

April 8, 2021

The Honorable James VanEerten
Ottawa County Prosecuting Attorney
315 Madison Street, Suite 205
Port Clinton, Ohio 43452

SYLLABUS: 2021-005

A person who is not a candidate for office may serve simultaneously as a village mayor and as deputy director of the board of elections within the same county. However, as deputy director of the board of elections, the person must abstain from activities relating to ballot issues for the village in which the village mayor serves.



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OPINION NO. 2021-005

The Honorable James VanEerten
Ottawa County Prosecuting Attorney
315 Madison Street, Suite 205
Port Clinton, Ohio 43452

Dear Prosecutor VanEerten:

You have requested an opinion concerning the compatibility of two public positions. I have framed your question as follows:

May a person simultaneously hold the positions of a village mayor and deputy director of the board of elections when the two positions are within the same county?

You report that a person who is currently the mayor of a village in Ottawa County has expressed an interest in obtaining a position as deputy director of the board of elections in Ottawa County. You state that the mayor does not plan on running for reelection, but would like to finish the term as mayor. The village in question has not adopted a charter form of government.

I conclude that the two positions are compatible, so long as the deputy director of the board of elections abstains from activities relating to ballot issues for the village in which the village mayor serves.

I

An issue of compatibility arises whenever one person wishes to hold simultaneously two or more positions of public service. The following seven questions are used to determine whether a person may hold two public positions simultaneously:

1. Is either position in the classified service for purposes of R.C. 124.57?
2. Does a constitutional provision or statute prohibit a person from serving in both positions at the same time?
3. Is one position subordinate to, or, in any way, a check upon the other position?
4. Is it physically possible for one person to discharge the duties of both positions?
5. Is there an impermissible conflict of interest between the two positions?
6. Are there local charter provisions, resolutions, or ordinances that are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

2019 Op. Att’y Gen. No. 2019-012, Slip Op. at 1-2; 2-87 to 2-88; 1979 Op. Att’y Gen. No. 79-111, at 2-367 to 2-368. All seven questions must be resolved in favor of compatibility for the positions to be compatible. 2013 Op. Att’y Gen. No. 2013-008, at 2-78. Consequently, if one of the seven questions is resolved against a finding of compatibility, the positions are incompatible. *Id.* at 2-79.

Question four, relating to the physical ability to perform both jobs, is a factual question best addressed by local officials. *See* 2019 Op. Att’y Gen. No. 2019-020, Slip Op. at 3; 2-148. The portions of Questions six and seven that relate to local provisions and regulations are for local officials to answer. *Id.* at Slip Op. at 6; 2-151. For the purposes of this opinion, I assume that no local provision, resolution, ordinance or departmental regulation prohibits the dual service in question.

II

Question one asks whether one of the positions is in the classified service for purposes of R.C. 124.57. If one of the positions is in the classified service, the other position may not constitute a partisan political activity. R.C. 124.57. Here, neither position is in the classified service. As an election officer, the deputy director of a board of elections is in the unclassified service. R.C. 124.11(A)(2); 3501.01(U)(4). As an elected official, a village mayor is in the unclassified service. R.C. 124.11(A)(1). Because neither position is in the classified service, the R.C. 124.57 prohibition does not apply.

III

Questions two and seven ask whether any state or federal constitutional provision, statute, or regulation prohibits a person from jointly serving in the two positions. Two state statutes are relevant for this opinion.

First, R.C. 731.12 prohibits a member of a village legislative authority from holding any other public office. A village mayor is president of the village’s legislative authority. R.C. 733.24. However, the duties imposed upon a village mayor by R.C. 733.24 do not make the mayor a member of the legislative authority who is then subject to the prohibition in R.C. 731.12. 2007 Op. Att’y Gen. No. 2007-023, at 2-230 fn.6; 1998 Op. Att’y Gen. No. 98-017, at 2-85 fn.1.

Therefore, R.C. 731.12 does not make the two positions incompatible.

Second, R.C. 3501.15 states that “[n]o person shall serve as a member, director, deputy director, or employee of the board of elections who is a candidate for any office to be filled at an election[.]” “Candidate” is defined in R.C. 3501.01(H). However, this provision only prohibits service with a board of elections while the person is seeking election or reelection to office. If the person is not currently a candidate for office, the prohibition does not apply. 2006 Op. Att’y Gen. No. 2006-041 at 2-396; 1936 Op. Att’y Gen. No. 5294, p. 347, at paragraph one of the syllabus. Accordingly, when a village mayor is not a candidate for the office of village mayor or any other office to be filled at an election, employment as deputy director of a board of elections is not prohibited by R.C. 3501.15.

