

OPINION NO. 87-002**Syllabus:**

The position of deputy sheriff is incompatible with the positions of village chief of police, deputy marshal, and police officer, where the village is within the same county served by the deputy sheriff.

To: Steve C. Shuff, Seneca County Prosecuting Attorney, Tiffin, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, February 4, 1987

I have before me your request for my opinion concerning whether the position of reserve deputy sheriff is compatible with the position of marshal, deputy marshal, or police officer of a village within the same county.¹

¹ As I stated in 1985 Op. Att'y Gen. No. 85-056 at 2-207:

[T]here is no express statutory authority for the designation of a sheriff's deputy as "regular" or "reserve." R.C. 311.04, which authorizes the appointment of deputies by a sheriff, states simply: "The sheriff may appoint, in writing, one or more deputies." It has, nonetheless, been recognized that a sheriff may appoint deputies for general purposes or for special purposes, and that he may define and limit the duties and powers of certain deputies, consistent with their assignments. See R.C. 3.06; State ex rel. Geyer v. Griffin, 80 Ohio App. 447, 76 N.E.2d 294 (Allen County 1946); 1977 Op. Att'y Gen. No. 77-027.

Two public positions are incompatible if, inter alia, one is subordinate to, or a check upon, the other or if an individual serving in both positions would be subject to a conflict of interest. See State ex rel. Attorney General v. Gebert, 12 Ohio C.C. (n.s.) 274 (Franklin County 1909); 1979 Op. Att'y Gen. No. 79-111. In order to resolve these issues, it is necessary to examine the statutory provisions governing the establishment, powers, and duties of the positions about which you ask.

Deputy sheriffs are appointed by the county sheriff. R.C. 311.04; R.C. 325.17. As the court stated in In Re Sulzmann, 125 Ohio St. 594, 597, 183 N.E. 531, 532 (1932): "The sheriff is the chief law enforcement officer in the county, with jurisdiction coextensive with the county, including all municipalities and townships." See R.C. 311.07 (general powers and duties of the county sheriff). The duties of a deputy sheriff were summarized in In Re Termination of Employment, 40 Ohio St. 2d 107, 114-15, 321 N.E.2d 603, 608-09 (1974) as follows:

Deputy sheriffs are clearly employed by and directly responsible to their sheriffs, who are elected county officials....

...A deputy sheriff may be called upon to serve process upon witnesses (R.C. 3.10, 117.03), and to serve writs and orders such as levys on property, writs of attachment, and summons to jurors. (R.C. 311.17.) He may perform ordinary police functions, such as transporting prisoners (R.C. 339.57), guarding prisoners in the county jail (R.C. 341.05), and exercising the general duties of a peace officer (R.C. 2935.01). For many deputies, a principal duty is to patrol state highways (R.C. 4513.39), while others are assigned as bailiffs in county courts (R.C. 2301.12)....For many, the duties assigned are virtually identical to those assigned to a member of a metropolitan police force or of the State Highway Patrol, or to a bailiff in the civil courts....[T]here are cases where a deputy sheriff is in a true fiduciary relationship with the sheriff, e.g., where a deputy sheriff has charge of deposits of bond (R.C. 2331.16), or acts as a receiver of property (R.C. 2333.22).

A village marshal, or chief of police, is appointed by the village mayor, with the advice and consent of the legislative authority of the village. R.C. 737.15. The legislative authority is empowered to remove the police chief upon charges of misconduct filed by the mayor. R.C. 737.171. R.C. 737.18 provides, in part, that:

Because a reserve deputy is a "deputy" sheriff, appointed pursuant to R.C. 311.04, I will analyze your question in terms of whether a deputy sheriff may hold the position of village marshal, deputy marshal, or police officer. Cf. 1979 Op. Att'y Gen. No. 79-111 (finding a "special" deputy to be a deputy sheriff, appointed pursuant to R.C. 311.04, for purposes of a compatibility analysis).

I note also that the position of village marshal is also designated village chief of police pursuant to R.C. 737.15.

