

OPINION NO. 87-085

Syllabus:

A person may at the same time hold the positions of township clerk and clerk of a board of county commissioners in different counties, provided that it is physically possible for such person to perform the duties of both positions, and provided further that there is no contract

between the county and township entered into under the authority of R.C. 307.15 which obligates the township to pay the county for services rendered or which otherwise directly involves either position.

To: Jeffrey W. Welbaum, Miami County Prosecuting Attorney, Troy, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, October 30, 1987

I have before me your request for my opinion regarding the compatibility of the positions of township clerk and clerk of a board of county commissioners when the positions are in different counties.

In considering whether two positions are compatible, the following seven factors must be considered:

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?

1979 Op. Att'y Gen. No. 79-111 at 2-367 to 2-368.

Question number one of this analysis concerns R.C. 124.57 which prohibits any officer or employee in the classified service of the state, the several counties, cities, city school districts, and civil service townships from taking part in political activity other than voting or expressing his or her political opinions. R.C. 124.11 divides the civil service into the classified and unclassified service. Both a township clerk and a clerk of a board of county commissioners are unclassified positions. R.C. 124.11(A)(1); R.C. 124.11(A)(8). Therefore, the prohibition contained in R.C. 124.57 does not apply.

Question number two asks whether the empowering statutes of either position limit outside employment. The empowering statute for the township clerk is R.C. 507.01 which provides that a township clerk shall be elected every four years. R.C. 507.01 does not prohibit the person so elected from holding outside employment. The empowering statute for the clerk of a board of county commissioners is R.C. 305.13 which provides:

[i]f the board of county commissioners finds it necessary for the clerk of the board to devote his entire time to the discharge of the duties of such position, it may appoint a full time clerk, in place of the county auditor, and such necessary assistants to the clerk as the board deems necessary. Such clerk

shall perform the duties required by sections 305.10 and 305.11 of the Revised Code and by the board.

This statute does not prohibit the clerk from holding outside employment; therefore question number two must be answered in the negative.

Question number three of the compatibility analysis asks if one office is subordinate to, or in any way a check upon, the other. The statutory duties of the positions must be examined to see whether one position controls the other, either directly or indirectly. See Op. No. 79-111. The position of clerk of the board of county commissioners is an appointed one. The county clerk serves at the pleasure of the board. Pursuant to R.C. 305.13, the county clerk performs the duties prescribed by R.C. 305.10 (recording the proceedings of the board of county commissioners), the duties prescribed by R.C. 305.11 (certifying the records of these proceedings), and other duties prescribed by the board itself. The county clerk, therefore, is responsible to, and subject to the control of, the board of county commissioners. The township clerk, on the other hand, is an elected official and is thus responsible to the electorate. The township clerk and county clerk serve different masters and are not subordinate to each other. See Pistole v. Wiltshire, 189 N.E.2d 654 (C.P. Scioto County 1961) (a township trustee is responsible to people who elected him and a deputy sheriff is responsible to the sheriff who appointed him; neither position is subordinate to or a check upon, the other); Op. No. 79-111 (the positions of municipal councilman and deputy sheriff are not subordinate to one another since a councilman is elected while the deputy sheriff is appointed). Therefore neither the township clerk nor the county clerk is subordinate to, or a check upon, the other.

Question number four asks whether it is physically possible for one person to discharge the duties of both positions. Ordinarily, this is a factual question to be determined at the local level since such persons may more precisely determine the demands of each position. Op. No. 79-111. However, as noted in 1959 Op. Att'y Gen. No. 1031, p. 708 at 711:

Although physical possibility is a question of fact and not of law, it must be considered since, should the duties of one of the offices in question consume a prohibitive amount of time or otherwise make it physically impossible for an individual to perform the duties of both, then it would [not] be in the best interests of the public for one individual to hold both offices at the same time.

Several of my predecessors have opined that it would not be physically possible for one person to hold the position of clerk of a board of county commissioners concurrently with another position. In so finding, my predecessors focused on the language of R.C. 305.13 which provides:

If the board of county commissioners finds it necessary for the clerk of the board to devote his entire time to the discharge of the duties of such position, it may appoint a full time clerk.... (Emphasis added.)

