

November 21, 2016

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

SYLLABUS:

2016-037

1. A secret service officer appointed pursuant to R.C. 309.07 may serve as a member of a board of township trustees, provided that in his capacity as a township trustee he refrains from participating in any discussions, deliberations, negotiations, or votes under R.C. 309.09(B) to retain legal counsel other than the prosecuting attorney to advise or represent the township, and in his capacity as a secret service officer he shall not be permitted or required to conduct any criminal investigatory activities or functions in connection with criminal charges that may be brought by the prosecuting attorney or other prosecuting authority against officers or employees of the township.
2. A legal secretary appointed pursuant to R.C. 309.06 may serve as a member of a board of township trustees, provided that in her capacity as a township trustee she refrains from participating in any discussions, deliberations, negotiations, or votes under R.C. 309.09(B) to retain legal counsel other than the prosecuting attorney to advise or represent the township.



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November 21, 2016

OPINION NO. 2016-037

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 the office of trustee of a township in Athens County is compatible with employment within the office of a prosecuting attorney.<sup>1</sup> Specifically, you ask whether a person may serve as a trustee of a township in Athens County while employed at the same time as either

- a secret service officer appointed pursuant to R.C. 309.07, or
- a legal secretary appointed pursuant to R.C. 309.06.

Whether two or more public offices or positions are compatible depends upon the answers to the following seven questions:

1. Is either of the positions a classified employment for purposes of R.C. 124.57?
2. Does a constitutional provision or statute prohibit the holding of both positions at the same time?
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 an impermissible conflict of interest between the two positions?
6. Are there local charter provisions, resolutions, or ordinances that are controlling?

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<sup>1</sup> No township in Athens County has adopted a limited home rule government under R.C. Chapter 504.

7. Is there a federal, state, or local departmental regulation applicable?

1979 Op. Att’y Gen. No. 79-111.

“All seven questions must yield answers in favor of compatibility in order to conclude that two positions are compatible.” 2013 Op. Att’y Gen. No. 2013-008, at 2-78.

At the outset we will address questions six and seven for these positions. Question six focuses on the applicability of charter provisions, resolutions, and ordinances, and question seven concerns federal, state, and local departmental regulations. There are no applicable charter provisions, ordinances, or state or federal regulations prohibiting a secretary or a secret service officer employed by a prosecuting attorney from serving as a township trustee. Whether there is an applicable local departmental regulation or township resolution applicable to these employment arrangements is a matter for local officials to determine. We will assume, for the purpose of this opinion, that there are no such regulations or resolutions.

### **Compatibility of Secret Service Officer and Township Trustee**

The first question of the compatibility analysis concerns the provisions of R.C. 124.57. This statute prohibits, in part, and except as provided therein, an officer or employee in the classified civil service of the state, the several counties, cities, city school districts, and civil service townships from holding partisan political offices or engaging in partisan political activities. R.C. 124.57(A). Thus, we must ascertain the civil service classification status of the office of township trustee and secret service officer.

As an elected official, R.C. 505.01, a trustee of a township located in Athens County is an unclassified position. R.C. 124.11(A)(1). R.C. 309.07 grants a prosecuting attorney authority to appoint secret service officers “whose duty it shall be to aid him in the collection and discovery of evidence to be used in the trial of criminal cases and matters of a criminal nature.” You have informed us that the secret service officers you have appointed are within the unclassified civil service under the civil service classification plan adopted for the officers and employees of Athens County government. Consequently, the strictures in R.C. 124.57 do not apply to the persons serving in these positions and do not prevent a person from serving simultaneously as an Athens County township trustee and secret service officer in your employ.

The second question asks whether a constitutional or statutory provision prohibits a person from holding two positions simultaneously. Our research discloses no provision of the Ohio Constitution or an enactment of the General Assembly within the Revised Code that prohibits a township trustee from serving at the same time as a secret service officer appointed pursuant to R.C. 309.07 by a prosecuting attorney. This question is thus resolved in favor of compatibility.

