The person may also be required to explain to the county budget commission the county's annual tax budget or the county's need for moneys from the undivided local government fund and the undivided local government revenue assistance fund. R.C. 5705.32(E); R.C. 5747.51(B); R.C. 5747.62(B).

A township clerk, as the township's fiscal officer, *see* R.C. 5705.01(D), may be required to assist in preparing the township'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. In addition, a township clerk may be asked by the board of township trustees to explain to the county budget commission the township's need for moneys from the undivided local government fund and the undivided local government revenue assistance fund.

Accordingly, if a person were to assist in the preparation and presentation of both the county's and township's annual tax budget to the county budget commission, 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. Similarly, if the person were required to explain to the county budget commission both the county's and township's need for moneys from the undivided local government fund and the undivided local government revenue assistance fund, the person might be subject to influences that could prevent him from making completely objective and disinterested decisions. *See id.*

We believe, however, that these conflicts of interest can be sufficiently avoided. A township clerk is not required by statute to prepare the township's tax budget or present the budget to the county budget commission. Instead, R.C. 5705.28 requires the taxing authority of the township 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 a township. R.C. 5705.01(C). Thus, a township clerk is not subject to conflicts of interest involving the township's budget or obtaining moneys from the county budget commission.

In addition, the fact that a county commissioner holds an additional employment with a political subdivision that competes with the county for tax moneys generated within the ten-mill limitation and moneys from the undivided local government fund and the undivided local government revenue assistance fund is, in and of itself, an insufficient reason to find that the county commissioner is subject to an impermissible conflict of interest. *See* 2000 Op. Att'y Gen. No. 2000-025 at 2-172; 1999 Op. Att'y Gen. No. 99-027 at 2-183. If this reason were deemed sufficient, a county commissioner would not be permitted to hold any employment or office with a political subdivision that competes with the county for tax moneys generated within the ten-mill limitation and moneys from the undivided local government fund and the undivided local government revenue assistance fund. *See* 2000 Op. Att'y Gen. No. 2000-025 at 2-172.

Moreover, while the county and township each prepare and submit a tentative tax budget and request moneys from the undivided local government fund and the undivided local government revenue assistance fund, it is the county budget commission that actually allocates to the county and township tax proceeds within the ten-mill limitation and moneys from the undivided local government fund and the undivided local government revenue assistance fund. *See, e.g.,* R.C. 5705.31-.32; R.C. 5747.51; R.C. 5747.62. Accordingly, the potential conflicts of interest arising because of the competition over tax moneys generated within the ten-mill limitation and the competition between a county and township for moneys in the undivided local government fund and the undivided local government revenue assistance fund are, as a general matter, avoided.

However, such conflicts are not avoided when the person, as township clerk, is required by the board of township trustees to prepare and present the township's annual tax budget to the county budget commission or to explain to the county budget commission the township's need for moneys from the undivided local government fund and the undivided local government revenue assistance fund. An impermissible "conflict of interest exists where one person, who owes a duty of loyalty to each of two different governmental entities, is required to advocate a position on behalf of one entity to the potential detriment of the other." 1999 Op. Att'y Gen. No. 99-018 at 2-131.

A person who serves simultaneously as a county commissioner and township clerk could not avoid the aforementioned conflicts if the board of township trustees requires the person, as township clerk, to prepare and present the township's annual tax budget to the county budget commission or to explain to the county budget commission the township's need for moneys from the undivided local government fund and the undivided local government revenue assistance fund. *See generally* 1992 Op. Att'y Gen. No. 92-053 at 2-218 ("a township clerk cannot avoid appearing before the county budget commission if the township trustees require him to defend the township tax budget"). A person who simultaneously holds, within the same county, the positions of county commissioner and township clerk thus is subject to an impermissible conflict of interest when he is required to prepare and present the township's annual tax budget to the county budget commission or to explain to the county budget commission the township's need for moneys from the undivided local government fund and the undivided local government revenue assistance fund. Therefore, conflicts of interest arising because of the competition over tax moneys generated within the ten-mill limitation and the competition between a county and township for moneys in the undivided local government fund and the undivided local government revenue assistance fund do not exist and do not render the positions of county commissioner and township clerk incompatible, unless the person, as township clerk, is required to prepare and present the township's annual tax budget to the county budget commission or to explain to the county budget commission the township's need for moneys from the undivided local government fund and the undivided local government revenue assistance fund.

