

**OPINION NO. 92-023****Syllabus:**

An 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.

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**To: Daniel Myers, Mercer County Prosecuting Attorney, Celina, Ohio**  
**By: Lee Fisher, Attorney General, June 26, 1992**

You have asked whether the positions of full-time referee of a court of common pleas and volunteer fireman for a city fire department are compatible. Information provided states that the city is located within the jurisdiction of the court of common pleas.

**I. Powers And Duties Of A Referee Of A Court Of Common Pleas  
And A Volunteer Fireman For A City Fire Department**

Ohio R. Civ. P. 53 provides for the appointment, compensation, and powers of a referee of a court of common pleas. This rule, in part, states:

(A) **Appointment.** The court may appoint one or more referees, who shall be attorneys at law admitted to practice in this state, to hear an issue or issues in any case in which the parties are not entitled to a trial by jury or in any case in which the parties consent in writing or in the record in open court, to submit an issue or issues to a court-appointed referee.

....  
 (C) **Powers.** The order of reference to a referee may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of his report. Subject to the specifications and limitations stated in the order, the referee has and shall exercise the power to regulate all proceedings in every hearing before him as if by the court and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may summon and compel the attendance of witnesses and may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests and guarantees the costs, and the court so orders, the referee shall make a record of the evidence offered and excluded in the same manner as and subject to the same limitations upon a court sitting without a jury.

See also R.C. 3113.21(L)(3) (empowering a judge in any Title IV-D case to appoint a referee to make findings of fact and recommendations); Ohio R. Civ. P. 75(C) (authorizing the appointment of referees by the domestic relations division of a court of common pleas); Ohio Traf. R. 14 (a court may appoint a referee to preside over traffic cases).

Division (E)(1) of this rule further requires a referee of a court of common pleas to prepare and file with the clerk of court a report upon the matters submitted by the order of reference. See also Ohio Traf. R. 14. The referee's report, however, becomes "effective and binding only when approved and entered as a matter of record by the court." Ohio R. Civ. P. 53(E)(5); see also Ohio Traf. R. 14. Referees of a court of common pleas, thus, perform duties which "involve the exercise of judicial powers in hearing and rendering decisions upon both the law and the facts" in matters assigned to them. *Burch v. Harte*, 1 Ohio N.P. (n.s.) 477, 490, 14 Ohio Dec. 433, 444 (Cincinnati Super. Ct. 1903); see also 1990 Op. Att'y Gen. No. 90-005 at 2-16 and 2-17.

A volunteer fireman for a city is employed by the city fire department. R.C. 737.08; see also R.C. 737.11 (a city fire department is maintained under the civil service system). The duties of a volunteer fireman of a city are to protect the lives and property of the citizens of the city in case of fire. R.C. 737.11; see also 1981 Op. Att'y Gen. No. 81-004 at 2-15; 1977 Op. Att'y Gen. No. 77-078 at 2-269 (disapproved, in part, by 1979 Op. Att'y Gen. No. 79-111).

## II. Compatibility Analysis

The seven question format within which to analyze a question of compatibility of two public positions is set forth in Op. No. 79-111 at 2-367 and 2-368 as follows:

1. Is either of the positions a classified employment within the terms of R.C. 124.57?
2. Do the empowering statutes of either position limit the outside employment permissible?
3. Is one office 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 a conflict of interest between the two positions?
6. Are there local charter provisions or ordinances which are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

*See also Estler v. Summit County*, 39 Ohio Misc. 2d 8, 9, 530 N.E.2d 973, 974-75 (C.P. Summit County 1985). Before two public positions may be determined to be compatible, all seven questions must yield an answer in favor of compatibility.

Questions six and seven involve matters of local concern, and I assume, for purposes of this opinion, that there are no local departmental regulations, charter provisions, or ordinances that limit the holding of outside employment by a referee of the court of common pleas or a volunteer fireman of a city fire department. It is not uncommon, however, for referees to be regulated by local rules of court. There are no applicable state or federal regulations.<sup>1</sup>

#### A. Revised Code Section 124.57

R.C. 124.57 prohibits employees or officers in the classified service from participating in partisan political activities, other than to vote or express their political views. A volunteer fireman in a city fire department is in the classified service. *See* R.C. 124.11(B) ("[t]he classified service shall comprise all persons in the employ of the ... cities ... not specifically included in the unclassified service"). As noted above, a referee of a court of common pleas is appointed by the court. Under R.C. 124.11(A)(10), a referee of a court of common pleas may be in the unclassified service if "the director of administrative services finds it impracticable to determine [his] fitness by competitive examination." However, since neither position is elected in a partisan election, the prohibition of R.C. 124.57 does not prohibit an individual from serving in both positions. *See generally* 1991 Op. Att'y Gen. No. 91-067 at 2-317 (insofar as court appointed volunteers are not elected in partisan elections, "the prohibition of R.C. 124.57 does not prevent a county personnel officer from serving as a court appointed volunteer").