Question three asks whether one position is subordinate to, or in any way a check upon, the other. A township trustee is an elected officeholder. R.C. 505.01. A township trustee serves on behalf of, and is answerable to, the township electorate. 2016 Op. Att’y Gen. No. 2016-034, slip op. at 9; 2014 Op. Att’y Gen. No. 2014-032, at 2-279. A secret service officer appointed by the prosecuting attorney pursuant to R.C. 309.07 is accountable to the prosecuting attorney. Thus, neither position is subordinate to or a check upon the other position. Question three, therefore, also is resolved in favor of compatibility.

The fourth question of the compatibility test asks whether it is physically possible for one person to perform the duties of both positions. This is a factual question that is best addressed by the interested local officials and the person who wishes to serve as a township trustee while also serving as a secret service officer. Being closer to the situation, they may be capable of assessing more accurately the time constraints and demands imposed upon the positions in question. *See* 2009 Op. Att’y Gen. No. 2009-010, at 2-90. If these parties determine that it is physically possible for a person to perform competently the duties of township trustee and secret service officer, a person may serve in each of these positions at the same time.

Finally, question five asks whether there is a conflict of interest between the duties, powers, or responsibilities assigned to each of the two public positions. A person may not hold two public positions simultaneously if he would be subject to divided loyalties, conflicting duties, or the temptation to act other than in the public’s best interest. 2009 Op. Att’y Gen. No. 2009-005, at 2-30. A conflict of interest exists if the duties or responsibilities of one of the positions are of such a nature as to influence improperly the exercise or performance of the duties and responsibilities attached to the other position. But as we also have explained in our opinions,

[t]he mere existence of a conflict of interest, however, does not automatically render two positions incompatible. When “the possibility of conflict is remote and speculative” and can be mitigated or avoided, “the conflict of interest rule is not violated.” 1993 Op. Att’y Gen. No. 93-016, at 2-91; *see also* 2004 Op. Att’y Gen. No. 2004-019, at 2-158 (“[w]here it can be demonstrated that the conflicts may be sufficiently avoided or eliminated entirely, the person may serve in both positions”).

2016 Op. Att’y Gen. No. 2016-034, slip op. at 12. Thus, the conflict of interest question requires that we catalog and evaluate the nature and scope of the duties, powers, and responsibilities conferred upon the office of township trustee and the position of secret service officer.

The powers, duties, and responsibilities of a board of township trustees relate primarily to exercising the legislative power of the township in many varied contexts, 1994 Op. Att’y Gen. No. 94-013, at 2-60 (“[t]ownship trustees are statutorily vested with various powers and duties associated with the government of the township”), as set out in the thirteen chapters of R.C. Title 5 (townships) and several other titles of the Revised Code. A board of township trustees is

authorized to appoint a township administrator, R.C. 505.031; maintain an inventory of township supplies, R.C. 505.04; maintain a list of building nuisances, R.C. 505.06; acquire and dispose of real and personal property, R.C. 505.10; exchange, transfer, and lease real property, R.C. 505.104; R.C. 505.11; provide for solid waste facilities, R.C. 505.12; purchase, construct, or acquire township parks, public library buildings, and other public areas, R.C. 505.26; and provide fire and police protection to the township's residents, R.C. 505.37-.39; R.C. 505.43. In the exercise of its legislative authority a board of township trustees may adopt resolutions, *see, e.g.*, R.C. 505.371; R.C. 519.02. As a taxing authority, a board of township trustees is required to adopt a tax budget for each fiscal year, R.C. 5705.28, submit the tax budget to the county auditor, R.C. 5705.30, who in turn presents the tax budget to the county budget commission, R.C. 5705.31. A board of township trustees is authorized to levy taxes upon the real and personal property within the township for the benefit of the township electorate, R.C. 5705.01(C); R.C. 5705.03(A).