See 1937 Op. Att'y Gen. No. 164, vol. I, p. 242 (county clerk position incompatible with position as secretary of a building commission); 1933 Op. Att'y Gen. No. 161, vol. I, p. 187 (county clerk position incompatible with position as deputy

clerk of county board of elections); 1931 Op. Att'y Gen. No. 3513, vol. II, p. 1098 (county clerk position incompatible with position as county hospital bookkeeper); 1913 Op. Att'y Gen. No. 65, vol. II, p. 1096 (county clerk position incompatible with position as deputy county auditor). But see 1959 Op. No. 1031, p. 708 (county clerk position compatible with position as member of local board of education); 1932 Op. Att'y Gen. No. 4884, vol. III, p.1512 (county clerk position compatible with position as deputy auditor of building commission).

The terms "full time" and "entire time" as used in R.C. 305.13 may be regarded as equivalent. 1959 Op. No. 1031. R.C. 325.19(G)(1) defines a "full time employee" for purposes of calculating holiday and vacation benefits as one "whose regular hours of service for a county total forty hours per week, or who renders any other standard of service accepted as full-time by an office, department, or agency of county service." See also 1962 Op. Att'y Gen. No. 3464, p. 971 (defining full-time employee as one who regularly works all of the normal working hours required by the employer). A full time clerk, then, must render either forty hours of work per week or "any other standard of service accepted as full-time" by the board of county commissioners. Thus the board of county commissioners has control over the amount of hours the clerk must devote to his duties. See also 1959 Op. No. 1031 (what is normal or standard depends on the particular fact situation and therefore is a question to be resolved by the appointing authority). In addition, the board will prescribe the time and location of the clerk's service, since pursuant to R.C. 305.13 the county clerk must perform those duties prescribed by the board and must record the proceedings of the board. Nevertheless, as long as the county clerk is able to perform the duties of his position, R.C. 305.13 does not prohibit him from holding another position.

In contrast to the county clerk, the township clerk has considerable discretion over when and where he performs his duties. In 1986 Op. Att'y Gen. No. 86-057 I addressed the issue of who has authority to regulate the time, place and manner of the township clerk's performance of his duties. I stated that:

[t]he [township] clerk is required to perform the duties imposed by statute and, where the nature of such duties requires that the clerk be present at a particular time or place, or act in a particular manner, the clerk must do so. See, e.g., R.C. 507.04 (requiring the clerk to keep an accurate record of the proceedings of the board of township trustees at all its meetings).

....
Where, however, the clerk has duties that need not, by their nature, be performed at any particular time or place, or in any particular manner, the clerk has discretion to choose the time, place, and manner of performance, provided that the duties are performed in compliance with the law. In such matters, the township trustees have no authority to control the discretion of the clerk. In particular, the township trustees are not authorized to require that the township clerk "be present in his office certain day-time hours each week," 1960 Op. No. 1151 (syllabus, paragraph one), or that the township clerk perform all his clerical duties in the township building.

Op. No. 86-057 at 2-312.

Since the township clerk has some discretion with respect to the time and place of the performance of his duties, it may be physically possible for him to perform other duties. In particular, it may be physically possible for a township clerk to also perform the duties of a full time clerk of a board of county commissioners. The ultimate determination of whether it is physically possible for one person to hold both positions must be determined locally by the affected individuals. Op. No. 79-111 at 2-373.

