

OPINION NO. 90-037**Syllabus:**

An individual serving as a township trustee, who does not vote upon a contract entered into between the township and a private fire company, may simultaneously be a full-time paid member of said company, provided that he is not in violation of any local departmental regulations, charter provisions or ordinances, or statutory provisions subject to interpretation by the Ohio Ethics Commission pursuant to R.C. 102.08. (1986 Op. Att'y Gen. No. 86-059, syllabus, paragraph one, clarified.)

To: Robert L. Becker, Licking County Prosecuting Attorney, Newark, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, June 20, 1990

I have before me your request for my opinion regarding the simultaneous holding of the positions of full-time paid member of a private volunteer fire corporation and trustee of a township which contracts for fire protection from that corporation. In addition, you have several questions concerning the removal of an individual from the position of township trustee if such positions may not be simultaneously held by the same individual. Pursuant to a telephone conversation between members of our respective staffs, I have rephrased your questions as follows:

1. May an individual simultaneously hold the positions of full-time paid member of a private volunteer fire corporation and trustee of a township which contracts for fire protection from that corporation?
2. If the answer to the first question is in the negative, what is the proper remedy for removing the individual from the position of township trustee?
3. If the answer to the first question is in the negative, is it the responsibility of the prosecuting attorney of the county in which the township is situated to take the necessary action to have the individual removed from the position of township trustee?

The powers and duties of township trustees are delineated in R.C. Chapter 505 and related provisions throughout the Revised Code. The trustees of a township are vested by statute with various powers and duties associated with the government of the township. See, e.g., R.C. 505.07 (may publish and distribute newsletters); R.C. 505.10 (may accept and sell township property); R.C. 505.17 (may regulate engine noise and vehicle parking); R.C. 505.262 (may issue notes of the township to finance purchases and construction); R.C. 505.27 (may provide, maintain, and operate facilities for or contract for the collection, transfer, and disposal of solid wastes); R.C. 505.37 (may provide for fire protection); R.C. 505.70 (may participate in and give financial assistance in establishing and operating federal programs); R.C. 505.75 (may adopt and enforce a township building code); R.C. 5731.48 (may disburse estate tax moneys to the board of education of the school district of which the township is a part).

I note that the term "private volunteer fire corporation" does not appear in the Revised Code. The current statutory scheme relative to township fire protection contemplates fire protection by two entities other than township, township fire district, joint fire district, and municipal corporation fire departments. 1980 Op. Att'y Gen. No. 80-075 at 2-299. A board of township trustees may either enter into an agreement with a "volunteer fire company" for the use and operation of the township's firefighting equipment, R.C. 505.37(A), or the board may contract with a "private fire company" to obtain fire protection, R.C. 9.60. See Op. No. 80-075 at 2-299; see also R.C. 505.37(C).

Private fire companies operate their own firefighting equipment, R.C. 9.60(A)(2), while volunteer fire companies use and operate the township's firefighting equipment and are compensated on any basis and in any amount that the township trustees consider equitable, R.C. 505.37(A). See generally Op. No. 80-075 at 2-299 (the important distinguishing characteristic of a private fire company, in addition to the contractual nature of its services, is that, under R.C. 9.60, it may only contract to operate the firefighting equipment which it owns). You have provided information that indicates that the "private volunteer fire corporation" operates its own firefighting equipment and that "[t]he township pays the private fire corporation on a yearly basis pursuant to the contract, and the private fire corporation pays the employees for services from proceeds of that contract." Pursuant to this information, I assume, for purposes of this opinion, that the "private volunteer fire corporation," you have described corresponds to the statutory term "private fire company," rather than "volunteer fire company."

The position of full-time paid member of a private fire company, the other position about which you ask, is a private occupation. See Op. No. 80-075 at 2-298 ("[i]t may not be concluded that private volunteer fire fighters are members of, or comprise, 'the fire department' of a township...even if the private fire company for which they work has contracted to provide all fire-related services to the political subdivision"); 1956 Op. Att'y Gen. No. 7464, p. 866 at 869 ("I find it impossible to conclude that a member of a private fire company which has contracted, as provided in Section 505.44, Revised Code, [now R.C. 9.60]¹ to provide fire protection to a subdivision, could be regarded as a 'regular full-time fireman in a township fire department'" (emphasis in original, footnote added)); see also *Schroeder v. Moore*, 15 Ohio App. 3d 40, 42, 472 N.E.2d 392, 396 (Ct. App. Allen County 1984) ("'fire department' refers to an agency established by the township and not to private companies hired for that purpose"). The duties of a full-time paid member of a private fire company involve the providing of fire protection to those governmental entities which have contracted or agreed to have such protection provided by the private fire company which employs him as a firefighter.

