

OPINION NO. 92-053**Syllabus:**

A person may not simultaneously hold the positions of township clerk and member of a board of park commissioners of a park district in the same county.

To: Timothy A. Oliver, Warren County Prosecuting Attorney, Lebanon, Ohio
By: Lee Fisher, Attorney General, September 30, 1992

You have requested an opinion relating to the compatibility of the positions of township clerk and member of a board of park commissioners of a park district when the positions are in the same county.

1979 Op. Att'y Gen. No. 79-111 established a seven question test for determining the compatibility of two public positions. Two public positions are incompatible if, *inter alia*, a person serving in both positions would be subject to an impermissible conflict of interest. 1990 Op. Att'y Gen. No. 90-083; 1987 Op. Att'y Gen. No. 87-092. An examination of the duties of the respective positions reveals that a person holding simultaneously in the same county the two positions

which are the subject of your question would be subject to an impermissible conflict of interest and, accordingly, that the positions are incompatible.

Duties of a Park Commissioner

The provisions concerning the creation and administration of a park district are found in R.C. Chapter 1545. The board of park commissioners of the park district are appointed by the probate judge. R.C. 1545.05. The board is, as a general matter, granted various powers and duties related to the government of the park district. *See, e.g.*, R.C. 1545.07-18. Pursuant to R.C. 1545.20-211 and R.C. 1545.24, the board is delegated authority to levy taxes within the ten-mill limitation, to submit a levy to the electors, and to issue notes or bonds. Also, for purposes of R.C. Chapter 5705 (tax levy law), a park district is a taxing unit, *see* R.C. 5705.01(H), and, accordingly, the park district's board of commissioners is required annually to prepare and adopt a tax budget, *see* R.C. 5705.28, which is submitted to the county budget commission, *see* R.C. 5705.31.

Duties of a Township Clerk

The township clerk is an elected official of the township. R.C. 507.01. The responsibilities of the township clerk include the recording of the proceedings of the township trustees, R.C. 507.04, the notifying of the board of elections of vacancies in township offices and of township boundary changes, R.C. 507.051, the administering of oaths and the certification of affidavits, R.C. 507.06, and the recording of bonds, R.C. 507.08. The township clerk is also the fiscal officer for his township. *See* R.C. 5705.01(D); *see also* R.C. 505.33 ("the township clerk shall certify to the county auditor the names of the property owners and a description of their lands which are delinquent as to waste disposal service charges"); R.C. 507.04 (township clerk shall keep an accurate record of all the accounts and transactions of the board of township trustees); R.C. 507.07 (township clerk shall make an annual statement of receipts and expenditures of the township); R.C. 507.11(A) (if authorized by a board of township trustees, a township clerk may incur financial obligations on behalf of the township); R.C. 507.11(B) (township clerk must countersign all orders for payment of township monies); R.C. 5705.03 (township clerk receives the proceeds of any township tax levy from the county auditor and must deposit these proceeds in the township treasury). Under R.C. 5705.01(A), a township is a "subdivision," for purposes of R.C. Chapter 5705, and as such, the township is empowered to levy taxes within the ten-mill limitation, *see* R.C. 5705.05-.06, to submit tax levies in excess of the ten-mill limitation to the electors, *see* R.C. 5705.07; R.C. 5705.19-.191, and annually to prepare and adopt a tax budget, *see* R.C. 5705.28, which is submitted to the county budget commission, *see* R.C. 5705.31.

Conflict of Interest

A review of the foregoing discloses that both a township and a park district prepare, adopt, and submit a tax budget to the county budget commission. *See* R.C. 5705.28-.32. 1988 Op. Att'y Gen. No. 88-033, which considered the compatibility of the positions of township trustee and commissioner of a county park district, determined that a park district and a township come into conflict with respect to the levying of taxes and the submittal of their budgets to the county budget commission. The opinion reasoned that

"in the preparation of annual budgets, the distribution of public moneys as between the township proper and the board of park commissioners, and in the fixing of tax levies, it is manifest that the township trustees and the board of park commissioners might be placed in the position of adversaries." [1939 Op. Att'y Gen. No. 1575, vol. III, p. 2346 at 2349.] The commissioner of a county park district may, similarly, find himself

in conflict with a township trustee with respect to the amounts or timing of tax levies. As was discussed in Op. No. 79-063, the county budget commission has discretion with respect to the certification of a tax levy that is not a mandated levy and, accordingly, may decline to certify a park district tax levied under R.C. 1545.20 without voter approval, or may exercise its discretion in modifying such a levy. See R.C. 1545.20; R.C. 5705.32. The county budget commission may similarly, modify certain township levies that have not been approved by the voters. See, e.g., R.C. 5705.05-.06; R.C. 5705.32. The positions of township trustee and commissioner of a county park district may, thus, be distinctly adversarial on this issue. See Op. No. 88-011; Op. No. 79-063; 1939 Op. No. 1575.

