

**OPINION NO. 91-036****Syllabus:**

The position of president pro tempore of the legislative authority of a village is compatible with the position of bituminous plant inspector in the Ohio Department of Transportation, provided that the election to the legislative authority is nonpartisan.

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**To: Alan R. Mayberry, Wood County Prosecuting Attorney, Bowling Green, Ohio**  
**By: Lee Fisher, Attorney General, September 4, 1991**

You have asked whether the positions of president pro tempore of the legislative authority of a village and bituminous plant inspector with the Ohio Department of Transportation are compatible.

According to information provided, the duties of a bituminous plant inspector include the monitoring of specialized testing of bituminous concrete and related materials, the performance of tests on asphalt concrete using the nuclear asphalt content gauge, the making of a determination that bituminous asphalt concrete materials as produced by the contractor are acceptable for incorporation into construction projects, and the cleaning, repairing and maintenance of laboratory and field testing equipment. In addition to these duties, a bituminous plant inspector performs related duties assigned by his supervisor.

The powers and duties of a member of the legislative authority of a village are set forth in R.C. Chapter 731 and related provisions. In general, members of the legislative authority of a village perform duties related to the government of the village. *See, e.g.*, R.C. 731.14 (power to enter contracts on behalf of the village); R.C. 731.17 (power to pass ordinances); R.C. 731.47 (management and control of village finances and property); R.C. 735.27 (provide for the care, supervision, and management of public institutions located within the territory of the village). *See generally* R.C. 731.09 ("[t]he legislative power of each village shall be vested in, and exercised by, a legislative authority"). The president pro tempore of the legislative authority of a village, who is elected from its members, R.C. 731.10, has the same powers and responsibilities as other members of the legislative authority, and in the mayor's absence or inability to perform his duties, "the president pro tempore shall be the acting mayor, and shall have the same powers and perform the same duties as the mayor." *Id.*; accord R.C. 733.25; *see also State v. Lanser*, 111 Ohio St. 23, 144 N.E. 734 (1924) (syllabus, paragraph one) ("when the mayor of a village is absent from the village or is unable for any cause to perform his duties, the president *pro tem.* of council becomes acting mayor and is invested with all powers of the mayor, including his judicial powers"). Pursuant to R.C. 733.23, the mayor is vested with the executive power of the village. *See also* R.C. 733.30 (the mayor "shall see that all ordinances, bylaws, and resolutions of the legislative authority are faithfully obeyed and enforced"); R.C. 1905.20(A) ("[t]he mayor of a municipal corporation has, within the corporate limits, all the powers conferred upon sheriffs to suppress disorder and keep the peace"). Moreover, in certain statutorily enumerated situations, mayors are authorized "to hear and determine...prosecution[s] for the violation of an ordinance of the municipal corporation [and for] criminal causes involving [certain] moving traffic violation[s] occurring on a state highway located within the boundaries of the municipal corporation." R.C. 1905.01(A).

An examination of the compatibility of two public positions necessitates the consideration of the following seven questions:

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 and 2-368. All seven questions must yield an answer in favor of compatibility before two public positions can be found compatible and, thus, can be held by the same person.

The sixth and seventh questions involve in large part matters 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 president pro tempore, acting mayor, or bituminous plant inspector. Moreover, there are no applicable state or federal regulations.<sup>1</sup>

#### R.C. 124.57

R.C. 124.57 prohibits classified employees or officers from participating in partisan political activity, other than by way of a vote or expression of political views. A bituminous plant inspector in the Department of Transportation is in the classified service. *See generally* R.C. 124.11(B) ("[t]he classified service shall compromise all persons in the employ of the state...not specifically included in the unclassified service"). Prior opinions of the Attorney General, however, have concluded that classified employees may be candidates in nonpartisan elections. 1989 Op. Att'y Gen. No. 89-056; 1983 Op. Att'y Gen. No. 83-033; 1982 Op. Att'y Gen. No. 82-085; 1978 Op. Att'y Gen. No. 78-022; *see also* 1 Ohio Admin. Code 123:1-46-02. Additional information provided indicates that the members of the legislative authority in question are elected in nonpartisan elections. Therefore, the prohibition of R.C. 124.57 would not prevent an individual from serving as president

<sup>1</sup> I note that 5 U.S.C. §§1501-1508 (1988) impose restrictions on the political activities of certain state and local officers or employees. Pursuant to 5 U.S.C. §1502(a)(3) (1988), "[a] State or local officer or employee may not...be a candidate for elective office." "State or local officer or employee" is defined in 5 U.S.C. §1501(4) (1988), as

an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or Federal agency, but does not include —

(A) an individual who exercises no functions in connection with that activity....

