

of a court of common pleas in an adjacent county, provided that as a magistrate she does not preside over cases involving the child support enforcement agency that employs her as an administrative hearing officer. (1989 Op. Att’y Gen. No. 89-072, distinguished.)

To: Bradford W. Bailey, Hardin County Prosecuting Attorney, Kenton, Ohio
By: Jim Petro, Attorney General, May 24, 2005

You have requested an opinion whether the positions of part-time administrative hearing officer for a child support enforcement agency (CSEA) in one county and part-time magistrate¹ of a court of common pleas in an adjacent county are compatible. Based on the following, it is our opinion that a person may hold both of these positions at the same time, provided that as a magistrate she does not preside over cases involving the CSEA that employs her as an administrative hearing officer.

Compatibility Test

The following seven questions are used to ascertain the compatibility of two public positions:

1. Is either of the positions a classified employment within the terms of R.C. 124.57?
2. Does a constitutional provision or statute prohibit a person from serving in both positions at the same time?
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?

See 2003 Op. Att’y Gen. No. 2003-041 at 2-335 and 2-336. *See generally* 2 Ohio Admin. Code 123:1-46-02(F) (“[s]ervice in an appointed or elected position is prohibited when such position is subordinate to or in any way a check upon a position concurrently occupied by a classified or unclassified employee, or when it is physically impossible for one person to discharge the duties of both positions, or if some specific constitutional or statutory bar exists prohibiting a person from serving [in] both positions”).

¹ Prior to 1995, the position of “magistrate” was titled “referee.” 2004 Op. Att’y Gen. No. 2004-030 at 2-270 n.2; 2001 Op. Att’y Gen. No. 2001-009 at 2-54 n.1; 1996 Op. Att’y Gen. No. 96-024 at 2-86.

The sixth and seventh questions ask whether a charter provision, resolution, or ordinance, or federal, state, or local regulation prevents a person from holding both of the positions at the same time. No state or federal regulation prevents a person from serving simultaneously as an administrative hearing officer for a CSEA and magistrate of a court of common pleas. Additionally, whether there is an applicable local charter provision, resolution, ordinance, or departmental regulation prohibiting a person from holding these two positions at the same time is a question for local officials to answer. For the purpose of this opinion, it is assumed that no such local charter provision, resolution, ordinance, or departmental regulation exists.

Discussion of R.C. 124.57

The first question asks whether either of the positions is a classified employment within the terms of R.C. 124.57, which prohibits officers and employees in the classified service of the state, or of a county, city, city school district, or civil service township, from taking part in a variety of activities that occur as part of the regular political process and are partisan in nature.² Specifically, “R.C. 124.57 does the following: it prohibits an officer or employee in the classified service from seeking election or appointment to, or holding, a partisan political office, or engaging in other partisan political activities, and it prevents a partisan political officeholder from serving simultaneously as an officer or employee in the classified service.” 2003 Op. Att’y Gen. No. 2003-041 at 2-336; *see* rule 123:1-46-02(C).

We must now determine whether a person holding either of these positions is an officer or employee in the classified service so as to be prohibited from taking part in partisan political activities. Materials provided by a member of your staff assert that the position of administrative hearing officer for the CSEA is in the unclassified service. *See generally* R.C. 124.11(A)(9) (the unclassified service of a county includes “those persons employed by and directly responsible to elected county officials or a county administrator and holding a fiduciary or administrative relationship to such elected county officials or county administrator, and the employees of such county officials whose fitness would be impracticable to determine by competitive examination”). You have also informed us that the position of magistrate of

² R.C. 124.57(A) states, in part:

No officer or employee in the classified service of the state, the several counties, cities, and city school districts of the state, or the civil service townships of the state 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 officer or employee in the classified service of the state, the several counties, cities, and city school districts of the state, or the civil service townships of the state be an officer in any political organization or take part in politics other than to vote as the officer or employee pleases and to express freely political opinions. (Emphasis added.)

the court of common pleas is in the unclassified service. *See generally* R.C. 124.11(A)(10) (officers and employees of courts of record are in the unclassified service if “the director of administrative services finds it impracticable to determine their fitness by competitive examination”) The prohibition of R.C. 124.57 thus does not apply to either position, and, as such, it does not render the positions of administrative hearing officer in the CSEA and magistrate of a court of common pleas incompatible.³ *See generally* rule 123:1-46-02(E) (“[e]mployees in the unclassified service, who serve at the pleasure of the appointing authority and are not subject to competitive examination, are not prohibited from engaging in political activity unless specifically precluded by federal or state constitutional or statutory provisions”).

