

October 30, 2018

The Honorable Paul A. Dobson
Wood County Prosecuting Attorney
One Courthouse Square
Bowling Green, Ohio 43402

SYLLABUS:

2018-025

Pursuant to village ordinance, the Mayor of the Village of Pemberville may serve simultaneously as a member of the village's Zoning Board of Appeals, provided that the simultaneous service does not violate a provision of R.C. Chapter 102 or R.C. 2921.42-.43.



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OPINION NO. 2018-025

The Honorable Paul A. Dobson
Wood County Prosecuting Attorney
One Courthouse Square
Bowling Green, Ohio 43402

Dear Prosecutor Dobson:

You have requested an opinion whether the Mayor of the Village of Pemberville may serve simultaneously as a member of the village's Zoning Board of Appeals. It is our understanding that the Village of Pemberville has not adopted a charter and is a statutory village.

Seven questions are used to determine whether two public positions may be held by the same person at the same time. Those seven questions are as follows:

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.* For ease of organization, we begin with questions three, five, and six.

Questions 3, 5, and 6: Subordination and Control, Conflict of Interest, and Controlling Ordinances

Questions three and five address whether subordination issues or conflicts of interest exist as a result of the duties of the two positions.¹ Question six asks whether a charter provision or ordinance controls whether a person may hold both positions at the same time.

To answer questions three and five, it is necessary to examine the powers, duties, and responsibilities of the two positions. A village mayor, along with other village officials, holds the executive power of the village. R.C. 733.23. The mayor is the chief conservator of the peace and is president of the legislative authority. R.C. 733.24. Although the mayor presides at every regular and special meeting of the legislative authority, he does not have a vote unless there is a tie. *Id.* A village mayor shall also assist the legislative authority in the handling of the village's finances and preparation of the village's annual tax budget. *See* R.C. 733.32; R.C. 733.33; R.C. 5705.28(C)(1). The mayor's general duties are set forth in R.C. 733.30, which provides:

The [mayor] shall perform all the duties prescribed by the bylaws and ordinances of the municipal corporation. He shall see that all ordinances, bylaws, and resolutions of the legislative authority are faithfully obeyed and enforced. He shall sign all commissions, licenses, and permits granted by such legislative authority, or authorized by [R.C. Title 7], and such other instruments as by law or ordinances require his certificate.

A village mayor has "general supervision over each department and the officers provided for in [R.C. Title 7 (municipal corporations)]." R.C. 733.35. He shall also "supervise the conduct of all the officers of the municipal corporation, inquire into and examine the grounds of all reasonable complaints against any of such officers, and cause their violations or neglect of duty to be promptly punished or reported to the proper authority for correction." R.C. 733.34. Finally, R.C. 733.35 provides, in pertinent part:

When the mayor has reason to believe that the head of a department or such officer has been guilty, in the performance of his official duty, of bribery, misfeasance, malfeasance, nonfeasance, misconduct in office, gross neglect of duty, gross

¹ Our review of potential conflicts of interest does not consider the application of provisions in R.C. Chapter 102 or R.C. 2921.42-.43. The Attorney General refrains from making determinations concerning the application of R.C. Chapter 102 and R.C. 2921.42-.43 because the General Assembly has conferred authority upon the Ohio Ethics Commission to render advisory opinions concerning those provisions, R.C. 102.08. Therefore, we recommend contacting the Ohio Ethics Commission for a determination of whether R.C. Chapter 102 or R.C. 2921.42-.43 applies to a village mayor who serves simultaneously as a member of an administrative board that has been delegated authority to hear zoning appeals in the village.

immorality, or habitual drunkenness, he shall immediately file with the legislative authority, except when the removal of such head of department or officer is otherwise provided for, written charges against such person, setting forth in detail a statement of such alleged guilt, and, at the same time, or as soon thereafter as possible, serve a true copy of such charges upon the person against whom they are made.

