

June 14, 2019

The Honorable James VanEerten
Ottawa County Prosecuting Attorney
Ottawa County Courthouse
315 Madison Street, Suite 205
Port Clinton, Ohio 43452

SYLLABUS:

2019-020

A person may serve simultaneously as a township trustee and a natural resources officer in the classified service of the Ohio Department of Natural Resources, provided that the position of township trustee is filled by nonpartisan election. As a member of the board of township trustees, the person shall refrain from discussions, deliberations, negotiations, or votes concerning any potential mutual aid compact between the township and the Ohio Department of Natural Resources.



DAVE YOST

OHIO ATTORNEY GENERAL

Opinions Section
Office 614-752-6417
Fax 614-466-0013

30 East Broad Street, 15th Floor
Columbus, Ohio 43215
www.OhioAttorneyGeneral.gov

June 14, 2019

OPINION NO. 2019-020

The Honorable James VanEerten
Ottawa County Prosecuting Attorney
Ottawa County Courthouse
315 Madison Street, Suite 205
Port Clinton, Ohio 43452

Dear Prosecutor VanEerten:

You have requested an opinion about whether the positions of township trustee and Ohio Department of Natural Resources (ODNR) natural resources officer are compatible. You have explained that the natural resources officer's "assignment with ODNR may cover land that, at least partially, is concurrent" with the township where he serves as trustee.

Compatibility Test

The following seven questions are used to determine whether a person may hold two public positions simultaneously:

1. Is either position in the classified service for purposes of R.C. 124.57?
2. Does a constitutional provision or statute prohibit a person from serving in both positions at the same time?
3. Is one position subordinate to, or in any way a check upon, the other position?
4. Is it physically possible for one person to discharge the duties of both positions?
5. Is there an impermissible conflict of interest between the two positions?
6. Are there local charter provisions, resolutions, or ordinances that are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

2014 Op. Att'y Gen. No. 2014-022, at 2-196; 1979 Op. Att'y Gen. No. 79-111, at 2-367 to 2-368. All seven questions must be resolved in favor of compatibility for the positions to be compatible. 2013

Op. Att’y Gen. No. 2013-008, at 2-78. Consequently, if one of the seven questions is resolved against a finding of compatibility, the positions are incompatible. *Id.* at 2-79.

The Positions of Township Trustee and ODNR Natural Resources Officer are Compatible, Subject to Conditions

The first question of the compatibility test asks whether either position is a classified position within the terms of R.C. 124.57. R.C. 124.57 prohibits officers and employees in the classified service of the state and civil service townships from taking part in a variety of activities that occur as part of the regular political process and are partisan in nature. 2007 Op. Att’y Gen. No. 2007-037, at 2-378 to 2-379. It has been interpreted as prohibiting an officer or employee in the classified service of the state or a civil service township from being elected to a public office in a partisan election or accepting a party-sponsored appointment to a public office that is normally filled by partisan election. *Id.*

We must determine whether the person as a township trustee or ODNR natural resources officer is subject to the restrictions set forth in R.C. 124.57. As an elected position, the office of township trustee is in the unclassified service.¹ *See* R.C. 124.11(A)(1); R.C. 505.01; *see also generally* 2003 Op. Att’y Gen. No. 2003-041, at 2-337 to 2-338. Natural resources officers are in the classified service of the state. R.C. 1501.24. R.C. 124.57, therefore, prohibits a natural resources officer from simultaneously serving as a partisan political officeholder. However, R.C. 124.57, does not prohibit a person in the classified service from serving in a position that is normally filled by nonpartisan election. Accordingly, the prohibition of R.C. 124.57 does not operate to prevent a person from holding simultaneously the positions of township trustee and ODNR natural resources officer, provided the position of township trustee is normally filled by nonpartisan election.²

The second question of the compatibility test asks whether a constitutional or statutory provision prohibits a person from serving in both positions at the same time. No constitutional

¹ Candidates for township trustee are typically nominated by petition, rather than in a primary election, unless a majority of the township electors petition for a primary election. R.C. 3513.01(C); R.C. 3513.253. In the absence of a primary election, candidates for election to township trustee appear on a nonpartisan ballot. R.C. 3505.04.

² Pursuant to 5 U.S.C.A. § 1502(a)(3), commonly referred to as the Hatch Act, a state or local officer or employee may not be a candidate for elective office if that officer or employee’s salary is paid completely, directly or indirectly, by federal loans or grants. 5 U.S.C.A. § 1503, however, provides that the Hatch Act does not prohibit a state or local officer or employee from being a candidate in a *nonpartisan* election. Accordingly, the Hatch Act does not prohibit an ODNR natural resources officer from being a candidate for the office of township trustee when that office is normally filled by nonpartisan election. *See* 2017 Op. Att’y Gen. No. 2017-021, at 2-225 to 2-227; 2007 Op. Att’y Gen. No. 2007-037, at 2-380 n.7.

provision or statute of which we are aware prohibits the service in question.³ Therefore, the second question of the test is resolved in favor of compatibility.

