

OPINION NO. 2001-036**Syllabus:**

A member of the legislative authority of the Village of Plymouth may serve simultaneously as a corrections officer at the Mansfield Correctional Institution, provided he does not participate in any deliberations, discussions, negotiations, or votes concerning a contract to provide fire protection or emergency medical services to the correctional institution or the housing of state prisoners in the village's jail or workhouse, the buying of crops from, or the leasing of land to, the correctional institution, or the submission of a proposal to the Department of Rehabilitation and Correction for the construction of a correctional facility within the village.

To: James J. Mayer, Jr., Richland County Prosecuting Attorney, Mansfield, Ohio
By: Betty D. Montgomery, Attorney General, August 27, 2001

You have requested an opinion whether the positions of member of the legislative authority of the Village of Plymouth and corrections officer at the Mansfield Correctional Institution are compatible. The Village of Plymouth is a statutory village that does not have any contracts with the Mansfield Correctional Institution. The office of the Secretary of State has informed us that the members of the village's legislative authority are elected on a nonpartisan ballot.¹

Corrections officers at state correctional institutions are employed by the State of Ohio through the Department of Rehabilitation and Correction (Department). R.C. 5120.38; 15 Ohio Admin. Code 5120-7-01. The managing officer of a state correctional institution is responsible for selecting and appointing the corrections officers at his institution. R.C. 5120.38; rule 5120-7-01(C). Employment as a corrections officer at a state correctional institution, including the Mansfield Correctional Institution, constitutes service in the classified civil service of the state. *See* 15 Ohio Admin. Code 5120-7-06(C); *see also* R.C. 124.11(B) (“[t]he classified service shall comprise all persons in the employ of the state ... not specifically included in the unclassified service”).

2000 Op. Att’y Gen. No. 2000-025 at 2-166 and 2-167 sets forth the following seven questions for determining whether two public positions are compatible:

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 employment in another public position or the holding of another public office?
3. Is one position subordinate to, or in any way a check upon, the other?

¹Candidates for member of the legislative authority of a village with a population of less than two thousand persons are nominated by petition, rather than in a primary election, unless a majority of the village electors petition for a primary election. R.C. 3513.01; R.C. 3513.251; *see also* R.C. 731.09. Candidates nominated by petition appear on a nonpartisan ballot. R.C. 3505.04.

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, resolutions, or ordinances which are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

See also 1979 Op. Att'y Gen. No. 79-111 at 2-367 and 2-368.

The sixth and seventh questions pertain to the applicability of charter provisions, resolutions, ordinances, and federal, state, and local departmental regulations. There are no applicable charter provisions or state or federal regulations in this instance. Whether there is an applicable local departmental regulation, resolution, or ordinance is a matter for the interested persons to determine. We will assume, for purposes of this opinion, that no local departmental regulation, resolution, or ordinance prohibits a person from holding these two positions simultaneously.

The first question of the compatibility analysis requires that we consider the application of R.C. 124.57 to each of these positions. R.C. 124.57 is the statute that prohibits an officer or employee in the classified service of the state, or of a county, city, city school district or civil service township from taking part in a variety of activities that occur as part of the regular political process and are partisan in nature.² See generally *Heidtman v. City of Shaker Heights*, 163 Ohio St. 109, 126 N.E.2d 138 (1955); see also *Gray v. City of Toledo*, 323 F. Supp. 1281 (N.D. Ohio 1971). "Reduced to its simplest terms, R.C. 124.57 does the following: it prohibits a classified civil service employee from running for or holding a partisan political office, or engaging in other partisan political activities, and it prevents a partisan political officeholder from serving simultaneously as a classified civil service employee."³ 2001 Op. Att'y Gen. No. 2001-034, slip op. at 3.

