

February 7, 2022

The Honorable Martin P. Votel
Preble County Prosecuting Attorney
101 E. Main Street, Courthouse, First Floor
Eaton, Ohio 45320

SYLLABUS:

2022-003

1. A person may serve simultaneously as the Preble County clerk of the court of common pleas and as the clerk of the Eaton Municipal Court, unless local officials determine it is physically impossible for the same person to perform the duties of both offices.
2. The clerk of the Eaton Municipal Court may not be hired as an independent contractor, and is a public employee as defined in R.C. 145.01.
3. There is no statutory limit for the compensation of the clerk of the Eaton Municipal Court.
4. Preble County and the City of Eaton contribute to the compensation of the clerk of the Eaton Municipal Court as set forth in R.C. 1901.31(C)(3) and R.C. 1901.11, which generally provide that the city pays three-fifths of the clerk's compensation and the county pays two-fifths.

5. When the person serving as the clerk of the Preble County Court of Common Pleas is appointed to serve as the clerk of the Eaton Municipal Court, the Preble County Board of County Commissioners may not veto the appointment.



DAVE YOST

OHIO ATTORNEY GENERAL

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

30 East Broad Street, 25th Floor
Columbus, Ohio 43215
www.ohioattorneygeneral.gov

February 7, 2022

OPINION NO. 2022-003

The Honorable Martin P. Votel
Preble County Prosecuting Attorney
101 E. Main Street, Courthouse, First Floor
Eaton, Ohio 45320

Dear Prosecutor Votel:

You have requested an opinion asking certain questions related to whether the Preble County clerk of the court of common pleas may simultaneously serve as the clerk of the Eaton Municipal Court. I have framed your questions as follows:

1. May a person simultaneously serve as the Preble County common pleas clerk and as the Eaton municipal court clerk? In other words, are the positions compatible?
2. If the positions are compatible, may the Eaton municipal court clerk be hired as an independent contractor, or must the employment be through a formal public employment arrangement with PERS contributions?
3. If the positions are compatible, is there a limit to the amount of compensation paid to the Eaton municipal court clerk?

4. If the positions are compatible, is there any requirement regarding how the compensation of the clerk positions will be divided between Preble County and the City of Eaton?
5. When the person serving as the clerk of the Preble County Court of Common Pleas is appointed to serve as the clerk of the Eaton Municipal Court, may the Preble County Board of County Commissioners veto the appointment?

I conclude that the two positions are compatible, provided that the local parties determine that it is physically possible for the same person to perform both jobs. I answer your remaining questions below.

I

As background, the Preble County clerk of the court of common pleas is an elected position that serves as the clerk for the Preble County Court of Common Pleas and the 12th District Court of Appeals. R.C. 2303.01 and 2303.03. The duties of the clerk generally include maintaining the books and records of the court and its cases, accepting case filings, collecting fees, and administering oaths. *See* R.C. Chapter 2303. The clerk also has duties relating to registration of motor vehicle titles. *See* R.C. Chapter 4505. The Preble County common pleas clerk is sometimes informally called the county clerk of courts.

The Eaton Municipal Court is created pursuant to R.C. 1901.01. It is based in the City of Eaton, but has jurisdiction throughout all of Preble County.

R.C. 1901.02(B). Despite having jurisdiction throughout Preble County, it is *not* a county-operated municipal court. R.C. 1901.03(F).

The Eaton municipal court clerk is created pursuant to R.C. 1901.31. Because the population of the territory of the court is less than 100,000, the clerk is appointed by the judge of the Eaton Municipal Court. R.C. 1901.31(A)(2)(a). The duties of the clerk are similar to those of the common pleas clerk, and include maintaining the records and docket of the court, collecting fees, and taking oaths and affidavits. R.C. 1901.31(E).

II

I first address whether the positions of the Preble County common pleas clerk and the Eaton municipal court clerk are compatible.

An issue of compatibility arises whenever one person wishes to hold simultaneously two or more positions of public service. The following seven questions are used to determine if two positions are compatible:

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?

