

OPINION NO. 2011-034**Syllabus:**

2011-034

A person may serve simultaneously as a township trustee and bridge worker in the classified service of a county highway department when the office of township trustee is normally filled by nonpartisan election.

To: Daniel G. Padden, Guernsey County Prosecuting Attorney, Cambridge, Ohio

By: Michael DeWine, Ohio Attorney General, September 28, 2011

You have requested an opinion whether a person may serve simultaneously as a township trustee and bridge worker in the classified service of a county highway department when the office of township trustee is normally filled by nonpartisan election.

Compatibility Analysis

The following compatibility test is used to determine whether a person may serve simultaneously in two public positions:

1. Is either of the positions a classified employment within the terms of R.C. 124.57?
2. Does a constitutional provision or statute prohibit the holding of both positions at the same time?
3. Is one position 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 an impermissible conflict of interest between the two positions?

6. Are there local charter provisions, resolutions, or ordinances which are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

2011 Op. Att'y Gen. No. 2011-023 at 2-186; *see* 2 Ohio Admin. Code 123:1-46-02(F).

The sixth and seventh questions concern the applicability of charter provisions, resolutions, or ordinances, and federal, state, and local regulations. No federal or state regulation prohibits a person from serving simultaneously as a township trustee and bridge worker in a county highway department.¹ In addition, whether an applicable local resolution, ordinance, departmental regulation, or charter provision prohibits a person from holding these two positions at the same time is a question for township and county officials to answer. For the purpose of this opinion, it is assumed that no local resolution, ordinance, departmental regulation, or charter provision bars a person from serving simultaneously in both positions.²

Discussion of R.C. 124.57

The first question asks whether either of the positions is a classified employment within the terms of R.C. 124.57. This statute prohibits, except as provided therein, an officer or employee in the classified service of a county or civil service township from holding a public office that is normally filled by partisan election.³ *See* rule 123:1-46-02(C).

As an elected public officeholder, a township trustee is not in the classified service. *See* R.C. 124.11(A)(1); R.C. 505.01. For that reason, R.C. 124.57 does not apply to a person holding the office of township trustee.

You have informed us that the position of bridge worker is in the classified

¹ Pursuant to the federal Hatch Act, a county bridge worker who 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 a federal agency, and exercises some function in connection with that activity, may not be a candidate in a partisan election for township trustee. *See* 5 U.S.C. §§ 1501-03; *see also* 5 C.F.R. §§ 151.101-.122. Because you have informed us that the office of township trustee in question is normally filled by nonpartisan election, the federal Hatch Act does not apply in your particular situation. *See* 5 U.S.C. § 1503; 5 C.F.R. § 151.122.

² A collective bargaining agreement entered into between a county and its employees may have a provision that may prohibit a county employee from holding the office of township trustee. *See* R.C. 4117.03(A)(4); R.C. 4117.08(A); R.C. 4117.10(A). Whether such a provision of a collective bargaining agreement applies in a given instance must be determined on a case-by-case basis by county officials. *See* 1991 Op. Att'y Gen. No. 91-065 at 2-311.

³ The terms of a collective bargaining agreement may permit an officer or employee in the classified service of a county or civil service township to hold a public office that is normally filled by partisan election. *See* 1991 Op. Att'y Gen. No. 91-065 (syllabus, paragraph 1).

service of a county highway department. *See generally* R.C. 124.11(B) (the classified service of a county comprises all positions “not specifically included in the unclassified service” of the county). You have also informed us that the office of township trustee is normally filled by nonpartisan election, rather than by partisan election.⁴ Because R.C. 124.57 does not prohibit a person in the classified service of a county from serving in an office that is normally filled by nonpartisan election, *see* 2001 Op. Att’y Gen. No. 2001-034 at 2-203, R.C. 124.57 does not prevent a bridge worker in the classified service of a county highway department from holding the office of township trustee when the office of township trustee is normally filled by nonpartisan election. Accordingly, R.C. 124.57 does not prohibit a person from serving in the positions of township trustee and bridge worker in the classified service of a county highway department at the same time when the office of township trustee is normally filled by nonpartisan election.

