

OPINION NO. 88-093

Syllabus:

The clerk of a municipal court may not appoint a municipal police officer who serves within the jurisdiction of the court to the position of deputy municipal court clerk.

To: John J. Plough, Portage County Prosecuting Attorney, Ravenna, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 27, 1988

I have before me your request for an opinion in which you ask if the Portage County Municipal Court Clerk may appoint a police officer who serves a municipal corporation within Portage County¹ to the position of deputy clerk with the power

¹ Both villages and cities are municipal corporations. "Municipal corporations are hereby classified into cities and villages. All such

only to verify the oath on criminal complaints. 1979 Op. Att'y Gen. No. 79-111 sets forth seven criteria for determining whether two public service functions 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 the outside employment permissible?
3. Is one office 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?

In order for two positions to be found compatible, all seven inquiries will need to be answered in favor of compatibility. Stated differently, if any one of the seven inquiries leads to a conclusion of incompatibility, the analysis need not go any further; the two positions will be held incompatible for that reason. For the reasons which follow in this opinion, I find that a municipal police officer is subordinate to a deputy clerk of the municipal court. Additionally, I note that a conflict of interest exists between the two positions. I conclude, accordingly, that the positions are not compatible.

The first step in a subordination analysis is to outline the respective duties of the two positions. The reason for outlining the duties of the two positions is to isolate areas where one position exercises control over the other. The position of municipal police officer in a city is created by the legislative authority of the municipality. R.C. 737.05. In villages the mayor appoints, with the advice and consent of the legislative authority, a village marshal, who serves as chief of police. R.C. 737.15. The legislative authority of a village creates the position of police officer and the mayor makes the necessary appointments subject to the legislative authority's confirmation. R.C. 737.16. The general duties of a municipal police officer are defined by statute and include the following:

preserve the peace, protect persons and property, and obey and enforce all ordinances of the legislative authority of the municipal corporation, all criminal laws of the state and the United States, and all court orders issued and consent agreements approved pursuant to sections 2919.26 and 3113.31 of the Revised Code.

R.C. 737.11. All municipal police officers have the authority to execute warrants and serve summons in criminal and quasi-criminal cases. R. Crim. P. 4(A)(1) states:

If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that

corporations having a population of five thousand or over shall be cities; all others shall be villages." Ohio Const. art. XVIII, § 1. "Municipal corporations, which, at the last federal census, had a population of five thousand registered resident electors or resident voters, as provided in section 703.011 of the Revised Code, are cities. All other municipal corporations are villages." R.C. 703.01. You have asked only about police officers who serve a municipality within the jurisdiction of the municipal court in question, and I am considering only such police officers.

an offense has been committed, and that the defendant has committed it, a warrant for the arrest of the defendant, or a summons in lieu of a warrant, shall be issued by a judge, clerk of court, or officer of the court designated by the judge, to any law enforcement officer authorized by law to execute or serve it.

For the purposes of the criminal rules, "[l]aw enforcement officer means a sheriff, deputy sheriff, constable, *municipal police officer*...." R. Crim. P. 2. (Emphasis added.) R.C. 1901.23 specifically authorizes municipal police officers to receive warrants or other types of process for service in criminal cases. "All warrants, executions, subpoenas, writs, and process in all criminal and quasi-criminal cases may be issued to the bailiff of the court, a police officer of the appropriate municipal corporation, or to the sheriff of the appropriate county." R.C. 1901.23.

