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COMPATIBLE-INCOMPATIBLE—OFFICE, JUSTICE OF PEACE,  
DELAWARE TOWNSHIP—SAFETY DIRECTOR, CITY OF  
DELAWARE—INCOMPATIBLE.

SYLLABUS:

The offices of justice of the peace of Delaware Township, Delaware County, and safety director of the city of Delaware are incompatible.

Columbus, Ohio, October 10, 1951

Hon. Clyde E. Lewis, Prosecuting Attorney  
Delaware County, Delaware, Ohio

Dear Sir:

Your request for my opinion is quoted as follows:

“The Justice of the Peace of Delaware Township, Delaware County, Ohio, has asked that I obtain your opinion relative to the following question:

“Are the offices of Delaware Township Justice of the Peace, and Safety Director of the City of Delaware compatible to the extent that one person may hold both offices at the same time?”

An examination of the statutes and the Constitution of Ohio reveals that they do not contain a specific prohibition against the holding of the two offices mentioned in your request by the same person at the same time. It is necessary, therefore, to interpret the common law rule of incompatibility as it applies to your question. That common law rule is defined by said court in the case of *The State of Ohio, ex. rel. Attorney General v. Frank Gebert*, 12 O. C. C., (N. S.) 274, 275, and is quoted as follows:

“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 question as to whether or not it would be physically impossible to perform the duties of both positions has been held by one of my predecessors to be a question of fact rather than of law. See Opinion No. 2560, Opinions of the Attorney General for 1948, at page 1. This being true it is not within the province of this office to pass upon said question of fact.

That rule also poses this question as it relates to your request: Is the office of justice of the peace of Delaware Township in any way subordinate to, or a check upon, the office of director of public safety of the city of Delaware?

Section 4368, General Code, states that the director of public safety is the executive head of the police department.

Section 13432-9, General Code, sets forth the procedure to be followed in the issuance of a warrant by a justice of the peace, and is quoted as follows:

“When an affidavit charging a person with the commission of an offense is filed with a judge, clerk or magistrate, if he has reasonable ground to believe that the offense charged has been committed, he shall issue a warrant for the arrest of the accused; if the offense charged is a violation of the laws of the state, such warrant shall be directed to and executed by any officer named in Section 1 of this chapter, but if the offense charged is a violation of the ordinance or regulation of a municipal corporation, such process shall be directed to and executed by the officers of such corporation.”

“Magistrate” is defined by Section 13422-1, General Code, to include justices of the peace. Section 13432-9, General Code, as quoted above, states in substance that a warrant may be directed to and executed by any officer named in Section 1 of this chapter. Section 1 of this chapter, being Section 13432-1, General Code, defines “officer” to include any police officer. Thus a justice of the peace shall issue a warrant for arrest when called upon to do so and may direct that such warrant be executed by a police officer. The legislature in enacting this statute recognized the principle of democracy that certain checks and balances are necessary

when an accused man is to be arrested for his alleged commission of a crime. It recognized that the judiciary and not the police should determine that there exists reasonable grounds to believe that the offense charged has been committed before a warrant can issue. Since the legislature felt that this safeguard was necessary, it follows that the offices of justice of the peace of Delaware Township and police officer of the city of Delaware are incompatible.

A similar question was presented to one of my predecessors in office and his opinion is reported in Opinion No. 1655, Opinions of the Attorney General for 1930, Vol. I, page 488. The then Attorney General held that the offices of justice of the peace and marshal of a village in the same county are incompatible. His reasons for that opinion are the same as my reasons for stating that the offices of justice of the peace and police officer are incompatible.

Does this conclusion—that the offices of justice of the peace of Delaware Township and police officer of the city of Delaware are incompatible—render the office of justice of the peace and director of public safety of that city incompatible? My opinion is that it does. Although a director of public safety does not actually make arrests, he directs police officers under his jurisdiction in the discharge of their duties. For an executive head of a police department to be a member of the judiciary also would certainly produce an incompatible situation. If this dual office holding were permitted, the check of the judiciary over the police would be lost.

In answer to your question, it is my opinion that the offices of justice of the peace of Delaware Township, Delaware County and safety director of the city of Delaware are incompatible.

Respectfully,

C. WILLIAM O'NEILL  
Attorney General