I turn now to your first question. In ascertaining whether two public positions are compatible, I have consistently utilized the seven question analysis formulated by my immediate predecessor as a method of reviewing the statutory and common law elements of compatibility. See 1979 Op. Att'y Gen. No. 79-111 at 2-367 and 2-368; see also *Esler v. Summit County*, 39 Ohio Misc. 2d 8, 530 N.E.2d 973 (C.P. Summit County 1985). A full-time paid member of a private fire company,

¹ The provisions of R.C. 505.44 which authorized a township to contract with a private fire company for fire protection were repealed by 1979-1980 Ohio Laws, Part I, 328 (Am. S.B. 98, eff. Oct. 6, 1980). These provisions, however, were incorporated into R.C. 9.60. See Am. S.B. 98; see also 1986 Op. Att'y Gen. No. 86-030 at 2-156 n. 3 (the terms of former R.C. 505.44 are analogous to those now found in R.C. 9.60); 1980 Op. Att'y Gen. No. 80-075 at 2-299 (Am. S.B. 98 "repealed R.C. 9.60, 307.05, 505.44, 717.02, and 3345.09 (as well as R.C. 505.42, 505.442 and 717.021), and enacted a new R.C. 9.60, which effectively consolidates and extends all former provisions relative to contracting for fire protection and authorizes any county, political subdivision or instrumentality to contract with a fire fighting agency of this state, a private fire company or the governmental entity of an adjoining state to obtain fire protection").

as indicated above, however, holds a private position. The common law analysis of compatibility, thus, does not apply to the analysis of these two positions. See 1989 Op. Att'y Gen. No. 89-105 at 2-512 (the common law test of compatibility is inapplicable when one of the positions is a private occupation); 1989 Op. Att'y Gen. No. 89-037 at 2-163 ("[s]ince the occupation of bail bonding is a private occupation, however, the common law test of compatibility does not apply to the analysis of these two positions"); 1983 Op. Att'y Gen. No. 83-035 at 2-135 ("[b]ecause a director of a county agricultural society holds a private position rather than a public office, the common law analysis of compatibility is inapplicable").

It is still necessary, however, to determine whether an applicable statute, local ordinance or regulation, or conflict of interest prohibits the simultaneous holding of the positions. Op. No. 89-105 at 2-512; Op. No. 89-037 at 2-163; see also Op. No. 83-035 at 2-135. I assume, for purposes of this opinion, that there are no local departmental regulations, charter provisions, or ordinances which prohibit the simultaneous holding of both positions. See Op. No. 89-105 at 2-512; Op. No. 89-037 at 2-164; cf. Op. No. 79-111 at 2-368. Moreover, I am not aware of any state or federal regulations.² However, it must be determined whether statutes governing either position limit the outside employment possible. R.C. 505.011, which authorizes and limits the outside employment of township trustees as firemen, provides:

A member of a board of township trustees may be appointed as a volunteer fireman and in such capacity be considered an employee of the township, or he may be a member of a private fire company which has entered into an agreement to furnish fire protection for the township of which such member is a trustee; provided that such member shall not receive compensation for his services as a volunteer fireman.

A township trustee, thus, is statutorily authorized, pursuant to R.C. 505.011, to be appointed as a volunteer fireman or employed as a member of a private fire company which has contracted or agreed to provide fire protection to the township. See, e.g., 1987 Op. Att'y Gen. No. 87-084 (syllabus, paragraph two) ("[a] township trustee may serve as a fire chief of a township volunteer fire department, provided that he does not receive compensation for his services"); 1986 Op. Att'y Gen. No. 86-059 (syllabus, paragraph one) ("[p]ursuant to R.C. 505.011, a member of a board of township trustees may be a member of a private fire company that has entered into an agreement to furnish fire protection for the township, provided that he receives no compensation as a volunteer fireman");³ 1984 Op. Att'y Gen. No. 84-018 (syllabus) (R.C. 505.011 "allows a township trustee to be appointed to serve as an officer of a volunteer fire department provided that such appointment does not entitle the officer to receive compensation for his services"); 1978 Op. Att'y Gen. No. 78-017 (syllabus) ("[a] township trustee may, pursuant to R.C. 505.011, serve in the volunteer fire department of another township, even though that other fire department has a contract to provide fire protection to the township for which he is trustee, provided that the trustee receives no compensation from the township for providing such protection"). The last clause of R.C. 505.011, which reads "provided that such member shall not receive compensation for his services as a volunteer fireman," however, raises the issue of whether or not a township trustee may be compensated for his services as a member of a private fire company which serves the township.

