

August 26, 2016

The Honorable Keller J. Blackburn
Athens County Prosecuting Attorney
1 South Court Street
Athens, Ohio 45701

SYLLABUS:

2016-029

1. A deputy county engineer who performs the duties of the county engineer in the county engineer's absence may not hold simultaneously the office of member of a village legislative authority.
2. A deputy county engineer who is responsible for planning, designing, and inspecting road or bridge work performed by a board of township trustees and making and approving estimates for township road projects may not hold simultaneously the office of township trustee in the same county.
3. A superintendent employed by the county engineer in the unclassified service may hold simultaneously the office of township trustee for a township within the county, provided that he does not approve, supervise, or inspect road work completed by the board of township trustees of which he is a member, does not have a prohibited interest in a contract between the county or county engineer and the township, and abstains from all discussions, negotiations, deliberations, and votes concerning any contemplated contracts or agreements between the township and the county or the county engineer that relate to the construction, repair, maintenance, or improvement of roads.



August 26, 2016

OPINION NO. 2016-029

The Honorable Keller J. Blackburn
Athens County Prosecuting Attorney
1 South Court Street
Athens, Ohio 45701

Dear Prosecutor Blackburn:

You have requested an opinion whether a superintendent employed by the Athens County Engineer may serve simultaneously as a member of a board of township trustees for a township in Athens County. You also wish to know whether a person who is a deputy county engineer for the Athens County Engineer may serve simultaneously as a member of a village legislative authority or as a township trustee for a village or township also located within Athens County. It is our understanding that the village, township, and Athens County have not adopted charters.

The following seven questions are used to determine whether two public offices or positions are compatible:

1. Is either of the positions a classified employment within the terms of R.C. 124.57?
2. Do the empowering statutes of either position limit employment in another public position or the holding of another public office?
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 a conflict of interest between the two positions?
6. Are there local charter provisions or ordinances which are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

1999 Op. Att’y Gen. No. 99-045, at 2-279. If each of the seven questions is answered in favor of compatibility, then a person may hold both positions at the same time. *Id.*

Application of R.C. 124.57

The first question asks whether one of the positions constitutes classified employment for purposes of R.C. 124.57. R.C. 124.57(A) provides, in part:

No officer or employee in the classified service of the state, the several counties, cities, and city school districts of the state, or the civil service townships of the state shall directly or indirectly, orally or by letter, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political party or for any candidate for public office; ... nor shall any officer or employee in the classified service of the state, the several counties, cities, and city school districts of the state, or the civil service townships of the state be an officer in any political organization or take part in politics other than to vote as the officer or employee pleases and to express freely political opinions.

“R.C. 124.57 ... prohibits a classified employee from holding a partisan elective office or engaging in partisan political activities, but does not apply to non-partisan elective offices.” 1989 Op. Att’y Gen. No. 89-022, at 2-101.¹

As an elected officer of a township, a township trustee is in the unclassified service. R.C. 124.11(A)(1) (“[a]ll officers elected by popular vote” are in the unclassified service). Accordingly, the prohibitions of R.C. 124.57 do not apply to the office of township trustee. Insofar as R.C. 124.57 does not “apply to officers and employees in the service of villages[,]” 2009 Op. Att’y Gen. No. 2009-018, at 2-128, R.C. 124.57’s prohibition does not apply to a village legislative authority member.

With respect to the positions of superintendent and deputy county engineer, a member of your office informed us that the superintendent and the deputy county engineer are in the unclassified service of the county. Insofar as the superintendent and the deputy county engineer are in the unclassified service of the county, they are not prohibited by R.C. 124.57 from holding the offices of township trustee or village legislative authority member.

¹ A classified employee may be permitted to participate in partisan political activities if the employee is permitted to do so by an applicable collective bargaining agreement or by a local charter provision. 2014 Op. Att’y Gen. No. 2014-032, at 2-278 n.4; 2009 Op. Att’y Gen. No. 2009-005, at 2-25 n.4. We presume that such a provision in an applicable collective bargaining agreement does not exist with respect to the superintendent or the deputy county engineer that are the subject of your request for an opinion. Your office has informed us that the county, village, and township do not have charters.

Constitutional and Statutory Limits on Holding Multiple Positions

The second question asks whether a statutory provision prohibits a person from holding more than one office or position at the same time. The simultaneous holding of multiple positions may also be prohibited by the state constitution. 2004 Op. Att’y Gen. No. 2004-051, at 2-437. No provision of the Ohio Constitution prohibits a superintendent employed by a county engineer from holding simultaneously the office of township trustee. No provision of the Ohio Constitution prohibits a deputy county engineer from holding simultaneously the office of member of a village legislative authority or township trustee.

We next consider any statutory limitations on holding multiple public offices or positions. We begin with the positions of deputy county engineer and member of a village legislative authority. No statute prohibits a deputy county engineer from holding another public employment or public office. *See* 1989 Op. Att’y Gen. No. 89-105, at 2-513 (R.C. 325.17 does not prohibit the holding of another employment by a deputy county engineer). R.C. 731.12 prohibits a member of a village legislative authority from “hold[ing] any other public office, be[ing] interested in any contract with the village, or hold[ing] employment with said village[.]”² Thus, we shall determine whether the position of deputy county engineer is a public office or a public employment.

The following criteria are used to determine whether a position is a public office: “durability of tenure, oath, bond, emoluments, the independency of the functions exercised by the appointee, and the character of the duties imposed upon him.” *State ex rel. Landis v. Bd. of Comm’rs of Butler Cnty.*, 95 Ohio St. 157, 159, 115 N.E. 919 (1917). Those criteria have been restated in opinions of the Attorney General as follows:

“(1) the incumbent must exercise certain independent public duties, a part of the sovereignty of the state; (2) such exercise by the incumbent must be by virtue of his election or appointment to the office; (3) in the exercise of the duties so imposed, he can not be subject to the direction and control of a superior officer.”

