

**OPINION NO. 89-052**

**Syllabus:**

**An individual may simultaneously hold the positions of county auditor employee and county law librarian if that individual's duties as county auditor employee do not include conducting or participating in an audit of the county law library association.**

To: Steven L. Story, Meigs County Prosecuting Attorney, Pomeroy, Ohio  
By: Anthony J. Celebrezze, Jr., Attorney General, July 25, 1989

I have before me your request for my opinion regarding the compatibility of the positions of employee of the county auditor<sup>1</sup> and law librarian for the county law library.

The determination of whether two public positions are compatible requires 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 possible?
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. See also *Chronister v. Trumbull County Prosecuting Attorney*, 39 Ohio Misc. 2d 10, 531 N.E.2d 785 (C.P. Trumbull County 1988); *Esler v. Summit County*, 39 Ohio Misc. 2d 8, 530 N.E.2d 973 (C.P. Summit County 1985). In order for two positions to be found compatible, all seven questions must be resolved in favor of compatibility.

The first question of this analysis asks whether either of the positions is a classified employment within the terms of R.C. 124.57, which provides:

No officer or employee in the classified service of the state, the several counties, cities, and city school districts thereof, and civil service townships, shall directly or indirectly, orally or by letter, solicit or receive, or be in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political party or for any candidate for public office...nor shall any officer or employee in the classified service...be an officer in any political organization or take part in politics other than to vote as he pleases and to express freely his political opinions.

This language has been construed to prohibit a classified civil servant from participating in partisan political activities or holding a partisan elective office. *Gray v. Toledo*, 323 F. Supp. 1281, 1286 (N.D. Ohio 1971); *Heidtman v. Shaker Heights*, 163 Ohio St. 109, 126 N.E. 2d 138 (1955); *Esler*, 39 Ohio Misc. 2d 8; 1 Ohio Admin. Code 123:1-46-02. However, since neither of these positions is a partisan elective office, there is no prohibition pursuant to R.C. 124.57 against an individual holding both positions. See 1984 Op. Att'y Gen. No. 84-070 at 2-225. Thus, the prohibition contained in R.C. 124.57 does not apply.

The second question of the analysis asks whether the empowering statutes of either position limit outside employment. Employees of the county auditor are appointed and compensated under the authority of R.C. 325.17. I find nothing in this

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<sup>1</sup> Your letter requesting my opinion in this matter referred to an "employee" of the county auditor. Therefore, for purposes of this opinion, I have assumed that the position in question is that of an "employee" hired pursuant to R.C. 325.17 rather than that of a "deputy" appointed under R.C. 319.05.

section that could be construed as a prohibition of or limitation on outside employment. The law librarian is appointed by the board of trustees of the law library association. R.C. 3375.48. Compensation for the position of law librarian is fixed by the judges of the court of common pleas. R.C. 3375.48. There is nothing in R.C. 3375.48 that prohibits or limits the outside employment of a law librarian, nor are there such prohibitions in R.C. Chapter 3375, which governs libraries in general. Therefore, I conclude that the empowering statutes do not limit outside employment for the positions involved.

Questions three and four of the analysis comprise the "common law" test of compatibility which was recognized in the case of *State ex rel. Attorney General v. Gebert*, 12 Ohio C.C. (n.s.) 274 (Cir. Ct. Franklin County 1909): "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 to discharge the duties of both." *Id.* at 275. See also *Chronister*, 39 Ohio Misc. 2d 10.

Question three requires an examination of the duties of the two positions to determine whether one position controls the other, either directly or indirectly, or whether either position is a check upon the other. 1987 Op. Att'y Gen. No. 87-085; Op. No. 79-111. The county auditor employee is hired by the county auditor pursuant to R.C. 325.17. The employee is thus responsible to, and subject to the control of, the county auditor. The law librarian is appointed by the board of trustees of the law library association. R.C. 3375.48. The duties of the law librarian are prescribed by the board of trustees and the law librarian is responsible to that board. Since the county auditor employee and the law librarian serve different masters, neither position controls the other.

There is a possibility, however, that the position of county auditor employee could act as a check upon the position of law librarian. Pursuant to R.C. 3375.56, the board of trustees of the law library association is required to make a detailed annual report to the county auditor of the money expended by the association and the money generated by certain court fines, penalties, and forfeitures that the association received during the previous calendar year.<sup>2</sup> If one of the duties of the county auditor employee is to audit this report, then the position of county auditor employee acts as a direct "check" upon the board of trustees of the law library association. In the event that the law librarian's duties include keeping records which are included in the board's report, then the position of county auditor employee could act as an indirect check upon the position of law librarian. This situation, however, is more properly characterized as a conflict of interest rather than a check upon the law librarian because the focus of the audit is not the librarian but the board of trustees of the law library association, which is ultimately responsible for the use of public funds. I therefore find that the position of county auditor employee does not operate as a check upon the position of law librarian for purposes of the common law test of incompatibility.<sup>3</sup>

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<sup>2</sup> A county law library operated by a law library association is supported by public funds in the form of certain court fines, penalties and forfeitures. R.C. 3375.50-3375.53; R.C. 733.40; R.C. 4513.35; R.C. 5503.04. *Akron Law Library Association v. Weil*, 16 Ohio App. 2d 151, 242 N.E.2d 664 (Summit County 1968).

