

January 21, 2014

The Honorable Kirk E. Yosick
Williams County Prosecuting Attorney
216 S. Lynn St.
Bryan, Ohio 43506

SYLLABUS:

2014-002

A person may serve simultaneously as a member of the Village of Montpelier legislative authority and as clerk of the Bryan Municipal Court.



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OPINION NO. 2014-002

The Honorable Kirk E. Yosick
Williams County Prosecuting Attorney
216 S. Lynn St.
Bryan, Ohio 43506

Dear Prosecutor Yosick:

You have requested an opinion concerning the compatibility of the positions of member of the legislative authority of the Village of Montpelier and clerk of the Bryan Municipal Court.¹ For the reasons that follow, we find the two positions compatible.

The following seven questions are used to determine whether two public positions are compatible. 2011 Op. Att’y Gen. No. 2011-043, at 2-351.

1. Is either position in the classified service for purposes of R.C. 124.57?

¹ While certain features of the municipal court system are common to all municipal courts, there remain significant differences among the individual municipal courts. 1992 Op. Att’y Gen. No. 92-070, at 2-290 n.2; *see* 2001 Op. Att’y Gen. No. 2001-001, at 2-9 (R.C. Chapter 1901 and relevant municipal charter provisions must be examined carefully to determine the extent of an Attorney General opinion’s application to any particular municipal court); 1990 Op. Att’y Gen. No. 90-110, at 2-489 (as a general matter, Ohio municipal courts “are not susceptible of uniform identification as entities of the state or one of its political subdivisions”). The City of Bryan has adopted a charter form of government pursuant to Ohio Const. art. XVIII, § 7. Nothing in the Bryan Charter or Bryan Municipal Code, however, changes the statutory scheme for a municipal court clerk set forth in R.C. Chapter 1901. *See* Bryan Municipal Code, § 171.01. Therefore, it is appropriate to focus principally upon those provisions of R.C. Chapter 1901 applicable to the Bryan Municipal Court and the clerk of that court. The Village of Montpelier also has adopted a charter form of government pursuant to Ohio Const. art. XVIII, § 7. That Charter lays out the qualifications for a member of the legislative authority of the Village of Montpelier. Montpelier Charter, art. IV, § 4.08. Therefore, it is appropriate to focus principally upon the relevant provisions of the Montpelier Charter. The conclusions reached in this opinion are accordingly limited to the City of Bryan, the Bryan Municipal Court, and the Village of Montpelier.

2. Does a constitutional provision or statute prohibit holding both positions at the same time?
3. Is one position subordinate to, or in any way a check upon, the other?
4. Is it physically possible for one person to discharge the duties of both positions?
5. Is there an impermissible conflict of interest between the two positions?
6. Are there local charter provisions, resolutions, or ordinances that are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

2011 Op. Att’y Gen. No. 2011-043, at 2-351. All seven questions must yield answers in favor of compatibility in order to conclude that two positions are compatible. 1996 Op. Att’y Gen. No. 96-062, at 2-252.

Discussion of R.C. 124.57

The first question of the compatibility analysis asks whether either of the positions is a classified employment within the terms of R.C. 124.57. This statute prohibits, except as provided therein, an officer or employee in the classified service of the state, the several counties, cities, city school districts, and civil service townships from holding partisan political offices and employments. *See* 2A Ohio Admin. Code 123:1-46-02; 2009 Op. Att’y Gen. No. 2009-018, at 2-128. It does not apply to officers or employees of villages. 2002 Op. Att’y Gen. No. 2002-021, at 2-133. Thus, R.C. 124.57’s limitations do not apply to a member of the Village of Montpelier’s legislative authority.