Another potential conflict of interest exists because a county may use an alternative method of apportioning the undivided local government fund and the undivided local government revenue assistance fund. Instead of apportioning these funds in accordance with R.C. 5747.51-.52 and R.C. 5747.62, respectively, a county budget commission may provide an alternative method of apportionment. Pursuant to R.C. 5747.53, before an alternative method of apportioning the undivided local government fund may be implemented, it must be approved by the board of county commissioners. Similarly, before an alternative method of apportioning the undivided local government revenue assistance fund may be instituted, R.C. 5747.63 requires the board of county commissioners to approve the alternative method.

The adoption of an alternative method of apportioning these funds may affect the amount of moneys that may be disbursed from these funds to a township. A board of county commissioners, therefore, may be able to affect the amount of moneys the township will receive from the undivided local government fund and the undivided local government revenue assistance fund. In such a situation, a county commissioner who serves as a township clerk could be subject to influences that might prevent him from making completely objective, disinterested decisions when deliberating, discussing, negotiating, or voting upon an alternative method of apportioning the undivided local government fund and the undivided local government revenue assistance fund. *See* 2000 Op. Att'y Gen. No. 2000-025 at 2-172.

Again, we believe that this conflict of interest can be sufficiently avoided or mitigated. The occasions requiring a county commissioner to discuss, deliberate, negotiate, or vote upon an alternative method of apportioning the undivided local government fund and the undivided local

government revenue assistance fund do not arise frequently. *See id.* 2-173. It is, thus, unlikely that a county commissioner will be required to discuss, deliberate, negotiate, or vote upon an alternative method of apportioning the undivided local government fund and the undivided local government revenue assistance fund. Additionally, since such occasions will be rare, a county commissioner should be able to abstain from participating in such deliberations, discussions, negotiations, or votes. Further, such activities are not part of the duties of the township clerk. This conflict of interest, thus, does not involve the primary duties of either position. Accordingly, this conflict of interest does not render the positions of county commissioner and township clerk incompatible, provided that this person, as county commissioner, does not participate in any deliberations, discussions, negotiations, or votes concerning an alternative method of apportioning the undivided local government fund and the undivided local government revenue assistance fund.

Conflicts of interest may also arise because the county and township may enter into contracts with each other. *See, e.g.*, R.C. 9.60 (authorizing a county and township to enter into a contract whereby the county or township provides fire protection to the other); R.C. 307.05 (a county may contract with a township in order to furnish or obtain ambulance, emergency medical and nonemergency patient transport services); R.C. 307.09 (a county may grant leases, rights, and easements to a township); R.C. 307.10 (a county may transfer real property in fee simple to a township); R.C. 307.12 (a county may sell or donate personal property to a township); R.C. 307.15 (authorizing a county and township to enter into a contract whereby the county or township is authorized to exercise any power, perform any function, or render any service on behalf of the other). If a county commissioner who serves as a township clerk were required to deliberate, discuss, negotiate, or vote on a contract between the county and township, it might be difficult for the commissioner to perform his duties and exercise his discretion in a completely objective and disinterested manner because of his position with the township.

We believe, nonetheless, that this potential conflict of interest can also be sufficiently avoided. No provision of law requires a county and township to contract with each other for services, property, or any other reason. The formation of these contracts thus is not a primary statutory duty of the board of county commissioners. As a result, the occasions in which the person, as a county commissioner will have to deliberate, discuss, negotiate, or vote on such a contract will be rare, indeed.

Even when such a contract is contemplated by a board of county commissioners, a commissioner who is employed by the township will be able to remove himself from any deliberations, discussions, negotiations, or votes on the contract because the board is capable of functioning and performing its statutory duties when one of its members abstains from a matter. *See generally State ex rel. Saxon v. Kienzle*, 4 Ohio St. 2d 47, 48, 212 N.E.2d 604, 605 (1965) ("[i]n the absence of a statute to the contrary, any action by a board requires that a quorum participate therein, and that a majority of the quorum concur"). Moreover, a county commissioner, as a public officer, has a duty to abstain from participating in any matter that would impair his objectivity. *See* 2000 Op. Att'y Gen. No. 2000-025 at 2-170. Accordingly, this potential conflict of interest does not prohibit a county commissioner from serving

simultaneously as a township clerk within the same county, provided the commissioner does not participate in any deliberations, discussions, negotiations, or votes concerning a contract between the county and township.

