OPINION NO. 65-150

Syllabus:

1. The Ohio common law test of incompatibility of officers, as stated in State ex rel., Attorney General v. Gebert, 12 C.C. (N.S.) 274, may be applied to preclude the same person from holding two positions in public service only when at least one of such positions qualifies under the common law as a public office.

2. Sections 733.78 and 2919.10, Revised Code, apply only to the public officers specified therein, and preclude any of such officers from receiving any fixed compensation from the municipal corporation or township other than the maximum specifically allocated by law as compensation for such office; however, such statutes do not preclude any of the specified public officers from holding other positions in public service without additional compensation.

To: Chester W. Goble, Auditor of State, Columbus, Ohio
By: William B. Saxbe, Attorney General, August 23, 1965

Your request for my opinion regarding common law and statutory problems of compatibility of offices and employments sets forth the following general questions,

without reference to any specific factual situations:

> "1. Is the common law test of incompatibility applicable only to the positions of public offices or can it be applied to a public office and a position of public employment; or can it apply to two positions which are not public offices but merely involve public employment?
>
> "2. Does Section 733.78, of the Revised Code, mean that one person may not receive two fixed compensations from the same municipal employer?
>
> "3. Does Section 2919.10, R.C., apply where one holds two paying positions of employment with the same municipal employer?"

Before considering the problem raised in your first question, we must clarify the legal distinctions between positions which are public offices and those which are merely public employments.

This matter has been the subject of judicial definition by the Supreme Court of Ohio. The Court held in the case, State ex rel., Attorney General v. Jennings, 57 Ohio St., 415, as follows, in the second paragraph of the syllabus:

> "2. To constitute a public office, against the incumbent of which quo warranto will lie, it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law, to be exercised by the incumbent, in virtue of his election or appointment to the office, thus created and defined, and not as a mere employe, subject to the direction and control of some one else."

Also in the case, State ex rel., Landis v. County Commissioners, 95 Ohio St., 157, at page 159, the Court said:

> "* * *The chief and most decisive characteristic of a public office is determined by the quality of the duties with which

the appointee is invested, and by the fact that such duties are conferred upon the appointee by law. If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office and not an employment.

"* * *It is no longer an open question in this state that 'to constitute a public office, * * * it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law.'"

It is stated in 44 O. Jur., 2nd pages 503, 504, 505, 506, as follows:

"* * * * * * * * *

"Broadly and loosely speaking, both public officers and public employees are in the public employment, and, for some purposes, such as the Public Employees Retirement System, the term 'public employee' may be defined by statute to include public officers. It frequently becomes necessary, however, to distinguish between a public office and a public employment, and there are very definite distinctions between the two. A public office is one which includes the various elements and characteristics hereinbefore discussed, while a public employment, on the other hand, is a position which lacks one or more of the foregoing elements. The most important characteristic which distinguishes public office from public employment is that the creation and conferring of a public office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public, and the exercise of such power within legal limits constitutes the correct discharge of the duties of such office. The power thus delegated and possessed may be a portion belonging sometimes to one of the three great departments and sometimes to another; still it is a legal power

> which may be rightfully exercised, and in its effects it will bind the rights of others and be itself subject to revision and correction only according to the standing laws of the state. Accordingly, a public officer may be distinguished from a public employee in that the former is one who is invested by law with a portion of the sovereignty of the state and who is authorized to exercise functions of an executive, legislative, or judicial character.
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> "The fact that a position is held at the will or pleasure of another, as a deputy or servant who holds at the will of his principal, is held to distinguish a mere employment from a public office, for in such cases no part of the state's sovereignty is delegated to such employees. Therefore, persons who are subject to the direction and control of someone else do not fall within the class of public officers, and an inferior or subordinate who performs no duties except such as by law are charged upon his superior holds an employment, not an office.
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> "In distinguishing between an office and an employment, the fact that the powers in question are created and conferred by law is an important item to be considered in determining the question, for although an employment may be created by law, it is not necessarily so and is often, if not usually, a creature of contract. A public office, on the other hand, is never conferred by contract, but finds its course and limitations in some act or expression of the governmental power. Where, therefore, the authority in question was conferred by contract, it must be regarded as an employment and not as a public office."

The basic philosophy apparent in the above quoted text is that certain positions in public employment, primarily because of the nature of the duties and the delegation of sovereign powers involved, are of such a character that they bear a direct trust relationship to the public; while other positions in public employment are nothing more than that because there is lacking sufficient authority to exercise sovereign power independent of supervision and control. In other words, public officers are responsible directly to the public, but public

employees are answerable directly to their ultimate superiors, who are the public officers.