You have informed us that the clerk of the Bryan Municipal Court is in the unclassified service. *See also* R.C. 124.11(A)(10) (the unclassified service includes “officers and employees of courts of record and such deputies of clerks of the courts of common pleas as the appointing authority finds it impracticable to determine their fitness by competitive examination”); 1936 Op. Att’y Gen. No. 5318, vol. I, p. 386, at 389 (finding that a clerk appointed by a judge is in the unclassified service). Thus, R.C. 124.57’s limitations likewise do not apply to the clerk of the Bryan Municipal Court. Because R.C. 124.57’s limitations do not apply to a member of the legislative authority of the Village of Montpelier or to the clerk of the Bryan Municipal Court, question one can be answered in the negative.

Applicability of Constitutional Provisions, Statutes, Charter Provisions, Resolutions, or Ordinances Prohibiting the Holding of Another Public Position

For ease of discussion, questions two and six are addressed together. First, question two asks whether a constitutional provision or statute prohibits a person from holding both positions at the same time. No constitutional provision bars a member of a village legislative authority from serving simultaneously as municipal court clerk.

With respect to whether a statute prohibits a person from holding these two positions simultaneously, R.C. 731.12 generally prohibits members of a village legislative authority from holding “any other public office.” A charter village, however, may establish qualifications for members of its legislative authority that are different from those provided in R.C. 731.12. Ohio Const. art. XVIII, §§ 3 and 7; *State ex rel. Bindas v. Andrish*, 165 Ohio St. 441, 136 N.E.2d 43 (1956) (syllabus, paragraph 2) (“[a] municipality can, by its charter and in the exercise of powers of local self-government, determine upon qualifications for its councilmen which may be different from those provided by statute”); *see also* 2009 Op. Att’y Gen. No. 2009-018, at 2-128 n.2 (a charter village through its powers of local self-government may establish qualifications for the president pro tempore of its legislative authority that are different from those provided in R.C. 731.12); 2008 Op. Att’y Gen. No. 2008-032, at 2-330 (“[i]n matters of local self-government involving procedure, it has long been held by the courts of Ohio that a city charter provision prevails over a conflicting state statute”).

The Montpelier Charter sets forth the qualifications for members of the village legislative authority. Montpelier Charter, art. IV, § 4.08. Pursuant to the Charter, a member of the village legislative authority “shall not hold any other compensated elected public office.” *Id.* While R.C. 731.12 prohibits a member of the village legislative authority from holding “any other public office,” the Montpelier Charter prohibition is narrower in scope, only prohibiting such a member from holding another “compensated elected public office.” The qualifications set forth in the Montpelier Charter therefore expressly conflict with the broader prohibition of the statute. Accordingly, the prohibition in R.C. 731.12 does not apply. *See* 2008 Op. Att’y Gen. No. 2008-037, at 2-379 and 2-380; 2008 Op. Att’y Gen. No. 2008-032, at 2-330. Moreover, because the clerk of the Bryan Municipal Court is appointed to that position, the prohibition in the Montpelier Charter that a member of the village legislative authority shall not hold *elected* public office also does not apply. Because no constitutional provision prohibits a person from holding both positions simultaneously and the Montpelier Charter prevails over the statutory prohibition, question two may be answered in the negative.

Question six asks whether any local charter provisions, resolutions, or ordinances apply. For purposes of this opinion, we assume that no local resolution or ordinance of either the City of Bryan or the Village of Montpelier prohibits a person from serving simultaneously as clerk of the Bryan Municipal Court and a member of the Village of Montpelier legislative authority.

As we have just explained, the qualifications for members of the village legislative authority set forth in the Montpelier Charter control in this instance. Nothing in the Bryan

Municipal Charter changes the statutory scheme for a municipal court clerk laid out in R.C. Chapter 1901. *See* Bryan Municipal Code, § 171.01. Whether a charter provision prohibits a person from holding two positions simultaneously is an issue ordinarily left to the discretion of local officials. After reviewing the Montpelier Charter and the Bryan Charter, however, we do not believe that either prohibits a person from holding both positions simultaneously.

Because the Montpelier Charter and the Bryan Charter do not prohibit a person from serving simultaneously as a member of the Village of Montpelier legislative authority and as clerk of the Bryan Municipal Court, question six may be answered in the negative, provided no local resolution or ordinance of either the City of Bryan or Village of Montpelier is to the contrary.

