

October 3, 2018

The Honorable Jess C. Weade
Fayette County Prosecuting Attorney
110 East Court Street
Washington Court House, Ohio 43160

SYLLABUS:

2018-023

A person may serve simultaneously as a township trustee and a village fiscal officer for a village that is not located within, or contiguous to, the township, provided that the simultaneous holding of the two positions is not prohibited by a village charter or ordinance, there are no contracts between the township and the village, and the person does not appear before the county budget commission on behalf of the township or village.



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OPINION NO. 2018-023

The Honorable Jess C. Weade
Fayette County Prosecuting Attorney
110 East Court Street
Washington Court House, Ohio 43160

Dear Prosecutor Weade:

You have requested an opinion whether a person may serve simultaneously as a township trustee and a village fiscal officer for a village that is not located within, or contiguous to, the township. Although the township and the village are in the same county, their territories do not overlap.

The following seven questions are used to determine whether two public offices or positions are compatible:

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 employment in another public position or the holding of another public office?
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 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?

1999 Op. Att’y Gen. No. 99-045, at 2-279. A person may hold both positions at the same time only if all seven questions are answered in favor of compatibility. *Id.*

Application of R.C. 124.57

The first question asks whether one of the positions constitutes classified employment for purposes of R.C. 124.57. R.C. 124.57(A) provides, in part:

No officer or employee in the classified service of the state, the several counties, cities, and city school districts of the state, or the civil service townships of the state 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 state, the several counties, cities, and city school districts of the state, or the civil service townships of the state 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.

“R.C. 124.57 ... prohibits a classified employee from holding a partisan elective office or engaging in partisan political activities, but does not apply to non-partisan elective offices.” 1989 Op. Att’y Gen. No. 89-022, at 2-101.

As an elected officer of a township, a township trustee is in the unclassified service. R.C. 124.11(A)(1) (“[a]ll officers elected by popular vote” are in the unclassified service). Accordingly, the prohibition of R.C. 124.57 does not apply to the office of township trustee. In addition, R.C. 124.57’s prohibition does not apply to a village fiscal officer. 2009 Op. Att’y Gen. No. 2009-018, at 2-128 (R.C. 124.57 does not “apply to officers and employees in the service of villages”). Therefore, the answer to the first question of the test favors compatibility.

Constitutional and Statutory Limits on Holding Multiple Positions

The second question asks whether a statutory provision prohibits a person from holding more than one office or position at the same time. The simultaneous holding of multiple positions may also be prohibited by the state constitution. 2004 Op. Att’y Gen. No. 2004-051, at 2-437. No statute or constitutional provision prohibits the simultaneous holding of the positions of township trustee and village fiscal officer.¹ Therefore, the answer to the second question of the test favors compatibility.

¹ R.C. 2921.44(G) prohibits a “public servant who is a ... village fiscal officer; village clerk-treasurer; [or] village clerk ... and [has been] convicted of or [plead] guilty to dereliction of duty is disqualified from holding any public office ... in this state for four years following the date of conviction or of entry of the plea, and is not entitled to hold any public office until any repayment or restitution required by the court is satisfied.” We presume that this prohibition does not apply to the person who is the subject of your letter.

Subordination and Control

Question three asks whether either position is subordinate to or under the control of the other position or whether either position is a check upon the other. A township trustee, as an elected official, answers to the electors of the township. R.C. 505.01; 2016 Op. Att’y Gen. No. 2016-029, at 2-337. A village fiscal officer is appointed by the mayor with the approval of a majority of the village legislative authority. R.C. 733.262(D). His duties are assigned by statute and village ordinance, if any ordinances specifying additional duties have been adopted. R.C. 733.262(C). A village fiscal officer “may be removed without cause either by the mayor with the consent of a majority of the members of the village legislative authority or by a three-fourths vote of the village legislative authority with or without the consent of the mayor.” R.C. 733.262(D); *see also* R.C. 733.78 (removal action filed by the Attorney General for failure to perform a fiscal duty imposed by law or committing an act expressly prohibited by law with respect to fiscal duties). Accordingly, neither position is subordinate to or subject to the control of the other. The answer to this question, thus, favors compatibility.

