

OPINION NO. 88-020**Syllabus:**

A township trustee who is not elected to that office in a partisan election may also be employed as a truck driver in the classified service of the county highway department. (1959 Op. Att'y Gen. No. 223, p. 110 overruled; 1962 Op. Att'y Gen. No. 3005, p. 361 overruled in part.)

To: Jim Slagle, Marion County Prosecuting Attorney, Marion, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, March 30, 1988

I have before me your request for my opinion on whether the positions of township trustee and county highway department employee are compatible.

In determining whether two positions are compatible, I must consider the following seven factors:

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?

1979 Op. Att'y Gen. No. 79-111 at 2-367 to 2-368.

The sixth and seventh questions of the compatibility analysis are of local concern and I assume, for purposes of this opinion, that there are no departmental regulations, charter provisions, or ordinances which limit the holding of outside employment by a township trustee or county highway department employee.

Question number one asks whether either position is a classified employment within the terms of R.C. 124.57. R.C. 124.57 prohibits classified employees or officers from taking part in political activity other than voting or expressing their political opinions. The position of township trustee is unclassified. See R.C. 124.11(A)(1); R.C. 505.01. Therefore, a township trustee is not subject to the prohibition of R.C. 124.57. Under R.C. 124.11(B), a county highway department employee may be in the classified service, and you have indicated that the individual in question would be a classified civil servant in his position as a truck driver for the county highway department. R.C. 124.57 does not prohibit a classified civil servant from also serving as a township trustee, as long as he is appointed trustee or seeks that office in a non-partisan election. 1978 Op. Att'y Gen. No. 78-022 (syllabus). For purposes of this opinion, I am assuming that the individual is elected as trustee in a non-partisan election. Therefore, the prohibition in R.C. 124.57 does not bar the individual from holding both positions.

Question number two asks whether the empowering statutes of either position limit outside employment. The empowering statute for a township trustee is R.C. 505.01 which provides for the election of three trustees for each township. A county highway department employee is hired pursuant to R.C. 5543.19 which provides that the county engineer may "employ such laborers...as are necessary in the construction, reconstruction, improvement, maintenance, or repair of roads by force account." Neither R.C. 505.01 nor R.C. 5543.19 limit outside employment for an individual occupying those positions.

Question number three asks whether one position is subordinate to, or in any way a check upon, the other. A township trustee, as an elected official, is responsible to the people who elected him. A county highway department employee is employed by the county engineer. Thus, a township trustee and county highway department employee serve different masters and are not subordinate to each other. *See Pistole v. Wiltshire*, 189 N.E.2d 654 (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).

The third question of the compatibility analysis also requires that I examine the statutory powers and duties of both positions to see whether one position controls the other, either directly or indirectly. *See Op. No. 79-111*. R.C. 5573.01 provides that "[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." In 1959 Op. Att'y Gen. No. 223, p. 110 (partially overruled on other grounds by 1978 Op. Att'y Gen. No. 78-022) one of my predecessors found that R.C. 5573.01 placed a county highway employee in a position subservient to that of a township trustee. I disagree with my predecessor's reasoning on this point. The provisions of R.C. 5573.01 make the county engineer subject to the order of the board of township trustees. The county engineer may delegate his duties under R.C. 5573.01 to those of his employees qualified "to make such surveys, plans, profiles, cross sections, estimates, and specifications." It seems unlikely, however, that the duties described in R.C. 5573.01 would be delegated or assigned to a classified county highway department employee working as a truck driver. Therefore, I conclude that the provisions of R.C. 5573.01 do not place a county highway department employee under the control of a township trustee for purposes of the compatibility analysis.

I note that R.C. 5571.05 provides that "[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." This statute places the board of township trustees under the general direction of but not necessarily the control of,¹ the county engineer when road maintenance or construction is involved. R.C. 5571.05 does not place a township trustee under the control of an employee of the engineer. *See 1985 Op. Att'y Gen. No. 85-080* at p. 2-318 (while "the Director of the Department of Transportation may act as a check upon the board of township trustees...with regard to state highways...the fact that the trustee in question is an employee of the Department of Transportation does not per se result in that employment being a check upon the office of township trustee"). I note also that in your request you state that the individual in question

¹ The 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. *See 1929 Op. Att'y Gen. No. 520*, vol. I, p. 788 (county surveyor [now county engineer] has no authority to direct township trustees to repair certain roads). For purposes of the compatibility analysis, I question whether this type of control as to technical advice renders a township trustee subordinate to the county engineer.

would not have supervisory powers in his position with the county highway department. I conclude, therefore, that a county highway department employee and a township trustee are not subordinate to, or in any way a check upon, the other.

