

OPINION NO. 86-007**Syllabus:**

The positions of parole officer employed by the state Department of Rehabilitation and Correction and village police chief are incompatible.

To: Richard P. Selter, Director, Ohio Department of Rehabilitation and Correction, Columbus, Ohio

By: Anthony J. Colebrezze, Jr., Attorney General, February 20, 1986

I have before me your request for my opinion on the question whether the positions of parole officer employed by the Department of Rehabilitation and Correction and village police chief are compatible.

1979 Op. Att'y Gen. No. 79-111 sets forth seven criteria which must be analyzed to determine whether two public positions are compatible. The questions are as follows:

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. For purposes of this opinion, I assume that there are no departmental regulations or other local provisions which limit the holding of outside employment by a parole officer or a village police chief. With respect to question two, I am aware of no constitutional or statutory provisions which prohibit one person from simultaneously holding the positions of parole officer and village police chief.

Question number one of the compatibility analysis concerns R.C. 124.57. Employees in the classified service of the state, the several counties, cities, city school districts, and civil service townships are prohibited by R.C. 124.57 from taking part in political activity other than to vote or express their political opinions. A classified employee may not be a candidate for public office in a partisan election. See 1985 Op. Att'y Gen. No. 85-042; 1983 Op. Att'y Gen. No. 83-033; 1982 Op. Att'y Gen. No. 82-085.

R.C. 5149.09 provides that, "[a]ll positions in the adult parole authority are in the classified civil service of the state." A parole officer serves in the adult parole authority, a bureau within the Department of Rehabilitation and Correction, see R.C. 5149.09, and thus is subject to the prohibition of R.C. 124.57. In Op. No. 85-042, at 2-148, I stated that:

A village marshal, who is designated the chief of police, is...appointed by the mayor with the advice and consent of the legislative authority, R.C. 737.15, and thus is not elected in a partisan election. Accordingly, a classified employee is not prohibited by R.C. 124.57 from serving as a village police chief.

A parole officer is not, therefore, prohibited by R.C. 124.57 from serving as a village police chief. Village officers and employees do not fall within the scope of R.C. 124.57, and thus a village police chief is not subject to R.C. 124.57. See Op. No. 85-042. 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).¹

In order to resolve the remaining three questions regarding subordination, conflict of interest, and physical possibility, the powers and duties of both positions must be examined.

The duties of a parole officer are set forth in R.C. Chapter 5149. R.C. 5149.02 creates the Adult Parole Authority (the authority) in the Division of Parole and Community Services of the Department of Rehabilitation and Correction. Pursuant to R.C. 5149.09, the chief of the Adult Parole Authority appoints all officers and employees of the authority. The chief of the authority has indicated to a member of my staff that the parole officer in question serves in the parole supervision section of the authority and is required to be on call twenty-four hours a day. The powers and duties of the parole supervision section are set forth in R.C. 5149.04, which provides in part:

(A) Persons paroled or conditionally pardoned shall be under jurisdiction of the adult parole authority and shall be supervised by the parole supervision section through its staff of parole and field officers in such manner as to insure as nearly as possible the parolee's rehabilitation while at the same time providing maximum protection to the general public. All state and local officials shall furnish such information to the parole supervision section as is requested by the superintendent of the section in the performance of his duties.

....
(D) The parole supervision section in the exercise of its supervision over parolees and persons conditionally pardoned shall carry out all lawful orders, terms, and conditions prescribed by the authority, the chief of the division of parole and community services, or the governor.

A parole officer in the parole supervision section is primarily charged with the duty of exercising supervision over parolees. The goals of this supervision are the rehabilitation of parolees and the protection of the general public.

The powers and duties of a village police chief are summarized in Op. No. 85-042 at 2-148 to 2-149:

¹ Even if a village police chief were subject to R.C. 124.57, a parole officer is appointed by the chief of the adult parole authority, R.C. 5149.09, and is not elected in a partisan election. Thus, a classified employee is not prohibited by R.C. 124.57 from serving as a parole officer. See 1985 Op. Att'y Gen. No. 85-042.

[A] village police chief is appointed by the mayor with the advice and consent of the legislative authority of the village. R.C. 737.15. The legislative authority has the power to remove the police chief upon charges of misconduct filed by the mayor. R.C. 737.171. The powers and duties of the marshal, or police chief, are defined in R.C. 737.18, which provides that:

The marshal shall be the peace officer of a village and the executive head, under the mayor, of the police force. The marshal...shall have the powers conferred by law upon police officers in all villages of the state, and such other powers, not inconsistent with the nature of their offices, as are conferred by ordinance.