²Division (A) of R.C. 124.57 thus reads as follows:

No officer or employee in the classified service of the state, the several counties, cities, and city school districts thereof, and civil service townships, 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 person solicit directly or indirectly, orally or by letter, or be in any manner concerned in soliciting any such assessment, contribution, or payment from any officer or employee in the classified service of the state and the several counties, cities, or city school districts thereof, or civil service townships; nor shall any officer or employee in the classified service of the state, the several counties, cities, and city school districts thereof, and civil service townships, be an officer in any political organization or take part in politics other than to vote as the officer or employee pleases and to express freely political opinions. (Emphasis added.)

³R.C. 124.57 has been interpreted as prohibiting a classified officer or employee who is covered by the terms thereof from being elected to a public office in a partisan election or accepting a party-sponsored appointment to a public office that is normally filled by partisan election. See 2 Ohio Admin. Code 123:1-46-02(C)(1), (6); 1994 Op. Att'y Gen. No. 94-087 at

R.C. 124.57(A) applies only to officers and employees in the service of "the state, the several counties, cities, and city school districts thereof, and civil service townships." It does not expressly include officers or employees in the service of a village. 1994 Op. Att'y Gen. No. 94-013 at 2-58. R.C. 124.57's prohibition, therefore, does not apply to a member of the Village of Plymouth's legislative authority.

As stated previously, the members of the Village of Plymouth's legislative authority are elected in a nonpartisan election. *See* note one, *supra*. Accordingly, R.C. 124.57 does not prohibit a corrections officer at the Mansfield Correctional Institution from seeking election to, or serving as a member of, the legislative authority of the Village of Plymouth. *See* 2 Ohio Admin. Code 123:1-46-02(C); *see, e.g.*, 1993 Op. Att'y Gen. No. 93-051; 1978 Op. Att'y Gen. No. 78-022. The prohibition of R.C. 124.57 thus does not operate to prevent a person from holding both of those positions at the same time.

The second question asks whether the empowering statutes of either position limit a person from being employed in another public position or holding another public office. Except as provided in R.C. 124.57, no other statute prohibits a state corrections officer in the classified civil service from being employed in another public position or holding a public office. A member of the legislative authority of a village, however, is prohibited by R.C. 731.12 from holding "any other public office" or being interested in "any contract with the village." A member of the legislative authority of a village who accepts another public office or becomes interested in any contract with the village forfeits the office of member of the legislative authority. *Id.*

You have informed us that there are, at this time, no contracts between the Village of Plymouth and the Mansfield Correctional Institution. Thus, there are no instances in which a member of the legislative authority of the Village of Plymouth is interested in any contract between the village and the Mansfield Correctional Institution. It follows, therefore, that R.C. 731.12 does not require a member of the legislative authority of the Village of Plymouth who is employed simultaneously as a corrections officer at the Mansfield Correctional Institution to forfeit the office of member of the legislative authority because of a prohibited interest in a contract between the village and the correctional institution.⁴

2-430. R.C. 124.57 does not, however, prohibit a classified officer or employee from being elected to a public office in a nonpartisan election or accepting appointment to a public office that is normally filled by nonpartisan election. *See* rule 123:1-46-02(C); *see, e.g.*, 1993 Op. Att'y Gen. No. 93-051; 1978 Op. Att'y Gen. No. 78-022.

A classified employee may participate in partisan politics if the terms of a collective bargaining agreement authorize such participation. *See* 1991 Op. Att'y Gen. No. 91-065 (syllabus, paragraph one) ("[t]he terms of a collective bargaining agreement may provide that a classified employee may engage in partisan politics and, pursuant to R.C. 4117.10(A), such terms will prevail over the provisions of R.C. 124.57").

⁴If a contract between the Village of Plymouth and the Mansfield Correctional Institution were proposed, it would be necessary to examine the particular contract to determine whether a member of the village's legislative authority who is employed by the correctional institution would have an interest in the contract. *See generally* 2000 Op. Att'y Gen. No. 2000-015 (examining whether a member of the board of trustees of a regional airport authority is interested directly or indirectly in certain contracts let by the regional airport authority); 1999 Op. Att'y Gen. No. 99-023 (addressing whether a member of a board of education who is employed by an educational service center is interested in a contract for technological services between the board of education and the educational service center).

