

OPINION NO. 79-112

Syllabus:

An individual may serve as a member of a board of county commissioners and as administrator of a village located within that county at the same time. (1958 Op. Att'y Gen. No. 1705, p. 81 overruled.)

To: Richard B. Hauser, Huron County Pros. Atty., Norwalk, Ohio
By: William J. Brown, Attorney General, December 28, 1979

I have before me your request for my opinion wherein you inquire whether a person may hold the positions of county commissioner and village administrator for a non-chartered village within the same county at the same time.

In determining whether an individual may hold two positions in the public service simultaneously, consideration must first be given to any statutory prohibitions against the same. 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, and there is no statute which limits the outside employment permissible for a member of a board of county commissioners.

An individual may also be barred from the holding of two public positions by virtue of R.C. 124.57, which has been construed in opinions of the Attorney General to prohibit the holding of a partisan elective office by a classified civil servant. E.g., 1974 Op. Att'y Gen. No. 74-071. R.C. 124.57 would, therefore, operate to preclude a village administrator from holding the elected office of county commissioner—assuming such an office could be considered partisan—if an administrator is in the classified civil service. R.C. 124.11(A)(3), however, provides that "the members of all boards and commissions and all heads of departments appointed by the mayor. . ." are in the unclassified service. A village administrator is, pursuant to R.C. 735.271, appointed by the mayor, and may be removed without cause. Moreover, although a village administrator does not head a "department" designated as such, one appointed to a principal office may be said to be the head of a department. See State ex rel. Franke v. Minshall, 10 Ohio App. 86 (Cuyahoga County 1917). Thus, a village administrator is in the unclassified civil service and is not barred by R.C. 124.57 from holding an elective office.

Since there are no statutory limitations upon the concurrent holding of the positions with which you are concerned, it must be determined whether the common law test of incompatibility will preclude a person from serving as village administrator and county commissioner at the same time. That test asks whether one position is subordinate to, or a check upon, the other, and whether it is physically possible for one person to discharge the duties of both positions. State ex rel. Attorney General v. Gebert, 12 Ohio C.C. (n.s.) 274, 275 (Cir. Ct. Franklin County 1909).

The powers and duties of a village administrator are set forth in R.C. 735.273 and include the management and control of water works and public utilities, and the supervision of improvement and repair of streets, bridges, sewers and the like, in the village. Such powers do not extend beyond the territorial limits of the village. Further, the village administrator is "under the general supervision and control of the mayor. . ." A county commissioner's powers are enumerated in various provisions of Title 3 of the Ohio Revised Code, and I am aware of no provision which makes either a county commissioner or a village administrator subordinate to, or a check upon, the other. Each is in an entirely different field;

county commissioners are responsible to their electors, while a village administrator is responsible to the mayor for village affairs under his or her supervision. Accordingly, it does not appear that the common law test of incompatibility would operate to prohibit a person from serving as village administrator and county commissioner concurrently.

My predecessor, in 1958 Op. Att'y Gen. No. 1705, p. 81 (questioned in 1979 Op. Att'y Gen. No. 79-111), however, opined that the office of county commissioner is incompatible with membership on a village board of trustees of public affairs. A board of trustees of public affairs exercises the same functions and powers as a village administrator, compare R.C. 735.273 with R.C. 735.29, and upon appointment of a village administrator, such a board is automatically abolished. R.C. 735.272. There is, accordingly, no significant difference between the position of village administrator and membership on a board of trustees of public affairs.

In Op. No. 1705, supra, it was contemplated that the county commissioners would attempt to conclude a contract with the board of trustees of public affairs for the purchase of surplus water from the village pursuant to R.C. 743.18. My predecessor thus relied upon the possibility that the individual in question would be a member of each contracting board, should such a contract be entered into, in concluding that the positions were incompatible, further stating that the "fact that a conflict in interest is a mere possibility and not inevitable does not make the two offices any the less incompatible" Op. No. 1705, at p. 85, quoting 1952 Op. Att'y Gen. No. 1289, p. 257, 259.

A village administrator, too, has the power to make contracts under R.C. 743.18. Therefore, Op. No. 1705, supra, would compel a finding of incompatibility between the positions of county commissioner and village administrator if my predecessor's conclusion that any potential conflict renders positions incompatible were adopted. More recent opinions of the Attorney General have, however, stated that public positions will not be considered incompatible where possible conflicts of interest are remote and speculative. See, e.g., 1979 Op. Att'y Gen. No. 79-049; 1973 Op. Att'y Gen. No. 73-108; 1971 Op. Att'y Gen. No. 71-081. I concluded in Op. No. 79-111, supra, that this is the better view. It must be determined, therefore, whether the possibility that a person serving as village administrator and as a member of a board of county commissioners might conclude a contract with the county for the sale of surplus water pursuant to R.C. 743.18 is so remote as to render the positions not incompatible.

In analyzing whether potential conflicts of interest will render positions incompatible, several factors should be considered. See Op. No. 79-111, supra. The degree of remoteness, for example, is a significant factor, and here, where it is not suggested that a contract pursuant to R.C. 743.18 is even contemplated, there is a high degree of remoteness. Moreover, the sale of surplus water by a village administrator, or its purchase by a board of county commissioners, would constitute only a small fraction of the duties of both positions. As a result, the potential conflict does not involve the primary functions of each position, another factor relevant to conflict of interest questions. See Op. No. 79-049, supra.

A third factor to be considered is whether the individual in question exercises decision-making authority in both positions. It has been said that where one person holding two public positions has the power to conclude a contract in one position, but has no independent power to contract in the other, the possibility that a contract will be concluded is not such a division of loyalty as to make the two positions incompatible. 1955 Op. Att'y Gen. No. 5565, p. 328. See also Pistole v. Wiltshire, 90 Ohio L. Abs. 525 (C.P. Scioto County 1961). Thus, the fact that a village administrator (or a board of trustees of public affairs) must, pursuant to R.C. 743.18, obtain the approval of the legislative authority of the municipality in order to conclude a contract for the sale of surplus water militates against a finding of incompatibility.

Furthermore, the ability of the individual in question to remove himself or herself from any discussion or vote by a board of county commissioners, should a

contract for the purchase of water from the village ever be contemplated, ensures that he or she may abstain from acting in any manner other than in the public's best interest. See 1970 Op. Att'y Gen. No. 70-168.

I conclude, therefore, that the possibility that a contract between a county and village pursuant to R.C. 743.18 might someday be entered into does not render the positions of village administrator and county commissioner incompatible. Further, inasmuch as the analysis herein applies with equal force to a person serving as county commissioner and member of a village board of trustees of public affairs, Op. No. 1705, supra, is hereby overruled.

Accordingly, it is my opinion, and you are advised, that an individual may serve as a member of a board of county commissioners and as administrator of a village located within that county at the same time. (1958 Op. Att'y Gen. No. 1705, p. 81 overruled.)