

OPINION NO. 2001-034**Syllabus:**

A clerk-treasurer of a school district free public library, who is not a member of the library's board of trustees, may also serve as the library's assistant director.

To: William R. Swigart, Fulton County Prosecuting Attorney, Wauseon, Ohio
By: Betty D. Montgomery, Attorney General, July 26, 2001

You have requested an opinion whether a clerk-treasurer of a school district free public library may serve simultaneously as the library's assistant director. You have informed us that the board of library trustees of a school district free public library is contemplating appointing its clerk-treasurer to serve as the library's assistant director.¹

R.C. Chapter 3375 authorizes the creation of public libraries. *See, e.g.*, R.C. 3375.01-.05 (state library); R.C. 3375.06-.07 (county free public library); R.C. 3375.09-.11 (township free public library); R.C. 3375.12-.13 (municipal free public library); R.C. 3375.14-.18 (school district free public library); R.C. 3375.19-.24 (county library district); R.C. 3375.28-.31 (regional library district). Provisions governing the establishment and operation of a school district free public library are set forth in R.C. 3375.14-.18 and R.C. 3375.32-.46. A school district free public library is created by a board of education of any city, exempted village, or local school district for the purpose of providing school library service to the pupils under its jurisdiction. R.C. 3375.14. The school district free public library is under the control and management of a board of library trustees. R.C. 3375.15.

2000 Op. Att'y Gen. No. 2000-025 at 2-166 and 2-167 sets forth the following seven questions for determining whether a person may serve simultaneously in two public positions:

1. Is either of the positions a classified employment within the terms of R.C. 124.57?

¹Pursuant to R.C. 3375.32, the board of library trustees of a school district free public library elects a clerk. The powers and duties of the clerk are set forth in R.C. 3375.35-.391 and R.C. 3375.41. A person elected as clerk is required to "be the treasurer of the library funds." R.C. 3375.36; *see* 1947 Op. Att'y Gen. No. 2549, p. 639. Accordingly, a person elected to serve as clerk of a school district free public library is commonly referred to as clerk-treasurer. *See, e.g.*, 1990 Op. Att'y Gen. No. 90-059; 1980 Op. Att'y Gen. No. 80-047 at 2-196.

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, resolutions, or ordinances which are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

See also 1979 Op. Att'y Gen. No. 79-111 at 2-367 and 2-368.

Questions six and seven concern the applicability of charter provisions, resolutions, ordinances, and federal, state, and local departmental regulations. There are no applicable charter provisions, resolutions, ordinances or federal or state regulations in this particular instance. Whether there is an applicable local departmental regulation is a matter for the board of library trustees of the school district free public library to determine. We will assume, for purposes of this opinion, that no local departmental regulation of the board of library trustees prohibits the library's clerk-treasurer from being appointed and serving as the library's assistant director.

The first question of the compatibility analysis requires that we consider the application of R.C. 124.57. This statute prohibits an officer or employee in the classified service of the state, or of a county, city, city school district or civil service township from taking part in partisan politics, except to vote as he pleases or to freely express his political opinions.² R.C. 124.57 has been interpreted as prohibiting a classified officer or employee who is covered by the terms thereof from being elected to a public office in a partisan election or accepting a party-sponsored appointment to a public office that is normally filled by partisan election.³ See 2 Ohio Admin. Code 123:1-46-02(C)(1), (6); 1994 Op. Att'y Gen. No. 94-087 at 2-430; see

²Division (A) of R.C. 124.57 thus reads as follows:

No officer or employee in the classified service of the state, the several counties, cities, and city school districts thereof, and civil service townships, 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 person solicit directly or indirectly, orally or by letter, or be in any manner concerned in soliciting any such assessment, contribution, or payment from any officer or employee in the classified service of the state and the several counties, cities, or city school districts thereof, or civil service townships; nor shall any officer or employee in the classified service of the state, the several counties, cities, and city school districts thereof, and civil service townships, 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.)

³A classified officer or employee may participate in partisan politics if the terms of a collective bargaining agreement authorize such participation. See 1991 Op. Att'y Gen. No. 91-065 (syllabus, paragraph one) ("[t]he terms of a collective bargaining agreement may

also *Heidtman v. City of Shaker Heights*, 163 Ohio St. 109, 126 N.E.2d 138 (1955). R.C. 124.57 does not, however, prohibit a classified officer or employee from being elected to a public office in a nonpartisan election or accepting appointment to a public office that is normally filled by nonpartisan election. See rule 123:1-46-02(C); see, e.g., 1993 Op. Att'y Gen. No. 93-051; 1978 Op. Att'y Gen. No. 78-022.

