

Note from the Attorney General's Office:

1989 Op. Att'y Gen. No. 89-007 was clarified by
1997 Op. Att'y Gen. No. 97-034.

OPINION NO. 89-007

Syllabus:

The positions of village solicitor and assistant county prosecuting attorney are incompatible.

To: Paul F. Kutscher, Jr., Seneca County Prosecuting Attorney, Tiffin, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, February 23, 1989

I have before me your request for my opinion on the compatibility of the positions of assistant county prosecuting attorney and village solicitor. Your specific concern is that a potential conflict of interest exists between the two positions.

The analysis to determine the compatibility of assistant prosecuting attorney with another position requires that the position of assistant prosecuting attorney be subject to the same restrictions that apply to the position of prosecuting attorney. *See, e.g.*, 1988 Op. Att'y Gen. No. 88-049; 1986 Op. Att'y Gen. No. 86-035; 1983 Op. Att'y Gen. No. 83-030. R.C. 309.06 permits the prosecuting attorney to appoint "such assistants...as are necessary for the proper performance of the duties of his office...." Assistant prosecuting attorneys have, in general, the power to act for the prosecuting attorney in all civil and criminal matters, when, and to the extent authorized by the prosecuting attorney, including the power to present evidence to the grand jury and to prosecute criminal cases. 1945 Op. Att'y Gen. No. 184, p. 163; *accord* 1971 Op. Att'y Gen. No. 71-050. My predecessor stated "it has long been the accepted opinion in this state that an assistant is, for all practical purposes, the alter ego of the prosecuting attorney and is authorized to act in his place in almost all matters. Op. No. 71-050 at 2-172. *See also* 1943 Op. Att'y Gen. No. 6186, p. 363.

Numerous specific provisions within R.C. Chapter 309 address the powers and duties of a prosecuting attorney. *See, e.g.*, R.C. 309.08 (prosecuting attorney to prosecute crimes committed within county); 309.09 (prosecuting attorney to serve as legal advisor to county and township officers, and to prosecute and defend civil actions); *see also* Op. No. 86-035 for an extensive discussion of the prosecuting attorney's duties.

R.C. 733.48 expressly authorizes villages to secure legal counsel: "When it deems it necessary, the legislative authority of a village may provide legal counsel for the village, or for any department or official thereof, for a period not to exceed two years, and provide compensation for such counsel." Such legal counsel's duties are delineated by R.C. 705.11,¹ which states:

The village solicitor...shall act as the legal advisor to and attorney for the municipal corporation, and for all officers of the municipal corporation in matters relating to their official duties. He shall prepare all contracts, bonds, and other instruments in writing in which the municipal corporation is concerned, and shall indorse on each his approval of the form and the correctness thereof. No contract with the municipal corporation shall take effect until the approval of the village solicitor...is indorsed thereon. He or his assistants shall be the prosecutor in any police or municipal court, and shall perform such other duties and have such assistants and clerks as are required or provided.

¹ Although R.C. 733.48 does not use the term "village solicitor" when referring to legal counsel for a village, the use of the term "village solicitor" in R.C. 705.11 impliedly recognizes that the legal counsel under R.C. 733.48 is called "village solicitor." *See* 1924 Op. Att'y Gen. No. 1150, p. 43 (the term "village solicitor" used in referring to legal counsel under General Code Section 4220, a predecessor of R.C. 733.48).

The nature of the village solicitor's position is that of contractual employee and not of a public office. See 1969 Op. Att'y Gen. No. 69-039; 1963 Op. Att'y Gen. No. 121, p. 203.

It is relevant to the instant discussion to note that the compatibility analysis may be properly applied to two positions, even though only one is an "office." See 1979 Op. Att'y Gen. No. 79-111 at 2-371, where the rationale was stated "it is the incompatibility of functions, and not their designation as 'offices,' which is important." Thus, the analysis is applied where an individual holds concurrently a position of public employment and a public office.

The seven questions set forth in Op. No. 79-111 comprise the general analysis by which two different positions are determined compatible or incompatible. The questions are:

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?

Question number five of the analysis addresses your concern about a potential conflict of interest. The compatibility analysis is to be applied to the particular facts involved and is to consider the degree of remoteness of a potential conflict, the ability or inability of an individual to remove himself from the conflict, whether the individual exercises decision-making authority in both positions, whether the potential conflict involves the primary functions of each position and whether the potential conflict may involve budgetary controls. Op. No. 79-111 at 2-372.

