

**OPINION NO. 90-089****Syllabus:**

Pursuant to Ohio Const. art. IV, §6(B) and R.C. 1901.11(D), an individual may not serve simultaneously as an acting judge and referee of a municipal court.

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**To: William F. Schenck, Greene County Prosecuting Attorney, Xenia, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, November 14, 1990**

I have before me your request for my opinion concerning individuals who are appointed or employed by a municipal court as part-time and full-time referees, while also contracting with the municipal court under R.C. 1901.10 to serve as acting judges. Your specific question reads: "[W]hether or not a dual role of employee/contractor is permissible in light of the fact that deductions are made from the salary of this individual, including Public Employee Retirement System while the contractual amount is paid directly to the individual without deductions." In addition, you have further asked, whether such a situation has "any effect upon the additional supplemental pay from the State for an acting judge."

R.C. 1901.10 empowers a municipal court judge or chief executive to appoint an "acting judge." Specifically, R.C. 1901.10(A)(2) provides:

If a judge of a municipal court that has only one judge is temporarily absent or incapacitated, the judge may appoint a substitute who has the qualifications required by section 1901.06 of the Revised Code, and, if the judge is unable to make the appointment, the chief executive shall appoint a substitute. The appointee shall serve during the absence or incapacity of the incumbent, shall have the jurisdiction and powers conferred upon the judge of the municipal court, and shall be styled "acting judge." He shall sign all process and records during the time he is serving, and shall perform all acts pertaining to the office, except that of removal and appointment of officers of the court. All courts shall take judicial notice of the selection and powers of the acting judge, who shall be paid in the same manner and at the same rate as the incumbent judge, except that, if the acting judge is entitled to compensation under division (A)(5) of section 141.04 of the Revised Code, then section 1901.121 of the Revised Code shall govern its payment.

*See generally* R.C. 1901.10(B) ("[i]f a request is made by a judge or the presiding judge of a municipal court to designate a judge of another municipal court because of the volume of cases in the court for which the request is made and the chief justice reports, in writing, that no municipal judge is available to serve by designation, the judges of the court requesting the designation may appoint a substitute as provided in [R.C. 1901.10(A)(2)], who may serve for any period of time that is prescribed by the chief justice"); R.C. 1901.12(B) (when a municipal court consists of a single judge, a qualified substitute may be appointed in accordance with R.C. 1901.10(A)(2) to serve during the judge's thirty-day vacation period). The position of acting judge of a municipal court, thus, is vested with all the powers and responsibilities, except the removal and appointment of officers of the court, that are conferred upon the position of judge of a municipal court. *See In re McClung*, 48 Ohio App. 3d 106, 107, 548 N.E.2d 319, 320 (Trumbull County 1988) (per curiam) ("[u]nder R.C. 1901.10, an acting judge is vested with the same jurisdiction and power which the elected municipal court judge has").

Referees of a municipal court are also appointed by the municipal court. *See* Civ. R. 53(A); Traf. R. 14; M.C. Sup. R. 4;<sup>1</sup> *see also* R.C. 1901.331 (a municipal court with a housing division may appoint housing court referees); R.C. 1925.01(B) (small claims division of a municipal court may appoint a referee). Under R.C. 1901.13(A)(1), a municipal court or any judge thereof, may refer matters to a referee of that court. *See* Civ. R. 53; Traf. R. 14; M.C. Sup. R. 4. When a matter is referred to a referee, the order of reference may specify or limit the referee's "powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of his report." Civ. R. 53(C); *see also* Traf. R. 14 ("a court may provide for the reference of contested cases to a referee for the taking of evidence and written report of findings and recommendations to the court for confirmation"). Additionally, subject to the specifications and limitations set forth in the order of reference, a referee of a municipal court

has and shall exercise the power to regulate all proceedings in every hearing before him as if by the court and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may summon and compel the attendance of witnesses and may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise

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<sup>1</sup> I note that the Ohio Rules of Civil Procedure, Ohio Traffic Rules, and Rules of Superintendence for Municipal Courts and County Courts are to be followed by municipal courts when applicable. *See* Civ. R. 1(A); Traf. R. 1(A); M.C. Sup. R. 1(A).

directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests and guarantees the costs, and the court so orders, the referee shall make a record of the evidence offered and excluded in the same manner as and subject to the same limitations upon a court sitting without a jury.