Laws Prohibiting the Holding of Another Public Position

The second question asks whether a constitutional provision or statute prohibits a person from serving in both positions at the same time. No constitutional provision or statute prohibits a person from serving concurrently in the positions of administrative hearing officer for a CSEA and magistrate of a court of common pleas.⁴ Thus, question two may be answered in the negative.

³ Although R.C. 124.57 does not apply to either of these positions, a local rule or policy of the court of common pleas or child support enforcement agency (CSEA) may limit or prohibit its unclassified officers’ and employees’ participation in partisan political activity. *See Painter v. Graley*, 70 Ohio St. 3d 377, 639 N.E.2d 51 (1994); *State ex rel. Vana v. Maple Heights City Council*, 54 Ohio St. 3d 91, 561 N.E.2d 909 (1990); 1994 Op. Att’y Gen. No. 94-087 at 2-431. We will assume, for the purpose of this opinion, that no such rule or policy exists.

⁴ Pursuant to Ohio Const. art. IV, § 6(B) and R.C. 141.04(D), judges of a court of common pleas are prohibited from holding any other office of profit or trust under the authority of this state, or of the United States. This prohibition does not apply to magistrates of the court of common pleas since they are not judges for purposes of Ohio Const. art. IV, § 6(B) and R.C. 141.04(D). Board of Commissioners on Grievances & Discipline Op. No. 2004-3, slip op. at 2 (June 3, 2004); 1996 Op. Att’y Gen. No. 96-062 at 2-253 n.1; *see also* 2004 Op. Att’y Gen. No. 2004-030 at 2-270 n.4 (“[a]lthough a municipal court magistrate is permitted to exercise certain judicial powers, a magistrate is not a judge except for the limited purpose of complying with the Ohio Code of Judicial Conduct. By law the positions of municipal court judge and municipal court magistrate are separate and distinct. In addition, the judicial powers conferred upon a municipal court magistrate are not conterminous with a municipal court judge’s powers, but rather, are subject to the specifications and limitations established by the court that appoints him. The primary purpose of a municipal court magistrate is to assist judges in the disposition of cases, and, as such, a magistrate’s decision in a case is not binding upon the parties in the case until it is adopted by the court. A municipal court magistrate thus serves the judges of the court that appoint him, and is not himself a judge of that court” (citations omitted)).

Subordination and Control

The third question asks whether one position is subordinate to, or in any way a check upon, the other. An administrative hearing officer for the CSEA is employed by, and responsible to, the CSEA. *See* R.C. 3111.53; R.C. 3125.17; 12 Ohio Admin. Code 5101:1-32-01. A magistrate of a court of common pleas is appointed by the court, and is under the control and supervision of the court. *See* Ohio R. Crim. P. 19; Ohio R. Civ. P. 53; Ohio R. Juv. P. 40; Ohio Traf. R. 14; *see also* R.C. 2151.16; R.C. 3125.60. An administrative hearing officer for a county CSEA and magistrate of a court of common pleas in an adjacent county thus hold positions with different governmental entities and are not subordinate to each other. The positions also operate independently of each other, and neither is required to assign duties to, or supervise, the other. Accordingly, neither position is subordinate to, or in any way a check upon, the other.

Physical Ability to Hold and Serve in Both Positions

The fourth question asks whether it is physically possible for one person to perform the duties of both positions. This is a factual question that is best resolved by the interested officials at the CSEA and court of common pleas since they may more precisely determine the time constraints and demands imposed upon the person as an administrative hearing officer and magistrate. 2003 Op. Att’y Gen. No. 2003-041 at 2-339.

Because both positions are part time, it seems likely to us that these two positions can be competently filled by the same person. Nevertheless, in order to serve in both of these positions at the same time, a person must be certain that she will be able to carry out the duties of both positions in a competent and timely manner. *Id.* This means that there may not be a direct conflict between the times when she is needed to perform duties or responsibilities on behalf of the court and CSEA.⁵ *Id.*

Conflicts of Interest

The fifth and final question asks whether there is a conflict of interest between the two positions.⁶ A person may not hold two public positions concurrently if the responsibilities in one position are such as to influence the performance of her

⁵ If an administrative hearing officer for a CSEA is required to perform her duties as a magistrate of a court of common pleas during the time she is required to perform her duties as an administrative hearing officer, she will have to take approved vacation or personal leave or leave without pay for the time she is absent from her duties as an administrative hearing officer. Also, if the person, as a magistrate, is required to perform her duties as an administrative hearing officer during the time she is required to perform her duties as a magistrate, she must take approved vacation or personal leave or leave without pay for the time she is absent from her duties as a magistrate.