The marshal shall be the peace officer of a village and the executive head, under the mayor, of the police force. The marshal, and the deputy marshals, policemen, or nightwatchmen under him shall have the powers conferred by law upon police officers in all villages of the state, and such other powers, not inconsistent with the nature of their offices, as are conferred by ordinance.

R.C. 737.19(C) further states that:

The marshal of a village shall suppress all riots, disturbances, and breaches of the peace, and to that end may call upon the citizens to aid him. He shall arrest all disorderly persons in the village and pursue and arrest any person fleeing from justice in any part of the state. He shall arrest any person in the act of committing any offense against the laws of the state or the ordinances of the village, and forthwith bring such person before the mayor or other competent authority for examination or trial. He shall receive and execute any proper authority for the arrest and detention of criminals fleeing or escaping from other places or states.

In the discharge of his duties, the marshal shall have the powers and be subject to the responsibilities of constables, and for services performed by him or his deputies, the same fees and expenses shall be taxed as are allowed constables.

Pursuant to R.C. 737.16, the mayor shall appoint all deputy marshals, policemen, night watchmen, and special policemen, as provided for by the legislative authority, and subject to its confirmation. The chief of police has the authority to station and transfer deputies and other police officers, under general rules prescribed by the mayor, R.C. 737.19(A), and deputies and other police officers may be suspended by the chief of police for just cause, R.C. 737.19(B). The mayor shall be notified of any such suspension, and shall determine whether to sustain the charges and, if so, whether to suspend, reduce in rank, or remove the deputy or officer. Id. The officer has, in most instances, a right of appeal to the legislative authority, and in cases of removal, a further appeal to the court of common pleas. Id. See also R.C. 737.18.

I turn now to the question whether there is a conflict of interest between the position of deputy sheriff and the position of village police chief, deputy marshal, or police officer. In 1985 Op. Att'y Gen. No. 85-021, I concluded that the positions of deputy sheriff and chief of police of a township police district within the same county are incompatible, stating at 2-82 to 2-83:

Upon an examination of the law governing these two positions, it is apparent that there is a conflict of interest between the positions of deputy sheriff and township police chief. One person may not simultaneously hold two public positions if he would be subject to divided loyalties and conflicting duties or exposed to the temptation of acting other than in the best interest of the public. See State ex rel. Hover v. Wolven, 175 Ohio St. 114, 191 N.E.2d 723 (1963); Op. No. 79-111. I believe that one person who holds the positions of deputy sheriff and chief of police of a township police district within the same

county would clearly be subject to divided loyalties. As noted above, the county sheriff has jurisdiction coextensive with the county including all townships within the county, In re Sulzmann, and a deputy sheriff is directly responsible to the county sheriff. In re Termination of Employment. Thus, a deputy sheriff and township police officer would both have jurisdiction over territory within the township police district. Since both the deputy sheriff and township police chief have jurisdiction within the township police district, a situation is created in which one person holding the positions of deputy sheriff and township police chief would be subject to divided loyalties. To the extent that law enforcement standards, policies and techniques established by the board of township trustees, see R.C. 505.49, differ from those of the county sheriff, see R.C. 311.07, it is apparent that a person who simultaneously serves as a deputy sheriff and township police chief within the same county would be subject to conflicting duties and interests.

Similarly, a deputy sheriff and village police officer who serve within the same county would both have jurisdiction over territory within the village. Thus, a person who held the positions of deputy sheriff and village peace officer would be subject to divided loyalties. A deputy sheriff is expected to comply with the law enforcement standards, policies, and techniques established by the county sheriff. See generally In re Termination of Employment; State ex rel. Geyer v. Griffin, 80 Ohio App. 447, 76 N.E.2d 294 (Allen County 1946). As chief of police, the village marshal is involved in the establishment of standards, policies, and techniques for the village police department, see generally R.C. 737.18, R.C. 737.19, and all members of the village police department must follow such requirements established by the chief, the mayor, and the legislative authority, id. Thus, to the extent that a deputy sheriff and village peace officer are expected to follow different law enforcement standards, policies, and techniques, I believe that one person serving in both positions would be subject to divided loyalties or a conflict of interest. See 1986 Op. Att'y Gen. No. 86-007 (the positions of parole officer employed by the Department of Rehabilitation and Correction and village police chief are incompatible because the law enforcement standards, policies, and techniques are different for each of the positions in question, and thus, one person serving in both positions would be subject to conflicting duties and interests).

