

July 22, 2016

The Honorable Keller J. Blackburn
Athens County Prosecuting Attorney
1 South Court Street
Athens, Ohio 45701

SYLLABUS:

2016-025

1. R.C. 731.12 prohibits a person from serving simultaneously, within the same county, as member of a village legislative authority and county dog warden.
2. A person may serve simultaneously, within the same county, as member of a board of township trustees and county dog warden, provided the person appointed county dog warden seeks election to the office of township trustee in a nonpartisan election or is appointed to a vacancy on a board of township trustees and the office of township trustee normally is filled by nonpartisan election.



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OPINION NO. 2016-025

The Honorable Keller J. Blackburn
Athens County Prosecuting Attorney
1 South Court Street
Athens, Ohio 45701

Dear Prosecutor Blackburn:

We have received your request whether the position of county dog warden is compatible with service as a member of a village legislative authority or a board of township trustees. Whether two public offices or positions are compatible depends upon the answers to the following seven questions:

1. Is either position in the classified civil service of the state, a county, a city, a city school district, or a civil service township as defined in R.C. 124.57?
2. Do any constitutional provisions or the governing statutes of either position prohibit or otherwise limit employment in another public position or the holding of another public office?
3. Is one of the positions subordinate to, or in any way a check upon, the other?
4. Is it physically possible for one person to perform the duties of both positions?
5. Is there a conflict of interest between the two positions?
6. Are there any controlling local charter provisions, resolutions, or ordinances?
7. Does a federal, state, or local departmental regulation prevent a person from holding both positions?

See 2014 Op. Att’y Gen. No. 2014-045, at 2-391 (“[a] seven-question compatibility test is used to determine whether a person may serve simultaneously in multiple public positions”); 2004 Op. Att’y Gen. No. 2004-019, at 2-153 to 2-154 (setting forth the seven-part compatibility test); 1979 Op. Att’y Gen. No. 79-111, at 2-367 to 2-368 (the seven-part compatibility test applies to the simultaneous holding of a public office and a public employment by the same person). All of

these questions “must yield answers in favor of compatibility in order to conclude that two positions are compatible.” 2013 Op. Att’y Gen. No. 2013-008, at 2-78.

The Offices of Village Legislative Authority Member and County Dog Warden are Incompatible

The offices of village legislative authority member and county dog warden are rendered incompatible pursuant to the second question of the compatibility test. This question asks whether there are any constitutional provisions or statutes applicable to either position that prohibit or otherwise limit employment in another public position or holding another public office. See 2A Ohio Admin. Code 123:1-46-02(E) (“[e]mployees in the unclassified service of the state, are not prohibited from engaging in political activity unless specifically precluded by federal or state constitutional or statutory provisions”). R.C. 731.12 states, in part, that “[n]o member of the legislative authority [of a village] shall hold any other public office.”¹ Therefore, if a person appointed as county dog warden holds a public office, he is prohibited by R.C. 731.12 from serving simultaneously as a member of a village legislative authority.

The term “public office” is not defined for the purpose of R.C. 731.12 or more generally for purposes of R.C. Chapter 731 or R.C. Title 7. See *State ex rel. Scarl v. Small*, 103 Ohio App. 214, 215, 145 N.E.2d 200 (Portage County 1956) (“[n]either the Constitution of Ohio nor the Code defines ‘public office’”). “The usual criteria considered 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 the appointee.” 2011 Op. Att’y Gen. No. 2011-021, at 2-173 (citing *State ex rel. Landis v. Bd. of Comm’rs of Butler Cnty.*, 95 Ohio St. 157, 159-60, 115 N.E. 919 (1917)); see also 2013 Op. Att’y Gen. No. 2013-008, at 2-78. The following characteristics are the most decisive in determining whether a position is a public office: (1) the position requires the person to exercise independent public duties, a part of the sovereignty of the state; (2) the exercise of those duties are by virtue of the person’s election or appointment to the position in question; and (3) the person is not subject to the direction and control of a superior officer in the exercise of those duties. See 2011 Op. Att’y Gen. No. 2011-021, at 2-174; 1963 Op. Att’y Gen. No. 3548, p. 58, at 61.

