

January 26, 2017

The Honorable Zac Corbin
Brown County Prosecuting Attorney
510 E. State Street, Suite 2
Georgetown, Ohio 45121

SYLLABUS:

2017-004

A secret service officer appointed by the prosecuting attorney of Brown County pursuant to R.C. 309.07 may not serve at the same time as an investigator appointed by the coroner of Brown County pursuant to R.C. 313.05(A)(3).



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OPINION NO. 2017-004

The Honorable Zac Corbin
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Dear Prosecutor Corbin:

Your predecessor requested an opinion of the Attorney General whether the position of secret service officer appointed by a prosecuting attorney pursuant to R.C. 309.07 is compatible with service as an investigator appointed by a coroner pursuant to R.C. 313.05 within the same county. Whether two public positions “are compatible depends upon the outcome of a seven-part test.” 2016 Op. Att’y Gen. No. 2016-004, at 2-43; *see also* 2014 Op. Att’y Gen. No. 2014-045, at 2-391 (“[a] seven-question compatibility test is used to determine whether a person may serve simultaneously in multiple public positions”); 2004 Op. Att’y Gen. No. 2004-019, at 2-153 to 2-154 (setting forth the seven-part compatibility test); 1979 Op. Att’y Gen. No. 79-111, at 2-367 to 2-368 (the seven-part compatibility test applies to the simultaneous holding of a public office and a public employment by the same person). All of the questions in this test “must yield answers in favor of compatibility in order to conclude that two positions are compatible.” 2013 Op. Att’y Gen. No. 2013-008, at 2-78.

A Conflict of Interest Renders the Positions of Secret Service Officer and Coroner’s Investigator Incompatible

One question of the compatibility test asks whether a conflict of interest exists between the two positions. 2016 Op. Att’y Gen. No. 2016-004, at 2-43; 2012 Op. Att’y Gen. No. 2012-040, at 2-351. A conflict of interest exists if the duties and responsibilities of one position are of such a nature as to influence the duties and responsibilities of the other position, “thereby subjecting [the person] to influences which may prevent [the person’s] decisions from being completely objective.” 2006 Op. Att’y Gen. No. 2006-041, at 2-397 (quoting 1980 Op. Att’y Gen. No. 80-035, at 2-149); *see also* 1993 Op. Att’y Gen. No. 93-016, at 2-89; 1979 Op. Att’y Gen. No. 79-111, at 2-371. The mere existence of a conflict of interest does not automatically render two positions incompatible. When “the possibility of conflict is remote and speculative” and can be mitigated or avoided, “the conflict of interest rule is not violated.” 1993 Op. Att’y Gen. No. 93-016, at 2-91; *see also* 2004 Op. Att’y Gen. No. 2004-019, at 2-158 (“[w]here it can

be demonstrated that the conflicts may be sufficiently avoided or eliminated entirely, the person may serve in both positions”).

The factors considered in determining whether a conflict of interest is remote and speculative and can be mitigated or avoided include “the probability of the conflict[] arising, the ability of the person to remove himself from any conflicts that may arise, whether the person exercises decision-making authority in each position, and whether the conflicts relate to the primary functions of each position or to financial or budgetary matters.” 2011 Op. Att’y Gen. No. 2011-048, at 2-382 (quoting 2011 Op. Att’y Gen. No. 2011-029, at 2-235). If a conflict of interest between two public positions is not remote and speculative and cannot be mitigated or avoided, a person may not hold those positions simultaneously. As explained in 1979 Op. Att’y Gen. No. 79-111, “[i]t is contrary to public policy for a public officer to be in a position which would subject him to conflicting duties or expose him to the temptation of acting in any manner other than the best interest of the public.” 1979 Op. Att’y Gen. No. 79-111, at 2-371 (quoting 1970 Op. Att’y Gen. No. 70-168, at 2-336).