2021 Op. Att’y Gen. No. 2021-005, Slip Op. at 2; 2-19 to 2-20; 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. 2021 Op. Att’y Gen. No. 2021-005, Slip Op. at 2; 2-19 to 2-20; 2013 Op. Att’y Gen. No. 2013-008, at 2-78.

The portions of questions six and seven that relate to local provisions and regulations are for local officials to answer. 2019 Op. Att’y Gen. No. 2019-020, Slip Op. at 5-6; 2-151. For the purposes of this opinion, I assume that no local provision, resolution, ordinance or departmental regulation prohibits the dual service in question.

A

Question one asks whether one of the positions is in the classified service for purposes of R.C. 124.57. If one of the positions is in the classified service, the other position may not constitute partisan activity. R.C. 124.57(A). Here, neither position is in the classified

service. As an elected official, the Preble County common pleas clerk is in the unclassified service. R.C. 124.11(A)(1). The Eaton municipal court clerk is also in the unclassified service. *See* 2014 Op. Att’y Gen. No. 2014-002, Slip Op. at 2; 2-9. Because neither position is classified, the prohibition in R.C. 124.57 does not apply.

B

Question two asks whether there are any statutes that prohibit joint service in both positions. One statute (R.C. 1901.31(A)(2)(c)) is potentially prohibitory, but a close analysis reveals no prohibition.

R.C. 1901.31(A)(2)(c) states, in relevant part:

In the Auglaize county, Brown county, Holmes county, Perry county, Putnam county, and Sandusky county municipal courts, the clerks of courts of Auglaize county, Brown county, Holmes county, Perry county, Putnam county, and Sandusky county shall be the clerks, respectively, of the Auglaize county, Brown county, Holmes county, Perry county, Putnam county, and Sandusky county municipal courts and may appoint a chief deputy clerk for each branch office that is established pursuant to section 1901.311 of the Revised Code, and assistant clerks as the judge of the court determines are necessary, all of whom shall receive the

compensation that the legislative authority prescribes.

R.C. 1901.31(A)(2)(d) contains a similar provision for the clerk of the Columbiana County municipal court.

Because R.C. 1901.31(A)(2)(c) and (d) state that in seven specified counties the common pleas clerk shall also serve as the municipal court clerk, the statute could potentially be read as prohibiting other common pleas clerks from simultaneously serving as municipal court clerks. This argument comes from the statutory construction canon of *expressio unius est exclusio alterius*—that the expression of one thing in a statute implies the exclusion of the other. *See, e.g., State v. Droste*, 83 Ohio St.3d 36, 39, 697 N.E.2d 620 (1998).

I conclude, however, that R.C. 1901.31(A)(2) does not prohibit other common pleas clerks from serving as municipal court clerks for two reasons. First, the statute states that in the seven specified counties the seven common pleas clerks *shall* serve as the municipal court clerks. The use of “shall” leaves open the possibility that in other counties the common pleas clerk *may* serve as the municipal court clerk. Second, I read the statute as setting forth who serves as the municipal court clerk in certain specified situations. The statute does not forbid anything, and the statute permits no strong negative inference. The Revised Code contains many provisions that apply only to a specific municipal court or municipal court clerk. *See* R.C. 1901.01; 1901.02; 1901.31. I do not view these provisions as indicating an intent of the legislature to forbid all other counties from making a choice that the statute does not

prohibit. *See, e.g., Ford v. United States*, 273 U.S. 593, 611, 47 S.Ct. 531, 71 L.Ed. 793 (1927) (*expressio unius* “properly applies only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference that that which is omitted must be intended to have opposite and contrary treatment”); *Baltimore Ravens, Inc. v. Self-Insuring Emp. Evaluation Bd.*, 94 Ohio St.3d 449, 455, 764 N.E.2d 418 (2002) (*expressio unius* “is not an interpretive singularity but merely an aid to statutory construction, which must yield whenever a contrary legislative intent is apparent.”).

Therefore, I conclude that there are no statutes that prohibit the same person from serving as the Preble County common pleas clerk and the Eaton municipal court clerk.

