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POSITION OF CLERK OF A TOWNSHIP AND FIRE PREVENTION OFFICER ARE NOT INCOMPATIBLE—§3735.08, OPINION 1206, O.A.G., 1918, OPINION 798, O.A.G., 1919.

SYLLABUS:

The positions of clerk of a township, elected pursuant to Section 507.01, Revised Code, and fire prevention officer of the township, appointed pursuant to Section 505.38, Revised Code, are not incompatible, provided it is physically possible for one person to perform the duties of both positions.

Columbus, Ohio, March 15, 1962

Hon. Harold E. Christman, Prosecuting Attorney
Shelby County, Sidney, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“The Board of Township Trustees of Orange Township, Shelby County, Ohio has requested this office to ask you for an opinion on the following question:

“Under Section 505.38, a township not having a fire department, the Board of Trustees shall appoint a fire prevention officer who shall exercise all of the duties of the fire chief except those involving the maintenance and operation of fire apparatus.

“My question is can the Board of Township Trustees appoint the township clerk to serve in such capacity as a fire prevention officer under the aforesaid section.”

Positions are incompatible when expressly made so by provisions of the constitution or statutes, or are made incompatible by the common law test of incompatibility.

The combination of positions described in your request is not, so far as I can ascertain, prohibited by any constitutional or statutory provision; therefore, the common law rule must be considered. In *State, ex rel. Attorney General v. Gebert*, 12 C.C. (N.S.) 274, at page 275, it is 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.”

The clerk of a township is elected for a four year term (Section 507.01, Revised Code), and his duties are mainly concerned with keeping the records of the township.

As to the fire prevention officer, he is appointed by the board of township trustees pursuant to Section 505.38, Revised Code, which reads:

“In each township or fire district which has a fire department, the head of such department shall be a fire chief, appointed by the board of township trustees. The board shall provide for the employment of such firemen as it deems best, and shall fix their compensation. Such appointees shall continue in office until removed therefrom as pro-

vided by sections 733.35 to 733.39, inclusive, of the Revised Code. To initiate removal proceedings, and for such purpose, the board shall designate the fire chief or a private citizen to investigate the conduct and prepare the necessary charges in conformity with sections 733.35 to 733.39, inclusive, of the Revised Code.

“In each township not having a fire department, the board of trustees shall appoint a fire prevention officer who shall exercise all of the duties of a fire chief except those involving the maintenance and operation of fire apparatus.

“The board of trustees may fix such compensation as it deems best. Such appointee shall continue in office until removed therefrom as provided by such sections. The provisions of section 505.45 of the Revised Code shall extend to such officer.

“In case of the removal of a fire chief or any member of the fire department of a township or district, an appeal may be had from the decision of the board to the court of common pleas of the county in which such township or district fire department is situated, to determine the sufficiency of the cause of removal. Such appeal from the findings of the board shall be taken within ten days.”

Other duties of the fire prevention officer are found in Section 3737.08, Revised Code, reading in part:

“The fire marshal, the chief of the fire department of each municipal corporation in which a fire department is established, the chief of the fire department in each township in which a fire department is established, and the fire prevention officer in each township or village where no fire department is established, shall investigate the cause, origin, and circumstances of each fire occurring in such municipal corporation or township by which property has been destroyed or damaged, and shall make an investigation to determine whether the fire was the result of carelessness or design. The investigation shall be commenced within two days, not including Sunday, if the fire occurred on that day. The marshal may superintend the investigation.

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On reading the statutes pertaining to the positions here concerned I have found no reason to conclude that either is subordinate to or in any way a check upon the other. It is true that under Section 507.02, Revised Code, the total compensation of the clerk and any deputy clerk may not exceed the sums fixed by Section 507.09, Revised Code, which section provides for the salary of the clerk. The services as fire prevention officer are, however, outside the scope of the duties as clerk, and I do not believe that the compensation for the fire prevention duties is barred by said Section 507.02.

While I have found no case law on the specific question here involved, two past opinions of this office appear to be significant. In Opinion No. 1206, Opinions of the Attorney General for 1918, Volume I, page 683, it is stated at page 685:

“In your second question you ask if a township clerk may receive compensation for janitor services in addition to compensation fixed by law as clerk. There is nothing incompatible between the two positions. As clerk he can only receive the sum of \$150.00. If he performs services as janitor *under a proper contract*, he may be paid for such services.”

In Opinion No. 714, Opinions of the Attorney General for 1937, page 1278, the syllabus reads:

“A township clerk may be employed as caretaker or sexton of a township cemetery upon a contract from month to month or for one year, such compensation to be paid to the caretaker in addition to the amount fixed for his services as township clerk.”

And in Opinion No. 798, Opinions of the Attorney General for 1919, Volume II, page 1474, the second paragraph of the syllabus reads:

“2. The limitation of section 3308 G.C. upon maximum annual compensation of the township clerk does not apply to services outside the scope of his official duties.”

I thus find no legal incompatibility in the duties of the positions here concerned. As to physical possibility, that is a question of fact not of law.

Accordingly, it is my opinion and you are advised that the positions of clerk of a township, elected pursuant to Section 507.01, Revised Code, and fire prevention officer of the township, appointed pursuant to Section 505.38, Revised Code, are not incompatible, provided it is physically possible for one person to perform the duties of both positions.

Respectfully,

MARK MCELROY

Attorney General