November 26, 1993

OPINION NO. 93-049

The Honorable Charles L. Bartholomew
Wyandot County Prosecuting Attorney
110 East Wyandot Avenue
P.O. Box 26
Upper Sandusky, Ohio 43351

Dear Prosecutor Bartholomew:

You have asked for an opinion whether the position of director of a county board of elections is compatible with the position of clerk of the legislative authority of a charter city. Information provided indicates that the clerk's position is with the city of Upper Sandusky.

Compatibility Analysis

1979 Op. Att'y Gen. No. 79-111 sets forth the following seven questions for 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. All seven questions must yield an answer in favor of compatibility before two public positions can be found compatible.

The sixth and seventh questions involve in large part matters of local concern, and it is assumed, for purposes of this opinion, that there are no departmental regulations or ordinances

which limit the holding of outside employment by a director of a county board of elections or clerk of the legislative authority of Upper Sandusky. There are no applicable state or federal regulations.

R.C. 124.57

Question one asks whether either of the positions is a classified employment within the terms of R.C. 124.57, which prohibits classified employees from participating in partisan political activity. Pursuant to R.C. 124.11(A)(2), the director of a county board of elections is in the unclassified service. The position of clerk of the legislative authority of Upper Sandusky is in the unclassified service of the city. Charter of the Municipality of Upper Sandusky, Ohio §13.05. Because neither position is in the classified service, R.C. 124.57 does not prohibit one person from holding both positions.

Outside Employment

The second question asks whether the empowering statutes of either position limit outside employment. No provision in the city charter of Upper Sandusky limits the outside employment possible for the clerk of the legislative authority of the city.[1] Pursuant to R.C. 3501.09, the director of a county board of elections may not be a member of the board of elections. In addition, R.C. 3501.15 prohibits an individual from serving as the director of a board of elections when the individual "is a candidate for any office to be filled at an election, except the office of delegate or alternate to a convention, member of the board of directors of a county agricultural society, presidential elector, or a member of a party committee." Pursuant to section 4.06 of the Charter of the Municipality of Upper Sandusky, Ohio, the clerk of the legislative authority is appointed by the legislative authority. Thus, no provision within the Revised Code or the city charter of Upper Sandusky prohibits an individual from holding simultaneously the positions of director of a county board of elections and clerk of the legislative authority of Upper Sandusky.

Subordination or Control

Question number three asks whether one position is subordinate to, or in any way a check upon, the other. According to information provided, the clerk of the legislative authority of the city is appointed by the legislative authority and serves at its pleasure. Charter of the Municipality of Upper Sandusky, Ohio §4.06. The director of a county board of elections is appointed by the board of elections, and serves for two years at the pleasure of the board of elections. R.C. 3501.09; R.C. 3501.14. The director also may be removed by the Secretary of State for the reasons set forth in R.C. 3501.16. Insofar as the director of a county board of elections and clerk of the legislative

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[1] Under the city charter of Upper Sandusky, the clerk of the legislative authority of the city may also serve as the city auditor. Charter of the Municipality of Upper Sandusky, Ohio §§4.07(f) and 8.03. Pursuant to section 8.03 of the charter, the city auditor may not hold an elected office of the city. Thus, if the clerk of the legislative authority of the city also serves as the city auditor, the clerk may not hold an elected office of the city.

authority of Upper Sandusky serve different masters, the positions operate independently of each other and neither is subordinate to the other. Moreover, there is no area in which one position acts as a check upon the other. *See generally Pistole v. Wiltshire*, 22 Ohio Op. 2d 464, 467, 189 N.E.2d 654, 657-58 (C.P. Scioto County 1961) (a township trustee is responsible to the electors who elected him and a deputy sheriff is responsible to the county sheriff who appointed him; neither position is subordinate to, or a check upon, the other). The positions, therefore, are not subordinate to, or in any way a check upon, each other.

Physical Constraints

Question number four asks whether it is physically possible for one person to perform the duties of both positions. Whether one person is physically able to adequately discharge the duties of both positions is a question of fact which is best answered by the parties involved. 1991 Op. Att'y Gen. No. 91-010 at 2-53. You have stated that both positions are part-time and that there are no time constraints to prevent one person from serving in both positions. Thus, it appears that it is physically possible for one person to perform the duties of both positions.

Conflict of Interest

The final question asks whether there is a conflict of interest between the two positions. An individual may not 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.

R.C. 3501.13 sets forth the duties of a director of a county board of elections as follows:

> The director of the board of elections shall keep a full and true record of the proceedings of the board and of all moneys received and expended; file and preserve in its office all orders and records pertaining to the administration of registrations, primaries, and elections; receive and have the custody of all books, papers, and property belonging to the board; and shall perform such other duties in connection with his office and the proper conduct of elections as the board determines.
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> The director may administer oaths to such persons as are required by law to file certificates or other papers with the board, to judges and clerks of elections, to witnesses who are called to testify before the board, and to voters filling out blanks at the board's offices. The records of the board and papers and books filed in its office are public records and open to inspection under such reasonable regulations as shall be established by the board.

The director of a county board of elections thus performs clerical and ministerial duties pertaining to the activities of the board of elections and administers oaths to various persons having business with the board.

The clerk of the legislative authority of Upper Sandusky is required to keep an accurate and complete journal of the legislative authority's proceedings and perform such other duties as the charter or legislative authority may require. Charter of the Municipality of Upper Sandusky, Ohio §4.06; *see also* Charter of the Municipality of Upper Sandusky, Ohio §4.08. Pursuant to section 5.09 of the city charter, the clerk is required to authenticate each ordinance or resolution passed by the legislative authority. In addition, the charter requires the clerk to authorize publication of the date for a public hearing on a zoning ordinance or resolution, the proposed revision, codification, recodification, rearrangement or publication of the municipal corporation's ordinances in book form, and the title to each ordinance and resolution passed by the legislative authority. Charter of the Municipality of Upper Sandusky, Ohio §§5.13 and 5.15-.16. The duties of the clerk of the legislative authority of a city thus are clerical and ministerial.[2]

A review of the foregoing discloses no situations in which the duties of the clerk of the legislative authority of Upper Sandusky and director of a county board of elections conflict. Accordingly, the positions of clerk of the legislative authority of Upper Sandusky and director of a county board of elections are compatible.

Conclusion

In conclusion, it is my opinion, and you are hereby advised, that an individual may serve simultaneously as the director of a county board of elections and clerk of the legislative authority of a charter city, provided that such simultaneous service does not violate a local departmental regulation, charter provision, or ordinance.

Respectfully,

LEE FISHER
Attorney General

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[2] As noted above, the clerk of the legislative authority of Upper Sandusky may also serve as the city auditor. *See* footnote one, *supra*. Because you have not indicated whether the clerk serves as city auditor, it is assumed, for purposes of this opinion, that the clerk does not serve as the city auditor.

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SYLLABUS: 93-049

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