OPINION NO. 79-111

Syllabus:

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.)

To: Edward G. Sustersic, Belmont County Pros. Atty., St. Clairsville, Ohio
By: William J. Brown, Attorney General, December 28, 1979

I have before me your request for my opinion inquiring into the compatibility of the positions of municipal council member and special deputy sheriff for the county in which the municipality is located.

In court cases and Attorney Generals' opinions analyzing the compatibility of different positions, limitations on the ability of one person to simultaneously hold multiple public offices have been found to arise from a number of different sources. These limitations adapt to a format of seven basic questions, each of which must be examined before it may be stated that the same person may hold both public positions at the same time. The questions are as follows:

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 the outside employment permissible?

3. Is one office 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?

My consideration of the question of compatibility which you raise is limited to common law principles and enacted provisions which forbid dual office-holding. At times, the holding of two public positions may give rise to prohibitions against having an interest in a public contract, see R.C. 2921.42; R.C. 731.02, or to violations of the ethics provisions of R.C. Chapter 102. These statutes may involve criminal sanctions or work a forfeiture of office, but are not usually pertinent to a discussion of compatibility of public positions since they forbid an interest in a public contract, not the holding of two or more positions of public trust. For this reason, I am not considering them in this opinion.

I turn now to the questions set forth above. Questions number six and seven are of local concern, and I assume, for the purposes of this opinion, that there are no departmental regulations, charter provisions, or ordinances which limit the holding of outside employment by a deputy sheriff or city council member.

With respect to the first question, in considering whether an individual may hold the two public positions with which you are concerned, it must be determined whether R.C. 124.57 bars a county deputy sheriff from holding a political office. That section provides:

> No officer or employee in the classified service of the state, the several counties. . .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. . .be an officer in any political organization or take part in politics other than to vote as he pleases and to express freely his political opinions.

This section has been construed to prohibit the holding of a partisan elective office by a classified civil servant. 1974 Op. Att'y Gen. No. 74-071; 1972 Op. Att'y Gen. No. 72-109; 1971 Op. Att'y Gen. No. 71-040; 1969 Op. Att'y Gen. No. 69-150. You have informed me that the elections for municipal council members in question here are partisan. Therefore, a special deputy sheriff may not hold the office of council member if the deputy sheriff is in the classified civil service.

A special deputy is a "deputy" sheriff as that term is used in R.C. 311.04, which creates the position. 1977 Op. Att'y Gen. No. 77-027. The Ohio Supreme Court has held that deputy sheriffs are members of the unclassified civil service only when they are assigned to and perform such duties that they hold a fiduciary or administrative relationship to the sheriff. In re Termination of Employment, 40 Ohio St. 2d 107 (1974). As such, unless the individual here holds a fiduciary or administrative relationship to the sheriff, he or she is in the classified civil service and is barred by R.C. 124.57 from holding a partisan municipal council position.

A deputy sheriff who is assigned ordinary and usual police functions does not perform the duties required of a fiduciary. A fiduciary relationship is "one in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence. . . ." In re Termination,

supra, at 115. Thus, although there may be cases where a deputy is in a fiduciary relationship with the sheriff—such as where he or she has charge of bond deposits or acts as a receiver of property—the "question is one of fact, not of title, and can only be answered by examination of the duties assigned to and performed by the deputy." Id. at 115. Inasmuch as I have not been given any facts upon which to base a determination as to whether or not the individual in question here holds a fiduciary relationship with the sheriff, I will assume that he or she does, and I will proceed with the second question in the consideration of the simultaneous holding of public positions, namely: do the empowering statutes of either office limit the outside employment permissible?

R.C. 311.04 provides that the sheriff may appoint one or more deputies, and further states that "[n]o judge of a county court or mayor shall be appointed a deputy." Clearly, this statute does not prohibit the holding of outside employment other than as judge or mayor.

With respect to the office of municipal council member, the relevant statute is R.C. 731.02, which states in pertinent part:

> Each member of the legislative authority shall be an elector of the city, shall not hold any other public office, except that of notary public or member of the state militia, and shall not be interested in any contract with the city, and no such member may hold employment with said city. A member who ceases to possess any of such qualifications. . .shall forthwith forfeit his office. (Emphasis added.)

A member of a municipal council may not, under R.C. 731.02, also be employed as a special deputy sheriff if the latter position constitutes a "public office." A good discussion of whether a deputy sheriff holds a public office or an employment may be found in 1970 Op. Att'y Gen. No. 70-035. I adopt the conclusion set forth in that opinion—that the position of special deputy sheriff is merely an employment, not an office. See also Pistole v. Wiltshire, 90 Ohio L. Abs. 525 (C.P. Scioto County 1961); State ex rel. Wolf v. Shaffer, 6 Ohio N.P. (n.s.) 219 (C.P. Fulton County 1906). I am not unaware of the language in 1977 Op. Att'y Gen. No. 77-078 which states that a deputy sheriff holds an "office." However, my conclusion that a deputy sheriff holds an employment, and not an office, does not affect the result in that opinion since neither of the positions under consideration in that opinion was a check upon, or subordinate to, the other. Accordingly, R.C. 731.02 presents no bar to the concurrent holding of office as municipal council member and employment as a special deputy sheriff.