Accordingly, if the position of bituminous plant inspector in the Department of Transportation is employed principally "in connection with an activity which is financed in whole or in part by loans or grants made by the United States or Federal agency," and exercises some function in connection with that activity, an individual holding that position may not participate in those political activities described in 5 U.S.C. §1502 (1988), including being a candidate for elective office in a partisan election. 5 U.S.C. §1502(a)(3) (1988); *see* 1985 Op. Att'y Gen. No. 85-080, at 2-316 and 2-317. A state or local officer or employee, however, is not prohibited from being a candidate in a *nonpartisan* election. 5 U.S.C. §1503 (1988). Since the members of the legislative authority in question are elected in *nonpartisan* elections, the prohibition set forth in 5 U.S.C. §1502(a)(3) (1988) would not apply. *See* Op. No. 85-080, at 2-317.

pro tempore of the legislative authority of a village and as bituminous plant inspector.<sup>2</sup> See generally Op. No. 78-022 (syllabus) ("R.C. 124.57 does not prohibit a classified civil servant from being appointed to the office of township trustee pursuant to R.C. 505.24, or from seeking that office in a non-partisan election").

#### Outside Employment

Other than R.C. 124.57, I am not aware of any limitation on the outside employment of bituminous plant inspectors. R.C. 731.12, which delineates the qualifications for members of the legislative authority of a village, however, provides, in relevant part, that "[n]o member of the legislative authority shall hold any other public office...or hold employment with said village." It must, therefore, be determined whether the position of bituminous plant inspector is either a public office or an employment with said village.

In determining whether a position is a public office, courts have applied the following test:

The usual criteria in determining whether a position is a public office are durability of tenure, oath, bond, emoluments, the independency of the functions exercised by the appointee, and the character of the duties imposed upon him...The chief and most-decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law. If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office and not an employment.

....  
[I]t is manifest that the functional powers imposed must be those which constitute a part of the sovereignty of the state.

*State ex rel. Landis v. Board of Comm'rs*, 95 Ohio St. 157, 159-60, 115 N.E. 919, 919-20 (1917); accord *State ex rel. Milburn v. Pethel*, 153 Ohio St. 1, 90 N.E.7d 686 (1950); *Scofield v. Strain*, 142 Ohio St. 290, 51 N.E.2d 1012 (1943).

Based on these criteria, I find that bituminous plant inspectors are not public officers. A bituminous plant inspector is neither appointed nor elected in a manner prescribed by law. Further, the title "bituminous plant inspector" is not bestowed expressly by statute. Moreover, bituminous plant inspectors have no official duties that are either prescribed by statute or involve the exercise of sovereign power on behalf of the public. As stated above, bituminous plant inspectors perform duties related to the maintenance and upkeep of roads, under the direction of an immediate supervisor and ultimately the Director of the Department of Transportation. See generally R.C. 5501.02 (the Director of the Department of Transportation "shall appoint such employees of the department as are necessary, and shall prescribe their titles and duties"). Hence, a bituminous plant inspector's duties do not involve the exercise of independent governmental functions. See generally *State ex rel. Attorney General v. Jennings*, 57 Ohio St. 415, 49 N.E. 404 (1898) (syllabus, paragraph two) ("[t]o constitute a public office...it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law, to be exercised by the incumbent, in virtue of his election or appointment to the office, thus created and defined, and not as a mere employe, subject to the direction and control of some one else").

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<sup>2</sup> The president pro tempore of the legislative authority of the village in question is not elected in a partisan election to the position of acting mayor. See R.C. 731.10; R.C. 733.25. Hence, R.C. 124.57 would not prevent the individual, as acting mayor, from holding the unclassified position of bituminous plant inspector.