Since a person in the public service owes an undivided duty to the public, a division of loyalty encountered by potentially conflicting duties of two different public positions is a major concern in compatibility determinations. See, e.g., Op. No. 86-035; Op. No. 79-111. It is contrary to public policy that a person holding a public position be subject to conflicting duties or be exposed to the temptation to act in a manner counter to the best interests of the public. Op. No. 86-035; Op. No. 79-111. Op. No. 79-111 at 2-371 states, "where the holding of dual public positions would preclude the unbiased discharge of public duties, both positions may not be held simultaneously."

A potentially great conflict of interest presents itself where one person serves simultaneously in the capacities of village solicitor and assistant county prosecuting attorney. The interests of the village and the county which the solicitor and assistant prosecuting attorney, respectively, must represent may conflict over significant budgeting matters. Of particular concern is a likely conflict over the levying of taxes, the examination and adjustment of tax budgets and the allocation of tax proceeds. All three of these matters directly involve the county budget commission.

In each county, a county budget commission consisting of the county auditor, the county treasurer and the prosecuting attorney² is charged with "adjusting the

² R.C. 5705.25 also provides that the electors of the county may add two elected members to the budget commission.

rates of taxation and fixing the amounts of taxes to be levied each year." R.C. 5705.27. The county budget commission also allocates the "undivided local government fund" to the various subdivisions in the county under R.C. 5747.51.

A village and a county are both subject to the authority of the county budget commission. The taxing authority of each subdivision must adopt an annual tax budget and submit it to the county auditor who presents it to the county budget commission. R.C. 5705.28; 5705.30; 5705.31. For purposes of R.C. Chapter 5705, both a village and county are defined as a "subdivision" and the council or other legislative authority of a village and the board of county commissioners are "taxing authorities." R.C. 5705.01. R.C. 5705.32 authorizes the county budget commission to "revise and adjust the estimate of balances and receipts from all sources for each fund" within each subdivision's tax budget. Based on the revised and adjusted estimates, the budget commission then adjusts the levies of the village and county within the limits of the law. The determination of the budget commission directly affects the potential revenue of each subdivision. R.C. 5705.31; 1988 Op. Att'y Gen. No. 88-011. The tax budgets are also utilized to apportion undivided local government funds to the village and the county based on their actual needs.³ R.C. 5747.51; 5747.52; 1988 Op. Att'y Gen. No. 88-033.

Each subdivision is permitted to participate in the determinations of the county budget commission. R.C. 5705.32(E) requires notice to the legislative authority of the village and the board of county commissioners. R.C. 5705.32(E)(2) authorizes the participation of the village and county by stating: "Before the final determination of the amount to be allotted to each subdivision from any source, the commission shall permit representatives of each subdivision...to appear before it to explain its financial needs." See R.C. 5747.51 ("after extending to the representatives of each subdivision an opportunity to be heard,...[the county budget commission] shall determine the amount of the undivided local government fund needed by and to be apportioned to each subdivision....")

The work of the county budget commission contemplates significant input from the village and county. The village solicitor and assistant county prosecuting attorney may be called upon to assist in or to make the presentation to the budget commission on behalf of the village legislative authority or the board of county commissioners, respectively. An impermissible inherent conflict of interest is present where one person who owes loyalty to two governmental entities must advocate a position on behalf of one to the potential detriment of the other. An argument that a village is entitled to a certain level of funds means a reduced level of funds are available for the county's potential use.

In Op. No. 88-011, I determined that a potential conflict before the budget commission lacks a sufficient "degree of remoteness" to make the positions compatible since the competition for funds and favorable budget decisions arises on an annual basis. In Op. No. 88-033, I noted that the subdivisions appearing before the budget commission are in adversarial positions and a person serving both subdivisions would be confronted with a conflict of interest. The inconsistent loyalties that result when one person represents conflicting subdivisions in seeking the same funds from the budget commission present a sufficiently serious conflict of interest to make the positions incompatible. Additional conflicts over the decision to seek levies or bond issues for more funds from the electorate also present conflict of interest considerations. See, e.g., Op. No. 88-011.

An additional factor affecting the compatibility of the two positions is the ability of an assistant county prosecuting attorney to sit on the budget commission in the absence of the prosecuting attorney. See 1943 Op. No. 6186. A member of the county budget commission has a duty to render unbiased determinations. The

³ R.C. 5747.53 also provides that the subdivisions within a county may agree to an alternate method for allocating the undivided local government fund.

duty of a village solicitor is to advocate the interests of the village which hired him. The judgment of an assistant prosecuting attorney who sits on the budget commission while he is a village solicitor may, thus, be improperly influenced. Avoidance of exposure to the temptation to act in a manner counter to the interest of the public by making a biased determination requires that one person not hold two such public positions. See Op. No. 79-111 at 2-371.

It is therefore my opinion, and you are hereby advised, that the positions of village solicitor and assistant county prosecuting attorney are incompatible.