

**OPINION NO. 80-046****Syllabus:**

1. A municipal corporation that operates under a general statutory plan of municipal government may not create the position or office of municipal income tax administrator and provide that the tax administrator shall be responsible for the enforcement of the municipal income tax ordinance and for the collection and deposit of income tax revenues.
2. Pursuant to R.C. 733.01 and R.C. 733.08, the legislative authority of a city that operates under a general statutory plan of municipal government may provide by ordinance or resolution for the appointment, by the city treasurer, of an individual to be known as the tax administrator to assist the treasurer in matters relating to income taxes. The individual so appointed must be an employee of the treasurer's office and be responsible to, and under the control of, the city treasurer.
3. Pursuant to R.C. 731.10, the legislative authority of a village that operates under a general statutory plan of municipal government may provide for and appoint an individual to be known as the tax administrator to assist the village treasurer in matters relating to income taxes. The individual so appointed must be an employee of the treasurer's office and be responsible to, and under the control of, the village treasurer.
4. Pursuant to R.C. 705.26, R.C. 705.76 and R.C. 705.77, the council of a village or a city that has elected to operate under a federal plan of municipal government pursuant to R.C. 705.71-.86 may create the office or position of municipal income tax administrator and provide that the tax administrator shall be responsible for the enforcement of the municipal income tax ordinance and for the collection and deposit of income tax revenue.
5. The mayor, the treasurer, or the auditor of a municipal corporation which has elected to operate under a federal plan of municipal government may be designated by the council of the municipal corporation, pursuant to R.C. 705.76, to act as the appointing authority for the position or office of tax administrator, unless such action would result in the violation of another ordinance of the municipal corporation or in a conflict of interest for the appointing officer.
6. Since R.C. 705.78 prohibits the head of any department of a municipal corporation operating under a federal plan of government from holding any other office or employment with the municipal corporation, the village treasurer, the village auditor, the city treasurer and the city auditor of a city or village that has elected to operate under a federal plan of municipal government are not permitted to also serve as the tax administrator of said village or city.

**To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio**  
**By: William J. Brown, Attorney General, September 5, 1980**

I have before me your request for an opinion on the following questions:

- (1) In a municipality who is the appointing authority for the position of Tax Administrator?
  - a. Mayor
  - b. Treasurer
  - c. Auditor
  
- (2) In a municipality may one individual serve as both Tax Administrator and:
  - a. Village Clerk
  - b. Village Treasurer
  - c. City Auditor
  - d. City Treasurer

It is my understanding based upon telephone conversations with your office that your request concerns the establishment of the position of tax administrator by cities and villages which have not adopted a charter pursuant to Ohio Const. art. XVIII, §7. The cities and villages concerned either operate under a general statutory plan of municipal government or have elected to operate under the federal plan of municipal government pursuant to R.C. 705.71-.86. I understand that the municipal corporations involved have created the office or position of tax administrator and have designated their respective tax administrators as the officers responsible for the enforcement of the provisions of their municipal income tax ordinances and for the collection and deposit of income tax revenues.

In responding to your inquiry, it must be noted that, while a municipality need not adopt a charter in order to avail itself of the "home rule" powers granted under Ohio Const. art. XVIII, §3, if a municipality does not adopt a charter, the municipality is subject to the statutory provisions enacted by the General Assembly pursuant to Ohio Const. art. XVIII, §2. Village of Perrysburg v. Ridgway, 108 Ohio St. 245, 140 N.E. 595 (1923); 1959 Op. Att'y Gen. No. 819, p. 513. The courts have uniformly held that the organization and operation of a municipal corporation that has not adopted a charter is governed by the statutory provisions enacted by the legislature. Morris v. Roseman, 162 Ohio St. 447, 123 N.E. 2d 419 (1954).

Since no statute provides for the office or position of municipal tax administrator, it would appear that your inquiry initially involves the question of whether a non-charter municipality has the authority to create such an office or position. In light of this fact, I have, for purposes of discussion, rephrased your questions as follows:

1. May a non-charter municipal corporation which operates under a general statutory plan of municipal government create the office or position of municipal tax administrator and provide that the tax administrator shall be responsible for the enforcement of the provisions of the municipal income tax ordinance and for the collection and deposit of income tax revenues?
  
2. May a non-charter municipal corporation which has elected to operate under a federal plan of municipal government pursuant to R.C. 705.71-.86 create the office or position of municipal tax administrator and provide that the tax administrator shall be responsible for the enforcement of the provisions of the municipal income tax ordinance and for the collection and deposit of income tax revenues?
  
3. If the answer to either of the first two questions is in the

affirmative, is the mayor, the treasurer, or the auditor of the municipal corporation the appointing authority for the office or position of tax administrator?

