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COMPATIBILITY—OFFICE OF CITY COUNCILMAN AND  
COUNTY CIVIL DEFENSE DIRECTOR—INCOMPATIBLE.

SYLLABUS:

The office of city councilman and that of county civil defense director cannot lawfully be held simultaneously by the same person.

Columbus Ohio, February 3, 1958

Hon. Charles W. Ayers, Prosecuting Attorney  
Knox County, Mount Vernon, Ohio

Dear Sir:

I have your request for my opinion reading as follows:

“On December 12, 1957, a report of examination of the City of Mount Vernon, Ohio, was filed with the Auditor of State by

the Bureau of Inspection and Supervision of Public Offices, on which on Page 25 under 'Member Qualification' it was reported that John Scott, a city council member while serving under appointment from the Knox County Commissioners as County Civil Defense Director was elected to the council of the City of Mount Vernon. The Examiner reports that under Revised Code Section 731.02 the two positions are incompatible apparently on the basis that the position of Knox County Civil Defense Director is a public office.

"It should be pointed out that the Knox County Civil Defense Director draws no salary, makes no expenditures of money without first signing a requisition which is approved by the Board of County Commissioners and warrants are issued under signature of the Knox County Auditor."

You have presented by your inquiry the question of the compatibility of the offices of member of city council and county civil defense director.

I invite your attention initially to Section 731.02, Revised Code, reading:

"Members of the legislative authority at large shall have resided in their respective cities, and members from wards shall have resided in their respective wards, for at least one year next preceding their election. *Each member of the legislative authority shall be an elector of the city, shall not hold any other public office, except that of notary public or member of the state militia, and shall not be interested in any contract with the city, and no such member may hold employment with said city.* A member who ceases to possess any of such qualifications, or removes from his ward, if elected from a ward, or from the city, if elected from the city at large, shall forthwith forfeit his office." (Emphasis added)

This section was amended by House Bill 206, 102nd General Assembly, effective September 16, 1957. The legislative prohibition against a member holding "any other public office" has been retained from the former language.

It remains to be determined then, whether the position of county civil defense director is a public office within the meaning of this section. It is a well settled principle of law that a public office includes the exercise of a measure of sovereignty of the state.

Section 5915.06 and 5915.07, Revised Code, provide for the appointment of civil defense directors. These sections read as follows:

## Section 5915.06:

“Each county or other political subdivision of this state may establish a local organization for civil defense in accordance with the regulations promulgated by the governor. *Each local organization for civil defense shall have a director who shall be appointed by the board of county commissioners for the counties and by the chief executive for the municipal corporations. He shall have direct responsibility for the organization, administration and operation of such local organization for civil defense, subject to the direction and control of such board and chief executive and not inconsistent with regulations promulgated by the governor.* Each local organization for civil defense shall perform civil defense functions within the territorial limits of the political subdivision within which it is organized, and in addition, shall conduct such functions outside of such territorial limits as are required pursuant to regulations promulgated by the governor.

“In addition to other powers, upon the declaration of an emergency, any local, county-wide or regional civil defense organization may:

“(A) Where the safety of the people is jeopardized, compel the evacuation of any person;

“(B) Furnish emergency aid in the form of cash or goods to persons made destitute by reason of an attack.” (Emphasis added)

## Section 5915.07:

“The board of county commissioners of any county and the legislative authority of all or of a majority of the other political subdivisions, including the municipal corporation having the largest population, within such county may enter into an agreement establishing a county-wide local organization for civil defense in accordance with such regulations as are promulgated by the governor. *A director of civil defense who shall have the direct responsibility for the organization, administration, and operation of such county-wide local organization for civil defense shall be appointed in accordance with and shall be subject to the direction and control prescribed by the regulations promulgated by the governor.*

“Two or more counties that have established county-wide local organizations for civil defense pursuant to this section may, with the consent of the legislative authorities of all or a majority of the political subdivisions of each county involved, including the largest municipal corporation in each county, enter into an agreement in writing establishing a regional local organization or authority for civil defense in accordance with such regulations

as are promulgated by the governor. A director of civil defense who shall have the direct responsibility for the organization, administration, and operation of such regional local organization for civil defense shall be appointed in accordance with and shall be subject to the direction and control prescribed by the regulations promulgated by the governor.” (Emphasis added)

The underlined passages from the above quoted sections demonstrate the type of authority given to a civil defense director. Such director has the “direct responsibility for the organization, administration, and operation of such local organization for civil defense, subject to the direction and control of such board and chief executive and not inconsistent with regulations promulgated by the governor.” In such a situation the chief executive of the municipality may have a measure of direction and control.

A director of civil defense for a county-wide organization as provided by Section 5915.07, *supra*, is “appointed in accordance with, and shall be subject to the direction and control prescribed by the regulations promulgated by the governor.” Herein no such measure of control is reserved to the board of county commissioners or chief executive of a municipal corporation.

Further, I invite your attention to the fourth paragraph of the syllabus of Opinion No. 4705, Opinions of the Attorney General for 1955, p. 8, reading as follows:

“4. Membership in a civil defense organization as a ‘civil defense volunteer’ is in the nature of a public office and may be terminated at any time by resignation, or by abandonment or non-user. Where such membership is so terminated there is no obligation under the law to perform further service as a member of such organization even though the individual concerned might be subject to call to duty as a militiaman under the provisions of Section 4, Article IX, Ohio Constitution.”

In this relation I invite your attention to the case of *State, ex rel. Milburn et al. v. Pethtel, Auditor*, 153 *Ohio St.*, 1, the first paragraph of the syllabus reading:

“A public officer, as distinguished from an employee, is one who is invested by law with a portion of the sovereignty of the state and who is authorized to exercise functions either of an executive, legislative or judicial character.”

If membership in such an organization is in the “nature of a public office”, surely the director of such an organization having by statute the

control of organization, administration and operation of such a unit involves a sufficient exercise of authority to be designated a public office.

I should like to direct your attention further to the provisions of Section 5915.11, Revised Code:

*“Each political subdivision may make appropriations for the payment of the expenses of its local organization for civil defense and for the payment of the expenses chargeable to such political subdivision by agreement or under regulations promulgated by the governor in any county wherein a county-wide civil defense organization has been established pursuant to section 5915.07 of the Revised Code.”* (Emphasis added)

Section 5915.01 (F), Revised Code, provides by definition:

*“(F) ‘Political subdivision’ includes a county, township, city, or village.”* (Emphasis added)

Although, as you pointed out in your inquiry, the director receives no compensation, the authority to appropriate municipal funds for use by the civil defense organization would allow the individual in question to take part in making appropriations to increase the funds available for his expenditure upon civil defense items. This power to control expenditures is clearly violative of the judicial pronouncement of incompatibility of offices found in *State, ex rel. Attorney General v. Gebert*, 12 O.C.C. (N.S.), 274, 275:

*“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.”* (Emphasis added)

Therefore, it is my opinion and you are accordingly advised that the office of city councilman and that of county civil defense director cannot lawfully be held simultaneously by the same person.

Respectfully,  
WILLIAM SAXBE  
Attorney General