

OPINION NO. 71-027**Syllabus:**

1. There is no incompatibility in a full-time employee of the county treasurer or the county engineer serving also as a part-time investigator on the staff of the prosecuting attorney, as long as it is understood that his duties will not involve any investigation of his full-time employer.

To: Robert D. Webb, Ashtabula County Pros. Atty., Jefferson, Ohio
By: William J. Brown, Attorney General, June 4, 1971

You have requested my opinion on a question you phrase as follows:

"My question concerns the compatibility of a part time special investigator, consisting of eight or ten hours per month, paid by the Prosecutor out of the 325.12 fund, and being a full time employee of another County office, for example, Auditor, Treasurer or Engineer, if the investigator spends time on this project only hours after the regular work day or on week-ends.

"There is an agreement that the investigator will not investigate other county, city or township offices in the County, but rather will work on consumer fraud cases and embezzlement cases in private companies. Also assuming it is physically possible for the investigator to perform both jobs, and that one job does not depend on the other."

Pursuant to later communication you indicate that an employee of the county auditor should be excluded from consideration. I shall, therefore, confine my opinion to employees of county treasurers and engineers.

Under Sections 325.17 and 325.27, Revised Code, the county treasurer and the county engineer are authorized to appoint all employees necessary to conduct the business of their offices. On the other hand, Section 309.07, Revised Code, authorizes the county prosecutor to appoint criminal investigators whose compensation shall be fixed, within certain limits, by the court of common pleas.

In addition, the prosecutor is allowed an amount equal to one-half his official salary, under Section 325.12, Revised Code, as follows:

"* * * [T]o provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice.* * *"

This fund may be used to hire additional criminal investigators (Opinion No. 557, Opinions of the Attorney General for 1917; Opinion No. 664, Opinions of the Attorney General for 1919; Opinion No. 324, Opinions of the Attorney General for 1923; Opinion No. 251, Opinions of the Attorney General for 1927) and the prosecutor is granted a broad discretion in such expenditure (Opinion No. 69-159, Opinions of the Attorney General for 1969).

I find no statutory prohibition against a full-time employee of either the county treasurer or the county engineer serving as a part-time investigator for your office. We must, therefore, look to the rule of the common law as to compatibility of employment. In Ohio, the general rule on this subject has been stated in State, ex rel. Attorney General v. Gebert, 12 Ohio C.C.R. (n.s.) 274, 275 (1909), as follows:

"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 extended summary of the law on this matter, see State, ex rel. Hover v. Wolven, 175 Ohio St. 114 (1963).

I assume, as do you, that it is physically possible for the investigator to perform both jobs, but that, of course, is a question of fact rather than of law. (Opinion No. 1993, Opinions of the Attorney General for 1961, and Opinion No. 2043, Opinions of the Attorney General for 1961.) Furthermore, it is clear that the prosecuting attorney, the county treasurer and the county engineer each has his own proper statutory function to perform in the county government, and that none of the three offices is subordinate to either of the others. The remaining question is whether either the treasurer or the engineer exercises any check upon the prosecutor, or vice versa.

Although it is difficult to see how the offices of either the treasurer or engineer can operate as a check upon the prosecutor, the same cannot be said of the converse situation since the prosecutor's power to inquire into the commission of crimes (Section 309.08, Revised Code) and his power to take all necessary action to protect public funds (Section 309.12, Revised Code) obviously creates a check upon the treasurer and the engineer. Here, however, we are concerned only with an employee, who works full-time for either the treasurer or the engineer, and only part-time for the prosecutor under an agreement which provides that he shall not participate in any investigation of his full-time employer.

In these circumstances, I think the logic of Opinion No. 2797,

Opinions of the Attorney General for 1962, requires a determination that the two positions are not incompatible. In that Opinion, my predecessor dealt with a case in which one person held positions as an employee of the county auditor and as village mayor. He pointed out that the auditor and the mayor might be in conflict when the village budget came up for review by the budget commission of which the auditor was a member. The Opinion distinguished the position of a mere employee, however, in the following language:

"While I might be constrained to agree with my predecessors as to the positions of deputy auditor and village mayor conflicting because of the budget commission duties, I do not believe that such a conflict would exist as to an employee such as here concerned. Such an employee, not being a deputy auditor, cannot act for the auditor and would have no connection with the budget commission other than possible purely ministerial duties that might be assigned by the auditor."

Similar rulings have been made as to compatibility of the positions of stenographer to the prosecutor and deputy clerk of courts (Opinion No. 3717, Opinions of the Attorney General for 1926) and of stenographer to the prosecutor and court stenographer (Opinion No. 1023, Opinions of the Attorney General for 1920).

In specific answer to your question, it is my opinion that there is no incompatibility in a full-time employee of the county treasurer or the county engineer serving also as a part-time investigator on the staff of the prosecuting attorney, as long as it is understood that his duties will not involve any investigation of his full-time employer.