The nature and characteristics of the position of county dog warden are indicative of a public office. A county dog warden is appointed by the board of county commissioners to enforce statutes that govern the registration, sale, transportation, ownership, and impoundment of dogs. R.C. 955.12; see also R.C. 955.01-.27; R.C. 955.50-.53. A county dog warden possesses “the same police powers as are conferred upon sheriffs and police officers in the performance of their duties as prescribed by [R.C. 955.01-.27] and [R.C. 955.50-.53]” and gives bond for the faithful performance of the duties of the office. R.C. 955.12. Although appointed by a board of

¹ A village that adopts a charter pursuant to Article XVIII, § 7 of the Ohio Constitution may include a provision in the charter that establishes qualifications for serving as a member of the village legislative authority that differ from those in R.C. 731.12.

county commissioners, a county dog warden is not subject to the direction and control of the board in the performance of these duties. *See id.*

In the course of adjudicating the compatibility of the positions of county dog warden and village marshal, one court determined that county dog warden is a public office. *See In re Compatibility of Cnty. Dog Warden & Vill. Marshal*, 19 Ohio Misc. 2d 12, 13, 482 N.E.2d 1355 (C.P. Van Wert County 1984) (“the position of a dog warden, clothed with part of governmental sovereignty, is indeed a public office”). The court set forth the following reasoning in support of its conclusion:

R.C. 955.12 provides, *inter alia*, that a dog warden shall give a bond for faithful discharge of duties, shall have similar police powers as general law enforcement officers in the discharge of duties relating to dogs, and shall have the power to seize and impound certain dogs. Certainly, a position granted statutory police powers of a nature similar to those of law enforcement personnel and conferred with the power to seize the property of others may be said to be a “public office”; the position is clothed with the responsibility to discharge particular duties which are a part of the sovereignty of the state, relating to a public function in the interest of citizens. Further, that the statute mandates the giving of a bond in addition to the granting of police powers would indicate that the position is a public office.

Id. at 12.

Based upon the foregoing, we conclude that a county dog warden is a public office for the purpose of R.C. 731.12. R.C. 731.12 prohibits a member of a village legislative authority from serving in any other public office. It follows that R.C. 731.12 prohibits a person from serving simultaneously as a member of a village legislative authority and county dog warden. Upon determining that the second question of the compatibility analysis disfavors compatibility, it is unnecessary for us to address the remaining six questions. *See generally* 2013 Op. Att’y Gen. No. 2013-008, at 2-79 (“[a]s one of the seven compatibility questions has yielded an answer disfavoring compatibility, it is unnecessary for us to address the remaining six questions”).

The Offices of Township Trustee and County Dog Warden are Compatible

Your next question asks whether the offices of township trustee and county dog warden are compatible. These positions are compatible only if the answers to all of the seven questions of the compatibility analysis are answered in favor of compatibility. 2013 Op. Att’y Gen. No. 2013-008, at 2-78.

The first question of the compatibility analysis asks whether one of the two positions in question is in the classified civil service of “the state, the several counties, cities, and city school districts of the state, or the civil service townships of the state” within the meaning of R.C.

124.57.² R.C. 124.57(A); *see also* 2006 Op. Att’y Gen. No. 2006-041, at 2-394. R.C. 124.57(A) states that an officer or employee in the classified civil service of “the state, the several counties, cities, ... city school districts ... or the civil service townships of the state,” shall not “be an officer in any political organization or take part in politics other than to vote ... and to express freely political opinions.” R.C. 124.57(A) “prohibits an officer or employee in the classified service from seeking election or appointment to, or holding, a partisan political office, or engaging in other partisan political activities, and it prevents a partisan political officeholder from serving simultaneously as an officer or employee in the classified service.” 2006 Op. Att’y Gen. No. 2006-041, at 2-394 to 2-395 (quoting 2003 Op. Att’y Gen. No. 2003-041, at 2-336). A partisan political office includes a public office obtained in a partisan election as well as a public office obtained in a “nonpartisan election if the nomination to candidacy was obtained in a partisan primary or through the circulation of nominating petitions identified with a political party.” Rule 123:1-46-02(C).