4. If the answer to either of the first two questions is in the affirmative, may the village clerk, the village treasurer, the city auditor, or the city treasurer also serve as the tax administrator of the village or the city?

In regard to your first question, I refer you to 1967 Op. Att'y Gen. No. 67-078 in which my predecessor had occasion to consider a similar question. In that opinion, my predecessor concluded that a municipality which operates under a general statutory plan of municipal government has no authority to create a separate department to handle income tax matters. I concur in the conclusion reached by my predecessor.

As was discussed in Op. No. 67-078, a municipality which has not framed a charter or adopted one of the optional plans of government must exercise its powers through the officers provided in the general laws and is "without power to transfer the powers and duties of such officers to other officers or boards of its own creation." 1952 Op. Att'y Gen. No. 2198, p. 832, 832. See 1964 Op. Att'y Gen. No. 64-851; 1929 Op. Att'y Gen. No. 826, vol. II, p. 1276.

R.C. 733.01 and R.C. 733.23 designate the officers and departments through which the powers of local government of a municipal corporation operating under a general statutory plan of government must be exercised. R.C. 733.01 provides that "[t]he executive power of cities shall be vested in a mayor, president of council, auditor, treasurer, director of law, director of public service, director of public safety, and such other officers and departments as are provided by Title VII of the Revised Code." R.C. 733.23 provides that "[t]he executive power of villages shall be vested in a mayor, clerk, treasurer, marshal, street commissioner, and such other officers and departments thereof as are created by law."

No statute provides for the office or position of tax administrator. Further, there is no statute that authorizes a municipal corporation which operates under a general statutory plan of government to create an office or position other than those expressly provided by statute. Moreover, the statutes expressly provide that the treasurer of such a municipal corporation shall be the officer responsible for the receipt and deposit of all municipal funds. R.C. 733.44 ("treasurer of a municipal corporation shall demand and receive, from the county treasurer, taxes levied and assessments made and certified to the county auditor by the legislative authority of such municipal corporation. . ."); R.C. 733.46 ("treasurer of a municipal corporation shall receive and disburse all funds of the municipal corporation. . ."). See State ex rel. Matheney v. Ferguson, 141 Ohio St. 61, 46 N.E. 2d 768 (1943) (only village treasurer has authority to receive money owed to the village).

For a municipal corporation to create the office or position of tax administrator and to vest in the tax administrator responsibility for the receipt and deposit of income tax revenue would be tantamount to transferring certain duties of the treasurer to an officer of the municipality's own creation. A municipal corporation operating under a general statutory plan of government clearly lacks the necessary statutory authority to take such action. In answer to your first question, then, it is my opinion that a municipal corporation operating under a general statutory plan of government may not create the office of municipal tax administrator and provide that the tax administrator shall be responsible for enforcing the provisions of the municipal income tax ordinance and for the collection and deposit of income tax revenues.

It should be discussed at this point, however, that the legislative authority of the municipality may provide for an employee to assist the treasurer in the performance of his duties, including the treasurer's duties relating to the collection and deposit of income tax revenues. R.C. 731.08 provides that, in cities, the legislative authority, by ordinance or resolution, "shall determine the number of

officers, clerks, and employees in each department of the city government, and shall fix, by ordinance or resolution, their respective salaries and compensation" (emphasis added). R.C. 733.01 provides that, in cities, all "executive officers," which includes by definition the city treasurer, "shall have exclusive right to appoint all officers, clerks, and employees in their respective departments or offices" (emphasis added). Thus, in a city, the legislative authority may provide for the appointment by the treasurer of an individual to be known as the tax administrator to assist the treasurer in matters relating to the collection of income taxes. The legislative authority may not, as previously discussed, provide that the person filling such position shall be the individual solely responsible for the collection and deposit of income tax revenue. Such individual, even if designated as the tax administrator, must be responsible to, and under the control of, the city treasurer, who, by statute, is responsible for the collection and deposit of all municipal funds.

In regard to villages operating under a general statutory plan of government, R.C. 731.10 provides that the legislative authority of a village "may provide such employees for the village as it determines, and such employees may be removed at any regular meeting by a majority of the members elected to such legislative authority" (emphasis added). Thus, in a village, the legislative authority may provide for and appoint an individual to be known as the tax administrator to assist the treasurer in matters relating to the collection of village income taxes. Such individual may not be solely responsible for the collection and deposit of income tax revenues, but rather must be responsible to, and under the control of, the village treasurer, who, by statute, is responsible for the collection and deposit of village funds.