Subordination and Control

Question three asks whether one position is subordinate to, or in any way a check upon, the other. Here, neither position is responsible for appointing or removing a person from the other position. A member of the legislative authority of the Village of Montpelier is an elected village officer pursuant to the Montpelier Charter, art. IV, § 4.01 and serves and is responsible to the village electorate. *See also* R.C. 731.09. The legislative authority is the sole judge of the qualifications of its members. Montpelier Charter, art. IV, § 4.06. The clerk of the Bryan Municipal Court is appointed by the court and holds office until her successor is appointed and qualified. R.C. 1901.31(A)(2)(a). The positions operate independently of each other, and neither is required to assign duties to or supervise the other. Therefore, neither position is subordinate to, or in any way a check upon, the other.

Physical Ability to Perform Duties of Both Positions

The fourth question of the compatibility test asks whether it physically is possible for one person to perform the duties of both positions. This is a factual question that is best addressed by local officials because they may determine more accurately the time constraints and demands imposed upon the positions in question. *See* 2009 Op. Att’y Gen. No. 2009-010, at 2-90. If local officials determine that it is physically possible for a person to perform the duties of both positions, a person may hold both positions at the same time.

We caution, however, that a member of a village legislative authority, as an elected officer, is required to perform duties imposed by statute or by charter provisions. Where the nature of those duties requires her to be present at a particular time or place, or act in a particular manner, she must be able to do so. *See generally* 2009 Op. Att’y Gen. No. 2009-018, at 2-130. Thus, if she is required to perform her duties as a member of the legislative authority during her regular work hours as the clerk, she must take approved vacation or personal leave, compensatory leave, or leave without pay for the time she is absent from her duties as clerk of the Bryan Municipal Court. *See, e.g., id.*

Conflicts of Interest

Question five asks whether there is a conflict of interest between the two positions.² A person may not hold two public positions simultaneously if he would be subject to divided loyalties, conflicting duties, or the temptation to act other than in the public's best interest. 2009 Op. Att'y Gen. No. 2009-005, at 2-30. The fact that an individual is subject to potential conflicts of interest, however, does not necessarily render two positions incompatible. 1997 Op. Att'y Gen. No. 97-026, at 2-154. Rather, each potential conflict requires a determination of the immediacy of the conflict. *Id.* If the possibility of conflict is remote and speculative, the conflict of interest rule is not violated, and the two positions are compatible. *Id.*; 1993 Op. Att'y Gen. No. 93-067, at 2-315. The factors used in making this decision include the probability of the conflicts arising, the ability of the person to remove himself from any conflicts that may arise, whether the person exercises decision-making authority in both positions, and whether the conflicts relate to the primary functions of each position or to financial or budgetary matters. 2006 Op. Att'y Gen. No. 2006-034, at 2-309. Resolution of this question requires an examination of the powers, duties, and responsibilities of the respective positions.

The powers, duties, and responsibilities of a member of the legislative authority of the Village of Montpelier primarily relate to exercising legislative power and managing and controlling village property and finances. Montpelier Charter, art. IV, § 4.05; *see also* R.C. 731.47. The legislative authority must originate, introduce and pass ordinances and adopt resolutions; require and fix bond for the faithful discharge of the duties of the office by officers and employees for the village; and provide for the enforcement of local police, sanitary and other similar regulations as are not in conflict with general laws. Montpelier Charter, art. IV, § 4.05. The budgetary and financial duties of the legislative authority include fixing the number and salary ranges of all officers and employees of the Village, adopting annual appropriation ordinances based on the annual budget, and levying taxes and incurring debts. *Id.*

R.C. 1901.01(A) establishes the municipal courts of Ohio, including the Bryan Municipal Court. *See also* Bryan Municipal Code, § 171.01. The Bryan Municipal Court has jurisdiction within Williams County. R.C. 1901.02(B). Because the population of the territory of the Bryan Municipal Court is less than one hundred thousand, the court clerk is appointed by the court and

