

administered so that favoritism and preference may be accorded another position of public trust. State ex rel. Baden v. Gibbons, 17 Ohio L. Abs. 341, 344 (Ct. App. Butler County 1934).

These are the evils that the common law rule of incompatibility is designed to meet, and it is apparent that they may arise just as easily where only one position is an office as where both are offices. See, e.g., 1966 Op. Att'y Gen. No. 66-072. Therefore, I am in agreement with the court in Haskins, *supra*, that it is the incompatibility of functions, and not their designation as "offices," which is important. Accordingly, it is my opinion that the common law test of incompatibility is applicable where an individual holds concurrently a public employment and a public office.

I am not called upon to re-examine the validity of the conclusion in Op. No. 65-150, *supra*, that the common law test of incompatibility is inapplicable to two positions of public employment inasmuch as membership on a municipal council constitutes the holding of public office. State v. Kearns, 47 Ohio St. 566 (1890). Therefore, I express no opinion on that question at this time.

Thus, I turn now to the question of whether either the office of municipal council member or employment as a special deputy sheriff for a county is subordinate to or a check upon the other. In the Pistole case, cited above, the court was presented with the question whether the positions of township trustee and deputy sheriff were compatible. Answering this question in the negative, the court stated:

Obviously one is not subordinate to the other because they are in entirely different fields. The township trustees are elected and responsible only to the people who elect them. The deputy sheriff is appointed by the sheriff who is likewise elected, he serves at the pleasure of the sheriff, and is directly responsible to him and takes his orders from him. Neither of the positions are subordinate to the other and neither serves as a check upon the other. 90 Ohio L. Abs. at 531.

In the same way, a council member is responsible to the electors of the municipality. A special deputy sheriff is responsible to the sheriff, and takes orders from the sheriff. Accordingly, it does not appear that either position is subordinate to, or a check upon, the other.

However, compatibility issues do not involve only an examination of whether one position directly, or indirectly, controls the other. The common law rule, designed in part to avoid divided loyalties, also requires an examination of whether a person serving in two different public capacities is subject to a conflict of interest between the two positions--the fifth question in the consideration of the simultaneous holding of public positions. See, e.g., 1970 Op. Att'y Gen. No. 70-170; 1970 Op. Att'y Gen. No. 70-168; 1964 Op. Att'y Gen. No. 959, p. 2-129; 1961 Op. Att'y Gen. No. 2206, p. 248; 1958 Op. Att'y Gen. No. 1705, p. 81. As was stated in Op. No. 70-168, *supra*, one in the public service "owes an undivided duty to the public. It is contrary to public policy for a public officer to be in a position which would subject him to conflicting duties or expose him to the temptation of acting in any manner other than the best interest of the public." (Citation omitted.)

The courts, too, recognize the interwoven nature of common law incompatibility and conflict of interest rules. See State ex rel. Hover v. Wolven, *supra*, (by implication); Pistole v. Wiltshire, *supra*. Thus, it is clear that where the holding of dual public positions would preclude the unbiased discharge of public duties, both positions may not be held simultaneously. This is the factor with which your letter expresses concern. It is necessary, then, to determine whether there is any material reason why an individual acting both as a municipal council member and a special deputy sheriff would be subject to conflicting interests.

There are several statutory provisions through which the legislative authority

of a municipal corporation may become involved with a county's sheriff's department. R.C. 735.053 authorizes the legislative authority of a municipality to adopt an ordinance empowering a duly authorized contracting officer, commission, board, or authority of the municipality to enter into a contract for services, material, or equipment from any department or subdivision of the state. Under this provision, the council members could authorize a contract between a municipal officer and county commissioners for the purchase of services or supplies from the sheriff. Under R.C. 753.02, the legislative authority of a municipal corporation and a board of county commissioners may enter into a contract for the care and maintenance of municipal prisoners by the sheriff, or they may, pursuant to R.C. 753.13, unite in the acquisition, management, and maintenance of a joint workhouse. Finally, R.C. 311.29 allows the sheriff to contract with municipal corporations for the provision of police functions by the sheriff on behalf of the municipality. A municipal corporation with a charter will, of course, be governed by the provisions of its charter rather than by the statutory provisions, if there is any conflict between the two.

The next question to be addressed is whether the possibility that the county or the sheriff may enter into any of the foregoing contractual relationships with the municipal corporation is sufficient to place the individual into a position of divided loyalties, or in a position whereby favoritism or preference may be accorded one position. It has been stated that the "fact that a conflict in interest is a mere possibility and not inevitable does not make the offices any the less incompatible." 1958 Op. Att'y Gen. No. 1705, p. 81, 85, quoting 1952 Op. Att'y Gen. No. 1289, p. 257, 259. See also 1962 Op. Att'y Gen. No. 3235, p. 660; 1961 Op. Att'y Gen. No. 2206, p. 248; 1927 Op. Att'y Gen. No. 1288, p. 2325. On the other hand, several opinions have concluded that where possible conflicts are remote and speculative, the common law incompatibility or conflict of interest rules are not violated. See 1979 Op. Att'y Gen. No. 79-049; 1973 Op. Att'y Gen. No. 73-108; 1971 Op. Att'y Gen. No. 71-081; 1970 Op. Att'y Gen. No. 70-168; 1959 Op. Att'y Gen. No. 853, p. 555. As was said in 1959 Op. Att'y Gen. No. 1031, p. 708, 710, "the mere fact that an officer holding two positions might do an act in connection with one of these positions which, if done, would indicate a divided loyalty toward his duty in the other position, is not sufficient to declare the offices incompatible. . . ." (Emphasis from the original.)