Physical Ability to Discharge Duties

Question four asks whether it is physically possible for one person to hold simultaneously two positions and fully perform all the duties required of each position. A village fiscal officer may be required to report to work during certain specified hours of the day. A township trustee, as an elected official, is not required to perform duties during specified periods of the day. *See* 2001 Op. Att’y Gen. No. 2001-036, at 2-218 n.6. Whether a person is physically able to fulfill the duties of two positions is “a factual question that is best resolved by the interested local officials since they may more precisely determine the time constraints and demands imposed upon the person” in each position. 2004 Op. Att’y Gen. No. 2004-051, at 2-438.

In resolving this inquiry, it is important to consider that “a person must be certain that he will be able to carry out the duties of both positions in a competent and timely manner[, which] means that there may not be a direct conflict between the times when the person is needed to perform duties” in each position. *Id.* at 2-439 (citation omitted). If, as a township trustee, the person is required to be available during the hours in which he is working as a village fiscal officer, the person must use approved leave commensurate with the amount of time in which he is absent from his duties as village fiscal officer. *See* 2011 Op. Att’y Gen. No. 2011-008, at 2-60.

Conflict of Interest

Question five asks whether a conflict of interest exists between the two positions.² A conflict of interest exists “when an individual’s ‘responsibilities in one position are such as to

² As the Ohio Ethics Commission is authorized to determine the applicability of the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43, R.C. 102.08, the Attorney General “refrain[s] from interpreting and applying [those] provisions by way of a formal opinion.” 2011 Op. Att’y Gen. No. 2011-008, at 2-60 n.1. For a determination of whether R.C. Chapter 102,

influence the performance of his duties in the other position, thereby subjecting him to influences which may prevent his decisions from being completely objective.” 1989 Op. Att’y Gen. No. 89-052, at 2-220 (quoting 1985 Op. Att’y Gen. No. 85-100, at 2-427). “[A] conflict of interest exists when a public servant is subject to divided loyalties and conflicting duties or exposed to the temptation of acting other than in the best interest of the public.” 1998 Op. Att’y Gen. No. 98-033, at 2-188 to 2-189.

To determine whether any conflicts of interest prohibit the simultaneous holding of two public positions, we must examine the powers, duties, and responsibilities of each of the positions. We begin with the powers, duties, and responsibilities of a village fiscal officer. R.C. 733.262(A) authorizes a village to combine the duties of a village clerk and treasurer into the office of village fiscal officer. A village fiscal officer exercises the executive power of a village and “shall perform the duties provided by law for the village clerk and treasurer and any other duties consistent with the nature of the office that are provided for by municipal ordinance.”³ R.C. 733.23; R.C. 733.262(C). The duties of a village fiscal officer include, signing village contracts, R.C. 731.14; notifying the board of elections of vacancies in elective municipal offices and boundary changes to the municipal corporation, R.C. 709.011; attending meetings of the village legislative authority and recording its proceedings, R.C. 733.27(A); serving as a member of the board of trustees of the sinking fund, R.C. 739.02; certifying the election of certain officers, R.C. 733.15; recording a plat of all grounds used for cemetery purposes, R.C. 759.44; keeping the books of the village, R.C. 733.28; and may include, serving as clerk of the village’s board of trustees of public affairs, board of hospital trustees, and board of park trustees, R.C. 733.28, R.C. 749.23, R.C. 755.24.

A village fiscal officer constitutes a “fiscal officer” for purposes of R.C. Chapters 133 and 5705. R.C. 133.01(L)(2) (village clerk or clerk-treasurer constitutes a “fiscal officer” for purposes of R.C. Chapter 133); R.C. 5705.01(D) (a village clerk constitutes a “fiscal officer” for purposes of R.C. Chapter 5705). As a fiscal officer for purposes of R.C. Chapters 133 and 5705, a village fiscal officer is required to certify to the village legislative authority “the estimate of maximum maturity of the bonds ... and that all the permanent improvements have an estimated life or period of usefulness of at least five years[,]” R.C. 133.19(A); sign R.C. Chapter 133 securities on behalf of the village, R.C. 133.27(A)(1); and certify that the amount required to be paid under a contract has been lawfully appropriated and is in the village treasury or in the process of collection, R.C. 5705.41(D)(1). In addition, a village fiscal officer audits the accounts of all officers and departments of the village, R.C. 733.12, and ensures that moneys set aside for appropriations are not overdrawn, moneys appropriated for an item are not used for another purpose, and sufficient moneys are in the village treasury to pay vouchers drawn on particular funds, R.C. 733.13. A village fiscal officer also keeps an accurate

R.C. 2921.42, or R.C. 2921.43 applies to the positions at issue in this opinion, we recommend that you contact the Ohio Ethics Commission. 2011 Op. Att’y Gen. No. 2011-008, at 2-60 n.1.

