

OPINION NO. 2002-028**Syllabus:**

A member of a veterans service commission may serve simultaneously as a member of a county central committee of a political party or as a member of a county executive committee of a political party.

To: Brent A. Saunders, Gallia County Prosecuting Attorney, Gallipolis, Ohio
By: Betty D. Montgomery, Attorney General, November 12, 2002

You have requested an opinion whether the positions of member of a veterans service commission and member of a county central committee of a political party are compatible. In addition, you also wish to know whether the positions of member of a veterans service commission and member of a county executive committee of a political party are compatible. For ease of discussion, we will consider your two questions together.

Prior opinions of the Attorneys General have consistently used a seven-question test for determining whether two public positions are compatible. *See* 2001 Op. Att'y Gen. No. 2001-040 at 2-238; 1979 Op. Att'y Gen. No. 79-111 at 2-367 and 2-368. However, if one of the two positions is a private position, rather than a public position, the seven-question test is modified into the following five-question test:¹

¹The seven-question test for determining the compatibility of two public positions incorporates the common law test of incompatibility. At common law in Ohio, "[o]ffices 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 person to discharge the duties of both." *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). Questions three and four of the seven-question test represent the common law test of incompatibility defined by the court in *State ex rel. Attorney General v. Gebert*.

The common law test of incompatibility does not apply, however, if one of the positions is a private position. 1989 Op. Att'y Gen. No. 89-037 at 2-163. Nevertheless, "[s]ince it is still necessary ... to determine whether the positions create a conflict of interest or whether there are applicable statutes, local ordinances, or regulations, the remaining five

1. Is the public position a classified employment within the terms of R.C. 124.57?
2. Do statutes governing either position limit employment in another public or private position or the holding of a public office?
3. Is there a conflict of interest between the two positions?
4. Are there local charter provisions, resolutions, or ordinances which are controlling?
5. Is there a federal, state, or local departmental regulation applicable?

See 1995 Op. Att'y Gen. No. 95-044 at 2-234 and 2-235; 1989 Op. Att'y Gen. No. 89-037 at 2-163 and 2-164.

As used in the compatibility analysis, the term "public position" encompasses the holding of an office or employment with a governmental entity. See 1979 Op. Att'y Gen. No. 79-111 at 2-369 through 2-371 (compatibility analysis applies when two public offices or a public office and public employment are involved); see also 1991 Op. Att'y Gen. No. 91-001 at 2-2 (for purposes of R.C. 3301.031, the term "public position" refers to a governmental position); *Webster's New World Dictionary* 1148 (2d college ed. 1986) (defining the term "public" as "acting in an official capacity on behalf of the people as a whole"). See generally 1981 Op. Att'y Gen. No. 81-078 at 2-308 (unless an electrical safety inspector is actually hired by a governmental entity, "he cannot be said to hold a public office or employment"). Accordingly, if a position does not constitute the holding of an office or employment with a governmental entity, the position is not a "public position," but rather a "private position." See 1981 Op. Att'y Gen. No. 81-078. See generally 1991 Op. Att'y Gen. No. 91-001 at 2-2 (the use of the word "public" to describe a position "clearly refers to the distinction between governmental and private positions").

With respect to your specific questions, it is clear that the position of member of a veterans service commission is a public position. See 2001 Op. Att'y Gen. No. 2001-038; 2001 Op. Att'y Gen. No. 2001-004. Pursuant to R.C. 5901.02, each county is required to have a veterans service commission. A veterans service commission is responsible for providing financial assistance and other services to veterans² and their families. See R.C. 5901.03; R.C. 5901.08; R.C. 5901.15. The five members of a veterans service commission are appointed by a judge of the court of common pleas, R.C. 5901.02, and in certain counties additional members may be appointed by the board of county commissioners, R.C. 5901.021. The compensation of the members of the commission is fixed by the board of county commissioners, R.C. 5901.04. Members of a veterans service commission thus hold county positions. See generally 2001 Op. Att'y Gen. No. 2001-033 at 2-197 ("a veterans service commission is a county body"); 1993 Op. Att'y Gen. No. 93-065 at 2-310 ("a veterans service commission is a county agency"); 1940 Op. Att'y Gen. No. 3133, vol. II, p. 1065 (syllabus, paragraph one) (the county prosecuting attorney, as legal adviser to all county offices and county boards, see R.C. 309.09, is the legal adviser for the county's soldiers' relief commission (now the veterans service commission, see 1987-1988 Ohio Laws, Part III, 4685 (Am. Sub. H.B. 626, eff. Sept. 14, 1988))). Because counties are governmental entities, *State ex rel.*

questions [of the seven-question test] provide a useful format for examining whether a public and private position may be held simultaneously." *Id.*

²R.C. 5901.01(A), (B) define the term "veteran" for purposes of R.C. 5901.01-37.

