

January 11, 2021

The Honorable William C. Hayes
Licking County Prosecuting Attorney
20 South Second Street
Newark, Ohio 43055

SYLLABUS:

2021-002

A person may not serve simultaneously as a county treasurer and as a member of a municipal civil service commission when the two positions are within the same county.



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OPINION NO. 2021-002

The Honorable William C. Hayes
Licking County Prosecuting Attorney
20 South Second Street
Newark, Ohio 43055

Dear Prosecutor Hayes:

You have requested an opinion concerning the compatibility of two public positions. I have framed your question as follows:

May a person simultaneously hold the positions of a county treasurer and a member of a municipal civil service commission when the two positions are within the same county?

I

Your request references the City of Newark, which has adopted a charter system of government. The City's charter states that the procedures, powers, and duties of the Newark municipal civil service commission are consistent with the Revised Code. Newark Charter, Art. XI §11.01. Thus, any assessment of the compatibility of a position on the commission and another position is the same as it would be for a non-charter government.

An issue of compatibility arises whenever one person wishes to hold simultaneously two or more positions of public service. The following seven questions are used to determine whether a person may hold two public positions simultaneously:

1. Is either position in the classified service for purposes of R.C. 124.57?
2. Does a constitutional provision or statute prohibit a person from serving in both positions at the same time?
3. Is one position subordinate to, or, in any way, a check upon the other position?
4. Is it physically possible for one person to discharge the duties of both positions?
5. Is there an impermissible conflict of interest between the two positions?
6. Are there local charter provisions, resolutions, or ordinances that are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

2019 Op. Att’y Gen. No. 2019-012, Slip Op. at 1-2; 2-87 to 2-88; 1979 Op. Att’y Gen. No. 79-111, at 2-367 to 2-368. All seven questions must be resolved in favor of compatibility for the positions to be compatible. 2013 Op. Att’y Gen. No. 2013-008, at 2-78. Consequently, if one of the seven questions is resolved against a finding of compatibility, the positions are incompatible. *Id.* at 2-79. Here, the answer to Question Five establishes the positions’ incompatibility, and so there is no need to consider the other questions.

II

Question Five asks whether a conflict of interest exists between two positions. A person may not serve simultaneously in two positions when an impermissible conflict of interest exists between the positions. 2017 Op. Att’y Gen. No. 2017-014, Slip Op. at 5; 2-130. A conflict of interest exists “when an individual’s 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.” 1989 Op. Att’y Gen. No. 89-052, at 2-220 (internal citations omitted.) Further, “a conflict of interest exists when a public servant is subject to divided loyalties and conflicting duties or exposed to the temptation of acting other than in the best interest of the public.” 1998 Op. Att’y Gen. No. 98-033, at 2-188 to 2-189.

To determine whether a conflict of interest exists between two positions, I must first examine the duties of both positions relevant to the question at hand. If my review reveals that a conflict of interest exists, then I will need to determine whether the conflict may be sufficiently mitigated or eliminated entirely so as to allow the person to hold both positions at the same time.

A

A conflict of interest is present where one person who owes loyalty to two governmental entities must advocate a position on behalf of one to the potential detriment of the other. 2003 Op. Att’y Gen. No. 2003-006, at 2-36; *see, e.g.*, 1983 Gen. No. 83-035, at 2-136 (“a county treasurer who, as a member of the county budget commission, is responsible for objectively reviewing and adjusting the county’s proposed appropriations, would be subject to [an impermissible] conflict of interest if he served as a director of the county agricultural society”). Applying that principle here, I determine that a conflict of interest exists when a person serves both as a *county* treasurer and as a member of a *municipal* civil service commission within the same

county. The reason is this: the same person will evaluate the budget of, and determine funding provided to, the municipality in which the person also serves. Thus, a person who serves simultaneously in both positions will have difficulty remaining completely objective and will be subject to divided loyalties.

To understand why, it is important to see the nature of the two positions' duties.

Consider first the role of county treasurer. The county treasurer, among other things, is one of three members of the county budget commission. (The other two are the county auditor and the prosecuting attorney.) R.C. 5705.27. Members of the county budget commission must remain objective. *See generally* 1997 Op. Att'y Gen. No. 97-034, at 2-197 (“[a] member of the county budget commission has a duty to render unbiased determinations”).

Now consider the role of the municipal civil service commission. That commission both participates in and is impacted by the municipality's annual tax budget. A municipal legislative authority submits an annual tax budget to the county budget commission. R.C. 5705.28, 5705.01(A), and 5705.01(C). The municipal civil service commission has authority to assist the municipal legislative authority in the preparation of the annual tax budget. R.C. 5705.28(C)(1). And that budget will directly impact the work of the municipal civil service commission, because the commission administers the municipality's civil service system. 1985 Op. Att'y Gen. No. 85-045, at 2-162; R.C. 124.40(A).