Question number five of the compatibility analysis asks whether there is a conflict of interest between the two positions. An answer to this question requires an examination of the powers and duties of the respective positions to see whether there is any material reason why an individual occupying both positions would be subject to conflicting interests or divided loyalties. Op. No. 79-111. See also 1970 Op. Att'y Gen. No. 70-168 at 2-336 (a public servant "owes an undivided duty to the public. It is contrary to public policy for a public officer to be in a position which would subject him to conflicting duties...."). Various statutory duties are imposed upon the township clerk. R.C. 507.04 requires the township clerk to "keep an accurate record of the proceedings of the board of township trustees at all its meetings, and of all its accounts and transactions, including the acceptance of the bonds of township officers." See also, R.C. 505.33 (the township clerk shall certify to the county auditor the names of property owners and a description of lands that are delinquent as to waste disposal service charges); R.C. 507.051 (the township clerk shall notify the board of elections of vacancies in township offices and of township boundary changes); R.C. 507.08 (the township clerk shall record the bonds of constables in the book kept for that purpose); R.C. 507.11 (no money belonging to the township shall be paid out except upon an order signed by at least two trustees and countersigned by the clerk); R.C. 5705.03 (clerk, as fiscal officer for township, must deposit proceeds of tax levy in township treasury to credit of appropriate fund); R.C. 5705.08 (each year, clerk must certify to township trustees the amount necessary to provide payment of final judgments against township). The duties of the clerk of the board of county commissioners include recording the proceedings of the board of county commissioners, R.C. 305.10, certifying the records of these proceedings, R.C. 305.11, and performing other duties as required by the board, R.C. 305.13.

The duties of both positions are largely ministerial and thus do not present any readily apparent conflict of interest. Several of my predecessors have acknowledged potential conflicts involved where officials must compete for the same county budget funds. See 1972 Op. Att'y Gen. No. 72-109 (since township clerk may appear before county budget commission to defend township budget, positions of township clerk and county highway department employee are incompatible because clerk may be tempted to subordinate his interests in township budget in favor of highway department budget); 1958 Op. Att'y Gen. No. 1962, p. 215 (since it is common for county clerk to appear before county budget commission to defend county budget, positions of county clerk and city council member are incompatible because of the possibility of inconsistent loyalties, as both are competing for available funds). See also R.C. 5705.32(E)(2) (representatives of each subdivision may appear in hearing before county budget commission). However, county budget conflict of interest concerns do not apply in this case because two different counties are involved.

While there does not appear to be any potential conflict between the positions of township clerk and county clerk as to budgetary matters when the positions are in different counties, I must also consider whether such a conflict could arise if the township and county contract with one another. R.C. 307.15 permits a board of county commissioners to contract with legislative authorities of subdivisions of other counties, including township trustees. Under such contracts, the board may "exercise any power, perform any function, or render any service, in behalf of the contracting subdivision or legislative authority, which said subdivision or legislative authority may exercise...." Id.

The township and county clerks' connection with such a contract would be limited. However, it is possible that the county clerk could be involved in some way if the board of county commissioners so prescribes. See R.C. 305.13. The township clerk is more likely to be directly involved since any payment by the township to the county under such a contract must be countersigned by the township clerk. See R.C. 507.11. It is thus clear that where the township and county have contracted with one another under R.C. 307.15, and the contract involves the township paying the county, an unacceptable conflict of interest would arise. However, since the formation of an inter-county contract is only a remote possibility, and since administration of such contracts is not a primary function of either the township clerk or the clerk of the board of county commissioners, I find that the potential conflict of interest does not, in itself, make the two positions incompatible. See Op. No. 79-111 (factors to consider in determining whether a potential conflict renders two positions incompatible include: degree of remoteness of a potential conflict; ability of individual to remove himself from the conflict; whether positions involve decision-making authority; whether potential conflict involves primary function of each position; and whether potential conflict involves budgetary controls).

Questions six and seven of the compatibility analysis are of local concern and I assume, for purposes of this opinion, that there are no departmental regulations, charter provisions, or ordinances which limit the holding of outside employment by a township clerk or clerk of a board of county commissioners.

Therefore, it is my opinion, and you are advised, that a person may at the same time hold the positions of township clerk and clerk of a board of county commissioners in different counties, provided that it is physically possible for such person to perform the duties of both positions, and provided further that there is no contract between the township and county entered into under the authority of R.C. 307.15 which obligates the township to pay the county for services rendered or which otherwise directly involves either position.