⁶ The authority to issue advisory opinions concerning the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43 is conferred upon the

duties in the other position, thereby subjecting her to influences which may prevent her decisions from being completely objective. 1980 Op. Att'y Gen. No. 80-035 at 2-149.

We must now review the powers, duties, and responsibilities of the respective positions so as to determine whether there are any conflicts of interest between the positions. If our review discloses conflicts, we must then determine whether the conflicts may be avoided or eliminated entirely, thus allowing the person to hold both positions at the same time. The factors used in making this determination include, but are not limited to, the probability of the conflicts occurring, the ability of the person to remove herself from any conflicts that may occur, whether the person exercises decision-making authority in both positions, and whether the conflicts relate to the primary functions of each position, or to financial or budgetary matters. 2003 Op. Att'y Gen. No. 2003-041 at 2-340.

Let us first review the powers, duties, and responsibilities of the person as an administrative hearing officer for a county CSEA. According to the position description you provided to us, this particular administrative hearing officer is assigned the following duties:

Performs administrative/quasi-judicial hearings regarding child support payment recommendations and appeals from findings and/or recommendations of CSEA case workers regarding child support matters; determines obligor/obligee; determines appropriate support amounts, poundage, etc.; orders payments; issues rulings; modifies orders regarding child support and alimony payment obligations; modifies payment amount orders as found appropriate during appeals. Determine Paternity as result of Genetic testing, order genetic testing.

Prepares orders and journal entries; issues subpoenas; makes recommendations to the court when required, files legal actions to protect support payment delinquencies from avoidance through bankruptcy filing.

Ohio Ethics Commission pursuant to R.C. 102.08. Also, the authority to issue advisory opinions regarding the rules, ethical considerations, and canons set forth in the Supreme Court Rules for the Government of the Bar of Ohio, the Code of Professional Responsibility, and the Ohio Code of Judicial Conduct is vested in the Board of Commissioners on Grievances and Discipline of the Supreme Court. R.C. 102.08; Ohio Gov. Bar R. V, § 2(C). In light of the foregoing grants of authority, we believe that it is proper to refrain from interpreting and applying such ethical provisions, canons, considerations, and rules by way of a formal opinion of the Attorney General. 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph three). Instead, we recommend that you consult with the Ohio Ethics Commission and the Board of Commissioners on Grievances and Discipline of the Supreme Court for guidance concerning the ethical and professional responsibilities that will confront a person who serves simultaneously as an administrative hearing officer for a county CSEA and magistrate of a court of common pleas in an adjacent county.

See R.C. 3111.53; rule 5101:1-32-01; *see also* R.C. 3125.17.

In addition, the administrative hearing officer serves as a staff attorney for the CSEA when required. *See* R.C. 3125.17. In this capacity, the person may perform such duties as directing and coordinating investigative operations, representing or providing legal advice to officials of the CSEA, preparing and reviewing contracts, leases, or other documents involving the CSEA, or otherwise assisting or representing the CSEA in its performance of its functions pertaining to the enforcement of support orders. *See id.*

We will now turn to the duties and responsibilities performed by the person as a magistrate of a court of common pleas. A magistrate is appointed by and has her duties assigned by the court. Ohio R. Civ. P. 53; Ohio R. Crim. P. 19; Ohio Traf. R. 14; Ohio R. Juv. P. 40; *see also* R.C. 2151.16; R.C. 3125.60. A magistrate of a court of common pleas exercises various judicial powers on behalf of the court that appoints her, including the power to rule on motions and the admissibility of evidence, hear cases, issue subpoenas for the attendance of witnesses and the production of evidence, and enter orders in criminal and civil proceedings. Ohio R. Civ. P. 53(C); Ohio R. Crim. P. 19(C); Ohio Traf. R. 14(A); Ohio R. Juv. P. 40(C); *see also* R.C. 2151.16; R.C. 3125.60; 1996 Op. Att’y Gen. No. 96-024 at 2-86.

