

OPINION NO. 80-035

Syllabus:

An individual may simultaneously hold the office of township trustee and that of trustee of a technical college district.

To: Edward Q. Moulton, Chancellor, Ohio Board of Regents, Columbus, Ohio
By: William J. Brown, Attorney General, June 11, 1980

I have before me your request for my opinion inquiring into the compatibility of the positions of township trustee and trustee of a technical college district.

In court cases and Attorney General opinions analyzing the compatibility of different positions, limitations upon the ability of one person to simultaneously hold multiple public offices have been found to arise from a number of different sources. These limitations adapt to a format of seven basic questions, each of which must be examined before it may be stated that the same person may hold both public positions at the same time. See 1979 Op. Att'y Gen. No. 79-III. The questions are as follows:

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. It is 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?

My consideration of the question of compatibility which you raise is limited to common law principles and enacted provisions which forbid dual office-holding. In certain factual contexts which may or may not arise in a given case, the holding of two public positions may trigger prohibitions against having an interest in a public contract, see R.C. 2921.42; R.C. 731.02, or violations of the ethics provisions of R.C. Chapter 102. These statutes may involve sanctions or a forfeiture of office, but are not usually pertinent to a discussion of compatibility of public positions. For this reason, I am not considering them in this opinion. See 1979 Op. Att'y Gen. No. 79-III.

I turn now to the questions set forth above. Questions number six and seven are of local concern, and I assume, for the purposes of this opinion, that there are no departmental regulations, charter provisions, or ordinances which limit the holding of outside employment by a township trustee or by a technical college district trustee.

Since both positions involved in your question fall within the unclassified service, as defined by R.C. 124.11(A), it is not necessary to consider the applicability of R.C. 124.57, which prohibits certain political activity by members of the classified civil service.

With respect to the second question, in considering whether an individual may hold the two public positions with which you are concerned, it must be determined initially whether a trustee of a technical college district is a public officer, and if so, then whether R.C. 3357.05 prohibits such technical college district trustee, a public officer, from holding another public office.

The usual criteria in determining whether a position is a public office are durability of tenure, oath, bond, emoluments, independence of the functions exercised by the appointee, and character of the duties imposed upon him. State ex. rel. Att'y Gen. v. Anderson, 45 Ohio St. 196, 12 N.E. 656 (1887). However, the chief and most decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law. If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent,

political or governmental functions, then the position is a public office and not an employment. State ex rel. Landis v. Butler County, 95 Ohio St. 157, 115 N.E. 919 (1917).

Hence, it can be stated that the integral characteristic which distinguishes public office from public employment is that the creation and conferring of a public office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public. Accordingly, a public officer may be distinguished from a public employee in that the former is one who is authorized to exercise functions of an executive, legislative, or judicial character. State ex rel. Milburn v. Pethtel, 153 Ohio St. 1, 90 N.E. 2d 686 (1950); State ex rel. Atty Gen. v. Jennings, 57 Ohio St. 415, 49 N.E. 404 (1898).

An investigation of the relevant statutes makes clear that a trustee of a technical college district is indeed a public officer. Under R.C. 3357.06, "each member of the board of trustees of a technical college district, before entering upon his official duties shall take and subscribe to an oath that he will honestly, faithfully, and impartially perform the duties of his office." (Emphasis added.) Moreover, R.C. 3357.09 sets forth the powers and duties of a board of trustees of a technical college district, which include owning and operating a technical college; holding, purchasing, leasing or selling real and personal property as needed by the college; appointing the president and faculty of the college; establishing schedules of fees and tuition; and granting associate degrees. It is clear that the trustees have "statutorily-prescribed duties which involve the exercise of continuing governmental functions" and, therefore, are public officers. State ex rel. Landis v. Butler County, 95 Ohio St. 157, 115 N.E. 919 (1917).

R.C. 3357.05 reads, in relevant part:

Within ninety days after a technical college district is created. . trustees shall be appointed to serve as a board of trustees of the technical college district. Appointees shall be qualified electors residing in the technical college district and shall not be employees of any governmental agency. No new trustee may be appointed who is a member of any board of education. (Emphasis added.)

The above section has previously been construed not to prohibit public officers (as distinguished from governmental employees) from holding the position of trustee of a technical college district. 1978 Op. Atty Gen. No. 78-048. The question then arises as to whether the position of township trustee is a public office or a public employment. Public officers are not "employees" in the traditional sense since they are not subject to supervisory control in the manner in which they execute their duties. State ex rel. Newman v. Skinner, 128 Ohio St. 325, 191 N.E. 127 (1934).

Township trustees are elected to office pursuant to R.C. 505.01, pursuant to R.C. 505.02 give bond to the state before entering upon the discharge of official duties, and possess statutorily-prescribed duties which involve the exercise of continuing governmental functions. See, e.g., R.C. 505.26; R.C. 505.37; R.C. 505.50. It follows, then, under the rules for identifying public officers which are outlined above, that township trustees are public officers rather than governmental employees. In addition, an examination of the relevant statutes does not disclose any express statutory prohibition which would preclude a township trustee from serving as a trustee of a technical college district.