2009 Op. Att’y Gen. No. 2009-018, at 2-128 to 2-129 (quoting 1963 Op. Att’y Gen. No. 3548, p. 58, 61). The Ohio Supreme Court explained that the determinative factor is “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.” *State ex rel. Landis v. Bd. of Comm’rs of Butler Cnty.*, 95 Ohio St. at 159. “If official duties are prescribed by statute, and their performance involves the exercise of

² A member of a village legislative authority “may be a notary public, a member of the state militia, or a volunteer fireman of said village, provided that such member shall not receive any compensation for his services as a volunteer fireman of the village in addition to his regular compensation as a member of the legislative authority.” R.C. 731.12.

continuing, independent political or governmental functions, then the position is a public office, and not an employment.” *Id.*

“Employment” is not defined for the purpose of R.C. 731.12. Accordingly, it is appropriate to consider the ordinary meanings of employment and employee. *See* R.C. 1.42. “Employment” is defined as the “activity in which one engages or is employed[.]” *Merriam – Webster’s Collegiate Dictionary* 408 (11th ed. 2005). The ordinary meaning of “employee” is “a person hired by another, or by a business firm, etc., to work for wages or salary[.]” *Webster’s New World College Dictionary* 477 (5th ed. 2014). Additional guidance as to the meaning of “employee” is provided in R.C. 124.01(F), which defines “employee” as “any person holding a position subject to appointment, removal, promotion, or reduction by an appointing officer.”

The job description provided to us for the deputy county engineer involved in your inquiry provides:

Under County Engineer’s direction, assists with the technical operation and procedures of departments and assists with certain administrative duties when assigned by the County Engineer; plans, designs, directs tax map department; plans, designs, and directs civil engineering projects for bridges, ditch and highway maintenance and construction, right-of-way determination; directs work and procedures of county employees and contractors to ensure technical compliance with plans, specifications and standards by performing the duties listed in the Job Descriptions and Worker Characteristics section.

The deputy county engineer’s essential duties and responsibilities are:

Assist the Athens County Engineer in the planning, design and direction of projects and road program operations. Analyzes reports, maps, drawings, blueprints, tests, and aerial photographs on soil composition, terrain, hydrological characteristics and other topographical and geologic data. Based on analysis of collected data, calculates cost and performs feasibility studies. Prepares or directs preparation and modification of reports, specifications, plans, construction schedules, environmental impact studies, and designs. Inspects construction sites to monitor progress and ensure conformance to engineering plans, specifications, and construction and safety standards. Directs and oversees technical activities of construction and maintenance on site for force account work and contractor work. Uses computer assisted engineering and design software and equipment to prepare engineering and design plans and documents. Answers questions and provides assistance to contractors, county employees and officials and general public. Receives complaints, analyzes problems and initiates corrective action. Performs bridge, culvert and pavement inspections and/or assists consultants in similar projects. Updates bridge inventories for submittal to ODOT. Maintain inventory of section corners; assist the Athens County Engineer in re-establishing lost or obliterated section corners. Evaluates deeds and updates, tax maps, county map,

GIS, and similar projects. Performs errands and/or other duties/tasks as assigned by the County Engineer. Courteously interacts and responds to the public, elected officials, and co-workers. May assist in labor relations activities on the management bargaining team. Acts in place of the County Engineer in his or her absence. Maintains confidentiality regarding information related to management issues, employee issues, financial issues, and other fiduciary information that should be kept confidential.

The deputy county engineer's supervisory responsibilities are: "[a]ssists the County Engineer in supervising technical activities and work of county employees. Performs certain assigned duties, normally performed by the County Engineer, when the County Engineer is absent." A member of your office has indicated that the deputy county engineer may make some decisions without the approval of the county engineer. In other words, the deputy county engineer may exercise independent decision-making authority with respect to some of his duties.

Applying the above definitions and criteria to the deputy county engineer's duties leads us to conclude that a deputy county engineer that performs the duties of the county engineer in his absence is a public office. Most of the *Landis* factors weigh in favor of concluding that the deputy county engineer involved here is a position of public employment. A deputy county engineer is not elected or appointed to a statutory term, but is appointed by the county engineer and holds the position at the pleasure of the county engineer. R.C. 3.06(A) ("[a] deputy or clerk, appointed in pursuance of law, holds the appointment only during the pleasure of the officer appointing him"); R.C. 325.17 (county engineer "may appoint and employ the necessary deputies ..., shall fix the compensation of those employees and discharge them"). The deputy county engineer's duties are not prescribed by statute, but are assigned by the county engineer. While performing the majority of his duties, he is subject to the direction of the county engineer.

However, the job description for the deputy county engineer states that the deputy county engineer acts in place of and performs the duties of the county engineer in the county engineer's absence.³ "The position of county engineer is a public office[.]" 2013 Op. Att'y Gen. No. 2013-011, at 2-99 (concluding that Ohio Const. art. II, § 20 applies to the position of county engineer as it is a public office). When the deputy county engineer performs the county engineer's duties, in place of the county engineer, he holds a public office. See 2016 Op. Att'y Gen. No. 2016-024, slip op. at 4 ("the position of deputy county auditor is a public office for the purpose of R.C.

³ The job description does not explain when the county engineer is deemed absent. There is no indication whether the county engineer is deemed absent whenever he is not present in the office, or whether a particular duration of unavailability is required before the deputy county engineer acts in place of the county engineer. The job description for the superintendent, however, provides the following examples of when the county engineer is absent: "vacation, sick, or otherwise away from the office[.]" If the same instances of absence apply to the deputy county engineer, then the deputy county engineer may be required to perform the county engineer's duties frequently.