Godfrey v. O'Brien, 95 Ohio St. 166, 115 N.E. 25 (1917) (syllabus, paragraph one), the members of the commission hold public positions. See 2001 Op. Att'y Gen. No. 2001-038; 2001 Op. Att'y Gen. No. 2001-004.

The positions of member of a county central committee of a political party and member of a county executive committee of a political party are not public positions, however. Members of a county central committee of a major or intermediate political party are elected by direct vote of the members of the party. R.C. 3517.02; R.C. 3517.03. Membership on the county central committee of a minor political party is determined in accordance with party rules. R.C. 3517.02; see also R.C. 3517.03 (members of a county central committee of a minor political party may be elected at a primary election). The members of a county executive committee of a major political party are elected by the county central committee. R.C. 3517.03. The members of a county executive committee of an intermediate or minor political party are either elected or chosen in accordance with party rules. *Id.* Thus, as a general rule, the members of these committees are not considered officers or employees of a governmental entity, but rather officers of the political party that elects or appoints them.³ *State ex rel. McCurdy v. DeMaiores*, 9 Ohio App. 2d 280, 281-82, 224 N.E.2d 353, 355 (Cuyahoga County 1967); 1970 Op. Att'y Gen. No. 70-011 at 2-20 and 2-21; see *Bd. of Elections of Montgomery County v. Henry*, 25 Ohio App. 278, 280, 158 N.E. 94, 95 (Montgomery County 1927); *Muskingum County Democratic Executive Comm. v. Burrier*, 31 Ohio Op. 570, 572 (C.P. Muskingum County 1945); 1934 Op. Att'y Gen. No. 3616, vol. III, p. 1746; 1934 Op. Att'y Gen. No. 3261, vol. II, p. 1407; 1916 Op. Att'y Gen. No. 1636, vol. I, p. 950; see also *Reisig v. Camarato*, 111 Ohio App. 3d 479; 676 N.E.2d 594 (Cuyahoga County 1996). But see 1932 Op. Att'y Gen. No. 4077, vol. I, p. 233.

Because political parties "are basically voluntary associations of persons who act together principally for party and community purposes," *State ex rel. Cain v. Kay*, 38 Ohio St. 2d 15, 18, 309 N.E.2d 860, 863 (1974); accord *State ex rel. McCurdy v. DeMaiores*, 9

³For purposes of a particular statute, members of a county central committee of a political party and members of a county executive committee of a political party may be considered public officers. See, e.g., *State ex rel. Hayes v. Jennings*, 173 Ohio St. 370, 374, 182 N.E.2d 546, 548 (1962) ("[t]he power conferred by [R.C. 305.02 (filling vacancies in certain county elected offices)] upon central committeemen makes them public officers"); *State ex rel. McCurdy v. DeMaiores*, 9 Ohio App. 2d 280, 224 N.E.2d 353 (Cuyahoga County 1967) (the office of chairman of a county central committee of a political party is a public office for purposes of R.C. 2733.01 (*quo warranto*)); 1980 Op. Att'y Gen. No. 80-083 (syllabus, paragraph one) (the members of a county central committee of a political party are public officials for purposes of R.C. 121.22 (open meetings law)); 1970 Op. Att'y Gen. No. 70-011 (syllabus, paragraph two) (for purposes of R.C. 3513.041 (requiring write-in candidates to file a declaration of intent to be a write-in candidate) and R.C. 3513.14 (setting forth the form for primary ballots), a member of a county central committee of a political party is a public office). See generally *Miller v. Bartunek*, 349 F. Supp. 251, 253 (N.D. Ohio 1972) (noting that the position of chairman of a county central committee of a political party is a public office for purposes of R.C. 2733.01 (*quo warranto*)), *vacated mem.*, 480 F.2d 927 (6th Cir. 1973). While there may be instances in which these committee members are considered public officers, the fact remains that such members are officers of the political party that elects or appoints them, rather than officers of a governmental entity. See generally 1970 Op. Att'y Gen. No. 70-011 at 2-22 (although a member of the county central committee is a public office for purposes of R.C. 3513.041 and R.C. 3513.14, such member remains an officer of the political party).