Constitutional Provisions and Statutes Prohibiting the Holding of Another Public Position

The second question asks whether a provision of the Ohio Constitution or Revised Code prohibits a person from serving concurrently as a township trustee and bridge worker in a county highway department. No constitutional provision or statute prohibits the dual service in question. The second question thus may be answered in the negative.

Subordination and Control

The third question asks whether one position is subordinate to, or in any way a check upon, the other. You have informed us that a person holding the position of bridge worker in the county highway department is appointed, removed, and assigned his duties by, and subject to the direction and control of, the county engineer. *See* R.C. 325.17; R.C. 5543.19; *see also* R.C. 325.27. A township trustee, as an elected public officeholder, *see* R.C. 505.01, serves and is responsible to the township’s electorate and performs the duties imposed by law upon him. Hence, neither position is responsible for appointing or removing a person from, or assigning duties to, the other position.

Several Attorney General opinions have determined, however, that there may be instances in which a township trustee and a county engineer employee may have to interact. *See, e.g.*, 1997 Op. Att’y Gen. No. 97-045; 1994 Op. Att’y Gen. No. 94-022; 1993 Op. Att’y Gen. No. 93-051; 1993 Op. Att’y Gen. No. 93-016; 1991 Op. Att’y Gen. No. 91-069; 1988 Op. Att’y Gen. No. 88-020. As succinctly explained in 1997 Op. Att’y Gen. No. 97-045 at 2-279 and 2-280:

[V]arious statutes require a county engineer’s office and boards of

⁴ Candidates for the office of township trustee are nominated by petition, rather than in a primary election, unless a majority of the township electors petition for a primary election. *See* R.C. 3513.01; R.C. 3513.253. When a township does not conduct a primary election for the office of township trustee, the candidates for such office appear on a nonpartisan ballot. *See* R.C. 3505.04; R.C. 3513.01.

township trustees to interact with respect to the construction, reconstruction, resurfacing, improvement, maintenance, and repair of the roads located within townships. 1993 Op. Att’y Gen. No. 93-016; 1991 Op. Att’y Gen. No. 91-069; 1988 Op. Att’y Gen. No. 88-020. A board of township trustees is authorized to construct, maintain, and repair the roads located within the township. *See, e.g.*, R.C. 5535.01(C) (a “board of township trustees shall maintain all [township] roads within its township”); R.C. 5571.01(A) (a “board of township trustees may construct, reconstruct, resurface, or improve any public road or part thereof under its jurisdiction or any county road, intercounty highway, or state highway within its township”); R.C. 5571.02 (a “board of township trustees shall have control of the township roads of its township and shall keep them in good repair”); R.C. 5573.01 (when a board of township trustees has determined that any road shall be constructed, reconstructed, resurfaced, or improved, such board shall determine “the route and termini of such road, the kind and extent of the improvement, and at the same time shall order the county engineer to make such surveys, plans, profiles, cross sections, estimates, and specifications as are required for such improvement”).

Similarly, a county engineer is responsible for the construction, maintenance, and repair of the roads located within a township. *See, e.g.*, R.C. 5541.01 (a county engineer may aid and assist the board of county commissioners in the preparation of blank forms and reports for the use of a board of township trustees in making its report concerning “the relative value of each road in the township in consecutive order as a used highway, the kind of traffic over such road, its length and present condition, together with such other information as may be desired and requested by the board of county commissioners”); R.C. 5541.03 (upon the application of a board of township trustees and the approval of the board of county commissioners, a county engineer shall make the necessary plans and estimates of cost for the construction, reconstruction, or improvement of any section of highway in the county system); R.C. 5543.01(B), R.C. 5543.09 (a county engineer shall have general charge and supervision of the construction, reconstruction, resurfacing, or improvement of roads by boards of township trustees); R.C. 5543.02 (a county engineer shall make an annual estimate for the board of township trustees of each township that sets forth the amount required by the township for the construction, reconstruction, resurfacing, or improvement of the public roads within its jurisdiction); R.C. 5543.06 (a county engineer shall instruct township officials “as to the best and most economical methods for repairing and maintaining the roads and bridges of the county, so as to provide a uniform system of highway work for such county”); R.C. 5543.10 (a county engineer, upon the order of a board of township trustees,

