

Note from the Attorney General's Office:

1960 Op. Att'y Gen. No. 60-1650 was clarified by
1999 Op. Att'y Gen. No. 99-045.

1650

A CLERK OF A TOWNSHIP ELECTED MAY NOT AT THE SAME TIME HOLD THE POSITION OF COUNTY AUDITOR OF THE COUNTY IN WHICH SUCH TOWNSHIP IS LOCATED—
§§507.01, 3.06, R.C.

SYLLABUS:

A clerk of a township elected pursuant to Section 507.01, Revised Code, may not at the same time hold the position of deputy county auditor of the county in which such township is located.

Columbus, Ohio, August 19, 1960

Hon. James I. Shaw, Prosecuting Attorney
Theatre Building, Wapakoneta, Ohio

Dear Sir:

I have before me your request for my opinion which reads:

"I have been requested by the County Auditor of Auglaize County, Ohio, to obtain your Opinion on the compatibility of the Office of Deputy County Auditor and Clerk of the Board of Township Trustees.

"In reviewing the former Opinions of the Attorney General and the pamphlet on compatibility of public offices, I do not find that this matter has ever been raised.

"I thank you for giving this request your early attention and trust that you will inform me in the near future as to the compatibility of these two offices."

It is clear that both positions here considered, are offices in that the holder of either exercises a portion of the sovereign power of the state; the clerk of a board of township trustees being an elective office (Section 507.01, Revised Code) and the county deputy auditor occupying such office by virtue of appointment.

As regards a county deputy auditor, Section 319.05, Revised Code, provides:

"The county auditor may appoint one or more deputies to aid him in the performance of his duties. The auditor and his sureties shall be liable for the acts and conduct of such deputies. When an auditor appoints or removes a deputy, such auditor shall make a record of such appointment or removal in his office and file a certificate of appointment or removal with the county treasurer, who shall record and preserve it."

In 14 Ohio Jurisprudence (2d), Counties, Section 94, it is stated at page 270:

"* * *

"Although the statute relating generally to deputies of public officers provides that a deputy, when duly qualified, may perform any duties of his principal, it has been held in most instances that a deputy county auditor cannot act for his principal in matters requiring the exercise of judgment and discretion, such as the

selection of names of persons for a struck jury, the approval of official bonds of assessors and the appointment of assistant assessors, or service as a member of the county board of revision. On the other hand, a more recent decision has interpreted this provision to mean that a deputy county auditor, as distinguished from a mere clerical employee, may perform any of the duties of the county auditor in the latter's absence, including his duty as a member of the county budget commission.

“* * *”

The statute above mentioned relating generally to deputies of public officers is Section 3.06, Revised Code, which reads :

“A deputy, when duly qualified, may perform any duties of his principal. A deputy or clerk, appointed in pursuance of law, shall hold the appointment only during the pleasure of the officer appointing him. The principal may take from his deputy or clerk a bond, with sureties, conditioned for the faithful performance of the duties of the appointment. The principal is answerable for the neglect or misconduct in office of his deputy or clerk.”

Section 3.06, *supra*, which was formerly Section 9, General Code, was considered in *State ex rel. Baden v. Gibbons*, 40 Ohio Law Rep., 285, where it was determined by the Court of Appeals of Butler County (1934) that the offices of city commissioner and deputy county auditor are incompatible. The conclusion reached is predicated on the following reasoning stated at page 289 :

We * * * take the view that a deputy county auditor, as distinguished from a mere clerical employee, may in the absence of his principal perform the duties of the county auditor. One of the many duties of that office is created by Section 5625-19, General Code, which makes the county auditor a member of the county budget commission. As a member thereof, he assists in adjusting the amounts budgeted by the various taxing divisions and revises the estimates and equalizes the total tax levied and collected between the various taxing subdivisions. He is further clothed with authority to value property for taxation, and to fix the rates of taxation, and to consider exemptions claimed ; and to distribute special taxes collected by the state, such as gasoline and inheritance taxes.