Whether a person who serves simultaneously as a secret service officer and a coroner’s investigator is subject to a conflict of interest requires an examination of the duties and responsibilities of each position.¹ See 2004 Op. Att’y Gen. No. 2004-044, at 2-380. A secret service officer is appointed by a prosecuting attorney pursuant to R.C. 309.07 “to aid [the prosecuting attorney] in the collection and discovery of evidence to be used in the trial of criminal cases and matters of a criminal nature.” R.C. 309.07; see also 1970 Op. Att’y Gen. No. 70-170, at 2-339 (“a secret service officer is an employee of the prosecuting attorney” whose “duties are narrowly limited to investigation”). It is the responsibility of a prosecuting attorney “to identify the areas and types of work that will be performed by each of his secret service officers in the collection and discovery of material, relevant evidence.” 2016 Op. Att’y Gen. No. 2016-037, slip op. at 4. A coroner’s investigator is appointed by a coroner pursuant to R.C.

¹ When the General Assembly expressly authorizes the simultaneous holding of two positions, it is unnecessary to consider whether a conflict of interest renders the positions incompatible. 2016 Op. Att’y Gen. No. 2016-034, slip op. at 7. R.C. 313.05(B)(2) provides, in part, that “[a] coroner may appoint, as an investigator, a deputy sheriff within the county or a *law enforcement officer of a political subdivision located within the county*.” (Emphasis added.) A secret service officer is a law enforcement officer of the county, not a law enforcement officer of a political subdivision located within the county for the purpose of R.C. 313.05(B)(2). See generally R.C. 309.07 (a secret service officer is appointed by a county prosecuting attorney (an elected county official) and paid a salary set by the judge of the county court of common pleas “payable monthly, out of the county fund”); R.C. 2901.01(A)(11)(h) (including a secret service officer within the definition of “law enforcement officer”); *Webster’s New World College Dictionary* 1663 (5th ed. 2014) (defining “within” to mean “in or into the interior; on the inside; internally”). Thus, R.C. 313.05(B)(2) does not expressly authorize a person appointed as a secret service officer by the prosecuting attorney of Brown County to also serve as an investigator employed by the coroner of Brown County.

313.05(A)(3). The coroner defines the duties of an investigator and fixes the investigator's salary. R.C. 313.05(A)(3), (4).

You have informed us that the investigator for the Brown County coroner performs duties and responsibilities that require him to employ discretion and judgment. The investigator is responsible for visiting the scene of an unexplained death in the county and making a precise and methodic examination of the entire area. The investigator may collect and catalog items found at the scene that may offer insight about the mode and manner of the victim's death. In this endeavor the investigator's training and experience will enable him to determine which items may be material and relevant to the foregoing determination. The investigator also will make a studied observation of the victim's body and the environment in which the body was found for the purpose of gleaning evidence that may permit the coroner to arrive at an accurate and definitive cause of death. The investigator will draw upon his learning and expertise as he assists the coroner to determine the cause of the victim's death. The investigator will explain to the coroner what the investigator believes about the evidence he has retrieved and what it means in relation to the death of the victim.

The secret service officer you employ does not perform investigatory duties and responsibilities with respect to unexplained deaths within the county. Rather, you have assigned your secret service officer investigatory functions that are not connected to deaths that occur within the county, including those that may be the result of criminal activity. These functions may include interviewing witnesses, assembling evidence, and assisting you and the assistant prosecuting attorneys prepare cases for trial.

A review of the duties and responsibilities of these positions reveals two potential conflicts of interest. First, a conflict of interest may arise if the prosecuting attorney calls upon the secret service officer to investigate crimes alleged to have been committed by or against the coroner or employees of the coroner's office. *Cf.* 2016 Op. Att'y Gen. No. 2016-037, slip op. at 6 (recognizing the existence of the same conflict of interest for a person serving simultaneously as a secret service officer and a member of a board of township trustees). A person serving simultaneously as a secret service officer and an investigator for the coroner would have difficulty remaining impartial when investigating the actions of, or allegations against, his superior (the coroner) or any of his coworkers at the coroner's office. *Cf. id.* (a secret service officer who also serves as a township trustee may have a relationship with the township's employees that "might cloud or impair his judgment were he required to investigate crimes alleged to have been committed by or against those persons"). This conflict of interest may be avoided if the secret service officer abstains from participating in any such investigation. *Cf. id.* at 6-7 ("[t]o avoid this conundrum, a secret service officer who is a member of a board of township trustees shall not be permitted or required to conduct any criminal investigatory activities or functions in connection with criminal charges that may [be] brought by your office or other prosecuting authority against officers or employees of the township").

