

OPINION NO. 79-086**Syllabus:**

1. Where the charter of a municipality vests the power to appoint the director of public safety in the mayor, and further prohibits the mayor from holding any other office or from being interested in the emoluments of any service for the municipality, other than his compensation as mayor, the mayor may not serve as the director of public safety; hence, the offices are incompatible.
2. The power to amend the charter of a municipality is vested in the people; therefore, the council may not, by means of an ordinance, effect any change in the charter.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, November 26, 1979

I have before me your request for my opinion regarding the compatibility of the positions of mayor of Middleburg Heights and director of public safety of that city. You ask the following questions:

- (1) Pursuant to the charter provisions, may the mayor serve in the additional capacity as Director of Public Safety?
- (2) If the answer to question No. 1 is in the negative, is an ordinance authorizing the dual role valid?
- (3) If the answer to question No. 1 is in the affirmative, may the mayor receive additional compensation by ordinance for the position of Director of Public Safety during term?

You have indicated that the position of director of public safety is a part time position.

Your first question is whether the provisions of the Middleburg Heights Charter allow the mayor to hold the position of director of public safety. Section 3.02 of the Charter sets forth the qualifications for the office of mayor and states:

Any person holding the office of Mayor, whether elected or appointed to fill a vacancy, shall serve in a full time capacity and shall hold no other office or full time public or private employment, or part time employment that would interfere with his duties as Mayor of Middleburg Heights, except that of a Notary Public or member of the National Guard or Reserve Corps of the United States, and shall not be interested in the profits or emoluments of any contract, job, work or service for the Municipality, other than his compensation as Mayor. (Emphasis added.)

The Charter thus prohibits the mayor from holding any "other office. . . , or part time employment that would interfere with his duties as Mayor of Middleburg Heights," It is clear from the fact that the words "or part time employment that would interfere with his duties as Mayor of Middleburg Heights" are set off by commas that the clause "that would interfere with his duties as Mayor of Middleburg Heights" modifies only "part time employment" and does not modify "other office." Hence, the Charter prohibits the mayor from holding any other office during his term as mayor, and also prohibits him from holding any part time employment that would interfere with his duties as mayor.

While the word "office" is not defined in the Charter, it is apparent that the term refers to a public office, particularly since it is used in contrast with the term "employment." Section 4.14 of the Charter, which deals with compensation and bonds, distinguishes between "elected officials" and "other employees" for purposes of fixing compensation, thereby suggesting that the director of public safety—who is appointed, rather than elected—must be an employee. However, I do not find this general language to be controlling, since Section 7.03 of the Charter specifically refers to the position of the director of public safety as an "office." Finding that the position of director of public safety constitutes an office is consistent with analyses of the statutory position of director of public safety. State ex rel. Lehner v. Sullivan, 91 Ohio App. 305 (1952); 1955 Op. Att'y Gen. No. 5565, p. 328. Hence, I conclude that the position of director of public safety is an office, and that the Charter prohibits the mayor from holding that position.

The conclusion that the mayor may not serve as director of public safety is required, also, by the final portion of Section 3.02 of the Charter, quoted above, which prohibits the mayor from having any interest in the "emoluments of any . . . job, work or service for the Municipality, other than his compensation as Mayor." Webster's New World Dictionary 458 (2d college ed.) defines "emolument" as: "gain from employment or position; payment received for work; salary, wages, fees, etc." If the mayor were to receive compensation for holding the position of the director of public safety, he would clearly be interested in the payment received for services rendered in that position. The Charter effectively prohibits his receiving payment from the municipality, "other than his compensation as Mayor," for undertaking any work or service. This prohibition prevents him from accepting payment for holding any office or employment with the municipality, other than the position of mayor.

The conclusion that one person may not serve as both mayor and director of public safety is consistent with the common law rule governing compatibility of public positions which prohibits a person from holding two positions where one is subordinate to the other. State ex rel. Hover v. Wolven, 175 Ohio St. 114 (1963). Sections 3.05 and 5.01 of the Charter vest the mayor with the authority and duty to appoint a director of public safety. It has been held that an appointing authority may not appoint himself to an appointive position, thereby holding both the appointive and the subordinate positions. As was stated in State ex rel. Louthan v. Taylor, 12 Ohio St. 130, 134 (1861):

The word appoint, when used in connection with an office, ex vi termini, implies the conferring of authority upon another. It was not necessary, therefore, that the statute should, in express terms, prohibit the infirmary directors from appointing one of their own number superintendent; for the language, "the board of directors shall appoint a superintendent," necessarily means that the person appointed shall be different from those who appoint. (Emphasis that of the original.)

One of my predecessors reached the same conclusion and further endorsed the view that all officers having appointive power are disqualified for the positions to which they may appoint. 1935 Op. Att'y Gen. No. 3865, p. 67. See also 1953 Op. Att'y Gen. No. 2253, p. 11; 1947 Op. Att'y Gen. No. 1526, p. 23; 1936 Op. Att'y Gen. No. 5114, p. 71; 1936 Op. Att'y Gen. No. 5408, p. 482. Thus, common law principles support the conclusion that the mayor is prohibited from assuming the position of public safety director.

Your second question asks if an ordinance allowing the mayor to hold the director's position would be valid. Since the prohibition against the mayor's holding any public office is found within the Middleburg Heights Charter, it would be necessary to amend the Charter to negate the prohibition. This cannot be accomplished by an ordinance. Section 16.01 of the Charter itself vests the power to amend the Charter in the people of the city. As was stated in Fuldauer v. City of Cleveland, 32 Ohio St. 2d 114, 118 (1972):

Sections 7, 8 and 9 of Article XVIII of the Ohio Constitution provide authority for the citizens of a municipality to adopt and amend their municipal charter and they constitute the ultimate legislative authority therefor. (Emphasis added.)

Hence, the city council may not, by means of an ordinance, modify the provisions of the Charter.

Your third question requires no answer because the answer to the first question is in the affirmative.

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

1. Where the charter of a municipality vests the power to appoint the director of public safety in the mayor, and further prohibits the mayor from holding any other office or from being interested in the emoluments of any service for the municipality other than his compensation as mayor, the mayor may not serve as the director of public safety; hence, the offices are incompatible.
2. The power to amend the charter of a municipality is vested in the people; therefore, the council may not, by means of an ordinance, effect any change in the charter.