Let us now turn to the issue whether the position of corrections officer is a “public office” for purposes of R.C. 731.12. The Ohio Supreme Court has set forth the following criteria for determining whether a position is a public office rather than one of public employment:

The usual criteria in determining whether a position is a public office are durability of tenure, oath, bond, emoluments, the independency of the functions exercised by the appointee, and the character of the duties imposed upon him.... The chief and most-decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law. If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office and not an employment.

....

... It is manifest that the functional powers imposed must be those which constitute a part of the sovereignty of the state.

State ex rel. Landis v. Board of Comm’rs, 95 Ohio St. 157, 159-60, 115 N.E. 919, 919-20 (1917); accord *State ex rel. Milburn v. Pethel*, 153 Ohio St. 1, 90 N.E.2d 686 (1950).

In accordance with these criteria, a public position is a public office, rather than a public employment, if the position is conferred by law with duties that require the exercise of continuing, independent, political, or governmental functions, which constitute a portion of the sovereignty of the state. As stated in *State ex rel. Attorney General v. Jennings*, 57 Ohio St. 415, 49 N.E. 404 (1898) (syllabus, paragraph two):

To constitute a public office ... it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law, to be exercised by the incumbent, in virtue of his election or appointment to the office, thus created and defined, and not as a mere employe, subject to the direction and control of some one else.

Accord *State ex rel. Landis v. Board of Comm’rs*.

Applying these criteria to the position of corrections officer at a state correctional institution, it is our opinion that the position is a public employment, rather than a public office. A corrections officer is not elected or appointed to a specific term by law. Instead, a corrections officer is appointed by the managing officer of a correctional institution, and is subject to disciplinary procedures and removal for cause by either the managing officer or the Director of Rehabilitation and Correction (*Director*). R.C. 124.34; R.C. 5120.38; rule 5120-7-01(C); 15 Ohio Admin. Code 5120-7-03 through 5120-7-05. As a general matter, corrections officers are not required to give a bond. See R.C. 5120.08. The duties and responsibilities of a corrections officer are not prescribed by statute, but rather, are assigned by the managing officer of the correctional institution. See R.C. 5120.38; rule 5120-7-01(C). A corrections officer thus performs his assigned duties and responsibilities under the direction of the correctional institution’s managing officer and, ultimately, the Director.⁵ Accord-

⁵Pursuant to R.C. 5120.38, the managing officer of a correctional institution “shall be appointed by the director of the department of rehabilitation and correction and shall be in the unclassified service and serve at the pleasure of the director.” Accord 15 Ohio Admin.

ingly, in the exercise of his duties, a corrections officer does not act independently in the performance of a governmental function. A corrections officer merely aids the managing officer of a correctional institution and the Director in discharging their responsibilities and functions by performing such duties and functions as may be assigned by the managing officer.

Because the position of corrections officer at the Mansfield Correctional Institution is not a public office, R.C. 731.12 does not prohibit someone who is employed in that position from serving as a member of the legislative authority of the Village of Plymouth. Therefore, question two of the compatibility test may be answered in the negative.

The third question asks whether one position is subordinate to, or in any way a check upon, the other. These two positions operate independently of each other, and neither is required to assign duties to, or supervise, the other. Neither position, therefore, is subordinate to, or in any way a check upon, the other.

The fourth question asks whether it is physically possible for one person to perform the duties of both positions. This is a factual question that is best answered by the interested persons because they may more precisely determine the time constraints imposed by each position. 1999 Op. Att'y Gen. No. 99-027 at 2-177. It seems likely, however, that the duties of these two public positions can be discharged competently by the same person if there is no direct conflict in the working hours of each position.⁶

The fifth question asks whether there is a conflict of interest between the two positions.⁷ A person may not hold two public positions simultaneously if he would be subject to

Code 5120-7-01(C)(2). *See generally* Ohio Const. art. VII, § 2 (“[t]he directors of the penitentiary shall be appointed or elected in such manner as the general assembly may direct”).

