

OPINION NO. 86-030**Syllabus:**

The positions of township trustee and chief of the fire department of a village located within the township are compatible, unless the township and village have contracted pursuant to R.C. 9.60 whereby the village has agreed to provide fire protection to the township.

To: Charles L. Bartholomew, Wyandot County Prosecuting Attorney, Upper Sandusky, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, May 21, 1986

I have before me your request for my opinion concerning whether the positions of township trustee and chief of a village fire department are compatible. You state in your letter of request that the village in question is located within the township which the individual would serve as trustee.

In 1979 Op. Att'y Gen. No. 79-111, my predecessor set forth a seven-step analysis for determining whether two public positions are compatible, as follows:

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?

With regard to question number one, R.C. 124.57 does not apply to either of the positions at issue since neither position is a classified employment. See R.C. 124.11(A)(1); R.C. 505.01; State ex rel. Giovanello v. Village of Lowellville, 139 Ohio St. 219, 39 N.E.2d 527 (1942).

Questions number six and seven are of local concern, and I assume for purposes of this opinion that there are no departmental regulations or other local provisions which would prevent one person from serving as both township trustee and chief of a village fire department. With regard to question

number two, there are no constitutional or statutory provisions which expressly prohibit one person from simultaneously holding the two positions in question.

Question number four concerning physical impossibility is a factual question, traditionally left to the determination of local officials who are more familiar with a particular situation and thus better able to resolve this issue. See Op. No. 79-111.

Question number three is whether one position is subordinate to, or a check upon, the other, and question number five is whether there is a conflict of interest between the two positions. In order to resolve these questions, the powers and duties of both positions must be examined.

Township trustees are elected for four-year terms, R.C. 505.01. Their duties are set forth in R.C. Chapter 505 and related provisions, and concern the government of the township which they serve. See, e.g., R.C. 505.17 (regulation of vehicle parking); R.C. 505.26 (provision of office space, township hall, and park); R.C. 505.27 (provision for garbage disposal); R.C. 505.75 (adoption of building code).

R.C. 737.21 authorizes the legislative authority of a municipal corporation to "establish all necessary regulations to guard against the occurrence of fires, protect the property and lives of its citizens against damage and accidents resulting therefrom, and for such purpose may establish and maintain a fire department...." R.C. 737.22 provides that, "[e]ach village establishing a fire department shall have a fire chief as the head thereof, appointed by the mayor with the advice and consent of the legislative authority of the village, who shall continue in office until removed therefrom as provided by" R.C. 733.35-.39.¹ See R.C. 3737.24 (requiring the chief of the fire department of a municipal corporation to "investigate the cause, origin, and circumstances of each major fire...occurring in such municipal corporation...by which property has been destroyed or damaged," and to "make an investigation to determine whether the fire was the result of carelessness or design"; the fire chief must notify the State Fire Marshal of his findings); 2 Ohio Admin. Code 1301:7-1-03(E) (investigation by fire chief of fires or explosions that are of a suspicious nature or which involve loss of life or serious injury or cause property damage or destruction).

It is apparent that neither position in question is subordinate to, or a check upon, the other. A township trustee is elected by popular vote and is responsible for governing the township he serves. The chief of a village fire department is appointed by the village mayor, with the advice and consent of the legislative authority, and is responsible for protecting village inhabitants from fire. The duties of each position are independent of one another and neither official is responsible for assigning duties to, or supervising, the other. I conclude, therefore, that one position is not subordinate to,

¹ R.C. 733.35-.39 provide for the removal by the legislative authority of municipal officers for misconduct upon complaint by the mayor and after an appropriate hearing.

or a check upon, the other. Cf. 1955 Op. Att'y Gen. No. 5565, p. 328 (neither a township trustee nor a city public safety director is a check upon the other);² 1941 Op. Att'y Gen. No. 4664, p. 1079 (the positions of township trustee and village marshal are not a check upon each other and one is not subordinate to the other).

Question number five raises the issue whether there is a conflict of interest between two positions. "One person may not simultaneously hold two public positions if he would be subject to divided loyalties and conflicting duties or exposed to the temptation of acting other than in the best interest of the public" (citations omitted). 1985 Op. Att'y Gen. No. 85-042 at 2-150. However, possibilities of conflict that are remote and speculative will not render positions incompatible. Op. No. 79-111. As a general matter, a township trustee and village fire chief may perform their respective duties independently and without conflict. There are instances, however, in which the duties or interests of the two officials may be in conflict, and thus bear closer examination.

R.C. 9.60 authorizes any firefighting agency, which includes a municipality, R.C. 9.60(A)(1), and any political subdivision of this state to contract whereby the firefighting agency shall provide the political subdivision fire protection "whether on a regular basis or only in times of emergency," upon the approval or authorization of the governing boards of the firefighting agency and the political subdivision. R.C. 9.60(B) and (C). See also R.C. 505.37(B) (authorizing a board of township trustees and legislative authority of a political subdivision to jointly purchase, maintain, use, and operate firefighting equipment).

For purposes of R.C. 9.60 the governing board of a municipal corporation is its legislative authority and the governing board of a township is its board of township trustees. R.C. 9.60(A)(3). Thus, a board of township trustees and the legislative authority of a village have the power to contract whereby the village agrees to provide the township with fire protection through its fire department. Such a contract would, of course, affect the duties of the chief of the village fire department. I do not believe, however, that the mere existence of the power to contract necessarily renders the positions of township trustee and village fire chief incompatible.