I turn now to a discussion of your second question, in which you inquire whether a municipal corporation which has elected to operate under a federal plan of government, pursuant to R.C. 705.71-.86, may create the office or position of tax administrator and provide that the tax administrator shall be responsible for enforcement of the provisions of the municipal income tax ordinance and for the collection and deposit of income tax revenue. The provisions of R.C. 705.71-.86 apply equally to both villages and cities which elect to operate under those sections. See R.C. 705.01-.05, 705.07. My response to your second question, therefore, will be applicable to both cities and villages operating under a federal plan of municipal government.

A municipal corporation which has elected to operate under a federal plan of government possesses, by statute, certain powers of local government which a municipal corporation operating under a general statutory plan of government lacks. R.C. 705.76 expressly provides that "[t]he council of a municipal corporation may create and discontinue departments and offices other than those provided in sections 705.01 to 705.92, inclusive, of the Revised Code, and may provide for the appointment of all officers of such departments. . . ." R.C. 705.26 provides that "[t]he duties of all officers and employees of a municipal corporation shall be those prescribed by sections 705.01 to 705.92, inclusive, of the Revised Code, or by ordinance or resolution of the legislative authority." R.C. 705.77 further provides that "[t]he executive power of a municipal corporation organized under sections 705.71 to 705.86, inclusive, of the Revised Code, shall be vested in the mayor, the heads of the departments of the municipal corporation and such other executive officers as are provided for in such sections or as provided for by ordinance."

In light of the express provisions of R.C. 705.26, 705.76 and 705.77, it must be concluded that the council of a municipal corporation operating under a federal plan of government has the authority to create offices and departments, other than those expressly provided by statute, through which to exercise its powers of local self government. It is, therefore, my opinion that the council of a city or a village that operates under a federal plan of municipal government, may, pursuant to R.C. 705.76, create the office or position of tax administrator and provide that the tax administrator shall be responsible for the enforcement of the provisions of the municipal income tax ordinance and for the collection and deposit of income tax revenues.

In your third question you have inquired whether the mayor, the treasurer, or the auditor may be the appointing authority for the position of tax administrator, if such office or position has been created by a municipal corporation operating under a federal plan of government.

R.C. 705.76, which, as previously discussed, authorizes the council of a municipal corporation to create offices and departments other than those provided by statute, further provides that the council "may provide for the appointment of all officers of such departments" (emphasis added). The plain language of R.C. 705.76 indicates that the legislative intent was for the council of the municipal corporation to prescribe the procedures to be employed in, and to designate the individual or individuals to be responsible for, the appointment of an officer for a position created by council pursuant to R.C. 705.76. The municipal council may, therefore, provide who shall be the appointing authority for the position of tax administrator and such provision will be deemed valid unless conflicting with a state statute, with another ordinance of the municipal corporation, or with common law conflict of interest principles.

There does not appear to be any statute which would prohibit the mayor, the treasurer, or the auditor of a municipal corporation operating under a federal plan of government from acting (pursuant to council designation) as the appointing authority for the position of tax administrator. Furthermore, there does not appear to be any conflict of interest which would, as a general rule, result from the mayor, the treasurer, or the auditor making such an appointment. Although such a conflict might arise if the mayor, the treasurer, or the auditor could appoint himself as tax administrator, the possibility of such a conflict occurring is eliminated by that fact that neither the mayor nor any department head may hold any other municipal office or employment. R.C. 705.78. The possibility, however, of a conflict arising under certain specific circumstances cannot be completely ruled out. If such a conflict of interest would, under specific circumstances, result from the mayor, the treasurer, or the auditor acting as appointing authority for the tax administrator, the officer involved should remove himself from the conflict and the municipal council should provide other means of appointment.

In specific answer to your third question, then, it is my opinion that in the absence of a municipal ordinance to the contrary, and in the absence of any indication that a conflict of interest would result in a particular situation, the mayor, the treasurer, or the auditor of a municipal corporation that has elected to operate under a federal plan of municipal government may be designated by the municipal council to act as the appointing authority for the office or the position of tax administrator.

Your fourth question concerns whether the village clerk, the village treasurer, the city auditor, or the city treasurer of a village or city operating under a federal plan of government may also serve as the tax administrator of the village or the city. As previously discussed, no differentiation is made, under the provisions of R.C. Chapter 705, between cities and villages; both have, by statute, the same power and authority and the same municipal officers. Since provision for the position of "village clerk" is made only under R.C. Chapter 733, R.C. 733.27, and not under R.C. Chapter 705, I will assume that in your fourth question you are inquiring whether the "village auditor," rather than the "village clerk," may also serve as tax administrator.

