

OPINION NO. 1516**Syllabus:**

1. The positions of chief of police of a municipal corporation and special deputy clerk of county court for the purpose of accepting bonds are not incompatible.

2. A police officer acting as special deputy clerk of county court under the provisions of Section 1907.101, Revised Code, for the purpose of accepting bonds may not be paid one dollar for each bond accepted, but must be compensated in semi-monthly installments out of the county treasury.

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To: John D. Sears, Jr., Crawford County Pros. Atty., Bucyrus, Ohio
By: William B. Saxbe, Attorney General, November 3, 1964

Your request for my opinion reads as follows:

"I respectfully request your opinion as to whether or not the Chief of Police of the city of Crestline, Ohio can also be a Deputy Clerk of a county court for the purpose of accepting bonds, which bonds have been set by the court judge. The situation in Crawford County is that we have two county courts, one located in Galion, Ohio and one located in Bucyrus, Ohio. Arrangements have been made by the county court judges for the Chief of Police in Crestline, Ohio, to accept bonds on behalf of the county court in the Eastern district and for the Chief of Police in Bucyrus, Ohio, to accept bonds on behalf of the county court in the Western District. The Chief of Police was being paid by the county court the sum of \$1.00 for each

bond taken in accordance with Section 2937.23 of the Revised Code.* * *

It is immediately apparent that the method of paying the chief of police for acting as a deputy clerk (more accurately here, special deputy clerk) is not in compliance with the statutory provisions of payment as set out in Section 1907.101, Revised Code, and for this reason, if for no other, the practice you have described is unlawful. Section 1907.101, Revised Code, reads in pertinent part:

"Special deputy clerks shall receive such compensation payable in semimonthly installments out of the county treasury as the board may prescribe."

(Emphasis added)

Furthermore, the special deputy clerk is receiving one dollar payments in direct proportion to the number of bonds posted as a result of arrests he makes as the chief of police.

However, the principal question involved in your request is whether the position of chief of police of a municipal corporation and special deputy clerk of a county court are incompatible. Assuming that all statutory requirements are complied with, it is my opinion that these two positions are compatible.

In arriving at this conclusion, I am not unmindful of Opinion No. 1641, Opinions of the Attorney General for 1960, and Opinion No. 2066, Opinions of the Attorney General for 1961. The 1960 opinion held that a deputy sheriff acting as ministerial officer of the county court under Section 1907.511, Revised Code, cannot accept cash appearance bonds in misdemeanor cases coming within the jurisdiction of the court. It is readily apparent, however, that the question was not one of compatibility of offices but of the authority of a deputy sheriff under a specific statute not here pertinent.

In the 1961 opinion, it was concluded that a sheriff or a deputy sheriff of a county may not at the same time serve as a clerk or deputy clerk of a county court of the same county for the purpose of accepting bail and appearance bonds. This conclusion was reached largely on the basis that a county sheriff is the chief law enforcement officer of the county and would be called upon to investigate any irregularities arising in the handling of funds collected by the clerk of a county court and in the general operation of the office. A county sheriff and a chief of police of a municipal corporation do not share this same responsibility, however, and the same objection cannot be found to holding the offices of chief of police and deputy clerk of county court at the same time. The 1961 opinion, then, is not controlling here.

The common law rule of incompatibility is well stated in two Ohio Cases as follows:

"It was early settled at common law that it was not unlawful per se for a man to hold two offices; if the offices were incompatible with each other, that is, if the attempt to fill one disqualified the officer from per-

forming the duties of the other, so that, for instance, in one position the officer was superior in functions to himself filling the other as in the case of a man attempting to fill at one time the office of councilman and village clerk, then he could hold but one, but if the duties of one were not in conflict with the duties of the other, then both could be held. And it was early held that the test of incompatibility was not that it was physically impossible for the officer to perform the duties of one office because he was at that time elsewhere performing the duties of the other, but the distinction was in an inconsistency in the functions of the offices, * * * " (State, ex rel. Wolf v. Shaffer, 6 N.P. (N.S.) 219, 221).

"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." (State of Ohio, ex rel. Attorney General v. Gebert, 12 C.C. (N.S.) 274, 275).

It is apparent from the authorities that in determining the compatibility of offices the test is not whether a person is placed in a position from which he may serve his own interests (for this condition exists for the untrustworthy in any public office) but is whether by holding more than one office a person may be placed in the position of preferring one office to another.

The application of the tests of incompatibility to the case at hand reveals none of the inconsistencies or conflicts guarded against by the rule.

I am not unaware of Section 1911.012, Revised Code, which provides with respect to county courts that:

* * * * *

"All warrants, executions, subpoenas, writs and processes in all criminal and quasi-criminal cases may be issued to a police officer of the appropriate municipal corporation or to the sheriff of the appropriate county."

While the duties of a police officer under this statute may be related to and complement the office of clerk of a county court, I see nothing in their exercise which will conflict with the responsibilities of a special deputy clerk of a county court for the purpose of accepting bonds or which in any instance would force a person holding both positions to show an allegiance to one position rather than another.

My opinion that the two positions in question are not incompatible is strengthened by the rule that to be incompatible each of the positions must be a public "office." A municipal

policeman is a public officer. See State, ex rel. Spaller v. Painesville, 13 C.C. (N.S.) 577. However, both a deputy clerk of court of common pleas (Halse v. State, 35 Ohio St., 421) and a deputy clerk of probate court (Warwick v. State of Ohio, 25 Ohio St., 21) have been held not to be public officers. While not decided judicially, it would seem by analogy that a special deputy clerk of county court is not a public office.

Accordingly, and in answer to your request it is my opinion that:

1. The positions of chief of police of a municipal corporation and special deputy clerk of county court for the purpose of accepting bonds are not incompatible.
2. A police officer acting as special deputy clerk of county court under the provisions of Section 1907.101, Revised Code, for the purpose of accepting bonds may not be paid one dollar for each bond accepted, but must be compensated in semi-monthly installments out of the county treasury.