February 17, 1999

OPINION NO. 99-018

The Honorable Brent A. Saunders
Gallia County Prosecuting Attorney
Gallia County Courthouse
18 Locust Street, Room 1267
Gallipolis, Ohio 45631-1267

Dear Prosecutor Saunders:

You have requested an opinion whether the positions of township clerk and auditor of a chartered city are compatible. The position of city auditor is with the City of Gallipolis. Under the Charter of the City of Gallipolis, the position of city auditor was created, and delegated responsibility for discharging the duties of auditor, clerk of the city commission, treasurer, clerk of the board of sinking fund trustees, and clerk of the municipal water works department. Charter of the City of Gallipolis, Ohio § 22. The charter also provides that the city auditor "shall perform such other duties … as may be required of city auditors and city treasurers by the general laws of the state applicable to municipalities." *Id*.

Under the Revised Code, the city auditor of the City of Gallipolis is required to keep the books of the city, R.C. 733.11, audit the accounts of all city officers and departments, R.C. 733.12, certify to the court of common pleas the election of every officer of the city authorized to discharge the duties of a judge of a county court, take the acknowledgement of deeds, or certify depositions or affidavits to be used within the city, R.C. 733.15, and inspect bids required to be filed for the letting of contracts, R.C. 733.18. As city treasurer, the person is required to demand and receive, from the county treasurer, taxes levied and assessments made and certified to the county auditor by the legislative authority of the city and placed on the tax list by the county auditor for collection, R.C. 733.44, settle and account with the legislative authority, quarterly, and at any other time which the legislative authority by resolution or ordinance requires, R.C. 733.45, and receive and disburse all funds of the municipal corporation, R.C. 733.46.

1979 Op. Att'y Gen. No. 79-111 at 2-367 and 2-368 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?

All seven questions must yield an answer in favor of compatibility before two positions may be found compatible.

Questions six and seven concern the applicability of charter provisions, ordinances, and federal, state, and local departmental regulations. There are no applicable state or federal regulations. Additionally, no current provision of the Charter of the City of Gallipolis prohibits the city auditor from serving simultaneously as a township clerk. Whether there is an applicable local departmental regulation or ordinance is a matter for local officials to determine. We will assume, for purposes of this opinion, that there is no departmental regulation or ordinance of either the township or the city that prohibits an individual from serving simultaneously in the positions of township clerk and city auditor.

Question one asks whether either of the positions is a classified employment within the terms of R.C. 124.57, which prohibits classified employees and officers from participating in partisan political activity other than to vote and express their political views. A township clerk, as an elected officer, holds an unclassified civil service position. *See* R.C. 124.11(A)(1); R.C. 507.01. The city auditor is appointed by the city commission and serves as the head of the department of finance. Charter of the City of Gallipolis, Ohio § 22. The city auditor holds office at the pleasure of the commission. *Id.* Pursuant to R.C. 124.11(A)(3), the head of a department appointed by the chief appointing authority of a city is in the unclassified service. The city auditor thus is in the unclassified civil service. Because neither of the positions is in the classified service, the prohibition of R.C. 124.57 does not apply.

Question two asks whether the empowering statutes of either position limit outside employment. No provision in the Charter of the City of Gallipolis limits the outside employment possible for the city auditor. There is no statute which limits outside employment for a township clerk. Thus, no statute or charter provision prohibits an individual from serving simultaneously as a township clerk and city auditor.

Question three asks whether one position is subordinate to, or in any way a check upon, the other. An elected official, such as a township clerk, is responsible to the people who elected

him. *See* 1994 Op. Att'y Gen. No. 94-022 at 2-98. The city auditor is appointed by the city commission and serves at the pleasure of the commission. A township clerk and city auditor thus serve different masters and are not subordinate to each other. In addition, a review of the duties of the respective positions reveals that the positions operate independently of each other, and that neither is responsible for assigning duties to or supervising the other. Therefore, neither position is subordinate to, or a check upon, the other.

Question four asks whether it is physically possible for one person to perform the duties of both positions. This is a factual question, which is best answered by the interested persons because they may more precisely determine the time demands of each position. *See* 1997 Op. Att'y Gen. No. 97-045 at 2-282. It is possible, however, that these two positions can be filled competently by the same person if there is no direct conflict in the working hours of each position.