The Ohio common law test of incompatibility was stated clearly in the case of State ex rel., Attorney General v. Gebert, 12 C.C. (N.S.), 274. In holding the offices of mayor and United States Congressman compatible, the Circuit Court of Franklin County stated at pages 275 and 276:

> "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.
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> "* * * * * * * * *
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> "Indeed, it may almost be said to be a part of the common law, that an Ohio man may occupy as many offices as he can be elected or appointed to. It is left to his own sense of fitness and propriety as to whether he should ever decline any."

The Gebert case, supra, was decided in 1909. In 1906, the Common Pleas Court of Fulton County, in the case of State ex rel., Wolf v. Shaffer, 6 N.P. (N.S.), 219, held that the same person could hold the positions of court baliff and deputy sheriff. The Court explained at pages 220, 224 of the opinion, as follows:

> "After a very careful consideration of the law upon this question, this court has no hesitancy in saying that there is nothing in law or morals which prevents a man holding these positions together and drawing compensation in both capacities, provided he does not draw double pay, and in this case it is very plain that defendant did not draw double pay.
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> "* * * * * * * * *
>
> "It was early settled at common law that it was not unlawful per se for a man to hold two offices* * *. And it was early held that the test of incompatibility was not that it was physically impossible for the officer to perform the duties of one office because he was at that time else where performing the duties of the other, but the distinction was

in an inconsistency in the functions of the offices.

"* * * * * * * * *

"Our conclusion is therefore, that the same person may at the same time hold both of these positions, neither of which is a public office, as that term is known to the law, and that such incumbent may lawfully receive the emoluments peculiar to each, provided he be not paid twice for the same service* * *." (Emphasis added)

Another Ohio case which is germane to your first question is State ex rel., Baden v. Gibbons, 17 Ohio Law Abs., 341, which was decided by the Court of Appeals for Butler County in 1934. In holding that the same person could not hold the positions of county commissioner and deputy county auditor because of incompatibility, the Court stated at page 344 of the opinion:

"It has long been the rule in this state that one may not hold two positions of public employment when the duties of one may be so administered and discharged that favoritism and preference may be accorded the other, and result in the accomplishment of the purposes and duties of the second position, which otherwise could not be effected. To countenance such practice, would but make it possible for one branch of government or one individual to control the official act and discretion of another independent branch of the same government or of interlocking governments which are constructed so as to operate in conjunction with each other. If the possible result of the holding of two positions of public trust leads to such a situation, then it is the rule, both ancient and modern, that the offices are incompatible and are contrary to the public policy of the state." (Emphasis added)

Although the Court in the Gibbons case, supra, initially used the phrase "two positions of public employment," it appears that they were referring to public officers because of the qualification in the subsequent

use of the more descriptive phrase "two positions of public trust." As has been pointed out above, only officers hold positions of public trust.

Therefore, some conclusions may be drawn from a comparison of these pertinent Ohio cases:

1. There is no reported judicial decision in Ohio which expressly limits the application of the common law test of incompatibility to two positions which qualify as public offices, or which expressly extends the application of such test to two positions of public employment, both of which fail to qualify as public offices.

2. Although the Court in the Shaffer case, supra, mentioned the test of incompatibility, it attached great significance to the fact that neither of the positions before it was a public office. This case was decided three years prior to the Gebert case, supra, which states the Ohio rule.

3. In the Gebert and Gibbons cases, supra, the courts phrased their rules and discussion of incompatibility in terms of "officers" and "positions of public trust." In these cases the courts were confronted with factual situations in which both positions were public offices, as in the Gebert case, or in which at least one was clearly a public office, as in the Gibbons case.

In other jurisdictions, courts have refused to apply the common law test where neither position qualifies as a public office. In 42 Am. Jur., Public Officers, Section 61, page 928, the general rule is stated:

> "The prohibitions against one person holding more than one office at the same time has reference to offices, as distinguished from positions in the public service that do not rise to the dignity of offices. It does not extend to a position which is a mere agency or employment * * * or other position which constitutes an employment as distinguished from a public office. * * *"

See also, 67 C.J.S., Officers, Section 23a, page 136; Mechem, Public Offices and Officers (1890), pages 268-270.

Therefore, after an examination of the case law of other jurisdictions and the Ohio cases discussed above, I am led to the conclusion that the common law test of incompatibility is applicable in any instance in which one of two positions of public employment held by the same person qualifies as a public office, and that such

test is not applicable when neither of such positions is a public office.

