

**OPINION NO. 84-070****Syllabus:**

1. The positions of deputy sheriff and county dog warden are compatible, provided it is physically possible for one person to discharge the duties of both positions. (1951 Op. Att'y Gen. No. 862, p. 656, overruled.)
2. An individual who serves as both deputy sheriff and county dog warden is entitled to receive the compensation provided for each position.

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**To: Steve C. Shuff, Seneca County Prosecuting Attorney, Tiffin, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, November 28, 1984**

I have before me your request for my opinion on two questions which I have rephrased as follows:

1. Are the positions of deputy sheriff and county dog warden compatible?
2. May one person who serves as both deputy sheriff and county dog warden receive compensation for serving in both positions?

Compatibility questions arise when one individual holds or wishes to hold two public positions. 1979 Op. Att'y Gen. No. 79-111 sets forth the seven issues which must be analyzed in determining whether two public positions are compatible 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?

Questions number six and seven are of local concern, and I assume for purposes of this opinion, that there are no departmental regulations or other local provisions which limit the holding of outside employment by a deputy sheriff or a dog warden. With regard to issue two, there are no constitutional or statutory provisions expressly prohibiting one person from simultaneously holding the two positions in question.

Question number one of the compatibility analysis concerns R.C. 124.57 which prohibits employees 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 to vote or express their political opinions. An employee in the classified service<sup>1</sup> is prohibited by R.C. 124.57 from being a candidate for public office in a partisan election. 1983 Op. Att'y Gen. No. 83-033; 1982 Op. Att'y Gen. No. 82-085. Deputy sheriffs are appointed by the county sheriff. R.C. 311.04. A county dog warden is appointed or employed by the board of county commissioners. R.C. 955.12. Thus, neither a deputy sheriff nor a county dog warden is elected in a partisan election, and accordingly, a classified employee is not prohibited by R.C. 124.57 from serving in either position.<sup>2</sup>

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<sup>1</sup> A deputy sheriff may be in the classified or unclassified service depending upon the duties which the deputy performs and depending upon whether there is a fiduciary relationship between the deputy and the sheriff. Yarosh v. Becane, 63 Ohio St. 2d 5, 406 N.E.2d 1355 (1980); In Re Termination of Employment, 40 Ohio St. 2d 107, 321 N.E.2d 603 (1974); 1982 Op. Att'y Gen. No. 82-085.

It is my understanding from the Ohio Department of Administrative Services that the Seneca County dog warden has been exempted from the classified service pursuant to R.C. 124.11(A)(8), which authorizes elective officers, such as county commissioners, to exempt "two secretaries, assistants, or clerks and one personal stenographer" from the classified service. Generally, the dog warden is in the classified service, unless exempted from the classified service. See generally R.C. 124.11(B) ("[t]he classified service shall comprise all persons in the employ of. . .the several counties. . .not specifically included in the unclassified service").

<sup>2</sup> 1951 Op. Att'y Gen. No. 862, p. 656 concluded that a county dog warden who was in the classified service could not hold the position of deputy sheriff since the holding of an appointment as deputy sheriff constituted political activity. While a county sheriff does run for office in a partisan election, see R.C. 311.01, R.C. 3505.03, R.C. 3513.01, deputy sheriffs, as noted above, are not elected in a partisan election, but rather, are appointed by the sheriff. The fact that a deputy sheriff is appointed or employed by an officer who is elected in a partisan election, does not in itself mean that the holding of the position of deputy sheriff constitutes political activity. See footnote 3.

Question number three of the compatibility analysis is whether one position is subordinate to, or in any way a check upon, the other, and question number five is whether there is a conflict of interest between the two positions. In order to resolve these questions, the powers and duties of both positions must be examined.

Pursuant to R.C. 311.04 and R.C. 325.17, a county sheriff may appoint one or more deputies. The duties of a deputy sheriff were thoroughly examined in In re Termination of Employment, 40 Ohio St. 2d 107, 114-115, 321 N.E.2d 603, 608-609, wherein the court stated:

Deputy sheriffs are clearly employed by and directly responsible to their sheriffs, who are elected county officials. . . .