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

Pursuant to R.C. 5705.28-.32, each city and township must prepare, adopt, and submit an annual tax budget to the county budget commission. *See generally* R.C. 5705.01(A) (defining both a city and township as a "subdivision" for purposes of R.C. Chapter 5705). The county budget commission revises and adjusts the estimate of balances and receipts from all sources for each fund within each city's and township's tax budget. R.C. 5705.32; *see* R.C. 5705.31. After making the revisions and adjustments, the county budget commission adjusts the levies of a city and township within the limits of the law. R.C. 5705.31. The potential revenue of a city or township thus is affected by the determination of the county budget commission. *See* 1988 Op. Att'y Gen. No. 88-011.

Each city and township is permitted to participate in the determinations of the county budget commission. In this regard, R.C. 5705.32(E)(2) states: "Before the final determination of the amount to be allotted to each subdivision from any source, the commission shall permit representatives of each subdivision … to appear before [the commission] to explain its financial needs." As a result, a city auditor and township clerk, as the fiscal officers of their respective subdivisions, R.C. 5705.01(D), may be called upon to assist in or to make the presentation to the county budget commission on behalf of the city or township, respectively.

It is well settled that a potential 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. 1996 Op. Att'y Gen. No. 96-008 at 2-33; 1993 Op. Att'y Gen. No. 93-048 at 2-236; 1992 Op. Att'y Gen. No. 92-053 at 2-217. As stated in 1996 Op. Att'y Gen. No. 96-008 at 2-33:

> An argument that a subdivision is entitled to a certain level of funds means a reduced level of funds are available for other subdivision's use. Thus, your situation raises a potential conflict with regard to distribution of a limited pool of funds, in this case inside millage, generated by the unvoted property tax.

A second potential conflict of interest also is present because a city auditor and township clerk, as the fiscal officers of their respective subdivisions, R.C. 5705.01(D), must certify[1] all warrants to be paid from their respective subdivision's treasury. R.C. 5705.41(D); *see* R.C. 507.11(B); R.C. 733.13; 1996 Op. Att'y Gen. No. 96-008 at 2-33. In discharging their duty to certify warrants, a city auditor and township clerk are required to render unbiased determinations. If a person who simultaneously serves as a city auditor and township clerk were required to certify a city warrant made payable to the township, or a warrant of the township made payable to the city, the person could be subject to influences that might prevent him from making a completely objective and disinterested determination. *See* 1996 Op. Att'y Gen. No. 96-008 at 2-33. *See generally* 1980 Op. Att'y Gen. No. 80-035 at 2-149 (a potential 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").

Although a person who serves simultaneously in two public positions is subject to potential conflicts of interest, the two positions may be found compatible where the possibility for conflicts is remote and speculative. 1979 Op. Att'y Gen. No. 79-111 (syllabus, paragraph three). Factors used in analyzing the immediacy of conflicts of interest include the remoteness of the conflicts, the ability or inability of a person to remove himself from the conflicts, whether the person exercises decision-making authority in both positions, whether the potential conflicts involve the primary functions of each position, and whether the conflicts involve budgetary controls. *Id*. at 2-372.

---

[1] Before a warrant may be redeemed from a township or city treasury, the appropriate fiscal officer must certify that sufficient unencumbered funds are available to satisfy the amount set forth in the warrant. *See generally* 1969 Op. Att'y Gen. No. 69-076 (syllabus, paragraph one) ("[s]ection 5705.41, Revised Code, requires that before any contract involving the expenditure of money is entered into by a county, the county auditor must certify that the amount required to meet the same has been lawfully appropriated for that purpose and is in the treasury or is in the process of collection to the credit of the appropriate fund free from any previous encumbrances"); 1963 Op. Att'y Gen. No. 167, p. 273 (syllabus, paragraph two) ("[a] township clerk may execute the certificate required by Section 5705.41(D), Revised Code, if sufficient unencumbered funds will be available to pay notes and interest thereon, issued pursuant to a continuing contract").