In reaching my conclusion regarding your first question, I have considered also all of the prior Opinions of the Attorney General dealing with the subject of incompatibility. I have found opinions in which the common law test has been used concerning two positions of mere public employment. However, only seven of these have held that the same person could not hold two positions, which clearly were not public offices, on the ground of incompatibility. In the other opinions in which the common law test was inappropriately applied, the positions were found to be compatible.

In Opinion No. 4021, Opinions of the Attorney General for 1932, page 150, a plumbing inspector was not permitted to engage in the plumbing business privately. While the result was correct, because there would have existed a conflict of interest between the inspector's public duty and his private financial enterprise, the opinion's supporting reasoning that these were incompatible offices under the common law test, in my opinion, was inaccurate. Since one position was not in public employment, the common law test was inapplicable. Therefore, I must modify this opinion as to its reasoning.

In Opinion No. 1905, Opinions of the Attorney General for 1947, page 255, the Attorney General stated at page 257, regarding application of the common law test, "Accordingly, it is unnecessary to determine whether the positions in question are offices or employments." In each instance involved therein, at least one of the two public employments qualified as a public office, and applying the common law test, I would agree with the result reached in the opinion. However, I am constrained to modify the opinion by holding as incorrect the above-quoted conclusion, and any other similar statements contained in such opinion.

There are two prior opinions which use a different approach to the common law test, and in my opinion are misleading not only in their reasoning, but also in their results. These are Opinions No. 3741, Opinions of the Attorney General for 1922, and No. 1076, Opinions of the Attorney General for 1949. Both of these opinions reason that two positions of public employment are incompatible because the person holding them would be subject to the supervision and control of, and owe allegiance to, two different masters, so that if they both called upon his services at the same time, he would be forced to prefer one to the other. While this may be true, such a situation was never intended to come within the scope of the common law test of incompatibility. The employee is responsible to the public officer who has the power of supervision and control in each instance. Such public officer is responsible in turn for the acts and conduct of his employees. Therefore, whether or not an employee's performance of his duties is satisfactory is a matter of concern primarily to such public officer regarding the internal administration of his own office.

Since I have concluded that the common law test of incompatibility is not applicable to the positions presented in the above cited opinions for 1922 and 1949, and there being no statutory prohibition against the same person performing the duties of both positions, I must overrule both of these opinions.

Paragraph two of the syllabus in Opinion No. 1076, supra, is based upon Opinion No. 633, Opinions of the Attorney General for 1913. The principle set forth in the latter opinion, i.e. the same person cannot hold the positions of deputy sheriff and county attendance officer if one is a full time position, cannot be founded upon the common law test of incompatibility if neither position is a public office. Therefore, such opinion must be modified to the extent that the common law test of incompatibility would not be applicable to those positions, in keeping with my conclusions as stated hereinafter.

A more difficult problem arises upon consideration of Opinions No. 3823, Opinions of the Attorney General for 1935, and No. 1381, Opinions of the Attorney General for 1957, in which the effect of the rulings was that the common law test of incompatibility was applicable to the positions of deputy or assistant to a public officer because such deputy or assistant could act on behalf of and perform the duties of his principal. Therefore, any other position incompatible with the principal's office would be incompatible with the position of deputy or assistant.

Section 3.06 (A), Revised Code, provides:

> "(A) A deputy, when duly qualified, may perform any duties of his principal. A deputy or clerk, appointed in pursuance of law, holds the appointment only during the pleasure of the officer appointing him. The principal may take from his deputy or clerk a bond, with sureties, conditioned as set forth in this section. The principal is answerable for the neglect or misconduct in office of his deputy or clerk."

Under the above statutory language, a deputy is granted liberal authority to act on behalf of his principal. On the other hand, such statute also places full responsibility for the acts of a deputy upon his principal, being the public officer. Moreover, the courts have drawn distinctions, for various reasons, between whether or not the position of a deputy qualifies as an officer, State ex rel. Binyon v. Houck, 11 C. C. (N.S.) 414, and between whether or not an employee qualifies as a deputy within the meaning of Section 3.06, supra, State ex rel. Emmons v. Guckenberger, 131 Ohio St., 466.

Therefore, I conclude, that before the common law test of incompatibility may be applied, an initial determination must be made that at least one of the two positions of public employment under scrutiny must possess enough of the characteristics of a public office to qualify as such. I cannot say that the results reached in Opinions No. 3823 for 1935 and No. 1381 for 1957, supra, are incorrect, in view of my conclusions reached herein, because the facts in each are inadequate to determine at this time whether the deputy or assistant qualified as a public officer.

