

**OPINION NO. 93-016****Syllabus:**

1. The positions of township trustee and administrative assistant to the county engineer are compatible, provided the position of administrative assistant is not delegated the authority to purchase equipment for a township pursuant to R.C. 5549.03, or inspect a work improvement under R.C. 5575.07, and further provided that the individual, as township trustee, does not participate in negotiations or vote upon a contract entered into between the county and his township pursuant to R.C. 307.15 or R.C. 164.15, or an agreement entered into between the county engineer and an owner of land pursuant to R.C. 5543.13 or R.C. 5543.17.
2. The positions of member of a legislative authority of a city and administrative assistant to the county engineer are compatible, provided the individual, as a member of the legislative authority, does not participate in negotiations or vote upon a contract entered into between the county and his municipal corporation pursuant to R.C. 307.15.

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**To: Dennis Watkins, Trumbull County Prosecuting Attorney, Warren, Ohio**  
**By: Lee Fisher, Attorney General, July 29, 1993**

You have asked for an opinion (1) whether the position of administrative assistant to the county engineer is compatible with the position of township trustee, and (2) whether the position of administrative assistant to the county engineer is compatible with the position of member of the legislative authority of a city. 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. Questions six and seven concern the applicability of state and federal departmental regulations and local departmental regulations, charter provisions, and ordinances. There are no applicable state or federal departmental regulations. Further, whether there is an applicable local departmental regulation, charter provision, or ordinance is a matter of local concern; thus, for purposes of this opinion, it is assumed that there are no local departmental regulations, charter provisions, or ordinances that prohibit the simultaneous holding of the positions in your questions.

#### **R.C. 124.57**

The first question of the analysis asks whether either of the positions is a classified employment within the terms of R.C. 124.57, which prohibits employees and officers in the classified service from participating in partisan political activity. A township trustee and a member of the legislative authority of a city, as elected officials, hold unclassified civil service positions. *See* R.C. 124.11(A)(1); R.C. 505.01; R.C. 731.01. Because information provided indicates that the administrative assistant is employed by and directly responsible to the county engineer and holds a fiduciary relationship to the county engineer, the position of administrative assistant to the county engineer is also in the unclassified service. *See* R.C. 124.11(A)(9). Insofar as none of the positions with which you are concerned is a classified employment, the prohibition of R.C. 124.57 does not prohibit an administrative assistant to the county engineer from serving simultaneously as either a township trustee or a member of the legislative authority of a city.

#### **Outside Employment**

The second question of the analysis asks whether the empowering statutes of either position limit outside employment. No provision in the Revised Code limits the outside employment possible of a township trustee or an administrative assistant to a county engineer. R.C. 731.02, which sets forth the qualifications for members of the legislative authority of a city, however, provides, in pertinent part, that, "[e]ach member of the legislative authority ...

shall not hold any other public office, except that of notary public or member of the state militia." It must, therefore, be determined whether the position of administrative assistant to the county engineer is a public office.

In *State ex rel. Landis v. Board of Comm'rs of Butler County*, 95 Ohio St. 157, 159-60, 115 N.E. 919, 919-20 (1917), the Ohio Supreme Court set forth the following criteria for determining whether a public position constitutes a "public office":

The usual criteria in determining whether a position is a public office are durability of tenure, oath, bond, emoluments, the independency of the functions exercised by the appointee, and the character of the duties imposed upon him.... The chief and most-decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law. If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office and not an employment.

....  
...[I]t is manifest that the functional powers imposed must be those which constitute a part of the sovereignty of the state.

See also, e.g., *State ex rel. Milburn v. Pethel*, 153 Ohio St. 1, 90 N.E.2d 686 (1950).