731.12 when the deputy county auditor serves in the place of the county auditor on the county board of revision, a hearing board of the board of revision, or the county budget commission”); 2010 Op. Att’y Gen. No. 2010-031 (syllabus, paragraph 2) (“[a] person who is appointed by the county auditor to serve on a hearing board of a county board of revision serves in a public office for purposes of R.C. 731.02”). When acting as county engineer, the deputy county engineer exercises a portion of the sovereignty of the state and carries out duties that are conferred by statute upon a public office. In addition, in the county engineer’s absence, the deputy county engineer makes decisions and exercises the powers of the county engineer independently and not under the control or direction of the county engineer. Accordingly, the position of deputy county engineer in this matter is a public office.⁴ Insofar as R.C. 731.12 prohibits a member of a village

⁴ In 1999 Op. Att’y Gen. No. 99-027, at 2-174 to 2-177, the Attorney General examined whether the position of assistant county prosecuting attorney is a public office for the purpose of R.C. 731.02, the statute that prohibits a member of a city legislative authority from holding another public office. The opinion concluded that R.C. 731.02 does not prohibit a member of a city legislative authority from serving simultaneously as an assistant prosecuting attorney as the position of assistant prosecuting attorney is not a public office. 1999 Op. Att’y Gen. No. 99-027, at 2-176 to 2-177. The opinion reasoned that “[w]hile an assistant prosecuting attorney may be empowered to act for and in the place of the prosecuting attorney, an assistant generally does not assume the role of prosecuting attorney or acting prosecuting attorney.” *Id.* at 2-175. Rather, an assistant prosecuting attorney performs the duties of a prosecuting attorney to assist the prosecuting attorney and only to the extent that those duties are assigned to the assistant. *Id.* An assistant prosecuting attorney is not “empowered to act for or in the place of the prosecuting attorney in all matters.” *Id.* Thus, the opinion concluded that “the fact that an assistant prosecuting attorney may be authorized to act for and in the place of the prosecuting attorney is insufficient *in and of itself* to find that an assistant prosecuting attorney may not hold a position that the prosecuting attorney may not hold.” *Id.* at 2-176 to 2-177 (emphasis added and footnote omitted).

We agree with the analysis and conclusion of 1999 Op. Att’y Gen. No. 99-027 as applied to the assistant prosecuting attorney position involved therein. However, the deputy county engineer position that is the subject of your inquiry is distinguishable from the assistant prosecuting attorney position involved in that opinion. Most of the duties of the deputy county engineer are performed on behalf of the county engineer in order to assist the county engineer in the performance of his statutory duties. The deputy county engineer carries out those duties under the direction and authority of the county engineer. However, when the county engineer is absent, the deputy county engineer stands in place of the county engineer and performs all the duties of the county engineer. Therefore, the deputy county engineer does not only perform duties on behalf of the county engineer that the county engineer assigns to him, but when the county engineer is absent, he assumes the role of the county engineer. That circumstance is sufficient for us to conclude that the deputy county engineer position that is the subject of your inquiry is a public office for the purpose of R.C. 731.12. The facts of this matter are more similar to the positions involved in 2016 Op. Att’y Gen. No. 2016-024 and 2010 Op. Att’y Gen. No. 2010-031, than the position involved in 1999 Op. Att’y Gen. No. 99-027.

legislative authority from holding another public office, a deputy county engineer who performs the duties of the county engineer in the county engineer's absence may not hold simultaneously the office of member of a village legislative authority. Therefore, the office of village legislative authority member and the position of deputy county engineer who performs the duties of the county engineer in the county engineer's absence are incompatible.

We now consider whether a statute prohibits a superintendent employed by the county engineer or a deputy county engineer from serving simultaneously as township trustee. No statute prohibits a superintendent employed by a county engineer or a deputy county engineer from holding another public office or employment. Although no statutes directly prohibit a township trustee from holding simultaneously the position of superintendent or deputy county engineer, R.C. 511.13 prohibits a township trustee from having an interest in a township contract, and may operate as a prohibition from holding the office of township trustee.⁵ 2007 Op. Att'y Gen. No. 2007-044, at 2-439 to 2-440. There are several circumstances in which a board of township trustees and a board of county commissioners or the county engineer may enter into a contract or cooperate with each other with respect to road improvement projects. *See, e.g.*, R.C. 9.482(B)(1); R.C. 164.15; R.C. 307.15; R.C. 5535.01(C); R.C. 5535.08; R.C. 5555.43. A superintendent or a deputy county engineer who is also a township trustee will have an interest in a contract of the township that is with the county or the county engineer that employs the superintendent or the deputy county engineer. 2008 Op. Att'y Gen. No. 2008-002, at 2-12 (“[i]t has generally been established under Ohio law that an individual who is employed by an enterprise that has a contract with a public body has an interest in the contract, even if there is no direct connection between the employee and the proceeds of the contract”).

As soon as a contract between the county or county engineer and the township is executed, R.C. 511.13 is violated even if the township trustee who is also a superintendent or a deputy county engineer had abstained from any discussions, negotiations, decision-making, or

⁵ Although R.C. 511.13 does not expressly state that a person who violates R.C. 511.13 forfeits his office, the effect of violating R.C. 511.13 prevents a person from assuming or continuing to serve in the office of township trustee so long as he has an interest in a township contract. A person who is not yet holding the office is not qualified to assume the office of township trustee if he would violate R.C. 511.13 upon assumption of the office. *See* 2007 Op. Att'y Gen. No. 2007-044, at 2-440 (“if a person enters into an ongoing multi-year contract to supply a township with garage storage facilities for a number of years in the future and is subsequently elected to the office of township trustee, the person is prohibited by R.C. 511.13 from serving as township trustee and continuing to have an interest in that preexisting multi-year contract”). A township trustee that acquires an interest in a township contract is subject to a removal action if he does not eliminate his interest in the contract. *See* 1998 Op. Att'y Gen. No. 98-033 (syllabus, paragraph 3) (an “individual may have a quo warranto action instituted against him ... if it is determined that the individual unlawfully holds or exercises the special deputy sheriff's commission by reason of the conflicts of interest inherent in serving as county coroner or deputy coroner and special deputy sheriff”).