In addition, if a village legislative authority has established a planning commission, the village mayor shall be a member. R.C. 713.01 (“[t]he legislative authority of each village may establish a commission of five members, consisting of the mayor, one member of the legislative authority ..., two citizens of the village, and one public member to be appointed by the mayor”). A village planning commission is responsible for developing a plan for the use of all or some of the land in the village. R.C. 713.02. A village planning commission’s plan for the village

shall show the commission’s recommendations for the general location, character, and extent of streets, alleys, ways, viaducts, bridges, waterways, waterfronts, subways, boulevards, parkways, parks, playgrounds, aviation fields and other public grounds, ways, and open spaces; the general location of public buildings and other public property; the general location and extent of public utilities and terminals, whether publicly or privately owned or operated, for water, light, sanitation, transportation, communication, power, and other purposes; and the removal, relocation, widening, narrowing, vacating, abandonment, change of use of or extension of such public ways, grounds, open spaces, buildings, property, utilities, or terminals.

Id. The village planning commission shall also be the platting commission for the village and shall exercise all of the powers and perform the duties set forth in R.C. 735.17-.26. R.C. 713.03.

A village planning commission may divide the territory of the village into districts or zones. R.C. 713.06. Those districts and zones shall represent the planning commission’s recommendations “for the limitations and regulation of the height, bulk, and location, including percentage of lot occupancy, set back building lines, and area and dimensions of yards, courts, and other open spaces, and the uses of buildings and other structures and of premises in such zones or districts.” *Id.* In addition, the planning commission’s plan may “regulate and restrict the location of buildings and other structures and premises to be used for trade, industry, residence, or other specified uses[.]” R.C. 713.07. Restrictions upon “the kinds or classes of trades, industries, residences, or other purposes for which buildings or other structures or premises may be permitted to be erected, altered, or used” may be imposed in accordance with the planning commission’s plan. *Id.* Upon certification of a plan from a planning commission, the legislative authority may impose additional regulations or limitations upon other characteristics of buildings, structures, or uses of village land that are subject to the commission’s plan for the village. *See, e.g.,* R.C. 713.08 (height restrictions for buildings); R.C. 713.081 (location, erection, construction, or use of small wind farms); R.C. 713.09 (restrictions on bulk and location of buildings, percentage of lot occupancy, and set back lines).

Once the planning commission has adopted a plan for the village, no person may construct a building, street, or structure in the village, or in the planned portion of the village, without the approval

of the planning commission. R.C. 713.02. If the planning commission disapproves of a proposed construction project, the commission shall communicate its reasons for the disapproval to the legislative authority and the head of the department that has control over the proposed construction project. *Id.* The legislative authority may overrule the disapproval of the planning commission. *Id.* The village or an owner of a contiguous or neighboring property may institute a suit for injunction against a person who erects, constructs, alters, repairs, or maintains a building or structure, or who uses land in violation of a zoning ordinance or regulation enacted pursuant to R.C. 713.06-.12 or Ohio Const. art. XVIII, § 3. R.C. 713.13.

We now turn to the powers, duties, and responsibilities of a member of the Pemberville Zoning Board of Appeals. In addition to establishing a planning commission, a village legislative authority may create an administrative board that is responsible for administering the village's zoning regulations. R.C. 713.11(A). In accordance with general rules set forth in districting ordinances and regulations, the village legislative authority may delegate various powers to the administrative board. *Id.* Those powers include: "the power to hear and determine appeals from refusal of building permits by building commissioners or other officers, to permit exceptions to and variations from the district regulations in the classes of cases or situations specified in the regulations, and to administer the regulations as specified therein." *Id.*

The legislative authority of the Village of Pemberville has adopted Ordinance No. 1141, the village's zoning ordinance. Section 1200.1 of Ordinance No. 1141 creates the Zoning Board of Appeals, which consists of three regular members and three alternate members.² The Zoning Board of Appeals rules on applications for permits and zoning certificates approving a nonconforming use. Pemberville Ordinance No. 1141 § 1200.4; Pemberville Ordinance No. 1141 § 1200.8; *see also* Pemberville Ordinance No. 1141 § 1204.2 (authority to grant an exception); Pemberville Ordinance No. 1141 § 1205.1 (authority to grant variances); Pemberville Ordinance No. 1141 § 1206.1 (authority to grant conditional uses); Pemberville Ordinance No. 1141 § 1207.1 (performance requirements). The Zoning Board of Appeals also hears appeals from decisions of the Zoning Inspector. Pemberville Ordinance No. 1141 § 1201.2; Pemberville Ordinance No. 1141 § 1204.1 (general authority to hear appeals from decisions of Zoning Inspector).