Civ. R. 53(C). In light of the foregoing, it is readily apparent that a referee of a municipal court is "clothed with the powers and duties of the judicial office which appoints him." 1972 Op. Att'y Gen. No. 72-073 at 2-293; see *Strietelmeier v. Angelo*, 66 Ohio Law Abs. 312, 113 N.E.2d 777 (Ct. App. Muskingum County 1952), *appeal dismissed mem. for the reason that no debatable constitutional question exists*, 159 Ohio St. 563, 112 N.E.2d 657 (1953); *Burch v. Harte*, 1 Ohio N.P. (n.s.) 477, 14 Ohio Dec. 433 (Cincinnati Super. Ct. 1903).

Before turning to your specific question, I must determine whether an individual is authorized to serve simultaneously as a referee and acting judge of a municipal court.<sup>2</sup> See 1979 Op. Att'y Gen. No. 79-111. Two public positions are incompatible when there exists a constitutional or statutory provision which limits the outside employment of either position. 1989 Op. Att'y Gen. No. 89-069 at 2-321; 1986 Op. Att'y Gen. No. 86-004 at 2-16.

Pursuant to Ohio Const. art. IV, §6(B), "[j]udges shall receive no fees or perquisites, nor hold any other office of profit or trust, under the authority of this state, or of the United States." The prohibition set forth in Ohio Const. art. IV, §6(B) applies to judges of municipal courts. Op. No. 86-004; 1973 Op. Att'y Gen. No. 73-081; see also 1969 Op. Att'y Gen. No. 69-131 at 2-286 ("[t]he prohibition in the present Section 6, Article IV...covers all judges without limitation").<sup>3</sup> R.C. 1901.11(D) similarly provides "[n]o municipal judge shall hold any other office of trust or profit under the authority of this state or the United States." It is thus clear that a judge of a municipal court is prohibited, pursuant to Ohio Const. art. IV, §6(B) and R.C. 1901.11(D), from holding another office of profit or trust under the authority of this state. See generally *Provident Bank v. Wood*, 36 Ohio St. 2d 101, 105-06, 304 N.E.2d 378, 381 (1973) ("[i]t is a cardinal rule that a court must first look to the language of the statute itself to determine the legislative intent.... If that inquiry reveals that the statute conveys a meaning which is clear, unequivocal and definite, at that point the interpretative effort is at an end, and the statute must be applied accordingly" (citations omitted)).

The question, therefore, is whether the aforementioned prohibition applies to the position of acting judge of a municipal court, and, if so, whether the position of referee of a municipal court is an office of profit or trust under the authority of this state. The position of acting judge of a municipal court, as stated above, possesses all the jurisdiction, powers, and duties, except the removal and appointment of officers of the court, that a municipal court judge possesses. R.C. 1901.10(A)(2); see also *In re McClung*. In addition, all courts are required to take judicial notice of the selection and powers of the acting judge. R.C. 1901.10(A)(2). Further, the acting judge has the same qualifications and is paid in the same manner and at the

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<sup>2</sup> Information provided indicates that the individual in question retains the position of referee and remains on the payroll as such, while also serving as acting judge. Pursuant to these additional facts, I assume, for purposes of this opinion, that the individual in question holds both positions simultaneously.

<sup>3</sup> Ohio Const. art. IV, §6(B) has been amended since the issuance of 1973 Op. Att'y Gen. No. 73-081 and 1969 Op. Att'y Gen. No. 69-131. See 1973 Ohio Laws, Part I, 2024 (Am. S.J.R. 30, eff. Nov. 6, 1973). The amendment, however, does not affect the determination that the prohibition of Ohio Const. art. IV, §6(B) applies to judges of municipal courts.

same rate as the municipal court judge. *Id.* It is thus readily apparent from the foregoing that an individual serving in the position of acting judge of a municipal court, is a judge of the municipal court. As a result, I find that an individual in the position of acting judge of a municipal court is subject to the prohibitions set forth in Ohio Const. art. IV, §6(B) and R.C. 1901.11(D). See 1986 Op. Att'y Gen. No. 86-002 (syllabus, paragraph two) ("[p]ursuant to...R.C. 1901.11, a common pleas judge may not serve as acting judge of a municipal court under R.C. 1901.10 or R.C. 1901.12"); 1973 Op. Att'y Gen. No. 73-082 (syllabus) (Ohio Const. art. IV, §6(B) prohibits an assistant county prosecuting attorney from also serving as an acting judge<sup>4</sup> of a municipal court). See generally *Thomas v. Maxwell*, 175 Ohio St. 233, 235, 193 N.E.2d 150, 152 (1963) (per curiam) ("the attorney appointed by the court to represent appellant was only an acting or in other words a part-time judge who would serve only in the absence of the regular Municipal Court judges and whose activities would be controlled by Section, 1901.11, Revised Code" (emphasis added)).