² You have not indicated that any federal funds are involved in the contract with the private fire company. I, therefore, offer no opinion as to whether such funding would make any federal statutes or regulations applicable.

³ I note that in your letter you indicate that you are concerned that the first syllabus paragraph of 1986 Op. Att'y Gen. No. 86-059 disallows an individual from simultaneously holding the positions of full-time paid member of a private fire company and trustee of a township which contracts with that company for fire protection, since the firefighting position receives compensation for any services performed. While the first syllabus

As stated above, R.C. 505.011 authorizes a township trustee to be appointed as a volunteer fireman or employed as a member of a private fire company. Volunteer firemen of a township fire department are appointed by the board of township trustees in the same manner as regular paid firemen of the township fire department. *Jaeger v. Wracker*, 13 Ohio App. 3d 341, 343, 469 N.E.2d 857, 860 (Ct. App. Lorain County 1983); see also R.C. 505.38(A) (a board of township trustees "shall provide for the employment of such fire fighters as it considers best"). Additionally, the compensation for volunteer and regular firemen of a township fire department is fixed by the board of township trustees. *Jaeger v. Wracker*, 13 Ohio App. 3d at 343, 469 N.E.2d at 860; see R.C. 505.38(A) (a board of township trustees shall fix the compensation of fire fighters in the township fire department). Consequently, volunteer firemen of a township fire department are employees of the township. *Jaeger v. Wracker*, 13 Ohio App. 3d at 343, 469 N.E.2d at 860; see R.C. 505.011 (a trustee acting as a volunteer fireman is considered an employee of the township); R.C. 505.41 ("persons employed by a township on a part-time basis to operate or maintain fire-fighting equipment, or persons employed in any manner incidental to the operation or maintenance of such equipment, are township employees for the purposes of workers' compensation insurance, the same as though regularly employed as designated in section 4123.01 of the Revised Code"). Members of a private fire company, however, are not employees of the township. See Op. No. 80-075; 1956 Op. No. 7464; see also *Schroeder v. Moore*. Further, the members of a private fire company which contracts with a township are not paid by the board of township trustees, but rather are paid by the private fire company.

Turning now to the last clause in R.C. 505.011, it becomes readily apparent that the language contained in that clause was intended only to apply to trustees appointed by the township as volunteer firemen in the township fire department. The language of the last clause specifically states that "such member shall not receive compensation for his services as a *volunteer fireman*." R.C. 505.011 (emphasis added). The only other reference to "volunteer fireman" in the statute is contained in the first clause, which authorizes township trustees to be appointed by the township as volunteer firemen in the township fire department. "[A] word repeatedly used in [a] statute will be presumed to bear the same meaning throughout the statute unless there is something to show that another meaning is intended." *Schuhholz v. Walker*, 111 Ohio St. 308, 325, 145 N.E. 537, 542 (1924); accord *Rhodes v. Weldy*, 46 Ohio St. 234, 20 N.E. 461 (1889) (syllabus, paragraph two). I find no indication that the General Assembly intended to attach a different meaning to the phrase "volunteer fireman," in the last clause of R.C. 505.011. See generally *Schuhholz v. Walker*, 111 Ohio St. at 325-26, 145 N.E. at 542 ("where the subject-matter to which the word refers is not the same in both clauses, or where the surrounding circumstances are different, this presumption [that a word means the same throughout a statute] yields to an adverse presumption furnished by an analysis of the various purposes of the law and of the language in which those purposes are expressed"). Hence, the phrase "volunteer fireman," as used throughout R.C. 505.011 refers to only those firemen appointed as volunteers in the township fire department. Accordingly, I find that R.C. 505.011 does not prohibit a full-time

paragraph of Op. No. 86-059 might be misread, to prohibit an individual from simultaneously holding the positions in question, an examination of the facts on which that opinion was based indicates no such prohibition was intended by the language of Op. No. 86-059. The opinion specifically concerned the simultaneous holding of the positions of *non-paid* member of a private fire company and trustee of a township which contracts with such company for fire protection. The facts on which the opinion were based specifically stated "that the individual members of the fire company will not be compensated for their activities." Op. No. 86-059 at 2-324. Consequently, the language of the first paragraph of the syllabus of Op. No. 86-059, to wit, "provided that he receives no compensation as a volunteer fireman," was intended to indicate that the opinion specifically concerned only non-paid members of a private fire company serving as trustees of townships which have contracted with the companies that employ them as firefighters, and did not address the question that you have presented.

paid member of a private fire company from simultaneously holding the position of trustee of a township which has contracted for fire protection from that company.