The third and fourth questions which must be answered in the negative before finding public positions compatible constitute the common law test of incompatibility. The common law test asks whether one office is subordinate to or a check upon the other, and whether it is physically impossible for one person to hold both positions. State ex rel. Attorney General v. Gebert, 12 Ohio C.C. (n.s.) 274, 276 (Cir. Ct. Franklin County 1909).

Before addressing this issue, it is incumbent upon me to resolve the conflict in opinions of the Attorney General with regard to the question of whether or not the common law test of incompatibility has application to a situation in which the positions are not both "offices." In several opinions, it has been stated or implied that the individual holding two public positions must be an officer with respect to each before the common law rule of incompatibility comes into play. E.g., 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. On the other hand, many opinions, too numerous for citation, have assumed the applicability of the common law rule where at least one of the positions was an office. In 1965 Op. Att'y Gen. No. 65-150, my predecessor made an extensive review of prior opinions and court decisions, and concluded in the first syllabus, as follows:

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

The foregoing conclusion has been cited with approval in 1973 Op.Att'y Gen. No. 73-035, 1973 Op. Att'y Gen. No. 73-024, and 1966 Op. Att'y Gen. No. 66-072.

I am aware of no Ohio case which decides whether or not both positions must be an "office" before the common law test is applicable. Although most cases speak in terms of "offices" and positions of "public trust," it is not clear that in each case both of the positions in question constituted offices. See, e.g., Allison v. Baynes, 65 Ohio L. Abs. 495 (C.P. Madison County 1953) (discussing the compatibility of a special constable and a deputy sheriff, the court calls the positions "offices," and later calls them "employments"). In Pistole v. Wiltshire, supra, where it was argued that the common law rule was inapplicable because both positions were not offices, the court stated:

> I am not able to find any judicial authority for this statement, and in view of the numerous opinions of the Attorney General over the years holding certain positions incompatible when they did not meet the requirements of a "public office," I am a little hesitant now to hold that this rule applies in all cases. I do feel, however, that it is important in the consideration of whether one office is subordinate to the other, is a check upon the other, or is inconsistent therewith. 90 Ohio L. Abs. at 531-32.

In view of the lack of controlling precedent in this state, I have examined the case law in other jurisdictions which have addressed this issue. The trend appears to be a movement away from a rule which requires that both positions be offices. For example, New Jersey originally held that the common law doctrine is limited to "offices." Wilentz ex rel. Golat v. Stanger, 129 N.J.L. 606, 30 A. 2d 885 (Ct. App. 1943). However, later cases seriously questioned this result, inquiring whether "the public evil which the doctrine of incompatibility was designed to meet is any less because one of the posts is other than an 'office.' " Reilly v. Ozzard, 33 N.J. 529, 166 A. 2d 360, 366 (1960). In Visotcky v. City Council of Garfield, 113 N.J. Super. 263, 273 A. 2d 597 (1971), the court, without directly discussing the issue, held incompatible an "office" and an "employment."

A thorough discussion of case law on the question whether both positions must be offices is set forth in Haskins v. State ex rel. Harrington, 516 P. 2d 1171 (Wyo. 1973), wherein an individual claimed an entitlement to hold the office of member of the board of trustees of a school district and employment by that district as a school teacher simultaneously. Noting that it is the incompatibility of two functions, and not the classification as office or employment, that is important, the court stated at 516 P. 2d 1178, that " '[s]ubordination' is the key word," and concluded that, while there may be cases in which a distinction between office and employment may be important, the decision in that case should not turn on such an issue. Certainly, it is "inimical to the public interest for one in public employment to be the employer and the employee. . . ." Haskins, supra, at 1178. Accord, Tarpo v. Bowman Public School District, 232 N.W. 2d 67 (N.D. 1975). Thus, the common law rule of incompatibility has not been restricted to situations involving two offices, but has been interpreted to apply also to situations involving employment. Cummings v. Godin, 377 A. 2d 1071 (R.I. 1977) (dictum). See also Knuckles v. Board of Eudcation, 272 Ky. 431, 114 S.W. 2d 511 (Ct. App. 1938).

Ohio courts have stated that, where duties and functions are inherently inconsistent, and a contrariety and antagonism "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." State ex rel. Hover v. Wolven, 175 Ohio St. 114, 117 (1963) (quoting 42 Am. Jur. 936, §70). One may not be in a position where duties may be

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.)