³ You have informed us that the village fiscal officer’s duties are only those that have been conferred by statute.

account of all moneys received or disbursed by him, R.C. 733.43, and receives, on a monthly basis, detailed statements of the receipts and expenditures of departments and village officers, R.C. 733.14. A village fiscal officer countersigns orders for the disbursement of village moneys, receives from the county auditor revenues collected from taxes and assessments, and accounts for village moneys. R.C. 733.44-46.

We now turn to the powers, duties, and responsibilities of a township trustee. “A board of township trustees is the governing body of a township.” 2014 Op. Att’y Gen. No. 2014-032, at 2-281; *see generally* R.C. Chapter 505 (general powers and duties of a board of township trustees). To carry out that purpose, the Revised Code confers several duties related to the governance of a township on a board of township trustees. *See, e.g.*, R.C. 505.10 (accepting and selling township property); R.C. 505.26 (constructing, improving, furnishing, and maintaining township buildings); R.C. 505.262 (contracting for the purchase of equipment, buildings, and sites, or for the construction of buildings for township purposes); R.C. 505.267 (entering lease-purchase agreements); R.C. 505.37 (provision of fire protection); R.C. 505.43 (contracting to obtain police protection); R.C. 505.44 (contracting to obtain ambulance or emergency medical services); R.C. 505.48 (creation of township police districts). “A board of township trustees also handles fiscal and budgetary matters on behalf of the township and is designated as the township’s taxing authority for purposes of R.C. Chapters 133 (uniform public securities law) and 5705 (tax levy law).” 2014 Op. Att’y Gen. No. 2014-032, at 2-281; *see also* R.C. 133.01(NN)(7); R.C. 5705.01(C).

Our review of the powers, duties, and responsibilities of the village fiscal officer and township trustee involved in your letter discloses three potential conflicts of interest. First, it is possible for a township and a village to enter into contracts with one another for various purposes. *See, e.g.*, R.C. 9.60 (contracting for fire protection and emergency medical services); R.C. 505.43 (contracting for police protection); R.C. 701.07 (cooperative economic development agreements); R.C. 709.192 (annexation agreements); R.C. 715.02 (joint construction or management of a public work, utility, or improvement); R.C. 715.70-72 (joint economic development districts); R.C. 737.04 (mutual aid agreements for law enforcement purposes). A person who is a township trustee and a village fiscal officer for a village with which the township is negotiating a contract may find it difficult to perform his duties as township trustee in a completely objective manner because of his position with the village. *See* 2007 Op. Att’y Gen. No. 2007-023, at 2-233. A village fiscal officer, in the performance of his duties as village clerk, signs contracts on behalf of the village. R.C. 731.14. Likewise, a board of township trustees enters into contracts on behalf of the township. *See, e.g.*, R.C. 505.262; R.C. 505.267; R.C. 505.43; R.C. 505.44. If the township and village enter a contract, the same person could be responsible for executing the contract on behalf of both parties to the contract. Moreover, if the contract requires payment from or to the township, a village fiscal officer, who is also a township trustee for the contracting township, would be required to certify that village moneys have been appropriated and are in the treasury. R.C. 5705.41; *see* 2002 Op. Att’y Gen. No. 2002-021, at 2-138. In addition, the village fiscal officer, who is also a township trustee, would be responsible for disbursing moneys from the village and receiving moneys from the township. R.C. 733.43-46; *see* 2002 Op. Att’y Gen. No. 2002-021, at 2-138. In those situations, the person’s duties in one position may influence the manner in which he performs his duties in the other position, thereby resulting in a conflict of interest. 2002 Op. Att’y Gen. No. 2002-021, at 2-138.

