

**OPINION NO. 85-080****Syllabus:**

The office of township trustee is compatible with the position of equipment operator in the Ohio Department of Transportation, provided that the township in question has neither railroad grade crossings nor municipal corporations within its boundaries, and further provided that the township trustee is elected in a nonpartisan election. (1959 Op. Att'y Gen. No. 602, p. 313, overruled in part and modified in part.)

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**To: W. Allen Wolfe, Muskingum County Prosecuting Attorney, Zanesville, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, December 26, 1985**

I have before me your request for my opinion regarding the compatibility of the office of township trustee and the position of employee in the Ohio Department of Transportation. Your request reads as follows:

In a certain township in our county, trustees are elected in nonpartisan elections. There are no

railroad tracks or municipal corporations in the township. There is presently one state highway open to travel by the public which intersects with but one of the township roads. The Board of Trustees has elected to divide the township into three road districts under Ohio Revised Code Section 5571.02(B). In light of 1959 Op. Att'y Gen. No. 602, p. 313, is there a conflict between the position of employee in the state highway department<sup>1</sup> and township trustee of the aforementioned township, so long as the intersection mentioned is not within the road district of which this trustee has charge? (Footnote added.)

In correspondence with a member of my staff you have indicated that the trustee in question is employed by the Department of Transportation as an all-around equipment operator, having no supervisory duties. He receives his work assignments and orders from the county superintendent, and he is typically assigned work such as filling berms, patching potholes, installing berms, and operating a road grader.

As you note in your request, the precise compatibility question you raise was addressed by one of my predecessors on a prior occasion. In 1959 Op. Att'y Gen. No. 602, p. 313 my predecessor determined that the office of township trustee is incompatible with the position of state Highway Department employee whether the latter position is in the classified or unclassified service of the state Highway Department. With respect to a township trustee employed in the classified service of the state, 1959 Op. No. 602 states as follows at 314:

As to the first aspect of your question, namely, whether or not the position of township trustee is compatible with that of a classified employee of the state highway department, the testing of the two positions in the light of the foregoing broad descriptive definition is not required. I merely need to apply the well-known express provision directed against partisan political activity of all officers and employees in the classified service of the state, its counties, cities and school districts contained in Section 143.41,<sup>2</sup> Revised Code, and I am thus lead to the

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<sup>1</sup> 1971-1972 Ohio Laws, Part II, 2399 (Am. Sub. H.B. 1064, eff. Sept. 27, 1972) transferred all duties, powers and functions of the Department of Highways to the newly-created Department of Transportation. See R.C. 5501.03; R.C. 5501.06.

<sup>2</sup> The text of former R.C. 143.41 is now found in R.C. 124.57:

No officer or employee in the classified service of the state, the several counties, cities, and city school districts thereof, and civil service townships, shall directly or indirectly, orally or by letter, solicit or receive, or be in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political party or for any candidate for public office; nor shall any person solicit directly or indirectly,

inescapable conclusion that the office of township trustee, it being elective pursuant to Section 505.01, Revised Code, and therefore political, is incompatible with the position of a classified service employee of the state highway department. (Footnote added.)

With respect to a township trustee employed in the unclassified service of the state, 1959 Op. No. 602, after examining several provisions<sup>3</sup> of the Revised Code dealing with the respective responsibilities of township trustees and the Director of Highways with regard to township and state roads, concludes as follows at 315-16:

It is not difficult to see that the foregoing sections of the Revised Code contain the ingredients of contrariety and antagonism which may develop under a variety of circumstances between a township and the state department of highways, whereby a township trustee who would also be a state highway unclassified service employee could not act freely and without restraint with respect to one of the principal duties of township trustees. The possibility of direct conflict between two positions is best exemplified in the provisions of Sections 5524.02 and 5524.03, Revised Code, under which the director of state highways and a board of township trustees may appear in court as opponents.

