

September 20, 2018

The Honorable Paul A. Dobson
Wood County Prosecuting Attorney
One Courthouse Square Office Building, 4th Floor
Bowling Green, Ohio 43402

SYLLABUS:

2018-021

R.C. 731.12 prohibits a person from serving simultaneously as assistant agent-in-charge of the Ohio Investigative Unit, Toledo District and member of the legislative authority of a non-charter village located in Wood County.



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OPINION NO. 2018-021

The Honorable Paul A. Dobson
Wood County Prosecuting Attorney
One Courthouse Square Office Building, 4th Floor
Bowling Green, Ohio 43402

Dear Prosecutor Dobson:

We have received your request whether a person employed by the Ohio Department of Public Safety and designated by the Director of Public Safety as an assistant agent-in-charge of the Ohio Investigative Unit, Toledo District, may serve simultaneously as a member of the legislative authority of a non-charter village located within Wood County. Whether two public offices or positions are compatible depends upon the answers to the following seven questions:

1. Is either position in the classified civil service of the state, a county, a city, a city school district, or a civil service township as defined in R.C. 124.57?
2. Do any constitutional provisions or the governing statutes of either position prohibit or otherwise limit employment in another public position or the holding of another public office?
3. Is one of the positions subordinate to, or in any way a check upon, the other?
4. Is it physically possible for one person to perform the duties of both positions?
5. Is there a conflict of interest between the two positions?
6. Are there any controlling local charter provisions, resolutions, or ordinances?
7. Does a federal, state, or local departmental regulation prevent a person from holding both positions?

See 2014 Op. Att’y Gen. No. 2014-045, at 2-391 (“[a] seven-question compatibility test is used to determine whether a person may serve simultaneously in multiple public positions”); 2004 Op. Att’y Gen. No. 2004-019, at 2-153 to 2-154 (setting forth the seven-part compatibility test); 1979 Op. Att’y Gen. No. 79-111, at 2-367 to 2-368 (the seven-part compatibility test applies to the

simultaneous holding of a public office and a public employment by the same person). All of these questions “must yield answers in favor of compatibility in order to conclude that two positions are compatible.” 2013 Op. Att’y Gen. No. 2013-008, at 2-78.

The positions of village legislative authority member and assistant agent-in-charge of the Ohio Investigative Unit, Toledo District, are rendered incompatible by the second question of the compatibility test. This question asks whether there are any constitutional provisions or statutes applicable to either position that prohibit or otherwise limit employment in another public position or the holding of another public office. R.C. 731.12 states, in part, that “[n]o member of the legislative authority [of a village] shall hold any other public office.”¹ Therefore, because the person serving as an assistant agent-in-charge of the Ohio Investigative Unit, Toledo District holds a public office, she is prohibited by R.C. 731.12 from serving simultaneously as a member of a village legislative authority.

The term “public office” is not defined for the purpose of R.C. 731.12 or more generally for purposes of R.C. Chapter 731 (organization of municipal government) or R.C. Title 7 (municipal corporations). See *State ex rel. Scarl v. Small*, 103 Ohio App. 214, 215, 145 N.E.2d 200 (Portage County 1956) (“[n]either the Constitution of Ohio nor the Code defines ‘public office’”).² “The usual criteria considered in determining whether a position is a public office are durability of tenure, oath, bond, emoluments, independence of the functions exercised by the appointee, and character of the duties imposed upon the appointee.” 2011 Op. Att’y Gen. No. 2011-021, at 2-173 (citing *State ex rel. Landis v. Bd. of Comm’rs of Butler Cnty.*, 95 Ohio St. 157, 159-60, 115 N.E. 919 (1917)); see also 2013 Op. Att’y Gen. No. 2013-008, at 2-78.

The chief and most decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law. If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office and not an employment.

¹ A village that adopts a charter pursuant to Article XVIII, § 7 of the Ohio Constitution may include a provision in the charter that establishes qualifications for serving as a member of the village legislative authority that differ from those in R.C. 731.12. In this instance, the village for whom the assistant agent-in-charge of the Ohio Investigative Unit, Toledo District serves as a legislative authority member, is not a charter village.

