

Note from the Attorney General's Office:

1957 Op. Att'y Gen. No. 57-844 was overruled by 1978
Op. Att'y Gen. No. 78-022.

844

COMPATIBILITY—TOWNSHIP CLERK, CITY STREET EMPLOYEE; INCOMPATIBLE UNLESS UNDER HOME RULE POWER CITY HAS RELIEVED THAT CLASS OF EMPLOYEES FROM RESTRICTIONS OF §143.41 RC.

SYLLABUS:

A township clerk cannot at the same time be a city street employee unless the city under its home rule powers, relieves such class of employees of the restrictions imposed by Section 143.41, Revised Code.

Columbus, Ohio, July 22, 1957

Hon. Marlowe Witt, Prosecuting Attorney,
Henry County, Napoleon, Ohio

Dear Sir:

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

"The city of Napoleon wishes to employ a man as street commissioner in the City of Napoleon, Ohio.

"The only difficulty which arises, is this, the individual whom the Council wish to employ is also the Clerk of the Board of Township Trustees of Napoleon Township.

"I could find no statutory incompatibility.

"May I please have your opinion as to whether these two jobs are compatible."

I notice that you refer twice to the *employment* of a man as street commissioner. Your later letter of May 24, 1957, reads in part:

"On the second point according to our charter Section 3 the City of Napoleon is authorized to *employ individuals* for such purposes as they deem necessary, and I would assume this would permit them to give them such title as they wish.

"I am not of the opinion that the general law relating to the appointment of a director of Public Service has any application here, since the man whom they wish for street commissioner is merely a foreman." (Emphasis added.)

Here again you refer to the city street commissioner as an employee. Finally, the resolution passed by the Napoleon city council June 17, 1957, reads:

"DEFINING DUTIES OF THE STREET
COMMISSIONER OF THE CITY OF
NAPOLEON, OHIO

"BE IT RESOLVED BY THE COUNCIL OF THE
CITY OF NAPOLEON, OHIO, ALL MEMBERS
ELECTED THERETO CONCURRING:

"Section 1. The duties of the Street Commissioner of the
City of Napoleon are as follows:

"1. He shall have supervision of all personnel working on the repair and maintenance of streets and sewers on duly dedicated and improved streets in the City of Napoleon, Ohio.

"2. He shall see that all work done under his supervision shall be completed in a good workmanlike manner.

"3. He shall have the authority to authorize and approve overtime work for employees under his supervision but in no event shall he be paid more than the salary authorized by ordinance.

"4. He shall do only that work authorized by the council of the city of Napoleon, its street committee or the Clerk-Treasurer.

"5. He shall have no authority to make capital purchases or purchases of materials and supplies other than those used in the ordinary course of his duties, said purchases only to be made by council or its duly authorized representative.

"Section 2. That this ordinance shall be in force and take effect from and after the earliest period allowed by law."

After considering all of these documents, I conclude that the "street commissioner" of Napoleon is an employee and not an officer. In the case of *State, ex rel. Milburn v. Pethtel*, 153 Ohio St., page 1, the first paragraph of the syllabus reads:

"A public officer, as distinguished from an employee, is one who is vested 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."

The Napoleon "street commissioner" is invested with no portion of sovereignty and exercises no executive, legislative, or judicial functions.

Since the Napoleon "street commissioner" is an employee, he is therefore in civil service. Section 143.01, Revised Code, reads in pertinent part as follows:

"As used in sections 143.01 to 143.08 inclusive of the Revised Code:

"(A) 'Civil Service' includes all officers and positions of trust or employment in the service of the state and the counties, cities, and city school districts thereof."

Furthermore, it follows that the Napoleon "street commissioner" is in the classified civil service. Section 143.08, Revised Code, reads in part as follows:

“(B) The classified service shall comprise *all persons in the employ of the state and the several counties, cities, and city school districts* thereof, not specifically included in the unclassified service, to be designated as the competitive class and the unskilled labor class.” (Emphasis added.)

The employee about whom you inquire is not specifically included in the unclassified service.

The activities of an individual who is in the classified service are limited by Section 143.41, Revised Code. That section reads in part as follows :

“No officer or employee in the classified civil service of the state, the several counties, cities, and city school districts shall * * * be an officer in any political organization, or take part in politics other than to vote as he pleases and to express freely his political opinions.”

Since by the terms of Section 507.01, Revised Code, a township clerk is an elected official, the individual holding that office is taking part in politics. And that is prohibited by Section 143.01, Revised Code, where the individual is in the classified service.

This conclusion is, I believe, correct if the city has not under its home rule powers made different provision for employees who would **otherwise be included in the classified service** as defined in Chapter 143., Revised Code. The Supreme Court of Ohio has several times pronounced that civil service matters are of local concern, and hence may be dealt with under home rule powers. In State *ex rel.* Lentz v. Edwards, 90 Ohio St., 305, the court said at page 309 :

“The manner of regulating the civil service of a city is peculiarly a matter of municipal concern. * * * As long as the provisions made in the charter of any municipality with reference to its civil service comply with the requirements of Section 10, Article XV, and do not conflict with any other provisions of the constitution, they are valid and under the case referred to discontinue the general law on the subject as to that municipality.”

But, if the municipality has taken no steps to enact different provisions, then the general laws of Ohio apply. In opinion No. 3846, Opinions of the Attorney General for 1941, page 426, one of my predecessors ruled in the second part of the syllabus :

“Where a city has adopted the charter plan of government and no provision is made in the charter to implement the provisions of Section 10 of Article XV of the Constitution of Ohio, the applicable provision of the state laws will govern and control until such provision is made in the charter.”

That is the precise situation in question here, hence I believe the conclusion I have reached applies to the facts involved in your inquiry.

Accordingly, you are advised that a township clerk cannot at the same time be a city street employee unless the city under its home rule powers relieves such class of employees of the restrictions imposed by Section 143.41, Revised Code.

Respectfully,
WILLIAM SAXBE
Attorney General