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COMPATIBLE OFFICE — MAYOR OF VILLAGE, CHIEF CLERK,
OFFICE OF COUNTY ENGINEER — MAY BECOME INCOMPAT-
IBLE IF DUTIES OF EACH BECOME NUMEROUS OR ARDUOUS
AND INTERFERE WITH PROPER EXECUTION OF BOTH.

SYLLABUS:

The office of mayor of a village is not per se incompatible with the position of chief clerk in the office of the county engineer, but may become so if the duties of each are so numerous or arduous as to render unlikely a proper execution of both.

Columbus, Ohio, June 10, 1941.

Hon. Paul J. Reagon, Prosecuting Attorney,
Warren, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion, which reads as follows:

“Is the office of mayor of a village incompatible with the position of Chief Clerk in the office of the County Surveyor?”

The dual holding of the office of mayor of a village and the position of chief clerk in the office of the county surveyor, now designated the office of county engineer, under Section 2782-1, General Code, is not prohibited by constitutional or statutory provisions. Any prohibition, therefore, if it exists at all, must be established by the application of common law principles.

Various common law tests have been applied by the Ohio courts for the purpose of determining whether the functions to be performed are inconsistent and therefore incompatible.

An attempt to formulate a general definition was undertaken in the case of *State ex rel, Attorney General v. Gebert*, 12 O.C.C. (N.S.) 274, 275, wherein it was stated that:

“Offices 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.”

Other definitions of the term “inconsistency” have indicated that offices or positions are incompatible when one is subject to supervision or control by the other or where contrariety and antagonism would result in an attempt by one person to discharge the duties of both. 32 O. Jur. 908; 22 R.C.L. 414.

In *Throop on Public Offices*, Section 33, the definition was stated in the following manner:

“Offices are said to be incompatible and inconsistent, so as not to be executed by the same person, when from the multiplicity of business in them they cannot be executed with care and ability, or when, their being subordinate and interfering with each other, it induces a presumption that they cannot be executed with impartiality and honesty.”

And in *Dillon on Municipal Corporations*, Section 166, note, it is said, that:

“ * * * incompatibility in offices exists, where the nature

and duty of the two offices are such as to render it improper, from consideration of public policy, for one incumbent to retain both."

With respect to the test of physical impossibility as expressed in the Gebert case, *supra*, the decisiveness of this single factor was somewhat weakened by the court's intimation that this problem was to be left to the officers' own sense of fitness and propriety. In the case of *State ex rel v. Shaffer*, 6 O.N.P. (N.S.) 219, 221, affirmed by the Circuit Court without opinion, the court in treating on the question of physical impossibility said:

"And it was early held that the test of incompatibility was not that it was physically impossible for the officer to perform the duties of one office because he was at that time elsewhere performing the duties of the other, but the distinction was in inconsistency in the functions of the offices. * * * "

Other authorities confirming this viewpoint are to be found in L.R.A. 1917 D, 210; Ann. Cas. 1915 A, 523 and note; 86 A.S.R. 580 note.

The question of physical impossibility assumes importance in the situation that you present in your inquiry due to the fact that the other tests as to inconsistency are not applicable.

The performance of the duties of the chief clerk to the county engineer are ministerial in nature and subject only to the mandate of the county engineer. The mayor of the village has no direction or control over such an employee so as to render the position subordinate to his office. And since the position in the office in question and the duties of each concern separate political subdivisions, the test as to whether one operates as a check upon the other or whether antagonism would result has no application under these circumstances.

Returning to the question of physical impossibility, there is the probability that if the clerk of the county engineer is hired for full time services it would be physically impossible for the same person to transact the duties of the office of village mayor. In view of what has been said, however, the test of physical impossibility is to be considered as one of fact rather than one of law to be determined largely by the officers' own

sense of propriety tempered by a proper regard for the interests of the public.

In specific answer to your inquiry, therefore, it is my opinion that the office of mayor of a village is not per se incompatible with the position of chief clerk in the office of the county engineer, but may become so if the duties of each are so numerous or arduous as to render unlikely a proper execution of both.

Respectfully,

THOMAS J. HERBERT,

Attorney General.