Since a bituminous plant inspector is not a public officer, it reasonably follows that one holding that position is an employee of the Department of Transportation. I find, accordingly, that since the position of bituminous plant inspector is not a public office or an employment with a village, a president pro tempore of the legislative authority of a village is not prohibited by R.C. 731.12 from serving as such an inspector.<sup>3</sup>

#### Subordination or Control

The third issue is whether one position is subordinate to, or in any way a check upon, the other. See *State ex rel. Attorney General v. Gebert*, 12 Ohio C.C. (n.s.) 274, 275, 21 Ohio C.C. Dec. 355, 356 (Cir. Ct. Franklin County 1909). There is one instance in which the Director of the Department of Transportation or his employees may act as a check upon the members of the legislative authority of a village.

Under R.C. 5521.11, the legislative authority of a village is authorized to construct any part of the state highway system, or the bridges and culverts thereon, within the village. The plans and specifications concerning the proposed construction by a legislative authority, however, must be submitted to the Director of the Department of Transportation for his approval, and any such construction is to be done under the supervision and inspection of the Director, his agents, or employees. Consequently, the Director of the Department of Transportation may act as a check upon the legislative authority of a village in approving and supervising the performance of the authority's function with regard to the construction of a portion of the state highway system. See 1985 Op. Att'y Gen. No. 85-080, at 2-317 and 2-318. In addition, there may be employees of the Department of Transportation, to whom the Director has assigned or delegated duties in connection with his responsibilities under R.C. 5521.11, who would also act as a check upon a legislative authority of a village. See Op. No. 85-080, at 2-318.

In Op. No. 85-080 my predecessor examined the possible check upon a board of township trustees by the Department of Transportation under R.C. 5521.11. In concluding that such a check upon the board by the Department of Transportation does not render the positions of township trustee and equipment operator in the Department of Transportation incompatible, my predecessor stated:

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 can conceive of no situation in which this particular employee, in performing the ordinary work of an equipment operator, would be in a position to work a check upon the office of township trustee. A situation could arise in which the township trustees would be answerable to an employee of the Department of Transportation insofar as the Director of the Department had delegated or assigned to that employee the responsibility of assisting him in the performance of his duties under R.C. 5521.11, R.C. 5571.01, or R.C. 5571.02. Indeed, R.C. 5521.11 specifically states an employee of the Department of Transportation may supervise and inspect construction work on the state highway system undertaken by the township trustees. It seems very unlikely, however, that duties pertaining to the approval of construction, improvement, maintenance or repair of state highways or work either of a supervisory nature or involving duties of inspection would be delegated or assigned to an equipment operator.

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<sup>3</sup> I have found no statute which prohibits an acting mayor from holding the position of bituminous plant inspector in the Department of Transportation.

Op. No. 85-080, at 2-318.

It is readily apparent that the reasoning of my predecessor in Op. No. 85-080 is applicable to the situation you have presented. The fact that the president pro tempore in question is an employee of the Department of Transportation does not per se result in that employment being a check upon the position of president pro tempore of a legislative authority of a village. Moreover, it is improbable that duties pertaining to the approval of plans and specifications covering the proposed construction to any part of the state highway system or work either of a supervisory nature or involving duties of inspection would be delegated or assigned to a bituminous plant inspector. I find, therefore, that the positions are not subordinate to, or in any way a check upon, each other.<sup>4</sup>

#### Physical Constraints

The fourth issue is whether it is physically possible for one person to discharge the duties of both positions. This question requires a determination as to the time demands that each position will make upon the individual in question and, thus, is a factual question which is best answered by the parties involved. See generally 1983 Op. Att'y Gen. No. 83-057, at 2-232 ("[t]his office is not equipped to serve as a fact-finding body....I shall not attempt to make final determinations where issues of fact are involved"). It seems quite likely, however, that the two positions can be competently filled by the same person.

