

OPINION NO. 87-013

Syllabus

The position of assignment commissioner and secretary
for a municipal court judge exercising countywide

jurisdiction and the position of mayor of a village within that county are compatible provided it is physically possible for one person to discharge the duties of both positions.

To: Frederick D. Pepple, Auglaize County Prosecuting Attorney, Wapakoneta, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, April 2, 1987

I have before me your request for my opinion regarding the compatibility of the positions of village mayor and assignment commissioner/secretary for the judge of a municipal court having countywide jurisdiction. You have indicated that the village, which is situated within the county, maintains a mayor's court, see generally R.C. Chapter 1905, and the police officers hired by the mayor have the discretion of bringing certain cases before either the mayor's court or the municipal court.

In order to determine whether an individual may hold two positions in the public service, it is necessary to consider the following questions which were set forth in 1979 Op. Att'y Gen. No. 79-111 at 2-367:

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?

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 limit the holding of outside employment by a village mayor or a municipal court assignment commissioner and secretary. Further, in response to question number two, I am unaware of any statutory provision which prohibits one person from holding the positions of village mayor and municipal court assignment commissioner/secretary. See note 1, infra.

Question number one of the compatibility analysis concerns R.C. 124.57, which prohibits employees in the classified service of the state, the several counties, cities, city school districts, and civil service townships from taking part in political activity other than to vote or express their political opinions. R.C. 124.57 prohibits an employee in the classified service from being a candidate for public office in a partisan election. See 1983 Op. Att'y Gen. No. 83-033; 1982 Op. Att'y Gen. No. 82-085. It does not prohibit classified employees from engaging in nonpartisan political activity. See 1983 Op. Att'y Gen. No. 83-095.

R.C. 124.57 applies specifically to any "officer or employee in the classified service of the state, the several counties, cities, and city school districts thereof, and civil

service townships." As R.C. 124.57 does not expressly mention officers or employees in the service of a village, the statute does not apply to such officers or employees. See generally Ohio Const. art. XV, §10; R.C. 124.01(A); State ex rel. Giovanello v. Village of Lowellville, 139 Ohio St. 219, 39 N.E.2d 527 (1942). Thus, a village mayor is not, by virtue of holding that position, subject to the provisions of R.C. 124.57. In addition, you have indicated that the position of assignment commissioner/secretary of the municipal court is exempted from the classified civil service, see R.C. 124.11(A)(10); R.C. 124.11(A)(8), and that the village mayor is elected in a nonpartisan election, see R.C. 703.01; R.C. 3513.251. Thus, neither position is within the classified civil service and neither position constitutes a partisan elective office. Therefore, the positions are not incompatible by virtue of R.C. 124.57.

Question number three of the compatibility analysis is whether one position is subordinate to, or in any way a check upon, the other, and question number five considers whether there is a conflict of interest between the two positions. This inquiry necessitates an examination of the powers and duties of the respective positions.

The mayor of a village is vested with the executive power of the municipality. R.C. 733.23.¹ He is elected for a four year term and is the "chief conservator of the peace" within the village. R.C. 733.24. The mayor also serves as the president of the legislative authority² of the village, although he has no vote except in case of a tie. Id. R.C. 733.30 provides:

The mayor shall perform all the duties prescribed by the bylaws and ordinances of the municipal corporation. He shall see that all ordinances, bylaws, and resolutions of the legislative authority are faithfully obeyed and enforced. He shall sign all commissions, licenses, and permits granted by such legislative authority, or authorized by Title VII of the Revised Code, and such other instruments as by law or ordinances require his certificate.

Pursuant to R.C. 733.32 the mayor "shall communicate to the legislative authority from time to time a statement of the finances of the municipal corporation, and such other information relating thereto and to the general condition of the affairs of such municipal corporation as he deems proper or as is required by the legislative authority." The mayor also has supervisory control over the conduct of all municipal officers and must file charges against delinquent officers. R.C. 733.34; R.C. 733.35. In addition to supervising the daily operations of municipal government, the mayor also assists the

¹ I note that the manner in which a mayor is elected and the duties which he is to perform may be altered by the formation of an alternate plan of government, R.C. Chapter 705, or by the charter of the municipality. For purposes of this opinion, I assume there is no alternate form of government or charter provision which is applicable in this instance.

² A council of six members constitutes the legislative authority of a village. R.C. 731.09. While the mayor serves as the president of the village council, he is not a

legislative authority of the municipality in preparing a tax budget. R.C. 5705.28. Pursuant to R.C. 731.13 the mayor shall receive a fixed annual salary as provided by the legislative authority.

In regard to the position of assignment commissioner/secretary, I note that you have indicated that the individual currently holding this position serves a multiplicity of functions with the municipal court. For example, in addition to her functions as assignment commissioner and secretary to the municipal court judge, she also has court administrative duties and she does some court reporting. However, since she was appointed by the municipal court judge pursuant to R.C. 1901.33 and her compensation is prescribed by the board of county commissioners as the legislative authority for the county, see R.C. 1901.03(B), I will, for purposes of analysis, consider her primary function to be that of assignment commissioner with such additional duties as the court directs.

R.C. 1901.33 provides for the appointment of assignment commissioner of a municipal court as follows:

The judge or judges of a municipal court may appoint...an assignment commissioner and deputy assignment commissioners, each of whom shall receive such compensation as the legislative authority³ prescribes...Assignment commissioners shall assign cases for trial and perform such other duties as the court directs. (Footnote added.)

It is my understanding from a conversation which a member of my staff had with the individual holding this position, that although she performs a variety of functions, she receives one compensation under this section. She does not receive additional compensation for her additional duties. See 1981 Op. Att'y Gen. No. 81-020 (a municipal court clerk may not receive additional compensation for the performance of the duties of an assignment commissioner, typist, stenographer, or statistical clerk for the court, because the duties of these court aides fall within the scope of the office of clerk).

