

Note from the Attorney General's Office:

1971 Op. Att'y Gen. No. 71-037 was questioned
by 2001 Op. Att'y Gen. No. 2001-027.

OPINION NO. 71-037

Syllabus:

An assistant prosecuting attorney may not be employed as administrative assistant to the board of county commissioners in the same county, where the duties of such administrative assistant include the general supervision of the office of the commissioners.

To: Gene Henry, Geauga County Pros. Atty., Chardon, Ohio
By: William J. Brown, Attorney General, July 23, 1971

You have requested my opinion as to whether or not the positions, in the same county, of assistant prosecuting attorney and administrative assistant to the board of county commissioners are compatible. You indicate the general function of the administrative assistant would be the supervision of the county commissioners' office. You also state the specific function of the assistant prosecuting attorney would be to act as the county commissioners' legal officer.

Before turning to your precise question, it should be noted that the rules of compatibility respecting the prosecuting attorney have been held to apply with equal force to assistant prosecuting attorneys. (Opinion No. 25, Opinions of the Attorney General for 1963; Opinion No. 1380, Opinions of the Attorney General for 1957.)

Chapter 309, Revised Code, specifically states the duties of the county prosecuting attorney. Among those Sections, Section 309.09, Revised Code, pertinently provides as follows:

"The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections, and all other county officers and boards, including all tax supported public libraries and any of them may require written opinions or instructions from him in matters connected with their official duties. * * *"

Section 309.02, Revised Code, lists certain officers with which the office of prosecuting attorney is incompatible, the office of administrative assistant to the county commissioners, however, not being one enumerated in that list. That Section is as follows:

"No person shall be eligible as a candidate for the office of prosecuting attorney, or shall be elected to such office, who is not an attorney at law licensed to practice law in this state. No prosecuting attorney shall be a member of the general assembly of this

state or mayor of a municipal corporation. No county treasurer, county auditor, county recorder, county engineer, or sheriff shall be eligible as a candidate for, or elected to, the office of prosecuting attorney."

I find no other specific statutory restriction against a county prosecuting attorney or his assistants serving in such other capacity. Thus, the question of incompatibility must be determined under common law. In Ohio, the general rule on this subject is stated in State, ex rel. Attorney General v. Gebert, 12 Ohio C.C.R. (n.s.) 274, 275 (1909), 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."

(For extended summary of the law on this matter, see State, ex rel. Hover v. Wolven, 175 Ohio St. 114 (1963).

My predecessors have forbidden such assistant to act as legal adviser for a township (Opinion No. 25, supra), and as an employee of a "soldiers' relief commission" when the prosecutor is the legal adviser of the commission. (Opinion No. 4130, Opinions of the Attorney General for 1948.) I have also had occasion to consider a related question affecting assistant prosecuting attorneys.

The rationale of the 1948 Opinion, supra, is stated cogently at page 597, as follows:

"It appears very clear that the person who is by law the legal adviser of a board could not be appointed by that board to a responsible position without violating the generally accepted rules as to incompatibility of offices. As such legal adviser it would manifestly be within his power to advise the board in his own interest and while he could not be said to hold a direct check or control over himself, as such officer, he would be subjected to the temptation to mold his advice to further his own interests."

I concur completely with that statement.

It follows here that an assistant prosecuting attorney, whose duty includes legal advice to the board of county commissioners, cannot occupy a responsible position in the employ of such board because he would be subject to conflict of loyalty as between the interests of the two employers.

In specific answer to your question, it is my opinion and you are so advised that an assistant prosecuting attorney may not be

employed as administrative assistant to the board of county commissioners in the same county, where the duties of such administrative assistant include the general supervision of the office of the commissioners.