OPINION NC. 80-015

Syllabus:

Under R.C. 1925.01 a part-time city director of law may be appointed to the position of referee of the small claims division of any municipal court, including the court before which he practices in his capacity as city director of law; a full-time city director of law may not be appointed as referee of the small claims division of the municipal court before which he practices in his capacity as city director of law.

To: Lee C. Falke, Montgomery County Pros. Atty., Dayton, Ohio
By: William J. Brown, Attorney General, May 2, 1980

I have before me your question as to whether a full-time city law director may be appointed as a referee of the small claims division of the municipal court before which he practices in his official capacity as city law director. You state that the city law director would be performing his referee functions only during his off-duty hours. Hence, there is no question as to the physical ability of one person to perform both jobs.

R.C. 1925.01 provides for the establishment of a small claims division in each municipal and county court. R.C. 1925.01(B) states:

> Proceedings in the small claims division of a municipal court may be conducted by a referee appointed by the court, who shall be a person admitted to the practice of law in this state, and who shall receive annual compensation as the court prescribes from the same sources and in the same manner as provided in section 1901.11 of the Revised Code. A part-time village solicitor or city director of law or part-time assistant village solicitor or city director of law of any municipal corporation may be appointed as a referee, serve in any case in which the municipal corporation is not an interested party, and receive the prescribed compensation. (Emphasis added.)

Thus, it is clear that a part-time city director of law may serve as a referee of the small claims division of any municipal court, including the court before which he practices in his capacity as city law director. However, neither R.C. 1925.01, nor any other section in R.C. Chapter 1925, gives any express indication as to whether a full-time city director of law is permitted to serve, or prohibited from serving, as a referee of the small claims division of a municipal court. As originally enacted in 1967, R.C. 1925.01 was silent on whether village solicitors or city law directors could be appointed as referees. The portion of the above statute that expressly allows part-time village solicitors or part-time city directors of law to be appointed as referees was added in 1969. See H.B. 404, 1969-1970 Ohio Laws 2144 (eff. Nov. 25, 1969). That bill consisted solely of the provision that allows part-time village solicitors and part-time city directors of law to be appointed as referees.

Given this legislative history of R.C. 1925.01, it would appear that when the General Assembly adopted H.B. 404, the General Assembly was of the opinion that city law directors could not be appointed as referees of small claims divisions of municipal courts and that the General Assembly intended to make an exception for

part-time city law directors. This hypothesis is supported by the general rule that all amendments to laws made by the General Assembly are presumed to have a substantive effect, Leader v. Glander, 149 Ohio St. 1, 5, 77 N.E. 2d 69, 71 (1948), and confirmed by H.B. 404, which expressly states that the purpose of enacting that bill was "to permit part-time[1] solicitors [now called city directors of law] to serve as referees in the small claims division" (emphasis added). 1969-1970 Ohio Laws 2144. Hence, two things are clear: one, that the General Assembly was of the opinion that, prior to the adoption of H.B. 404, city law directors were prohibited from also serving as referees of small claims divisions; and two, that the General Assembly intended to allow only part-time city law directors (as opposed to all city law directors) to be appointed to the position of referee of the small claims division of a municipal court.

If there could still be any doubts as to the intent of the General Assembly in light of its expressly stated intent, principles of statutory construction eliminate them and make clear that the above interpretation of R.C. 1925.01 is the correct interpretation. First, the plain language of the statute compels concluding that the General Assembly intended that only part-time city directors of law (as opposed to all city directors of law) be eligible for appointment to the position of referee. The statute states that "a part-time. . .city director of law. . .may be appointed as referee" (emphasis added). Significantly, R.C. 1925.01 does not mention full-time city directors of law. Second, the Ohio Supreme Court in State ex rel. Boda v. Brown, 157 Ohio St. 368, 372, 105 N.E. 2d 643, 640 (1952), stated: "It is generally recognized that the express mention of but one class of persons in a statute implies the exclusion of others." Thus, it is clear that R.C. 1925.01 allows only part-time city law directors to be appointed as referees of small claims divisions of municipal courts, and any interpretation of R.C. 1925.01 that would allow expansion of the class of persons who may be appointed as referees to include full-time city law directors must be rejected.