votes regarding the contract. *See* 2008 Op. Att’y Gen. No. 2008-002, at 2-12 to 2-13 (a violation of R.C. 511.13’s prohibition from having an interest in an existing or executed contract of the township is not cured by having abstained from the negotiations, discussions, deliberations, or votes concerning whether to enter into the contract); 2000 Op. Att’y Gen. No. 2000-015, at 2-91 (“[b]ecause of the comprehensive language contained in R.C. 308.04, we are compelled to conclude that a member of the board of trustees of an airport authority is prohibited from having any interest, direct or indirect, in a contract of the airport authority, even if the member does not participate in considering or acting upon the contract”). A member of your office has informed us, however, that, at this time, there are no contracts between Athens County or the Athens County Engineer and the township. Therefore, R.C. 511.13 does not prohibit either the superintendent or the deputy county engineer involved in your inquiry from holding the office of township trustee.⁶

We conclude that no constitutional provision prohibits a person from holding simultaneously the positions of superintendent employed by the Athens County Engineer and township trustee or the positions of deputy county engineer and member of a village legislative authority or township trustee. In addition, no statutes prohibit a person from holding simultaneously the positions of superintendent employed by the Athens County Engineer and township trustee or the positions of deputy county engineer and township trustee. However, R.C. 731.12 prohibits a deputy county engineer that performs the duties of the county engineer in the county engineer’s absence from being a member of a village legislative authority at the same time. Having concluded that the deputy county engineer position involved in your inquiry is not compatible with the office of member of a village legislative authority, we need not address the compatibility of those two positions under the remaining questions of the compatibility test. 2013 Op. Att’y Gen. No. 2013-008, at 2-79 (“[a]s one of the seven compatibility questions has yielded an answer disfavoring compatibility, it is unnecessary for us to address the remaining six questions”).

Subordination and Control

Question three asks whether either position is subordinate to or under the control of the other position or whether either position is a check upon the other. It is our understanding that the superintendent in the county engineer’s office is appointed by the county engineer pursuant to R.C. 325.17 and serves at the pleasure of the county engineer. Similarly, a deputy county engineer is appointed by and is subject to the direction and control of the county engineer. R.C. 325.17; 2011 Op. Att’y Gen. No. 2011-023, at 2-188. A township trustee is elected by the electors of the township and

⁶ The person involved in your inquiry may violate R.C. 511.13 if he has an interest in a township contract that does not involve the county or the county engineer. For example, if the person owns a company that has contracted with the township to provide a service to the township, he has an interest in a township contract. None of the information that you provided to us indicates that the superintendent has an interest in a township contract in that way.

is answerable to the electorate. R.C. 505.01. Thus, the positions of superintendent and deputy county engineer are not directly subordinate to a township trustee or vice versa.

A board of township trustees and a county engineer may interact with each other in numerous situations with respect to the construction, maintenance, repair, and improvement of roads and bridges within a township. *See, e.g.*, R.C. 5535.01(C) (“[t]he board of township trustees shall maintain all [township] roads within its township”); R.C. 5535.15(A) (“[t]he board of county commissioners, board of township trustees, or legislative authority of a municipal corporation may maintain, repair, construct, reconstruct, improve, or widen any section of a road under the control of the state or another political subdivision” if the criteria identified in R.C. 5535.15(A) are met); R.C. 5541.03 (once a board of county commissioners has approved a board of township trustees’ application for the construction, reconstruction, or improvement of a part of the county highway system, the county engineer shall make the plans for the project and an estimate of the cost of the project); R.C. 5543.01(A)(2) (“the county engineer shall have general charge of ... [c]onstruction, reconstruction, resurfacing, or improvement of roads by boards of township trustees under [R.C. 5571.01, R.C. 5571.06, R.C. 5571.07, R.C. 5571.15, R.C. 5573.01-.15, and R.C. 5575.02-.09]”); R.C. 5543.02 (county engineer makes a cost estimate for township road construction projects and approves estimates before township moneys are paid); R.C. 5543.06 (county engineer is responsible for instructing township and county authorities “as to the best and most economical methods for repairing and maintaining the roads and bridges of the county”); R.C. 5543.09(A) (“the county engineer shall supervise ... the construction, reconstruction, resurfacing, and improvement of public roads by boards of township trustees under [R.C. 5571.01, R.C. 5571.06, R.C. 5571.07, R.C. 5571.15, R.C. 5573.01-.15, R.C. 5575.02-09, and R.C. 5577.01]”); R.C. 5543.10(A) (a board of township trustees may order a county engineer to construct sidewalks, curbs, or gutters); R.C. 5543.20 (“[t]he county engineer shall inspect all ... bridges on township roads”); R.C. 5549.03 (a county engineer may make purchases of equipment for a board of township trustees); R.C. 5571.01(A) (“[a] board of township trustees may construct, reconstruct, resurface, or improve any public road or part thereof under its jurisdiction, or any county road, intercounty highway, or state highway within its township”); R.C. 5571.01(G) (a board of township trustees cannot erect a traffic control signal at an intersection of county road and a township road without the approval of the county engineer); R.C. 5571.05 (when a board of township trustees repairs or maintains roads, the board “shall be subject to the general supervision and direction of the county engineer” and “shall follow the direction of the engineer as to methods to be followed in making repairs”); R.C. 5575.01(A) (the county engineer shall complete the force account assessment form when a board of township trustees maintains or repairs roads by force account); R.C. 5575.01(B) (“[b]efore undertaking the construction or reconstruction of a township road, the board shall cause to be made by the county engineer an estimate of the cost of the work”); R.C. 5575.07 (“[t]he work of road improvement shall be done under the general supervision and direction of the county engineer

and he may appoint some competent person to act as inspector during the construction of such improvement”).⁷