“This court cannot be blind to the fact that the duties of a county auditor in tax matters have become highly technical in character, and that many auditors are not possessed of this special knowledge, and that many auditors appoint as their deputies persons experienced in tax matters who have almost exclusive charge thereof. This being true, it is quickly discernible that such

a deputy might favor and prefer a municipality of which he was a councilman or commissioner at the expense of another taxing division, such as a school district or township which must levy upon the same property. As a commissioner, he assists in the budgeting of the municipal requisition made upon the county budget commission, and as a member thereof he might purposely favor the municipality. It is therefore our judgment that the positions held by the defendant are incompatible. * * *

I am now confronted with the question whether or not the office of a deputy county auditor is compatible with the office of a township clerk. The definition of incompatibility quoted, perhaps, more often than any other is the one given in *State of Ohio ex rel. v. Gebert*, 12 C. C. (N.S.) 274, where it is stated:

“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.”

See also 32 Ohio Jurisprudence, pages 908 and 909; 42 American Jurisprudence, page 926.

A definition, apparently appropriate in the situation here considered, is formulated in the case of *Baden v. Gibbons*, *supra*, where the court stated at page 288:

“It has long been the rule in this state that one may not hold two positions of public employment when the duties of one may be so administered and discharged that favoritism and preference may be accorded the other, and result in the accomplishment of the purposes and duties of the second position, which otherwise could not be effected. To countenance such practice, would but make it possible for one branch of government or one individual to control the official act and discretion of another independent branch of the same government or of interlocking governments which are constructed so as to operate in conjunction with each other. If the possible result of the holding of two positions of public trust leads to such a situation, then it is the rule, both ancient and modern, that the offices are incompatible and are contrary to the public policy of the state.”

A perusal of Chapter 507., Revised Code, pertaining to the office of a township clerk, fails to disclose any provisions which would suggest that such office is incompatible with that of a deputy county auditor. An examination of Chapter 5705., Revised Code, containing the tax levy law, however, presents a different picture. Under Section 5705.01 (A), Revised

Code, a township is defined as a "subdivision," as used in Section 5705.01 to 5701.47, inclusive, Revised Code, under 5705.01 (D), Revised Code, the township clerk is designated as "fiscal officer" of a township.

Chapter 5705., *supra*, also contains the statutes relating to the budget commission. The part of such chapter spelling out the provisions of the budget law is contained in Section 5705.27 to 5705.41, inclusive, Revised Code. Under the provisions of Section 5705.27, *supra*, the county budget commission consists of the county auditor, the county treasurer, and the prosecuting attorney. An analogous situation was before one of my predecessors where in Opinion No. 1022, Opinions of the Attorney General for 1933, Volume 11, page 1038, he decided that the clerk-treasurer of a township may not at the same time hold the position of deputy treasurer of the county in which the said township is located.

In Opinion No. 1022, *supra*, at page 1039, it is stated :

"* * * there might be occasions when the township-clerk, as fiscal officer of his township, would be called before the county budget commission on which he was, as deputy treasurer, acting in place of the county treasurer. In such a situation, he would under his duties as township clerk be required to insist upon a proper share of the revenue for his subdivision, and under his duties as acting county treasurer on the budget commission, be required to adjust the funds among the subdivisions in an unbiased manner. Obviously, there would be conflicting duties which would, under the common law test of incompatibility, render the office of township clerk-treasurer and position of deputy county treasurer incompatible."

I concur with the reasoning and the conclusion of my predecessor as set forth in opinion No. 1022, *supra*, and conclude that the determination made in such opinion is applicable to the situation here considered in view of the fact that both the county treasurer and the county auditor are members of the county budget commission.

Accordingly, in answer to your specific question, it is my opinion and you are advised that a clerk of a township elected pursuant to Section 507.01, Revised Code, may not at the same time hold the position of deputy county auditor of the county in which such township is located.

Respectfully,
MARK McELROY
Attorney General