² As used in R.C. 731.12, “public office” is to be understood as synonymous with the common law understanding of the term. See, e.g., *State ex rel. Scarl v. Small*, 103 Ohio App. 214, 215-16, 145 N.E.2d 200 (Portage County 1956) (using the common law understanding of “public office” to determine the meaning of “public office” for the purpose of R.C. 731.12).

State ex rel. Milburn v. Pethel, 153 Ohio St. 1, 5, 90 N.E.2d 686 (1950) (quoting *State ex rel. Landis*, 95 Ohio St. at 159).

The Ohio Investigative Unit is created by statute within the Ohio Department of Public Safety for the purpose of “conduct[ing] investigations and other enforcement activity” related to Ohio’s liquor laws and other chapters and sections of the Revised Code. R.C. 5502.13. The specific chapters and sections of the Revised Code that are within the Ohio Investigative Unit’s area of authority are specified in R.C. 5502.13.³ The Ohio Department of Public Safety separates the Ohio Investigative Unit into six offices or “districts” for ease of operation and management.⁴ See The Ohio State Highway Patrol’s Website, *Ohio Investigative Unit: OIU Districts*, available at <http://www.oiu.ohio.gov/oiu-districts.aspx> (last visited Aug. 22, 2018). Each district is responsible for investigating and enforcing laws within a particular geographical area, and is managed by an agent-in-charge and at least one assistant agent-in-charge. In this instance, the person employed as an assistant agent-in-charge works for the Ohio Investigative Unit’s Toledo District, which encompasses the area of Wood County.

³ Pursuant to R.C. 5502.13, the Ohio Investigative Unit shall “conduct investigations and other enforcement activity authorized by” the following chapters and sections of the Revised Code:

[R.C. Chapters 4301 (liquor control law), 4303 (liquor permits), 5101 (department of job and family services), 5107 (Ohio Works First program), and 5108 (prevention, retention, and contingency program)] and [R.C. 2903.12 (aggravated assault), R.C. 2903.13 (assault), R.C. 2903.14 (negligent assault), R.C. 2907.09 (public indecency), R.C. 2913.46 (illegal use of food stamps or WIC program benefits), R.C. 2917.11 (disorderly conduct), R.C. 2921.13 (falsification), R.C. 2921.31 (obstructing official business), R.C. 2921.32 (obstructing justice), R.C. 2921.33 (resisting arrest), R.C. 2923.12 (carrying concealed weapons), R.C. 2923.121 (possession of firearm in beer liquor permit premises – prohibition, exceptions), R.C. 2925.11 (possession of controlled substances), R.C. 2925.13 (permitting drug abuse), R.C. 2927.02 (illegal distribution of or permitting children to use cigarettes or other tobacco or alternative nicotine products), and R.C. 4507.30 (prohibitions)].

R.C. 5502.13.

⁴ Employees of the Ohio Department of Public Safety familiar with the hierarchical structure of the Ohio Investigative Unit provided us with information regarding the operation and management of the Ohio Investigative Unit as well as information regarding the duties typically assigned to an assistant agent-in-charge of one of the Ohio Investigative Unit’s six district offices.

The General Assembly has conferred responsibility upon the Director of Public Safety to appoint necessary employees of the Ohio Investigative Unit. R.C. 5502.13. Persons “employed by the department of public safety and designated by the director of public safety to enforce [R.C. Title 43 (liquor)], the rules adopted under it, and the laws and rules regulating the use of supplemental nutrition assistance program benefits,” are called “enforcement agents.”⁵ R.C. 5502.14(B)(1). The assistant agent-in-charge of the Ohio Investigative Unit, Toledo District, is an enforcement agent within the meaning of R.C. 5502.14.