Our review of the powers, duties, and responsibilities of the respective positions discloses one potential conflict of interest. As a magistrate of the court of common pleas, a person may have to preside over a case involving the CSEA of any county. *See, e.g.*, R.C. 3123.19 (“[i]f an obligor is in default under a support order and has a claim against another person or is a party in an action for any judgment, the [CSEA] or the agency’s attorney, on behalf of the obligor, immediately shall file with the court in which the action is pending a motion to intervene in the action or a creditor’s bill”); R.C. 3123.66-.78 (upon a determination that an obligor is in default under a support order, a CSEA may assert a lien on real and personal property of the obligor located in this state and may file with the appropriate court of the county in which the property is located a complaint stating that the agency has obtained a lien on real and personal property of the obligor that is located in the county and that the agency is entitled to have the property sold to obtain child support that is in arrears and subsequently overdue and asks the court to issue an order that the property be sold by an execution sale in accordance with R.C. Chapter 2329). *See generally* R.C. 3125.11 (the CSEA “for a county is the local Title IV-D agency for the county and shall operate a program for support enforcement in the county that complies with Title IV-D of the ‘Social Security Act,’ 88 Stat. 2351 (1975), 42 U.S.C. 651, as amended, any rules adopted pursuant to that title, and state law. Each [CSEA] shall be ... responsible in the county it serves for the enforcement of support orders and shall perform all administrative duties related to the enforcement of any support order”).

A potential conflict thus exists in that the person, as a magistrate, may be required to preside over a hearing involving the CSEA that employs her as an

administrative hearing officer.⁷ See 1997 Op. Att’y Gen. No. 97-044 at 2-274; 1992 Op. Att’y Gen. No. 92-041 at 2-162; 1992 Op. Att’y Gen. No. 92-023 at 2-81; 1990 Op. Att’y Gen. No. 90-005 at 2-19. In such a situation, it would be difficult for the person, as a magistrate, to set aside her loyalty to the CSEA that employs her as an administrative hearing officer. Such a predisposition of loyalty may affect the ability of the person to conduct an impartial hearing or render an impartial decision as a magistrate. 1997 Op. Att’y Gen. No. 97-044 at 2-274; 1992 Op. Att’y Gen. No. 92-041 at 2-162; 1992 Op. Att’y Gen. No. 92-023 at 2-81; 1990 Op. Att’y Gen. No. 90-005 at 2-19 and 2-20.

We believe, however, that this conflict of interest can be sufficiently avoided or mitigated. There will be few occasions in which the person, as a magistrate, could be required to preside over a case involving the CSEA that employs her as an administrative hearing officer. As stated in your letter, the two positions are not in the same county, but rather are in adjoining counties. It is unlikely that a matter involving the CSEA of one county will be litigated in the court of common pleas of another county. See generally 1990 Op. Att’y Gen. No. 90-005 at 2-20 (“[i]t would seem very unusual that the county prosecuting attorney would have occasion to litigate domestic relations matters in an adjacent county”). Therefore, the occasions in which the court of common pleas that employs the person as a magistrate will be required to preside over a case involving the CSEA that employs her as an administrative hearing officer should be infrequent.

Moreover, even when such a case does arise, the person, as a magistrate, must abstain from presiding over the case. See, e.g., 1992 Op. Att’y Gen. No. 92-023 at 2-81 (a referee of a court of common pleas “must refrain from presiding over hearings involving the city fire department that employs him as a volunteer fireman”). Canon 3(E) of the Ohio Code of Judicial Conduct, which provides for the disqualification of judges, provides, in part, as follows:

(1) A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances where:

(a) The judge has a personal bias or prejudice concerning a party or a party’s lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) The judge served as a lawyer in the matter in controversy, a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning the matter;

⁷ The person, as an administrative hearing officer for a CSEA, may not practice law on behalf of the CSEA before the court of common pleas that employs her as a magistrate. See Ohio Code of Judicial Conduct, Compliance Section, division (B)(2) (a part-time magistrate “[s]hall not practice law in the court on which he or she serves or in any court subject to the appellate jurisdiction of the court on which he or she serves”).

....

(d) The judge ...:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party.... (Emphasis added.)

See 2004 Op. Att’y Gen. No. 2004-025 at 2-228 (“it is well established that, in a matter in which a public officer is exposed to influences that may prevent her from making completely objective and disinterested decisions, the officer should refrain from participating in the matter”).