In 1979 Op. Att'y Gen. No. 79-111, a somewhat more elaborate seven-question analysis was set forth for determining the compatibility of different public positions. In light of this more recent compatibility analysis, a reevaluation of the compatibility of the positions of township trustee and Department of Transportation employee is appropriate. In order to determine whether two public positions are compatible, it is necessary to consider the following seven questions:

1. Is either of the positions 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?

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orally or by letter, or be in any manner concerned in soliciting any such assessment, contribution, or payment from any officer or employee in the classified service of the state and the several counties, cities, or city school districts thereof, or civil service townships; nor shall any officer or employee in the classified service of the state, the several counties, cities, and city school districts thereof, and civil service townships, be an officer in any political organization or take part in politics other than to vote as he pleases and to express freely his political opinions.

<sup>3</sup> R.C. 5524.02 (now R.C. 5523.32), R.C. 5524.03 (now R.C. 5523.33), R.C. 5535.08, R.C. 5571.01 and R.C. 5571.02. These statutes are discussed below in greater detail.

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?

Question number four asks whether it is physically possible for one person to discharge the duties of both positions. This test must 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.

Questions number six and number seven are of local concern, and I assume, for the purpose of this opinion, that there are no local or departmental regulations that limit the holding of outside employment by an employee of the Department of Transportation or a township trustee.

Question number one asks whether either of the positions is a classified employment within the terms of R.C. 124.57, which prohibits classified employees from engaging in political activity other than to vote and freely express their opinions. See footnote two, supra. The position of township trustee is not a classified employment. See R.C. 124.11(A)(1); R.C. 505.01; 1983 Op. Att'y Gen. No. 83-016. Thus, a township trustee is not subject to the prohibition of R.C. 124.57. The position of equipment operator in the Ohio Department of Transportation is a classified employment. See R.C. 124.11(B). The scope of the proscription against classified employees engaging in political activity has been reconsidered since the issuance of 1959 Op. No. 602, and R.C. 124.57 has been construed as prohibiting a classified employee from being a candidate in a partisan election, but not as prohibiting a classified employee from being a candidate in a nonpartisan election. See 1983 Op. Att'y Gen. No. 83-033; 1982 Op. Att'y Gen. No. 82-085; 1978 Op. Att'y Gen. No. 78-022; 1974 Op. Att'y Gen. No. 74-034. You have informed me that in this instance, the election for township trustee is nonpartisan. See R.C. 3513.01; R.C. 3513.253 (candidates for township trustee are nominated by petition, rather than in a primary election, unless a majority of the township electors files a petition with the board of elections requesting a primary). See also R.C. 3505.04 (candidates who are nominated by petition seek election on a nonpartisan ballot). Therefore, in this instance, a classified employee of the Department of Transportation is not prohibited by R.C. 124.57 from running for election as township trustee.

I note in passing that federal law also imposes restrictions on the political activities of certain state and local officials or employees. See 5 U.S.C. §§1501-1508. 5 U.S.C. §1502 describes the types of political activities in which certain state or local officers or employees may not engage, and provides in part that, "[a] state or local officer or employee may not...be a candidate for elective office." 5 U.S.C. §1502(a)(3). 5 U.S.C. §1501(4) defines "state or local officer or employee" in part as:

an individual employed by a state or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or Federal agency, but does not include --

(A) an individual who exercises no functions in connection with that activity....

Thus, if an employee in the Department of Transportation is employed principally "in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency," and exercises some function in connection with that activity, he may not participate in those political activities described in 5 U.S.C. §1502, including being a candidate for elective office. 5 U.S.C. §1502(a)(3). 5 U.S.C. §1503, however, further provides that §1502(a)(3) does not prohibit a state or local officer or employee from being a candidate in a nonpartisan election. Thus, even if the employee in question is a state employee as defined in 5 U.S.C. §1501(4), he is not prohibited by §1502 from being a candidate for the office of township trustee in a nonpartisan election.