Certain Attorney General opinions have raised a question as to whether the mere fact that two bodies have their budgets reviewed by the county budget commission is sufficient to make membership on the two bodies incompatible. See, e.g., Op. No. 85-006; 1981 Op. Att'y Gen. No. 81-010. As I noted in Op. No. 88-011, however, "a potential dispute before the budget commission has long been held to be a basis for a finding of incompatibility, since inconsistent loyalties may result." Op. No. 88-011, slip op at 4. I find it clear that the positions in question are incompatible, and I find support for that conclusion in the fact that both the township and the park district may seek to levy taxes within the ten-mill limitation that may be subject to reduction by the county budget commission pursuant to R.C. 5705.32. See R.C. 1545.20; R.C. 5705.03-.06; R.C. 5705.34; Op. No. 79-063. The fact that the county budget commission may, in certain circumstances, reduce levies of either or both of these bodies makes it clear that persons appearing before the county budget commission serve in adversarial positions, and that one person serving in both positions would be confronted with a conflict of interests. See, e.g., Op. No. 87-085; 1963 Op. No. 559; 1927 Op. No. 2.

Op. No. 88-033 at 2-150 and 2-151. See generally Op. No. 90-083 at 2-356 ("[p]rior opinions of the Attorney General which have considered the compatibility of two positions when a potential conflict of interest exists due to the competition for tax moneys and advantageous budget decisions have concluded that the positions are incompatible, since inconsistent loyalties may result").

A township clerk is not charged specifically with the duty of preparing the township's tax budget. 1961 Op. Att'y Gen. No. 2480, p. 532 at 534. However, as noted above, the township clerk is designated as the fiscal officer of the township. R.C. 5705.01(D). Because "the township clerk is the fiscal officer, he might be ordered to appear before the budget commission to defend the township budget, and tempted to subordinate his interests in that budget in favor [of] the budget of the" park district. 1972 Op. Att'y Gen. No. 72-109 at 2-426; see 1963 Op. Att'y Gen. No. 559, p. 566; 1961 Op. No. 2480. An individual who simultaneously holds the positions of park commissioner and township clerk is, thus, subject to influences that may prevent him from discharging objectively and in a completely disinterested fashion the duties of township clerk. See generally 1980 Op. Att'y Gen. No. 80-035 at 2-149 (a conflict of interest occurs 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").

The Conflict Is Not Remote and Speculative

That an individual is subject to influences that may prevent him from objectively discharging his duties, however, does not per se render two positions incompatible. Rather, each potential conflict of interest requires a determination as

to the immediacy of the conflict. Op. No. 79-111 at 2-372. *See generally* 1961 Op. No. 2480 at 534-35 (because revenue for a local school district is fixed by statute, "the possibility of conflict between a board of township trustees and a local school district embracing the same territory in connection with the distribution of taxes is credited non-existent;" thus, the positions of township clerk and member of a board of education of a local school district are compatible). Where the possibility of conflict is remote and speculative, the conflict of interest rule is not violated. Op. No. 79-111. Factors utilized in determining the immediacy of a conflict include, *inter alia*, the remoteness of the conflict, the ability or inability of an individual to remove himself from the conflict, and whether the potential conflict may involve budgetary controls. *Id.* at 2-372.

Because budget and funding matters arise annually, the potential conflict is not remote. *See* Op. No. 90-083 at 2-358; 1988 Op. Att'y Gen. No. 88-011 at 2-43. In addition, prior Attorney General opinions have determined that a township clerk cannot avoid appearing before the county budget commission if the township trustees require him to defend the township tax budget. Op. No. 72-109; 1963 Op. No. 559; 1961 Op. No. 2480; *cf.* 1992 Op. Att'y Gen. No. 92-041 (insofar as the assistant county prosecuting attorney in question is not required to prepare and present the county's budget to the county budget commission, the potential conflict of interest that results from the competition for tax moneys and advantageous budget decisions does not render incompatible the positions of assistant county prosecuting attorney and mayor's court magistrate). Moreover, the potential conflict of interest involves budgetary matters. The potential conflict of interest that exists due to the competition for tax moneys and advantageous budget decisions thus is not remote and speculative. Accordingly, an individual who simultaneously holds, within the same county, the positions of township clerk and member of a board of park commissioners of a park district would be subject to an impermissible conflict of interest.

Conclusion

Based upon the foregoing, it is my opinion, and you are hereby advised, that a person may not simultaneously hold the positions of township clerk and member of a board of park commissioners of a park district in the same county.