

August 24, 2016

The Honorable Keller J. Blackburn
Athens County Prosecuting Attorney
1 South Court Street
Athens, Ohio 45701

SYLLABUS:

2016-028

A person may not hold simultaneously, within the same county, the positions of member of a board of township trustees and deputy county treasurer when the deputy county treasurer may serve in place of the county treasurer on the county budget commission, the county board of revision, or a hearing board of the county board of revision. (2006 Op. Att'y Gen. No. 2006-034, followed.)



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OPINION NO. 2016-028

The Honorable Keller J. Blackburn
Athens County Prosecuting Attorney
1 South Court Street
Athens, Ohio 45701

Dear Prosecutor Blackburn:

You have requested an opinion whether a deputy county treasurer of Athens County may serve simultaneously as a member of the board of trustees of a township in Athens County.

A seven-question test is used to determine whether a person may serve in multiple public positions:

1. Is either of the positions a classified employment within the terms of R.C. 124.57?
2. Do the empowering statutes of either position limit employment in another public position or the holding of another public office?
3. Is one position subordinate to, or in any way a check upon, the other?
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 which are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

2003 Op. Att’y Gen. No. 2003-010, at 2-69 to 2-70. “In order for two positions to be found compatible, all seven questions must be resolved in favor of compatibility.” 1989 Op. Att’y Gen. No. 89-052, at 2-218.

Conflicts of Interest

The positions of a member of a board of township trustees and deputy county treasurer are rendered incompatible by the fifth question of the compatibility analysis. The fifth question asks

whether a conflict of interest exists when one person serves simultaneously in two positions. 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 (quoting 1985 Op. Att’y Gen. No. 85-100, at 2-427). “A person may not simultaneously hold two public positions if he would be subject to divided loyalties and conflicting duties or be exposed to the temptation of acting other than in the best interest of the respective agencies or offices he serves.” 2000 Op. Att’y Gen. No. 2000-025, at 2-168.¹

To determine the potential conflicts of interest that may exist with respect to the positions of member of a board of township trustees and a deputy county treasurer, we must examine the powers and duties of each position.

Duties and Functions of a Deputy County Treasurer

R.C. 321.04 states, in part, that “[e]ach county treasurer may appoint one or more deputies, and he shall be liable and accountable for their proceedings and misconduct in office.” A deputy county treasurer is appointed and compensated by the county treasurer to perform duties on the treasurer’s behalf and holds the position at the pleasure of the county treasurer. *See* R.C. 3.06(A); R.C. 321.04; R.C. 325.17. No language in R.C. 321.04 delineates the specific duties and functions of a deputy county treasurer. Rather, the county treasurer assigns duties and responsibilities to a deputy county treasurer. A deputy county treasurer is thus accountable to and subject to the direction of the county treasurer.

¹ Pursuant to R.C. 102.08(A), the Ohio Ethics Commission is authorized to render advisory opinions regarding the application of the provisions of R.C. Chapter 102, R.C. 2921.42, and R.C. 2921.43 to the conduct of public officials. *See, e.g.*, R.C. 102.03(D) (prohibiting a public official or employee from using the authority or influence of his office or employment “to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person’s duties”); R.C. 2921.42 (prohibiting the use of official influence to obtain contracts that benefit a public officer or his family, and providing exceptions for certain situations in which the public officer does not participate); R.C. 2921.43 (prohibiting the receipt of improper compensation by a public official or public employee). In light of this express statutory grant of power to the Ohio Ethics Commission, the Attorney General refrains from issuing formal opinions on questions that are within the Commission’s exclusive jurisdiction. 1997 Op. Att’y Gen. No. 97-044, at 2-275 n.6; 1989 Op. Att’y Gen. No. 89-037, at 2-166 to 2-167. Thus, questions about the application of R.C. Chapter 102, R.C. 2921.42, and R.C. 2921.43 to the positions at issue in this opinion should be directed to the Ohio Ethics Commission.

The duties and responsibilities of a county treasurer generally include keeping accounts of all moneys received and disbursed by the treasurer, R.C. 321.07; receiving taxes and assessments collected by the treasurer, R.C. 321.08; R.C. 323.12; R.C. 323.132; R.C. 323.14; R.C. 323.15; and providing statements to the county auditor concerning the amount and crediting of taxes collected by the treasurer, R.C. 321.09-.10. 2006 Op. Att’y Gen. No. 2006-034, at 2-310. Additionally, a county treasurer may be responsible for redeeming warrants, R.C. 321.16; depositing redeemed warrants with the county auditor, R.C. 321.20; settling with the county auditor all taxes and assessments that the treasurer has collected, R.C. 321.24; R.C. 321.29; accepting liquidated claims and certificates, R.C. 323.02-.05; and enforcing tax liens, R.C. 323.25. Your office has indicated that collection of taxes and recordation of all monies received by other county agencies are responsibilities of a deputy county treasurer.