Finally, it must be determined whether there is a conflict of interest between the two positions. In order to answer this question, "it is necessary to examine the statutory provisions governing the authority of a township trustee to engage in contract negotiations or other activities in circumstances that raise questions concerning possible conflicts of interest." Op. No. 86-059 at 2-322.

R.C. 511.13 concerns conflicts of interest in township contracts and provides, in pertinent part, that "[n]o member of the board of township trustees or any officer or employee thereof shall be interested in any contract entered into by such board." Cf., e.g., R.C. 305.27 ("[n]o county commissioner shall be concerned, directly or indirectly, in any contract for work to be done or material to be furnished for the county"); R.C. 731.02 (no member of the legislative authority of a city shall be interested in any contract with the city); R.C. 731.12 ("[n]o member of the legislative authority [of a village] shall...be interested in any contract with the village"); R.C. 3313.33 ("[n]o member of [a board of education] shall have, directly or indirectly, any pecuniary interest in any contract of the board...of which he is a member"). Township trustees, thus, are statutorily prohibited, pursuant to R.C. 511.13, from having an interest in a township contract. See 1982 Op. Att'y Gen. No. 82-008 (syllabus) ("[t]he provision of R.C. 511.13 which prohibits members of the board of township trustees and officers or employees of a township from having an interest in contracts entered into by the board of township trustees applies to any contract entered into by such board, unless the interested person meets the criteria for a permissible interest set forth in this section").

You have indicated that the individual as a member of the private fire company will be compensated. Therefore, the township trustee in question has an interest in a township contract. It is my opinion, however, that in this particular situation, R.C. 511.13 is inapplicable. By enacting R.C. 505.011, the General Assembly has implicitly sanctioned this interest in a township contract. The General Assembly has evidently deemed that the potential conflicts of interest which might arise between a township trustee and member of a private fire company which contracts with the township are outweighed by the need for firefighters. See Op. No. 86-059 at 2-325 and 2-326 (by enacting R.C. 505.011, the General Assembly has implicitly sanctioned the participation of a single individual in the positions of township trustee and non-paid member of a private fire company); Op. No. 84-018 at 2-62 ("[t]he General Assembly [by enacting R.C. 505.011] has evidently deemed that the potential conflicts of interest which might arise between a township trustee and volunteer firefighter, see 1960 Op. No. 1166, are outweighed by the need for firefighters"); cf. R.C. 135.11 (providing that an officer, director, stockholder, employee, or owner of an interest in a public depository is not deemed interested in the deposit of moneys in such depository, for the purpose of laws that prohibit officers from being interested in public contracts, even though such individual might otherwise be deemed to have such an interest, as per Ohio Ethics Commission, Advisory Op. No. 83-003). See generally Op. No. 78-017 at 2-42 ("[t]he obvious purpose of R.C. 505.011 is to allow township trustees to serve their communities as volunteer firemen without jeopardizing their trusteeship"). But see R.C. Chapter 102 and R.C. 2921.42 (discussed, *infra*).

I find further support for my opinion in the long-standing rule of statutory construction that a specific statute enacted later in time than a preexisting statute will control where a conflict between the two arises. See *Davis v. State Personnel Bd. of Review*, 64 Ohio St. 2d 102, 105, 413 N.E.2d 816, 818 (1980); *City of Cincinnati v. Bossert Mach. Co.*, 16 Ohio St. 2d 76, 79, 243 N.E.2d 105, 107 (1968), *cert. denied*, 394 U.S. 998 (1969); *State ex rel. Steller v. Zangerle*, 100 Ohio St. 414, 414, 126 N.E. 413, 413 (1919) (*per curiam*); see also R.C. 1.51 (a special provision prevails as an exception to a general provision when an irreconcilable conflict between the two exists). R.C. 511.13 is a general statute in that it generally prohibits all township officers and employees from being interested in township contracts. R.C. 505.011, however, is a specific statute which authorizes a township trustee to be a member of a private fire company which contracts with the township. Further, R.C. 505.011, 1967-1968 Ohio Laws, Part II-III, p. 2649 (Sub.

H.B. 499, eff. Dec. 11, 1967), was enacted after the adoption of R.C. 511.13, 1919 Ohio Laws, Part I, 542, 545 (Am. S.B. 112, passed May 6, 1919).⁴ Moreover, a presumption exists that the General Assembly enacts legislation in light of all prior legislation on the subject. *State v. Frost*, 57 Ohio St. 2d 121, 125, 387 N.E.2d 235, 238 (1979); *City of Cincinnati v. Thomas Soft Ice Cream*, 52 Ohio St. 2d 76, 79, 369 N.E.2d 778, 780 (1977). Consequently, I find that R.C. 511.13 does not prohibit a township trustee from being a full-time paid member of a private fire company which contracts with the township.