Ohio App. 2d at 281, 224 N.E.2d at 354, such parties are not governmental entities. See generally R.C. 3517.01(A) (“[a] political party within the meaning of [R.C. Title 35 (elections)] is any group of voters that, at the most recent regular state election, polled for its candidate for governor in the state or nominees for presidential electors at least five [percent] of the entire vote cast for that office or that filed with the secretary of state, subsequent to any election in which it received less than five [percent] of that vote, a petition signed by qualified electors equal in number to at least one [percent] of the total vote for governor or nominees for presidential electors at the most recent election, declaring their intention of organizing a political party”); 1932 Op. Att’y Gen. No. 4587, vol. II, p. 1001 (syllabus, paragraph one) (“[u]pon a petition being filed with the Secretary of State and the signatures being examined and certified, all as provided in [G.C. 4785-61 (now R.C. 3517.01)], a sufficient length of time before any primary election, the group of petitioners becomes a political party and is entitled to all privileges with respect to such primary election as are accorded under the law to political parties”). It thus follows that the members of a county central committee of a political party and members of a county executive committee of a political party do not hold public positions for purposes of the compatibility analysis.

In light of the foregoing, we must use the five-question test to determine whether a member of a veterans service commission may serve simultaneously as a member of a county central committee of a political party or as a member of a county executive committee of a political party.

Questions four and five concern the applicability of charter provisions, resolutions, ordinances, and federal, state, and local regulations. In this instance, there are no applicable charter provisions, resolutions, ordinances, or state or federal regulations. Whether there is an applicable local departmental regulation is a matter for local officials to determine. It is assumed, for the purpose of this opinion, that there is no such local departmental regulation.

The first question concerns the application of R.C. 124.57 to the public position. R.C. 124.57(A) provides, in relevant part:

No officer or employee in the classified service of ... the several counties ... 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 of ... the several counties ... be an officer in any political organization or take part in politics other than to vote as the officer or employee pleases and to express freely political opinions. (Emphasis added.)

Thus, in simple terms, R.C. 124.57 does the following: it prohibits an officer or employee in the classified service of a county from running for or holding a partisan political office, or engaging in other partisan political activities, and it prevents a partisan political officeholder from serving simultaneously as an officer or employee in the classified service of a county. 2001 Op. Att’y Gen. No. 2001-034 at 2-203; see 2 Ohio Admin. Code 123:1-46-02(C); see also *Heidtman v. City of Shaker Heights*, 163 Ohio St. 109, 126 N.E.2d 138 (1955).

1984 Op. Att’y Gen. No. 84-041 advised that R.C. 124.57 prohibits an employee in the classified service of a county from serving on a county central committee of a political party or on a county executive committee of a political party. In this regard, the opinion explained:

I believe it is apparent that membership on the governing body of a political party constitutes partisan political activity for purposes of R.C. 124.57. Specifically, R.C. 124.57 prohibits a classified employee from being an officer in any political organization. Clearly, service on a county or state central committee, or executive committee thereof, whether such service is by election or appointment, constitutes being an officer in a political organization.

This conclusion is directly supported by *Jackson v. Coffey*, 52 Ohio St. 2d 43, 44, 368 N.E.2d 1259, 1260 (1977), wherein the court concluded that service as a member of a county party central committee "*per se*, falls within the political activities proscribed for classified employees in R.C. 124.57," and thus was grounds for removal pursuant to R.C. 124.34. The conclusion of *Jackson* would undoubtedly apply to membership on a state central committee or on the executive committees of either the state or a county central committee. (Citations omitted.)

Id. at 2-134 and 2-135. *See generally* rule 123:1-46-02(C)(5) (an employee in the classified service of a county is prohibited from "[s]ervice in an elected or appointed office in any partisan political organization"). We must first determine, therefore, whether a member of a veterans service commission is a position that is subject to the prohibition of R.C. 124.57.

R.C. 5901.02 requires each county to have a veterans service commission. The five members of a veterans service commission are appointed by a judge of the court of common pleas, R.C. 5901.02, and in certain counties additional members may be appointed by the board of county commissioners, R.C. 5901.021. A judge of the court of common pleas may remove, for cause, any member of the commission appointed under R.C. 5901.02 and fill vacancies occurring among memberships appointed under R.C. 5901.02 for the unexpired terms. R.C. 5901.03. A board of county commissioners may remove, for cause, any member of the commission appointed under R.C. 5901.021 and fill any vacancy in a membership appointed under R.C. 5901.021 for the unexpired term. R.C. 5901.021. The compensation of the members of the commission is fixed by the board of county commissioners. R.C. 5901.04.