A board of township trustees possesses various powers and duties regarding the implementation and enforcement of township zoning regulations. *See* R.C. Chapter 519 (township zoning). A board of township trustees may construct, repair, or otherwise improve public roads within its jurisdiction. R.C. 5571.01; R.C. 5573.01; 1987 Op. Att'y Gen. No. 87-046, at 2-302 ("authority to construct, repair, maintain, and improve roads and highways within a township is conferred upon a board of township trustees by R.C. Chapters 5571 and 5573").

R.C. 309.07 authorizes a prosecuting attorney to appoint secret service officers for the purpose of assisting the prosecuting attorney in the collection and discovery of evidence that will be used in the trial of criminal cases and matters of a criminal nature. The statute does not further delineate the activities that a secret service officer may perform for a prosecuting attorney in accomplishing the investigatory function. *See generally* 1980 Op. Att'y Gen. No. 80-088, at 2-344 ("[a] secret service officer attempts to gather evidence which may eventually lead to an arrest; however, he does not possess the authority to perform the arrest himself"); 1970 Op. Att'y Gen. No. 70-170, at 2-339 ("it is important to understand that a secret service officer is an employee of the prosecuting attorney. His duties are narrowly limited to investigation"); 1957 Op. Att'y Gen. No. 461, p. 131, at 133 ("[t]he duties of a secret service officer are set forth in [R.C. 309.07], and they are simply to aid the prosecuting attorney in the discovery and collection of evidence to be used in the trial of criminal cases and matters of a criminal nature"); 1933 Op. Att'y Gen. No. 1668, vol. II, p. 1532, at 1533 ("[f]rom a reading of the statute, it is clear that the principal duties of such secret service officer are to act as an investigator and to assist the prosecuting attorney in preparing the evidence in criminal cases as distinguished from the legal aspects of the case. There is no indication in this statute that he is to engage in the activities of a police officer or of a deputy sheriff"). We may infer that the General Assembly expects each prosecuting attorney, in the exercise of a reasonable discretion, to identify the areas and types of work that will be performed by each of his secret service officers in the collection and discovery of material, relevant evidence. *See, e.g.*, 1971 Op. Att'y Gen. No. 71-027 (finding compatible the positions of part-time secret service officer and full-time employee of the county engineer or county treasurer; the prosecuting attorney had assigned the secret service officer to investigate

consumer fraud and embezzlement cases in private sector companies and did not authorize him to conduct investigations of any county, city, or township offices). You have informed us that the secret service officers you have appointed assist with your office's investigations of drug offenses and supervise criminal defendants admitted to the Athens County Empowerment Program, a diversion program for low-level offenders who have no record of felonies, and the Athens County Vivitrol Program, which helps persons suffering from heroin and opiate addictions.

We discern the potential for a conflict of interest between the office of township trustee and secret service officer in either of two situations, each of which may be avoided in a way that will permit a person to serve as a township trustee and secret service officer simultaneously. In 2016 Op. Att'y Gen. No. 2016-036 we advised you that an assistant prosecuting attorney may serve as a member of a board of township trustees so long as he takes care, in his capacity as a township trustee, to refrain from participating in all deliberations, discussions, negotiations, or votes under R.C. 309.09(B) to retain legal counsel other than the prosecuting attorney to advise or represent the township. We explained our reasons for that advice, which followed a similar recommendation in 2001 Op. Att'y Gen. No. 2001-027, as follows:

The exercise of this authority by a township trustee who is employed as an assistant prosecuting attorney might be improperly influenced by the assistant's loyalty to the prosecuting attorney. Specifically, the assistant might not wish to approve the township's retention of another attorney, lest that decision disadvantage the prosecuting attorney. This predisposition on the part of the assistant prosecuting attorney thus would mean that, in his capacity as township trustee, he would not ponder or make that decision in a completely disinterested and neutral manner. 2001 Op. Att'y Gen. No. 2001-027, at 2-157; *see also* 1997 Op. Att'y Gen. No. 97-044, at 2-274 (an assistant prosecuting attorney who serves as an administrative hearing officer for a child support enforcement agency (CSEA) may be required to preside over a hearing in which one of the parties is represented by the office of the prosecuting attorney by whom the assistant is employed, and "[i]n this situation, it would be difficult for the [assistant prosecuting attorney], as an administrative hearing officer, to set aside his loyalty to the county prosecuting attorney").