As the individual's primary functions consist of setting cases for trial, performing secretarial and administrative duties, and court reporting, it does not appear that the duties of village mayor and assignment commissioner/secretary for a municipal court judge are such that one position is subordinate to, or a check upon, the other. Although R.C. 1905.22,⁴

member of the council for purposes of R.C. 731.12 which prohibits any member from holding another public office or from holding employment with the village. See 1953 Op. Att'y Gen. No. 2367, p. 69 (city council president); 1959 Op. Att'y Gen. No. 778, p. 482. Cf. 1946 Op. Att'y Gen. No. 744, p. 68 (city council president).

³ Pursuant to R.C. 1901.03(B), the legislative authority for the Auglaize county municipal court is the board of county commissioners.

⁴ R.C. 1905.22 states that "[a]ppeals from a mayor's court may be taken to the municipal court or county court having jurisdiction within the municipal corporation."

which provides for appeals from a mayor's court to the municipal court, might be construed as establishing a check by the municipal court upon the actions of a village mayor who presides over the mayor's court, see R.C. 1905.01, it is the judge of the municipal court, and not subordinate employees such as the assignment commissioner or a secretary, who would be conducting the trial. Moreover, since "[a]n appeal from the mayor's court to the municipal court or county court shall proceed as a trial de novo," R.C. 1905.25, the entire case is retried and does not constitute a review of an earlier proceeding. Therefore, I conclude that the position of assignment commissioner and secretary of a judge of a municipal court exercising countywide jurisdiction and the position of village mayor within the county are not subordinate to one another, and neither provides a check upon the other.

In addition, the salaries of the positions are independently fixed by two different governing entities. The village mayor receives a fixed annual salary designated by the village council, R.C. 1905.21, while the municipal court assignment commissioner receives such compensation as the board of county commissioners prescribe. R.C. 1901.33.

You have expressed a concern that a potential conflict of interest may exist because the village maintains a mayor's court and the village police officers hired by the mayor have the discretion of bringing all "non-jailable" ordinance cases before either the mayor's court or the municipal court. Such discretion, you have indicated, arises from the concurrent jurisdiction of the mayor's court and the municipal court. See R.C. 1905.01; R.C. 1901.20; State ex rel. Brady v. Howell, 49 Ohio St. 2d 195, 360 N.E.2d 704 (1977) (both municipal and mayor's court have jurisdiction to hear a case involving a traffic violation). Since the village mayor, as executive officer of the village, has an interest in the financial condition of the municipality, it might appear that he would desire having more cases brought in mayor's court than in municipal court because of an increase in revenue for the village from the fees collected in mayor's court.⁵ Thus, while it is conceivable that a village mayor might exercise his influence over village police officers to encourage more cases originating in mayor's court rather than the municipal court, such a scenario would not serve to benefit one position over the other. The village police officers have the discretion, authorized by statute, to proceed before either the mayor's court or the municipal court. Moreover, any fines collected in municipal court which are "received for violation of municipal ordinances shall be paid into the treasury of the municipal

⁵ I note that in order to avoid a due process challenge to a decision of a mayor's court because of the mayor's pecuniary interest in benefitting the municipality, see Ward v. Village of Monroeville, 409 U.S. 57 (1972); Tuney v. State of Ohio, 273 U.S. 510 (1927); Village of Covington v. Lyle, 69 Ohio St. 2d 659, 433 N.E.2d 597 (1982), it has been determined that only where the mayor's court does not provide any substantial portion of the municipality's finances may the mayor proceed to trial upon a plea of not guilty; and, if the court does contribute substantially to the municipal treasury, the mayor may not accept a plea of guilty or no contest and impose sentence unless such sentence is mandatory. See 1974 Op. Att'y Gen. No. 74-001; 1974 Op. Att'y Gen. No. 74-009.

corporation whose ordinance was violated." R.C. 1901.31. Thus, the village would receive all fines arising from violations of village ordinances regardless of whether the court exercising jurisdiction is the mayor's court or the municipal court. Accordingly, I conclude that any perceived conflict of interest is too remote and speculative to render the positions of assignment commissioner/secretary and village mayor incompatible. See generally 1985 Op. Att'y Gen. No. 85-099 (county auditor whose son serves as city school board member); 1985 Op. Att'y Gen. No. 85-080 (township trustee serving simultaneously as employee of Department of Transportation); 1981 Op. Att'y Gen. No. 81-087 (township clerk serving as treasurer's assistant for a board of education). Presuming one will act in good faith while serving in these capacities, I cannot foresee any way in which an individual serving in these positions might act in one position to show a divided loyalty to his duties in the other position.

The final aspect of the compatibility analysis is the determination of whether it is physically possible for one person to discharge the duties of both positions. This is a factual question, which must take into account the time demands of each position. Op. No. 79-111. Questions of physical impossibility are usually left to individuals involved on the local level, since such persons have a more precise idea of the demands which would be placed on each officeholder. Id. The working hours of each position must not be such that a person holding both positions could be called upon to perform the duties of both jobs at the same time. See 1981 Op. Att'y Gen. No. 81-100. See also 1964 Op. Att'y Gen. No. 64-1421 at 2-374 ("[a] person employed full time may not be excused from the responsibilities of full time employment, except as expressly provided by statute").

Accordingly, it is my opinion, and you are advised, that, the position of assignment commissioner and secretary for a municipal court judge exercising countywide jurisdiction and the position of mayor of a village within that county are compatible provided it is physically possible for one person to discharge the duties of both positions.