Attorney General opinions have recognized that the operation of those statutes may result in instances in which the county engineer’s office and a board of township trustees may be subordinate to or a check upon the other. *See, e.g.*, 1997 Op. Att’y Gen. No. 97-045, at 2-281; 1994 Op. Att’y Gen. No. 94-022, at 2-98; 1993 Op. Att’y Gen. No. 93-016, at 2-87. In 1997 Op. Att’y Gen. No. 97-045, at 2-281, the Attorney General advised, “the fact that a board of township trustees is subject to the general direction of the county engineer with respect to road maintenance and construction does not place the office of township trustee in a position subservient to that of [the county engineer’s employee].” Rather, whether a township trustee or an employee of the county engineer is subordinate to, or a check upon the other, depends upon the specific duties of the county engineer’s employee. 2011 Op. Att’y Gen. No. 2011-034, at 2-269; 1997 Op. Att’y Gen. No. 97-045, at 2-281; 1993 Op. Att’y Gen. No. 93-051, at 2-247. Accordingly, we shall examine the duties of the superintendent and the deputy county engineer separately and determine whether subordination and control are issues of concern.

The job description provided to us for the superintendent position states that the superintendent “[u]nder general direction of the Athens County Engineer, performs management and supervisory duties related to highway maintenance, repair, and construction projects; managing and evaluating personnel; and managing complaints.” The superintendent has the following specific responsibilities:

Incumbent is responsible for planning, organizing, directing, coordinating and supervising the work activities of the roadway/bridge systems of the Athens County [H]ighway Department to insure that the operations are properly and timely executed in accordance with Department, county, State and federal standards, and that the public safety and welfare are promoted. Incumbent discusses future/current projects with County Engineer and is responsible for issuing general instruction before and while guided by policies and procedures approved by the County Engineer to insure conformance with Agency precedents. Incumbent is responsible for the timely completion of work and the performance and safety of the crew. Incumbent interacts with co-workers, subordinates, the general public, other County agencies and private entities in obtaining and furnishing information to complete the work assignments, resolve problems and assure co-operation in achieving objective. The incumbent is responsible for directing employee’s work activities, receiving/resolving/adjusting employee’s grievances, evaluating employee’s work performance, issuing

⁷ It is impractical within the scope of an Attorney General opinion to envision every instance in which a county and a township may interact concerning the construction, maintenance, repair, or improvement of roads within a county. The statutes identified in this opinion are a sampling and are not meant to be an exhaustive list.

verbal/written reprimands and recommending discipline utilizing prudent independent judgment to accomplish the County Engineer's Departmental policies/procedures and short/long term goals/objectives. In emergency situations overtime is mandatory and a condition of continued employment. Must maintain a telephone at place of residence and be available for call out, and calling out appropriate personnel for emergency conditions.

The job description further provides "if Deputy Engineer's position is not filled, and the Athens County Engineer is absent . . . , then the Highway Maintenance Superintendent is in responsible charge of all operations and all management and bargaining unit personnel."⁸

The superintendent's duties and responsibilities do not involve directing, inspecting, or approving the acts of the board of township trustees. Even if some of his duties are performed on township roads, the superintendent acts under the supervision and control of the county engineer and not at the direction of the board of township trustees.⁹ Thus, in the performance of his duties, the superintendent is not likely to interact with a township trustee in such a way as to render either position subordinate to or a check upon the other. *See* 1967 Op. Att'y Gen. No. 67-033, at 2-59 ("the position of crew chief and superintendent of roads would not be subordinate to the position of [city] councilman, nor would the position of councilman be subordinate to the position of crew chief and superintendent of roads"). Therefore, we conclude that neither the position of superintendent employed by the Athens County Engineer, nor the office of township trustee of a township in Athens County is subject to the control of or a check upon the other.

⁸ We presume that the management and supervisory duties of the superintendent relate to the management and supervision of personnel working on a project completed by the county and do not constitute approval, supervision, or inspection of road work done by a board of township trustees. If the superintendent does approve, supervise, or inspect work done by a township, the superintendent may operate as a check upon the board of township trustees, which would render incompatible the positions of township trustee and superintendent.

In addition, when there is no deputy county engineer, the county engineer is absent, and the superintendent takes charge of all operations of the county engineer, the superintendent will be a check upon the board of township trustees with respect to road projects of the township. This conclusion is explained in this opinion's discussion of whether the deputy county engineer and township trustee are subject to the control of or a check upon the other. At this time, the position of deputy county engineer in Athens County is filled. Accordingly, there is little likelihood that the superintendent will take charge of the county engineer's operations when the county engineer is absent.

⁹ If a superintendent in a county engineer's office were to work under the supervision and control of a board of township trustees, it may be concluded that the position of superintendent and the office of township trustee are incompatible as one is subordinate to or a check upon the other.

We now consider whether the deputy county engineer and a township trustee are subject to the control of or a check upon the other. The duties and responsibilities of the deputy county engineer were set forth in full in the section determining whether a statute prohibits the holding of multiple positions. Thus, we focus on the deputy county engineer's duties that are pertinent to this part of the compatibility analysis. The deputy county engineer is responsible for assisting the county engineer in "the planning, design and direction of projects and road program operations." In addition, the deputy county engineer calculates cost and "[i]nspects construction sites to monitor progress and ensure conformance to engineering plans, specifications, and construction and safety standards." The deputy county engineer also inspects bridge, culvert, and pavement projects. A member of your office has informed us that the deputy county engineer makes some of his decisions independently without the prior approval of the county engineer. Finally, the deputy county engineer acts in place of the county engineer when the county engineer is absent.