IV

Question three asks whether one of the positions is subordinate or otherwise a check on the other. A village mayor, as an elected official, answers to the electors of the village. R.C. 733.24; 2007 Op. Att’y Gen. No. 2007-023, at 2-231. A deputy director of a board of elections is appointed by, and accountable to, the board of elections. R.C. 3501.09; *see also* 1993 Op. Att’y Gen. No. 93-049 (discussing subordination and control relating to board of elections director). Neither position is subordinate to or subject to the control of the other. The positions also operate independently of each other, and neither is required to assign duties to, or supervise, the other. *See generally* 2006 Op. Att’y Gen. No. 2006-041, at 2-396. The answer to this question, therefore, favors compatibility.

V

Question five asks whether there is an impermissible conflict of interest between the two positions. A person

may not serve simultaneously in two positions when an impermissible conflict of interest exists between the positions. 2017 Op. Att’y Gen. No. 2017-014, Slip Op. at 5; 2-130. A conflict of interest exists “when an individual’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.” 1989 Op. Att’y Gen. No. 89-052, at 2-220 (internal citations omitted.) To determine whether a conflict of interest exists between two positions, I must examine the powers, duties, and responsibilities of each of the positions.

I am aware of one potential conflict of interest that may arise between the positions of village mayor and deputy director of a board of elections. A conflict may arise if the village legislative authority proposes a levy, bond issue, or other ballot question that will be voted on by the village electorate, or if electors of the village propose their own ballot question. *See, e.g.*, R.C. 703.20; 705.01; 718.04; 5705.19. The board of elections, including the deputy director, will administer the election. *See generally* R.C. Chapter 3501; Chapter 5705. Meanwhile, the village mayor may be strongly interested in the outcome of election, as the village’s funding and operation could depend on the outcome. Thus, a potential conflict of interest exists. *See* 2006 Op. Att’y Gen. No. 2006-041, at 2-403 to 2-404 (conflict of interest exists between the positions of member of board of elections and county commissioner).

The opinion states “[d]ecisions made by a county board of elections when performing these duties have the potential of affecting the conduct or outcome of an election on a county issue or question.” *Id.* at 2-404. “[A] member of the board of elections who is a county commissioner could be prevented from making completely objective decisions because of her responsibility to advance the interests and welfare of the county and its citizens.” *Id.* A deputy director of a board of elections who also serves as a village mayor

would be presented with a conflict of interest when administering an election for a village issue.

However, a conflict of interest between two positions does not always mean that the conflict makes the two positions incompatible. If my review reveals that a conflict of interest exists between the positions, I next need to determine whether the conflict may be sufficiently mitigated or eliminated entirely, thus allowing the person to hold both positions at the same time. Factors used in making this determination include “the probability of the conflicts occurring, the ability of the person to remove himself from any conflicts that may occur, whether the person exercises decision-making authority in both positions, and whether the conflicts relate to the primary functions of each position, or to financial or budgetary matters.” 2004 Op. Att’y Gen. No. 2004-051, at 2-439.

2006 Op. Att’y Gen. No. 2006-041 found that the conflict of interest between the positions of county commissioner and board of elections member could be properly avoided if the board of elections member “abstain[ed] from participating in deliberations, discussions, negotiations, and votes... pertaining to the conduct or outcome of an election on a county issues or question.” *Id.* at 2-407. Here, it is less likely that a specific conflict will exist, and is thus easier to avoid, as a village mayor is likely to be interested in fewer ballot issues than a county commissioner.

I conclude that a deputy director of a board of elections may abstain from involvement with ballot issues involving the village. Although the duties of the *director* of a board of elections are clearly set forth in statute, including in their own section, *see* R.C. 3501.13, there is no comparable listing of duties for the *deputy director*. Moreover, the position of deputy director is itself optional, and the board of elections may vote to not have a deputy director if the board finds that “the services of a deputy director are unnecessary.” R.C. 3501.09. These provisions indicate

that the duties of the board of elections can be properly performed without a deputy director. As such, the deputy director could properly abstain from matters involving ballot issues related to the village in which the village mayor serves. The ultimate decision of whether an employee may properly fulfill the job duties while abstaining from certain matters is a decision for the employing entity, in this case the board of elections. *See generally* 2020 Op. Att’y Gen. 2020-001, at Slip Op. 4; 2-3; 2019 Op. Att’y Gen. No. 2019-12, at Slip Op. 9-10; 2-95 to 2-97.

Therefore, there is no disqualifying conflict of interest.

Conclusion

Because the positions of village mayor and deputy director of a board of elections meet all the requirements for compatibility, the two positions are compatible.

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

A person who is not a candidate for office may serve simultaneously as a village mayor and as deputy director of the board of elections within the same county. However, as deputy director of the board of elections, the person must abstain from activities relating to ballot issues for the village in which the village mayor serves.

Respectfully,

A handwritten signature in blue ink that reads "Dave Yost". The signature is written in a cursive, flowing style.

DAVE YOST
Ohio Attorney General