In addition to the direct statutory prohibition of R.C. 511.13, principles of the common law prohibit a township trustee from participating in a situation that involves a conflict of interest. Op. No. 86-059 at 2-323. "A public servant may not simultaneously hold an additional position which would subject him or her to divided loyalties and conflicting duties or to the temptation to act other than in the best interests of the public." Op. No. 89-037 at 2-164; accord Op. No. 89-105 at 2-513; cf. Op. No. 79-111 at 2-371. See generally *State ex rel. Taylor v. Pinney*, 13 Ohio Dec. 210, 212 (C.P. Franklin County 1902) ("[t]he self interest of the public official and the public interests which he represents, must not be brought into conflict"). A township trustee who is a paid member of a private fire company which contracts with the township, clearly is subject to divided loyalties, if as trustee, he votes upon the contract with the private fire company. See Op. No. 86-059 at 2-325. However, in Op. No. 86-059 at 2-325, I concluded

that R.C. 505.011 permits a township trustee who is a [non-paid] member of a private fire company to participate, in his capacity as trustee, in negotiating and voting upon a contract with the private fire company. It is clear that such participation may place the trustee in a position where he has certain loyalties to both parties to the contract. A township trustee has the duty of assuring that the township receives adequate fire protection at a reasonable price; a member of the fire company is concerned that any contract provide adequate compensation and favorable conditions for the firefighters. See also 1960 Op. No. 1166. I find, nonetheless, that R.C. 505.011 implicitly sanctions the participation of a single individual in both capacities. As I stated in Op. No. 84-018, I believe that, by enacting R.C. 505.011, the General Assembly has indicated that the conflicts of interest which might arise in such a situation are outweighed by the need for firefighters.

Thus, Op. No. 86-059 confirms the participation of a township trustee who is a *non-paid* member of a private fire company in the voting upon the contract with the private fire company. As indicated in footnote three, *supra*, Op. No. 86-059 specifically concerned *non-paid* members of a private fire company serving as township trustees. In your particular situation, the individual receives compensation. As a result, the individual has a direct pecuniary interest in the contract. "It is an established principle that public officers are disqualified from voting on a matter coming before the agency in which they serve if they have a direct, pecuniary interest in the matter in question." 1969 Op. Att'y Gen. No. 69-084 at 2-181; see *Oliver v. Brill*, 14 Ohio App. 312, 317, 32 Ohio C.C. (n.s.) 129, 132-33 (Ct. App. Guernsey County 1921) ("[m]embers of a legislative body or municipal board are disqualified to vote therein on propositions in which they have a direct pecuniary interest adverse to the state or municipality which they represent" (quoting *Board of Supervisors of Oconto County v. Hall*, 47 Wis. 208, 2 N.W. 291 (1879) (syllabus, paragraph one))). Consequently, a township trustee who is a paid member of a private fire company should not vote upon a contract entered into between the township and the private fire company.

I find, accordingly, that an individual serving as a township trustee, who does not vote upon a contract entered into between the township and a private fire company, is not prohibited from simultaneously being a full-time paid member of

⁴ R.C. 511.13 was originally enacted by the General Assembly as G.C. 3410-8.

said company, provided that he is not in violation of any local departmental regulations, charter provisions, or ordinances. Since, I have answered your first question in the affirmative, it is not necessary for me to address your remaining questions. I note, however, that the individual must refrain from voting upon a contract entered into between the township and the private fire company.

My consideration of the question of conflict of interest does not constitute an opinion on the applicability of the provisions of R.C. Chapter 102 or R.C. 2921.42 governing ethics and conflicts of interest with respect to public servants. Pursuant to R.C. 102.08, the authority to render advisory opinions on these sections of the Revised Code is vested in the Ohio Ethics Commission. "In light of this express statutory grant of power, I have held that it is inappropriate for the Attorney General to render opinions on these statutes." Op. No. 89-037 at 2-167; *accord* 1989 Op. Att'y Gen. No. 89-022 at 2-101 n. 2; 1987 Op. Att'y Gen. No. 87-025 (syllabus, paragraph three).

Therefore, it is my opinion and you are hereby advised that an individual serving as a township trustee, who does not vote upon a contract entered into between the township and a private fire company, may simultaneously be a full-time paid member of said company, provided that he is not in violation of any local departmental regulations, charter provisions or ordinances, or statutory provisions subject to interpretation by the Ohio Ethics Commission pursuant to R.C. 102.08. (1986 Op. Att'y Gen. No. 86-059, syllabus, paragraph one, clarified.)