The opinion reasoned, however, that the potential for the foregoing conflict of interest did not render the positions of assistant prosecuting attorney and township trustee incompatible. 2001 Op. Att'y Gen. No. 2001-027, at 2-157. The opinion determined that the township trustees likely would not find it necessary to consider the retention of legal counsel other than the prosecuting attorney on a regular basis. Further, should the township trustees have to consider such a matter, the assistant prosecuting attorney would be able to abstain from having any role in that decision. 2001 Op. Att'y Gen. No. 2001-027, at 2-157 and 2-158 ("the potential for this conflict of interest does not prohibit a person from

serving simultaneously as a township trustee and assistant prosecuting attorney, provided that as a township trustee he does not participate in any deliberations, discussions, negotiations, or votes concerning the township's employment of an attorney other than the prosecuting attorney").

2016 Op. Att'y Gen. No. 2016-036, slip op. at 6 and 7.

The potential for this same conflict of interest exists for a secret service officer who would also serve as a township trustee. Even as an assistant prosecuting attorney might be expected to be influenced unduly by his working relationship with the prosecuting attorney when the board of township trustees of which he is a member considers having legal counsel other than the prosecuting attorney advise or represent the township, so too a secret service officer who also is a township trustee may confront the same dilemma under R.C. 309.09(B). Accordingly, in any instance in which the board of township trustees of which the secret service office is a member considers retaining legal counsel other than the prosecuting attorney to advise or represent the township, the secret service officer, in his capacity as a member of the board of township trustees, shall refrain from participating in all deliberations, discussions, negotiations, or votes by the board in that matter.

The second potential conflict of interest for a secret service officer who would serve as a township trustee is associated with the duties and responsibilities he will carry out for the prosecuting attorney in ferreting out evidence for use in criminal trials and in connection with other criminal matters. In 2016 Op. Att'y Gen. No. 2016-036, slip op. at 7, in reliance upon 2001 Op. Att'y Gen. No. 2001-027, we stated the following regarding a person's dual service as an assistant prosecuting attorney and member of a board of township trustees:

The 2001 opinion also found that the assistant prosecuting attorney would confront a conflict of interest were he to investigate or prosecute criminal offenses associated with the township in which he served as township trustee. For example, an assistant prosecuting attorney might be called upon to prosecute the offense of theft in office, R.C. 2921.41, against other officers or employees of the township, including the other trustees or the assistant himself. 2001 Op. Att'y Gen. No. 2001-027, at 2-156 n.6 The opinion chose to engage the presumption that the prosecuting attorney would ensure that the assistant not be required to prosecute criminal charges brought against any officers or employees of the township, thus eliminating the potential for this untenable conflict of interest. *Id.*

In light of his criminal investigatory responsibilities, a secret service officer is susceptible to this same kind of conflict of interest in his role as a township trustee. His relationship to his fellow trustees and other township officers and employees might cloud or impair his judgment were he required to investigate crimes alleged to have been committed by or against those persons. To avoid this conundrum, a secret service officer who is a member of a board of township trustees shall not be permitted or required to conduct any criminal investigatory

activities or functions in connection with criminal charges that may brought by your office or other prosecuting authority against officers or employees of the township. *Cf.* 1971 Op. Att’y Gen. No. 71-027 (syllabus) (“[t]here is no incompatibility in a full-time employee of the county treasurer or the county engineer serving also as a part-time investigator on the staff of the prosecuting attorney, as long as it is understood that his duties will not involve any investigation of his full-time employer”).