An enforcement agent of the Ohio Investigative Unit is a peace officer, vested by statute with the authority to make arrests in the course of keeping the peace, enforcing all laws and rules on retail liquor permit premises, enforcing violations of R.C. Title 43 on public or private property, and enforcing laws and rules governing supplemental nutrition assistance program benefits. R.C. 5502.14(B)(1); *see also* R.C. 2935.01(B) (defining “peace officer” to include an “enforcement agent of the department of public safety designated under [R.C. 5502.14]”); R.C. 2935.03 (detailing the circumstances in which peace officers may arrest and detain persons found violating, or suspected to have violated, certain laws). An enforcement agent also may, in the circumstances described in R.C. 5502.14(B)(2) and (B)(3), execute search warrants, seize contraband and property, and make arrests for violations of R.C. Title 29.⁶ An enforcement

⁵ That R.C. 5502.14 uses the word “employed” to describe the relationship of an enforcement agent to the Ohio Department of Public Safety is not determinative of whether the position of assistant agent-in-charge of the Ohio Investigative Unit, Toledo District is a public office rather than a mere employment. A public office “is an employment,” although not every “employment” is a public office. *State ex rel. Mikus v. Hirbe*, 5 Ohio App. 2d 307, 310, 215 N.E.2d 430 (Lorain County 1965) (internal quotations omitted).

⁶ R.C. 5502.14(B)(2) provides, in pertinent part, that “an enforcement agent ... may execute search warrants and seize and take into custody any contraband ... or any property that is otherwise necessary for evidentiary purposes related to any violations of the” liquor laws and rules or other laws “described in division (B)(1) of this section.” R.C. 5502.14(B)(2) also authorizes an enforcement agent to “enter public or private premises where activity alleged to violate the laws or rules described in division (B)(1) of [R.C. 5502.14] is occurring.” R.C. 5502.14(B)(3) provides:

Enforcement agents who are on, immediately adjacent to, or across from retail liquor permit premises and who are performing investigative duties relating to that premises, enforcement agents who are on premises that are not liquor permit premises but on which a violation of [R.C. Title 43] or any rule adopted under it allegedly is occurring, and enforcement agents who view a suspected violation of [R.C. Title 43], of a rule adopted under it, or of another law or rule described in division (B)(1) of this section have the authority to enforce the laws and rules described in division (B)(1) of this section, authority to enforce any section in [R.C. Title 29] or any other section of the Revised Code listed in [R.C.

agent is required to complete a basic training program as set forth in R.C. 109.77, take an oath of office, and receive a commission from the Governor of Ohio “indicating authority to make arrests as provided in [R.C. 5502.14].” R.C. 5502.17.

An enforcement agent is employed and subject to suspension or termination by the Ohio Department of Public Safety. R.C. 5502.14(D) sets forth the circumstances under which the Ohio Department of Public Safety is responsible for suspending or terminating an enforcement agent. An enforcement agent serving as an assistant agent-in-charge of the Ohio Investigative Unit, Toledo District is further responsible, under the current management structure of the Ohio Investigative Unit, for reporting to the agent-in-charge of the Ohio Investigative Unit, Toledo District. Under this reporting structure, the assistant agent-in-charge of the Ohio Investigative Unit, Toledo District performs various managerial and ministerial functions that are overseen and directed entirely by her superior officer.⁷

If the sole responsibility of the assistant agent-in-charge of the Ohio Investigative Unit, Toledo District were to perform managerial and ministerial functions delegated by, and subject to the direction and control of, the agent-in-charge of the Ohio Investigative Unit, Toledo District, the position of assistant agent-in-charge would be one of mere employment. Significantly, however, the assistant agent-in-charge of the Ohio Investigative Unit, Toledo District, as an enforcement agent designated under R.C. 5502.14, possesses the authority, independent of any delegation by a superior officer, to enforce observance of the law and make arrests for violations thereof.⁸ The police powers conferred upon an enforcement agent pursuant

5502.13] if they witness a violation of the section under any of the circumstances described in this division, and authority to make arrests for violations of the laws and rules described in division (B)(1) of this section and violations of any of those sections.