#### Conflict of Interest

The critical inquiry is whether there is a conflict of interest between the two positions. An individual may not 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. 1985 Op. Att'y Gen. No. 85-042, at 2-150. A conflict of interest exists 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." 1980 Op. Att'y Gen. No. 80-035, at 2-149; see also *State ex rel. Baden v. Gibbons*, 17 Ohio Law Abs. 341, 344 (Ct. App. Butler County 1934) (a conflict of interest results when the duties of one position may be administered or discharged in such a way as to result in favoritism and preference being accorded the other position).

With respect to your specific inquiry, I note that several potential conflicts of interest exist. Various statutes within the Revised Code permit or require the consent of, a request from, or the entering into a contract by, a village, before the Department of Transportation may construct, repair, or maintain a state highway or bridge thereon, within a municipal corporation. See, e.g., R.C. 5501.41 ("[t]he director [of transportation] may remove snow and ice from the state highways within municipal corporations, but before doing so he must obtain the consent of the legislative authority of such municipal corporation"); R.C. 5501.49(B) ("[t]he director [of transportation] may enter into an agreement with the legislative authority of a municipal corporation..., upon mutually agreeable terms, for the municipal corporation...to operate and perform major maintenance and repair on any lift bridge located on the state highway system within the municipal corporation"); R.C. 5511.01 ("[t]he director [of transportation] may enter upon such state highways within any municipal corporation and construct, reconstruct, widen, improve, maintain, and repair them, provided the municipal corporation first consents thereto by resolution of its legislative authority"); R.C. 5521.01 ("[t]he director of transportation, upon the request by and the approval of the legislative authority of a village, shall maintain, repair, and apply standard longitudinal pavement marking lines as he considers appropriate, or may establish, construct, reconstruct, improve,

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<sup>4</sup> I am unaware of any instance in which either the position of acting mayor of a village or bituminous plant inspector is subordinate to, or a check upon, the other.

or widen any section of a state highway within the limits of a village"), R.C. 5523.15 ("[a] municipal corporation may co-operate with the department of transportation in the abolishment of railway grade crossings and the construction or reconstruction of bridges and viaducts within such municipal corporation, and may pay such portion of the cost of any such work as is agreed upon between the legislative authority of such municipal corporation and the director of transportation"). It is clear that under these sections, a president pro tempore may be influenced in his vote on a proposal to construct, repair, or maintain a state highway, if the proposal would affect his duties as a bituminous plant inspector in the Department of Transportation. *See*

Op. No. 85-080, at 2-323.

The fact that there is the possibility for a conflict of interest, however, does not automatically result in a finding of incompatibility. Rather, a further inquiry into the immediacy of the conflict of interest must be undertaken. "Where possible conflicts are remote and speculative, common law incompatibility or conflict of interest rules are not violated." Op. No. 79-111 (syllabus, paragraph three). Factors to be considered in determining the immediacy of a conflict of interest include:

the degree of remoteness of a potential conflict, the ability or inability of an individual to remove himself from the conflict, whether the individual exercises decision-making authority in both positions, whether the potential conflict involves the primary functions of each position, and whether the potential conflict may involve budgetary controls.

Op. No. 79-111, at 2-372.

In light of the above factors, I conclude that the potential conflicts of interest presented by R.C. 5501.41, R.C. 5501.49(B), R.C. 5511.01, R.C. 5521.01, and R.C. 5523.15 are remote and speculative. *See* Op. No. 85-080, at 2-323. First, they depend on the existence of several factors, including whether or not a state highway is located within the territorial jurisdiction of the village, or whether a state highway located within the territorial jurisdiction of the village needs construction, repair or maintenance. Second, there are six members on the legislative authority of a village, *see* R.C. 731.09, thus, it would not be arduous for the individual in question to remove himself from any conflict of interest by abstaining from voting or discussing the construction, repair or maintenance of a state highway. *See* Op. No. 85-080, at 2-323 (the township trustee in question "could properly withdraw from participating in the board's deliberation and ultimate decision in order to avoid any conflict of interest"). Third, a bituminous plant inspector is not in a supervisory or decision-making position, or in control over the budgetary matters of the Department of Transportation. Finally, the conflicts of interest presented above do not concern a primary function of either position.