Our examination of the law does not disclose other conflicts of interest that may confront a secret service officer of a prosecuting attorney in connection with his service as a member of a board of township trustees. Accordingly, a secret service officer appointed by a prosecuting attorney pursuant to R.C. 309.07 may serve as a member of a board of township trustees, provided that, in his capacity as a township trustee he refrains from participating in any discussions, deliberations, negotiations, or votes under R.C. 309.09(B) to retain legal counsel other than the prosecuting attorney to advise or represent the township, and in his capacity as a secret service officer he shall not be permitted or required to conduct any criminal investigatory activities or functions in connection with criminal charges that may brought by the prosecuting attorney or other prosecuting authority against officers or employees of the township.

### **Compatibility of Legal Secretary and Township Trustee**

Regarding the application of R.C. 124.57 to the positions of legal secretary and township trustee, you have informed us that the legal secretary position has been placed in the unclassified civil service under the civil service classification plan adopted for the officers and employees of Athens County government. Once again, the office of township trustee, being filled by election, R.C. 505.01; R.C. 124.11(A)(1), is within the unclassified civil service. This means that R.C. 124.57 does not apply to persons serving in either of these positions and does not prevent a person from serving simultaneously as an Athens County township trustee and legal secretary in your employ.

The second question of the compatibility assessment asks whether a constitutional or statutory provision prohibits a person from holding two positions simultaneously. Our research discloses no provision of the Ohio Constitution or an enactment of the General Assembly within the Revised Code that prohibits a township trustee from serving at the same time as a legal secretary within the office of prosecuting attorney appointed pursuant to R.C. 309.06. This question is thus resolved in favor of compatibility.

Question three of the compatibility assessment asks whether one position is subordinate to, or in any way a check upon, the other. A township trustee is an elected officeholder who serves on behalf of, and is answerable to, the township electorate. R.C. 505.01; 2016 Op. Att’y Gen. No. 2016-034, slip op. at 9; 2014 Op. Att’y Gen. No. 2014-032, at 2-279. A legal secretary appointed by the prosecuting attorney pursuant to R.C. 309.06 who serves within his office is accountable to the prosecuting attorney. Thus, neither position is subordinate to or a check upon the other position. Question three, therefore, also is resolved in favor of compatibility.

The fourth question of the compatibility test asks whether it is physically possible for one person to perform the duties of both positions. As mentioned above, this is a factual question that is best addressed by local officials because they may determine more accurately the time constraints and demands imposed upon the positions in question. 2009 Op. Att’y Gen. No. 2009-010, at 2-90.

Finally, we consider whether conflicts of interests will confront a person who serves at the same time as a member of a board of township trustees and legal secretary employed within the office of a prosecuting attorney. A conflict of interest exists if the duties or responsibilities of one of the positions are of such a nature as to influence improperly the exercise or performance of the duties and responsibilities attached to the other position. This aspect of the compatibility evaluation requires that we catalog and appraise the nature and scope of the duties, powers, and responsibilities conferred upon the office of township trustee and the position of legal secretary.

We have summarized the general powers, duties, and responsibilities of a board of township trustees earlier in this opinion. In its enactment of R.C. 309.06, the General Assembly has authorized a prosecuting attorney to appoint to employment within his office “any ... clerks, and stenographers who are necessary for the proper performance of the duties of his office.” The term “clerk” is defined generally as “one employed to keep records or accounts or to perform general office work.” *Merriam-Webster’s Collegiate Dictionary* 231 (11th ed. 2005). A “stenographer” is defined as “a writer of shorthand,” or “a person employed chiefly to take and transcribe dictation,” and “stenography” is “a shorthand esp. written from dictation or oral discourse.” *Id.* at 1222. A “secretary” is “one employed to handle correspondence and manage routine and detail work for a superior,” *id.* at 1122, and a “legal secretary” undertakes the foregoing kind of work within the profession of law. *Black’s Law Dictionary* 1034 (10th ed. 2014).