A second potential conflict of interest arises as a result of competition between the township and village for tax moneys within the ten-mill limitation.⁴ Except as provided in R.C. 5705.28(B) or R.C. 5705.281, the taxing authority of each subdivision is required to prepare an annual tax budget that is submitted to the county budget commission. R.C. 5705.28(A). As defined in R.C. 5705.01(C), a board of township trustees is the taxing authority for a township and the legislative authority of a village is the taxing authority for a village. Accordingly, a board of township trustees prepares, adopts, and submits a township's annual tax budget. While a village legislative authority is statutorily responsible for preparing, adopting, and submitting a village's annual tax budget, a village fiscal officer may participate in the preparation of the tax budget. *See* 2004 Op. Att'y Gen. No. 2004-025, at 2-227.

Once the tax budgets are submitted, the county budget commission examines them and may revise and adjust the estimate of revenue and receipts for each fund within the tax budget of a subdivision. R.C. 5705.31; R.C. 5705.32. "Because revisions and adjustments made by the county budget commission directly affect the amount of tax money generated within the ten-mill limitation that will be allotted to villages and townships, both villages and townships are permitted to have representatives appear before the county budget commission to explain their financial needs." 2007 Op. Att'y Gen. No. 2007-023, at 2-238; R.C. 5705.32(E)(2). A township trustee or a village fiscal officer may represent the subdivision before the county budget commission. *See* 2014 Op. Att'y Gen. No. 2014-032, at 2-284 to 2-285; 2004 Op. Att'y Gen. No. 2004-025, at 2-227. A township trustee who is also a village fiscal officer may be subject to influences that could prevent him from making completely objective, disinterested decisions with respect to the annual tax budgets of the township and village and the explanation of the needs of the township or village to the county budget commission. *See* 2014 Op. Att'y Gen. No. 2014-032, at 2-284 to 2-285. An argument that the township is entitled to tax revenue necessarily means that less revenue is available to the other subdivisions in the county. *Id.* at 2-285.

A similar conflict of interest arises because of competition for moneys in the undivided local government fund. *See* R.C. 5747.50-.55; 2014 Op. Att'y Gen. No. 2014-032, at 2-285. Townships and villages may each be apportioned a share of moneys from the undivided local government fund. *See* R.C. 5747.01(Q)(1); 2014 Op. Att'y Gen. No. 2014-032, at 2-285; 2007 Op. Att'y Gen. No. 2007-023, at 2-238 to 2-239. Under R.C. 5747.51(B), a township and a village may have a representative appear before the county budget commission to explain the subdivision's need for an allocation of moneys from the fund. 2014 Op. Att'y Gen. No. 2014-032, at 2-285. A township trustee who also serves as a village fiscal officer may be subject to divided loyalties if he were to appear in front of the county budget commission to explain the township's or village's need for a distribution of moneys from the undivided local government fund.

⁴ The Ohio Constitution prohibits property from being "taxed in excess of one percent of its true value in money for all state and local purposes," unless approved by the voters or a municipal charter. Ohio Const. art. XII, § 2; *see also* R.C. 5705.02 ("ten-mill limitation"); 2014 Op. Att'y Gen. No. 2014-032, at 2-284 n.9.

Finding the existence of a potential conflict of interest between two positions does not necessarily mean that a person is prohibited from holding both positions. 1998 Op. Att’y Gen. No. 98-033, at 2-189. Rather, whether a potential conflict of interest is impermissible depends upon several factors. *Id.* 2006 Op. Att’y Gen. No. 2006-010, at 2-86 to 2-87 summarized the approach taken if a conflict of interest is found to exist between the two positions:

[i]f our review discloses such conflicts, we must next determine the immediacy of the conflicts to see whether the conflicts may be sufficiently avoided or eliminated entirely so as to allow the person to serve simultaneously in both positions. The pertinent factors used in making this determination include, but are not limited to, the probability of the conflict, the ability of the person to remove himself from the conflict (should it arise), whether the person exercises decision-making authority in both positions, and whether the conflict relates to the primary functions of each position, or to financial or budgetary matters.

Upon consideration of those factors, we believe that the potential conflicts of interest in this matter are remote and speculative or may be sufficiently avoided or eliminated entirely. With respect to the first potential conflict of interest, there is no requirement that a township and village contract with each other. You have informed us that the township and village do not have any existing or contemplated contracts at this time. Accordingly, the potential conflict of interest related to a contract between the township and the village is remote and speculative and does not render the two positions incompatible.⁵

The potential conflicts of interest related to budgetary and tax matters may be sufficiently avoided or eliminated entirely. A village fiscal officer is not required by statute to prepare or assist in the preparation of the village’s annual tax budget. *See* 2004 Op. Att’y Gen. No. 2004-025, at 2-227. Accordingly, preparation, or assisting in the preparation, of the village’s tax budget is not a primary duty of a village fiscal officer. Even if a village fiscal officer assists in the preparation of an annual tax budget for the village, the village legislative authority is responsible for the adoption of the tax budget. *See* 2004 Op. Att’y Gen. No. 2004-025, at 2-227 to 2-228; 2002 Op. Att’y Gen. No. 2002-021, at 2-137. The village legislative authority operates as a check upon the potential for biased actions by the village fiscal officer in the preparation of a tax budget.