A veterans service commission is funded by the county through means of a tax levy. R.C. 5901.11. The board of county commissioners may review and revise the annual budget submitted by the veterans service commission and thereafter must make the necessary tax levy to raise the amount the board has approved. *Id.*; *see also* 1991 Op. Att'y Gen. No. 91-008. The revenues of the tax levy described in R.C. 5901.11 are appropriated by the board of county commissioners to the veterans service commission. R.C. 5901.11. Accordingly, the members of the commission are employed by, and directly responsible to, the judges of the court of common pleas and the board of county commissioners. *See generally* 1993 Op. Att'y Gen. No. 93-065 at 2-309 ("a veterans service commission is organized and supervised by the county that it serves").

A veterans service commission is responsible for providing financial assistance and other services to veterans and their families. In order to accomplish this task, the commission is authorized to operate and staff a veterans service office, R.C. 5901.03(A); R.C. 5901.06; R.C. 5901.07; *see also* R.C. 5901.11, prepare the budget of the veterans service commission and veterans service office and present the budget to the board of county commissioners for approval, R.C. 5901.03(D); R.C. 5901.11, establish programs of outreach and coordination with other agencies for the purpose of enhancing the availability of services to veterans within the county, R.C. 5901.03(E), and establish regularly scheduled

transportation for veterans to and from veterans administration medical centers whose districts the county is within, R.C. 5901.03(H). In addition, the commission is required to establish policies and procedures for the administration of the commission and the veterans service office, R.C. 5901.03(B), and the administration of assistance to veterans and their families, R.C. 5901.03(C).

In light of the foregoing, it is apparent that a member of a veterans service commission is employed by, and directly responsible to, elected county officials. See Ohio Const. art. IV, § 6(A)(3) (election of common pleas judges); R.C. 305.01 (election of county commissioners); R.C. 2301.01 (election of common pleas judges); *Carder v. Bd. of Comm'rs of Fayette County*, 16 Ohio St. 353, 369 (1865) (“[t]he board of county commissioners is the body—the quasi corporation—in whom is vested by law the title of all the property of the county. In one sense they are the *agents* of the county, and in another sense they are the *county itself*”); 1988 Op. Att’y Gen. No. 88-055 (a county judge is an elected official of the county). It is further apparent that a member of the commission holds an administrative relationship to the board of county commissioners and the judges of the court of common pleas. See generally 2 Ohio Admin. Code 123:1-5-01(B)(1) (“[a]dministrative relation—Generally means a relationship where an employee has substantial authority to initiate discretionary action and/or in which the agency, board, or commission must rely on the employee’s personal judgment and leadership abilities. It is characterized by a position where the employee is in charge of formulating official policy or is in charge of carrying out that policy. The average employee would not possess such qualities or be delegated such discretionary authority”); *Rarick v. Bd. of County Comm'rs of Geauga County*, 63 Ohio St. 2d 34, 37, 406 N.E.2d 1101, 1103 (1980) (“[a] position is in an administrative relationship with the appointing authority when the authority must rely on the personal judgment and leadership abilities of the employee occupying that position”).

Pursuant to R.C. 124.11(A)(9), the unclassified service of the county includes “those persons employed by and directly responsible to elected county officials ... and holding a fiduciary or administrative relationship to such elected county officials.” Because a member of a veterans service commission is employed by and directly responsible to elected county officials and holds an administrative relationship to such elected county officials, a member of a veterans service commission is included in the unclassified service of a county. See 1961 Op. Att’y Gen. No. 1989, p. 18, at 19. R.C. 124.57’s prohibition thus does not apply to a member of a veterans service commission. Accordingly, this prohibition does not operate to prevent a member of a veterans service commission from serving simultaneously as a member of a county central committee of a political party or as a member of a county executive committee of a political party.

The second question asks whether the statutes governing either position limit a person from being employed in another public or private position or holding a public office. No statute governing the members of a county central committee of a political party or the members of a county executive committee of a political party prohibits these members from serving as a member of a veterans service commission.

