

Note from the Attorney General's Office:

1959 Op. Att'y Gen. No. 59-223 was overruled in part by 1978 Op. Att'y Gen. No. 78-022 and 1988 Op. Att'y Gen. No. 88-020.

223

COMPATIBILITY — TOWNSHIP TRUSTEE AND COUNTY HIGHWAY EMPLOYEE — INCOMPATIBLE — TOWNSHIP TRUSTEE AND COUNTY PROBATION OFFICER—INCOMPATIBLE—§143.41 R.C.

SYLLABUS:

1. The elective position of township trustee is incompatible with the position of county highway department employee whether the latter position be in the classified or unclassified service of the county.
2. The elective position of township trustee and the position of county probation officer are not compatible by reason of Section 143.41, Revised Code.

Columbus, Ohio, March 16, 1959

Hon. J. B. O'Brien, Prosecuting Attorney
Meigs County, Pomeroy, Ohio

Dear Sir:

I have before me your request for my opinion which asks the following questions:

- (1) Is the elective position of township trustee compatible with that of county highway department employee?
- (2) Is the elective position of township trustee compatible with that of county probation officer?

The initial step in determining whether or not two particular offices, positions or employments are compatible is to ascertain if such dual positions are authorized or prohibited by statute.

There is nothing in your request to suggest that the township trustees who are employed by the county highway department are so employed in unclassified positions under the civil service pursuant to Section 143.08, Revised Code. Therefore, in part, your first question resolves itself into this: May a person simultaneously occupy the office of township trustee and be an employee of the county department of highways in a position which falls within the classified civil service?

An employee in the classified civil service is subject to the provisions of Section 143.41, Revised Code, which provides:

“No officer or employee in the classified service of the state, the several counties, cities, and city school districts thereof, 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, 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; nor shall any officer or employee in the classified service of the state, the several counties, cities, and city school districts thereof, 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.”

The office of township trustee is an elective office pursuant to Section 505.01, Revised Code, and there can be no question that such an office is obtained by taking part in politics within the meaning of Section 143.41, *supra*. See Opinion No. 1014, Opinions of the Attorney General for 1951, p. 854, and Opinion No. 4058, Opinions of the Attorney General for 1954, p. 367.

Therefore, an individual may not, without violating the provisions of Section 143.41, *supra*, simultaneously (1) be employed by the county highway department, when such employment falls within the classified civil service, and (2) hold the office of township trustee.

Assuming that certain of the township trustees are employed under an unclassified civil service status in the county highway department, the

question as to compatibility must be approached from a different direction because there are no statutory provisions expressly prohibiting such employment.

There are no definite and uniform common-law standards established for making the determination of whether or not one position is compatible with another; however, there are certain tests helpful in making such a determination. In *State, v. Gebert*, 12 O.C.C. (N.S.), 275, the court stated:

“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.”

To effectively make use of this test it is necessary to consider the relative functions of each office, that is, what is the scope of activity of the board of township trustees in relation to that of the county highway department. We may first bear in mind that the county highway department is under the supervision of the county engineer and is supported by funds appropriated by the board of county commissioners.

Pursuant to Section 5571.01, Revised Code, the board of township trustees may, “construct, reconstruct, resurface or improve any public road or part thereof under its jurisdiction or any county road, intercounty highway, or state highway within its township,” and pursuant to Section 5571.02, Revised Code, the board of township trustees has control of the township roads and is obligated to keep them repaired. Furthermore, pursuant to this section the trustees may, with the consent of the county commissioners and state highway director, maintain and repair county and state highways in the township.

Pursuant to Section 5555.02, Revised Code, and Section 5543.01, Revised Code, the county engineer with funds provided by the county commissioners has essentially the same powers and duties relating to county roads.

The question, then, is whether the duties involved in the two positions in any way conflict with one another within the meaning of the test noted above. Keep in mind that township trustees are charged by statute with the duty of keeping township roads in repair pursuant to Section 5571.10, Revised Code. See *Gause, v. Peeler, et al.*, 41 Ohio App., 192.

It is obvious that under Section 5571.02, *supra*, there is a conflict of interest. The township trustees may deal directly with county commis-

sioners relating to roads located in the township, that is to say, the board of township trustees and the county commissioners may contract with one another as to duties each subdivision will assume as to maintenance and repair of county roads within the township. In such transactions it is imperative that the officers are in no capacity subservient to one another.

Furthermore, under Section 5573.01, Revised Code, the township trustees may deal directly with the county engineer with regard to road improvement, in that the county engineer acts in behalf of the board of township trustees in the preparation of surveys, plans, profiles, cross sections, estimates, and specifications relating to proposed road improvement, and they may work together in making a selection where alternate plans are submitted. In such transactions the officers ought not be subservient to one another in any capacity.

Furthermore, pursuant to Section 5555.43, Revised Code, the township trustees and the county commissioners may deal with one another as to cost of road improvement, that is to say, the board of township trustees and the county commissioners may contract regarding the proportion of cost to be assumed by each subdivision relating to improvements made in the township area. Once again it is imperative that the persons in these offices are not subservient to the other in any capacity.

In each of these cases it would be possible for the county to exert influence upon the trustees employed in the county highway department relating to the activities carried on between the two subdivisions. Obviously, the township trustees, as individuals working for the county highway department, are subordinate to the county commissioners, therefore, such conflict comes directly within the terms of the test set forth in *State, v. Gebert, supra*.

In the light of the above it is unnecessary for me to consider whether or not there is any impossibility of performance as to the two duties.

On the basis of this authority and reasoning it is my opinion that a township trustee can not also be an employee of a county highway department, notwithstanding that such employment may be either classified or unclassified under the civil service.

With regard to the question as to whether a township trustee may serve as a probation officer, I invite your attention to Section 2301.27, Revised Code, which in pertinent part provides:

“* * * All positions within such department of probation shall be in the classified service of the civil service of the county.”

As a result of this provision Section 143.41, *supra*, is directly applicable, and the positions are thus not compatible.

Accordingly, it is my opinion and you are hereby advised that:

(1) The elective position of township trustee is incompatible with the position of county highway department employee whether the latter position be in the classified or unclassified service of the county.

(2) The elective position of township trustee and the position of county probation officer are not compatible by reason of Section 143.41, Revised Code.

Respectfully,

MARK McELROY

Attorney General