The political activity prohibition in R.C. 124.57 applies only to officers or employees of civil service townships.³ A trustee of a township that is not a civil service township is not subject to R.C. 124.57. 2003 Op. Att’y Gen. No. 2003-041, at 2-337 (“[R.C. 124.57] does not apply ... to officers and employees in the service of a township that is not a civil service township”). Furthermore, R.C. 124.11(A)(1) explicitly excludes “officers elected by popular vote” from the classified civil service. A township trustee is an officer elected by vote in a general election. *See* R.C. 505.01. Accordingly, a township trustee of a civil service township also is not subject to the prohibition set forth in R.C. 124.57. 2011 Op. Att’y Gen. No. 2011-034, at 2-266 (“[a]s an elected public officeholder, a township trustee is not in the classified service”).

The office of county dog warden, however, is in the classified civil service and therefore a person who serves as county dog warden is subject to the prohibition set forth in R.C. 124.57. *See* 1985 Op. Att’y Gen. No. 85-042, at 2-148 (“[a] county dog warden is, as a general matter, in the classified service of the county, and is thus subject to the prohibition of R.C. 124.57”); 1984 Op. Att’y Gen. No. 84-070, at 2-225 n.1 (“[g]enerally, the dog warden is in the classified service, unless exempted from the classified service”). R.C. 124.11(B) states that “[t]he classified

² The state and local civil service in Ohio is divided into the classified and unclassified service. R.C. 124.11; *see also* Ohio Const. art. XV, § 10. A person employed in the classified civil service possesses a statutory claim of qualified entitlement to continued employment, *see* R.C. 124.23, R.C. 124.34, whereas a person employed in the unclassified civil service may be dismissed without cause, provided that the dismissal is not otherwise unlawful. *See* 1996 Op. Att’y Gen. No. 96-040, at 2-154.

³ “‘Civil service township’ means any township with a population of ten thousand or more persons residing within the township and outside any municipal corporation, which has a police or fire department of ten or more full-time paid employees and which has a civil service commission established under [R.C. 124.40(B)].” R.C. 124.01(G).

service shall comprise all persons in the employ of the ... several counties ... not specifically included in the unclassified service.” No statute excludes a county dog warden from the classified civil service, nor have you indicated that the county dog warden is otherwise exempted from the classified civil service by the board of county commissioners. *See generally* 1984 Op. Att’y Gen. No. 84-070, at 2-225 n.1 (noting that for the purpose of that opinion, the county dog warden had been exempted from the classified civil service by the board of county commissioners pursuant to R.C. 124.11(A)(8)). Therefore, R.C. 124.57 prohibits the county dog warden in this instance from “seeking election or appointment to, or holding, a partisan political office.” 2006 Op. Att’y Gen. No. 2006-041, at 2-394 to 2-395 (quoting 2003 Op. Att’y Gen. No. 2003-041, at 2-336).