Let us now review the immediacy of the conflicts of interest encountered by a person who serves simultaneously as a city auditor and township clerk. It is only speculative whether the person, as city auditor or township clerk, will be required to appear before the county budget commission to defend the city's or township's tax budget. Neither the position of city auditor nor township clerk is statutorily responsible for preparing tax budgets that are to be presented to the county budget commission. *See* R.C. 5705.28 (the taxing authority[2] of each city and township shall adopt a tax budget). It is thus unlikely that the person, as city auditor or township clerk, will be required to defend the city's or township's tax budget before the county budget commission. *See generally* 1996 Op. Att'y Gen. No. 96-008 at 2-33 and 2-34 ("[i]t is generally unlikely that a clerk-treasurer of a village and a clerk of a joint township fire department will be required to defend their subdivision's tax budget since neither exercises decision-making authority with respect to the preparation of their subdivision's budget"). It is also speculative whether the person, as city auditor, will be required to certify a city warrant made payable to the township, or that the person, as township clerk, will be required to certify a warrant of the township made payable to the city. As a general matter, the issuance of a city or township warrant that is payable to a township or city, respectively, is not a matter that arises regularly.

In addition, neither the position of city auditor nor township clerk exercises discretionary authority with respect to the preparation of their subdivision's tax budget or the certification of warrants. *See generally* R.C. 5705.28 (a township's tax budget is prepared by its board of township trustees, while a city's tax budget is prepared by its legislative authority); 1996 Op. Att'y Gen. No. 96-008 at 2-34 (the act of certifying a warrant is ministerial in nature). Also, the defense of a city's or township's tax budget, and the certification of city warrants made payable to a township, or township warrants made payable to a city, constitute only a small fraction of the duties of the positions in question. The conflicts of interest, thus, do not involve the primary duties of either position.

Finally, the fact that the potential conflicts of interest noted above involve budgetary matters and statutory responsibilities of a city auditor or township clerk is not sufficient in and of itself to result in a finding that the positions are incompatible. As we have already explained, these conflicts are likely to be rare and neither position exercises discretionary authority with respect to budgetary matters or the certification of warrants. *See generally* R.C. 5705.28 (a township's tax budget is prepared by its board of township trustees, while a city's tax budget is prepared by its legislative authority); R.C. 5705.31-.32 (the county budget commission is responsible for allocating money to the various subdivisions after adjusting the rates of taxation, fixing the amount of taxes to be levied, and adjusting the estimates of balances and receipts from available sources); *State ex rel. Ms. Parsons Constr. Inc. v. Moyer*, 72 Ohio St. 3d 404, 650 N.E.2d 472 (1995) (a city auditor does not possesses discretionary power to refuse payment due

---

[2] Pursuant to R.C. 5705.01(C), "taxing authority" means the legislative authority in the case of a city and the board of township trustees in the case of a township.

under a public contract); 1996 Op. Att'y Gen. No. 96-008 at 2-34 (the act of certifying a warrant is ministerial in nature).

Moreover, if the person, as township clerk or city auditor, were required either to appear before the county budget commission to present a tax budget, *see* Charter of the City of Gallipolis, Ohio § 22; 1972 Op. Att'y Gen. No. 72-109 at 2-426, or to certify a warrant requiring the payment of moneys to another governmental entity that employs him, *see* R.C. 5705.41(D), it is reasonable to presume that the individual would use his best judgment in defending the tax budget before the county budget commission or certifying the warrant. *See generally 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"). Accordingly, the potential conflicts of interest are remote and speculative, and such conflicts do not render the positions of city auditor of the City of Gallipolis and township clerk incompatible. *See* 1996 Op. Att'y Gen. No. 96-008 (finding compatible the positions of clerk-treasurer of a non-charter village and clerk of a joint township fire district).

In conclusion, it is my opinion, and you are hereby advised that the positions of township clerk and city auditor of the City of Gallipolis are compatible, provided a person does not violate a local departmental regulation, charter provision, or ordinance by holding both positions.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

February 17, 1999

The Honorable Brent A. Saunders
Gallia County Prosecuting Attorney
Gallia County Courthouse
18 Locust Street, Room 1267
Gallipolis, Ohio 45631-1267

SYLLABUS: 99-018

The positions of township clerk and city auditor of the City of Gallipolis are compatible, provided a person does not violate a local departmental regulation, charter provision, or ordinance by holding both positions.