⁷ According to the position description of an assistant agent-in-charge of an Ohio Investigative Unit District, a person holding this position performs, in addition to her law enforcement duties, the following managerial and ministerial functions: “reviews investigative reports for accuracy; maintains office files and equipment” and “prepares and delivers lectures and conducts in-service training sessions for new hires.”

⁸ That an enforcement agent derives the authority to enforce observance of the law and make arrests for violations thereof from statute and not from a superior officer, is important in determining whether the enforcement agent holds a “public office” for the purpose of R.C. 731.12. That such authority is derived from statute and not from a superior officer, however, does not alter an enforcement agent’s employment relationship with the Ohio Department of Public Safety. *See* R.C. 5502.14. While an enforcement agent need not obtain permission from a superior officer to legally exercise the powers conferred upon the agent by statute, an enforcement agent is an employee of the Ohio Department of Public Safety and may therefore be

to R.C. 5502.14 are not derived from the Ohio Department of Public Safety or the agent-in-charge of the Ohio Investigative Unit, Toledo District. *Cf.* 2016 Op. Att’y Gen. No. 2016-025, at 2-280 (“[a]lthough appointed by a board of county commissioners, a county dog warden,” who possesses similar police powers as are conferred upon sheriffs and police officers, “is not subject to the direction and control of the board in the performance of these duties”). Rather, the authority of an enforcement agent to enforce observance of the law and preserve the peace is derived solely from the sovereignty by statute. It is the independent, sovereign nature of these law enforcement powers that renders the position of assistant agent-in-charge of the Ohio Investigative Unit, Toledo District a public office rather than a position of mere employment. *See generally Pethtel*, 153 Ohio St. 1 (syllabus, paragraph 2) (“[a]n appointee, upon whom the specific duties imposed by law are in relation to the exercise of the police powers of the state ... is thereby clothed with a part of the sovereignty of the state”).

A majority of Ohio courts and Attorney General opinions have concluded that law enforcement officers, upon whom the power to enforce observance of the law is conferred by statute, are “clothed with a part of the sovereignty of the state,” and thus hold a public office. *Pethtel*, 153 Ohio St. 1 (syllabus, paragraph 2); *see also State ex rel. McArthur v. Desouza*, 65 Ohio St. 3d 25, 28, 599 N.E.2d 268 (1992) (“[a] police officer of a municipal corporation is a public officer, and as such he occupies a public office” (quoting *State ex rel. Mikus v. Hirbe*, 5 Ohio App. 2d 307, 215 N.E.2d 430 (Lorain County 1965) (syllabus, paragraph 2))); *New York, Chicago & St. Louis R.R. Co. v. Fieback*, 87 Ohio St. 254, 100 N.E. 889 (1912) (syllabus, paragraph 1) (a policeman appointed and commissioned under the predecessor statutes to R.C. 4973.17 and R.C. 4973.18 holds a public office); *In re Compatibility of Cnty. Dog Warden & Vill. Marshal*, 19 Ohio Misc. 2d 12, 482 N.E.2d 1355 (C.P. Van Wert County 1984) (syllabus, paragraph 1) (a county dog warden, vested with police powers similar to law enforcement personnel, holds a public office); 1953 Op. Att’y Gen. No. 2318, p. 39, at 43 to 44 (a police officer of a municipal corporation holds a public office); 1952 Op. Att’y Gen. No. 1116, p. 60, at 66 (“a township constable holds a public office within the meaning of” G.C. 4207, predecessor to R.C. 731.02); 1924 Op. Att’y Gen. No. 1389, vol. I, p. 196, at 199 (deputy marshal of a village holds a public office). *But see* 1982 Op. Att’y Gen. No. 82-085 (syllabus, paragraphs 1 and 2) (concluding that a deputy sheriff or a city police officer may be a candidate for, and serve as, a village council member if the election for such position is nonpartisan in nature).⁹ As recognized

subject to discipline by the Director of Public Safety for exercising such powers in contravention of a superior officer.

