

Note from the Attorney General's Office:

1977 Op. Att'y Gen. No. 77-078 was disapproved in part by
1979 Op. Att'y Gen. No. 79-111.

OPINION NO. 77-078

Syllabus:

The position of municipal fireman and the office of deputy sheriff are not, by operation of law, incompatible where it is physically possible to discharge the duties of both.

To: David E. Bowers, Allen County Pros. Atty., Lima, Ohio
By: William J. Brown, Attorney General, November 25, 1977

I have before me your request for my opinion which poses the following question:

May a full-time city fire fighter in the classified civil service also serve in the additional position of deputy sheriff, also in the classified civil service, where it is physically possible to perform the duties of both offices?

It should be noted at the outset that a city or county sheriff may well be authorized to require that employees such as you describe refrain from serving any other governmental unit while in its employ. Your question however, assumes a situation where the city and county sheriff in question have not seen fit to impose such a requirement.

The traditional test of incompatibility is stated in State, ex rel., Attorney General v. Gebert, 12 Ohio C.C.R. (n.s.) 274, 275 (1909):

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.

In order to apply this test, it is necessary to examine the powers and duties imposed upon persons holding such positions. The Supreme Court of Ohio, in In Re Termination of Employment of Pratt, 40 Ohio St. 2d 107, 115 (1974) summarized the duties of a deputy sheriff as follows:

A deputy sheriff may be called upon to serve process upon witness (R.C. 3.10, 1117.03), and to serve writs and orders such as levys on property, writs of attachment, and summons to jurors. (R.C. 311.17) He may perform ordinary police functions, such as transporting prisoners (R.C. 339.57), guarding prisoners in the county jail (R.C. 341.05), and exercising the general duties of a peace officer (R.C. 2935.01) For many deputies a principal duty is to patrol state highways (R.C. 4513.39), while others are assigned as bailiffs in county courts (R.C. 2301.12).

A deputy sheriff, pursuant to R.C. 311.04, is appointed to his position by the county sheriff, subject to approval by a judge of the court of common pleas. The compensation for the services of a deputy sheriff is fixed by the sheriff. R.C. 325.17.

The duties of a fire fighter in a municipal corporation are simply to protect the property and lives of its citizens in case of fire. All firemen are to be hired under the civil service system. R.C. 737.11. The legislative authority of a city, pursuant to R.C. 731.08, has the power to set the compensation of fire fighters.

From the provisions of the statutes cited above, it is apparent that there is no conflict between the two positions assuming that it is physically possible to perform the duties of both. The positions of deputy sheriff and fire fighter do not constitute a check upon the other. There is no overlap in duties. The manner of appointment and the fixing of compensation are regulated by different statutes. The test for incompatibility set forth in Gebert, supra is not met.

It should, however, be noted that there is another reason for determining that incompatibility does not exist in the instant situation. The rule of incompatibility applies to "offices". Gebert, supra. The terms "officer" and "office" are to be regarded as strictly correlative. Muskingham County Democratic Executive Committee v. Burrier, 31 O. Ops. 570 (1945). Accordingly, the party holding both positions must be an "officer" in regard to each before a possible conflict might arise. Municipal firemen, other than the chief of the fire department, are not public officers. State ex rel. Att'y Gen. v. Jennings, 57 Ohio St. 415 (1878). As a result, there can be no incompatibility between the office of deputy sheriff and the position of municipal firemen.

Therefore, it is my opinion and you are so advised that the position of municipal fireman and the office of deputy sheriff are not by operation of law, incompatible where it is physically possible to discharge the duties of both.