

OPINION NO. 72-014

Syllabus:

Assuming there is no city ordinance to the contrary, a city councilman may also serve as law clerk for the county prosecutor's office so long as it is understood that he will not participate in the rare case in which the county prosecutor is required to prosecute a member of the city council.

To: Joseph R. Grunda, Lorain County Pros. Atty., Elyria, Ohio
By: William J. Brown, Attorney General, February 8, 1972

You have requested my opinion as to the compatibility of the office of city councilman and law clerk for the county prosecutor's office.

Section 309.06, Revised Code, sets out the procedure for appointing clerks. That Section reads in part as follows:

"The prosecuting attorney may appoint such assistants, clerks, and stenographers as are necessary for the proper performance of the duties of his office and fix their compensation, not to exceed, in the aggregate, the amount fixed by the judges of such court."

Section 731.01, Revised Code, which refers to city councilmen, states that:

"(A) The legislative power of each city shall be vested in, and exercised by a legislative authority, composed of not less than seven members, four of whom shall be elected by electors of the city at large. * * *

"(B) The legislative power of a city may be vested in, and exercised by a legislative authority composed of not less than five nor more than seventeen members, to be determined in the manner provided in this division, and in lieu of the number required in division (A) of this section. * * *

"* * * * * * * * *"

Section 731.02, Revised Code, relates to the holding of other public offices and states in part as follows:

"* * * Each member of the legislative authority shall be an elector of the city, shall not hold any other public office, except that of notary public or member of the state militia, and shall not be interested in any contract with the city, and no such member may hold employment

with said city. A member who ceases to possess any of such qualifications, * * * shall forthwith forfeit his office."

Prior to amendment in 1957, this statute (formerly Section 4207, General Code) read, "shall not hold any other public office or employment." (Emphasis added.) The amendment omitted the word "employment". Opinion No. 65-60, Opinions of the Attorney General for 1965.

In one of my recent Opinions, Opinion No. 71-071, Opinions of the Attorney General for 1971, issued November 3, 1971, I defined public office as contrasted to other public employment. A public officer exercises independently a part of the sovereign power of the state, while a mere public employee acts under the direction of a public officer. A public officer's duties are prescribed by statute, and he is responsible to the public, while a public employee's duties are prescribed by his superior, a public officer. According to this definition, the position of law clerk in the county prosecutor's office is not a public office; nor is it employment with the city. There would therefore seem to be nothing in the statutes to prevent an individual holding both the office of city councilman and the position of law clerk in the county prosecutor's office.

Since there is no statutory prohibition against the simultaneous performance of these two functions, and assuming that the city of Elyria has no prohibitory ordinance, we must look to the rule of the common law as to compatibility of employment. In my Opinion No. 71-065, Opinions of the Attorney General for 1971, I stated that:

"In Ohio, the general rule on this subject has been stated in State ex rel. Attorney General v. Gebert, 12 Ohio C.C.R. (n.s.) 274, 275 (1969):

"'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.'

"For an extended summary of the law on this matter, see State ex rel. Hover v. Wolven, 175 Ohio St. 114 (1963)."

In a related situation, Opinion No. 2043, Opinions of the Attorney General for 1961, one of my predecessors stated that:

"There is no incompatibility between the positions of assistant prosecuting attorney of a county, appointed pursuant to Section 309.06, Revised Code, and clerk of council of a city in the county, * * *."

Although the offices in question here are somewhat reversed, the conclusion would appear to be the same. The duties of a law clerk in the county prosecutor's office are limited to research of cases involving "county and township officers" and with preparation of the state's case in criminal matters. Opinion No. 2043, supra. The duties of a city councilman are related to the city, "a subdivision separate and apart from the county", and would not con-

flict with the office of the county prosecutor. Opinion No. 2043, supra. That is to say, the office of city councilman and the position of law clerk in the county prosecutor's office are neither subordinate to, nor in any way a check upon, each other. Of course, in the rare case in which the county prosecutor must prosecute a member of the city council, e.g., for a narcotics offense, the law clerk should not participate. In Opinion No. 71-027, Opinions of the Attorney General for 1971, issued June 4, 1971, I held that a full-time employee of the county treasurer's office could also serve as a part-time investigator for the county prosecutor, as long as it was understood that his duties would not involve any investigation of his full-time employer. My opinion in No. 71-025, Opinions of the Attorney General for 1971, issued May 27, 1971, is clearly distinguishable, for there the position of assistant prosecuting attorney is one which is so closely connected with that of the county prosecutor himself that the assistant is subject to the same inhibitions as its prosecutor. Opinion No. 1380, Opinions of the Attorney General for 1957 and Opinion No. 25, Opinions of the Attorney General for 1963. A law clerk, however, does not have the status of assistant and is merely an employee.

In specific answer to your question it is my opinion, and you are so advised, that assuming there is no city ordinance to the contrary, a city councilman may also serve as law clerk for the county prosecutor's office so long as it is understood that he will not participate in the rare case in which the county prosecutor is required to prosecute a member of the city council.