The provisions of R.C. 705.78 expressly prohibit certain municipal officers from holding other offices or employment with the municipality. R.C. 705.78 provides that "[t]he mayor and the heads of departments of the municipal corporation shall not hold any other federal, state, county, or municipal office, except that of notary public or member of the state militia, nor shall they be employees in any such office" (emphasis added). Although the mayor clearly comes within the purview of R.C. 705.78, the auditor and the treasurer come with the statute's prohibition only if they may be deemed to be "heads of departments" as that term is used in R.C. 705.78.

The term "heads of departments" is not defined for the purposes of R.C.

705.78, nor is the term defined for the purposes of the various other sections of R.C. 705.71-.86 in which the term is employed. See R.C. 705.80 ("all officers, clerks, and employees of the several departments of government of a municipal corporation. . . shall be appointed, employed, suspended, or removed by the head of such department"); R.C. 705.84 ("there shall be a board of control composed of the mayor, . . . the auditor, and the heads of the departments appointed by the mayor"); R.C. 705.85 ("[t]he mayor and the heads of the several departments. . . shall have seats in the council of the municipal corporation"). The use of the term "head of department" in R.C. 705.80, however, is helpful in determining which officers were intended to be encompassed within that term.

As previously noted, R.C. 705.80 provides that all employees of the departments of a municipal corporation shall be employed, suspended, or removed by the head of such department. Since there is no other provision in R.C. 705.71-.86 for the employment of subordinate officers and employees for the various municipal offices and departments, it appears that the legislative intent was for all subordinate officers and employees of the various municipal offices and departments to be employed, suspended, or removed by the head of such office or department pursuant to R.C. 705.80. Thus it may be concluded that the term "head of department" as used in R.C. 705.80 includes any officer or individual who is the head of an independent branch, division, office or department of the municipal corporation regardless of the official designation given to such division or branch.

There is nothing in the language of R.C. 705.78 which evidences a legislative intent to have the term "heads of departments" interpreted any differently for the purposes of R.C. 705.78 than said term is interpreted for the purposes of other sections of R.C. 705.71-.86. Consequently, I conclude that R.C. 705.78 prohibits any officer or individual who serves as the head of an independent division, branch, office or department of the municipal corporation from holding any other office or employment with the municipal corporation. The validity of this conclusion is evident from the fact that construing the term "heads of departments" to include only the officers or individuals who serve as the head of a division of the municipal corporation which is specifically designated as a "department" would lead to the incongruous result of preventing heads of "departments," such as the departments of public service and public safety, from holding other offices while permitting officers, such as the auditor and treasurer, to do so.

Since the village treasurer and village auditor, as well as the city treasurer and city auditor, serve as heads of independent offices in their respective villages and cities, they come within the prohibition of R.C. 705.78. It is, therefore, my opinion that the village treasurer, the village auditor, the city treasurer and the city auditor of a village or a city which has elected to operate under a federal plan of municipal government are prohibited from also serving as the tax administrator of the village or city.

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

1. A municipal corporation that operates under a general statutory plan of government may not create the position or office of municipal income tax administrator and provide that the tax administrator shall be responsible for the enforcement of the municipal income tax ordinance and for the collection and deposit of income tax revenues.
2. Pursuant to R.C. 733.01 and R.C. 733.08, the legislative authority of a city that operates under a general statutory plan of government may provide by ordinance or resolution for the appointment, by the city treasurer, of an individual to be known as the tax administrator to assist the treasurer in matters relating to income taxes. The individual so appointed must be an employee of the treasurer's office and be responsible to, and under the control of, the city treasurer.

3. Pursuant to R.C. 731.10, the legislative authority of a village that operates under a general statutory plan of municipal government may provide for and appoint an individual to be known as the tax administrator to assist the village treasurer in matters relating to income taxes. The individual so appointed must be an employee of the treasurer's office and be responsible to, and under the control of, the village treasurer.
4. Pursuant to R.C. 705.26, R.C. 705.76 and R.C. 705.77, the council of a village or a city that has elected to operate under a federal plan of municipal government pursuant to R.C. 705.71-.86 may create the office or position of municipal income tax administrator and provide that the tax administrator shall be responsible for the enforcement of the municipal income tax ordinance and for the collection and deposit of income tax revenue.
5. The mayor, the treasurer, or the auditor of a municipal corporation which has elected to operate under a federal plan of municipal government may be designated by the council of the municipal corporation, pursuant to R.C. 705.76, to act as the appointing authority for the position or office of tax administrator, unless such action would result in the violation of another ordinance of the municipal corporation or in a conflict of interest for the appointing officer.
6. Since R.C. 705.78 prohibits the head of any department of a municipal corporation operating under a federal plan of government from holding any other office or employment with the municipal corporation, the village treasurer, the village auditor, the city treasurer and the city auditor of a city or village that has elected to operate under a federal plan of municipal government are not permitted to also serve as the tax administrator of said village or city.