Notwithstanding that the foregoing conflict of interest may be sufficiently avoided, a second conflict of interest exists that, in this particular instance, renders the positions of secret

service officer and coroner's investigator incompatible. A coroner and a prosecuting attorney work closely with each other to determine the cause of an unexplained death in the county and to prosecute any persons responsible for the death, respectively. *See, e.g.*, R.C. 313.09 (“[t]he coroner shall promptly deliver, to the prosecuting attorney ... copies of all necessary records relating to every death in which, in the judgment of the coroner or prosecuting attorney, further investigation is advisable”); R.C. 313.15 (“[a]ll dead bodies in the custody of the coroner shall be held until such time as the coroner, after consultation with the prosecuting attorney [or other appropriate law enforcement officials], has decided that it is no longer necessary”); R.C. 313.18 (“[t]he prosecuting attorney or coroner may order the disinterment of any dead body, under the direction and supervision of the coroner”); R.C. 313.211 (“[t]he coroner may ..., with the approval of the prosecuting attorney, destroy any dangerous drugs found at the scene of an investigation”). The cooperation between the coroner and prosecuting attorney does not mean that the coroner and the prosecuting attorney possess identical objectives. Rather, the distinct objectives of the coroner and prosecuting attorney make it inappropriate for the same person to serve simultaneously as an investigator for the coroner and a secret service officer for a prosecuting attorney.

A prosecuting attorney “inquire[s] into the commission of crimes within the county” and “prosecute[s], on behalf of the state, ... complaints, suits, and controversies in which the state is a party.” R.C. 309.08(A). A prosecuting attorney prosecutes only those charges that the prosecutor knows to be supported by probable cause. *See* Ohio Prof. Cond. R. 3.8(a) (“[t]he prosecutor in a criminal case shall not ... pursue or prosecute a charge that the prosecutor *knows* is not supported by probable cause”). A coroner is responsible for investigating and determining the “cause, manner, and mode of any unexplained death in the county.” 1989 Op. Att’y Gen. No. 89-037, at 2-165; *see also* R.C. Chapter 313. The determination by a coroner as to “[t]he cause of death and the manner and mode in which the death occurred ... shall be the legally accepted manner and mode in which such death occurred, and the legally accepted cause of death, unless” the coroner is ordered to change his decision by the court of common pleas. R.C. 313.19.

The determination by a coroner as to the cause, manner, and mode of an unexplained death in the county directly affects charges that a prosecuting attorney may bring against a person allegedly responsible for the death. For example, a prosecuting attorney may suspect, from the gathering of initial evidence, that a particular person is responsible for an unexplained death within the county. The prosecuting attorney may be hopeful that the coroner is able, from the evidence collected from the coroner's investigator, to definitively determine a cause of death that aligns with the prosecuting attorney's theory of the crime. A person serving simultaneously as a secret service officer and a coroner's investigator might be unduly influenced, in his role as the coroner's investigator, to collect evidence that supports the theory of the prosecuting attorney and ignore evidence that may be antithetical to the prosecuting attorney's case.

This conflict of interest is not remote and speculative, as this conflict has the potential to arise each time there is an unexplained death in the county. Further, this conflict of interest cannot be mitigated or avoided. Although the final decision as to the cause, manner, and mode

of an unexplained death in the county rests with the coroner and not a coroner's investigator, an investigation into the death and any evidence collected from the investigation has the potential to influence the coroner's determination. Moreover, it is not possible for a coroner's investigator who also serves as a secret service officer to avoid the conflict by abstaining from any investigations into unexplained deaths in the prosecuting attorney's jurisdiction. *See, e.g.*, 1989 Op. Att'y Gen. No. 89-016, at 2-80 (reasoning that any conflict of interest in this regard for a person serving simultaneously as a part-time investigator for a county coroner and a police chief of a city may be avoided if the coroner "refrain[s] from utilizing the police chief as his investigator when the matter to be investigated is within the jurisdiction of the police chief of the city"). The jurisdiction of the prosecuting attorney, like that of the coroner, encompasses the entire county.