A second potential conflict of interest exists, however, in that the Director of the Department of Transportation and the legislative authority of the village may appear in court as opponents in a proceeding brought by the village to review the reasonableness and necessity of a proposed establishment or improvement to a federal aid highway or a federal aid interstate highway within the village. Specifically, R.C. 5521.01, in pertinent part, provides:

when in the opinion of the director there is urgent need to establish a state highway, which is to be designated a federal aid highway, or a federal aid interstate highway within a municipal corporation or, in the opinion of the director, any federal aid highway or interstate federal aid highway is in urgent need of repair, reconstruction, widening, improvement, or relocation, so as to accommodate the traveling public, the director shall submit a written request to the legislative authority of the municipal corporation for its consent to the desired establishment or improvement. The legislative authority shall within sixty days after such written request has been received from the director either grant its consent to the establishment or improvement or refuse consent by filing in writing with the director a statement of its reasons for refusing consent and any alternate proposals it considers

reasonable. If the legislative authority fails to act or refuses consent, the director may upon consideration of the reasons for rejection make a resolution declaring the necessity of the establishment or improvement, which shall be spread upon his journal, and then proceed in the same manner as if consent had been given. A certified copy of the resolution shall be served upon the municipal legislative authority which may, within twenty days from the date of service, appeal to the court of common pleas of the county in which the municipal corporation is situated, upon the reasonableness and necessity of the action provided for in the resolution.

Since R.C. 5521.01 authorizes court proceedings between a legislative authority of a village and the Department of Transportation, an employee of the Department of Transportation who also serves on the legislative authority of a village could be subject to divided loyalties. For example, a situation could arise where the legislative authority contemplates the bringing of legal action, under R.C. 5521.01, against the Department of Transportation. In such a situation, the president pro tempore of the legislative authority would be subject to influences which may prevent him from being completely objective in his decision-making. See Op. No. 85-080, at 2-318 and 2-319; see also 1959 Op. Att'y Gen. No. 602, p. 313, at 316 ("[t]he possibility of direct conflict between two positions is best exemplified in the provisions of sections 5524.02 and 5524.03, Revised Code,<sup>5</sup> under which the director of state highways and a board of township trustees may appear in court as opponents" (footnote added)), *overruled in part and modified in part*, Op. No. 85-080.

A consideration of the factors to determine the immediacy of a conflict of interest, however, leads me to conclude that this potential conflict of interest is also too remote and speculative to furnish an adequate basis for finding the positions in question incompatible. It is readily apparent that an appeal by the village to a court as to the reasonableness and necessity of a proposed establishment or improvement to a federal aid highway or a federal aid interstate highway within the village is contingent upon the occurrence of several events. First, the Director of the Department of Transportation must determine that there is an *urgent need* to establish, reconstruct, widen, improve, or relocate a federal aid highway or a federal aid interstate highway within the village. Second, the legislative authority of the village must fail to act upon, or refuse consent to, the Director's request to establish or improve the federal aid highway or the federal aid interstate highway.

Moreover, as stated previously, it is possible for the president pro tempore in question to abstain from all votes and discussions concerning the construction and improvement of the state highways located within the village. As such, the individual in question would not be involved in the legal action. Hence, I conclude that an individual simultaneously holding the positions of president pro tempore of the legislative authority of a village and bituminous plant inspector in the Department of Transportation is not subject to any impermissible conflicts of interest.<sup>6</sup>

Therefore, it is my opinion, and you are hereby advised that the position of president pro tempore of the legislative authority of a village is compatible with the position of bituminous plant inspector in the Ohio Department of Transportation, provided that the election to the legislative authority is nonpartisan.

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<sup>5</sup> 1961 Ohio Laws 582, 945-47 (Am. H.B. 1, eff. Jan. 10, 1961) repealed R.C. 5524.01-.03 and simultaneously reenacted the provisions contained therein as R.C. 5523.31-.33. Since 1961, however, the provisions of R.C. 5523.31-.33 have been amended and renumbered as R.C. 4907.471-.475. Am. Sub. H.B. 111, 118th Gen. A. (1989) (eff. Oct. 28, 1989).

<sup>6</sup> I note that I have been unable to locate any area in which the duties of acting mayor of a village and bituminous plant inspector conflict.