Question number two concerns whether the empowering statutes of either position limit outside employment. None of the statutes governing a township trustee limit the scope of a trustee's permissible outside employment. Further, I am unaware of any statute that limits the scope of outside employment permitted an employee of the Department of Transportation.

Question number three of the compatibility analysis asks whether one office or employment is subordinate to, or a check upon, the other. See State ex rel. Attorney General v. Gebert, 12 Ohio C.C. (n.s.) 274, 276 (Cir. Ct. Franklin County 1909). A determination whether one position is subordinate to, or a check upon, another office or employment involves a careful scrutiny of both positions and the powers and functions inherent in each.

There are a number of statutory provisions describing the powers and functions of township trustees with respect to state, county, intercounty and township roads. As a general matter, the state, and each county and township is required to maintain and repair its own roads. See R.C. 5535.01; R.C. 5535.08; R.C. 5571.01; R.C. 5571.02. See generally 5535.01 (dividing the public highways of the state into state roads, county roads, and township roads, and providing that state roads "include the roads and highways on the state highway system" and township roads include "all public highways other than state or county roads"). There are instances, however, in which the Director of the Department of Transportation or his employees may act as a check upon the township trustees in the performance of the trustees' functions with respect to public roads.

R.C. 5571.01(A) permits a board of township trustees to construct, reconstruct, resurface, or improve any intercounty or state highway within the township, but the plans and specifications for such work must first be approved by the Director of the Department of Transportation. R.C. 5571.02 permits a board of township trustees to maintain or repair an intercounty or state highway within the township limits, subject to the approval of the Director of the Department of Transportation. R.C. 5521.11 also permits the board of

township trustees, in cooperation with the board of county commissioners, to construct any part of the state highway system within the township. The plans for such construction must be submitted to the Director of the Department of Transportation for his approval, and any such construction is to be done under the supervision and inspection of the Director, his agents, or employees.

From an examination of R.C. 5521.11, R.C. 5571.01, and R.C. 5571.02, it is evident that the Director of the Department of Transportation may act as a check upon the board of township trustees in approving and supervising the performance of the board's functions with regard to state highways under the jurisdiction of the Department of Transportation. Further, there may be employees of the Department of Transportation, to whom the Director has assigned or delegated duties in connection with his responsibilities under R.C. 5521.11, R.C. 5571.01, and R.C. 5571.02, who would also act as a check upon a board of township trustees. I must conclude, however, that the fact that the trustee in question is an employee of the Department of Transportation does not per se result in that employment being a check upon the office of township trustee. I can conceive of no situation in which this particular employee, in performing the ordinary work of an equipment operator, would be in a position to work a check upon the office of township trustee. A situation could arise in which the township trustees would be answerable to an employee of the Department of Transportation insofar as the Director of the Department had delegated or assigned to that employee the responsibility of assisting him in the performance of his duties under R.C. 5521.11, R.C. 5571.01, or R.C. 5571.02. Indeed, R.C. 5521.11 specifically states an employee of the Department of Transportation may supervise and inspect construction work on the state highway system undertaken by the township trustees. It seems very unlikely, however, that duties pertaining to the approval of construction, improvement, maintenance or repair of state highways or work either of a supervisory nature or involving duties of inspection would be delegated or assigned to an equipment operator.

I am unaware of any instance in which a township trustee would act as a check upon an employee of the Department of Transportation. Thus, I conclude that neither the position of township trustee nor equipment operator in the Department of Transportation acts as a check upon, or is subordinate to, the other.

Question number five requires an examination of whether a person serving in two public capacities is subject to a conflict of interest. As was stated in 1970 Op. Att'y Gen. No. 70-168 (overruled on other grounds by 1981 Op. Att'y Gen. No. 81-100), at 2-336, one 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."