. . . A deputy sheriff may be called upon to serve process upon witnesses (R.C. 3.10, 117.03), and to serve writs and orders such as levys on property, writs of attachment, and summons to jurors. (R.C. 311.17.) He may perform ordinary police functions, such as transporting prisoners (R.C. 336.57), guarding prisoners in the county jail (R.C. 341.05), and exercising the general duties of a peace officer (R.C. 2935.01). For many deputies, a principal duty is to patrol state highways (R.C. 4513.39), while others are assigned as bailiffs in county courts (R.C. 2301.12). . . . For many, the duties assigned are virtually identical to those assigned to a member of a metropolitan police force or of the State Highway Patrol, or to a bailiff in the civil courts.

. . . .

. . . there are cases where a deputy sheriff is in a true fiduciary relationship with the sheriff, e.g., where a deputy sheriff has charge of deposits of bond (R.C. 2331.16), or acts as a receiver of property (R.C. 2333.22).

The duties of a county dog warden are set forth in R.C. Chapter 955. Pursuant to R.C. 955.12, county dog wardens and deputy county dog wardens are appointed and compensated by the board of county commissioners. The dog warden is charged with the enforcement of R.C. 955.01 to 955.27, 955.29 to 955.38 and 955.50. As set forth in R.C. 955.12:

The warden and deputies shall make a record of all dogs owned, kept, and harbored in their respective counties. They shall patrol their respective counties and seize and impound on sight all dogs found running at large and all dogs more than three months of age found not wearing a valid registration tag. . . . If a dog warden has reason to believe that a dog is being treated inhumanely on the premises of its owner, keeper, or harbinger, the warden shall apply to the court of common pleas. . . for an order to enter the premises, and if necessary, seize the dog. . . . The warden and deputies shall also investigate all claims for damages to animals, fowl, or poultry reported to them under section 955.29 of the Revised Code and assist claimants to fill out the claim form therefor. They shall make weekly reports, in writing, to the board in their respective counties of all dogs seized, impounded, redeemed, and destroyed and of all claims for damage to animals, fowl, or poultry inflicted by dogs. The wardens and deputies shall have the same police powers as are conferred upon sheriffs and police officers in the performance of their duties as prescribed by section 955.01 to 955.27, 955.29 to 955.38, and 955.50 of the Revised Code. They shall also have power to summon the assistance of bystanders in performing their duties and may serve writs and other legal processes issued by any court in their respective counties with reference to enforcing such sections. County auditors may deputize the wardens or deputies to issue dog licenses as provided in sections 955.01 and 955.14 of the Revised Code. Whenever any person files an affidavit in a court of competent jurisdiction that there is a dog running at large that is not kept constantly confined either in a registered dog kennel. . . or that a

dog is kept or harbored in his jurisdiction without being registered as required by law, the court shall immediately order the warden to seize and impound the animal. Thereupon the warden shall immediately seize and impound the dog complained of. . . .

Pursuant to R.C. 955.19, all funds received by the dog warden in connection with the administration of R.C. Chapter 955 shall be deposited in a dog and kennel fund. The dog and kennel fund is used by the board of county commissioners to pay the compensation of the county dog warden and to pay other expenses of administering R.C. Chapter 955. R.C. 955.20. Surplus funds in the dog and kennel fund are distributed by the board of county commissioners pursuant to R.C. 955.27.

From an examination of the respective duties of deputy sheriff and dog warden, it is apparent that neither position is a check upon, nor subordinate to, the other. A deputy sheriff is directly responsible to the county sheriff, while the dog warden is appointed by, and responsible to, the board of county commissioners. The duties of each position are performed independently of the other. Neither official is responsible for assigning duties to, or supervising, the other. I conclude that one position is not subordinate to, or a check upon, the other.

Question number five addresses the issue of whether there is a conflict of interest between the two positions. One person may not simultaneously hold both 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. See State ex rel. Hover v. Wolven, 175 Ohio St. 114, 191 N.E.2d 723 (1963); Pistole v. Wiltshire, 90 Ohio L.Abs. 525, 189 N.E.2d 654 (C.P. Scioto County 1961); Op. No. 79-III. Given the respective duties of each position as set forth above, I do not believe that one person who holds the positions of deputy sheriff and dog warden would be subject to divided loyalties. Both a deputy sheriff and county dog warden are charged with enforcing the law, although a dog warden may enforce only the provisions of R.C. Chapter 955. Neither a deputy sheriff nor a dog warden exercises budgetary control or has the power to contract. I conclude that one person who serves as both deputy sheriff and dog warden is not subject to a conflict of interest.