Our review of the powers, duties, and responsibilities of the two positions reveals that a village mayor's responsibility of oversight or supervision of village officers and departments and duty to investigate complaints made against those departments and officers under R.C. 733.30, R.C. 733.34, and R.C. 733.35 create an issue of subordination and control. Two public positions are generally incompatible if one position serves as a check upon the other position. *See State ex rel. Hover v. Wolven*, 175 Ohio St. 114, 118, 191 N.E.2d 723 (1963) ("[o]ne of the most important tests as to whether offices are incompatible is found in the principle that the incompatibility is recognized whenever one is subordinate to the other in some of its important and principal duties, and subject in

² A member of your office has informed us that the position of member of the Zoning Board of Appeals is uncompensated.

some degree to its supervisory power” (quoting 42 Am. Jur. § 71, at 937)); 2014 Op. Att’y Gen. No. 2014-022, at 2-199 to 2-200. A village mayor who also serves as a member of the village Zoning Board of Appeals is responsible for supervising his own conduct as a member of the Zoning Board of Appeals and for inquiring into complaints made against him as a member of that board. The responsibility to supervise officers and departments and to inquire into complaints places the position of Zoning Board of Appeals member subordinate to the village mayor and causes a village mayor to be a check upon the conduct of village officers and departments. That check is eliminated when the same person is responsible for performing an action while at the same time judging the manner in which an action is performed.

The mayor’s responsibilities under R.C. 733.30, R.C. 733.34, and R.C. 733.35 also create a potential conflict of interest when the mayor serves in another position in a department of the village. A conflict of interest exists “when an individual’s ‘responsibilities in one position are such as to influence the performance of his duties in the other position, thereby subjecting him to influences which may prevent his decisions from being completely objective.’” 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. When a village mayor who is also a member of the Zoning Board of Appeals is required to supervise and investigate the actions of the Board, he may find it difficult to set aside his loyalty to the other board members when inquiring into complaints made against the specific board members or the Board as a whole. He may also be unable to fulfill his supervisory and investigative duties in an unbiased and objective manner. That circumstance results in a potential conflict of interest. *See* 2007 Op. Att’y Gen. No. 2007-037, at 2-386 to 2-387 (duty to participate in inspections or investigations concerning the effect of a mining or reclamation operation on township land creates a conflict of interest between the position of mineral resources inspector for the Department of Natural Resources and township trustee); 2006 Op. Att’y Gen. No. 2006-010, at 2-89 (“a conflict of interest occurs when the person, as an investigator in the consumer services division of a county auditor’s office, is required to review a matter, or conduct or participate in an investigation, involving the township on which he serves on the board of trustees” (footnote omitted)); 1989 Op. Att’y Gen. No. 89-022, at 2-106 (“[p]rior opinions have held that when a public position requires an individual to conduct an objective investigation or review of another entity, a conflict arises when the individual holds a second position which creates a loyalty to that entity or a predisposition toward the outcome of the review or investigation”).

Nevertheless, we do not find that the subordination and control issue or the potential conflict of interest that we explained above prohibits the simultaneous holding of the two positions. The members of the Pemberville Zoning Board of Appeals shall be appointed by the Mayor, with the approval of the village legislative authority. Pemberville Ordinance No. 1141 § 1200.1. That

provision also states that one of the regular members of the Zoning Board of Appeals shall be the Mayor. *Id.* Thus, the village legislative authority has expressly approved the Mayor serving simultaneously as a member of the village Zoning Board of Appeals.