As noted above, 1959 Op. No. 602 concluded that there are conflicts of interest between the positions of township trustee and employee in the state Highway Department, emphasizing the conflict presented as a result of proceedings undertaken by the

Director of Highways pursuant to R.C. 5524.03<sup>4</sup> to close hazardous highway-railway grade crossings within townships. The opinion noted that in such proceedings the Director of State Highways and a board of township trustees might appear in court as opponents, and thus, an employee of the state Highway Department who also served on the the board of trustees would have a conflict of interest between his duties to the Director and his duties as township trustee. You have stated in your request, however, that there are no railroad tracks within the township. Since there are no railroad lines passing through the township in question there is, of course, no possibility that the Director of the Department of Transportation and the board of township trustees will appear in court as opponents in a proceeding brought by the Director to close a hazardous highway-railway grade crossing pursuant to R.C. 5523.33. There is, therefore, no possibility that this employee would encounter any conflict of interest between his duties to the Director of the Department of Transportation and his duties as township trustee with regard to the closing of a hazardous highway-railway grade crossing.

1959 Op. No. 602 also referred to R.C. 5535.08, which provides as follows:

The state, county, and township shall each maintain its roads, as designated in section 5535.01 of the Revised Code; however, the county or township may, by agreement between the board of county

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<sup>4</sup> R.C. 5524.01-.03 were repealed by 1961 Ohio Laws 582, 945 (Am. H.B. 1, eff. Jan. 10, 1961) and the provisions thereof were simultaneously reenacted as R.C. 5523.31, R.C. 5523.32 and R.C. 5523.33. R.C. 5523.31 requires the Director of Transportation to "survey all public crossings of railroads at grade, whether on state, county, or township highways or on streets or ways within municipal corporations," and to "devise a formula according to sound highway engineering practice for determining the probability of accident at each such crossing." R.C. 5523.33 reads in part:

If the director of transportation finds that a crossing could be closed to vehicular traffic, or to pedestrian traffic, or to both, without unreasonable inconvenience to the public, and the travel over said crossing diverted to other crossings, and if such crossing is on a road or highway other than a state highway and is outside the limits of a municipal corporation, the director may request the board of county commissioners of the county in which such crossing is located to discontinue such crossing and to close it to vehicular traffic, or to pedestrian traffic, or to both, by resolution, or as provided by sections 5553.01 to 5553.07 of the Revised Code....

If the board does not provide for the discontinuance of a crossing within ninety days after the filing of a request by the director, the director may petition the court of common pleas of the county in the manner and form set out in section 5523.32 of the Revised Code.

commissioners and the board of township trustees, contribute to the repair and maintenance of the roads under the control of the other. The state, county, or township, or any two or more of them, may, by agreement, expend any funds available for road construction, improvement, or repair upon roads inside a village. A village may expend any funds available for street improvement upon roads outside the village and leading thereto.

The opinion noted that this section could also present circumstances in which an individual township trustee who was employed by the state Highway Department would not be able to act freely and without restraint with respect to his duties as township trustee. The conflict apparently would arise if the township and state entered into an agreement to expend funds to construct, repair, or improve roads inside a village. In that case the township trustee would find himself negotiating the terms of such an agreement with his own employer, the state Highway Department.

The potential conflict of interest presented by R.C. 5535.08, however, will not arise for the trustee in question since you state in your request that there are no municipal corporations within this particular township. See generally Ohio Const. art. XVIII, §1 (classifying municipal corporations

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Upon the filing of such a petition the action shall proceed to issue, hearing and judgment as is provided in the case of municipal corporations by section 5523.32 of the Revised Code. The board of county commissioners and board of trustees of any township within which is located a crossing which the director petitions to discontinue may file an answer as provided by section 5523.32 of the Revised Code. After the judgment of the court has been rendered, the rights and obligations of the parties and the powers of the court shall be the same as is provided by section 5523.32 of the Revised Code.

The pertinent part of R.C. 5523.32, which deals with the closing of highway-railway grade crossings by the Director of the Department of Transportation within municipal corporations, to which reference is made in R.C. 5523.33, provides as follows:

If the court finds that the crossing should be closed to vehicular traffic, or to pedestrian traffic, or to both, it shall so order. If the court finds that the crossing cannot be closed without unreasonable inconvenience to the public, it shall find for the municipal corporation. Either party aggrieved by the order of the court may appeal as in other civil cases.

