

Note from the Attorney General's Office:

1974 Op. Att'y Gen. No. 74-071 was overruled in part by
1982 Op. Att'y Gen. No. 82-085.

OPINION NO. 74-071

Syllabus:

1. An employee in a county highway department, in the classified civil service, may not also serve as village councilman, because of the prohibition of political activity by classified employees in R.C. 124.57.
2. The position of employee in a county highway department, in the unclassified civil service, may be held simultaneously with that of village councilman.

To: Nicholas A. Carrera, Greene County Pros. Atty., Xenia, Ohio
By: William J. Brown, Attorney General, August 22, 1974

I am in receipt of your request for my opinion as to whether the position of an employee of the Greene County Highway Department is compatible with the position of a member of a village council.

It is necessary first to determine whether there is any statutory prohibition against the simultaneous holding of these two positions. Since you did not indicate whether the position in the county highway department is in the classified or unclassified service, it will be necessary to deal with each separately.

If the county highway department employee is in the classified service then my conclusion must be that the positions cannot be held by the same individual since the position of village councilman is an elective office (R.C. 731.09), and R.C. 124.57 prohibits an employee in the classified service from engaging in partisan politics. See Opinion No. 72-109, Opinions of the Attorney General for 1972.

Assuming the position in the highway department is in the unclassified service, further consideration is necessary, since R.C. 124.57 applies only to persons in the classified service. R.C. 731.12 reads as follows:

"Each member of the legislative authority of a village shall have resided in the village one year next preceding his election, and shall be an elector of the village. No member of the legislative authority shall hold any other public office, be interested in any contract with the village, or hold employment with said village, except that such member may be a notary public, a member of the state militia, or a volunteer fireman of said village, * * *."

(Emphasis added.)

In interpreting the emphasized language, my predecessor in Opinion No. 6674, Opinions of the Attorney General for 1956, page 447, made the following observation at 448:

"The obvious intention of the legislature * * * was to permit a member of village council to be otherwise engaged in public employment,

so long as that employment was not with the village."

In view of the above interpretation it does not appear that there is any statutory prohibition against a county highway department employee in the unclassified service being a member of a village council.

Next, there are common law compatibility restrictions to be considered. In continuing his analysis my predecessor in Opinion No. 6674, supra, stated at 448 as follows:

"Absent any statutory prohibition, the question of whether these positions may be held by the same person must be resolved in light of the common law rules respecting compatibility. The rule most often relied upon is stated in State, ex rel. v. Gebert, 12 C.C. (n.s.) 274, at page 275, 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.'"

In an extended discussion of the law on this matter the Court in State, ex rel. Hover v. Wolven, 175 Ohio St. 114 (1963), quoted the following statement in 44 O. Jur. 2d 524, Public Offices, Section 370, at 175 Ohio St. 116-117:

"* * * One of the most important tests as to whether offices are incompatible is found in the principle that incompatibility is recognized whenever one office is subordinate to the other in some of its important and principal duties, or is subject to supervision or control by the other * * * or is in any way a check upon the other, or where a contrariety and antagonism would result from an attempt by one person to discharge the duties of both. * * *

"'One person may not hold two public offices where the duties of one may be so administered that favoritism and preference may be accorded the other, and result in the accomplishment of purposes and duties of the second position which otherwise could not be effected.'"

The present case, however, does not involve two public offices, since the individual in question is only an employee of the county highway department. I had occasion to discuss such a situation in Opinion No. 72-014, Opinions of the Attorney General for 1972, involving the positions of city councilman and law clerk to the county prosecutor, and I there said:

"* * *. The duties of a law clerk in the county prosecutor's office are limited to research of cases involving 'county and township officers' and with preparation of the state's case in criminal matters. Opinion No. 2043, supra. The duties of a city councilman are re-

lated to the city, 'a subdivision separate and apart from the county', and would not conflict with the office of the county prosecutor. Opinion No. 2043, supra. That is to say, the office of city councilman and the position of law clerk in the county prosecutor's office are neither subordinate to, nor in any way a check upon, each other. Of course, in the rare case in which the county prosecutor must prosecute a member of the city council, e.g., for a narcotics offense, the law clerk should not participate. In Opinion No. 71-027, Opinions of the Attorney General for 1971, issued June 4, 1971, I held that a full-time employee of the county treasurer's office could also serve as a part-time investigator for the county prosecutor, as long as it was understood that his duties would not involve any investigation of his full-time employer. My opinion in No. 71-025, Opinions of the Attorney General for 1971, issued May 27, 1971, is clearly distinguishable, for there the position of assistant prosecuting attorney is one which is so closely connected with that of the county prosecutor himself that the assistant is subject to the same inhibitions as its prosecutor. Opinion No. 1380, Opinions of the Attorney General for 1957 and Opinion No. 25, Opinions of the Attorney General for 1963. A law clerk, however, does not have the status of assistant and is merely an employee.

"In specific answer to your question it is my opinion, and you are so advised, that assuming there is no city ordinance to the contrary, a city councilman may also serve as law clerk for the county prosecutor's office so long as it is understood that he will not participate in the rare case in which the county prosecutor is required to prosecute a member of the city council."

In a situation similar to the one you have presented, one of my predecessors determined that the position of employee in the county highway department is incompatible with the position of township trustee. Opinion No. 223, Opinions of the Attorney General for 1959, page 110. Part of the rationale in that Opinion is based on the fact that the board of county commissioners interacts extensively with the township trustees. Since an employee in the county highway department is subordinate to the county engineer who, in turn, is subordinate to the board of county commissioners; and since the county highway department is supported by funds appropriated by the board of county commissioners, it was determined that it would be possible for the county commissioners to exert influence upon a township trustee employed in the county highway department. However, this argument would seem to apply equally to any county employee, with the result that any position in the county service would be incompatible with any other public office with which the board of county commissioners dealt extensively. Therefore this rationale is overbroad, in view of Opinions Nos. 72-014 and 71-027, supra, and therefore I am constrained to disagree with it.

In view of the foregoing considerations the positions of an employee in the county highway department and village councilman may be held simultaneously by the same individual.

In specific answer to your question, it is my opinion and you are so advised that:

1. An employee in a county highway department, in the classified civil service, may not also serve as village councilman, because of the prohibition of political activity by classified employees in R.C. 124.57.

2. The position of employee in a county highway department, in the unclassified civil service, may be held simultaneously with that of village councilman.