With respect to the township trustee, preparation and adoption of the township’s tax budget is a primary duty of the board of township trustees that arises annually. Thus, it is not practical for a township trustee to abstain completely from all matters related to the township’s budget. 2017 Op. Att’y Gen. No. 2017-043, at 2-416 to 2-417; 2016 Op. Att’y Gen. No. 2016-

⁵ If a contract were to exist between the township and the village, the two positions would be incompatible. R.C. 511.13 prohibits a member of a board of township trustees from being “interested in any contract entered into by such board.”

034, at 2-417. However, a township trustee who is also a village fiscal officer is only one member of a three-member board of trustees who vote to adopt the township's budget. *See* 2014 Op. Att'y Gen. No. 2014-032, at 2-285. Any undue influence that the township trustee may exert will be counterbalanced by the role that the remaining township trustees play in the adoption of an annual tax budget. 2017 Op. Att'y Gen. No. 2017-043, at 2-417.

With respect to any conflicts of interest that may arise from appearing in front of the county budget commission, someone other than the person who serves simultaneously as a township trustee and a village fiscal officer may be designated by the township and village to appear. For example, one of the other township trustees or the township fiscal officer may appear on the township's behalf and another village officer, other than the village fiscal officer, may appear on behalf of the village. *See* 2004 Op. Att'y Gen. No. 2004-025, at 2-227. Moreover, while the township and the village submit tentative tax budgets and request moneys from the undivided local government fund, it is the county budget commission that has the authority to make a final determination as to the allocation of tax revenue and moneys from the undivided local government fund. *See* 2014 Op. Att'y Gen. No. 2014-032, at 2-285; 2007 Op. Att'y Gen. No. 2007-023, at 2-240.

Finally, the fact that a township trustee holds a public position or employment with another political subdivision that competes for tax moneys within the ten-mill limitation and moneys from the undivided local government fund is, in and of itself, an insufficient basis for concluding that the two positions are incompatible. *See* 2007 Op. Att'y Gen. No. 2007-023, at 2-239 to 2-240; 2004 Op. Att'y Gen. No. 2004-025, at 2-228; 2000 Op. Att'y Gen. No. 2000-025, at 2-172; 1999 Op. Att'y Gen. No. 99-027, at 2-183. "If such reason were sufficient, a member of a political subdivision that adopts a tax budget and presents it to the county budget commission would not be permitted to hold any office or employment with a political subdivision that also adopts a tax budget and presents it to the commission." 1999 Op. Att'y Gen. No. 99-027, at 2-183. Therefore, we conclude that the potential conflicts of interest related to tax and budgetary matters may be mitigated or sufficiently avoided and do not render the two positions incompatible.

Charter Provisions, Local Ordinances, and Federal, State, or Local Departmental Regulations

The sixth and seventh questions ask about any applicable charter provisions, local ordinances, and federal, state or local departmental regulations that may prohibit a person from simultaneously holding the two positions. "[W]hether there is an applicable local charter provision, resolution, ordinance, or departmental regulation which prohibits a person from concurrently holding ... two positions is a question for [local] officials to answer."⁶ 2004 Op. Att'y Gen. No. 2004-051, at 2-434. It is presumed that no local charter provisions, resolutions,

⁶ You have informed us that the village involved in your letter has not adopted a charter.

ordinances, or departmental regulations apply. *See id.* There are no state regulations that prohibit a township trustee from serving simultaneously as a village fiscal officer.

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised that a person may serve simultaneously as a township trustee and a village fiscal officer for a village that is not located within, or contiguous to, the township, provided that the simultaneous holding of the two positions is not prohibited by a village charter or ordinance, there are no contracts between the township and the village, and the person does not appear before the county budget commission on behalf of the township or village.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General