

OPINION NO. 70-096**Syllabus:**

A person who is employed as statutory development specialist in the Department of Urban Affairs does not hold public office within the meaning of Section 731.02, Revised Code, and therefore the position of a city councilman and statutory development specialist in the Department of Urban Affairs are not incompatible.

To: Albert G. Giles, Director, Dept. of Urban Affairs, Columbus, Ohio
By: Paul W. Brown, Attorney General, July 28, 1970

I have before me your request for my opinion concerning the compatability of the positions of city councilman and statutory development specialist in the Department of Urban Affairs.

Relevant to a determination of this question is Section 731.02, Revised Code, which reads in part as follows:

"* * * Each member of (city) council shall not hold any other public office, except that of notary public or member of the state militia * * * and no such member may hold employment with said city * * *."

Former Section 731.02, Revised Code, forbade a city councilman to hold any other public office or employment, but the prohibition against public employment was deleted in the 1957 amendment to said statute.

In Opinion No. 60, Opinions of the Attorney General for 1965, it was held that Section 731.02, supra, does not prohibit a member of the city council from holding other public employment so long as such employment is not with said municipality, or is not in opposition to some other statutory provision.

The above holding logically raises the next question, that is, is a person who is a statutory development specialist in the Department of Urban Affairs holding a public office?

Opinion No. 038, Opinions of the Attorney General for 1970 discusses the question concerning what constitutes a public office and what constitutes a public employment, and applies the most usual standard which is found in The State, ex rel., Herbert v. Ferguson, 142 Ohio St. 496 (1944) at page 500:

"A 'civil office' or a public office of a civil nature, as defined by the Ohio cases, is a charge or trust conferred by public authority for a public purpose, with independent and continuing duties, involving in their performance the power of some portion of the sovereign power."

Or as otherwise defined in State ex rel., Scarl v. Small, 103 O. App. 214, 3 O.O. (2d) 276, 145 N.E. (2d) 200 (1956):

"The term 'public office' imparts an office wherein certain independent public duties, as part of the sovereignty of the state, are appointed to it by law, to be exercised by the incumbent by virtue of his election or appointment to the office, and not as a mere employee, subject to the direction and control of someone else."

It has usually been held that one who is subject to the direction and control of someone else or performs no duties except such as by law are charged upon his superior, hold an employment and not an office. State ex rel., Allen v. Mason, etc. et al., 61 Ohio St. 62, 55 N.E. 167 (1899).

Section 124.02 (E), Revised Code, states that the Department of Urban Affairs shall have, among others, the following powers and duties:

"Study existing legal provisions that affect the structure, operation and financing of local government and those state activities that involve significant relations with local government units, and recommend to the Governor and to the general assembly such changes in these provisions and activities as will strengthen local government operations."

In accordance with this section, and under the authority

of Section 124.05, Revised Code, which states that:

"The director of urban affairs may employ such technical and professional personnel, and such other personnel, as are necessary to carry out the purposes of Chapter 124. of the Revised Code."

A statutory development specialist may be employed to conduct research studies and otherwise assist in identifying legislative action to be recommended in the area of urban affairs; and in doing so performs no duties except such as by law are charged upon his superior.

Therefore, being a person who is subject to the direction and control of a superior, the statutory development specialist does not fall within the class of public officer, State v. Brennan, 49 O.S. 33, 29 N.E. 593 (1892).

In the case of State ex rel., Allen v. Mason, supra, it was stated that an inferior or subordinate who performs no duties except such as by law are charged upon his superior holds an employment, not an office.

The only question remaining to be answered is whether, under the common law rule respecting compatability, one person can serve in both capacities. The rule involved is best stated in State ex rel., v. Gerbert, 12 C.C. (N.S.) 274, at page 275 (1909), as follows:

"Offices are considered incompatible when one is subordinate to, or in any way a check upon the other, or when it is physically impossible for one person to discharge the duties of both."

Assuming that the duties involved can be carried out by one person, I can think of no circumstances in which either position would be subordinate to, or a check upon, the other.

In conclusion, it is my opinion and you are hereby advised that a person who is employed as statutory development specialist in the Department of Urban Affairs does not hold public office within the meaning of Section 731.02, Revised Code, and therefore the positions of a city councilman and statutory development specialist in the Department of Urban Affairs are not incompatible.