The deputy county engineer's duties of planning and cost estimating, road design, and inspection correspond to the duties of the county engineer under R.C. 5541.03, R.C. 5543.01(A)(2), R.C. 5543.02, R.C. 5543.09(A), R.C. 5543.20, R.C. 5571.05, R.C. 5575.01(B), and R.C. 5575.07. When the deputy county engineer is assigned and performs those duties with respect to township roads, he serves as a check upon the board of township trustees. 2011 Op. Att'y Gen. No. 2011-034, at 2-269 n.5 (statutes that make a board of township trustees' repair and maintenance of roads and bridges subject to the general direction of the county engineer "do[] not ... make an employment position with the county engineer a check upon the position of township trustee *unless* the particular duties of the county engineer employee include the supervision of road or bridge construction, reconstruction, resurfacing, improvement, maintenance, or repair in the township" (emphasis added)); 1997 Op. Att'y Gen. No. 97-045, at 2-281 ("the fact that a board of township trustees is subject to the general direction of the county engineer with respect to road maintenance and construction does not render the position of township trustee subordinate to the position of project inspector for the county engineer unless the duties of the project inspector include the supervision of road and bridge construction and maintenance in the township in which the trustee serves"); *cf.* 1994 Op. Att'y Gen. No. 94-022, at 2-98 ("[t]here are ... several instances in which the position of township trustee may be subordinate to, or act as a check upon, a position in the county engineer's office" but "[i]t seems unlikely ... that the duties of a welder in the county engineer's office would place the welder under the control of township trustees, or place the trustees in a position subservient to that of the welder"); 1993 Op. Att'y Gen. No. 93-016, at 2-89 (from "the fact that the position of administrative assistant to the county engineer in question is not delegated the duty of supervising township road and bridge construction and maintenance, it may be concluded that the statutes relating to the maintenance and construction of roads do not place a township trustee in a position subservient to that of the administrative assistant"). *But see* 1988 Op. Att'y Gen. No. 88-020, at 2-77 to 2-78 (opinion concludes that R.C. 5571.05, which makes a board of township trustees "subject to the general supervision and direction of the county engineer" when maintaining or repairing roads, requires that the board follow the technical advice of the county engineer, but does not make the board of township trustees subordinate to the county engineer. The opinion noted, however, that the employee of the county engineer under consideration "would not have supervisory powers in his position with the county highway department").

Township road projects are subject to the charge and supervision of the county engineer, in part, to ensure that uniform standards are applied and satisfied with respect to the condition of roads in the county. In planning, designing, and inspecting township road projects, the deputy county engineer operates as a check upon a board of township trustees by ensuring that the county's uniform standards are met. Similarly, in performing the county engineer's duty to approve estimates that are paid from township funds pursuant to R.C. 5543.02, the deputy county engineer acts as a check upon a board of township trustees in the board's expenditure of township moneys for road projects.¹⁰

Therefore, a deputy county engineer who plans, designs, and inspects road or bridge work performed by a board of township trustees and makes and approves estimates for township road projects may not serve simultaneously as township trustee for a township in the same county. The two positions are incompatible as one is a check upon the other. Having concluded that the deputy county engineer position involved in your inquiry and the office of township trustee for a township in the same county are incompatible based upon subordination and control, it is unnecessary for us to determine whether the positions are compatible under the remaining questions of the compatibility analysis. 2013 Op. Att'y Gen. No. 2013-008, at 2-79 (“[a]s one of the seven compatibility questions has yielded an answer disfavoring compatibility, it is unnecessary for us to address the remaining six questions”). Consequently, the remaining questions of the compatibility analysis will address the positions of superintendent employed by the Athens County Engineer and township trustee.

Physical Ability to Discharge Duties

Question four asks whether it is physically possible for one person to hold simultaneously two positions and fully perform all the duties required of each position. A superintendent may be required to report to work during certain specified hours of the day. A township trustee, as an elected official, is not required to perform duties during specified periods of the day. *See* 2001 Op. Att'y Gen. No. 2001-036, at 2-218 n.6. Whether a person is physically able to fulfill the duties of two positions is “a

¹⁰ A deputy county engineer may be subject to the control of a board of township trustees under R.C. 5575.01, which requires the county engineer to take certain actions as directed by a board of township trustees that elects to maintain or repair roads by force account. The board of township trustees “shall cause” the county engineer to complete the force account assessment form, R.C. 5575.01(A), and to make an estimate of the cost of the work, R.C. 5575.01(B). “All force account work under [R.C. 5575.01] shall be done under the direction of a member of the board [of township trustees] or the township road superintendent.” R.C. 5575.01(D); *see* 2008 Op. Att'y Gen. No. 2008-007, at 2-77 (“[t]he [county] engineer’s cost estimate can ... be viewed as the first stage of a force account project [under R.C. 5543.19]”). If the deputy county engineer is responsible for completing the form and making the estimate, he does so under the direction of the board of township trustees. Nothing in your request for an opinion of the Attorney General indicates that at this time the board of township trustees and the Athens County Engineer are cooperating on a township road repair or maintenance project by force account.

factual question that is best resolved by the interested local officials since they may more precisely determine the time constraints and demands imposed upon the person” in each position. 2004 Op. Att’y Gen. No. 2004-051, at 2-438.

In resolving this inquiry, it is important to consider that “a person must be certain that he will be able to carry out the duties of both positions in a competent and timely manner[, which] means that there may not be a direct conflict between the times when the person is needed to perform duties” in each position. *Id.* at 2-439 (citation omitted). If, as a township trustee, the person is required to be available during the hours in which he is working as a superintendent, the person must use approved leave commensurate with the amount of time in which he is absent from his duties as superintendent. *See* 2011 Op. Att’y Gen. No. 2011-008, at 2-60.

