

**Note from the Attorney General's Office:**

1962 Op. Att'y Gen. No. 62-3005 was overruled in part by  
1983 Op. Att'y Gen. No. 83-095.

1962 Op. Att'y Gen. No. 62-3005 was overruled in part by  
1988 Op. Att'y Gen. No. 88-020.

3005

THE ELECTIVE POSITION OF TOWNSHIP TRUSTEE IS INCOMPATIBLE WITH THE POSITION OF COUNTY HIGHWAY DEPT. EMPLOYEE—A COUNTY HIGHWAY DEPT. EMPLOYEE WHO IS IN THE CLASSIFIED SERVICE AND IS A CANDIDATE FOR TOWNSHIP TRUSTEE VIOLATES THE CODE—A COUNTY HIGHWAY EMPLOYEE ELECTED TO TOWNSHIP TRUSTEE MAY HOLD OFFICE IF HE VACATES HIS COUNTY JOB—OPINION 4058 OAG 1954, OPINION 5350 OAG 1942.

## SYLLABUS:

1. The elective position of township trustee is incompatible with the position of county highway department employee whether the latter position is in the classified or unclassified service of the county. Opinion No. 223, Opinions of the Attorney General for 1959, page 110, approved and followed.

2. A county highway department employee who is in the classified service of the county and who becomes a candidate for the elective position of township trustee, is in violation of Section 143.41, Revised Code, prohibiting political activity by classified employees, and is subject to removal from his classified position under Section 143.27, Revised Code. Opinion No. 4058, Opinions of the Attorney General for 1954, page 367, approved and followed.

3. A county highway department employee, classified or unclassified, who is elected as a township trustee, may qualify for, and serve in, that office, but in so doing he vacates his county employment.

Columbus, Ohio, May 18, 1962

Hon. Thomas E. Ray, Prosecuting Attorney  
Morrow County, Mt. Gilead, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"We respectfully ask your opinion regarding the questions hereinafter posed:

- "1. Is the elected office of Township Trustee incompatible with that of a County Highway employee?
- "2. If the answer to question one is yes, may the person who received the same amount of votes in a general election for Township Trustee, but who lost the election by drawing lots, be certified by the election board as the elected Trustee?

- "3. If the answer to question number two is no, and assuming the duly elected Trustee is ineligible for such office as a result of the answer to question number one, does the incumbent in the office of Township Trustee hold over under Section 3.01 of the Revised Code, until his successor is elected and qualifies, or may the remaining members of the Board of Trustees fill the vacancy upon said Board by appointment?
- "4. Whether a successful candidate incompatibly employed at time of his election may resign his employment and legally qualify for and perform the duties of the elected office.

"The questions posed arose out of the following fact situations: A, B, C, and D are candidates for the office of Township Trustee for the term beginning January 1, 1962. 'A' and 'B' tied for the election, and 'A' won by drawing lots with 'B' for the election, under the supervision of the local election board. 'A' at the time of his election was and is presently an employee of the County Highway Department, and unaware of his ineligibility, attempted to qualify for the office by oath and bond. 'C' was the incumbent and 'D' merely a losing candidate for the office.

"This office ruled that the office of Township Trustee and employee of the County Highway to be incompatible and further, that acceptance by 'A' who is therefor ineligible for the office is absolutely void; citing 1959 OAG 223 as to incompatibility and State vs. Kearne, 47 OS, 566 as to the last proposition.

"This office also ruled that 'B', who lost the election by drawing lots, is not elected to the office by virtue of 'A's' ineligibility to serve, citing Renner vs. Bennett, 21 OS, 431.

"This office in a separate opinion, ruled that since 'A', the duly elected Trustee was ineligible for such office and acceptance of the office was absolutely void, that 'C', the incumbent held over as Township Trustee under the provisions of Revised Code, 3.01. That this section controls Revised Code, Section 503.24, which provides for filling of vacancy on a Board of Township Trustees, citing Case vs. Burnell, 4 App., 260; State v. Riffle, 132 OS, 546; Huff vs. Pask, 126 OS, 633 and 1958 OAG 1651.

"The answers to questions one and two seem apparent, however, it is necessary that we have a formal opinion in order to properly take up questions three and four, which are our main problems.

"I would appreciate an answer to our questions as soon as possible in view of the controversial nature of the problem and to expedite the orderly functioning of the Township involved."