Our system of justice demands that a coroner and a prosecuting attorney perform the distinct, yet collaborative duties of their offices in an unbiased, professional manner. Decisions reached by a coroner and a prosecuting attorney must be impartial and well founded, as they have the potential to affect whether a person is charged and convicted of a crime in relation to an unexplained death in the county. Such decisions are founded, in part, upon evidence collected from investigations undertaken by a coroner's investigator and a secret service officer, respectively. Any partiality on the part of a coroner's investigator or a secret service officer might unfairly influence or affect these decisions, thereby affecting a person against whom the prosecuting attorney desires to bring charges. Such a conflict of interest is unavoidable and therefore untenable. Accordingly, we conclude in these circumstances that the positions of secret service officer appointed by the prosecuting attorney of Brown County pursuant to R.C. 309.07 and investigator appointed by the coroner of Brown County pursuant to R.C. 313.05(A)(3) are incompatible.²

Application of Ohio Ethics Law

In addition to the seven-part compatibility analysis, it also is important to consider whether the simultaneous holding of these positions presents issues under the Ohio ethics law and its conflict of interest provisions. *See* R.C. Chapter 102; R.C. 2921.42-.43. Special attention should be paid to R.C. 2921.42(A)(4), which prohibits a public employee from being interested in a public contract. R.C. 2921.42(A)(4) states, in pertinent part, that "[n]o public official shall knowingly ... [h]ave an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision ... with which the public official is connected." The term "public official" includes an employee of any political subdivision of the state. R.C. 2921.01(A).

² We recognize that there may be instances in which the positions of secret service officer and coroner's investigator are compatible. For example, if a person serving as a coroner's investigator performs ministerial functions, the performance of which has no potential to affect or influence the determination by a coroner as to the cause, manner, and mode of an unexplained death in the county, the conflict of interest that renders the positions incompatible in this instance will not exist.

The term “public contract” means “a contract for the purchase or acquisition ... of property or services by or for the use of the state” or “any of its political subdivisions, ... including the employment of an individual by ... any of [the state’s] political subdivisions.” R.C. 2921.42(I)(1)(a). R.C. 2921.42(A)(4) thus prohibits a county employee from knowingly having an interest in the profits or benefits of any person’s employment, or a contract for the employment of any person, by the county.

The Ohio Ethics Commission has interpreted R.C. 2921.42(A)(4) as prohibiting “an elected officer of a political subdivision from simultaneously holding compensated employment with his own political subdivision because an employment relationship between a political subdivision and a public employee is a ‘public contract’ for purposes of R.C. 2921.42.” Ohio Ethics Comm’n, Advisory Op. No. 99-002, slip op. at 3. Accordingly, it is possible that the Ohio Ethics Commission may determine that R.C. 2921.42(A)(4) prohibits a person serving as a coroner’s investigator from simultaneously holding a position as a secret service officer for a prosecuting attorney within the same county. *Cf.* 2002 Op. Att’y Gen. No. 2002-039, at 2-252 n.4 (explaining that it is possible for the Ohio Ethics Commission to determine that a person who serves as a staff attorney for a county department of job and family services and a member of a county children services board has an unlawful interest in a public contract under R.C. 2921.42(A)(4)). As the Ohio Ethics Commission is authorized to determine the applicability of the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43, R.C. 102.08, the Attorney General “refrain[s] from interpreting and applying [those] provisions by way of a formal opinion.” 2011 Op. Att’y Gen. No. 2011-008, at 2-60 n.1. For a determination of whether those provisions apply to the positions of secret service officer and coroner’s investigator, we recommend that you contact the Ohio Ethics Commission.

Conclusion

It is our opinion, and you are hereby advised that a secret service officer appointed by the prosecuting attorney of Brown County pursuant to R.C. 309.07 may not serve at the same time as an investigator appointed by the coroner of Brown County pursuant to R.C. 313.05(A)(3).

Very respectfully yours,



MICHAEL DEWINE
Ohio Attorney General