Although I believe that I have correctly ascertained the intent of the General Assembly in the above analysis, I believe that it is, nevertheless, helpful to determine the basis of the General Assembly's conclusion that city directors of law were prohibited from serving as referees of small claims divisions of municipal courts prior to the adoption of H.B. 404 in 1969. The conclusion that two public positions are incompatible may result either from express statutory prohibition or from common law principles against allowing the same person to hold two positions that have inherently inconsistent duties or functions.

I will begin by reviewing the relevant statutes. There is no provision in R.C. 733.49 through R.C. 733.62 (the statutes governing city law directors) that prohibits a full-time city law director from also serving as a referee of a small claims division of a municipal court. Similarly, there is no express provision in R.C. Chapter 1925 that would prohibit a full-time city director of law from also serving as referee of a small claims division of a municipal court before which he practices in his official capacity as law director. In addition, there are no cases or Attorney General Opinions of which I am aware that have held these two positions to be incompatible based upon any applicable statutes. Hence, the two positions are not incompatible by statute. Therefore, it is necessary to review cases on incompatibility generally and opinions of my predecessors that have some bearing upon whether a full-time city law director may also serve in the capacity of referee of the small claims division of a municipal court.

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[1]Perhaps the reason for allowing only part-time city directors of law to also hold the position of referee was because of the difficulty in filling such part-time offices. See 1966 Op. Att'y Gen. No. 66-138, where it was stated that the only person qualified to be appointed acting county court judge was the part-time village solicitor. By allowing part-time village solicitors and part-time city directors of law to be appointed as referees of small claims divisions of municipal courts, the General Assembly may well have made it easier to fill both the referee positions and the part-time solicitor and law director positions.

The Ohio Supreme Court in State ex rel. Hover v. Wolven, 175 Ohio St. 114 117, 191 N.E 2d 723, 726 (1963) (quoting 42 Am. Jr. Public Officers & Employees §70), stated:

> They [offices] are generally considered incompatible where such duties and functions are inherently inconsistent and repugnant so that, because of a contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both. (Emphasis added.)

This is the basic test for incompatibility. In State ex rel. Baden v. Gibbons, 17 Ohio L. Abs. 341, 344 (Ohio App. Butler County 1934), the court stated: "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. . . ." Thus, absent a statute to the contrary, a law director may not be appointed to the position of referee if, in holding the referee position, he could discharge his duties in a manner so that favoritism or preference is shown to the city that he represents.

In 1964 Op. Att'y Gen. No. 1023, p. 2-185, my predecessor applied these principles and concluded that the offices of part-time municipal court judge and part-time village solicitor are incompatible where the jurisdiction of the municipal court includes the village which the solicitor serves. In Op. No. 64-1023 my predecessor stated at 2-187:

> In the case presented by your question, although the village solicitor is prohibited by ordinance from appearing in the court in which he is a judge, still, considering that the village is within the jurisdiction of the court in question, it would appear probable that matters upon which the solicitor has worked or involving policies or positions adopted by the village in reliance on his professional advice as solicitor eventually will come before that court. It has been suggested that, in such cases, the solicitor-judge could disqualify himself; and I have no doubt that the gentleman in question would do so, but that is not the point. In this case there appears to be a substantial probability of the municipal judge being presented with situations where he could sit in judgment on his own professional work for, and legal advice to, the village which he serves as solicitor.
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> I am cognizant of the fact that this sort of problem might arise in the case of any judge who is permitted to carry on a private practice and that, in the case of part-time municipal judge. such private practice is authorized. But, in this case more than mere private practice is involved; another public office is involved, that of solicitor for a village within the territorial jurisdiction of the court. In such a situation there is, in my opinion, a sufficient risk of the duties of one office being so administered and discharged that favoritism and preference could be shown the other that the offices in question must be deemed incompatible and may not, therefore, be held by the same person. (Emphasis added.)

Accord, 1964 Op. Att'y Gen. No. 64-781, p. 2-22. See also 1919 Op. Att'y Gen. No. 222, p. 390 (offices of city solicitor (now law director) and municipal court judge are incompatible). Hence, it is clear that the office of a village solicitor or city law director and that of a municipal court judge have been considered to be incompatible where the court's jurisdiction includes the village or city that is served by the solicitor or law director, respectively.