Reduced to its simplest terms, R.C. 124.57 does the following: it prohibits a classified civil service employee 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 a classified civil service employee.

In this instance, R.C. 124.57 is inapplicable for two reasons. First, R.C. 124.57 applies only to officers and employees in the service of "the state, the several counties, cities, and city school districts thereof, and civil service townships." It does not encompass officers or employees in the service of a school district free public library. Cf. 2000 Op. Att'y Gen. No. 2000-025 at 2-167 (R.C. 124.57 does not apply to officers and employees in the service of a park district created pursuant to R.C. Chapter 1545 since R.C. 124.57 does not expressly refer to such persons). See generally *Fort Hamilton-Hughes Mem'l Hosp. Center v. Southard*, 12 Ohio St. 3d 263, 265, 466 N.E.2d 903, 905 (1984) ("[i]t is a basic doctrine of construction that the express enumeration of specific classes of persons in a statute implies that the legislature intended to exclude all others"). Second, the positions of clerk-treasurer and assistant director of a school district free public library are not filled by partisan election. Thus, even officers or employees in the classified civil service would not be prohibited by R.C. 124.57 from holding these positions.

The second question asks whether the empowering statutes of either position limit a person from being employed in another public position or holding another public office. No statute bars a clerk-treasurer of a school district free public library from being appointed and serving as the library's assistant director. Therefore, the second question of the compatibility test may be answered in the negative.

The third question asks whether one position is subordinate to, or in any way a check upon, the other. The clerk-treasurer of a school district free public library is elected by the board of library trustees. R.C. 3375.32. The clerk-treasurer, who may be a member of the board of library trustees, R.C. 3375.32, is the treasurer of the library's funds and is responsible for receiving and disbursing, and keeping an account of, the library's funds. R.C. 3375.36. The clerk-treasurer also files financial statements with the board of library trustees and the county auditor, R.C. 3375.36-.37, and credits to the appropriate fund interest earned and paid on library moneys, see R.C. 3375.391. The assistant director is appointed by and serves at the pleasure of the board of library trustees. R.C. 3375.40(G). The duties of the assistant director are not prescribed by statute. You have informed us that the assistant director is responsible for overseeing the day-to-day operations of the library and serving in the library director's place when he is absent.

In light of the duties of the two positions, you state that you are "concerned that the position of assistant director, especially in the absence of the director, is a check upon the office or activities of the library clerk-treasurer who is involved in the expenditure of and accounting for public library funds." For the reasons that follow, however, we do not believe

provide that a classified employee may engage in partisan politics and, pursuant to R.C. 4117.10(A), such terms will prevail over the provisions of R.C. 124.57").

that one position is subordinate to, or in any way a check upon, the other, unless the clerk-treasurer is also a member of the board of library trustees.

The clerk-treasurer "deals only with the financial affairs of the board [of library trustees]." 1980 Op. Att'y Gen. No. 80-047 at 2-198; *accord* 1990 Op. Att'y Gen. No. 90-059 at 2-254; *see, e.g.*, R.C. 3375.35-.391. The clerk-treasurer is not responsible for any of the day-to-day operations of the library. In addition, the board of library trustees, rather than the clerk-treasurer or assistant director, is responsible for spending the library's moneys. R.C. 3375.40(B); *see also* R.C. 3375.33; R.C. 3375.35; R.C. 3375.41. Once the board of library trustees determines to expend moneys for a particular purpose, the clerk-treasurer is required to pay out library moneys for that purpose. *See generally State ex rel. Ms. Parsons Constr. Inc. v. Moyer*, 72 Ohio St. 3d 404, 650 N.E.2d 472 (1995) (a city auditor does not possess discretionary power to refuse the payment due under a public contract that is completely and satisfactorily performed); 1999 Op. Att'y Gen. No. 99-018 at 2-133 (neither a city auditor nor township clerk "exercises discretionary authority with respect to budgetary matters or the certification of warrants"); 1996 Op. Att'y Gen. No. 96-008 at 2-34 (the act of certifying a warrant is ministerial in nature).