I turn now to the question of whether the position of referee of a municipal court is an office of profit or trust under the authority of this state. The Ohio Supreme Court in *State ex rel. Bricker v. Gessner*, 129 Ohio St. 290, 293-94, 195 N.E. 63, 65 (1935) considered the attributes of an office for purposes of construing the prohibition now set out in Ohio Const. art. IV, §6(B),<sup>5</sup> and stated as follows:

"[A] public office is a charge or trust conferred by public authority for a public purpose, the duties of which involve in their performance the exercise of some portion of the sovereign power, whether great or small. A public officer is an individual who has been appointed or elected in the manner prescribed by law, who has a designation or title given to him by law, and who exercises the functions concerning the public assigned to him by law."

"...A public office is the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer." (Citations omitted.)

*Cf., e.g., State ex rel. Milburn v. Pethel*, 153 Ohio St. 1, 90 N.E.2d 686 (1950); *Scofield v. Strain*, 142 Ohio St. 290, 51 N.E.2d 1012 (1943); *State ex rel. Landis v. Board of Comm'rs of Butler County*, 95 Ohio St. 157, 115 N.E. 919 (1917); *State ex rel. Attorney General v. Brennan*, 49 Ohio St. 33, 29 N.E. 593 (1892).

Referees of a municipal court, as indicated above, are appointed by the court. See Civ. R. 53(A); Traf. R. 14; M.C. Sup. R. 4; see also R.C. 1901.331; R.C. 1925.01(B). A referee's compensation is set by the appointing court. Civ. R. 53(B); see also R.C. 1925.01(B). Moreover, the powers and duties of a referee of a municipal court are prescribed by law, see, e.g., Civ. R. 53(C); Traf. R. 14, and involve the exercise of judicial powers. See *Strietelmeier v. Angelo*; *Burch v. Harte*; Op. No. 72-073. The exercise of judicial powers is clearly a sovereign function of government. See *State ex rel. Newman v. Skinner*, 128 Ohio St. 325, 191 N.E. 127 (1934); see also *Coyne v. State*, 22 Ohio App. 462, 153 N.E. 876

<sup>4</sup> The syllabus paragraph of 1973 Op. Att'y Gen. No. 73-082 refers to the position with the municipal court as a part-time judge, rather than acting judge. The facts of that opinion, however, indicate that the position in question was that of acting judge.

<sup>5</sup> When the opinion of the Ohio Supreme Court was rendered in *State ex rel. Bricker v. Gessner*, 129 Ohio St. 290, 195 N.E. 63 (1935), the prohibition against judges holding any other public office was set forth in Ohio Const. art. IV, §14. See generally 1967-1968 Ohio Laws, Parts II-III, 2878 (Am. Sub. H.J.R. 42, eff. Jan. 10, 1970).

(Cuyahoga County 1926); *Burch v. Harte*. Hence, the duties of the position of referee of a municipal court involve in their performance the exercise of some portion of the sovereign power of government. Accordingly, I find that the position of referee of a municipal court is an office of trust under the authority of this state. See *Hill v. Board of Park Comm'rs*, No. C-800097, slip op. at 8 (Ct. App. Hamilton County 1981) (unreported) ("[i]t has similarly been held that court-appointed referees are public officers or, at least, officers of the court" (citing *Mennel Milling Co. v. Slosser*, 140 Ohio St. 445, 45 N.E.2d 306 (1942))). See generally *Stokes v. State of Indiana*, 168 Ind. App. 514, 343 N.E.2d 788 (Third Dist. 1976) (determining that a city court referee, a position analogous to that of referee of a municipal court in Ohio, is a court officer empowered to hear cases referred to him by the court).

In support of this finding, I note that in Op. No. 69-131, one of my predecessors, after examining the characteristics of an office, determined that the positions of referee in the probate division and referee in the domestic relations division of a court of common pleas are offices within the meaning of Ohio Const. art. IV, §(B), and, therefore, a judge of the county court is prohibited from holding these positions. In reaching this conclusion my predecessor reasoned that:

A referee, in either the division of domestic relations or the probate division of the court of common pleas, holds a position involving broad powers and serious responsibilities. A referee holds a position conferred by an exercise of governmental authority for a public purpose. He also has a title and exercises public functions. He, therefore, holds an "office" both in the popular sense of the term and within the definition of the Supreme Court. A person holding the position of a referee in either the probate division or the division of domestic relations of the court of common pleas holds an "office" within the meaning of Section 6, Article IV of the Ohio Constitution.