With respect to your second question, Section 733.78, Revised Code, (formerly Section 3808, General Code) provides in pertinent part:

> "No member of the legislative authority or of any board and no officer or commissioner of the municipal corporation shall have any interest, other than his fixed compensation, in the expenditure of money on the part of such municipal corporation.* * *"

The rule seems to be well settled that this statutory prohibition applies only to a person who holds a position which qualifies either as a "member of the legislative authority or of any board" or as an "officer or commissioner" of the corporation; and I interpret "officer," as used therein, to be synonymous with "public officer," as described above regarding your first question. See Opinion No. 1754, Opinions of the Attorney General for 1924; Opinion No. 2951, Opinions of the Attorney General for 1925; Opinion No. 3835, Opinions of the Attorney General for 1931; Opinion No. 1453, Opinions of the Attorney General for 1939. I find myself in full accord with these prior opinions.

Within the above-quoted statutory provision, the term "fixed compensation" has been construed to include the salary paid an official of a municipal corporation. Such conclusion was reached by the Hamilton County Court of Appeals in the case of Petermann v. Tepe, 87 Ohio App., 487, at 493, the court stated:

> "It was argued, that the 'fixed compensation,' mentioned in this section, related to compensation paid in violation of the section. We think it obvious that by the use of this phrase the General Assembly intended to make it clear that Section 3808, General Code, did not prevent the official from drawing his salary. The whole intent was that he should not receive anything beyond that from the corporation in any way."
> (Emphasis added)

Therefore, in answer to your second question, it is my opinion that Section 733.78, supra, prohibits a person who holds one of the positions specified in such section from receiving any other fixed compensation from the same municipal corporation. However, such statutory prohibition does not apply to the performance of the duties of other positions with such corporation. In other words, I believe that if a person holds a position within the scope of Section 733.78, supra, his maximum compensation would be limited to the compensation provided for that particular position, but he would not be disqualified under such statute from holding another position, so long as he received no additional compensation from the corporation. Of course, this conclusion assumes that no incompatibility exists either under another statutory provision or under the common law test.

In your opinion request, you suggest the possibility of a conflict between prior opinions pertaining to this second question and my Opinion No. 225, Opinions of the Attorney General for 1964. I find no conflict because the only question raised in that opinion concerned the compatibility of two positions with a municipal corporation. The fact as to whether or not the person in question was to receive additional compensation was never supplied; therefore, the applicability of Section 733.78, supra, did not arise as a question for discussion in that opinion.

With respect to your third question, Section 2919.10, Revised Code, provides in pertinent part:

> "No officer of a municipal corporation or member of the council thereof or a member of a board of township trustees, shall be interested in the profits of a contract, job, work, or services for such municipal corporation or township* * *.
>
> "Whoever violates this section shall forfeit his office and be fined not less than fifty nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both."

This statutory prohibition applies only to a person holding a position which qualifies as an "officer of a municipal corporation or member of the council thereof" or as "a member of a board of township trustees." Once again, I must interpret the term "officer" as being synonymous with "public officer" as described above regarding your first and second questions. Accordingly, this statute would not prevent a person from holding two positions with either a municipal corporation or a township and receive compensation for both, when neither

position qualifies as one of those specified in such statute. See Opinion No. 798, Opinions of the Attorney General for 1919; Opinion No. 1754, Opinions of the Attorney General for 1924; Opinion No. 2763, Opinions of the Attorney General for 1962.

In Opinions No. 680, Opinions of the Attorney General for 1951, and No. 2272, Opinions of the Attorney General for 1961, my predecessors opined that Section 2919.10, supra (formerly Section 12912, General Code), precluded a township trustee from receiving additional compensation for performing services for the township outside the scope of his duties as trustee. However, they concluded also that such statute did not prevent the individual from performing such services, but only limited his total compensation from the township to the maximum allowed a trustee. With these opinions I concur, and I am of the opinion that such rules would be applicable equally to the positions of "officer of a municipal corporation or member of the council thereof."

Therefore, it is my opinion and you are advised:

1. The Ohio common law test of incompatibility of officers, as stated in State ex rel., Attorney General v. Gebert, 12 C.C. (N.S.) 274, may be applied to preclude the same person from holding two positions in public service only when at least one of such positions qualifies under the common law as a public office.

2. Sections 733.78 and 2919.10, Revised Code, apply only to the public officers specified therein, and preclude any of such officers from receiving any fixed compensation from the municipal corporation or township other than the maximum specifically allocated by law as compensation for such office; however, such statutes do not preclude any of the specified public officers from holding other positions in public service without additional compensation.