“shall construct sidewalk of suitable materials, along or connecting the public highways, outside any municipal corporation”); R.C. 5549.03 (a county engineer, upon the order of a board of township trustees “may purchase from any public institution within the state any road material, machinery, tools, or equipment, quarried, mined, prepared, or manufactured by such institution”); R.C. 5571.05 (a county engineer shall supervise and direct a board of township trustees or township highway superintendent in the maintenance and repair of roads); R.C. 5575.01 (a county engineer shall prepare an estimate of costs of work when a board of township trustees undertakes the construction or reconstruction of a township road); R.C. 5575.07 (the work of road improvement by a township shall be done under the general supervision and direction of the county engineer).

A person who serves simultaneously as a township trustee and a county engineer employee thus may have duties that relate to the construction, reconstruction, resurfacing, improvement, maintenance, and repair of roads and bridges located within the township. This may, in turn, result in instances in which a county engineer employee may be under the control of, or a check upon, the position of township trustee.⁵ *See, e.g.*, 1997 Op. Att’y Gen. No. 97-045; 1994 Op. Att’y Gen. No. 94-022; 1993 Op. Att’y Gen. No. 93-051; 1993 Op. Att’y Gen. No. 93-016; 1988 Op. Att’y Gen. No. 88-020.

In order to determine whether a county engineer employee is under the control of, or a check upon, the position of township trustee, we must examine the specific duties assigned to the county engineer employee. *See* 1997 Op. Att’y Gen. No. 97-045 at 2-281; 1993 Op. Att’y Gen. No. 93-051 at 2-247; 1993 Op. Att’y Gen. No. 93-016 at 2-87 and 2-88. According to information provided in conjunction with your request for an Attorney General opinion, the position of bridge worker performs the following tasks:

JOB RESPONSIBILITIES:

Under close supervision of Bridge Foreman, assists in maintenance

⁵ Prior Attorney General opinions have explained that the statutes pertaining to the construction, reconstruction, resurfacing, improvement, maintenance, and repair of roads and bridges located within a township indicate that a board of township trustees is under the general direction of the county engineer with respect to such matters. *See* 1997 Op. Att’y Gen. No. 97-045; 1993 Op. Att’y Gen. No. 93-016; 1988 Op. Att’y Gen. No. 88-020; *see also* R.C. 315.08; R.C. 5543.01; R.C. 5543.02; R.C. 5543.09; R.C. 5571.05; R.C. 5575.07. This fact does not, however, make an employment position with the county engineer a check upon the position of township trustee unless the particular duties of a county engineer employee include the supervision of road or bridge construction, reconstruction, resurfacing, improvement, maintenance, or repair in the township. *See* 1997 Op. Att’y Gen. No. 97-045; 1993 Op. Att’y Gen. No. 93-016; 1988 Op. Att’y Gen. No. 88-020.

and repair of roads, highways, bridges, culverts and highway signs; performs manual labor; performs other related duties as required.

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JOB DUTIES:

1. Assists in maintenance and repair of bridges, decks, abutments, arches, railings, guardrails, approaches and/or repair and installation of culverts and headwalls.
2. Operates snow and ice removal equipment; sets up traffic control signals; performs preventative maintenance on equipment.
3. Sets up traffic control cones and signs; acts as flagman on traffic control.
4. May perform duties in a lower classification.

The duties of a bridge worker in the county highway department do not include inspecting the roads and bridges within a township, supervising township road and bridge improvements, providing road and bridge construction advice to township trustees, or preparing plans and specifications for improvements to township roads or bridges. In addition, in the performance of his duties, a bridge worker in the county highway department is not subject to the control of, or assigned duties by, a board of township trustees. Instead, a bridge worker in the county highway department is subject to the direction and control of the county engineer. The positions of township trustee and bridge worker in a county highway department thus operate independently of each other, and neither is required to assign duties to or supervise the other. Therefore, neither position is subordinate to, or in any way a check upon, the other.