A member of a board of township trustees is nominated by petition and stands for election to that office on a nonpartisan ballot, “unless a majority of the electors of such township have petitioned for a primary election.” R.C. 3513.253; *see also* R.C. 3505.04; R.C. 3513.01; 2011 Op. Att’y Gen. No. 2011-034, at 2-267 n.4 (“[c]andidates for the office of township trustee are nominated by petition, rather than in a primary election. ... When a township does not conduct a primary election for the office of township trustee, the candidates for such office appear on a nonpartisan ballot”); 1978 Op. Att’y Gen. No. 78-022, at 2-52. Accordingly, R.C. 124.57 does not prohibit a county dog warden from serving simultaneously as a member of a board of township trustees when the township trustee is nominated by petition and elected after appearing on a nonpartisan ballot. A person serving as county dog warden may also serve simultaneously as a township trustee if he is appointed to a vacancy on a board of township trustees pursuant to R.C. 503.24 and the office of township trustee is normally filled by nonpartisan election. *See* 1978 Op. Att’y Gen. No. 78-022 (syllabus) (“R.C. 124.57 does not prohibit a classified civil servant from being appointed to the office of township trustee pursuant to R.C. 503.24, or from seeking that office in a non-partisan election”).⁴ The election of a township trustee transforms from nonpartisan to partisan when township electors petition for a primary election pursuant to R.C. 3513.253. 1978 Op. Att’y Gen. No. 78-022, at 2-52 (“R.C. 3513.253 requires that a primary election be held upon petition of a majority of the electors in the township. Where such a primary is held the ensuing general election becomes partisan, with partisan ballots in use”). In that circumstance, R.C. 124.57 prohibits a person serving as county dog warden from seeking election to the office of township trustee. 1978 Op. Att’y Gen. No. 78-022, at 2-52 (it would be “inappropriate” in these circumstances “for a classified civil servant to seek office in such an election”).

Therefore, the first question of the compatibility analysis may be answered in favor of compatibility provided the person that serves as county dog warden seeks election to the office of township trustee in a nonpartisan election or is appointed to a vacancy on a board of township

⁴ The conclusion in 1978 Op. Att’y Gen. No. 78-022 overruled 1962 Op. Att’y Gen. No. 2879, p. 213, in which the Attorney General had concluded that R.C. 143.31, predecessor to R.C. 124.57, prohibited a member of a board of township trustees from serving simultaneously as county dog warden.

trustees and the office of township trustee normally is filled by nonpartisan election. *Cf.* 2011 Op. Att’y Gen. No. 2011-034 (syllabus) (“[a] person may serve simultaneously as a township trustee and bridge worker in the classified service of a county highway department when the office of township trustee is normally filled by nonpartisan election”).

The second question of the compatibility analysis asks whether there are any constitutional provisions or statutes applicable to either position that prohibit or otherwise limit employment in another public position or the holding of another public office. *See* rule 123:1-46-02(E) (“[e]mployees in the unclassified service of the state, are not prohibited from engaging in political activity unless specifically precluded by federal or state constitutional or statutory provisions”). No constitutional provision or statute in the Revised Code limits the outside employment of a township trustee or a county dog warden. Therefore, the second question of the compatibility analysis may be answered in favor of compatibility.

The third question of the compatibility analysis asks whether one of the positions is subordinate to, or in any way a check upon, the other. A county dog warden is appointed by the board of county commissioners and receives “such compensation as the board considers necessary to enforce [R.C. 955.01-.27] and [R.C. 955.50-.53].” R.C. 955.12. A county dog warden is not subject to the direction and control of the board of county commissioners or any other superior authority in his performance of the duties of county dog warden. *See* R.C. 955.01-.27; R.C. 955.50-.53; *see also In re Compatibility of Cnty. Dog Warden & Vill. Marshal*, 19 Ohio Misc. 2d at 12-13 (a county dog warden is “clothed with part of governmental sovereignty”). A township trustee is an elected public officeholder. R.C. 505.01. A township trustee serves and is responsible to the township’s electorate and performs the duties and responsibilities imposed upon him by the law of Ohio. 2011 Op. Att’y Gen. No. 2011-034, at 2-267. The offices of county dog warden and township trustee are appointed or elected by different authorities or bodies and operate independently of one another. Neither position is accountable or subordinate to the other, nor is either position responsible for assigning duties to, or supervising the activities of, the other. Accordingly, neither position is subordinate to, or in any way a check upon, the other.