In light of the above criteria and the information provided in your letter of request, it appears that the administrative assistant position in question is not a public office. The position of administrative assistant to the county engineer is not specifically provided for in the Revised Code; rather, such assistants are appointed and employed pursuant to R.C. 325.17, which authorizes the county engineer to "appoint and employ the necessary deputies, assistants, clerks, bookkeepers, or other employees." The administrative assistant is not required by statute to take an oath or post a bond. Neither the duties nor the tenure of the administrative assistant position is prescribed by statute. Moreover, the duties assigned to the administrative assistant by the county engineer do not involve the exercise of sovereign power. As stated in your request letter, the primary duties of the administrative assistant include labor relations and human resource development, equipment purchasing, administration of a minority hiring program, administration of the department's facility maintenance program, and preparation of specifications for the department's maintenance material program. Thus, because an administrative assistant has no official duties that are prescribed by statute and involve the exercise of independent governmental functions, the position of administrative assistant is not a "public office," as that term is used in its traditional sense to refer to a position that confers part of the sovereignty of the state upon the individual holding such position. See generally *State ex rel. Attorney General v. Jennings*, 57 Ohio St. 415, 49 N.E. 404 (1898) (syllabus, paragraph two) ("[t]o constitute a public office ... it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law, to be exercised by the incumbent, in virtue of his election or appointment to the office, thus created and defined, and not as a mere employe, subject to the direction and control of some one else"); 1967 Op. Att'y Gen. No. 67-033 at 2-58 and 2-59 (the supervisory position of crew chief and superintendent of roads in the county engineering department is not a public office). Accordingly, R.C. 731.02 does not prohibit the individual in question from serving simultaneously as a member of a city's legislative authority and administrative assistant to the county engineer. Finally, no other statute prohibits an administrative assistant to the county engineer from serving simultaneously as either a township trustee or member of the legislative authority of a city.

### Subordination or Control

The third question of the analysis asks whether one position is subordinate to, or in any way a check upon, the other. As an elected official, *see* R.C. 731.01, a member of the legislative authority of a city is responsible to the citizens who elected him. The administrative assistant is employed by the county engineer, and thus is responsible to the county engineer. The positions of member of the legislative authority of a city and administrative assistant therefore serve different masters, and neither position is subordinate to the other. *Cf.* Op. No. 67-033 at 2-59 (the position of crew chief and superintendent of roads in the county engineering department is not subordinate to the position of councilman, and the position of councilman is not subordinate to the position of crew chief and superintendent of roads). Moreover, an examination of the powers and duties of each position discloses no area in which one position controls the other, either directly or indirectly. The positions of member of the legislative authority of a city and administrative assistant to the county engineer, thus, operate independently of each other, and neither position is subordinate to 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 people who elected him and a deputy sheriff is responsible to the sheriff who appointed him, neither position is subordinate to, or a check upon, the other).

With respect to the positions of township trustee and administrative assistant to the county engineer, there are several instances in which one position may be subordinate to, or act as a check upon the other. Pursuant to R.C. 5573.01, "[w]hen the board of township trustees has determined that any road shall be constructed, reconstructed, resurfaced, or improved," the board "shall order the county engineer to make such surveys, plans, profiles, cross sections, estimates, and specifications as are required for such improvement." R.C. 5575.01 provides that "[b]efore undertaking the construction or reconstruction of a township road," the board of township trustees "shall cause to be made by the county engineer an estimate of the cost of such work, which estimate shall include labor, material, freight, fuel, hauling, use of machinery and equipment, and all other items of cost." Also, the county engineer, upon the order of a board of township trustees, "shall construct sidewalk of suitable materials, along or connecting the public highways, outside any municipal corporation," R.C. 5543.10, and "may purchase from any public institution within the state any road material, machinery, tools, or equipment, quarried, mined, prepared, or manufactured by such institution", R.C. 5549.03. The provisions of R.C. 5543.10, R.C. 5549.03, R.C. 5573.01, and R.C. 5575.01,<sup>1</sup> thus, "make the county engineer subject to the order of the board of township trustees." 1988 Op. Att'y Gen. No. 88-020 at 2-77.

However, Op. No. 88-020, which considered the compatibility of the positions of township trustee and county highway department employee who is employed by the county engineer, concluded that the fact that a township trustee is employed by the county engineer as a county highway department employee does not, in itself, place the county highway department employee under the control of the township trustees. *Id.* at 2-77; *see* 1991 Op. Att'y Gen. No. 91-036 at 2-194 and 2-195; 1985 Op. Att'y Gen. No. 85-080 at 2-318. Instead, the specific

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<sup>1</sup> See also R.C. 5541.03, which provides that, if the board of county commissioners approves the application of a board of township trustees for the construction, reconstruction, or improvement of any section of highway in the county system, the board of county commissioners "shall direct the county engineer to make the necessary plans for the construction, reconstruction, or improvement of such section of highway, together with an estimate of the cost thereof."

duties of the county highway department employee must be examined to determine whether such employment is under the control of the township trustees. See Op. No. 88-020 at 2-77; see also Op. No. 91-036 at 2-194 and 2-195; Op. No. 85-080 at 2-318. Similarly, the specific duties of the administrative assistant to the county engineer must be examined to determine whether that position is subject to the control of the township trustees.