Conflict of Interest

Question five asks whether a conflict of interest exists between the two positions.¹¹ A conflict of interest exists “when an individual’s ‘responsibilities in one position are such as to influence the performance of his duties in the other position, thereby subjecting him to influences which may prevent his decisions from being completely objective.’” 1989 Op. Att’y Gen. No. 89-052, at 2-220 (quoting 1985 Op. Att’y Gen. No. 85-100, at 2-427). “[A] conflict of interest exists when a public servant is subject to divided loyalties and conflicting duties or exposed to the temptation of acting other than in the best interest of the public.” 1998 Op. Att’y Gen. No. 98-033, at 2-188 to 2-189.

As we have already set forth the duties and responsibilities of the superintendent employed by the Athens County Engineer, we will not repeat them here. A board of township trustees is generally responsible for governing the township. 1991 Op. Att’y Gen. No. 91-069, at 2-325. The duties of a board of township trustees are largely set forth in R.C. Chapter 504 (for a township that has adopted a limited home-rule government) and R.C. Chapter 505. 1991 Op. Att’y Gen. No. 91-069, at 2-325. A board of township trustees also has specific duties with respect to township roads. *See, e.g.*, R.C. 5535.01(C) (“[t]he board of township trustees shall maintain all such roads [(all public highways other than state or county roads)] within its township”); R.C. 5571.01(A) (“[a] board of township trustees may construct, reconstruct, resurface, or improve any public road or part thereof under its jurisdiction, or any county road, intercounty highway, or state highway within its township”); R.C. 5571.02 (“[t]he board of township trustees shall have control of the township roads of its township and, except for those

¹¹ As the Ohio Ethics Commission is authorized to determine the applicability of the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43, R.C. 102.08, the Attorney General “refrain[s] from interpreting and applying [those] provisions by way of a formal opinion.” 2011 Op. Att’y Gen. No. 2011-008, at 2-60 n.1. For a determination of whether R.C. Chapter 102, R.C. 2921.42, or R.C. 2921.43 applies to the positions at issue in this opinion, we recommend that you contact the Ohio Ethics Commission. 2011 Op. Att’y Gen. No. 2011-008, at 2-60 n.1.

township roads the board places on nonmaintained status pursuant to [R.C. 5571.20], shall keep them in good repair”); R.C. 5573.01 (“[w]hen the board of township trustees has determined that any road shall be constructed, reconstructed, resurfaced, or improved, the board shall determine by resolution, by unanimous vote if acting without a petition, and by a majority vote if acting upon a petition, the route and termini of the road, and the kind and extent of the improvement, and at the same time shall order the county engineer ... to make surveys, plans, profiles, cross sections, estimates, and specifications as are required for the improvement”).

An examination of the duties of the superintendent involved in your inquiry and a board of township trustees reveals a potential conflict of interest between the two positions when a contract or agreement concerning road projects is contemplated between the county and township. Several statutes authorize a township and a county to enter into contracts or agreements with respect to the construction, maintenance, repair, or improvement of roads. For example, R.C. 9.482 and R.C. 307.15 authorize a board of county commissioners and a board of township trustees to enter into an agreement whereby the board of county commissioners exercises powers and performs functions related to constructing, maintaining, repairing, or improving township roads on behalf of the township trustees.¹² R.C. 5535.08(C)(1) is an additional source of authority for a township and a county to agree “to obtain or provide road or street construction, reconstruction, resurfacing, improvement, repair, or maintenance services” from the other. In addition, several statutes authorize a board of township trustees and a board of county commissioners to agree to share certain road improvement costs. *See, e.g.*, R.C. 164.15 (“a board of township trustees may enter into a contract with the county engineer under which the board agrees to pay all or any part of the cost of engineering services to be provided to or obtained for the township by the county engineer that are necessary for projects awarded under [R.C. Chapter 164]”); R.C. 5535.08(A) (“the county or township, by agreement between the board of county commissioners and the board of township trustees, may contribute to the repair and maintenance of the roads under the control of the other”); R.C. 5555.43 (“[t]he board of county commissioners ... may enter ... into an agreement with the boards of township trustees of the townships in which the improvement is situated in whole or in part, whereby the entire cost of the improvement is paid by the county and townships, or one or more of them, in the agreed upon proportion or amount of the cost”).

When any of the above described contracts or agreements are contemplated by the board of township trustees, it may be difficult for the trustee who is also the superintendent to set aside his loyalty to his employer, the county engineer, in order to neutrally and objectively carry out his township trustee duties with respect to negotiating a contemplated contract or agreement. *See* 2011 Op. Att’y Gen. No. 2011-034, at 2-271; 1997 Op. Att’y Gen. No. 97-045, at 2-283; 1994 Op. Att’y Gen. No. 94-022, at 2-99 to 2-100; 1993 Op. Att’y Gen. No. 93-051, at 2-248; 1993 Op. Att’y Gen. No. 93-016, at 2-90. Depending upon the terms of the contract or agreement, a

¹² A board of township trustees may also agree “to exercise any power, perform any function, or render any service for” the county that the county is legally authorized to do. R.C. 9.482(B)(1).

township trustee, who is also a superintendent, may find himself negotiating a contract that may result in additional work for the superintendent or in which he may have an interest. 1988 Op. Att'y Gen. No. 88-020, at 2-78.

Finding the existence of a potential conflict of interest between two positions does not necessarily mean that a person is prohibited from holding both positions. 1998 Op. Att'y Gen. No. 98-033, at 2-189. Rather, whether a potential conflict of interest is impermissible depends upon several factors. *Id.* 2006 Op. Att'y Gen. No. 2006-010, at 2-86 to 2-87 summarized the approach taken if a conflict of interest is found to exist between the two positions:

[i]f our review discloses such conflicts, we must next determine the immediacy of the conflicts to see whether the conflicts may be sufficiently avoided or eliminated entirely so as to allow the person to serve simultaneously in both positions. The pertinent factors used in making this determination include, but are not limited to, the probability of the conflict, the ability of the person to remove himself from the conflict (should it arise), whether the person exercises decision-making authority in both positions, and whether the conflict relates to the primary functions of each position, or to financial or budgetary matters.