The fourth question of the compatibility analysis asks whether it is physically possible for one person to perform the duties of both positions. “Whether an individual is physically able to adequately perform the duties of both positions is a question of fact which is best answered by the parties involved.” 1993 Op. Att’y Gen. No. 93-016, at 2-89. In 2004 Op. Att’y Gen. No. 2004-019, at 2-157 to 2-158, we offered the following guidance for determining whether a person is physically able to perform the duties of both positions:

[I]n order to serve simultaneously [in both positions], a person must be certain that he will be able to carry out the duties of both positions in a competent and timely manner. This means that there should not be a direct conflict between the times when the person is needed to perform duties on behalf [of both positions].

We will presume for the purpose of this opinion that one person is physically able to perform the duties of both positions. *See generally* 1980 Op. Att’y Gen. No. 80-047, at 2-198 (assuming one person was physically capable of serving simultaneously as the secretary-treasurer of the regional airport authority and clerk-treasurer of the board of public library trustees of a county library district when the Attorney General “ha[d] no reason to believe” otherwise).

The fifth question of the compatibility analysis asks whether there is a conflict of interest between the two positions. A person may not hold two public positions simultaneously if a conflict of interest exists. 2012 Op. Att’y Gen. No. 2012-040, at 2-351. A conflict of interest exists if the duties and responsibilities of one position are of such a nature as to influence the duties and responsibilities of the other position, ““thereby subjecting [the person] to influences which may prevent [the person’s] decisions from being completely objective.””⁵ 2006 Op. Att’y Gen. No. 2006-041, at 2-397 (quoting 1980 Op. Att’y Gen. No. 80-035, at 2-149); *see also* 1993 Op. Att’y Gen. No. 93-016, at 2-89; 1979 Op. Att’y Gen. No. 79-111, at 2-371. As explained in 1979 Op. Att’y Gen. No. 79-111:

[O]ne in the public service “owes an undivided duty to the public. It is contrary to public policy for a public officer to be in a position which would subject him to conflicting duties or expose him to the temptation of acting in any manner other than the best interest of the public.”

1979 Op. Att’y Gen. No. 79-111, at 2-371 (quoting 1970 Op. Att’y Gen. No. 70-168, at 2-336). Whether a person who serves simultaneously in the positions of county dog warden and township trustee is subject to a conflict of interest requires an examination of the duties and responsibilities of each position. *See* 2004 Op. Att’y Gen. No. 2004-044, at 2-380.

The Revised Code confers upon a board of township trustees numerous, varied powers and duties related to the government of the township. *See generally* R.C. Chapter 505. These powers and duties include appointing a township administrator, R.C. 505.031, keeping an inventory of township supplies, R.C. 505.04, maintaining a list of building nuisances, R.C. 505.06, accepting and disposing of property, R.C. 505.10, exchanging, transferring, and leasing real property, R.C. 505.104, R.C. 505.11, purchasing, constructing, or otherwise acquiring township parks, public library buildings, and other public areas, R.C. 505.26, and providing fire and police protection to residents of the township. *See, e.g.*, R.C. 505.37-.39, R.C. 505.43.

⁵ As the Ohio Ethics Commission is authorized to determine the applicability of the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43, R.C. 102.08, the Attorney General “refrain[s] from interpreting and applying [those] provisions by way of a formal opinion.” 2011 Op. Att’y Gen. No. 2011-008, at 2-60 n.1. For a determination of whether those provisions apply to the positions at issue in this opinion, we recommend that you contact the Ohio Ethics Commission. *Id.*

