

OPINION NO. 93-048**Syllabus:**

The position of village administrator is compatible with the position of township clerk.

To: Tim Oliver, Warren County Prosecuting Attorney, Lebanon, Ohio

By: Lee Fisher, Attorney General, November 26, 1993

You have requested an opinion whether the position of township clerk is compatible with the position of village administrator. Information provided indicates that the village that employs the administrator is located within the township served by the township clerk.

1979 Op. Att'y Gen. No. 79-111 established a seven question test for determining the compatibility of two public positions. The seven questions read 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?

Op. No. 79-111 at 2-367 and 2-368. The sixth and seventh questions raise issues of local concern, and it is assumed, for purposes of this opinion, that there are no local departmental regulations, charter provisions, or ordinances that limit the holding of outside employment by a township clerk or village administrator. There are no applicable state or federal regulations.

R.C. 124.57

Question number one asks whether either of the positions is a classified employment within the terms of R.C. 124.57, which prohibits employees or officers in the classified service of the state, the several counties, cities, and city school districts thereof, and civil service townships from participating in partisan political activities, other than to vote or express their political views. A township clerk, as an elected officer, R.C. 507.01, holds an unclassified civil service position, *see* R.C. 124.11(A)(1), and, therefore, is not subject to the prohibition of R.C. 124.57. Similarly, since R.C. 124.57 does not apply to officers and employees in the service of a village, *see* 1989 Op. Att'y Gen. No. 89-069 at 2-315; *see also* Ohio Const. art. XV, §10; R.C. 124.01, a village administrator is not subject to R.C. 124.57's prohibition.

Outside Employment

Question number two asks whether the empowering statutes of either position limit outside employment. There is no statute which limits outside employment for a township clerk. A village administrator is prohibited only from being "an elected official of the village at the time of his appointment or during his tenure in office." R.C. 735.271. Thus, no statute prohibits an individual from serving simultaneously as a village administrator and township clerk.

Subordination or Control

Question number three asks whether one position is subordinate to, or in any way a check upon, the other. A village administrator is appointed by the mayor of the village. R.C. 735.271. The administrator serves at the pleasure of the mayor and legislative authority of the village. *Id.*; *see also* R.C. 735.273 (a village administrator is under the general supervision and control of the mayor). A township clerk is elected by the electors of the township, *see* R.C. 507.01, and is therefore responsible to the electors who elected him. A village administrator and township clerk thus serve different masters and are not subordinate to each other. *See 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 electors who elected him and a deputy sheriff is responsible to the county sheriff who appointed him; neither position is subordinate to, or a check upon, the other). Also there is no area in which one position acts as a check upon the other. Accordingly, the positions of village administrator and township clerk are not subordinate to, or in any way a check upon, each other.

Physical Constraints

Question number 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 individuals because they may more precisely determine the time demands of each position. Op. No. 79-111 at 2-373. It seems likely, however, that these two positions can be filled competently by the same person if there is no direct conflict in their working hours.

Conflict of Interest

Question number five asks whether there is a conflict of interest between the two positions. An individual may not serve simultaneously in 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.

A village administrator's powers and duties are set forth in R.C. 735.273. Pursuant to this section, the village administrator is required to manage, conduct, and control the water works, electric light plants, artificial or natural gas plants, or other similar public utilities, furnish supplies of water, electricity, or gas, collect all water, electric, and gas rents, and supervise the improvement and repair of streets, bridges, sewers and the like, in the village. In addition, the village administrator may make such bylaws and regulations as he deems necessary for the safe, economical, and efficient management and protection of such works, plants, and public utilities, R.C. 735.273, contract with any other municipal corporation to supply it or its inhabitants with water or electricity, or dispose of surplus water by lease or otherwise, R.C. 743.18.