For purposes of this canon, a part-time magistrate of the court of common pleas is a judge who is required to comply with the mandates set forth therein. See Ohio Code of Judicial Conduct, Compliance Section (a part-time magistrate is a judge that must comply with Canon 3 of the Ohio Code of Judicial Conduct); see also Board of Commissioners on Grievances & Discipline Op. No. 2004-3, slip op. at 3 (June 3, 2004) (“[p]art-time magistrates, like part-time judges must comply with all of the provisions of the Ohio Code of Judicial Conduct except for Canon 2(C)(3); Canon 4(C)(2), (D), (E), (F); and Canon 2(D)(3) (but must file the annual disclosure statement”). Accordingly, a person who serves simultaneously as a magistrate of a court of common pleas in one county and administrative hearing officer for a CSEA in an adjoining county must abstain from presiding over a case involving the CSEA that employs her as an administrative hearing officer.⁸

In light of the foregoing, a person is not barred by conflicts of interest from serving simultaneously as a part-time administrative hearing officer for a county CSEA and part-time magistrate of a court of common pleas in an adjacent county, provided that as a magistrate she does not preside over cases involving the CSEA that employs her as an administrative hearing officer.⁹ See generally 1997 Op. Att’y Gen. No. 97-044 at 2-275 (if an administrative hearing officer “does not preside over a hearing in which one of the parties is represented by the county prosecuting

⁸ Under the Ohio Code of Judicial Conduct, a part-time magistrate may not act as a lawyer in a proceeding in which she has served as a magistrate or in any other related proceeding. See Ohio Code of Judicial Conduct, Compliance Section, division (B)(2) (a part-time judge, which includes part-time magistrates, may not “act as a lawyer in a proceeding in which he or she has served as a judge or in any other related proceeding”). This means that a part-time magistrate who serves as a part-time administrative hearing officer for a CSEA in an adjoining county may not act as a lawyer for the CSEA in any proceeding in which she has served as a magistrate or in any other related proceeding. Any questions about the interpretation or application of this prohibition should be addressed to the Board of Commissioners on Grievances and Discipline of the Supreme Court. See note six, *supra*.

⁹ Certain information maintained by a county CSEA is required to be kept confidential and used only to carry out child support programs. See, e.g., R.C. 3125.08; 12 Ohio Admin. Code 5101:1-31-80. An administrative hearing officer for a county CSEA thus has a duty to safeguard this information.

attorney who employs him as an assistant county prosecuting attorney or sit in judgment of his own professional work for, and legal advice to, the county department of human services or the CSEA, the conflict of interest rule is not violated”); 1992 Op. Att’y Gen. No. 92-023 (syllabus) (“[a]n individual employed as a volunteer fireman in a city fire department, solely to fight fires, may also serve as a referee in a court of common pleas, provided that the individual does not preside over hearings involving the city fire department that employs him as a volunteer fireman”); 1990 Op. Att’y Gen. No. 90-005 at 2-20 (“an individual who serves as an assistant county prosecuting attorney is not barred by conflict of interest from accepting an appointment as a part-time domestic relations referee in an adjoining county, provided that the individual does not preside over hearings involving actions prosecuted or defended by the county prosecuting attorney who employs him as an assistant county prosecuting attorney”).

Conclusion

In summary, it is my opinion, and you are hereby advised that a person may serve as a part-time administrative hearing officer for a county child support enforcement agency and part-time magistrate of a court of common pleas in an adjacent county, provided that as a magistrate she does not preside over cases involving the child support enforcement agency that employs her as an administrative hearing officer. (1989 Op. Att’y Gen. No. 89-072, distinguished.)

In an analogous situation involving the safeguarding of confidential information by a person who holds two public positions, 1989 Op. Att’y Gen. No. 89-072 determined that the positions of village police officer and fraud investigator for the county department of human services are incompatible because a situation could arise where the person as a village police officer might obtain and use personal and confidential information he acquires as a fraud investigator to discharge his duties as a police officer. *See* 1983 Op. Att’y Gen. No. 83-071. As explained in that opinion, a fraud investigator’s duty to safeguard the personal information of public assistance applicants, recipients, and former recipients presents an impermissible conflict of interest that bars him from serving as a village police officer. 1989 Op. Att’y Gen. No. 89-072 at 2-330 and 2-331.

However, because a person who serves simultaneously as a magistrate of a court of common pleas in one county and administrative hearing officer for a CSEA in an adjoining county must abstain from presiding over a case involving the CSEA that employs her as an administrative hearing officer, it follows that there should be no instances in which the person, as a magistrate, will need to use information maintained by the CSEA that employs her as an administrative hearing officer to perform her judicial duties as a magistrate. Accordingly, the situation addressed in 1989 Op. Att’y Gen. No. 89-072 may be distinguished from the situation you have presented to us.