It is my opinion that the better view is that no hard and fast rule should be laid down with respect to the question of whether a potential conflict will render positions incompatible, but that each compatibility question should be decided upon its particular facts. The factors to be considered with respect to questions of potential conflicts are the degree of remoteness of a potential conflict, the ability or inability of an individual to remove himself from the conflict, whether the individual exercises decision-making authority in both positions, whether the potential conflict involves the primary functions of each position, and whether the potential conflict may involve budgetary controls. Thus, not all potentialities for conflict will render positions incompatible, and to the extent that the earlier opinions cited herein state categorically that any possibility thereof necessitates a finding of incompatibility, they are hereby disapproved.

With respect to your specific inquiry, it should be noted that it is only speculative whether a municipality will enter into a contract involving the sheriff's department. In any event, a special deputy sheriff has no decision-making authority and no power to enter into any of the contractual arrangements authorized by statute. As a municipal council member, the individual would, in conjunction with other council members, have such power. However, in 1955 Op. Att'y Gen. No. 5565, p. 328, it was concluded that the positions of township trustee and director of public safety of a city were compatible despite R.C. 505.44, which authorizes a contract for fire protection between a municipality and township. In that opinion, my predecessor noted that even though the contract would be made by the director for the city, it had to be approved by the city council. Therefore, the director had no independent power to contract, and the possibility of such a contract was not such a division of loyalty on the part of the person concerned as to make the two positions incompatible. This opinion was relied upon in the Pistole

case, cited above, wherein it was claimed that the authority of township trustees and the sheriff pursuant to R.C. 505.441 to contract for police protection would result in a conflict of interest for an individual holding dual positions as township trustee and deputy sheriff. The court held that "[s]ince the law imposes no duty nor gives any authority to a deputy sheriff to contract for police protection. . . , we can see no conflict of interest resulting from the provision authorizing the sheriff to contract with the township trustees for police protection which would make the position of deputy sheriff incompatible with that of township trustee." 90 Ohio L. Abs. at 534.

Similarly, a special deputy sheriff has no authority to contract for police protection with a municipality under R.C. 311.29. The other contractual arrangements between a county and a municipality which are discussed above would not be made by the sheriff directly. For these reasons, together with the fact that the likelihood of the potential conflict is remote and the fact that such a contract would constitute only a small fraction of the daily affairs of a municipal council, it is my opinion that the office of municipal council member and employment as a county special deputy sheriff are compatible positions. However, inasmuch as it is contrary to public policy for a public officer to expose himself to the temptation of acting in any manner other than in the public's best interest, a municipal council member should abstain from any discussion of, or vote upon, any matter relating to the county sheriff's department, should that eventually arise. See Op. No. 79-049 and 70-168, supra.

Finally, the fourth question relating to incompatibility asks whether it is physically possible for one person to discharge the duties of both positions. This test must, of course, take into account the time demands that each position will make upon the individual involved. It is, therefore, a factual question which can best be resolved by the interested parties. Assuming that the individual can perform the duties of each position without overlap by the other, the same person may be employed as a special deputy sheriff and hold the office of municipal council member.

Accordingly, it is my opinion, and you are hereby advised, that:

1. The common law test of incompatibility is applicable to the simultaneous holding of a public office and a public employment by the same person. (1965 Op. Att'y Gen. No. 65-150, first paragraph of the syllabus followed. 1979 Op. Att'y Gen. No. 79-049; 1977 Op. Att'y Gen. No. 77-078; 1974 Op. Att'y Gen. No. 74-039; 1959 Op. Att'y Gen. No. 198, p. 103; 1955 Op. Att'y Gen. No. 5565, p. 328 disapproved in part.)
2. An individual is not precluded from holding office as a municipal council member and employment as a special deputy sheriff at the same time, assuming that the special deputy holds a fiduciary relationship to the sheriff and, thus, is in the unclassified civil service. (1970 Op. Att'y Gen. No. 70-035 followed.)
3. Where possible conflicts are remote and speculative, common law incompatibility or conflict of interest rules are not violated. (1979 Op. Att'y Gen. No. 79-049 approved in part. 1962 Op. Att'y Gen. No. 3235, p. 660; 1961 Op. Att'y Gen. No. 2206, p. 248; 1958 Op. Att'y Gen. No. 1705, p. 81; 1952 Op. Att'y Gen. No. 1289, p. 257; 1927 Op. Att'y Gen. No. 1288, p. 2325, questioned.)