C

Question three asks whether one of the positions is subordinate to, or otherwise a check on, the other. A common pleas clerk, as an elected official, answers to the citizens of the county. R.C. 2303.01; *see* 2003 Op. Att’y Gen. No. 2003-006, at 2-32 (county elected officials are responsible to the citizens of the county). The Eaton municipal court clerk is appointed by, and responsible to, the judge of the Eaton Municipal Court. R.C. 1901.31(A)(2)(a); *see* 2014 Op. Att’y Gen. No. 2014-002, Slip Op. at 4; 2-11. The positions operate independently of each other, and neither is required to assign duties to or supervise the other. Therefore,

neither position is subordinate to, or in any way a check upon, the other.

D

Question four asks whether it is physically possible for one person to perform both positions. For example, it is physically impossible to perform both positions if they have duties that must be performed at the same time. 2004 Op. Att’y Gen. No. 2004-051, at 2-438.

Physical possibility to perform both positions is a factual question that the Attorney General leaves for the parties involved to address, because they best understand the time demands of each job. *E.g.*, 1989 Op. Att’y Gen. No. 89-022, at 2-105. The person “must be certain 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. For elected officials, “the test of physical impossibility is to be considered as one of fact rather than one of law to be determined largely by the officers’ own sense of propriety tempered by a proper regard for the interests of the public.” 1941 Op. Att’y Gen. No. 41-3869, at 447-448.

Although the question of physical possibility is one for local officials to answer, thoughtful consideration should be given as to whether one person could properly fulfill both positions. A municipal court clerk, or a deputy, is required to be “in attendance at all sessions of the municipal court, although not necessarily in the courtroom.” R.C. 1901.31(J). The duties of a common pleas clerk do not include this express requirement that the clerk or a deputy be in attendance

during all sessions of court, but many of the duties of the clerk necessarily require that the clerk or a deputy be in close proximity to the common pleas court. *See, e.g.,* R.C. 2303.06 through 2303.09. The Preble County Court of Common Pleas and the Eaton Municipal Court are located in separate buildings about two miles apart, and the courts presumably have sessions at overlapping times. Particularly in a smaller county like Preble where the clerks have few or no deputies, the parties involved should carefully consider whether one person can properly perform the duties of both clerk positions.

E

Question five asks whether there is an impermissible conflict between the two positions. 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.

I have reviewed the duties of both a common pleas clerk and a municipal court clerk, and I find no impermissible conflicts of interest.

The duties of both clerk positions are quite similar and include maintaining the books and records of the court, accepting case filings, collecting fees, and administering oaths. R.C. Chapter 2303; R.C. 1901.31. The duties of a municipal court clerk also expressly include all duties of a common pleas clerk “so far as they are

applicable.” R.C. 2303.31; *see also* R.C. 1901.02(A) (municipal courts are courts of record). In sum, the clerks of each court maintain the records of the court and the cases filed in it. The duties are in many ways identical, just with different court cases.

In most instances these duties will not overlap with each other—they involve different cases in different courts. In some rare instances, it may be possible that a case in one court will relate to a case in the other court. In such an instance, however, there would still be no impermissible conflict of interest between the duties of the two clerk positions. A clerk of court’s duties involving cases are largely ministerial, meaning that they involve no discretion on the part of the clerk. *See* 2014 Op. Att’y Gen. No. 2014-002, Slip Op. at 6-7; 2-13 to 2-14 (clerks have “no ability to influence the outcome of a particular case and [their] involvement with individual cases is largely ministerial”). My predecessors have long held that ministerial duties do not create impermissible conflicts of interest, and in the rare instance where two offices have opposing ministerial duties, “there is a presumption that [the official] will perform her duties in a regular and lawful manner.” *Id.* at 2-14; *see State ex rel. Speeth v. Carney*, 163 Ohio St. 159, 186, 126 N.E.2d 449 (1955); *see also* 2011 Op. Att’y Gen. No. 2011-043, at 2-353 to 2-354.

