

OPINION NO. 72-109**Syllabus:**

The positions of township clerk and county highway department employee are incompatible, whether the highway position is classified or unclassified.

To: Bernard W. Freeman, Huron County Pros. Atty., Norwalk, Ohio
By: William J. Brown, Attorney General, November 22, 1972

You have requested my opinion as to whether one person may hold the elective office of township clerk and be a county highway department employee at the same time. Since you have not stated whether the position in the highway department is in the classified, or the unclassified, service, I shall deal with each of these alternatives in turn.

Opinion No. 3005, Opinions of the Attorney General for 1962,

considered a similar situation involving a township trustee and a county highway department employee. There, my predecessor held that a classified county highway department employee could not simultaneously hold the position of township trustee. He relied upon Section 143.41, Revised Code, which prohibits any political activity by a classified employee other than that of voting. Since the position of township trustee is an elective office, an individual would be prohibited from holding it and a classified position concurrently. Since the position of township clerk is also an elective position, the outcome here must be the same, if the county employee is in the classified service.

Further consideration is necessary if the highway position is unclassified since Section 143.41, Revised Code, deals only with persons in the classified service.

I find no constitutional or statutory prohibition against a township clerk being a highway employee in the unclassified service. We must, therefore, look to the common law rule in State ex rel., Attorney General v. Gebert, 12 C.C. (N.S.) 274 (1909), which states as follows, at page 275:

"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."

For an extended discussion of the law on this matter, see State, ex rel. Hover v. Wolven, 175 Ohio St. 114 (1963). Section 5705.01, Revised Code, which designates the township clerk as the township fiscal officer, reads as follows:

"(D) 'Fiscal officer' in the case of a county, means the county auditor; * * * in the case of a township, the township clerk; * * * and in all other cases, the officer responsible for keeping the appropriation accounts and drawing warrants for the expenditure of the moneys of the district or taxing unit." (Emphasis added.)

In Opinion No. 2480, Opinions of the Attorney General for 1961, which involved the compatibility of the offices of township clerk and member of the board of education for the school district in which the township is located, my predecessor stated that:

"Since 1927, when the Budget Law went into effect, it often happens that officers of different political subdivisions of the state find themselves on opposite sides in the contest for a share of the tax dollar and that, thus, incompatibility not apparent at first blush, is discovered where there was none before. Pursuing the instant question in such light, I find that under Section 5705.01 (C), Revised Code, the taxing authority of a school district is the board of education, and that of a township, the board of township trustees. Under Section 5705.28, Revised Code, the taxing authorities of the respective subdivisions are charged with the duty of preparing their tax budgets for the next succeeding fiscal year by a certain date of the previous year. A member of a local board

of education is thus required to help in the preparation of the tax budget of his school district. A township clerk, being an officer of the township, elected independently of township trustees, is not charged specifically with such duty as regards the township tax budget. However, under Section 5705.01 (D), Revised Code, the township clerk is designated as the fiscal officer of the township.

" Should I assume that the report of the clerk to the board of township trustees, as the fiscal officer of the township, in connection with the preparation of the tax budget is to be viewed as an act of a ministerial nature, which I think is a fair and safe assumption, the further question arises, whether or not the township clerk, as the fiscal officer of the township, could avoid appearing before the county budget commission, as provided in Section 5705.32, Revised Code, to defend the township tax budget, before the final determination by the commission is made. I do not believe he could avoid such appearance, in case the township trustees asked him so to do. This being clear, it might appear that his appearance before the budget commission could be directed against the budget requests of other, competing subdivisions, among them the budget request of the board of education of the local school district."

(Emphasis added.)

The conclusion reached by my predecessor was that the offices were not conflicting because revenue for the local school district is fixed by statute, and his appearance in favor of the township budget could not be directed against the budget request of the board of education as another competing subdivision. See also Opinion No. 2797, Opinions of the Attorney General for 1962; and Opinion No. 71-027, Opinions of the Attorney General for 1971.

However, in the situation which you present, since the township clerk is the fiscal officer, he might be ordered to appear before the budget commission to defend the township budget, and tempted to subordinate his interests in that budget in favor the budget of the county highway department. A similar rationale was used in the following Opinions: Opinion No. 559, Opinions of the Attorney General for 1963, which held that the position of township clerk is incompatible with the position of member of a board of health of a general health district; Opinion No. 223, Opinions of the Attorney General for 1959, which held that the position of township trustee is incompatible with that of county highway department employee whether the latter position be in the classified or unclassified service; and Opinion No. 3005, supra, which held similarly.

In specific answer to your request it is my opinion, and you are so advised, that the positions of township clerk and county highway department employee are incompatible, whether the highway position is classified or unclassified.