The statutes governing the members of a veterans service commission provide that, “[a]t the time of appointment or reappointment to the commission, no commission member appointed under [R.C. 5901.02] shall be an employee of the commission or *hold an elective or other appointive office of the county served by the commission.*” R.C. 5901.02 (emphasis added); see also R.C. 5901.07 (no member of a veterans service commission may be employed as a veterans service officer). As explained previously, members of a county central committee of a political party and members of a county executive committee of a

political party do not hold elective or appointive county offices. See *State ex rel. Cain v. Kay*, 38 Ohio St. 2d at 18, 309 N.E.2d at 863; *State ex rel. McCurdy v. DeMaioribus*, 9 Ohio App. 2d at 281, 224 N.E.2d at 354; see also R.C. 3517.01(A); 1932 Op. Att'y Gen. No. 4587, vol. II, p. 1001 (syllabus, paragraph one). The second question thus may be answered in the negative.

The final question asks whether there is a conflict of interest between the two positions.⁴ A public officer or employee may not hold a private position if he will be subject to divided loyalties and conflicting duties or to the temptation to act other than in the best interests of the public. 1989 Op. Att'y Gen. No. 89-037 at 2-164.

In order to determine whether a person who holds both a public and private position is subject to a conflict of interest, we must review the powers, duties, and responsibilities of each position. *Id.* at 2-165. This review will enable us to determine whether the person's activities in the private position will conflict with the performance of his duties and responsibilities in the public position. *Id.*

Let us consider, first, the powers, duties, and responsibilities of a veterans service commission. The primary responsibility of the commission is to provide aid and assistance to veterans and their families. In general, the duties of the commission include operating a veterans service office, R.C. 5901.03(A); R.C. 5901.06; R.C. 5901.07; see also R.C. 5901.11, providing financial assistance to veterans and their families, see R.C. 5901.08-.15, establishing programs of outreach and coordination with other agencies for the purpose of enhancing the availability of services to veterans within the county, R.C. 5901.03(E), and establishing regularly scheduled transportation for veterans to and from veterans administration medical centers whose districts the county is within, R.C. 5901.03(H). The commission also establishes policies and procedures for the administration of the commission and the veterans service office, R.C. 5901.03(B), and the administration of financial assistance and other aid to veterans and their families, R.C. 5901.03(C).

In addition, a veterans service commission may provide for the burial, removal, and reinterment of the bodies of neglected and indigent veterans, R.C. 5901.16, and may direct the removal and reinterment of a deceased veteran, R.C. 5901.18-.20. Veterans service commissions also may participate in appropriate memorial and commemorative activities to help promote patriotism and veterans services. R.C. 5901.03(I).

Let us now look to the statutory powers, duties, and responsibilities of county central committees and county executive committees of political parties. County central committees are primarily responsible for appointing persons to fill vacancies that occur in county and municipal elected offices. See R.C. 305.02; R.C. 731.43; R.C. 733.08; R.C. 733.31; R.C. 1901.31; see also 1946 Op. Att'y Gen. No. 958, p. 349. These committees also fill vacancies that occur when a candidate nominated in a primary election withdraws or dies prior to the

⁴The Ohio Ethics Commission is authorized to issue advisory opinions concerning the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43. R.C. 102.08. In accordance with this grant of authority, we believe that it is proper to refrain from interpreting such provisions by way of a formal opinion, and recommend that you consult with the Ohio Ethics Commission for advice and interpretations concerning these provisions in the situation in which a member of a veterans service commission serves simultaneously as a member of a county central committee of a political party or as a member of a county executive committee of a political party. See 2000 Op. Att'y Gen. No. 2000-025 at 2-170 n.4.

general election, R.C. 3513.31, and determine whether a candidate for membership to the committee must file a petition for candidacy pursuant to R.C. 3513.05, R.C. 3513.051.

County executive committees of political parties are granted their powers by county central committees. R.C. 3517.03. In addition, county executive committees may make and file a recommendation with the Secretary of State for the appointment of a qualified elector to serve as a member of a county board of elections, R.C. 3501.07, select delegates to the political party's state convention, R.C. 3513.11, and appoint persons to witness the canvass of election returns, R.C. 3505.32; R.C. 3513.22. These committees may also be authorized by a county central committee to fill vacancies on the county central committee. R.C. 3517.05.

Given the respective duties of the positions, we believe that there are no instances in which a member of a veterans service commission is subject to a conflict of interest when he serves as a member of a county central committee of a political party or as a member of a county executive committee of a political party. Accordingly, no conflict of interest prohibits a member of a veterans service commission from serving simultaneously as a member of a county central committee of a political party or as a member of a county executive committee of a political party.

Based on the foregoing, it is my opinion, and you are hereby advised that a member of a veterans service commission may serve simultaneously as a member of a county central committee of a political party or as a member of a county executive committee of a political party.