Physical Ability to Serve in Both Positions

The fourth question asks whether it is physically possible for one person to perform the duties of both positions. This is a factual question that is best addressed by township and county officials who can accurately determine the time constraints and demands imposed upon the person as a township trustee and bridge worker for a county highway department.

We caution, however, that a township trustee, as an elected township officer, is required to perform duties imposed by statute and, where the nature of such duties requires the trustee to be present at a particular time or place, or act in a particular manner, the trustee must be able to do so. *See generally* 1965 Op. Att’y Gen. No. 65-70 at 2-146 (“failure to attend to the duties of an office may be sufficient ground for the removal of a township trustee under [R.C. 3.07]”). *See generally also* R.C. 3.17 (“[a]ny member of a board, commission, council, board of trustees of an institution of higher education, or other public body of the state, except a member of the general assembly or a judge of any court in the state, who fails to attend at least three-fifths of the regular and special meetings held by that board, com-

mission, council, board of trustees, or public body during any two-year period forfeits the member's position on that board, commission, council, board of trustees, or public body"). Also, if a township trustee who is employed as a county bridge worker is required to perform his duties as a trustee during his regular work hours as a county bridge worker, the trustee must take approved vacation, personal, or compensatory leave or leave without pay for the time he is absent from his duties as a county bridge worker.

Therefore, in order to serve simultaneously in the positions of township trustee and bridge worker for a county highway department, a person must be certain that he will be able to carry out the duties of both positions in a competent and timely manner. *See* 2003 Op. Att'y Gen. No. 2003-041 at 2-339. This means that there may not be a direct conflict between the times when the person is needed to perform duties on behalf of the township and county. *See id.*

Conflicts of Interest

The fifth and final question asks whether there is a conflict of interest between the two positions.⁶ A person may not serve simultaneously as a township trustee and bridge worker in a county highway department if the "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.

A board of township trustees may have to deliberate, discuss, negotiate, or vote on matters that relate to the construction or maintenance of (1) township roads and bridges by the county highway department or (2) roads and bridges under the jurisdiction of the county. *See, e.g.,* R.C. 164.15; R.C. 5535.01; R.C. 5535.08; R.C. 5535.15; R.C. 5535.16; R.C. 5543.13; R.C. 5543.17; R.C. 5555.43; R.C. 5571.02; R.C. 5571.08. If a township trustee who serves as a bridge worker in a county highway department were required to deliberate, discuss, negotiate, or vote on such matters, it might be difficult for the township trustee to perform his duties and exercise his discretion in a completely objective and disinterested manner because of his position with the county highway department. *See* 1997 Op. Att'y Gen. No. 97-045 at 2-283; 1994 Op. Att'y Gen. No. 94-022 at 2-99 and 2-100; 1993 Op.

⁶ R.C. 102.08 empowers the Ohio Ethics Commission, rather than the Attorney General, to address the application of the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43. In light of R.C. 102.08, we must refrain from interpreting and applying the foregoing provisions by way of a formal opinion. 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph 3). Instead, questions concerning the interpretation and application of these provisions to your particular situation should be directed to the Ohio Ethics Commission. We also note that R.C. 511.13 prohibits a township trustee from having an interest in a contract entered into by the board of township trustees. Whether a township trustee has an interest in a contract that is prohibited by R.C. 511.13 is a question of fact that must be determined on a case-by-case basis at the local level. *See* 2006 Op. Att'y Gen. No. 2006-003 at 2-30 n.13.

Att’y Gen. No. 93-051 at 2-248; 1993 Op. Att’y Gen. No. 93-016 at 2-89 and 2-90; 1988 Op. Att’y Gen. No. 88-020 at 2-78.

However, the fact that a township trustee who serves simultaneously as a county engineer employee may be subject to potential conflicts of interest does not render the two positions incompatible. Rather, the immediacy of the conflicts must be determined on a case-by-case basis, and where the facts of a particular situation indicate that the possibility of the conflicts occurring is remote and speculative, a township trustee may serve simultaneously as a county engineer employee. *See* 2011 Op. Att’y Gen. No. 2011-023 at 2-189 and 2-190.

