

Note from the Attorney General's Office:

1960 Op. Att'y Gen. No. 60-1166 was overruled by
1978 Op. Att'y Gen. No. 78-017.

1166

POSITION OF MEMBER OF BOARD OF TOWNSHIP TRUSTEES—IMCOMPATIBLE WITH POSITION OF MEMBER OF VOLUNTEER FIRE DEPARTMENT—§505.37, R.C.

SYLLABUS:

Under Section 505.37, Revised Code, a member of a board of township trustees may not be employed by the township to maintain and operate fire fighting equipment and may not serve on a volunteer fire department which has entered into an agreement with the township to furnish fire protection, as such employment is incompatible with the office of member of a board of township trustees.

Columbus, Ohio, February 29, 1960

Hon. Calvin W. Hutchins, Prosecuting Attorney
Ashtabula County, Jefferson, Ohio

Dear Sir:

I have your request for my opinion reading as follows:

“We have searched all of the compiled information on compatibility and incompatibility of specific offices, and have not found anything pertaining to a member of a Volunteer Fire Department at the same time being a Township Trustee.

“Under the 1948 Attorney General’s Opinion No. 2983, we have found that a Volunteer Fire Department is not amenable to those sections which provide that an officer or person holding an office in trust shall not be interested in contracts. However, most township-volunteer fire department contracts provide method of payments from the township to the department for individual fires and assistance in financing fire equipment. Consequently, we would like to request of you an opinion as to the compatibility or incompatibility of these two offices.”

In Opinion No. 2983, Opinions of the Attorney General for 1948, page 143, the third paragraph of the syllabus states:

“A volunteer fireman of a municipality is not amenable to the provisions of Sections 3808, 12910, 12911 or 12912 of the General Code.”

The above cited sections of the General Code are now 733.78, 2919.08, 2919.09 and 2919.10, Revised Code, which contain prohibitions relative

to contracts with municipalities and townships in which officers or employees of such subdivisions may have an interest. I note that Opinion No. 2983, *supra*, relied on a 1914 Opinion of the Attorney General, page 458, where it was decided that such statutory prohibitions regarding an interest in contracts do not apply to voluntary firemen because their employment as such firemen is of a casual nature. In addition, the severe penalties prescribed for the violation of the mentioned statutes are stressed by the writer of the opinion as an indication that such penalties were not intended to be used against persons holding such employment.

The question here presented is, however, different from those considered in the two opinions of my predecessors just discussed in that the present situation involves a township trustee acting as volunteer fireman of the township. Section 2919.10, Revised Code, provides:

“No officer of a municipal corporation or member of the council thereof or a *member of a board of township trustees*, shall be interested in the profits of a contract, *job, work or services* for such municipal corporation or *township*, or act as commissioner, architect, superintendent, or engineer, in work undertaken or prosecuted by such municipal corporation or township during the term for which he was elected or appointed, or for one year thereafter, or become the employee of the contractor of such contract, job, work, or services while in office.

“Whoever violates this section shall forfeit his office and be fined not less than fifty nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both.” (Emphasis added)

It is not inconceivable that a township trustee who is at the same time a volunteer fireman of such township could be considered as being interested in the profits of a “job, work, or services” under the provisions of Section 2919.10, *supra*. In that event, such person might be amenable to the penalties of Section 2919.10, *supra*, and if so, the two positions would be incompatible on that basis alone. However, a definite answer to the question at hand requires an examination of statutes dealing with the authority of township trustees.

Pursuant to the provisions of Section 505.39, Revised Code, a board of township trustees is given the authority to levy a tax on all taxable property in the township or in the fire district for the purpose of, among other things, paying for permanent, part time, or *volunteer fire-fighting companies to operate such equipment*.

Section 505.37, Revised Code, gives a board of township trustees the authority to adopt regulations for the protection of property against fires and to purchase or otherwise provide equipment for the fighting of fires; it provides further :

“* * * The board may employ one or more persons to maintain and operate fire-fighting equipment, or it may enter into an agreement with a volunteer fire company for the use and operation of such equipment. *The board may compensate the member of a volunteer fire company on such basis and in such amount as it deems equitable.*

“The board of any two or more townships, or the legislative authorities of any two or more political subdivisions, or any combination thereof, may through joint action, unite in the joint purchase, maintenance, use, and operation of fire-fighting equipment, or for any other purpose designated in section 505.37 to 505.44, inclusive of the Revised Code, *and may prorate the expenses of such joint action on such terms as are mutually agreed upon.*

“* * * (Emphasis added)

Under the provisions of above Sections 505.39 and 505.37, *supra*, a member of a board of township trustees actively participates in the determination of the tax levy on all township property whereby money for the payment of a volunteer fire force is obtained, and he also votes on the amount of compensation volunteer firemen are to receive, whether such firemen are in the service of one township or in the service of two or more political subdivisions who have agreed to combine their fire-fighting apparatus and manpower.

Thus, a township trustee who is at the same time a volunteer fireman would be actually determining, at two levels, indirectly in fixing the tax levy and directly in setting the amount of compensation for volunteer fireman, what his pay should be as such fireman. The common law test of incompatibility, as stated in *32 Ohio Jurisprudence*, page 908, reads :

“* * * One of the most important tests as to whether offices are incompatible is found in the principle that incompatibility is recognized whenever one office is subordinate to the other in some of its important and principal duties, or is subject to supervision or control by the other, * * * or is in any way a check upon the other, or where a contrariety and antagonism would result in an attempt by one person to discharge the duties of both.”

The above rule appears clearly applicable to the present situation in several aspects: Control by the board of volunteer firemen; the office of a

trustee acting as check upon the position of volunteer fireman, and vice versa; and a self-evident conflict of interest, or contrariety, to which a person in a situation here discussed would be inevitably subjected.

In light of the foregoing, it is my opinion and you are advised that under Section 505.37, Revised Code, a member of a board of township trustees may not be employed by the township to maintain and operate fire fighting equipment and may not serve on a volunteer fire department which has entered into an agreement with the township to furnish fire protection, as such employment is incompatible with the office of member of a board of township trustees.

Respectfully,

MARK McELROY
Attorney General