The assistant director thus may not prohibit the clerk-treasurer from paying a duly authorized expenditure of the board of library trustees, or direct the clerk-treasurer to pay an expenditure unless the expenditure has been authorized by the board, in which case the clerk-treasurer has a mandatory duty to expend library moneys. Further, the clerk-treasurer may not pay out library moneys to, or on behalf of, the assistant director unless the board of library trustees has authorized that payment, R.C. 3375.40(B), and the moneys are paid out by a check that has been signed by the president, vice-president, or secretary of the board of library trustees, R.C. 3375.35. Moreover, there are no instances in which either position is required to assign duties to, or supervise, the other. Accordingly, our examination of the duties of the respective positions discloses no subordination of one position to the other, nor does it reveal that one position operates as a check upon the actions of the other.

It must be noted, however, that the General Assembly has provided that a board of library trustees may elect one of its own members as clerk-treasurer. R.C. 3375.32. In such a situation, the clerk-treasurer would be a member of the board of library trustees that appoints, removes, and fixes the compensation of the assistant director. *See* R.C. 3375.40(G) (a board of library trustees is vested with the power to "[a]ppoint and fix the compensation of all of the employees of the free public library under its jurisdiction"); 1992 Op. Att'y Gen. No. 92-017 at 2-60 ("the law generally recognizes that, absent constitutional or statutory provisions specifying otherwise, the power to remove an appointee from a public office or position is implied by the power to make such appointment").

It is well established that "all officers having appointive power are disqualified for the positions to which they may appoint." 1979 Op. Att'y Gen. No. 79-086 at 2-277; *accord* 1998 Op. Att'y Gen. No. 98-009 at 2-51; 1983 Op. Att'y Gen. No. 83-070 at 2-289; 1935 Op. Att'y Gen. No. 3865, vol. I, p. 67, at 68; *see also* 1979 Op. Att'y Gen. No. 79-099 at 2-308 ("[t]here can be a no stronger case of subordination, and, therefore, incompatibility, than a direct employer-employee relationship"); 1958 Op. Att'y Gen. No. 1742, p. 93, at 94 ("[t]here can be no doubt that the power to remove is a complete check of one [position] upon the other"). In this regard, 1936 Op. Att'y Gen. No. 5114, vol. I, p. 71 (syllabus, paragraph one) states:

A public officer possessing the power of appointment or employment may not appoint or employ himself, nor may a public board possessing such power appoint or employ one of their own number, in the absence of a statute

expressly authorizing such action, even though his vote is not essential to a majority in favor of his appointment or employment and although he was not present when the appointment was made. (Emphasis added.)

See, e.g., State ex rel. Louthan v. Taylor, 12 Ohio St. 130 (1861) (a board of directors of a county infirmary may not appoint one of its members as superintendent of the county infirmary); 1936 Op. Att'y Gen. No. 5408, vol. I, p. 482 (a board of library trustees may not appoint one of its own members as librarian for the school district public library); 1935 Op. Att'y Gen. No. 3865, vol. I, p. 67 (a district board of health may not appoint one of its own members as sanitary inspector).

In the absence of a statute providing otherwise, application of the general rule means that a board of library trustees may not appoint or employ one of its own members as the assistant director for a school district free public library. In this instance no statute authorizes a board of library trustees to appoint or employ one of its own members as the assistant director for the school district free public library. It follows, therefore, that the general rule applies, which means that a member of a board of library trustees may not be appointed or employed as assistant director for the library. Accordingly, a clerk-treasurer of a school district free public library who is a member of the board of library trustees may not be appointed to serve as the library's assistant director. *See generally* 1936 Op. Att'y Gen. No. 5408, vol. I, p. 482 (because a board of library trustees appoints the library's employees, a member of the board may not serve as librarian for the school district public library).

The fourth question asks whether it is physically possible for one person to perform the duties of both positions. This is a factual question that is best answered by the board of library trustees of the school district free public library because they may more precisely determine the time demands that would be imposed upon the person by each position. *See* 1999 Op. Att'y Gen. No. 99-027 at 2-177.

The final question asks whether there is a conflict of interest between the two positions. A person may not serve in two public positions simultaneously if he would be subject to divided loyalties and conflicting duties or be exposed to the temptation of acting other than in the best interests of the positions he holds. 1985 Op. Att'y Gen. No. 85-042 at 2-150.

Given the respective duties of the positions in question, we believe that there are no inherent conflicts between the duties and responsibilities of these two positions. Accordingly, a person who serves simultaneously in the positions of assistant director and clerk-treasurer will not confront any inherent conflicts of interest that are otherwise impermissible.

Based on the foregoing, it is my opinion, and you are hereby advised that a clerk-treasurer of a school district free public library, who is not a member of the library's board of trustees, may also serve as the library's assistant director.