You do not state whether the county highway employee in question is in the classified or unclassified service. Assuming, however, that he was in the classified service at the time that he was a candidate for the office of township trustee, then he would have been in violation of Section 143.41, Revised Code, which section bars a classified employee from participating in politics other than to vote as he pleases (Opinion No. 1014, Opinions of the Attorney General for 1961, page 854; Opinion No. 223, Opinions of the Attorney General for 1959, page 110); and by reason of that section he may not hold the two positions here in question simultaneously.

If, however, a classified county highway employee is elected to the office of township trustee, it does not appear that because of Section 143.41, supra, he is automatically precluded from qualifying and serving in the office of township trustee. If he is so elected and qualified, he may serve as township trustee, but is subject to removal from his classified position. In this regard, the syllabus of Opinion No. 4058, Opinions of the Attorney General for 1954, page 367, provides in part:

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“3. A person who occupies a classified position in the state civil service, and simultaneously is occupying an elective office, in violation of Section 143.41, Revised Code, does not, ipso facto, vacate or terminate either position or office but is subject to removal from his classified position under the provisions of Section 143.27, Revised Code.

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“5. A person who is occupying a classified position does not, by declaring his candidacy for an elective office, thereby forfeit or terminate his position in the classified service, but becomes amenable to the provisions of Section 143.41, Revised Code, and is subject to proceedings, for removal under Section 143.27, Revised Code.”

As to an unclassified county highway employee, in my Opinion No. 223, Opinions of the Attorney General for 1959, page 110, I hold that the elective position of township trustees is incompatible with the position of county highway department employee *whether the latter position be in the classified or unclassified service of the county.*

In said Opinion No. 223, I noted that in certain cases it would be possible for the county to exert influence upon a township trustee em-

ployed by the county, as to activities carried on between the two subdivisions, and thus concluded that a conflict exists between the positions making them incompatible. On reviewing the statutes involved, I am still of the opinion that the positions are incompatible.

The next question is whether a county highway department employee may qualify and serve as township trustee after he has been elected to that office, the positions being incompatible. (Recognizing, of course, that the classified employee is subject to removal under Sections 143.41 and 143.27, Revised Code.)

There is no express statutory provision prohibiting a county highway department employee from holding the office of township trustee, the position only being incompatible under the conflicts noted above. Also, there is no statutory direction as to which position may be held where two positions are incompatible. The general rule in such a case is, however, that the acceptance of a second position which is incompatible with one already held vacates the first. In this regard, it is stated in 44 Ohio Jurisprudence 2d, Section 40, page 527:

“The acceptance of a second office which is incompatible with one already held vacates the first, and this is true whether the incompatibility is based on the common law, or on a constitutional or statutory provision that an office becomes vacant when the incumbent accepts and undertakes to discharge the duties of an incompatible office. This rule is based on the presumption of election as evidenced by the acceptance and incumbency of the second office, and it is immaterial whether the title to the second office is valid or invalid. Furthermore, when the officer has been once inducted into the second office, his subsequent resignation of the latter does not ordinarily restore his right or title to the first.

“Certain limitations and exceptions to the general rule have been recognized, however, and among such limitations or exceptions are the cases where the officer is, by law, compelled to accept the second position assigned to him: where the office first held cannot be resigned by the officer; where the second office is of a temporary character; and where the officer is ineligible to hold the second office. It is well settled that the appointment or election of one to an office to which he is ineligible because of an express statutory provision prohibiting an incumbent of one office from holding another named office is absolutely void. In other words, he holds the first office and is ineligible to the second.”

(The incompatibility here concerned obviously does not fall within any of the exceptions referred to in the second paragraph of the above quote.)

further, the rule of law is stated in *State, ex rel. Baden v. Gibbons*, 40 O.L.R. 285, at 291, as follows:

“The general rule is succinctly further stated in 22 R. C. L. 418. Section 63; ‘the acceptance of a second office, incompatible with one already held, vacates the first, and this is true whether the incompatibility is based on the common law or by reason of a constitutional mandate, or because of an express statutory direction to the effect that an office becomes vacant when the incumbent accepts and undertakes to discharge the duties of another incompatible office.’ In the case of a constitutional or statutory command it is not a question as to whether or not the offices or employments are incompatible in the light of the various definitions as to what makes offices incompatible, for our legislature in its wisdom has seen fit to declare that all public office and employment, other than that of a notary public or militiaman is incompatible with the office of councilman. Mechem in his work on Public Offices and Officers in Section 429 says:

“*Where, however, it is the holding of two offices at the same time which is forbidden by the constitution or the statutes, a statutory incompatibility is created, similar in its effect to that of the common law, and, as in the case of the latter, it is well settled that the acceptance of a second office of the kind prohibited, operates ipso facto to absolutely vacate the first.*

“No judicial determination is therefore necessary to declare the vacancy of the first, but the moment he accepts the new office the old one becomes vacant, as is said in one case “His acceptance of the one was an absolute determination of his right to the other” and left him “no shadow of title, so that neither quo warranto nor a motion was necessary.”