The third question of the compatibility test asks whether one of the positions is subordinate to or otherwise a check upon the other position. A township trustee, as an elected official, answers to the electors of the township. R.C. 505.01; 2018 Op. Att’y Gen. No. 2018-023, at 2-206. An ODNR natural resources officer is appointed by, and accountable to, the Director of Natural Resources. R.C. 1501.24. Neither position is subordinate to or subject to the control of the other. Rather, the positions operate independently of each other. The answer to this question, therefore, favors compatibility.

The fourth question asks whether it is physically possible for one person simultaneously to hold the positions in question and fully perform the duties required of each. This is a factual question that is best addressed by township and ODNR officials who are familiar with the responsibilities and time commitments of each position. *See* 2007 Op. Att’y Gen. No. 2007-037, at 2-383 to 2-384; *see also generally State ex rel. Grettick v. Jeffrey*, 12 Ohio St. 3d 55, 56, 465 N.E.2d 412 (1984) (a person may hold the positions of county commissioner and full-time principal at a high school where there is no evidence that the person is physically unable to perform the duties of both positions). A final determination of compatibility requires the determination that it is, in fact, possible for one person simultaneously to hold the two positions at issue. In addressing this question, it is important to remember that a person must be confident that he will be able to carry out the duties of both positions in a competent and timely manner. 2004 Op. Att’y Gen. No. 2004-051, at 2-439. This means that there “may not be a direct conflict between the times when the person is needed to perform duties” in each position. *Id.* If there is a direct and regular conflict between the times when the person is required to perform the duties of both positions, the positions are incompatible. Otherwise, the fourth question of the test may be answered in favor of compatibility.

Question five of the compatibility test asks whether a conflict of interest exists between the two positions.⁴ A person may not serve simultaneously in two positions when an impermissible

³ We recognize that R.C. 1513.04(C) states that no employee of ODNR “performing any function or duty under [R.C. Chapters 1513 or 1514] shall ... [b]e employed as an attorney, agent, or in any other capacity by any person engaged in coal or surface mining operations[.]” A person who violates this provision shall be removed from office or dismissed from employment. R.C. 1513.04(D). Situations may arise in which a board of township trustees participates in mining operations. *See* 2007 Op. Att’y Gen. No. 2007-037, at 2-381 to 2-383. However, we do not believe that R.C. 1513.04 operates to prohibit an ODNR natural resources officer from serving as a township trustee. While a natural resources officer may arrest someone for violating provisions of R.C. Chapters 1513 or 1514, *see* R.C. 2935.03(A)(2), natural resources officers do not “perform[] any function or duty under [R.C. Chapters 1513 or 1514],” as required for R.C. 1513.04’s provisions to apply.

⁴ 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

conflict of interest exists between the positions. 2017 Op. Att’y Gen. No. 2017-014, at 2-130. 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). To determine whether a conflict of interest exists between two positions, we must first examine the powers, duties, and responsibilities of each of the positions. If our review reveals that a conflict of interest exists between the positions, we will next need to determine whether the conflict may be sufficiently mitigated or eliminated entirely, thus allowing the person to hold both positions at the same time. Factors used in making this determination include “the probability of the conflicts occurring, the ability of the person to remove himself from any conflicts that may occur, whether the person exercises decision-making authority in both positions, and whether the conflicts relate to the primary functions of each position, or to financial or budgetary matters.” 2004 Op. Att’y Gen. No. 2004-051, at 2-439.

A board of township trustees is the governing body of a township. *See generally* R.C. Chapter 505 (setting forth the general powers and duties of a board of township trustees). The powers, duties, and responsibilities of a member of a board of township trustees relate primarily to exercising executive and legislative powers on behalf of the township. 2017 Op. Att’y Gen. No. 2017-043, at 2-409. A board of township trustees may accept and sell township property (R.C. 505.10), may contract for the purchase of equipment and buildings (R.C. 505.262), and may provide for fire and police protection for the township (R.C. 505.37 and R.C. 505.48). “A board of township trustees also handles fiscal and budgetary matters on behalf of the township.” 2000 Op. Att’y Gen. No. 2000-025, at 2-168.

ODNR natural resources officers are appointed by the Director of Natural Resources pursuant to R.C. 1501.24. “Natural resources officers have peacekeeping and enforcement responsibilities on lands and waters owned or administered by ODNR.” *Ohio’s Newest Natural Resources Officers to Begin Assignments*, OHIO DEPARTMENT OF NATURAL RESOURCES, <http://ohiodnr.gov/news/post/ohio-s-newest-natural-resources-officers-to-begin-assignments> (last visited June 12, 2019). Their duties “include law enforcement and public service as well as education and public relations.” *ODNR to Hire 18 Natural Resources Officers*, OHIO DEPARTMENT OF NATURAL RESOURCES, <http://parks.ohiodnr.gov/news/post/odnr-to-hire-18-natural-resources-officers> (last visited June 12, 2019); *see also* R.C. 1547.51 (describing a natural resources officer’s duties regarding educational programs and inspections). They enforce Ohio’s boating laws, investigate allegations, protect state property, and are authorized to make arrests. *Ohio’s Newest Natural Resources Officers to Begin Assignments*, OHIO DEPARTMENT OF NATURAL RESOURCES, <http://ohiodnr.gov/news/post/ohio-s-newest-natural-resources-officers-to-begin-assignments> (last visited June 12, 2019); *see also* R.C.