With respect to your specific inquiry, no statute mandates that a board of township trustees and county enter into a contract for the construction or maintenance of township roads and bridges by the county. Nor is a board of township trustees required to enter into a contract with a board of county commissioners whereby the township agrees to construct or maintain roads and bridges under the jurisdiction of the county. It is thus speculative whether a board of township trustees will be required to vote on matters that relate to the construction or maintenance of (1) township roads and bridges by the county highway department or (2) roads and bridges under the jurisdiction of the county. Therefore, the occasions in which a township trustee who serves simultaneously as a county engineer employee would be required to discuss, deliberate, negotiate, or vote on matters that relate to the construction or maintenance of (1) township roads and bridges by the county highway department or (2) roads and bridges under the jurisdiction of the county should be infrequent.

Further, the law presumes that, in the absence of evidence to the contrary, a township trustee will perform his duties in a regular and lawful manner. *See State ex rel. Speeth v. Carney*, 163 Ohio St. 159, 126 N.E.2d 449 (1955) (syllabus, paragraph 10) (“[i]n the absence of evidence to the contrary, public officials, administrative officers, and public authorities, within the limits of the jurisdiction conferred upon them by law, will be presumed to have properly performed their duties in a regular and lawful manner and not to have acted illegally or unlawfully”); 1997 Op. Att’y Gen. No. 97-061 at 2-379 (“[t]he fact that a student who serves on a board of education may be in a position to take action that affects him as a student should not bar his service on the board”); *see also State ex rel. Corrigan v. Hensel*, 2 Ohio St. 2d 96, 206 N.E.2d 563 (1965) (syllabus) (“[a] person . . . will not be ousted from . . . elective office [as a member of a local board of education] by quo warranto, on the ground that by reason of his private occupation he *might possibly or could* secure personal monetary benefits by using his public office in a wrongful manner, it being established by the evidence that said person had not committed, nor was he about to commit, any act or acts in violation of law or violative of his oath of office”). Nevertheless, whether it is appropriate for a person who serves as a township trustee and county engineer employee to deliberate, discuss, negotiate, or vote on matters, as a township trustee, that relate to the construction or maintenance of (1) township roads and bridges by the county highway department or (2) roads and bridges under the jurisdiction of the county may require a case-by-case factual analysis by local officials when such matters are brought to the board of township trust-

ees for formal action. *See generally Hamilton v. Bd. of Comm'rs of Hardin County*, 108 Ohio St. 566, 141 N.E. 684 (1923) (syllabus) (“[t]he fact that a county commissioner owns real estate within the assessable area of an improvement to be taxed by a special assessment for the construction of a road does not of itself disqualify him to act as a county commissioner in proceedings relative to laying out and making a road under [G.C.] 6906” (now R.C. 5555.02)); *Goodwin v. Comm'rs of Van Wert County*, 41 Ohio St. 399 (1884) (ownership of land crossed by a ditch did not disqualify a county commissioner from participating in voting upon the order authorizing the ditch); *State ex rel. Huffman v. Shuff*, 20 Ohio App. 432, 152 N.E. 300 (Knox County 1925) (syllabus, paragraph 1) (“[a] county commissioner is not disqualified to act in a matter of the improvement of a public highway merely by reason of the fact that he has farm property which will be increased in value by the improvement”).

Thus, while a person who serves in the positions of township trustee and bridge worker in the county highway department may face potential conflicts of interest when discussing, deliberating, negotiating, or voting on matters that relate to the construction or maintenance of (1) township roads and bridges by the county highway department or (2) roads and bridges under the jurisdiction of the county, such conflicts do not render the two positions incompatible. Accordingly, we conclude that a person may serve simultaneously as a township trustee and bridge worker in the classified service of a county highway department when the office of township trustee is normally filled by nonpartisan election.

Conclusion

In sum, it is my opinion, and you are hereby advised that a person may serve simultaneously as a township trustee and bridge worker in the classified service of a county highway department when the office of township trustee is normally filled by nonpartisan election.