⁶A state corrections officer may be ordered back to work due to some unusual or emergency situation. *See* 15 Ohio Admin. Code 5120-7-07. “When ordered back to work due to some unusual or emergency situation, reporting is not optional.” Rule 5120-7-07(D). If a corrections officer who serves as a member of the legislative authority of a village is required to report back to work for an extremely long period of time, a direct conflict in the working hours of the two positions may occur.

However, because corrections officers are ordered back to work in unusual or emergency situations, it seems unlikely that a corrections officer will be ordered to report back to work, or that he will be required to report back to work for an extremely long period of time. *See generally* rule 5120-7-07(F) (“[e]ach employee who is ordered back to work ... and reports, shall receive, at the minimum, call-back pay at an amount equal to four times his/her total rate of pay”). Moreover, an elected public officer, such as a member of a village legislative authority, is not required to devote particular hours to his duties; instead, he schedules his work as he finds necessary to fulfill his responsibilities. 1990 Op. Att'y Gen. No. 90-014 at 2-57. Hence, the fact that a state corrections officer may be required to report back to work for a long period of time does not make it physically impossible for one person to perform the duties of corrections officer at the Mansfield Correctional Institution and member of the legislative authority of the Village of Plymouth.

⁷R.C. 102.08(A) authorizes the Ohio Ethics Commission to render advisory opinions regarding the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43. In light of this authority, the Attorney General will refrain from interpreting such provisions by way of a formal opinion. 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph three). Therefore, questions concerning the application of these provisions in the

divided loyalties and conflicting duties or be exposed to the temptation of acting other than in the best interest of the respective offices or agencies he serves. 2000 Op. Att'y Gen. No. 2000-025 at 2-168.

There are several situations in which a member of the legislative authority of the Village of Plymouth who serves simultaneously as a corrections officer at the Mansfield Correctional Institution could be subject to a conflict of interest. Pursuant to R.C. 9.60(C), the village and the State of Ohio are authorized to enter into a contract whereby the village provides fire protection or emergency medical services to the correctional institution. The village may also buy crops from, or rent land for the production of crops to, the correctional institution. R.C. 5120.19(A). Finally, the village may submit a proposal to the Department for the construction of a facility⁸ in the territory of the village, 15 Ohio Admin. Code 5120-5-12; *see also* R.C. 5120.422, or may enter into a contract with the Department for the housing of state prisoners in the village's jail or workhouse, R.C. 753.16; R.C. 5120.10(D)(7); R.C. 5120.161.

If a person who serves as a member of the legislative authority of the Village of Plymouth and corrections officer at the Mansfield Correctional Institution were required to discuss, or to deliberate, negotiate, or vote upon, any of the foregoing matters involving the correctional institution or Department, it would be difficult for the person to set aside his loyalty to the correctional institution and Department. Such a predisposition of loyalty could prevent the person from making completely objective decisions. *See* 1997 Op. Att'y Gen. No. 97-044 at 2-274. Further, the person, as a member of the legislative authority, might be unable to perform his duties with respect to matters concerning the correctional institution or the Department in a completely objective manner because of the employment relationship he has with the correctional institution and the Department. *See id.* at 2-277.

However, it does not necessarily follow that a person who wishes to serve in two public positions simultaneously is prohibited from such service simply because he may face a conflict of interest in that capacity. As our prior compatibility opinions have advised, consideration of various factors may demonstrate that the conflict may be sufficiently avoided or eliminated entirely, thus making possible service by the same person in two or more positions. 2001 Op. Att'y Gen. No. 2001-027, slip op. at 9. Factors to be considered in that regard include the probability of the conflict, the ability of the person to remove himself from the conflict (should it arise), whether the person exercises decision-making authority in both positions, and whether the conflict relates to the primary functions of each position, or to financial or budgetary matters. *Id.*

It is only speculative whether the Village of Plymouth will enter into a contract to provide fire protection or emergency medical services to the correctional institution or to house state prisoners in the village's jail or workhouse. It is also speculative whether the village will buy crops from, or lease land to, the correctional institution, or consider submitting a proposal to the Department for the construction of a correctional facility within the village. As stated previously, there are, at this time, no contracts or leases between the village and the correctional institution or Department. In addition, you have advised us that no such

case of a person who serves in these two positions should be addressed to the Ohio Ethics Commission.