The third and fourth questions, which must be answered in the negative before finding public positions compatible, constitute the common law test of incompatibility. The common law test asks whether one office is subordinate to or a check upon the other, and whether it is physically possible for one person to hold both positions. State ex rel. Attorney General v. Gebert, 12 Ohio C.C. (n.s.) 274, 276 (Cir. Ct. Franklin County 1909).

I will first consider the question of whether either the office of township trustee or the office of trustee of a technical college district is subordinate to or a check upon the other. In Pistole v. Wiltshire, 90 Ohio L. Abs. 525 (C.P. Scioto County 1961), the court was presented with the question of whether the positions of township trustee and deputy sheriff were compatible. Answering the issue of subordination in the negative, the court stated:

Obviously one is not subordinate to the other because they are in entirely different fields. The township trustees are elected and responsible only to the people who elect them. The deputy sheriff is appointed by the sheriff who is likewise elected, he serves at the pleasure of the sheriff, and is directly responsible to him and takes his orders from him. Neither of the positions are subordinate to the other and neither serves as a check upon the other.

90 Ohio L. Abs. at 531.

As stated in Pistole, township trustees are responsible only to the electors who placed them in office. Trustees of a technical college district are appointed either by the governor or by the boards of education of the various school districts whose territories comprise the technical college district, and are not in any manner subordinate to a board of township trustees. R.C. 3357.05. Accordingly, it does not appear that either position is subordinate to, or a check upon, the other.

However, compatibility issues do not involve only an examination of whether one position directly, or indirectly, controls the other. The common law rule, designed in part to avoid divided loyalties, also requires an examination of whether a person serving in two different public capacities is subject to a conflict of interest between the two positions—the fifth question in the consideration of the simultaneous holding of public positions. An individual who serves in dual public positions faces a situation which poses a conflict of interests when his responsibilities in one position are such as to influence the performance of his duties in the other position, thereby subjecting him to influences which may prevent his decisions from being completely objective. See, e.g., 1970 Op. Att'y Gen. No. 70-170; 1970 Op. Att'y Gen. No. 70-168; 1964 Op. Att'y Gen. No. 959, p. 2-129; 1961 Op. Att'y Gen. No. 2206, p. 248; 1958 Op. Att'y Gen. No. 1705, p. 81.

If the technical college district and the township in question are geographically separate from one another, the possibility that a conflict situation will arise appears remote. However, in the event that the township is located within the technical college district (especially if the institution's physical facilities are located within the township) there are several statutory provisions through which a board of township trustees might become involved with the board of trustees of a technical college district. R.C. 3357.09(B) empowers the board of trustees of technical college districts to purchase, sell, or lease real and personal property "on whatever terms and for whatever consideration may be appropriate for the purposes of the institution." Boards of township trustees are authorized to acquire land and buildings for various purposes, such as office space, establishment of parks, and provision of police protection, pursuant to the provisions of R.C. 505.26, R.C. 505.261, and R.C. 505.50. Additionally, a board of township trustees could be called upon to make decisions which would affect a technical college whose physical plant was located within the township boundaries through consideration of such matters as the adoption of fire safety regulations pursuant to R.C. 505.37 and R.C. 505.371.

In previous opinions I have stated that no hard and fast rule should be laid down with respect to the question of whether a potential conflict will render positions incompatible, but that each potential conflict question should be decided upon its particular facts. See 1979 Op. Att'y Gen. No. 79-111. With respect to your specific inquiry, it should be noted that it is only speculative whether a board of township trustees would enter into a transaction with a technical college district involving the purchase or lease of land and buildings. The degree of likelihood that such a transaction would occur depends upon a number of factors, such as whether

the technical college involved owns land or buildings situated within the township, and whether such property is suitable for use by the township. Similarly, a board of township trustees would be called upon to make regulatory decisions which might affect a technical college only if the institution has physical facilities located within the boundaries of the township.

It appears in this situation that the likelihood of the potential conflict is remote, and would involve only a small fraction of the affairs of each position. For these reasons, it is my opinion that the positions of township trustee and trustee of a technical college district are compatible. However, inasmuch as it is contrary to public policy for a public officer to expose himself to the temptation of acting in any manner other than in the public's best interest, an individual holding both positions should abstain from any discussion of, or vote upon, any particular matter relating to the other entity which may eventually arise during his service on either board. Pistole v. Wiltshire, supra.

Finally, the fourth question relating to incompatibility asks whether it is physically possible for one person to discharge the duties of both positions. This test must, of course, take into account the time demands that each position will make upon the individual involved. It is, therefore, a factual question which can best be resolved by the interested parties.

In that regard, it is my understanding that neither of the positions discussed herein requires the full time attention of the officeholder. Upon that understanding, and upon the assumption that no other facts preclude the physical performance of both sets of duties by one individual or otherwise cause an overlap of responsibilities, I conclude that the same person may serve as a township trustee and as a trustee of a technical college district.

Accordingly, it is my opinion, and you are advised, that an individual may simultaneously hold the office of township trustee and that of trustee of a technical college district.