The county treasurer is a member of the county budget commission, R.C. 5705.27, and the county board of revision, R.C. 5715.02. A deputy county treasurer may serve in place of the county treasurer on the county budget commission or the county board of revision. *See* R.C. 3.06 (“[a] deputy, when duly qualified, may perform any duties of his principal”); R.C. 5715.02 (authorizing the county treasurer to “appoint one qualified employee from the [county treasurer’s] office to serve in the [county treasurer’s] place and stead” on the county board of revision); 1934 Op. Att’y Gen. No. 3605, vol. III, p. 1721; *see also* 1943 Op. Att’y Gen. No. 6186, p. 363 (“deputies may so sit in place of their principals”). The county budget commission reviews annual tax budgets and information submitted by various subdivisions and taxing authorities² within the county and revises and adjusts the estimates of balances and receipts from all sources for each fund, certifies the estimated resources for each fund, and determines the total appropriations to be made from each fund. *See* R.C. 5705.31-.32; R.C. 5705.34; *see also* 2005 Op. Att’y Gen. No. 2005-002, at 2-18.

Each county has a county board of revision consisting of the county treasurer, county auditor, and the president of the board of county commissioners. *See* R.C. 5715.01(B); R.C. 5715.02. “The primary function of the board of revision is equalization and revision of real property taxation assessments.” 1990 Op. Att’y Gen. No. 90-028, at 2-104; R.C. 5715.01(B) (the county board of revision “hear[s] complaints and revise[s] assessments of real property for taxation”). R.C. 5715.02 authorizes a county treasurer to “appoint one qualified employee from his office to serve in his place and stead on each such board³ for the purpose of hearing complaints as to the value of real property only.” (Footnote added.)

² For purposes of R.C. Chapter 5705, a township is a “subdivision,” R.C. 5705.01(A), and a board of township trustees is a “taxing authority,” R.C. 5705.01(C).

³ Pursuant to R.C. 5715.02, the members of the county board of revision

may provide for one or more hearing boards when they deem the creation of such to be necessary to the expeditious hearing of valuation complaints.... Each such hearing board has the same authority to hear and decide complaints and sign the journal as the

Duties and Functions of a Member of a Board of Township Trustees

A township trustee, as an elected township officer, R.C. 505.01, serves and is responsible to the township's electorate. The powers, duties, and responsibilities of a member of a board of township trustees relate primarily to exercising the legislative power of the township. 1994 Op. Att'y Gen. No. 94-013, at 2-60 ("[t]ownship trustees are statutorily vested with various powers and duties associated with the government of the township"). A board of township trustees is authorized to appoint a township administrator, R.C. 505.031; maintain an inventory of township supplies, R.C. 505.04; maintain a list of building nuisances, R.C. 505.06; accept and dispose of property, R.C. 505.10; R.C. 759.19, exchange, transfer, and lease real property, R.C. 505.104; R.C. 505.11; provide for solid waste facilities, R.C. 505.12; purchase, construct, or acquire township parks, public library buildings, and other public areas, R.C. 505.26; and provide fire and police protection to the township's residents, R.C. 505.37-.39; R.C. 505.43. As a taxing authority, a board of township trustees is required to adopt a tax budget for each fiscal year, R.C. 5705.28, and submit the tax budget to the county auditor, R.C. 5705.30, who in turn presents the tax budget to the county budget commission, R.C. 5705.31.

Specific Conflicts of Interest

As a member of the county budget commission, the county treasurer assists in adjusting the amounts budgeted by the various subdivisions, revises the estimates, and equalizes the total tax revenues available. *See* R.C. 5705.31-.32. "An argument that a subdivision is entitled to a certain level of funds means a reduced level of funds are available for [another] subdivision's use." 1996 Op. Att'y Gen. No. 96-008, at 2-33. In this circumstance, a deputy county treasurer who is also a township trustee, while serving on the county budget commission in place of the county treasurer, may be inclined to adjust the tax budgets of the other subdivisions within the county so that the board of township trustees has all the moneys it needs to cover the amount it has proposed in the budget submitted to the county budget commission. In addition, in carrying out his duties on the county budget commission in place of the county treasurer, a deputy county treasurer will have to review the budget he helped formulate for his township. *See* R.C. 5705.28 (the annual tax budget of a township is prepared by its legislative authority). A predisposition of loyalty could prevent a deputy county treasurer who serves in place of the county treasurer on the county budget commission from making

board of revision, and shall proceed in the manner provided for the board of revision by [R.C. 5715.08-.20]. Any decision by a hearing board shall be the decision of the board of revision.