As in the case of a secret service officer appointed pursuant to R.C. 309.07, R.C. 309.06 does not explicitly delineate the various activities that a clerk or stenographer shall undertake to enable a prosecuting attorney to properly perform the duties of his office. We may infer that the General Assembly expects each prosecuting attorney, in the exercise of a reasonable discretion, to identify and select the kinds of clerical and stenographic work that will be performed by the person or persons he appoints under R.C. 309.06 for that purpose.

The duties and responsibilities typically assigned to a legal secretary bring that position within the language of R.C. 309.06. This is confirmed by the description of the duties and tasks you have assigned to the person appointed to the position of legal secretary within your office. You have informed us that the legal secretary types and formats letters, legal memoranda, pleadings, trial subpoenas, and all other manner of documents needed for the conduct of trials. The legal secretary also maintains the records of restitution ordered by the trial courts, keeps track of violations of community control sanctions by criminal offenders, delivers documents to the clerk of court and the court’s judges, manages the billing system for the county child support

enforcement agency, opens all new cases on the office docket, superintends the prosecuting attorney's web site, opens and distributes mail sent to the prosecuting attorney's office, and serves as a receptionist to persons who arrive at the office seeking assistance.

Comparing the powers and duties of a township trustee with the job responsibilities of the legal secretary in your office leads us to conclude that, with one exception, no conflicts of interest are presented. In their nature and character the ministerial activities performed by the legal secretary are unrelated to the powers and duties of a township trustee, and are unlikely to intersect or influence a trustee's exercise of those powers and duties. The one exception is presented by the possibility that the board of township trustees of which the legal secretary is a member may wish to retain the services of legal counsel other than the prosecuting attorney to advise or represent the township in a particular matter, as authorized by R.C. 309.09(B). Even as an assistant prosecuting attorney might be expected to be influenced unduly by his working relationship with the prosecuting attorney when the board of township trustees of which he is a member considers having legal counsel other than the prosecuting attorney advise or represent the board, *see* 2016 Op. Att'y Gen. No. 2016-036; 2001 Op. Att'y Gen. No. 2001-027, so too a legal secretary employed by the prosecuting attorney who also is a township trustee may well confront the same dilemma under R.C. 309.09(B). Her loyalty to her employer may influence the decision she makes about the question of retaining legal counsel other than her employer to advise or represent the township.

Thus, in any instance in which the board of township trustees of which the legal secretary is a member considers retaining legal counsel other than the prosecuting attorney to advise or represent the township, the legal secretary, in her capacity as a member of the board of township trustees, shall refrain from participating in all deliberations, discussions, negotiations, or votes by the board in that matter. Provided the legal secretary complies with this recommendation, we find compatible the office of member of a board of township trustees and legal secretary appointed by a prosecuting attorney pursuant to R.C. 309.06. Accordingly, a legal secretary appointed pursuant to R.C. 309.06 may serve as a member of a board of township trustees, provided that in her capacity as a township trustee she refrains from participating in any discussions, deliberations, negotiations, or votes under R.C. 309.09(B) to retain legal counsel other than the prosecuting attorney to advise or represent the township.

### **Conclusions**

It is, therefore, our opinion, and you are advised that:

1. A secret service officer appointed pursuant to R.C. 309.07 may serve as a member of a board of township trustees, provided that in his capacity as a township trustee he refrains from participating in any discussions, deliberations, negotiations, or votes under R.C. 309.09(B) to retain legal counsel other than the prosecuting attorney to advise or represent the township, and in his capacity as a secret service officer he shall not be

permitted or required to conduct any criminal investigatory activities or functions in connection with criminal charges that may be brought by the prosecuting attorney or other prosecuting authority against officers or employees of the township.

2. A legal secretary appointed pursuant to R.C. 309.06 may serve as a member of a board of township trustees, provided that in her capacity as a township trustee she refrains from participating in any discussions, deliberations, negotiations, or votes under R.C. 309.09(B) to retain legal counsel other than the prosecuting attorney to advise or represent the township.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE  
Ohio Attorney General