A review of the duties of the administrative assistant to the county engineer, set forth above, discloses that the duties of the administrative assistant do not, as a general matter, include the duties described in R.C. 5543.10, R.C. 5549.03, R.C. 5573.01, and R.C. 5575.01. Therefore, none of these statutes places the administrative assistant to the county engineer under the control of the township trustees for purposes of the compatibility analysis.<sup>2</sup>

It should be noted, however, that a board of township trustees is under the general direction of the county engineer when road maintenance or construction is involved. See R.C. 5543.01 (the county engineer has general charge of the construction, reconstruction, resurfacing, or improvement of roads by boards of township trustees under R.C. 5571.01, R.C. 5571.06, R.C. 5571.07, R.C. 5571.15, R.C. 5573.01-.15, and R.C. 5575.02-.09); R.C. 5543.06 (at the county engineer's annual meeting, the engineer, or his designee, shall instruct township and county authorities as to the best and most economical methods for repairing and maintaining the roads and bridges of the county); R.C. 5543.09 (the county engineer shall supervise the construction, reconstruction, resurfacing, and improvement of public roads by boards of township trustees); R.C. 5571.05 ("[i]n the maintenance and repair of roads, the board of township trustees ... shall be subject to the general supervision and direction of the county engineer. Such board of township trustees shall follow the direction of the engineer as to methods to be followed in making repairs"). Accordingly, it must be determined whether the fact that a board of township trustees is subject to the general direction of the county engineer with respect to road maintenance and construction renders the position of township trustee subordinate to the position of administrative assistant to the county engineer.

Op. No. 88-020 examined this issue and concluded that a board of township trustees is under the general direction, but not necessarily the control of, the county engineer when road maintenance and construction is involved. The opinion reasoned that, "township trustees must follow the technical advice of the engineer as to the methods to be used for road repair. The engineer does not have authority to direct the trustees to repair certain roads." *Id.* at 2-77 n.1. The opinion also found that insofar as the statutes relating to the maintenance and construction of roads do not place a township trustee under the control of an employee of the county engineer, the fact that the trustee is an employee of the engineer does not, in itself, result in that employment being a check upon the position of township trustee. *Id.* at 2-77; see Op. No. 91-036 at 2-194 and 2-195; Op. No. 85-080 at 2-318.

<sup>2</sup> You have indicated that the position of administrative assistant is responsible for the preparation of the specifications for equipment that is to be purchased by the county engineer. Because the administrative assistant is not delegated express authority to purchase the equipment, R.C. 5549.03, which empowers a county engineer, when authorized by a board of township trustees, to purchase equipment manufactured by a public institution, does not place an administrative assistant under the control of the township trustees. However, if the administrative assistant is delegated the authority to purchase equipment for a township pursuant to R.C. 5549.03, the administrative assistant would be under the control of the township trustees.

In light of the conclusion reached in Op. No. 88-020, and the fact that the position of administrative assistant to the county engineer in question is not delegated the duty of supervising township road and bridge construction and maintenance, it may be concluded that the statutes relating to the maintenance and construction of roads do not place a township trustee in a position subservient to that of the administrative assistant. The positions of administrative assistant to the county engineer and township trustee thus are not subordinate to, or in any way a check upon, each other.<sup>3</sup>

### Physical Constraints

The fourth question of the analysis asks whether it is physically possible for one individual to perform the duties of both positions. Whether an individual is physically able to adequately perform 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. It seems possible, however, that the positions of township trustee and administrative assistant to the county engineer, and the positions of member of the legislative authority of a city and administrative assistant to the county engineer can be filled competently by the same individual.

### Conflict of Interest

The final question of the analysis asks whether there is a conflict of interest between the two positions.<sup>4</sup> 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.