#### B. Outside Employment

Other than R.C. 124.57, there is no statutory limitation on the outside employment of a volunteer fireman of a city fire department. Additionally, no statute or rule sets forth a provision limiting the outside employment of a referee of a court of common pleas. Hence, absent limitations on outside employment of referees of a court of common pleas as may appear in the local rules of court, no provision of law limits the outside employment permissible of either a volunteer fireman of a city fire department or a referee of a court of common pleas.

#### C. Subordination Or Control

The third issue is whether one position is subordinate to, or in any way a check upon, the other. *See State ex rel. Attorney General v. Gebert*, 12 Ohio C.C. (n.s.) 274, 275, 21 Ohio C.C. Dec. 355, 356 (Cir. Ct. Franklin County 1909). A volunteer fireman of a city fire department is employed by that department, *see* R.C. 737.08, and is thus accountable to that department. A referee of a court of common pleas, however, is appointed by the court, *see* R.C. 3113.21(L)(3); Ohio R. Civ. P. 53; Ohio R. Civ. P. 75, Ohio Traf. R. 14, and is responsible to the court that appoints him. The positions, thus, operate independently of each other and neither is

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<sup>1</sup> You have not indicated that any federal funds are involved in the operation of the city fire department. Hence, I offer no opinion as to whether such funding would make any federal statutes or regulations applicable.

subordinate to the other. *See generally Esler v. Summit County*, 39 Ohio Misc. 2d at 10, 530 N.E.2d at 975 ("[n]either the chief county building inspector nor the township trustees have any direct responsibilities to or powers over the other .... [T]herefore, the occasion for one position to have a check on the other would be rare"); *Pistole v. Wiltshire*, 22 Ohio Op. 2d 464, 467, 189 N.E.2d 654, 657-58 (C.P. Scioto County 1961) (a township trustee is responsible to the electors who elected him and a deputy sheriff is responsible to the county sheriff who appointed him; neither position is subordinate to, or a check upon, the other). Moreover, there is no area in which one position acts as a check upon the other. The positions, therefore, are not subordinate to, or in any way a check upon, each other.

#### D. Physical Constraints

The fourth issue is whether it is physically possible for one person to discharge the duties of both positions. Prior opinions of the Attorney General have determined that this question requires an inquiry into the time demands of each position. *See, e.g., 1991 Op. Att'y Gen. No. 91-036 at 2-195*. It is, therefore, a factual question that is best answered by the concerned parties. *See id.* It seems quite likely, however, that these two positions can be competently filled by the same individual.

#### E. Conflict Of Interest

The final inquiry is whether there is a conflict of interest between the two positions. A conflict of interest occurs when the duties of one position may be administered or discharged in such a way as to result in favoritism and preference being accorded the other position. *State ex rel. Baden v. Gibbons*, 17 Ohio Law Abs. 341, 344 (Ct. App. Butler County 1934). *See generally 1985 Op. Att'y Gen. No. 85-042 at 2-150* ("[o]ne person may not simultaneously hold two public positions if he would be subject to divided loyalties and conflicting duties or exposed to the temptation of acting other than in the best interest of the public"). A conflict of interest, thus, arises when an individual, as a referee of a court of common pleas, presides over the hearing of a matter involving the city fire department that employs him as a volunteer fireman. *See Op. No. 90-005 at 2-19*. In this situation, it would be difficult for the individual, in his capacity as referee, to set aside his loyalty to the city fire department. *See id.* at 2-19 and 2-20. *See generally 1981 Op. Att'y Gen. No. 81-009 at 2-31* ("[i]t is to be expected that a special deputy would develop a sense of loyalty to the sheriff and his fellow officers"). Such a predisposition of loyalty may affect the ability of the individual to conduct an impartial hearing or to render an impartial decision. *See Op. No. 90-005 at 2-20; Op. No. 81-009 at 2-31*. Therefore, the individual, as a referee of the court of common pleas, must refrain from presiding over hearings involving the city fire department that employs him as a volunteer fireman. *See Code of Judicial Conduct Canon 3(C) (1982)* ("[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned"); *see also Op. No. 90-005 (syllabus)* ("[a]n individual employed as an assistant county prosecuting attorney may also serve as a part-time domestic relations referee in an adjoining county without having a common law conflict of interest, 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"). *See generally Board of Commissioners on Grievances & Discipline Op. No. 87-038 (June 1987) (syllabus)* ("[r]eferees are considered judges for purposes of complying with the Code of Judicial Conduct").