For the purpose of this opinion, a reference to a "county board of revision" is meant to include one or more hearing boards created by the county board of revision under R.C. 5715.02.

completely objective and disinterested determinations in matters concerning the township's budget or result in preferential treatment being accorded the township in the disbursement of moneys during the budgeting process. Opinions of the Attorney General have determined that a potential conflict of interest is present where one person who owes loyalty to two governmental entities both presents and reviews a position on behalf of one entity to the potential detriment of the other. 2003 Op. Att'y Gen. No. 2003-006, at 2-36; *cf.* 1983 Op. Att'y 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" as the county agricultural society is competing against other county entities for the county's tax revenues; as county treasurer, this person may be inclined to make budget decisions advantageous to the county agricultural society for which he also serves to the detriment of other county entities); 1982 Op. Att'y Gen. No. 82-042, at 2-119 (deputy county treasurer and mayor of a municipality are incompatible as the deputy county treasurer, who serves on the county budget commission as the county treasurer's designee, reviews the budget of the municipality in which he serves as a mayor); 1933 Op. Att'y Gen. No. 1022, vol. II, p. 1039 (a township clerk-treasurer could not also serve as a deputy treasurer in the same county in which the township is located because a township clerk-treasurer, as fiscal officer for the township, may be called upon to appear and insist upon a proper share of revenue for the township before the county budget commission on which he, as deputy treasurer, was acting in place of the county treasurer). In his service on the county budget commission, the deputy county treasurer is required to adjust the funds among the subdivisions, including the township in which he serves, in an unbiased manner. *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"). A deputy county treasurer who serves in place of the county treasurer on the county budget commission may be tempted to make budget decisions that unduly favor the township of which he is a trustee.

A similar potential conflict of interest may exist as a result of a deputy county treasurer serving in place of the county treasurer on the county board of revision. Pursuant to R.C. 5715.02, a deputy county treasurer may serve in place of the county treasurer on the county board of revision for the purpose of hearing complaints about the value of real property for taxation purposes. 2006 Op. Att'y Gen. No. 2006-042, at 2-413. "Under R.C. Chapter 5705, each parcel of real property is subject to taxation by every taxing unit within which it is located." 2010 Op. Att'y Gen. No. 2010-031, at 2-226. Determinations of the value of real property located within a county by the county board of revision affect the amount of taxes the political subdivisions are authorized to collect. *See, e.g.*, R.C. 5705.02; R.C. 5705.03; R.C. 5705.49; R.C. 5713.01(A). It follows that a board of township trustees has an interest in the property value determinations made by the county board of revision. There would be an incentive for this person, while serving on a county board of revision, to render a decision where a higher assessment value is reached thereby increasing the tax revenues collected for the township. Thus, these determinations made by a deputy county treasurer might be improperly influenced by the incentive to potentially increase these moneys for the township in which he serves as a township trustee.

Determination of Impermissible Conflicts of Interest

That a conflict of interest exists does not automatically render two positions incompatible. Whether a conflict of interest is impermissible, in the sense that it makes two positions incompatible, depends upon several factors:

[i]f our review discloses such conflicts, we must next determine the immediacy of the conflicts to see whether the conflicts may be sufficiently avoided or eliminated entirely so as to allow the person to serve simultaneously in both positions. The pertinent factors used in making this determination include, but are not limited to, the probability of the conflict, the ability of the person to remove himself from the conflict (should it arise), whether the person exercises decision-making authority in both positions, and whether the conflict relates to the primary functions of each position, or to financial or budgetary matters.

2006 Op. Att’y Gen. No. 2006-010, at 2-86 to 2-87. In 2006 Op. Att’y Gen. No. 2006-034, at 2-308 to 2-309, the Attorney General considered “whether a member of a city legislative authority may serve within the same county as a chief deputy treasurer for the county treasurer when the chief deputy treasurer may serve in place of the county treasurer on the county budget commission and hearing board of the county board of revision.” 2006 Op. Att’y Gen. No. 2006-034, at 2-316, determined that “the conflicts [of interest] cannot be sufficiently avoided or eliminated entirely when a chief deputy treasurer or deputy treasurer serves in place of the county treasurer on the county budget commission or a hearing board of the county board of revision.” Although 2006 Op. Att’y Gen. No. 2006-034 addresses the compatibility of the positions of chief deputy county treasurer and member of a city legislative authority, rather than a board of township trustees, the rationale of 2006 Op. Att’y Gen. No. 2006-034 nonetheless applies insofar as a board of township trustees undertakes legislative duties and responsibilities that are analogous to the legislative duties and responsibilities of a city legislative authority. We conclude that the conflicts of interest that confront this deputy county treasurer while serving as a township trustee cannot be sufficiently mitigated or eliminated.