Upon consideration of those factors, we believe that the potential conflict of interest in this matter is remote and speculative and may be sufficiently avoided or eliminated entirely.

A member of your office has informed us that, at this time, the county and the township do not have any contracts for road work. The possibility that a conflict of interest will arise because of contracts or agreements between the county and township is, therefore, speculative. Further, although a township trustee exercises decision-making authority with respect to whether to enter into an agreement or contract with the county, the superintendent does not.¹³ While the conflict of interest we have recognized relates to the primary functions of a township trustee, the conflict does not relate to the primary functions of the superintendent. In addition, depending upon the terms of the contract or agreement, financial or budgetary matters of the township or county engineer may be affected. Finally, should the conflict of interest arise from a contemplated contract, a township trustee who is a superintendent employed by the county engineer may abstain from any deliberations, discussions, negotiations, or votes on the contracts or agreements to avoid or eliminate the conflict of interest. It is presumed that officials will

¹³ Based upon the job description of the superintendent that your office provided to us, it is our understanding that the superintendent does not participate in negotiations or discussions concerning entering into a contract with a board of township trustees. However, if the duties of a superintendent who is also a township trustee include discussing or negotiating contracts between the county engineer and a township, an analysis of the immediacy of the potential conflict of interest and whether the conflict of interest may be avoided or eliminated may reach a different conclusion based upon those facts.

discharge their duties in a lawful manner. *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”). Therefore, on balance, we do not believe that an impermissible conflict of interest exists between the office of township trustee and the superintendent position that is the subject of your inquiry.

Charter Provisions, Local Ordinances, and Federal, State, or Local Departmental Regulations

The sixth and seventh questions ask about any applicable charter provisions, local ordinances, and federal, state or local departmental regulations that may prohibit a person from simultaneously holding the two positions. “[W]hether there is an applicable local charter provision, resolution, ordinance, or departmental regulation which prohibits a person from concurrently holding ... two positions is a question for [local] officials to answer.” 2004 Op. Att’y Gen. No. 2004-051, at 2-434. It is presumed, for the purpose of this opinion, that no local charter provisions, resolutions, ordinances, or departmental regulations apply. *See id.* We also presume that there is no provision of a collective bargaining agreement applicable to the superintendent employed by the county engineer that prohibits the holding of the office of township trustee. There are no state regulations that prohibit a superintendent employed by the county engineer from serving simultaneously as a township trustee.

As for a federal law that may prohibit the holding of the two positions involved in this opinion, the Hatch Act, 5 U.S.C.A. §§ 1501-1508, may be applicable. The Hatch Act prohibits a state or local officer or employee from being a candidate for an elective office when the employee’s salary “is paid completely, directly or indirectly, by loans or grants made by the United States or a Federal agency[.]” 5 U.S.C.A. § 1502(a)(3); *see also* 2011 Op. Att’y Gen. No. 2011-008, at 2-68. For purposes of the Hatch Act, “State or local officer or employee” is defined as “an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a federal agency[.]” 5 U.S.C.A. § 1501(4).¹⁴

¹⁴ 5 U.S.C.A. § 1501(4) excludes the following state or local officers and employees from the definition:

(A) an individual who exercises no functions in connection with [an activity that is financed in whole or in part by loans or grants made by the United States or a Federal agency]; or

(B) an individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by –

(i) a State or political subdivision thereof;

A superintendent employed by the county engineer may be covered by the Hatch Act if his salary is paid by a federal grant or loan. The prohibition of 5 U.S.C.A. § 1502(a)(3), however, applies only to offices that are filled by a partisan election. 5 U.S.C.A. § 1503. A candidate for the board of township trustees that is the subject of your inquiry is elected in a nonpartisan election. Thus, even if the superintendent is an employee covered by the Hatch Act, the Act's prohibition will not apply to him when he seeks election to a board of township trustees on a nonpartisan ballot.

Conclusions

Based on the foregoing, it is my opinion, and you are hereby advised that:

1. A deputy county engineer who performs the duties of the county engineer in the county engineer's absence may not hold simultaneously the office of member of a village legislative authority.
2. A deputy county engineer who is responsible for planning, designing, and inspecting road or bridge work performed by a board of township trustees and making and approving estimates for township road projects may not hold simultaneously the office of township trustee in the same county.
3. A superintendent employed by the county engineer in the unclassified service may hold simultaneously the office of township trustee for a township within the county, provided that he does not approve, supervise, or inspect road work completed by the board of township trustees of which he is a member, does not have a prohibited interest in a contract between the county or county engineer and the township, and abstains from all discussions, negotiations, deliberations, and votes concerning any

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- (ii) the District of Columbia; or
 - (iii) a recognized religious, philanthropic, or cultural organization.

Additionally, the following are excluded from the prohibition of 5 U.S.C.A. § 1502(a)(3):

- (1) the Governor or Lieutenant Governor of a State or an individual authorized by law to act as Governor;
- (2) the mayor of a city;
- (3) a duly elected head of an executive department of a State, municipality, or the District of Columbia who is not classified under a State, municipal, or the District of Columbia merit or civil-service system; or
- (4) an individual holding elective office.

5 U.S.C.A. § 1502(c).

contemplated contracts or agreements between the township and the county or the county engineer that relate to the construction, repair, maintenance, or improvement of roads.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive style with a large initial "M" and a long, sweeping tail.

MICHAEL DEWINE
Ohio Attorney General