Question number four asks whether it is physically possible for one person to perform the duties of both positions. Ordinarily, the question of physical impossibility is a factual question to be determined at the local level, since those persons may more precisely determine the demands of each position. Op. No. 79-111. Therefore, I leave the final determination of this issue to the persons directly involved.

Question number five asks whether there is a conflict of interest between the two positions. I must examine the powers and duties of the respective positions to see whether there is any material reason why an individual occupying both positions would be subject to conflicting interests or divided loyalties. Op. No. 79-111. See also 1985 Op. Att'y Gen. No. 85-042 at 2-150 ("One person may not simultaneously hold two public positions if he would be subject to divided loyalties and conflicting duties or exposed to the temptation of acting other than in the best interest of the public") (citations omitted).

The 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." R.C. 5571.01. R.C. 5571.02 provides that "[t]he board of township trustees shall have control of the township roads of its township and shall keep them in good repair." Under R.C. 307.15, a board of county commissioners may contract with a board of township trustees, 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, or render." Pursuant to R.C. 307.15, the township trustees may contract with a board of county commissioners whereby the county agrees to construct, reconstruct, resurface or improve a public road within the township. A township trustee may, therefore, enter a contract as trustee which could ultimately require him to perform work as a county highway employee. This creates a potential conflict of interest for an individual serving as both township trustee and county highway department employee.

Another potential conflict may exist because of R.C. 5555.43 which provides that 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 such a case, a township trustee who also is employed by the county would be involved in a contract between the township which he represents and the county which employs him. This, too, is a potential conflict of interest for an individual serving in both positions.

One of my predecessors found that both of the above potential conflicts barred an individual from serving as both township trustee and county highway department employee. 1962 Op. Att'y Gen. No. 3005, p. 361 (partially overruled on other grounds by 1978 Op. Att'y Gen. No. 78-022); 1959 Op. Att'y Gen. No. 223, p. 110 (partially overruled on other grounds by Op. No. 78-022). However, I must reconsider the conclusion reached by my predecessor in light of Op. No. 79-111, which lists several factors to be considered in determining whether a potential conflict renders two positions incompatible. These factors are as follows: the degree of remoteness of the potential conflict, the ability of the individual to remove himself from the conflict, whether the positions involve decision-making authority, whether the conflict involves the primary function of each position, and whether the conflict involves budgetary controls. *Id.* at 2-372. In 1985 Op. Att'y Gen. No. 85-080, I concluded that the positions of township trustee and equipment operator in the Ohio Department of Transportation are compatible, in spite of the fact that a trustee could be influenced on his vote on a proposal to construct, repair or maintain a highway if the proposal could affect his duties as a Department of Transportation employee. I found the potential conflict too remote and speculative to bar one person from holding both positions. *Id.* at 2-323. I reach the same conclusion where the positions of township trustee and county highway department employee

are involved. You have indicated that the individual in question would not be in a supervisory or decision-making position as a county highway department employee. If a conflict arose, the individual could easily remove himself from the conflict by abstaining on a vote or resigning one of the positions. As a truck driver, the individual in question has no control over budgetary matters or decisions by the county highway department. I therefore conclude that the above potential conflicts do not render these positions incompatible.

As a final matter, I note that R.C. 5575.07 permits the county engineer to "appoint some competent person to act as inspector during the construction of [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 county highway employee in question were considered for this position of inspector. Once again, I find this potential conflict remote and speculative and the other factors also weigh against finding that this provision bars one person from serving as both township trustee and county highway department employee.

Therefore, it is my opinion and you are advised that a township trustee who is not elected to that office in a partisan election may also be employed as a truck driver in the classified service of the county highway department. (1959 Op. Att'y Gen. No. 223, p. 110 overruled; 1962 Op. Att'y Gen. No. 3005, p. 361 overruled in part.)