The final question relating to incompatibility asks whether it is physically possible for one individual to discharge the duties of both positions. This is a factual question, which must take into account the time demands of each position and which is best resolved at the local level. See 1981 Op. Att'y Gen. No. 81-010; Op. No. 79-III. Assuming that it is physically possible for one person to serve as both deputy sheriff and county dog warden, I conclude that the two positions are compatible.

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<sup>3</sup> 1951 Op. Att'y Gen. No. 862, p. 656, see footnote 2, concluded that the positions of deputy sheriff and dog warden are incompatible. One reason given was the fact that previously, sheriffs had certain duties with regard to the enforcement of the law relating to the licensing and registration of dogs, and that the law had been changed to provide for the appointment of dog wardens, thereby evidencing a legislative intent that the positions of sheriff or deputy sheriff and county dog warden should not be held by the same individual. I am not in agreement with the reasoning and conclusion of 1951 Op. No. 862. I do not believe that the mere fact that the legislature has created two separate positions indicates that one individual may not hold both positions if the positions are otherwise compatible. The change in legislation with which 1951 Op. No. 862 was concerned merely indicates that the General Assembly deemed that the county sheriff should no longer be charged with the enforcement of the laws relating to the licensing and registration of dogs, and that such duties were to be assigned to another public official.

In light of my disagreement with 1951 Op. No. 862 both on the basis set forth above and on the basis that I do not believe holding the position of deputy sheriff constitutes political activity, see footnote 2, I overrule 1951 Op. No. 862.

Having concluded that one person may simultaneously serve as deputy sheriff and county dog warden, I further conclude in response to your second question that one person who serves in both capacities is entitled to receive the compensation of both positions. There is no prohibition against one person, who performs the duties of two compatible public positions, receiving the compensation of both positions, see 1951 Op. Att'y Gen. No. 224, p. 72, as long as he does not draw double pay for performing the same service. See State ex rel. Wolf v. Shaffer, 6 Ohio N.P. (n.s.) 219, 18 Ohio Dec. 303 (C.P. Fulton County 1906), aff'd by circuit court without report, cited in State ex rel. Taylor v. Coughlin, 6 Ohio N.P. (n.s.) 101, 103, 18 Ohio Dec. 289, 291 (C.P. Ashtabula County 1907). See also State ex rel. Mikus v. Roberts, 15 Ohio St. 2d 253, 239 N.E.2d 660 (1968) (a board of county commissioners may not appoint the county engineer to the position of sanitary engineer and pay him the sanitary engineer's salary when the board of county commissioners has the authority to require the county engineer to perform such duties as the board requires; the board of commissioners may either employ a sanitary engineer or assign the duties of the sanitary engineer to the county engineer); Donahey v. Marshall, 101 Ohio St. 473, 129 N.E. 591 (1920) (a public officer may not receive an increase in compensation for performing additional duties imposed upon him if such duties are within the scope of his office). In this instance, a deputy sheriff and dog warden perform independent duties. A board of county commissioners has a mandatory duty, pursuant to R.C. 955.12, to appoint a county dog warden. See Dorrian v. Scioto Conservancy District, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (the use of the word "shall" in a statute renders its provisions mandatory in nature). Further, a board of county commissioners has no general authority to require the sheriff and his employees to perform such duties as the board requires. A person serving in the capacity of dog warden or deputy sheriff could not be called upon to perform, within the scope of his employment, the duties of the other position. Thus, one person who serves in both positions may receive the compensation provided for each position. Of course, a person serving in both positions may be required to document the time spent performing the duties of each position prior to receipt of compensation.

Accordingly, it is my opinion, and you are advised, that:

1. The positions of deputy sheriff and county dog warden are compatible, provided it is physically possible for one person to discharge the duties of both positions. (1951 Op. Att'y Gen. No. 862, p. 656, overruled.)
2. An individual who serves as both deputy sheriff and county dog warden is entitled to receive the compensation provided for each position.