Revisions and adjustments made by the county budget commission to a municipality's funds affect the amount of tax money generated that will be allotted to the municipality—and thus the funds that can be spent in connection with the municipal civil service system. 2006 Op. Att'y Gen. No. 2006-034, at 2-313; 2004 Op. Att'y Gen. No. 2004-051, at 2-441. Accordingly, a person who serves both as a

county treasurer and as a member of a municipal civil service commission within the same county is subject to a conflict of interest when that person participates in the revision and adjustment to the municipality's funds. *See* 2006 Op. Att'y Gen. No. 2006-034, at 2-312-2-314; 2004 Op. Att'y Gen. No. 2004-019, at 2-160; 1989 Op. Att'y Gen. No. 89-007, at 2-29 and 2-30; 1983 Op. Att'y Gen. No. 83-035, at 2-136; *see also* 1999 Op. Att'y Gen. No. 99-045, at 2-281; 1959 Op. Att'y Gen. No. 999, p. 686, at 697.

A county budget commission is also responsible for reviewing the budget of a municipality so as to determine the amount of money to appropriate to the municipality from the undivided local government fund. R.C. 5747.50-.55. As such, a person who serves as a county treasurer and as a member of a municipal civil service commission within the same county is also subject to a conflict of interest when that person participates in matters that may affect the amount of money to be allocated to the municipality from the undivided local government fund. *See* 2006 Op. Att'y Gen. No. 2006-034, at 2-314; *see generally State ex rel. Baden v. Gibbons*, 17 Ohio Law Abs. 341, 344, 1934 Ohio Misc. LEXIS 1224 (Ct. App. Butler County 1934) (a conflict of interest results when the duties of one position may be administered in such a way as to result in favoritism and preference being accorded to the other position).

My predecessors have recognized a conflict of interest between a county treasurer's county budget commission duties and any duties owed to a municipal government. The positions of a member of a city legislative authority and chief deputy treasurer or deputy treasurer are incompatible when the chief deputy treasurer or deputy treasurer may serve in place of a county treasurer on a county budget commission. 2006 Op. Att'y Gen. No. 2006-034, at 2-318. The position of deputy county treasurer is incompatible with that of mayor of a municipality within the same county because the deputy county treasurer, in carrying out the duties of the county treasurer, would review the budget of

the mayor's municipality. 1982 Op. Att'y Gen. No. 82-042, at 2-119. The same logic applies here: a county treasurer, because he oversees municipal budgets, has a conflict of interest by serving also on an entity—the municipal civil service commission—affected by that budget.

B

I must next determine if there is a way to avoid or eliminate this conflict. Several factors bear on the question whether a potential conflict of interest is impermissible. 1998 Op. Att'y Gen. No. 98-033, at 2-189. These factors include “the probability of the conflicts occurring, the ability of the person to remove himself from any conflicts that may occur, whether the person exercises decision-making authority in both positions, and whether the conflicts relate to the primary functions of each position, or to *financial or budgetary matters*.” 2004 Op. Att'y Gen. No. 2004-051, at 2-439. (Emphasis added.)

Would it be possible to avoid this conflict by allowing a deputy treasurer to serve on the county budget commission? I conclude the answer is “no.”

A county treasurer has the authority to appoint a deputy treasurer to perform duties on the county treasurer's behalf. R.C. 325.17 and 321.04; *see* R.C. 3.06(A). As service with a county budget commission is a statutory duty of a county treasurer, a deputy treasurer, when directed, may perform the county treasurer's duties as a member of the county budget commission. *See* 1934 Op. Att'y Gen. No. 3605, vol. III, p. 1721. However, even if this occurs, the conflict remains. My predecessor found that even though a county treasurer may appoint a deputy treasurer to sit on the county budget commission in the place of the treasurer, such appointment does not remove all conflict. *See* 2016 Op. Att'y Gen. No. 2016-017, Slip Op. at 18-19; 2-180 to 2-181; *See also* R.C. 3.06(A). Specifically, “a county treasurer's delegation of specific duties to a deputy treasurer to avoid or mitigate a conflict of interest facing the county treasurer does not eliminate the possibility that the

deputy treasurer may be adversely influenced by the interest of his superior.” 2016 Op. Att’y Gen. No. 2016-017, Slip Op. at 19; 2-180. Deviation from the interest of a county treasurer could result in the loss of the deputy treasurer’s position. *Id.* Thus, because a subordinate employee is subject to the influence of a superior, a county treasurer may not avoid a conflict of interest by appointing a subordinate to a county budget commission. *See id.*

I agree with my predecessor’s conclusion, and incorporate it here. Because either the county treasurer or his deputy will serve on the budget commission, and because there will in either case be an impermissible conflict with service on a municipal civil service commission, the same person cannot serve as both county treasurer and on a municipal civil service commission within the same county.

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised that:

A person may not serve simultaneously as a county treasurer and as a member of a civil service commission of a municipality when the two positions are within the same county.

Respectfully,



DAVE YOST
Ohio Attorney General