I note further that the county sheriff may call upon the chief executive of any municipal corporation within his county or adjoining counties to furnish law enforcement personnel and equipment to preserve the public peace in the requesting sheriff's county in the event of riot, insurrection, or invasion. R.C. 311.07(B). If the county sheriff should call upon the chief executive of the village to furnish law enforcement personnel and equipment, it is possible that the village police chief or other village police officer would be subject to the supervision of the county sheriff or of a deputy sheriff assigned the responsibility of overseeing the village officers. See Op. No. 85-021. R.C. 311.29(B) also provides that the county sheriff may enter into contracts with municipal corporations in order "to perform any police function, exercise any police power, or render any police service" on behalf of the municipality which the municipality may perform, exercise,

or render. If the sheriff should contract with the village, it is possible that the terms of the contract could place the county sheriff or a deputy sheriff in a position of supervising the village police chief and officers. The village police officers would, thus, be subordinate to the county sheriff or his deputies. Cf. Op. No. 85-021 (concluding that R.C. 505.50, which provides that a board of township trustees may contract with a county sheriff to provide additional police protection, could lead to a situation where the terms of the contract entered into under R.C. 505.50 could place the township police chief in a position of supervising the county sheriff and deputies). See also 1976 Op. Att'y Gen. No. 76-027. The possibility that the county sheriff may call upon the village for police personnel under R.C. 311.07(B) or that the sheriff and village may contract for the sheriff to exercise police powers or functions on behalf of the village under R.C. 311.29(B), so that, in either situation, the county sheriff or a deputy would be in a position of supervising village police officers, may not, standing alone, be sufficient to find that the positions of deputy sheriff and village police chief or officer are incompatible. See generally 1986 Op. Att'y Gen. No. 86-030; Op. No. 79-111. These provisions do, however, pose additional concerns as to the appropriateness of one person holding both positions and lend support for my conclusion that the positions are, indeed, incompatible.

In an analysis of whether two public positions are compatible, the issue whether it is physically possible for one person to perform the duties of both positions must be considered. See State ex rel. Attorney General v. Gebert; Op. No. 79-111. In 1957 Op. Att'y Gen. No. 199, p. 61, the positions of deputy sheriff and village marshal were found to be incompatible on the basis of physical impossibility. 1957 Op. No. 199 states at 63:

It would appear that duties thus imposed on a village marshal are such as to make that office a full time occupation, and to leave no time available to the incumbent for the discharge of the duties of another office.

....

Since the authority of a deputy sheriff extends over the whole county...it is evident that a village marshal could not be maintaining the peace in his village and at the same time be performing duties somewhere else in the county.

See also 1913 Op. Att'y Gen. No. 656, vol. I, p. 421 (concluding that the positions of chief of police of a city and deputy sheriff are incompatible since the chief's duties require all his time, or require that he hold himself ready to respond to the call of duty day or night). Recently, opinions of this office have indicated that the issue of physical impossibility, which must take into account the time demands that each position will make upon the person involved, is a factual determination that, as a general matter, can best be resolved by the interested parties. See, e.g., Op. No. 79-111. But cf. 1985 Op. Att'y Gen. No. 85-042 (syllabus, paragraph two) ("[a] person who serves as a county dog warden on a full time basis and who is on call twenty-four hours a day, may not serve as a part-time village police chief"). Thus, without more facts before me, I am reluctant to follow 1957 Op. No. 199 and hold, as a matter of law, that the positions of deputy sheriff and village chief of police are incompatible on the grounds of physical impossibility. 1957

Op. No. 199 does indicate, however, that there is a substantial question as to the extent to which a village police chief has time available to perform the duties of another public position.

In conclusion, it is my opinion, and you are advised, that the position of deputy sheriff is incompatible with the positions of village chief of police, deputy marshal, and police officer, where the village is within the same county served by the deputy sheriff.