Moreover, the Revised Code also indicates that the legislature recognizes that the same person serving as clerk for two courts does not create an impermissible conflict of interest. Clerks of common pleas courts also serve as the clerk for the court of appeals in that county, even though common pleas court cases are

appealed to the court of appeals. R.C. 2303.03. And, as discussed above, for certain counties, the Revised Codes *requires* that the common pleas clerk also serve as the municipal court clerk. R.C. 1901.31(A)(2)(c).

One potential case-conflict is of particular note: in the event that there is litigation regarding how the costs of a municipal court are proportioned between various political subdivisions, the common pleas court has jurisdiction over such a case. R.C. 1901.026(C). Again, however, any duties of the common pleas clerk in this instance would be ministerial, and the clerk is presumed to fulfill them lawfully.

Nor are there any significant budgetary conflicts. The Preble County common pleas court is funded out of the county budget, *see* R.C. 307.01(B), and the Eaton municipal court is funded out of the budgets of the political subdivisions (municipalities and townships) it serves. R.C. 1901.026. At the highest level, the county and political subdivisions divide tax revenue among themselves, which means there could be a limited conflict over tax revenues. *See generally* R.C. Chapter 5705. But this conflict would be filtered through several-different levels of government, and the clerks would not appear directly before the county budget commission. Previous Attorney General opinions have found that similar conflicts of interest are remote and speculative, and do not make the positions incompatible. *See, e.g.*, 2013 Op. Att’y Gen. No. 2013-002, at 2-25; 2004 Op. Att’y Gen. No. 2004-051, at 2-443. In accordance with these prior opinions, I find that no budgetary conflict of interest exists in this case.

Therefore, I conclude that there are no impermissible conflicts of interest between the positions of the Preble County common pleas clerk and the Eaton municipal court clerk.

*

Because the positions pass all seven parts of compatibility test—assuming that there are no local regulations that prohibit holding both positions, and that the local parties determine that it is physically possible for the same person to perform both jobs—I conclude that the positions are compatible.

III

Having concluded that the two positions are compatible, I now turn to your other questions.

A

You ask “must the municipal job be a formal public employment arrangement with PERS contributions, or may the clerk form an L.L.C. and enter an independent contractor (1099) arrangement with the municipal court?”

Occasionally some individuals who perform services for the state and its subdivisions are considered independent contractors. *See* Ohio Adm. Code 145-1-42. These individuals are generally hired for specific tasks and paid a set fee per task, instead of an hourly-rate or salary. They are not eligible for fringe benefits. *See, e.g.,* 2007 Op. Att’y Gen. No. 2007-046,

at 2-455 to 2-456 (individuals who perform certain real estate appraisals and auctions for county sheriffs are independent contractors).

These positions are a far cry from the Eaton municipal court clerk, however. The clerk is created by R.C. 1901.31, which states that “[t]he clerk and deputy clerks of a municipal court shall be selected, be compensated, give bond, and have powers and duties as follows.” The clerk is appointed by the judge of the court. R.C. 1901.31(A)(2)(a). The clerk has the right to health insurance coverage for holding the position. R.C. 1901.312. The clerk’s duties are not one-off tasks, and she is not paid a fee per task. Moreover, as creatures of statute, the municipal court and its clerk have only those powers assigned to them by statute. 2021 Op. Att’y Gen. No. 2021-008, Slip Op. at 2; 2-33; 1980 Op. Att’y Gen. No. 80-073, at 2-291. R.C. 1901.31 makes no mention of hiring the clerk as an independent contractor, and thus the municipal court may not do so.

Participation in the Ohio Public Employees Retirement System is governed by R.C. Chapter 145. The Eaton municipal court clerk holds a non-elective public office, and as such is a public employee as defined in R.C. 145.01(A). Participation in PERS is generally compulsory for public employees. R.C. 145.03. In rare cases, there are some exceptions to compulsory participation in PERS—for example, if the employee’s earnings are also subject to social security tax the employee may opt out of PERS. R.C. 145.034. The decision to opt-out, however, is the employee’s, not the employer’s. As such, unless the

employee qualifies for an opt-out and chooses to opt-out, the municipal court clerk participates in PERS. *See also* 1952 Op. Att’y Gen. No. 52-1872, at 713, syllabus 4 (appointed municipal court clerks are public employees as defined in now-R.C. 145.01).