Op. No. 69-131 at 2-287.<sup>6</sup> See generally R.C. 2315.37 ("[b]efore a general referee enters upon the duties of his office he shall be sworn by the probate judge well and faithfully to hear and examine all actions, causes, and proceedings referred to him, and to make a just and true report therein, according to the best of his understanding" (emphasis added)). Further, the Superior Court of Cincinnati in *Burch v. Harte*, 1 Ohio N.P. (n.s.) at 485-86, 14 Ohio Dec. at 440, summarized:<sup>7</sup>

In the light of the statutory provisions and of the judicial comments cited, it is difficult to see why a referee, under Ohio laws, is not a "public officer," in a reasonable and proper sense within the general doctrine of public policy under discussion. There can be no question that a judge of a court of record is a public officer, because the nature of his duties make him one of the agencies for administering one of the three great powers of government, apportioned by the Constitution between the three administrative departments of the

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<sup>6</sup> When Op. No. 69-131 was issued, R.C. 2315.26-.36 governed the appointment, compensation and powers of referees. These sections, however, were repealed by 1969-1970 Ohio Laws, Part III, 3017 (Am. H.B. 1201, eff. July 1, 1971) as being in conflict with the Rules of Civil Procedure and, therefore, prima-facie superseded by the adoption of such rules.

<sup>7</sup> The court in *Burch v. Harte*, 1 Ohio N.P. (n.s.) 477, 14 Ohio Dec. 433 (Cincinnati Super. Ct. 1903) examined referees appointed and operating in accordance with the provisions of R.S. 5210-5218, which were the predecessors to G.C. 11475-11486, see S.B. 2, 78th Gen. A. (1910) (approved Feb. 15, 1910 and published in General Code of State of Ohio, Commissioners of Public Printing 1911) (revising and consolidating the general statutes of Ohio), and R.C. 2315.26-.36, see 1953-1954 Ohio Laws 7 (Am. H.B. 1, eff. Oct. 1, 1953) (an act "[t]o recodify the entire Ohio General Code into the Ohio Revised Code").

state—the legislative, the executive and the judicial. The "referee," under our law, is, as declared by the Supreme Court, a "substitute for the court and jury," and falls quite within the definition of [public office contained in] Mechem, in his work on "Public Offices and Officers...."

*See also Mennel Milling Co. v. Slosser*, 140 Ohio St. at 448, 45 N.E.2d at 308 ("[a] referee is an officer of the court appointing him" (quoting 35 Ohio Jurisprudence *References* §45 (1934))). Additionally, Canon 5(F) of the Code of Judicial Conduct, as adopted by the Ohio Supreme Court, states, in part, that "[t]he judge or judges under whom a particular referee, or other such officer of a judicial system, serves are charged with the responsibility of securing the referee's compliance with the Code." (Emphasis added.) The language used by the Ohio Supreme Court in Canon 5(F) of the Code of Judicial Conduct indicates that the court impliedly recognizes referees as officers of the court that appoints them. I find, accordingly, that since the position of referee of a municipal court is an office of trust, an acting judge of a municipal court is prohibited, under Ohio Const. art. IV, §6(B) and R.C. 1901.11(D), from serving as a referee of a municipal court.<sup>8</sup>

Based upon my answer that the positions are incompatible, I find it unnecessary for purposes of this opinion, to address your remaining inquiry concerning the additional supplemental pay from the state for an acting judge. Therefore, it is my opinion and you are hereby advised that, pursuant to Ohio Const. art. IV, §6(B) and R.C. 1901.11(D), an individual may not serve simultaneously as an acting judge and referee of a municipal court.

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<sup>8</sup> I note that the position of acting judge of a municipal court may also act as a check upon the position of referee of that municipal court. This may occur because a referee's report must be signed by a judge before it becomes effective and binding. Civ. R. 53; *see Normandy Place Assoc. v. Beyer*, 2 Ohio St. 3d 102, 105, 443 N.E.2d 161, 164 (1982) (a "court must approve the referee's report and enter it upon its own record in order for that report to have any validity or binding effect"). Since I have already determined that the positions are incompatible because of constitutional and statutory impediments, I need not determine whether the fact that the position of acting judge may be a check upon the position of referee is sufficient itself to render the positions incompatible.