² The Ohio Ethics Commission, rather than the office of the Attorney General, is required by R.C. 102.08 to address the application of the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43. We will, therefore, refrain from interpreting and applying these provisions by way of a formal opinion. 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph 3). Questions concerning the interpretation and application of these provisions in your particular situation should instead be directed to the Ohio Ethics Commission. *See, e.g.*, Ohio Ethics Comm'n, Advisory Op. No. 88-005, slip op. at 3 (R.C. 1724.10, which requires a city official to serve on the governing board of a community improvement corporation designated as an agency by the city, does not exempt the official from the provisions of R.C. Chapter 102).

“shall hold office until [her] successor is appointed and qualified.”³ R.C. 1901.31(A)(2)(a). Depending on the revenue of the municipal court, the clerk’s compensation is prescribed by either the court’s presiding judge or the legislative authority of the City of Bryan. R.C. 1901.31(C)(1); R.C. 1901.03(B). Because the Bryan Municipal Court has territory that extends beyond the corporate limits of Bryan, the operating costs of the court are apportioned among all the municipal corporations and townships that are within Williams County. R.C. 1901.026. Each municipal corporation and each township is liable for the assigned proportionate share of the current operating costs, subject to certain exceptions. R.C. 1901.026.

A clerk of the Bryan Municipal Court performs numerous and varied duties and responsibilities with respect to managing the municipal court. These duties include, among other things, administering oaths, taking affidavits, and issuing executions upon judgments rendered in the court. R.C. 1901.31(E). The clerk must issue, sign, and attach the seal of the court to documents issuing out of the court and must approve all bonds, sureties, recognizances, and undertakings fixed by any judge of the court or by law. *Id.* The clerk must prepare and maintain a general index, a docket, and other records that the court requires and enter on that docket various events in an action, the names of the parties and counsel, the nature of the proceedings, and the relief granted in each action. *Id.* The clerk of the Bryan Municipal Court also has responsibility for moneys payable to the office of the clerk or any officer of the court. R.C. 1901.31(F). She must receive, collect, and issue receipts for all costs, fees, fines, bail, and other moneys payable to the office or to any officer of the court. R.C. 1901.31(F). The clerk of the Bryan Municipal Court is responsible for collecting moneys that are received by the court and disbursing those moneys to the appropriate officer or treasury. R.C. 1901.31(F).

Now that we have examined the duties of a member of the legislative authority of the Village of Montpelier and the duties of the clerk of the Bryan Municipal Court, we must determine whether a person holding both of these positions will be subject to conflicts of interest that render the two positions incompatible.

A review of the powers, duties, and responsibilities of the positions of member of the legislative authority of the Village of Montpelier and clerk of the Bryan Municipal Court discloses that there is a potential conflict of interest between the two positions. Insofar as you have informed us that the Village of Montpelier does appear as a party in the Bryan Municipal Court from time to time in cases involving misdemeanor matters, a conflict may arise if the clerk feels her loyalties are compromised when working on a case that involves the Village of Montpelier. The clerk of the Bryan Municipal Court, however, does not have any ability to

³ The term “territory,” for purposes of R.C. Chapter 1901, is defined as “the geographical area within which municipal courts have jurisdiction as provided in [R.C. 1901.01] and [R.C. 1901.02].” R.C. 1901.03(A). The territory of the Bryan Municipal Court is within Williams County. R.C. 1901.02(B). You have informed us that the territory of the Bryan Municipal Court has a population of less than one hundred thousand.