<sup>3</sup> I note that in 1965 Op. Att'y Gen. No. 65-150, it was the opinion of the Attorney General that the "common law" test of compatibility (questions three and four of the analysis) does not apply when the issue is the compatibility of two public positions, neither of which is a public office. In 1979 Op. Att'y Gen. No. 79-111, my predecessor determined that the common law test applied to the issue of the compatibility of two public positions where only one of the positions is a public office but declined to express an opinion on whether the test would apply where neither public position is a public office. In the present situation, neither position is a public office. However, because I find that the common law test of compatibility does not render the positions of county auditor employee and law librarian incompatible, I am not called upon to re-examine the validity of the conclusion in Op. No. 65-150.

The fourth question is whether it is physically possible for the individual to hold both positions. To the extent that this question involves an inquiry into the time demands of each position, it is a factual question which can best be resolved by the interested parties. Op. No. 87-085; Op. No. 79-111. For the purposes of this opinion, I assume that it is physically possible for one individual to hold both positions.

The fifth question asks whether there is a conflict of interest between the two positions. This requires an examination of the powers and duties of the positions to determine whether a person occupying both positions would be subject to conflicting interests or divided loyalties. 1988 Op. Att'y Gen. No. 88-017 at 2-68. I note that the mere fact that a conceivable or possible conflict exists does not render the two positions incompatible. Each compatibility question should be decided on its particular facts, and where the possibility of conflict is remote and speculative, the conflict of interest rule is not violated. Op. No. 79-111.

A conflict of interest does occur, however, 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." 1985 Op. Att'y Gen. No. 85-100 at 2-427 (quoting 1980 Op. Att'y Gen. No. 80-035). Prior opinions have held that a conflict arises when an individual is required in one position to conduct an audit or investigation of an entity to which the individual is loyal by virtue of his second position. For example, in 1981 Op. Att'y Gen. No. 81-004, my predecessor concluded that the office of city auditor and the position of volunteer firefighter in the same city were incompatible because of a conflict of interest:

If the city auditor were to serve as a firefighter, it would be impossible for him to carry out his duties as auditor with the requisite degree of objectivity. It is to be expected that the auditor would develop a sense of comradeship with his fellow firefighters, with whom he might be risking his life in emergency situations. This individual would, therefore, be subject to divided loyalties when, as auditor, he had to examine the accounts of the fire department.

*Id.* at 2-15. See also 1989 Op. Att'y Gen. No. 89-016 (positions are incompatible where one serves as a budgetary check upon the other).

In analyzing the positions of county auditor employee and law librarian, it is evident that an impermissible conflict of interest would arise if, as part of the duties with the county auditor, the individual was required to conduct or participate in a financial review or audit of the law library association. The conflict arises from the law librarian's vested interest in the outcome of an audit of the law library association, especially if the audit concerned records kept or compiled by the law librarian. Even if the records of the law librarian were not directly involved in the audit, the individual's loyalty to the law library association could create a conflict. Such a predisposition of loyalty would affect the ability of an individual holding both positions to conduct or participate in an objective audit of the law library association. This possibility of conflict is neither remote nor speculative, and I therefore find that an impermissible conflict exists between the position of county auditor employee and law librarian if, as county auditor employee, the individual is required to conduct or participate in an audit of the law library association.

If, however, the individual's duties as county auditor employee do not involve conducting or participating in an audit of the law library association, then the possibility for a conflict of interest is far more remote and speculative. I find, therefore, that if the individual as county auditor employee is removed from any duties which require a review or audit of the law library association or the records of the law library, then no conflict as such exists, and the two positions would not be incompatible in this regard.

Finally, questions six and seven are of a local concern and must be determined on a case by case basis. Op. No. 79-111 at 2-368. I assume, for the purposes of this opinion, that there are no departmental regulations, charter provisions or ordinances which limit the holding of outside employment by a county auditor employee or a county law librarian.

Accordingly, it is my opinion, and you are hereby advised, that an individual may simultaneously hold the positions of county auditor employee and county law librarian if that individual's duties as county auditor employee do not include conducting or participating in an audit of the county law library association.