As a final matter, a potential conflict of interest may also exist if the individual, as a volunteer fireman, is certified as a "fire safety inspector" or designated a "fire official." *See generally R.C. 3737.01(D)* (as used in R.C. Chapter 3737, "fire safety inspector" means any person who is a member of the civil service as defined in R.C. 124.01<sup>2</sup> and who examines the property of another person for the purpose of identifying fire safety hazards); 2 Ohio Admin. Code 1301:7-1-03(A) (the chief of the fire department of each city and members of the

<sup>2</sup> "Civil service," as defined in R.C. 124.01(A), "includes all offices and positions of trust or employment in the service of the ... cities" of this state.

department as are designated by the chief are the fire officials for that city). Pursuant to rule 1301:7-1-03, fire safety inspectors and fire officials are empowered as follows:

(B) FM-102.2. Inspections: The ... certified fire safety inspector may inspect all structures, premises and vehicles pursuant to section 3737.14 of the Revised Code as often as may be necessary for the purpose of ascertaining and causing to be corrected, any conditions liable to cause fire, contribute to the spread of fire, interfere with fire fighting operations, endanger life or any violations of the provisions or intent of this code or any other ordinance affecting fire safety.

....  
(D) F-102.2.2. Right of entry: Whenever necessary for the purpose of enforcing the provisions of this code, or whenever the fire official has reasonable cause to believe that there exists in any structure or upon any premises any condition which makes such structure or premises unsafe, the fire official may enter such structure or premises at all reasonable times to inspect the same or to perform any duty imposed upon the fire official by this code; provided, that if such structure or premises be occupied, he shall first present proper credentials and request entry. If such entry is refused, the fire official shall have recourse to every remedy provided by law to secure entry.

(E) F-102.3. Investigation of fires: The fire official shall investigate, or cause to be investigated, every fire or explosion occurring within the jurisdiction that is of a suspicious nature or which involves the loss of life or serious injury or causes destruction or damage to property. Such investigation shall be initiated immediately upon the occurrence of such fire or explosion; and if it appears that such an occurrence is of a suspicious nature, the fire official shall take charge immediately of the physical evidence, and in order to preserve any physical evidence relating to the cause or origin of such fire or explosion, take means to prevent access by any person or persons to such building, structure or premises until such evidence has been properly processed. The fire official shall notify such persons designated by law to pursue investigations into such matters and shall further cooperate with such authorities in the collection of evidence and prosecution of the case and shall pursue the investigation to its conclusion.

See also R.C. 3737.14; R.C. 3737.41; R.C. 3737.42. A conflict of interest, therefore, may exist if the individual, as a fire safety inspector or a fire official, has a duty to inspect the premises of the court of common pleas or is required to investigate a fire or explosion that occurs on the premises of the court of common pleas.

With respect to the situation presented in your request letter, information provided indicates that the individual's duties as a volunteer fireman in the city fire department do not include the inspection of premises or the investigation of fires or explosions, but rather are limited to the fighting of fires. Moreover, you have not indicated that the imposition of such duties upon the individual is contemplated. Consequently, it is unnecessary in this opinion to determine whether the potential conflict of interest presented by rule 1301:7-1-03 renders the positions about which you ask incompatible. See generally 1988 Op. Att'y Gen. No. 88-086 at 2-413 and 2-414 (an assistant county prosecuting attorney whose only duty is to prosecute criminal cases is not subject to an impermissible conflict of interest, and thus may also serve as an assistant city law director employed for the exclusive purpose of prosecuting criminal cases in municipal court); 1988 Op. Att'y Gen. No. 88-017 at 2-68 (the determination whether an individual who simultaneously holds two public positions is subject to a conflict of interest is limited to an analysis of the particular duties performed by the respective positions).

### III. Conclusion

Accordingly, it is my opinion, and you are hereby advised that an 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.