B

You ask whether there is a limit to the amount of compensation that may be paid to the Eaton municipal court clerk.

The person or entity that sets the salary for the Eaton municipal court clerk is set forth in R.C. 1901.31(C)(1). If the revenue of the court exceeds its expenditures for the previous year, the presiding judge of the court prescribes the clerk’s salary. If the revenue of the court is less than its expenditures, the Eaton city council prescribes the salary. *See also* R.C. 1901.03(B). The statute does not contain a limit on the salary.

You ask specifically if the salary limit provided in R.C. 1901.31(A)(2)(c) applies to the Eaton municipal court clerk. This provision provides that for six-specified counties the common pleas clerk also serves as the municipal court clerk, and provides the clerk an additional salary equal to that of one-fourth the salary of the clerk of the court of common pleas. By its plain language, this provision applies only to the six-specified courts, and has no application to the Eaton Municipal Court.

Although there is no specific statutory limit to the amount of compensation that may be paid to the Eaton municipal court clerk, the amount will still be limited by the overall budgeting process of the county and city. *See generally* R.C. Chapter 5705.

C

You ask how the salary of the Eaton municipal court clerk will be divided between Preble County and the City of Eaton.

The means of paying the compensation of the Eaton municipal court clerk is set forth in R.C. 1901.31(C)(3), and incorporates R.C. 1901.11. R.C. 1901.11 generally provides that three-fifths of a municipal court clerk's salary is paid from the relevant city's treasury and two-fifths from the county's treasury. *See also* 2016 Op. Att'y Gen. No. 2016-020, Slip Op. at 3-4; 2-206. Details are provided in R.C. 1901.11, but for purposes of your question, the manner in which the Eaton municipal court clerk is paid is not impacted by the fact that the same individual is also serving as the Preble County common pleas clerk.

D

You ask whether the Preble County board of county commissioners can veto the appointment of the Preble County common pleas clerk as the clerk of the Eaton municipal court clerk.

The means by which the Eaton municipal court clerk is appointed is set forth in R.C. 1901.31(A)(2)(a), which states that “the clerk shall be appointed by the court.” This statute provides no role for the board of county commissioners. Moreover, the common pleas clerk is an elected official. And no provision of the Revised Code gives a board of county commissioners the power to limit what outside jobs the person serving as the common pleas clerk may hold. *See generally* R.C. Chapters 305, 307, and 2303. Therefore, the board of county commissioners cannot veto the appointment.

E

Finally, you ask whether Ohio’s ethics laws impose any restrictions on a person simultaneously serving as a common pleas clerk and as a municipal court clerk. The Ohio Ethics Commission issues advisory opinions addressing the application of Ohio’s ethics laws. The Attorney General traditionally refrains from issuing formal opinions applying these laws. *E.g.*, 2011 Op. Att’y Gen. No. 2011-043, at 2-352, n.2. I refer you to the Ohio Ethics Commission regarding the application of the ethics laws.

Conclusion

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

1. A person may serve simultaneously as the Preble County clerk of the court of common pleas and as the clerk of the Eaton Municipal Court,

unless local officials determine it is physically impossible for the same person to perform the duties of both offices.

2. The clerk of the Eaton Municipal Court may not be hired as an independent contractor, and is a public employee as defined in R.C. 145.01.
3. There is no statutory limit for the compensation of the clerk of the Eaton Municipal Court.
4. Preble County and the City of Eaton contribute to the compensation of the clerk of the Eaton Municipal Court as set forth in R.C. 1901.31(C)(3) and R.C. 1901.11, which generally provide that the city pays three-fifths of the clerk's compensation and the county pays two-fifths.

5. When the person serving as the clerk of the Preble County Court of Common Pleas is appointed to serve the clerk of the Eaton Municipal Court, the Preble County Board of County Commissioners may not veto the appointment.

Respectfully,

A handwritten signature in blue ink that reads "Dave Yost". The signature is written in a cursive, flowing style with a large, prominent initial "D".

DAVE YOST
Ohio Attorney General