With respect to the probability of the conflict of interest, the conflict of interest is not remote or speculative because tax and budget issues are regularly addressed by the board of township trustees and county budget commission. *See* 2011 Op. Att’y Gen. No. 2011-048, at 2-385 (“[d]iscussions, deliberations, and votes about a tax budget or appropriation measure and other fiscal matters related to the tax budget or appropriation measure are regularly undertaken ... since the tax budget or appropriation measure and its funding are matters that arise on an annual basis”); R.C. 5705.28(A)(2) (every year a taxing authority “shall adopt a tax budget for the next succeeding fiscal year ... [o]n or before the fifteenth day of July” for submission to the county budget commission).

Additionally, these conflicts of interest affect directly the finances and tax budget of the township. A board of township trustees is responsible for controlling the township’s finances. Fiscal, tax, and budgetary matters “require the exercise of independent, decision-making authority, and involve essential, nondelegable responsibilities.” 2012 Op. Att’y Gen. No. 2012-008, at 2-57. A

primary statutory function of a board of township trustees is to administer and manage the township's fiscal and budgetary matters.

Similarly, in his service upon the county budget commission, the deputy county treasurer is responsible for making adjustments to the budgets of the county and political subdivisions within the county, including the township in which he serves as township trustee. In his service upon the county board of revision, the deputy county treasurer is responsible for making adjustments to the county's real property values, including real property within his township. These taxing and budgeting decisions made by the deputy county treasurer directly affect the budget of the township.

The final factor is whether a person may remove himself from the conflict of interest. “Prior opinions of the Attorney General have determined that when a public officer is exposed to influences that may prevent him from making completely objective, disinterested decisions in a particular matter, the public officer should abstain from any discussions or votes concerning that matter,’ if such abstention is possible.” 1994 Op. Att’y Gen. No. 94-079, at 2-394 (quoting 1994 Op. Att’y Gen. No. 94-039, at 2-201). It is impractical for a member of a board of township trustees to abstain regularly from participating in discussions, deliberations, negotiations, and votes concerning the township’s tax, budget and finances. *See* 2006 Op. Att’y Gen. No. 2006-034, at 2-317. Likewise, a deputy county treasurer serving on the county budget commission and county board of revision is required to serve under the conditions prescribed by the county treasurer. *Id.* at 2-316 to 2-317. Constant abstentions from fiscal, tax, and budgetary matters may prevent the deputy county treasurer from competently and completely fulfilling his duties in that position. *See* 1994 Op. Att’y Gen. No. 94-035, at 2-180 (“because the [county budget] commission has only three members, the need for [one member] to recuse himself on a constant and recurring basis from making such decisions would likely impair the functioning of the commission”); *see generally* 2010 Op. Att’y Gen. No. 2010-031, at 2-228 (a member of a hearing board of a county board of revision who serves as a member of a city legislative authority within the same county “cannot continually abstain from participating in matters involving taxing units that overlap the city since all the matters the board considers will involve the county (which is a taxing unit) and, possibly, other taxing units that overlap the city. If this were permitted, the hearing board member could not perform the duties the law requires him to perform as a member of the hearing board”).

The conflicts of interest that a deputy county treasurer will face when serving on the county budget commission and county board of revision and as a member of the board of township trustees involve primary functions of these positions as well as fiscal and budgetary matters, and thus, are unable to be eliminated or mitigated. Accordingly, we conclude that a person may not hold simultaneously, within the same county, the positions of member of a board of township trustees and deputy county treasurer when the deputy county treasurer may serve in place of the county treasurer on the county budget commission, the county board of revision, or a hearing board of the county board of revision.

Finding that the fifth question of the analysis does not support compatibility, we need not address the remaining questions of the compatibility analysis. *See* 1981 Op. Att’y Gen. No. 81-079, at 2-311 (“[i]n order for the positions at issue to be compatible, each of the seven questions must be

answered in the negative. An affirmative answer to even one of the seven questions compels a conclusion that the positions are incompatible”).

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised that a person may not hold simultaneously, within the same county, the positions of member of a board of township trustees and deputy county treasurer when the deputy county treasurer may serve in place of the county treasurer on the county budget commission, the county board of revision, or a hearing board of the county board of revision. (2006 Op. Att’y Gen. No. 2006-034, followed.)

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive style with a long, sweeping tail on the final letter.

MICHAEL DEWINE
Ohio Attorney General