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MAYOR OF MUNICIPALITY—AFTER JANURAY 1, 1954 MAY NOT RETAIN COSTS COLLECTED IN EXERCISE OF FUNCTIONS WHILE SITTING AS MAYOR'S COURT—OFFICE INCOMPATIBLE—VILLAGE MAYOR AND JUSTICE OF PEACE OF TOWNSHIP IN WHICH VILLAGE LOCATED — SECTION 1905.21 RC.

SYLLABUS:

The enactment of the amendment to Section 1905.21, Revised Code, whereby after January 1, 1954, the mayor of a municipality may not retain costs collected in the exercise of his functions while sitting as a mayor's court, renders the office of village mayor and justice of the peace of the township in which the village is located, incompatible.

Columbus, Ohio, December 24, 1953

Hon. William Ammer, Prosecuting Attorney
Pickaway County, Circleville, Ohio

Dear Sir:

I have before me your request for my opinion, reading as follows:

“At the recent election the sole candidate for the position of Mayor of (a village) was elected to that office as well as being elected as justice of the peace for the township in which this village is located.”

“This is to request your opinion as to whether or not the offices of village mayor and justice of the peace of the township are incompatible.

“In checking past opinions of the Attorney General, I find three bearing on this question, all of which have held that the two offices are compatible. These three opinions are as follows:

1913	page 284
1917	page 2102
1933	page 1381

“However, there appears to be another matter which has arisen with the passage of a new statute by the 100th General Assembly, this being Section 1905.21 of the Revised Code of Ohio effective October 13, 1953, and reading in part as follows:

“The mayor of a municipal corporation shall keep a docket. After January 1, 1954, he shall not retain or receive for his own

use any of the fines, forfeitures, fees, or costs he collects, but shall be paid such fixed annual salary as the legislative authority of the municipal corporation provides under sections 731.08 and 731.13 of the Revised Code of Ohio.'

"It is apparent from this section that the mayor can no longer retain any of the costs in a case, however, this section in no way affects the right of the justice of the peace to retain costs in a case.

"It is on that fact and due to the difference in village mayor and justice of the peace as to retaining costs after January 1, 1954, that there would appear to be basis for considering the office of village mayor and justice of the peace as incompatible. If one person held both of these positions, it would be possible for such party to accept the case in whichever court he feels would be either to the best interest of the village or to his own best interest.

"I would, therefore appreciate an early reply as to whether or not the offices of village mayor and justice of the peace are compatible." (Words in parenthesis, the writer's.)

The test most frequently applied in determining the compatibility of public offices, is that laid down in *State ex rel. Attorney General v. Gebert*, 12 C.C., (N.S.), 274, at page 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."

The amendment to Section 1905.21, Revised Code, to which you refer in your letter does not change the basic character of the offices of mayor and justice of the peace so as to require a conclusion that the offices are now incompatible under the criteria established in the last cited case. However, the test above set forth is not the sole and exclusive test to be applied. Thus, it is stated in 32 Ohio Jurisprudence, page 908, as follows:

"One of the most important tests as to whether offices are incompatible is found in the principle that incompatibility is recognized whenever one office is subordinate to the other in some of its important and principle duties, or is subject to supervision or control by the other, as an officer who presents his personal account for audit and at the same time is the officer who passes upon it,—or is in any way a check upon the other, *or where a contrariety and antagonism would result in an attempt by one person to discharge the duties of both.*" (Emphasis added.)

It would appear, then, that by operation of Section 1905.21, Revised Code, as amended, a "contrariety and antagonism" has been created. In those matters wherein the jurisdiction of the justices' court and the mayors' court is concurrent, the incumbent is presented with a conflicting choice between his private pecuniary interest to increase the emolument of his office by sitting as a justice of the peace, and his public interest and duty to render unto the municipal treasury that which is its due, by sitting as mayor. In fairness to the incumbent, he should not be faced with the necessity of making such a choice.

As a matter of practice, the incumbent might well elect to subordinate his private interest and sit as mayor in all those cases wherein jurisdiction of the respective courts is concurrent. The factor, however, which is determinative of incompatibility, is not how he actually exercises the prerogatives of his respective offices, but rather how the statutes creating or pertaining to the offices permit him to exercise those prerogatives.

There is conceivably, one instance wherein the basic conflict heretofore noted, would not arise. Where the limits of a township and municipality become identical and the legislative authority of the municipality provides by ordinance for the compensation of the justice of the peace, pursuant to the provisions of Section 703.22, in such manner that the justices' emoluments are subject to the same limitations as those of the mayor under Section 1905.21, Revised Code, then, the grounds for finding of incompatibility would not obtain. It is my understanding that your inquiry is not predicated on such a state of facts.

Accordingly, in specific answer to your inquiry it is my opinion that the enactment of the amendment to Section 1905.21, Revised Code, whereby after January 1, 1954, the mayor of a municipality may not retain costs collected in the exercise of his functions while sitting as a mayor's court, renders the office of village mayor and justice of the peace of the township in which the village is located, incompatible.

Respectfully,

C. WILLIAM O'NEILL
Attorney General