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1. VILLAGE COUNCIL — MEMBER — NOT PROHIBITED FROM HOLDING PUBLIC EMPLOYMENT NOT WITH VILLAGE—SECTION 731.12 RC.
2. VILLAGE COUNCIL—MEMBER—MAY BE EMPLOYED BY TOWNSHIP TRUSTEES AS SEXTON OF TOWNSHIP CEMETERY.

SYLLABUS:

1. Section 731.12, Revised Code, as amended by the 101st General Assembly in Amended Senate Bill No. 320, does not prohibit a member of village council from holding other public employment so long as such employment is not with said village.

2. A member of village council may simultaneously be employed by a board of township trustees as sexton of a township cemetery.

Columbus, Ohio, June 7, 1956

Hon. John S. Bath, Prosecuting Attorney
Fayette County, Washington C. H., Ohio

Dear Sir:

I have before me your request for my opinion as to whether the positions of sexton of a township cemetery and member of the village council of a village located within that township are compatible.

I note that Chapter 517., Revised Code, which chapter authorizes a board of township trustees to acquire, manage and control land for cemetery purposes, contains no express grant of authority to employ a sexton or caretaker. This chapter does, however, impose a duty upon the trustees to care for and maintain the land acquired for this purpose. Upon this basis, one of my predecessors, in Opinion No. 791, Opinions of the Attorney General for 1929, page 1210, held that the authority of the trustees to employ a sexton is therefore necessarily implied. I see no reason to depart from this ruling.

Prior to the enactment of Amended Senate Bill No. 320 by the 101st General Assembly, amending Section 731.12, Revised Code, members of a village council were prohibited from holding *any* other public office or

employment, whether such public employment was with the village or otherwise. See, Opinions of the Attorney General for 1927, page 2555.

Section 731.12, Revised Code, formerly provided as follows:

“Each member of the legislative authority of a village shall have resided in the village one year next preceding his election, and shall be an elector of the village. No member of the legislative authority shall hold *any other public office or employment*, except that of notary public or member of the state militia, or be interested in any contract with the village. Any member who ceases to possess any of such qualifications or who removes from the village shall forfeit his office.” (Emphasis added.)

This section was amended to read as follows:

“Each member of the legislative authority of a village shall have resided in the village one year next preceding his election, and shall be an elector of the village. No member of the legislative authority shall hold any other public office, except that of notary public or member of the state militia, or be interested in any contract with the village, *and no such member may hold employment with said village*. Any member who ceases to possess any of such qualifications or who removes from the village shall forfeit his office.” (Emphasis added.)

The obvious intention of the legislature in enacting Amended Senate Bill No. 320, was to permit a member of village council to be otherwise engaged in public employment, so long as that employment was not with the village.

Your request indicates that the cemetery in question is a *township* cemetery, title to which is vested in the township trustees. The duty to care for and maintain such cemetery, as well as the implied authority to employ a caretaker or sexton to assist in carrying out this purpose, is also vested in the trustees. I am therefore of the opinion that Section 731.12, Revised Code, does not prohibit a village councilman from simultaneously holding the position of sexton of a township cemetery.

Absent any statutory prohibition, the question of whether these positions may be held by the same person must be resolved in light of the common law rules respecting compatibility. The rule most often relied upon is stated in *State ex rel. v. Gebert*, 12 C.C. (N.S.), 274, at page 275, 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.”

Assuming that the duties of the positions in question could be physically performed at one and the same time, I can conceive of no instance where such duties would either conflict with or in any way serve as a check upon the other.

The terms upon which the sexton may be employed are fixed by agreement with the township trustees. No responsibility rests with any village within the township to assist in the maintenance of the cemetery; nor would such village have a voice in determining the advisability of employing a sexton or fixing the terms of his employment.

In specific answer to your inquiry, therefore, it is my opinion and you are advised that:

1. Section 731.12, Revised Code, as amended by the 101st General Assembly in Amended Senate Bill No. 320, does not prohibit a member of village council from holding other public employment so long as such employment is not with said village.

2. A member of village council may simultaneously be employed by a board of township trustees as sexton of a township cemetery.

Respectfully,

C. WILLIAM O'NEILL
Attorney General