Pursuant to R.C. 5571.01, a board of township trustees is authorized to "construct, reconstruct, resurface, or improve any public road or part thereof under its jurisdiction or any county road, intercounty highway, or state highway within its township." *See also* R.C. 5571.02 ("[t]he board of township trustees shall have control of the township roads of its township and shall keep them in good repair"). Similarly, the legislative authority of a city is authorized to construct, reconstruct, widen, resurface, or repair a street or other public way within its territory. *See* R.C. 723.01; R.C. 723.52-.53. Under R.C. 307.15, a board of county commissioners may enter into a contract with a board of township trustees or legislative authority of a city, whereby the board of county commissioners is authorized "to exercise any power, perform any function, or render any service, in behalf of the contracting subdivision or its legislative authority, which such subdivision or legislative authority may exercise, perform,

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<sup>3</sup> It should be noted that several provisions require the county engineer to prepare reports and estimates for a board of township trustees and the legislative authority of a city. *See, e.g.,* R.C. 5543.02; R.C. 5543.20. The fact that the county engineer's office must prepare reports or estimates for a board of township trustees and the legislative authority of a city does not, by itself, result in the placement of an administrative assistant to the county engineer under the control of the township trustees or members of the legislative authority of a city. The reports and estimates are statutorily required, and are not prepared upon an order from a board of township trustees or legislative authority of a city.

<sup>4</sup> This opinion's consideration of the question of conflict of interest does not constitute an opinion on the applicability of the provisions of R.C. Chapter 102, R.C. 2921.42, or R.C. 2921.43 governing ethics, unlawful interests in public contracts, or financial disclosure with regard to public officials. Pursuant to R.C. 102.08, the authority to render advisory opinions on these sections of the Revised Code is vested in the Ohio Ethics Commission. *See* 1987 Op.

or render." Accordingly, a board of township trustees may enter into a contract with a board of county commissioners whereby the county agrees to construct, reconstruct, resurface or improve a public road within the township, or the legislative authority of a city may enter into a contract with the board of county commissioners whereby the county agrees to construct, reconstruct, widen, resurface or repair a street or other public way within the city. A township trustee or member of the legislative authority of a city may, thus, be required to participate in negotiations or vote upon a contract to be entered into between the county and his township or municipal corporation. *See Op. No. 88-020 at 2-78.*

This creates a potential conflict of interest because the individual may be placed into a position of divided loyalties, or in a position whereby favoritism or preference may be accorded one position. *See Op. No. 88-020 at 2-78; see also Op. No. 91-036 at 2-195 and 2-196; Op. No. 85-080 at 2-321 through 2-323.* For example, where a county and township or city propose to enter into a contract concerning the construction or maintenance of roads or streets, an individual who is also a member of the board of trustees or legislative authority of a city might be influenced in the manner in which he votes upon the contract as a result of particular duties or responsibilities that the contract imposes upon him in his capacity as administrative assistant to the county engineer. Moreover, an individual's ability as a township trustee or member of the legislative authority of a city to exercise clear and independent judgment on behalf of the township or city in negotiating or voting upon a contract between the county and township or city could be drawn into question since it would be difficult for such individual, as trustee or member of the legislative authority, to set aside his loyalty to the county engineer. Such a predisposition of loyalty may affect the ability of the individual to remain impartial during negotiations or influence the manner in which he votes upon the contract. Thus, a potential conflict of interest exists because the individual is subject to influences that may prevent him from discharging objectively and in a completely disinterested fashion the duties of township trustee or member of the legislative authority of a city. *See Op. No. 88-020 at 2-78; see also Op. No. 91-036 at 2-195 and 2-196; Op. No. 85-080 at 2-321 through 2-323.*

A second potential conflict of interest exists because R.C. 164.15 authorizes a board of township trustees to "enter into a contract with the county engineer under which the board agrees to pay all or any part of the cost of engineering services to be provided to or obtained for the township by the county engineer that are necessary for projects awarded under [R.C. Chapter 164 (aid to local government improvements)]." *See also R.C. 5555.43* (the board of county commissioners may contract with a board of township trustees of the township in which a road improvement is situated, whereby the county and township apportion the costs of such improvement). In addition, if the county engineer enters into an agreement with an owner of land pursuant to R.C. 5543.13 or R.C. 5543.17 as to compensation or damages already sustained or to be sustained by the owner of the land, the board of township trustees is required to approve the agreement. Because the individual, as a township trustee, is required to vote upon a contract entered into pursuant to R.C. 164.15 or an agreement entered into by the county engineer under R.C. 5543.13 or R.C. 5543.17, the individual may not vote in the township's best interest for fear of reprisals, in his position as administrative assistant to the county engineer, by the county engineer.