Next, it is necessary to outline the duties of the municipal court clerk. Although the potentially incompatible position here involved is that of deputy clerk of the court, I will outline the duties of the clerk since the deputy clerk has been granted the statutory authority to perform all the duties of the clerk. R.C. 1901.31(H)("[e]ach deputy clerk...may perform the duties appertaining to the office of the clerk").² The clerk, and hence his deputies, can "[a]dminister oaths, take affidavits and issue executions upon any judgment rendered in the municipal court...; issue, sign and attach the seal of the court to all writs, process, subpoenas, and papers issuing out of the court." R.C. 1901.31(E). The clerk is also authorized to keep the books and records of the court, and to "issue receipts for all costs, fees, fines, bail and other moneys payable to the office or to any officer of the court." R.C. 1901.31(E); R.C. 1901.31(F). In addition to the duties already set out, the clerk shall also "keep a separate account of all receipts and disbursements in civil and criminal cases, which shall be a permanent public record of the office.... He shall have other powers and duties as are prescribed by rule or order of the court." R.C. 1901.31(F). Further, and of greatest importance in this instance, the clerk can issue warrants and summonses in criminal and quasi-criminal cases and order municipal police officers to execute such process. R.C. 1901.23; R. Crim. P. 4(A)(1). Thus, a clerk has a wide variety of functions and duties, all of which are authorized by statute to be performed by a deputy clerk. See R.C. 1901.31(H); *State ex rel. Cramer v. Board of County Commissioners of Crawford County*, 18 Ohio St. 3d 157, 480 N.E.2d 443 (1985)(the court has great latitude when defining duties of deputy clerks).

Even though the extent of the intended authority of the deputy clerk in the instant case is to verify the oath on criminal complaints, the statutory scheme confers much broader authority upon a deputy clerk. Once the deputy clerk assumes his position, there is no affirmative restraint on his exercise of the conferred statutory authority. See note 2, *supra*. Clearly the duties of the deputy clerk outlined above demonstrate that he can instruct a municipal police officer to

² Although your request says that the deputy clerk would have authority only to verify the oath on criminal complaints, the ability to create a deputy clerk with such limited authority is questionable. R.C. 1901.31(H) specifically confers on a deputy clerk the authority to exercise all "duties appertaining to the office of the clerk." Even if the position of deputy clerk with limited authority did exist, its implementation might be cumbersome. The clerk of courts is not the only person who exercises authority over the deputy clerks. The court may also assign duties to the clerk and his deputies. R.C. 1901.31(F); R.C. 1901.31(H). Thus, even though in practice the clerk might treat the deputy clerk as having limited authority when assigning duties, the court might view the deputy clerk as having the full degree of authority delegated by the code. See, e.g., *State ex rel. Cramer v. Board of County Commissioners*, 18 Ohio St. 3d 157, 158, 480 N.E.2d 443, 445 (1985)("p]ursuant to R.C. 1901.31(H), deputy clerks 'may perform the duties appertaining to the office of the clerk.' Further, R.C. 1901.31(F) provides that the clerk 'shall have other powers and duties as are prescribed by rule or order of the court.' These two statutory provisions give the court wide latitude in prescribing the particular duties of deputy clerks").

serve process in criminal cases and suggest that the position of municipal police officer is subordinate to that of deputy clerk of the municipal court. R.C. 1901.23; R. Crim. P. 4(A)(1). I now turn to past compatibility opinions that provide guidance to answering the questions raised here.

In 1961 Op. Att'y Gen. No. 2066, p. 132, one of my predecessors held that the position of clerk or deputy clerk of a county court and sheriff or deputy sheriff are incompatible. My predecessor was concerned that a sheriff and his deputies are in a subordinate position to the clerk and deputy clerk because the clerk could instruct the sheriff to serve process: "A sheriff insofar as service of process, execution of affidavits and other miscellaneous matters, is subordinate to and dependent upon the clerk of the county court." 1961 Op. No. 2066 at 134. My predecessor concluded that "[t]he county sheriff must act upon the demand of the clerk." 1961 Op. No. 2066 at 136.

Keeping in mind that the duties of a county court clerk are virtually identical to the duties of a municipal court clerk (*compare* R.C. 1907.101 with R.C. 1901.31(E) and (F)), I turn now to my opinion in 1984 Op. Att'y Gen. No. 84-028. In Op. No. 84-028 I held, following the holding of 1961 Op. No. 2066, that "[a] municipal court clerk may not appoint deputy sheriffs of the county in which the municipal court is located as deputy clerks of the court." Op. No. 84-028 at 2-83. In Op. No. 84-028, just as in the present case, the deputy clerk's authority was intended to be limited to verifying the oath on criminal complaints. Despite that fact, my rationale in Op. No. 84-028 was that, "[a]lthough the clerk of a municipal court could call upon the sheriff or his deputies only in the limited case of serving criminal warrants...to such extent the sheriff or his deputies are subordinate to and dependent upon the clerk of a municipal court." Op. No. 84-028 at 2-83. In respect to service of process in criminal cases we have already seen that a municipal police officer enjoys the same status as a sheriff or deputy sheriff. R.C. 1901.23; R. Crim. P. 4(A)(1). Thus, it is logical and consistent to extend the conclusions of Op. No. 84-028 and 1961 Op. No. 2066 to the current situation.³