In 1955 Op. No. 5565 the positions of township trustee and city public safety director were held compatible. This conclusion was reached despite the existence of a statutory provision empowering a township to contract with a city for fire protection.³ See note two, *supra*. The opinion noted that a public safety director has no independent power to contract with a township for fire protection, but rather is

² The director of public safety is the executive head of the city police and fire departments. R.C. 737.02.

³ When 1955 Op. Att'y Gen. No. 5565, p. 328 was rendered, what was then R.C. 505.44 provided the necessary authority for a township to contract for fire protection. The terms of R.C. 505.44 are analogous to those now found in R.C. 9.60. See 1979-1980 Ohio Laws, Part I, 328 (Am. S.B. 98, eff. Oct. 6, 1980).

subject to the control of city council, and thus found there to be no conflict of interest.

1955 Op. No. 5565 was relied upon in Pistole v. Wiltshire, 90 Ohio L. Abs. 525, 189 N.E.2d 654 (C.P. Scioto County 1961), which found the positions of township trustee and deputy sheriff to be compatible, and Op. No. 79-111 wherein my predecessor examined the question whether the positions of municipal council member and deputy sheriff are compatible. The opinion noted the existence of various statutes permitting the legislative authority of a municipal corporation to contract with either the board of county commissioners or the county sheriff for the provision of the sheriff's services, but concluded that the possibility that the county commissioners or the sheriff could contract with the municipality does not render the positions of council member and deputy sheriff incompatible, stating:

[I]t is only speculative whether a municipality will enter into a contract involving the sheriff's department. In any event, a special deputy sheriff has no decision-making authority and no power to enter into any of the contractual arrangements authorized by statute....

....
 ...For these reasons, together with the fact that the likelihood of the potential conflict is remote and the fact that such a contract would constitute only a small fraction of the daily affairs of a municipal council, it is my opinion that the office of municipal council member and employment as a county special deputy sheriff are compatible positions.

Op. No. 79-111 at 2-372 to 2-373.

Thus, I find that the power of a board of township trustees and village council to contract for fire protection pursuant to R.C. 9.60 does not render the positions of township trustee and chief of the village fire department incompatible. If, however, a board of township trustees is contemplating such a contract, the trustee who also serves as village fire chief should abstain from discussing or voting upon the question. Op. No. 79-111. See also R.C. 2921.42(A)(1).

If a township and village have entered a contract whereby the village has agreed to provide fire protection to the township, then I believe that the positions of township trustee and village fire chief must be found to be incompatible. As stated in 1981 Op. Att'y Gen. No. 81-027 at 2-101:

It is a well-established common law principle that a public officer may not deal with himself, directly or indirectly. See State ex rel. Taylor v. Pinney, 13 Ohio Dec. 210 (C.P. Franklin County 1902). By participating on both sides of a contract, a public officer would be exposed to conflicting loyalties and to the potential temptation of acting in a manner not in the best interest of the public. See 1979 Op. Att'y Gen. No. 79-111. A public officer may not be in a position to control services delivered pursuant to contract, while at the same time passing upon the adequacy of the services delivered. See 1979 Op. Att'y Gen. No. 79-055.

If one person served as trustee of a township and fire chief of a village which contracted for fire protection, he would be in a position as fire chief to control the fire protection services rendered and in a position as township trustee to pass upon the adequacy of the services delivered. An individual who served in both positions would clearly be subject to a conflict of interest.⁴

R.C. 9.60 also provides that a firefighting agency may provide fire protection to a political subdivision of this state "without a contract to provide fire protection, upon the approval of the governing board of the firefighting agency...and upon authorization of an officer or employee of the firefighting agency providing the fire protection designated by title of their office or position pursuant to the authorization of the governing board of the firefighting agency." R.C. 9.60(D). It would appear reasonable for a village to designate the fire chief as the officer responsible for authorizing the provision of fire protection to a township in the absence of a contract. If, however, one person holds the positions of township trustee and village fire chief, the individual would be subject to a conflict of interest if called upon to authorize fire protection for the township. Thus, if a village council approves fire protection to a township of which the fire chief is a trustee, the village council must designate someone other than the chief to authorize the protection.⁵

As a final point, I note that R.C. 505.371 authorizes a board of township trustees and the legislative authority of a municipal corporation to adopt a joint resolution creating a joint fire district comprising the municipal corporation and all or any part of such township as is mutually agreed upon. If the township and village in question were to form a joint fire district, such action would obviously have an impact on the duties and responsibilities of the village fire chief. One person who served as township trustee and village fire chief could not objectively serve the interests of the township in determining whether to join in the creation of a joint fire district. However, I find this possible conflict of interest remote and speculative so as not to render the two positions incompatible. See Op. No. 79-111. However, if the township is contemplating the formation of a joint fire district with the village, the individual in question must abstain from discussing or voting on the issue as township trustee. Id.

In conclusion, it is my opinion, and you are so advised, that the positions of township trustee and chief of the fire

⁴ If one person served as both township trustee and village fire chief, and the township and village were to contract for fire protection services, the individual could arguably be deemed to have an unlawful interest in a public contract in violation of R.C. 2921.42. See 1976 Op. Att'y Gen. No. 76-027. See also R.C. 511.13. The Ohio Ethics Commission, which has the authority to render advisory opinions interpreting R.C. 2921.42, see R.C. 102.08, may be contacted for further guidance in this matter.

⁵ I would add that in order to avoid further conflicts, the village council should not appoint an employee under the control of the village fire chief to authorize fire protection for the township. See 1979 Op. Att'y Gen. No. 79-055.

department of a village located within the township are compatible, unless the township and village have contracted pursuant to R.C. 9.60 whereby the village has agreed to provide fire protection to the township.