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Att'y Gen. No. 87-033 (syllabus, paragraph three) ("[t]he Attorney General will abstain from rendering an opinion where another governmental entity has been granted the authority to render advisory opinions concerning the relevant subject matter").

Moreover, whether a conflict of interest exists between two positions is, as a general matter, a question of fact, the resolution of which turns upon the specific duties and responsibilities of the respective positions. *See 1988 Op. Att'y Gen. No. 88-017 at 2-68.*

That an individual is subject to potential conflicts of interest, however, does not necessarily render two positions incompatible. Rather, each potential conflict of interest requires a determination as to the immediacy of the conflict. Op. No. 79-111 at 2-372. Where the possibility of conflict is remote and speculative, the conflict of interest rule is not violated. *Id.* (syllabus, paragraph three). Factors utilized in determining the immediacy of a conflict include the following:

the degree of remoteness of a potential conflict, the ability or inability of an individual to remove himself from the conflict, whether the individual exercises decision-making authority in both positions, whether the potential conflict involves the primary functions of each position, and whether the potential conflict may involve budgetary controls.

*Id.* at 2-372.

A consideration of the factors to determine the immediacy of a conflict of interest leads to the conclusion that the potential conflicts presented above are remote and speculative. First, it is only speculative whether a municipal corporation or a township will enter into a contract under R.C. 307.15 or R.C. 164.15 with the county concerning the construction or maintenance of roads, and whether a county engineer will enter into an agreement with the owner of land pursuant to R.C. 5543.13 or R.C. 5543.17 as to compensation or damages already sustained or to be sustained by the owner of land. *See* Op. No. 88-020 at 2-78 and 2-79. Second, it would not be arduous for an individual, as a township trustee or a member of the legislative authority of a city, to remove himself from any conflict of interest by abstaining from voting upon or discussing the construction, repair, or maintenance of roads or streets, or an agreement between the county engineer and an owner of land. *But cf.* 1990 Op. Att'y Gen. No. 90-083 at 2-358 (because a board of township trustees has only three members, it is difficult for a trustee to remove himself from voting on taxing and budgetary matters). Third, the individual, as administrative assistant, does not exercise decision-making authority in any of the matters in conflict. Finally, the potential conflicts do not involve the primary functions of each position or budgetary controls. Therefore, the above potential conflicts of interest do not render the positions about which you are concerned incompatible.

As a final matter, it should be noted that R.C. 5575.07 permits the county engineer to "appoint some competent person to act as inspector during the construction of [a road] improvement." This inspector is to receive not more than four dollars per day "upon the order of the board of township trustees with the approval of the engineer." R.C. 5575.07. A conflict would arise if the administrative assistant were considered for this position of inspector. Op. No. 88-020, however, concluded that this potential conflict is remote and speculative. *Id.* at 2-79. Thus, this provision does not bar an individual from serving simultaneously as both a township trustee and administrative assistant to the county engineer.

### Conclusions

Based on the foregoing, it is my opinion, and you are hereby advised, that:

1. The positions of township trustee and administrative assistant to the county engineer are compatible, provided the position of administrative assistant is not delegated the authority to purchase equipment for a township pursuant to R.C. 5549.03, or inspect a work improvement under R.C. 5575.07, and further provided that the individual, as township trustee, does not participate in negotiations or vote upon a contract entered into between the county and his township pursuant to R.C. 307.15 or R.C.

164.15, or an agreement entered into between the county engineer and an owner of land pursuant to R.C. 5543.13 or R.C. 5543.17.

2. The positions of member of a legislative authority of a city and administrative assistant to the county engineer are compatible, provided the individual, as a member of the legislative authority, does not participate in negotiations or vote upon a contract entered into between the county and his municipal corporation pursuant to R.C. 307.15.