

Note from the Attorney General's Office:

1964 Op. Att'y Gen. No. 64-897 was questioned by
2004 Op. Att'y Gen. No. 2004-019.

OPINION NO. 897**Syllabus:**

A member of a board of elections who is employed as a secretary by a congressman from the same district is not prohibited from exercising the duties of both positions, notwithstanding the fact that that board of elections is required to tabulate and count the votes for election of a congressman from that district and that the board member's employer is seeking re-election.

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To: G. William Brokaw, Columbiana County Pros. Atty., Lisbon, Ohio
By: William B. Saxbe, Attorney General, March 5, 1964

Your request for my opinion reads as follows:

"Please furnish my office with your Opinion as to whether the position of Secretary to a Congressman, working in his home County, is compatible with being a member of the Board of Elections in said County.

"* * * * *"

The procedure for filling vacancies of the county boards of election is found in Section 3501.06, Revised Code. That section provides that the secretary of state shall appoint, on the first day of March in even-numbered years, two board members who shall serve for four years. The members appointed shall have been recommended by the party who cast the highest and second highest number of votes for the office of governor in the last preceding regular state election. In cases where no recommendation is made, the secretary of state shall make the appointments.

The duties of the boards of election are outlined in Section 3501.11, Revised Code. That section provides in part as follows:

"Each board of elections shall exercise by a majority vote all powers granted to such board by Title XXXV of the Revised Code, shall perform all the duties imposed by law, and shall:

"(K) Review, examine, and certify the sufficiency and validity of petitions and nomination papers;

"(L) Receive the returns of elections, canvass the returns, make abstracts thereof, and transmit such abstracts to the proper authorities;

"(M) Issue certificates of election on forms to be prescribed by the secretary of state;"

Other duties of the boards of elections include providing of polling places, investigation of irregularities and non-performance of duty by election officials.

Section 3501.15, Revised Code, is directed to the eligibility of candidates for elective office to serve as election officials. This section reads as follows:

"No person shall serve as a member, clerk, deputy clerk, assistant clerk, or employee of the board of elections who is a candidate for any office to be filled at an election, except the office of delegate of alternate to a convention, member of the board of directors of a county agricultural society, presidential elector, or a member of a party committee. No person who is a candidate for an office or position to be voted for by the electors of a precinct shall serve as a precinct election officer in said precinct."

In Opinion No. 1730, Opinions of the Attorney General for 1952, page 594, a question was raised as to the compatibility of one being a member of the board of elections while holding another appointive position as a member of a board of health of a general health district. In that opinion, the following discussion is found at page 599:

"In the consideration of this question, regard must be had to the essential nature of our system by which elections are conducted and supervised. By reference to the statutory provisions already noted herein for the appointment of members of election boards, it is readily apparent that all of such members are representatives of one or the other of two major political parties. All of them

are, therefore, in positions of partisanship with respect to the election of the candidates sponsored by the party which each represents. To a lesser, and perhaps a more mixed extent, the same would be true with respect to the 'questions and issues' which from time to time are submitted to the electorate. Here it becomes evident that the General Assembly has frankly rejected any notion of attempting to provide non-partisan, unprejudiced or neutral membership for such boards, and has provided instead that the partisanship on such boards should be equally divided between the major parties. Purely as a political matter, it may be doubted whether any attempt to provide for membership on such boards on a non-partisan basis could be successful in a society in which political interest is as widespread as it is in our own. In any event, it is clear that under our present statutes, partisanship on the part of election board members is accepted as an essential feature of the state election machinery. * * *

As discussed in the 1952 opinion, the composition of a board of elections reflects political partisanship, and political activity -- rather than inhibiting appointment -- is a recognized basis for appointment. The only question there can be, then, is whether specific employment of a member of a board of elections by the holder of a political office or a candidate for office, or other employer, creates a conflict of interest such that one person may not simultaneously hold the two positions.

In Opinion No. 3930, Opinions of the Attorney General for 1954, page 307, the then attorney general found that an assistant prosecuting attorney who was appointed by a prosecuting attorney who was then a candidate for re-election could not properly discharge his contemporaneous duties as a member of a county board of elections. In the fact situation involved in Opinion No. 3930, supra, there was a latent conflict as between the board member's superior, the prosecuting attorney, and the board of elections. The prosecuting attorney is an ex officio member of the county budget commission and is involved in the process of appropriating funds for the operation of county boards, including the board of elections. This latent conflict, coupled with the potential conflict of interests of the assistant to a prosecuting attorney who was a current candidate for re-election was held sufficient to find an incompatibility.

In this case, there is no such interlocking of interests and potential conflict of interests. Further, the position of secretary to a congressman is not an office created by statute as is the position of assistant prosecuting attorney in Ohio under Section 309.06, Revised Code.

It should be noted that there are three situations in which a person is not eligible to sit as a member of

a county board of elections. These situations are:

(a) Where one is presently a candidate for political office in that county,

(b) where there is a specific statutory prohibition (e.g. members of the governor's cabinet per Section 121.12, Revised Code),

(c) where there is a common law incompatibility (see State ex rel. v. Gebert, 12 O. C.C. (N.S.) 274, 275).

The prohibitions contained in Section 3501.15, supra, are based upon the probability of a conflict of interest developing, as opposed to mere partisanship. I consider the difference between a conflict of interest and partisanship (as these terms are used here) to be that the former encompasses a situation in which a person is compelled to make a choice between serving one of two or more interests, while the latter term connotes an allegiance without presenting to an honest adherent a choice.

In the situation which you have posed, there is a possible partisanship but, as a practical matter, there is not a conflict of interests. In the absence of conflict and, in the absence of existence of statutory inhibition or common law incompatibility, there is no prohibition against holding the positions of member of a county board of elections and of secretary employed by a congressman.

Therefore, it is my opinion and you are advised that a member of a board of elections who is employed as a secretary by a congressman from the same district is not prohibited from exercising the duties of both positions, notwithstanding the fact that that board of elections is required to tabulate and count the votes for election of a congressman from that district and that the board member's employer is seeking re-election.