Another conflict of interest may arise because the person's decisions as a county commissioner in annexation or detachment proceedings under R.C. Chapter 709[6] may affect the person's compensation as township clerk. Pursuant to R.C. 507.09(A), township clerks are compensated as follows:

> (A) Except as otherwise provided in division (D) of this section,[7] the township clerk shall be entitled to compensation as follows:
>
> (1) In townships having a budget of fifty thousand dollars or less, three thousand five hundred dollars;
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> (2) In townships having a budget of more than fifty thousand but not more than one hundred thousand dollars, five thousand five hundred dollars;
>
> (3) In townships having a budget of more than one hundred thousand but not more than two hundred fifty thousand dollars, seven thousand seven hundred dollars;
>
> (4) In townships having a budget of more than two hundred fifty thousand but not more than five hundred thousand dollars, nine thousand nine hundred dollars;
>
> (5) In townships having a budget of more than five hundred thousand but not more than seven hundred fifty thousand dollars, eleven thousand dollars;
>
> (6) In townships having a budget of more than seven hundred fifty thousand but not more than one million five hundred thousand dollars, thirteen thousand two hundred dollars;
>
> (7) In townships having a budget of more than one million five hundred thousand but not more than three million five hundred thousand dollars, fifteen thousand four hundred dollars;
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> (8) In townships having a budget of more than three million five hundred thousand dollars but not more than six million dollars, sixteen thousand five hundred dollars;
>
> (9) In townships having a budget of more than six million dollars, seventeen thousand six hundred dollars. (Footnote added.)

The compensation of a township clerk thus is directly related to the size of the township's budget. *See* R.C. 507.09(A). The size of a township's budget is based, in part, on the amount of

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[6] R.C. 709.01 provides, in part, that "[t]erritory may be annexed to, or detached from, municipal corporations, in the manner provided in [R.C. 709.01-.47]."

[7] R.C. 507.09(D) provides that, beginning in calendar year 1999, the compensation of township clerks shall increase three percent each year.

taxable property in the township. *See* R.C. 5705.02; R.C. 5705.03. Accordingly, when a township gains or loses territory in an annexation or detachment proceeding under R.C. Chapter 709, the amount of taxable property in the township is either increased or decreased. In such a situation, the township's budget is correspondingly increased or decreased. Such a change in the township's budget could ultimately increase or decrease the township clerk's compensation.

There are several instances in which the actions of a board of county commissioners in an annexation or detachment proceeding could affect the amount of taxable property in a township, and possibly, the compensation of the township clerk. *See, e.g.*, R.C. 709.033 (a board of county commissioners may allow a petition for annexation when it makes certain factual determinations); R.C. 709.16(C) (if the only territory to be annexed is contiguous territory owned by a county, the board of county commissioners, by resolution, may grant or deny the annexation); R.C. 709.50(C)(2) (when territory that is detached from a municipal corporation does not become a village, "the board of county commissioners shall attach all the unincorporated territory that does not become a village to any township contiguous to that territory or erect that territory into a new township, the boundaries of which need not include twenty-two square miles of territory"). If a county commissioner who serves as a township clerk were required to deliberate, discuss, negotiate, or vote on an annexation or detachment proceeding involving the township, it might be difficult for the commissioner to perform his duties and exercise his discretion in a completely objective and disinterested manner because of his position as township clerk.

For the following reasons, we believe that the conflicts arising from annexation and detachment proceedings can be sufficiently avoided. First, annexation and detachment proceedings involving townships do not arise regularly before a board of county commissioners, and thus, the occasions in which the person, as a county commissioner, will have to deliberate, discuss, negotiate, or vote on a matter in such proceedings will be rare, indeed. Moreover, the person, as county commissioner, is able to remove himself from any deliberations, discussions, negotiations, or votes in such proceedings. Finally, as stated above, a county commissioner has a duty to abstain from participating in any matter in which his objectivity is impaired. *See* 2000 Op. Att'y Gen. No. 2000-025 at 2-170. Accordingly, this potential conflict of interest does not prohibit a county commissioner from serving simultaneously as a township clerk within the same county, provided the commissioner does not participate in any deliberations, discussions, negotiations, or votes concerning annexation or detachment proceedings involving the township.