In your letter of request, you refer to the case of *State, ex rel. v. Kearns*, 47 Ohio St., 566, as authority for the contention that the person concerned is barred from qualifying and serving as township trustee because of the incompatibility. The fifth paragraph of the syllabus of that case reads as follows:

“5. The appointment by a city council of a member thereof to an office which the statute makes a member of council ineligible to fill, and his acceptance thereof, does not work an abandonment of his office as councilman. The appointment to the second office is absolutely void.”

It will be noted that in the *Kearns* case a specific statute made a member of council ineligible to hold the other office there concerned. Thus, that case comes within the exceptions noted in the 44 Ohio Jurisprudence 2d quotation given above, and should be distinguished from the case at hand.

It is true that the general rule as expressed above refers to the situation where two *offices* are incompatible, while in the present case one of the positions, township trustee, is an office and the other, county highway department employee, is not. Here I might note that at one time it was not considered that there could be any incompatibility in mere employments, as opposed to offices. For years, however, my predecessors in this office have been applying the doctrine of incompatibility whether or not the positions concerned were offices. For example, in Opinion No. 5350, Opinions of the Attorney General for 1942, page 522, it is stated at page 530:

“While most of the cases relating to incompatibility arise in connection with public offices as distinguished from public employments, yet I can see no reason for not applying the principles which have been developed, as well to public employees as to public officers, where the nature of their duties or the powers conferred upon them would seem to make them ineligible to render efficient and impartial service in another public office or employment \* \* \*”

I see no reason to now deviate from the policy that has been followed by this office through the years.

While I have found no ruling on the exact set of circumstances here concerned, I also have found no reason to hold that the rule pertaining to two incompatible offices should not also apply to the incompatibility presented by the instant case. I thus conclude that a county highway department employee who is elected to the office of township trustee may qualify and serve as township trustee, but in doing so he vacates his position as county highway department employee.

To answer your first question, therefore, the office of township trustee is incompatible with the position of county highway department employee whether the latter position be in the classified or unclassified service of the county (Opinion No. 1014, Opinions of the Attorney General for 1951, page 854, followed).

Answering your second question, where there is a tie vote, the tie is resolved by lot by the chairman of the board of elections (Section 3505.33, Revised Code.) The loser of the drawing is then in the same position as if he had received the lowest number of votes originally, and cannot be certified as elected even if the winner should later fail to qualify for the office.

Coming to your third question, as discussed earlier, I am of the opinion that the person who was elected township trustee may qualify and serve in that office even though he holds the incompatible position of county highway department employee, but that he then vacates the latter position.

My answers to the first three questions appear to be dispositive of the fourth. I note, however, in that regard that a classified county employee who becomes a candidate for the office of township trustee is in violation of Section 143.41, Revised Code, upon becoming a candidate, and whether elected or not, is subject to removal from his classified position under Section 143.27, Revised Code. An unclassified employee on the other hand is not barred from political activity, and such an employee would not be subject to penalty merely on the grounds that he became a candidate.

Concluding, it is my opinion and you are advised:

1. The elective position of township trustee is incompatible with the position of county highway department employee whether the latter position is in the classified or unclassified service of the county. Opinion No. 223, Opinions of the Attorney General for 1959, page 110, approved and followed.

2. A county highway department employee who is in the classified service of the county and who becomes a candidate for the elective position of township trustee, is in violation of Section 143.41, Revised Code, prohibiting political activity by classified employees, and is subject to removal from his classified position under Section 143.27, Revised Code. Opinion No. 4058, Opinions of the Attorney General for 1954, page 367, approved and followed.



3. A county highway department employee, classified or unclassified, who is elected as a township trustee, may qualify for, and serve in, that office, but in so doing he vacates his county employment.

Respectfully,

MARK McELROY

Attorney General