A county dog warden is appointed by the board of county commissioners to enforce R.C. 955.01-.27 and R.C. 955.50-.53. R.C. 955.12; *see also* 1985 Op. Att’y Gen. No. 85-042, at 2-149 (“[t]he duties of a county dog warden are set forth in R.C. Chapter 955”). These statutes regulate dog registration and kennels, R.C. 955.01-10, R.C. 955.14, R.C. 955.21, the sale, transportation, or transfer of ownership of dogs, R.C. 955.11, R.C. 955.50, dog impoundment and disposal, R.C. 955.15-.18, and the confinement and treatment of dangerous dogs. R.C. 955.22. A county dog warden is responsible for making a record of all dogs owned, kept, and harbored in the county, patrolling the county, and seizing and impounding dogs running at large. R.C. 955.12. A county dog warden possesses the same police powers as are conferred upon sheriffs and police officers in the performance of the duties of the office. *Id.* A county dog warden is responsible for depositing all funds he receives in connection with the administration and enforcement of R.C. Chapter 955 in a dog and kennel fund. *Id.*; *see also* R.C. 955.19.

We are able to conceive of no instances in which the powers and duties of a township trustee and the powers and duties of a county dog warden will conflict or overlap. Pursuant to R.C. 955.21(B)(2), a township may, in certain circumstances, adopt local resolutions to control dogs within the township, so long as those resolutions do not conflict with any other provision of the Revised Code. A county dog warden has no authority to enforce resolutions to control dogs that are adopted by a township located in the county.⁶ *Cf.* 1984 Op. Att’y Gen. No. 84-034, at 2-103 (“a county dog warden has no authority to enforce municipal animal control ordinances”). Therefore, a conflict of interest does not exist even when a township has adopted local resolutions to control dogs pursuant to R.C. 955.21(B)(2). Accordingly, we conclude that the fifth question of the compatibility analysis may be answered in favor of compatibility.

The final two questions of the seven-part compatibility test ask whether any local charter provisions, resolutions, ordinances, or departmental regulations, or state or federal departmental regulations limit the holding of outside public employment by a county dog warden or township trustee. Whether any local charter provisions, resolutions, ordinances, or departmental

⁶ In 1981 Op. Att’y Gen. No. 81-037 (syllabus, paragraph 1), the Attorney General concluded that “[a] county may contract with a municipality to enforce municipal animal control ordinances and issue citations for violations of such ordinances” and that “[t]he county may employ the person acting as county dog warden to assume the additional duties which the county has assumed pursuant to such contract, provided that the positions” are otherwise compatible. *See also* R.C. 307.15(A)(1) (authorizing a board of county commissioners and the legislative authority of a village to enter into an agreement “whereby the board [of county commissioners] undertakes, and is authorized by the [village legislative authority], to exercise any power, perform any function, or render any service, on behalf of the [village]” that the village is authorized to perform or render). You have not indicated that the board of township trustees and board of county commissioners have entered into an agreement in which the person serving as county dog warden shall also be employed by the board of county commissioners to enforce township resolutions to control dogs. Accordingly, it is not necessary that we address any conflicts of interest that could arise in that situation.

regulations apply is a matter of local concern. *See* 1996 Op. Att’y Gen. No. 96-062, at 2-252; 1993 Op. Att’y Gen. No. 93-016, at 2-85; 1979 Op. Att’y Gen. No. 79-111, at 2-368; *see also* note 1, *supra*. We presume, having received no information to the contrary, that no local charter provisions, resolutions, ordinances, or departmental regulations prohibit one person from holding the positions of county dog warden and township trustee in this instance. Further, there are no state or federal departmental regulations applicable. Thus, questions six and seven of the compatibility analysis may be answered in favor of compatibility.

Conclusions

In sum, it is our opinion, and you are hereby advised that:

1. R.C. 731.12 prohibits a person from serving simultaneously, within the same county, as member of a village legislative authority and county dog warden.
2. A person may serve simultaneously, within the same county, as member of a board of township trustees and county dog warden, provided the person appointed county dog warden seeks election to the office of township trustee in a nonpartisan election or is appointed to a vacancy on a board of township trustees and the office of township trustee normally is filled by nonpartisan election.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General