⁹ For over a century, courts and opinions of the Attorney General have reasoned that a deputy sheriff does not hold a public office. *See, e.g., Pistole v. Wiltshire*, 90 Ohio L. Abs. 525, 533, 189 N.E.2d 654 (C.P. Scioto County Dec. 29, 1961) (“since a deputy sheriff has no independent authority or power in the disposition of property or to incur financial obligations upon the part of the county or state, or to act in cases involving business or political dealings between individuals and the public, has no independent duties except those given to the sheriff, is subject to direction and control of the sheriff, it would seem that the requirements are not met

by the Ohio Supreme Court, “[p]olice officers, by whomever appointed or elected are generally regarded as public or state officers deriving their authority from the sovereignty, for the purpose of enforcing the observance of the law.” *Fieback*, 87 Ohio St. at 265-55. We follow the reasoning set forth in these cases and opinions to conclude that an enforcement agent invested with law enforcement powers, the independent exercise of which is authorized by R.C. 5502.14, holds a public office.

Based upon the foregoing, we conclude that an assistant agent-in-charge of the Ohio Investigative Unit, Toledo District, designated by the Director of Public Safety as an enforcement agent under R.C. 5502.14, holds a public office for the purpose of R.C. 731.12. Because R.C. 731.12 prohibits a member of a village legislative authority from serving in any other public office, the assistant agent-in-charge of the Ohio Investigative Unit, Toledo District may not serve simultaneously as a member of a village legislative authority. Upon determining that the second question of the compatibility analysis disfavors compatibility, it is unnecessary for us to address the remaining six questions. *See generally* 2013 Op. Att’y Gen. No. 2013-008, at 2-79 (“[a]s one of the seven compatibility questions has yielded an answer disfavoring compatibility, it is unnecessary for us to address the remaining six questions”).

and that a deputy sheriff is not an ‘officer’”); *State ex rel. Wolf v. Shaffer*, 18 Ohio Dec. 303, 305, 6 Ohio N.P. (n.s.) 219 (C.P. Fulton County 1906) (“the deputy sheriff can do nothing in his own name; has no power to act whatever save in the name of the sheriff, and that whatever he does, *colore officii*, is done by the sheriff. From this it follows that the deputy sheriff is not a public officer”); 1979 Op. Att’y Gen. No. 79-111, at 2-369 (adopting the conclusion set forth in 1970 Op. Att’y Gen. No. 70-035 that a deputy sheriff does not hold a public office); 1970 Op. Att’y Gen. No. 70-035, at 2-55 (concluding that a special deputy sheriff does not hold a public office for the purpose of R.C. 731.12); 1942 Op. Att’y Gen. No. 5487, p. 704 (syllabus, paragraph 1) (“[t]he position of deputy sheriff is not an office in this state, within the scope of the term ‘office’ as used in Ohio Const. art. II, § 5”). *But see* 1978 Op. Att’y Gen. No. 78-059, at 2-142 (stating, in concluding that deputy sheriffs and other peace officers are public officers: “[b]ecause police officers, by whomever appointed or elected, derive their authority from the sovereign power for the purpose of enforcing observance of the law, they are generally regarded as public officers rather than public employees”); 1977 Op. Att’y Gen. No. 77-079, at 2-270 (referring to the position of deputy sheriff as an “office”). These cases and opinions reason that a deputy sheriff is answerable to the county sheriff in the exercise of all of his duties and does not exercise independent sovereign powers of the state. *See, e.g., Pistole*, 90 Ohio L. Abs. at 533.

Conclusion

It is our opinion therefore, and you are hereby advised that R.C. 731.12 prohibits a person from serving simultaneously as assistant agent-in-charge of the Ohio Investigative Unit, Toledo District and member of the legislative authority of a non-charter village located in Wood County.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive style with a large, looping initial "M".

MICHAEL DEWINE
Ohio Attorney General