General, therefore, “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 those provisions apply to the positions at issue in this opinion, we recommend that you contact the Ohio Ethics Commission. *Id.*

1501.24; R.C. 2935.01(B) (natural resources officers are “peace officers” for purposes of R.C. Chapter 2935). Within the limits of a natural resources officer’s territorial jurisdiction, a natural resource officer may arrest and detain, until a warrant can be obtained, a person found violating a state law. R.C. 1501.24(B); R.C. 2935.03(A)(2). Finally, a natural resources officer “may render assistance to a state or local law enforcement officer at the request of that officer or may render assistance to a state or local law enforcement officer in the event of an emergency.” R.C. 1501.24(D)(1).

A review of the powers, duties, and responsibilities of the respective positions discloses a potential conflict of interest between the two positions. Pursuant to R.C. 1501.02, the Director of Natural Resources may enter into a mutual aid compact with any township “to enable ... natural resources officers and the law enforcement officers of the [township] to assist each other in the provision of police services within each other’s jurisdiction.” A mutual aid compact between ODNR and the township with which an ODNR natural resources officer serves as trustee may potentially subject that individual to competing loyalties.

We believe, however, that this potential conflict of interest is insufficient to render these two positions incompatible. ODNR is not required to enter into a mutual aid compact with a township, and it is remote and speculative whether ODNR will enter into such a compact with this particular township. Additionally, as an ODNR natural resources officer, the person does not exercise any decision-making authority concerning a potential mutual aid compact with a township. Rather, the Director of Natural Resources decides whether to enter a mutual aid compact. R.C. 1501.02. As a township trustee, the person may exercise decision-making authority regarding the advisability of entering into a mutual aid compact with ODNR. However, should this issue arise, the person as a township trustee is able to remove himself from any deliberations, discussions, or votes concerning the matter. A board of township trustees is capable of functioning and performing its duties when one of its members abstains from a matter. 1999 Op. Att’y Gen. No. 99-004, at 2-23 (two township trustees constitute a quorum that is qualified to take action on behalf of the board). Moreover, if a member of a board of township trustees is not able to abstain from discussing or making decisions about matters that potentially conflict with his duties as a natural resources officer, any undue influence that the township trustee might exert may be mitigated by the role that the other members of the board of township trustees play in the process. 2011 Op. Att’y Gen. No. 2011-008, at 2-65 to 2-66; *see also generally State ex rel. Speeth v. Carney*, 163 Ohio St. 159, 126 N.E.2d 449 (1955) (syllabus, paragraph 10).

In short, although a potential conflict of interest may arise between the positions of township trustee and ODNR natural resources officer, the conflict is remote and speculative and can be sufficiently mitigated should it arise. Therefore, we conclude that question five of the compatibility test may be answered in favor of compatibility.

Questions six and seven of the compatibility test concern the applicability of charter provisions, resolutions, or ordinances, and federal, state, and local regulations. No federal or state regulation prohibits a person from serving simultaneously as a township trustee and natural resources officer for ODNR when the position of township trustee is normally filled by nonpartisan election. *See generally* note 2, *supra* (discussing the application of the federal Hatch Act to the situation

presented in your letter). Whether an applicable local charter provision, resolution, ordinance, or departmental regulation prohibits a person from holding the two positions at the same time is a question for township and ODNR officials to answer. For the purpose of this opinion, we assume that no local charter provision, resolution, ordinance, or departmental regulation prohibits the dual service in question.⁵

Conclusion

Based on the foregoing, it is our opinion, and you are hereby advised that a person may serve simultaneously as a township trustee and a natural resources officer in the classified service of the Ohio Department of Natural Resources, provided that the position of township trustee is filled by nonpartisan election. As a member of the board of township trustees, the person shall refrain from discussions, deliberations, negotiations, or votes concerning any potential mutual aid compact between the township and the Ohio Department of Natural Resources.

Respectfully,



DAVE YOST
Ohio Attorney General

⁵ A collective bargaining agreement entered into by the state and employees of ODNR pursuant to R.C. Chapter 4117 may have a provision that prohibits an employee of ODNR from holding another public position. *See generally* R.C. 4117.03(A)(4); R.C. 4117.08(A); R.C. 4117.10(A). Whether the provisions of a collective bargaining agreement apply in a given instance so as to prohibit an employee of ODNR from holding the office of township trustee must be determined on a case-by-case basis by the parties to the agreement. 2007 Op. Att’y Gen. No. 2007-037, at 2-378 n.1.