influence the outcome of any particular case because she does not have ultimate decision-making authority. Rather, the role of the clerk with regard to specific cases is largely ministerial. For example, she may administer oaths, take affidavits, issue executions upon judgments, affix the seal of the court to papers issuing from the court, and enter on the docket the names of the parties and counsel, the nature of the proceedings, the date of various filings and events in the case, and the relief granted in each case. R.C. 1901.31(E). While the clerk receives, collects, and issues receipts for all costs, fees, fines, bail, and other moneys payable to the office, the clerk is not granted any discretion in these matters, so there is little risk of her overcharging or undercharging the Village of Montpelier. *See* R.C. 1901.31(F) (“[t]he clerk of a municipal court shall receive, collect, and issue receipts for all costs, fees, fines, bail, and other moneys payable to the office or to any officer of the court” (emphasis added)); *see, e.g.*, R.C. 1901.261(A) (“the court shall include [an additional fee] and shall direct the clerk of the court to charge the fee” (emphasis added)); R.C. 1901.262(A) (“the court may include in the court’s schedule of fees and costs . . . a reasonable fee. . . and the court shall direct the clerk of the court to charge the fee” (emphasis added)). Because the clerk of the Bryan Municipal Court has no ability to influence the outcome of a particular case and her involvement with individual cases is largely ministerial, and because she handles court moneys largely without the exercise of discretion, there is no conflict that would require the clerk to be subject to divided loyalties, conflicting duties, or the temptation to act other than in the public’s best interest. Accordingly, the above-mentioned conflict is not sufficient to render the positions incompatible.

To the extent that the clerk of the Bryan Municipal Court is involved in any way in cases involving the Village of Montpelier, there is a presumption that she will perform her duties in a regular and lawful manner in the absence of evidence to the contrary. *See State ex rel. Speeth v. Carney*, 163 Ohio St. 159, 126 N.E.2d 449 (1955) (syllabus, paragraph 10) (“[i]n the absence of evidence to the contrary, public officials, administrative officers, and public authorities, within the limits of the jurisdiction conferred upon them by law, will be presumed to have properly performed their duties in a regular and lawful manner and not to have acted illegally or unlawfully”); *see also* 2007 Op. Att’y Gen. No. 2007-023, at 2-237 and 2-238. Moreover, if the clerk of the Bryan Municipal Court appoints deputy clerks, those clerks may be assigned the responsibility of performing those duties of the clerk that concern the Village of Montpelier. *See* R.C. 1901.31(H) (“[d]eputy clerks of a municipal court . . . may be appointed by the clerk . . . [and the deputy clerk] may perform the duties appertaining to the office of the clerk”); 1996 Op. Att’y Gen. No. 96-050, at 2-188 to 2-189 (“the deputy clerk retains statutory authority to perform any duties appertaining to the office of municipal court clerk”). Thus, there is no potential conflict of interest that cannot be sufficiently avoided by the clerk of the Bryan Municipal Court simply removing herself from that conflict and assigning a deputy clerk to perform her duties.

The fact that the Village of Montpelier must pay a proportionate share of the operating costs of the Bryan Municipal Court pursuant to R.C. 1901.026 is not a conflict because the village legislative authority has no discretion to determine whether it should or should not pay such costs. R.C. 1901.026 (subject to certain exceptions, “[e]ach municipal corporation and each township within the territory of the municipal court shall be assigned a proportionate share of the current operating costs of the municipal court that is equal to the percentage of the total criminal

and civil caseload of the municipal court that arose in that municipal corporation or township” (emphasis added)). Moreover it is the auditors or chief fiscal officers of each of the municipal corporations and townships within the territory of the municipal court who determine the proportionate share due from each municipal corporation and township and to adjust accounts. R.C. 1901.026(C). This duty does not fall to the village legislative authority.

Applicability of Federal, State, or Local Regulations

Finally, question seven of the compatibility test asks about the applicability of federal, state, and local regulations. No state regulation prohibits a person from serving simultaneously in the positions in question. Whether an applicable local regulation bars a person from holding these two positions simultaneously is a question for local officials to answer.

It is, therefore, my opinion, and you are hereby advised that a person may serve simultaneously as a member of the Village of Montpelier legislative authority and as clerk of the Bryan Municipal Court.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General