³ I am aware of 1964 Op. Att'y Gen. No. 64-1516. In that opinion one of my predecessors held: "The positions of chief of police of a municipal corporation and special deputy clerk of county court for the purpose of accepting bonds are not incompatible." Op. No. 64-156 (syllabus, paragraph 1). However, the continued validity of that opinion must be seriously questioned. First, Op. No. 64-1516 merely assumed that special deputies could be appointed by the clerk. The opinion did not discuss the statutory procedure for appointing special deputy clerks of a county court. *See* R.C. 1907.20(F) (formerly R.C. 1907.101(F)), enacted by 128 Ohio Laws 840 (eff. Nov. 6, 1959). In this respect, Op. No. 64-1516 can be distinguished. A municipal court clerk cannot appoint special deputies. Only the municipal court can appoint special deputies and only for the purpose of administering a branch office. R.C. 1901.311.

Second, Op. No. 65-1516 distinguished the law enforcement functions of municipal police officers from deputy sheriffs. Such a distinction is questionable. *See In Re Termination of Employment of Pratt*, 40 Ohio State 2d 107, 321 N.E.2d 603 (1974). In particular, municipal police officers and deputy sheriffs have similar duties where criminal process is to be served. *See* R.C. 1901.23.

Finally, Op. No. 64-1516 did not consider the need to maintain a separation between law enforcement functions and judicial functions. Instead the opinion concluded that with respect to a deputy clerk whose authority is limited to accepting bonds and a chief of police "nothing in their exercise...would force a person holding both positions to show an allegiance to one position rather than another." Op. No. 64-1516 at 2-411. At the core of that opinion was the theory that the clerk could appoint a deputy with limited authority. For reasons detailed throughout this opinion that theory is rejected. A deputy clerk's statutory authority is broad and the potential for divided loyalties is too great to permit a police officer to assume those additional responsibilities.

In order to determine whether one position is subordinate to another, it is necessary to identify the element of control. *In Re Compatibility of County Dog Warden and Village Marshal*, 19 Ohio Misc. 2d 12, 14, 482 N.E.2d 1355, 1357-58 (C.P. Van Wert County 1984)("[t]he authority and duties of the two positions do not overlap and are in 'entirely different fields'...Neither position was subject to supervision or control of the other"); *Pistole v. Wiltshire*, 90 Ohio L. Abs. 525, 189 N.E.2d 654 (C.P. Scioto County 1961); 1979 Op. Att'y Gen. No. 79-111 at 2-370 (control is the key inquiry under a subordination analysis). Indeed, in 1961 Op. No. 2066 my predecessor found the element of control when he concluded that "[t]he county sheriff must act upon the demand of the clerk." 1961 Op. No. 2066 at 136. I too found control in Op. No. 84-028 when I noted that the municipal court clerk "could call on the sheriff or his deputies." Op. No. 84-028 at 2-83. Since the degree of control that a municipal court clerk can exercise over a municipal police officer is the same as the degree of control he can exercise over a sheriff or a deputy sheriff, I conclude that a municipal police officer is subordinate to the municipal court clerk.

Both 1961 Op. No. 2066 and Op. No. 84-028 articulated a second reason for finding incompatibility. The earlier opinions were concerned that since the sheriff is the chief law enforcement officer of the county he or his deputies could be called upon to investigate potential improprieties in the clerk's office. Specifically, the second theory reasoned that a deputy sheriff who is also a deputy clerk of court would be subject to divided loyalties. Such a potential conflict of interest, it was concluded, could not be allowed to develop. Op. No. 84-028 at 2-83; 1961 Op. No. 2066 at 134.