Generally, two positions are not incompatible when legislation has been adopted that expressly authorizes the same person to hold both positions simultaneously. *See, e.g.*, 2016 Op. Att’y Gen. No. 2016-034, at 2-407 to 2-408; 2012 Op. Att’y Gen. No. 2012-040, at 2-351; 2009 Op. Att’y Gen. No. 2009-005, at 2-33; 2003 Op. Att’y Gen. No. 2003-041, at 2-343. In that circumstance, the statute authorizing dual service is read as evidence of the General Assembly’s approval of the simultaneous holding of the two positions despite the existence of a potential conflict of interest. 2016 Op. Att’y Gen. No. 2016-034, at 2-406 (when the General Assembly has expressly authorized the simultaneous holding of two positions, there is no need to consider whether one position is subordinate to the other, whether it is physically possible for one person to perform the duties of both positions, or whether there is a conflict of interest between the two positions); 2012 Op. Att’y Gen. No. 2012-040, at 2-350 to 2-351; 2009 Op. Att’y Gen. No. 2009-005, at 2-33; 2003 Op. Att’y Gen. No. 2003-041, at 2-343. We conclude that in adopting Pemberville Ordinance No. 1141 § 1200.1, the village legislative authority has determined that the benefits of the mayor serving as a member of the Zoning Board of Appeals outweigh the potential detriments that may be caused by a potential conflict of interest or a subordination and control issue caused by the same person holding both positions at the same time.³ *See* 1990 Op. Att’y Gen. No. 90-037, at 2-153 (“[b]y enacting R.C. 505.011, the General Assembly has implicitly sanctioned this interest in a township contract. The General Assembly has evidently deemed that the potential conflicts of interest which might arise between a township trustee and member of a private fire company which contracts with the township are outweighed by the need for firefighters”). Therefore, the third, fifth, and sixth questions may be answered in favor of finding that the positions of Pemberville Village Mayor and member of the Pemberville Zoning Board of Appeals are compatible.

Question 1: Classified Employment and 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. Broadly, R.C. 124.57 prohibits an officer or employee who is in the classified civil service of the state, the counties, cities, city school districts, or civil service townships from holding partisan elective office or from engaging in partisan political activities. 2016 Op. Att’y Gen. No. 2016-034, at 2-401. The prohibition of R.C. 124.57 does not apply to officers or employees in the service of villages. 2009 Op. Att’y Gen. No. 2009-018, at 2-128. Accordingly, neither the village mayor nor a member of the village’s Zoning Board of Appeals is a classified employment within the terms of R.C. 124.57. The answer to the first question, therefore, favors compatibility.

³ Although it may be possible for additional conflicts of interest to arise between the two positions, in light of Pemberville Ordinance No. 1141 § 1200.1, it is unnecessary for us to address them in this opinion.

Question 2: Constitutional or Statutory Provisions Prohibiting or Limiting Holding More Than One Position

The second question asks whether a statutory or constitutional provision prohibits a person from holding more than one office or position at the same time. No statute or constitutional provision prohibits the simultaneous holding of the office of village mayor and member of a village Zoning Board of Appeals.⁴ Therefore, the second question may be answered in favor of compatibility.

Question 4: 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. 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).

Insofar as Pemberville Ordinance No. 1141 § 1200.1 requires the Mayor to serve as a member of the Zoning Board of Appeals, the duties of the Zoning Board of Appeals are part of the Mayor’s duties. Accordingly, the Pemberville Mayor will be physically able to perform all of the duties required of each position. Therefore, the answer to the fourth question favors compatibility.

Question 7: Federal, State, or Local Departmental Regulations

Question seven asks whether there are federal, state, or local department regulations that prevent the person from holding both positions at the same time. Whether there is an applicable local departmental regulation is a question for local officials to answer. However, in light of Pemberville Ordinance No. 1141 § 1200.1, we presume that such a local departmental regulation does not exist. We are not aware of a federal or state regulation that prevents the Pemberville Mayor from serving simultaneously as a member of the Pemberville Zoning Board of Appeals. Therefore, the seventh question may be answered in favor of compatibility.

⁴ R.C. 731.12 prohibits village legislative authority members from, *inter alia*, holding another public office or holding employment with the same village. Although a village mayor is president of the legislative authority, presides over meetings of the legislative authority, and votes in the event of a tie, R.C. 733.24, the mayor is not a member of the legislative authority for the purpose of R.C. 731.12’s prohibition from holding another public office or village employment. 2007 Op. Att’y Gen. No. 2007-023, at 2-230 n.6; 1998 Op. Att’y Gen. No. 98-017, at 2-86 n.1.

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised that pursuant to village ordinance, the Mayor of the Village of Pemberville may serve simultaneously as a member of the village's Zoning Board of Appeals, provided that the simultaneous service does not violate a provision of R.C. Chapter 102 or R.C. 2921.42-.43.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive style with a large initial 'M' and a long, sweeping tail.

MICHAEL DEWINE
Ohio Attorney General