If a municipal corporation refuses or neglects to comply with an order made by the court as provided by this section, the court may enforce its orders by either mandamus or mandatory injunction, or as for contempt of court, as the necessity of the case requires, upon the application of the director.



as either cities or villages). Because there are no villages within this township, the township and its trustees will not find it necessary to enter into any agreement with the state to expend funds to construct, repair, or improve village roads, and thus the trustee in question will not be placed in the position of dividing his loyalties between the township and his employer.

1959 Op. No. 602 also alludes to a conflict of interest that could arise in those situations in which a township trustee is called upon to either approve or disapprove construction, repair or maintenance work on a state highway. Several statutory provisions previously cited grant to the board of township trustees the discretion to perform a variety of construction, maintenance, and repair work on state highways. See R.C. 5521.11; R.C. 5571.01(A); R.C. 5571.02. Such work is to be accomplished either by contract or force account. R.C. 5575.01. Township trustees have thus been granted the discretion to undertake construction, maintenance, and repair work on state highways that might otherwise be undertaken by the Director of the Department of Transportation and his own employees. See, e.g., R.C. 5517.02. To the extent that such work, if left to the Director and his own employees, might affect the duties of the individual in question as an employee of the Department of Transportation, he might be improperly influenced in his decision as township trustee whether such work should be performed by the township.

In your letter you state that in the township in question there is presently only one state highway open to travel by the public that intersects with only one township road. The board of township trustees has elected to divide the township into three road districts pursuant to R.C. 5571.02(B),<sup>5</sup> and has placed this trustee in charge of a district in which the above-mentioned intersection is not located. Although you have made no mention of it in your request, I will also assume that no portion of the state highway passes through this trustee's assigned road district. I must thus consider whether the utilization by the board of township trustees of the procedure under R.C. 5571.02(B) operates to shield this trustee from the board's decision-making process in the case of the township's repair and improvement of state highways.

One of my predecessors had occasion to briefly touch upon this question in 1941 Op. Att'y Gen. No. 4665, p. 1082. In that opinion a board of township trustees had passed a resolution dividing a township into three road districts,

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<sup>5</sup> R.C. 5571.02 permits the board of township trustees to proceed in any one of three methods in the repair and maintenance of roads within the township. Under R.C. 5571.02(A) the board may appoint one of its members to have charge of the maintenance and repair of roads within the township. The board, under R.C. 5571.02(B), may also divide the township into three road districts, with each trustee being in charge of the maintenance and repair of roads within one of the three districts. Finally, under R.C. 5571.02(C), the board may appoint some competent person, not a member of the board, to have charge of the maintenance and repair of roads within the township, who shall be known as "township highway superintendent," and who shall serve at the pleasure of the board of township trustees.

assigning one district to each trustee, pursuant to subparagraph two of G.C. 3370, the statutory predecessor to R.C. 5571.02(B). G.C. 3373, the statutory predecessor to R.C. 5575.01, authorized the township trustees to maintain, repair, construct or reconstruct township roads by contract or force account. G.C. 3373 also provided in pertinent part as follows:

They [the township trustees] shall have the power to purchase such material and to employ such labor and teams as may be necessary for carrying into effect the provisions of this section, or they may authorize the purchase or employment of the same by one of their number or by the township highway superintendent at a price to be fixed by the township trustees.