The sheriff and his deputies, however, are not the only law enforcement officers charged with investigating crimes and enforcing the laws of the state. Clearly, R.C. 737.11 places that burden on municipal police officers as well. It is well recognized that a deputy sheriff and a municipal police officer have similar duties and functions. Discussing the duties of a deputy sheriff, the Ohio Supreme Court said: "He may perform ordinary police functions, such as transporting prisoners (R.C. 339.57), guarding prisoners in the county jail (R.C. 341.05), and exercising the general duties of a peace officer (R.C. 2935.01)...For many, the duties assigned are virtually identical to those assigned to a member of a metropolitan police force." *In Re Termination of Employment of Pratt*, 40 Ohio St. 2d 107, 115, 321 N.E.2d 603, 608 (1974). *But see* note 3, *supra*. Given the similarities between a municipal police officer and a deputy sheriff (each may investigate crimes and enforce the criminal laws in their respective jurisdictions), I conclude that even as a potential conflict of interest exists when a deputy sheriff holds the position of deputy municipal court clerk, so also the same conflict exists when a municipal police officer holds that position.

An element of concern in this case, as it was in 1961 Op. No. 2066 and Op. No. 84-028, is the need to maintain a division between those who are empowered with law enforcement and investigation on the one side, and the judiciary on the other. There are compelling reasons why our system of law requires law enforcement functions to be performed independently of judicial functions. *See, e.g.*, Op. No. 84-028 (quoting 1961 Op. No. 2066 at 136)("[t]hese positions [county sheriff and county clerk of courts] are clearly designed to separate the function of law enforcement from the ministerial duties of accounting not only for documents served by the sheriff but bail posted to secure appearance and fines levied by the courts. The separation of such duties are [sic] well founded and thus the two cannot be joined for the sake of expediency"). Although the potential conflict involved in verifying oaths may appear to be minimal, the independence of the judicial function vis-a-vis the law enforcement function is at issue. *See generally State ex rel. Johnston v. Taulbee*, 66 Ohio St. 2d 417, 423 N.E.2d 80 (1981); *State ex rel. Edwards v. Murray*, 48 Ohio St. 2d 303, 358 N.E.2d 577 (1976); *City of Cincinnati v. Bossert Machine Co.*, 14 Ohio App. 2d 35, 236 N.E.2d 216, *rev'd. on other grounds*, 16 Ohio St. 2d 76, 243 N.E.2d 105 (1968), *cert. denied*, 394 U.S. 998 (1969). A deputy municipal court clerk would be faced with a conflict of loyalties if he served also as a municipal police officer for a municipality within the jurisdiction of the court, since he would be serving masters with conflicting duties. *See* 1985 Op. Att'y Gen. No. 85-021 at 2-82 ("[o]ne person may not simultaneously hold two public positions if he would be subject to divided loyalties and conflicting duties or exposed to the temptation of acting other than in the best interest of the

public"). *See generally State ex rel. Hover v. Wolven*, 175 Ohio St. 114, 191 N.E.2d 723 (1963); Op. No. 79-111; 1961 Op. No. 2066. *But see* note 3, *supra*. The inevitable result of allowing a police officer (or a sheriff as in previous opinions) to become a deputy clerk would be to jeopardize the independence of the judicial function.⁴

Thus, based on the foregoing, it is my opinion, and you are advised, that the clerk of a municipal court may not appoint a municipal police officer who serves within the jurisdiction of the court to the position of deputy municipal court clerk.

⁴ My staff has been informed that, in the instant case, the issue of allowing police officers to serve as deputy court clerks arose because every time a police officer in a municipality within Portage County received a complaint, he needed to drive into Ravenna to have the oath verified. The Portage County Municipal Court has county-wide jurisdiction. R.C. 1901.02(B). In order to avoid the necessity of a drive into Ravenna to verify the oath on each criminal complaint, the clerk of courts began to appoint deputies in each municipality. In one village, it was necessary to make a municipal police officer a deputy clerk since no other village personnel were on duty after 6:00 p.m.

I note that it may be possible to avoid the problems confronted in this instance by having a notary public verify the oaths on criminal complaints. R. Crim. P. 3 provides that complaints "shall be made upon oath before any person authorized by law to administer oaths." The Ohio Revised Code specifically grants to a notary public the authority to administer oaths: "[A] notary public may, throughout the state, administer oaths required or authorized by law." R.C. 147.07.