The question, then, becomes whether the position of referee is sufficiently similar to that of judge of the municipal court to also make the referee position

incompatible with that of city law director. In 1972 Op. Att'y Gen. No. 72-073, in interpreting R.C. 1925.01, I stated:

> [A] referee is an agent and officer of the appointing court, and clothed with the powers and duties of the judicial office which appoints him. 47 O. Jur. 2d, References 84, Section 2; Strietelmeier v. Angelo, 66 Ohio L. Abs. 312 (1952); The Mennel Milling Co. v. Slosser, 140 Ohio St. 445 (1942); and Burch v. Harte, 1 Ohio N.P. (n.s.) 477 (1903).

Hence, as a general matter of law it is possible that the position of referee is sufficiently similar to that of municipal court judge to make the position of referee incompatible with that of a city law director who practices before the municipal court in his offical capacity as law director. However, it is necessary to review the jurisdiction of the small claims division to see if in fact there is a potential conflict between the position of referee and that of city law director.

R.C. 1925.02 sets forth the jurisdiction of the small claims division. The small claims division has no jurisdiction over criminal matters and has limited jurisdiction over civil matters. R.C. 1925.02 provides in pertinent part:

> A small claims division established under section 1925.01 of the Revised Code has jurisdiction in civil actions for the recovery of money only, other than libel, slander, replevin, malicious prosecution, abuse of process actions, actions on any claim brought by an assignee or agent, and actions for punitive damages, for amounts not exceeding five hundred dollars, exclusive of interest and costs. The territorial jurisdiction and venue are concurrent with that of the respective court under its procedures in ordinary civil actions. . . . A counterclaim or cross-claim of more than five hundered dollars, but less than one thousand dollars does not affect the jurisdiction of the small claims division. (Emphasis added.)

Hence, there is no possibility that the city director of law will appear before the small claims division to prosecute a crime. However, the small claims division does have jurisdiction over civil matters and it is likely that the city will appear before the division in civil matters. Even though R.C. 1925.01 precludes a referee from serving in any case in which the municipal corporation is an interested party, there is still some possibility that a city law director who serves as referee may, in his capacity as referee, be confronted by matters like those noted in Op. No. 64-1023 with which he was involved in his capacity as city law director.

Admittedly, this potential conflict is remote. However, Ohio courts have long been vigilant against allowing any person to hold two positions of public employment when the duties of one may be discharged or administered in such a way as to favor the other. State ex rel. Baden v. Gibbons, 17 Ohio Law. Abs. 341 (1934); 1919 Op. Att'y Gen. No. 222, p. 390. In addition, where one of the offices is a judicial or quasi-judicial office it is especially important to be sensitive to any possible conflicts of interest. The ability of our judicial system to function properly is absolutely dependent upon the impartiality of the courts.[2] Thus, it would appear appropriate to apply common law principles against incompatibility to the two offices in the instant case. It is apparent, then, that the General Assembly's conclusion that the position of referee of a small claims division of a municipal court and that of city law director are incompatible was based upon common law principles of incompatibility.

As you have asked only about the capacity of a full-time city director of law to serve as a part-time referee of the small claims division of the court before

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[2]See Op. No. 72-073 at 2-294 (discussion of the restrictions placed upon those holding a judicial office by the Canons of Judicial Ethics); 1919 Op. Att'y Gen. No. 222, p. 390.

which he appears in his official capacity, I have limited my discussion to that situation. I have not considered the question whether a full-time city director of law may serve as part-time referee of the small claims division of a court that does not have jurisdiction over the city that the director serves. See 1971 Op. Att'y Gen. No. 71-055 (the offices of judge of the county court and assistant city solicitor of a municipality in an adjoining county are compatible).

Therefore, it is my opinion, and you are advised, that under R.C. 1925.01 a part-time city director of law may be appointed to the position of referee of the small claims division of any municipal court, including the court before which he practices in his capacity as city director of law; a full-time city director of law may not be appointed as referee of the small claims division of the municipal court before which he practices in his capacity as city director of law.