⁸"Facility," for purposes of 15 Ohio Admin. Code 5120-5-12, includes, but is not limited to, "correctional institutions, technical violator centers, intensive program prisons, and half-way houses." Rule 5120-5-12(B).

contracts are being contemplated at this time. Deliberations, discussions, negotiations, or votes by a member of the legislative authority upon such matters thus will be unlikely to occur often. This means that the potential conflicts confronting a member of the legislative authority of the Village of Plymouth pertain to only a small fraction of the duties of both positions. Therefore, the probability of these conflicts of interest occurring is remote and speculative.

Further, even when such matters are presented to the village's legislative authority, a member will be able to remove himself from any such deliberations, discussions, negotiations, or votes because the legislative authority of a village is capable of functioning and performing its statutory duties when one of its members abstains from a matter. *See generally* R.C. 731.09 (the legislative authority of a village is composed of six members); *State ex rel. Saxon v. Kienzle*, 4 Ohio St. 2d 47, 48, 212 N.E.2d 604, 605 (1965) ("[i]n the absence of a statute to the contrary, any action by a board requires that a quorum participate therein, and that a majority of the quorum concur"). The potential conflicts also do not relate to financial or budgetary matters or involve decision-making authority by a corrections officer.

The potential conflicts of interest, however, do involve the decision-making authority of a member of the village's legislative authority. Prior opinions have advised that this fact is not sufficient by itself to result in a finding of incompatibility if the conflicts of interest are unlikely to occur and the person is able to remove himself from the conflicts. *See, e.g.*, 1997 Op. Att'y Gen. No. 97-045 at 2-284; 1994 Op. Att'y Gen. No. 94-022 at 2-100. As explained previously, matters involving a contract to provide fire protection or emergency medical services to the correctional institution or to house state prisoners in the village's jail or workhouse, the purchase of crops from, or the leasing of land to, the correctional institution, and the submission of a proposal to the Department for the construction of a correctional facility within the village are not likely to be considered often by the village's legislative authority. A member of the village's legislative authority is also able to remove himself from any deliberations, discussions, negotiations, or votes on such matters. Moreover, a member of the village's legislative authority has a duty to abstain from participating in any matter in which his objectivity would be impaired or compromised. 2000 Op. Att'y Gen. No. 2000-025 at 2-170; *see note seven, supra*. Consequently, a member of the village's legislative authority is required to abstain from any deliberations, discussions, negotiations, or votes concerning these matters.

Accordingly, the potential conflicts discussed above do not prohibit a member of the legislative authority of the Village of Plymouth from serving simultaneously as a corrections officer at the Mansfield Correctional Institution, provided he does not participate in any deliberations, discussions, negotiations, or votes concerning a contract to provide fire protection or emergency medical services to the correctional institution or to house state prisoners in the village's jail or workhouse, the buying of crops from, or the leasing of land to, the correctional institution, or the submission of a proposal to the Department for the construction of a correctional facility within the village.

Based on the foregoing, it is my opinion, and you are hereby advised that a member of the legislative authority of the Village of Plymouth may serve simultaneously as a corrections officer at the Mansfield Correctional Institution, provided he does not participate in any deliberations, discussions, negotiations, or votes concerning a contract to provide fire protection or emergency medical services to the correctional institution or the housing of state prisoners in the village's jail or workhouse, the buying of crops from, or the leasing of land to, the correctional institution, or the submission of a proposal to the Department of

Rehabilitation and Correction for the construction of a correctional facility within the village.