As a final matter, it should be noted that, if the county and township were to enter into a contract that requires the township to pay the county for a service, the township clerk, as the township's fiscal officer, 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, and to disburse township moneys payable to the county under the contract, R.C. 507.04; R.C. 507.11(B). In such a situation, the township clerk's responsibilities as county commissioner could influence the performance of his duties as township clerk, thereby subjecting him to a conflict of interest.

Although it is possible for this conflict of interest to occur, prior opinions of the Attorney General have advised that this conflict of interest is insufficient to summarily render two public positions incompatible. 2002 Op. Att'y Gen. No. 2002-021 at 2-138; 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 certifies the availability of money payable under a public contract or disburses township moneys payable under a public contract, the township clerk performs a ministerial duty. 2002 Op. Att'y Gen. No. 2002-021 at 2-138; 1999 Op. Att'y Gen. No. 99-018 at 2-133; 1996 Op. Att'y Gen. No. 96-008 at 2-34. In other words, a township clerk 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"); *accord* 2002 Op. Att'y Gen. No. 2002-021 at 2-138. Accordingly, when a township clerk certifies the availability of money payable under a contract between a township and county or disburses township moneys payable to the county under the contract, the township clerk exercises no decision-making authority.

Moreover, there is a presumption that, in the absence of evidence to the contrary, a township clerk will perform his ministerial duties in a regular and lawful manner. 2002 Op. Att'y Gen. No. 2002-021 at 2-139; *see State ex rel. Speeth v. Carney*, 163 Ohio St. 159, 126 N.E.2d 449 (1955) (syllabus, paragraph ten) ("[i]n the absence of evidence to the contrary, public officials, administrative officers, and public authorities, within the limits of the jurisdiction conferred upon them by law, will be presumed to have properly performed their duties in a regular and lawful manner and not to have acted illegally or unlawfully"). Hence, when a township and county enter into a contract that requires the township to pay the county for a service, in the absence of evidence to the contrary, it is to be presumed that the township clerk will discharge his ministerial duties of certifying the availability of money payable under the contract and disbursing township moneys payable to the county under the contract in a regular and lawful manner.

Therefore, the potential conflicts of interest here identified do not prohibit a person from serving simultaneously as a county commissioner and township clerk within the same county, provided that as a township clerk he does not prepare or present the township's tax budget to the county budget commission or explain to the county budget commission the township's need for moneys from the undivided local government fund and the undivided local government revenue assistance fund. As county commissioner, he may not participate in any deliberations, discussions, negotiations, or votes concerning annexation or detachment proceedings involving the township, a contract between the county and township, or an alternative method of apportioning the undivided local government fund and the undivided local government revenue assistance fund.[8]

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[8] Because we have determined that there are instances in which the positions of county commissioner and township clerk are incompatible because of a conflict of interest between the two positions, 1932 Op. Att'y Gen. No. 4885, vol. III, p. 1528, syllabus, paragraph four, is

Although we have determined that a person may serve simultaneously as a township clerk and county commissioner within the same county when the person abstains from participating in particular activities or matters, we must caution you that given the number and nature of the potential conflicts of interest it may be impractical for a person to hold both of these positions simultaneously. If the person is continually removing himself from potential conflicts of interest, the township's or county's affairs may, in general, suffer or go unattended. In addition, the person as township clerk or county commissioner may not perform in a competent manner the important duties he is required by law to perform on behalf of the township or county, respectively. Finally, it is conceivable that the situation could reach the point where county and township officials are spending an inordinate amount of time determining whether the person has a conflict of interest in particular matters. In light of these practical concerns, we strongly urge you and the local officials involved to carefully consider the multitude of potential problems that may occur when a person serves simultaneously in the positions of township clerk and county commissioner within the same county.

Based on the foregoing, it is my opinion, and you are hereby advised that a person may serve simultaneously as a township clerk and county commissioner within the same county, provided that as a township clerk he does not prepare or present the township's tax budget to the county budget commission or explain to the county budget commission the township's need for moneys from the undivided local government fund and the undivided local government revenue assistance fund. As county commissioner, he may not participate in any deliberations, discussions, negotiations, or votes concerning annexation or detachment proceedings involving the township, a contract between the county and township, or an alternative method of apportioning the undivided local government fund and the undivided local government revenue assistance fund. (1932 Op. Att'y Gen. No. 4885, vol. III, p. 1528, syllabus, paragraph four, clarified.)

Respectfully,

JIM PETRO
Attorney General

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hereby clarified to the extent that it suggests that the positions of county commissioner and township clerk are compatible in all instances.