A township clerk is responsible for recording the proceedings of the township trustees, R.C. 507.04, notifying the board of elections of vacancies in township offices and of township boundary changes, R.C. 507.051, administering oaths and certifying affidavits, R.C. 507.06, and recording bonds, R.C. 507.08. In addition, a township clerk is delegated various duties related to the financial affairs of the township. These duties include certifying "to the county auditor the names of the property owners and a description of their lands which are delinquent as to waste disposal service charges," R.C. 505.33, keeping an accurate record of all the accounts and transactions of the board of township trustees, R.C. 507.04, preparation of an annual statement of receipts and expenditures of the township, R.C. 507.07, and the receipt of the proceeds of any township tax levy from the county, R.C. 5705.03. *See also* R.C. 507.11(A) (if authorized by a board of township trustees, a township clerk may incur financial obligations on behalf of the township); R.C. 507.11(B) (township clerk must countersign all orders for payment of township monies). Moreover, for purposes of R.C. Chapter 5705 (tax levy law), the township clerk is designated as the fiscal officer for his township. R.C. 5705.01(D).

The township clerk's role as township fiscal officer may present a conflict of interest for him in his position as village administrator. Under R.C. 5705.28, R.C. 5705.30, and R.C. 5705.31, the taxing authorities of both a village and township are required to adopt a proposed tax budget and submit it to the county auditor who presents it to the county budget commission. *See generally* R.C. 5705.01(A) (defining both a village and township as "subdivisions" for purposes of R.C. Chapter 5705). The county budget commission examines the proposed tax budget submitted by the taxing authorities, and pursuant to R.C. 5705.32, modifies the estimated amounts in order to bring the tax levies required within the limits of the law. *See* R.C. 5705.31.

"The determination of the budget commission directly affects the potential revenue of each subdivision." 1989 Op. Att'y Gen. No. 89-007 at 2-29; *see also* R.C. 5705.31; 1988 Op. Att'y Gen. No. 88-011.

Because "the township clerk is the fiscal officer, he might be ordered to appear before the budget commission to defend the township budget, and tempted to subordinate his interests in that budget in favor [of] the budget of the" village. 1972 Op. Att'y Gen. No. 72-109 at 2-426; *see* 1963 Op. Att'y Gen. No. 559, p. 566; 1961 Op. Att'y Gen. No. 2480, p. 532. The potential for a conflict in such a situation is readily apparent. *See generally* 1980 Op. Att'y Gen. No. 80-035 at 2-149 (a conflict of interest occurs 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").

That a conflict of interest may arise, however, does not necessarily mean that the positions are incompatible. Rather, a further inquiry into the immediacy of the conflict must be made. Op. No. 79-111 at 2-372. "[W]here possible conflicts are remote and speculative, the common law incompatibility or conflict of interest rules are not violated." Op. No. 79-111 at 2-372. Factors utilized in determining whether a potential conflict of interest will render two positions incompatible include, *inter alia*, the degree of remoteness of a potential conflict, whether the individual exercises decision-making authority in both positions, and whether the potential conflict involves the primary functions of each position. *Id.*

In light of the above factors, it is clear that the presentation of the township budget to the county budget commission by the individual as township clerk is insufficient, in itself, to render the positions of township clerk and village administrator incompatible. First, neither a village administrator nor township clerk participates in the preparation of their subdivision's budget. Although the township clerk may be required to defend the township's tax budget before the county budget commission, the possibility that he would not use his best judgment in defending the budget merely because he was employed as a village administrator is too remote to render the positions incompatible. This is especially true in light of the fact that while each taxing authority submits a tentative budget, it is the budget commission which actually allocates 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. *See* R.C. 5705.31; R.C. 5705.32. Second, neither a township clerk nor village administrator exercises decision-making authority with respect to the preparation of their subdivision's budget. Finally, the defense of the township's budget by the township clerk would constitute only a small fraction of the duties of the clerk's position. As a result, the potential conflict of interest does not involve the primary duties of each position. Thus, an individual simultaneously holding the positions of township clerk and village administrator is not subject to any impermissible conflicts of interest.

Conclusion

Based upon the foregoing, it is my opinion, and you are hereby advised, that the position of village administrator is compatible with the position of township clerk.