R.C. 737.19(A) and (B) provide for the marshal's authority over the deputies, officers and employees within the village police department, and R.C. 737.19(C) provides that:

The marshal of a village shall suppress all riots, disturbances, and breaches of the peace, and to that end may call upon the citizens to aid him. He shall arrest all disorderly persons in the village and pursue and arrest any person fleeing from justice in any part of the state. He shall arrest any person in the act of committing any offense against the laws of the state or the ordinances of the village, and forthwith bring such person before the mayor or other competent authority for examination or trial. He shall receive and execute any proper authority for the arrest and detention of criminals fleeing or escaping from other places or states.

In the discharge of his duties, the marshal shall have the powers and be subject to the responsibilities of constables, and for services performed by him or his deputies, the same fees and expenses shall be taxed as are allowed constables.

Upon examination of the law governing the positions of parole officer and village police chief, it is clear that there is a conflict of interest between these two positions. 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. See State ex rel. Hover v. Wolven, 175 Ohio St. 114, 191 N.E.2d 723 (1963); Op. No. 85-042; 1985 Op. Att'y Gen. No. 85-021; Op. No. 79-111.

A conflict of interest may result where one person holding two law enforcement positions is subject to different law enforcement standards, policies and techniques. See Op. No. 85-021 at 2-83. R.C. 2967.15 addresses the standards which apply to a parole officer upon the arrest of a parolee for parole violations by providing as follows:

Whenever any parole officer has reasonable cause to believe that any parolee under the supervision of

the authority has violated the terms and conditions of his pardon or parole, such parole officer may arrest such parolee, or may order any sheriff, deputy sheriff, constable, or police officer to make such arrest. A person so arrested shall be confined in the jail or detention home of the county in which he is arrested until released on parole or removed to the proper institution. Upon making such arrest the parole officer shall, as soon as practicable thereafter, notify the superintendent of parole supervision, in writing, that such parolee has been arrested and is in custody and submit in detail an appropriate report of the reason for such arrest.

Thus a parole officer may arrest a parolee whenever he has reasonable cause to believe that there has been a violation of parole conditions. However, a marshal may arrest a parolee for parole violations only upon "being advised or knowing that such convict or prisoner is in his bailiwick and has violated the conditions of his pardon or parole." R.C. 2941.46. Use of the word "know" in R.C. 2941.46 imposes a stricter standard upon a marshal than applies to a parole officer who may act upon "reasonable cause." See State v. Call, 8 Ohio App. 2d 277, 220 N.E.2d 130 (Montgomery County 1965). Failure to meet this standard of knowing that a parolee has violated the conditions of parole may invalidate an arrest. See DiMarco v. Greene, 385 F. 2d 556 (6th Cir. 1967); State v. Call. Further, a parole officer must attempt to rehabilitate parolees and protect the general public. R.C. 5149.04. A village marshal is the peace officer of the village and executive head of the village police force with power conferred by law and by ordinance. See R.C. 737.18; R.C. 737.19; Op. No. 85-042. While a village police chief has a duty to protect the public, he has no duty to attempt rehabilitation of parolees. Thus, the law enforcement standards, polices and techniques are different for each of the positions in question. It is apparent that a person who simultaneously served as a parole officer and a village police chief would be subject to conflicting duties and interests. Thus, the positions are incompatible.

In addition to the fact that a person who served as parole officer and village police chief would be subject to a conflict of interest, the issues of subordination and physical possibility are problematic for an individual simultaneously holding both positions. Pursuant to R.C. 2967.15, a parole officer may order a police officer to make an arrest when the parole officer has reasonable cause to believe that a parolee has violated the terms of his parole. Thus a parole officer is in the position of assigning duties to a village police chief. Cf. Op. No. 85-042 (because neither the dog warden nor village police chief are responsible for assigning duties to or supervising the other, the positions are independent and not subordinate).

The question of physical possibility is, as a general matter, left to those involved on the local level, since such individuals have a more accurate idea of the demands placed on each officeholder. See Op. No. 79-111. However, in Op. No. 85-042 (syllabus paragraph two), I concluded that, "[a] person who serves as a county dog warden on a full time basis and who is on call twenty-four hours a day, may not serve as a part time village police chief." Although, in the situation considered in Op. No. 85-042, the position of village police chief was part time with no set hours, the dog warden position required the officeholder to be on twenty-four hour call and I

reasoned in Op. No. 85-042 that there may "be times when a person holding both positions would be called upon to perform the duties of both jobs at the same time." Id. at 2-150. The position of parole officer is full time and the officeholder is required to be on twenty-four hour call. In the situation before me, as in Op. No. 85-042, the position of village police chief is part time with no set hours. Because an individual holding both positions may be required to simultaneously perform the duties of each position, I conclude that it is physically impossible for one person to perform the duties of parole officer and village police chief. See Op. No. 85-042; 1981 Op. Att'y Gen. No. 81-010. 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 so advised that the positions of parole officer employed by the state Department of Rehabilitation and Correction and village police chief are incompatible.