1941 Op. No. 4665 addressed the question whether two trustees who had road districts of their own could lawfully hire labor pursuant to G.C. 3373 to perform maintenance work on township roads in a district that had been assigned to the third trustee. In responding to this question, 1941 Op. No. 4665 notes that dividing the township into three separate road districts, with each trustee assigned to one district, does not relieve a trustee of his responsibility as a board member for supervision and control of roads and highways located outside that trustee's own road district:

It will be noted that power to employ labor is vested in the township trustees. The statute, however, permits the board to authorize one of its members to perform that function. Of course, it is well settled that a public board, such as a board of township trustees, functions by rule of the majority. See State of Ohio, ex rel. Cline v. The Trustees of Wilkesville Township, 20 O.S. 288; Opinion No. 2292, Opinions of the Attorney General for 1934, Volume I, page 164.

It follows, therefore, that at a meeting properly called two of the three trustees constituting a board of township trustees may hire all labor in connection with maintenance work on township roads or may authorize one of its members to do such hiring either for the entire township or for the particular road district assigned to such member under the provisions of paragraph 2 of section 3370, supra. I might add that in the absence of express language to the contrary, the adoption by the board of township trustees of a resolution which merely places each of the members thereof in charge of a designated road district does not constitute an authorization to each member to hire labor in his assigned district. Such a resolution does not relieve the board as a whole of its duty with respect to the maintenance and repair of township roads. Neither does it divest the board of the power to employ labor specifically granted by Section 3373, supra. Dividing the township into road districts and placing one trustee in charge of each is merely a method by which the board's determinations may be carried through; supervision and control of township roads still remain with the board of trustees. (Emphasis added).

1941 Op. No. 4665 at 1086. According to 1941 Op. No. 4665, therefore, the entire board of township trustees remains vested with the responsibility to maintain and repair township roads.

notwithstanding that each trustee has been assigned to take charge of a single road district pursuant to R.C. 5571.02(B). By implication, therefore, the entire board of trustees would ordinarily participate in the decision whether a particular township road or state highway should be repaired or improved. A township trustee who is also an employee of the Department of Transportation could then find himself voting on a proposal that the township undertake the maintenance or repair of a state highway, notwithstanding that such a highway is neither located within nor passes through the road district of which he has charge. Further, a township trustee would ordinarily vote on whether to construct part of the state highway system pursuant to R.C. 5521.11 and R.C. 5571.01, regardless of how the township is divided for purposes of maintaining and repairing roads. In such situations the trustee might be influenced in his vote on a proposal to construct, repair, or maintain a state highway, if the proposal would affect his duties as an employee of the Department of Transportation.

That this trustee might find himself with a conflict of interest in the situation just described, however, does not end my inquiry. In Op. No. 79-111 my predecessor established the principle that when possible conflicts are remote and speculative, common law incompatibility or conflict of interest rules are not violated. In determining whether a potential conflict is remote and speculative, each compatibility question should be decided upon its own particular facts. The factors to be considered in this regard are the following:

the degree of remoteness of a potential conflict, the ability or inability of an individual to remove himself from the conflict, whether the individual exercises decision-making authority in both positions, whether the potential conflict involves the primary functions of each position, and whether the potential conflict may involve budgetary controls.

Op. No. 79-111 at 2-372. A consideration of these factors with regard to the possible conflict of interest facing this township trustee leads me to conclude that the potential conflict is too remote and speculative to furnish a basis for disqualifying this individual from serving simultaneously as a township trustee and as an employee of the Department of Transportation. I believe the occasions will be very rare when the township trustees must decide whether to construct or to make repairs or improvements to the state highway within the township in lieu of having such work performed by the Department of Transportation. In such circumstances, furthermore, this trustee could properly withdraw from participating in the board's deliberation and ultimate decision in order to avoid any conflict of interest. See 1979 Op. Att'y Gen. No. 79-049; 1970 Op. Att'y Gen. No. 70-168.

Accordingly, it is my opinion, and you are hereby advised, that the office of township trustee is compatible with the position of equipment operator in the Ohio Department of Transportation, provided that the township in question has neither railroad grade crossings nor municipal corporations within its boundaries, and further provided that the township trustee is elected in a nonpartisan election. (1959 Op. Att'y Gen. No. 602, p. 313, overruled in part, and modified in part.)