

OPINION NO. 99-045**Syllabus:**

A person may serve simultaneously as a deputy county auditor and township clerk within the same county, provided that as deputy county auditor the person does not substitute for the county auditor on the county budget commission, issue warrants for the disbursement of tax moneys to townships, or certify the availability of township appropriations. (1960 Op. Att'y Gen. No. 1650, p. 584, clarified.)

To: Jim Slagle, Marion County Prosecuting Attorney, Marion, Ohio

By: Betty D. Montgomery, Attorney General, August 31, 1999

You have requested an opinion whether the positions of deputy county auditor and township clerk are compatible. The township is located within the county that employs the person as deputy county auditor.

The following seven questions must be considered when 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?
4. Is it physically possible for one person to discharge the duties of both positions?
5. Is there a conflict of interest between the two positions?
6. Are there local charter provisions or ordinances which are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

See 1979 Op. Att'y Gen. No. 79-111 at 2-367 and 2-368. All seven questions must yield an answer in favor of compatibility before two public positions may be found compatible.

The sixth and seventh questions concern the applicability of charter provisions, ordinances, and federal, state, and local departmental regulations. We have found no applicable state or federal regulations. Whether there is an applicable local departmental regulation or ordinance is a matter for the interested parties to determine. We will assume, for purposes of this opinion, that there is no local departmental regulation or ordinance that prohibits a person from serving in the positions of township clerk and deputy county auditor.

The first question asks whether either of the positions is a classified civil service position within the terms of R.C. 124.57, which prohibits classified employees and officers from participating in partisan political activity other than to vote and express freely their political views. The position of township clerk is in the unclassified civil service because it is an elected position. *See* R.C. 124.11(A)(1); R.C. 507.01. You have indicated that the position of deputy county auditor is in the unclassified civil service. Since neither position is in the classified civil service, the prohibition of R.C. 124.57 does not apply.

The second question requires that we determine whether the empowering statutes of either position limit a person from being employed in another public position or holding some other public office. No statute prohibits a person from serving simultaneously in the positions of township clerk and deputy county auditor. The second question, therefore, 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. As an elected officer, a township clerk serves and is responsible to the township electorate. *See* R.C. 507.01. A deputy county auditor is appointed by and serves at the pleasure of the county auditor. *See* R.C. 319.05; R.C. 325.17. The positions operate independently of each other, and neither is responsible for assigning duties to, or supervising, the other. Accordingly, neither position 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 demands of each position. 1994 Op. Att'y Gen. No. 94-022 at 2-98. You have indicated that it would be possible for one person to competently discharge the duties of these two positions.

The final question asks whether there is a conflict of interest between the two positions. A person may not hold two public positions simultaneously if he would be subject to divided loyalties and conflicting duties or be exposed to the temptation of acting other than in the best interest of the public. 1985 Op. Att'y Gen. No. 85-042 at 2-150. In order to determine whether there is a conflict of interest between the positions of township clerk and deputy county auditor, we must examine the powers, duties, and responsibilities conferred upon each position.

Deputy county auditors are appointed by the county auditor "to aid him in the performance of his duties." R.C. 319.05; *see* R.C. 325.17 (a county auditor may appoint deputies); *see also* R.C. 3.06 ("[a] deputy, when duly qualified, may perform any duties of his principal"). Deputy county auditors thus may perform those duties bestowed by law upon the county auditor. *See generally* 1960 Op. Att'y Gen. No. 1640, p. 559 (syllabus) ("[b]y virtue of Sections 319.05 and 3.06, Revised Code, a deputy county auditor, in the absence of the county auditor, may sign, execute and deliver a deed to the purchaser in a forfeited land sale held under the provisions of Section 5723.12, Revised Code").

The general powers, duties, and responsibilities of the county auditor are set forth in R.C. Chapter 319. Pursuant to this chapter, a county auditor administers any oath necessary in the discharge of the duties of his office, or proper in the authentication of any return, voucher, or document to be filed in his office, R.C. 319.06, prepares the county's financial report, R.C. 319.11, certifies all moneys into the county treasury, R.C. 319.13, and issues warrants on the county treasury for all moneys payable from the county treasury, R.C. 319.16. The county auditor also endorses real property conveyances, R.C. 319.20, compiles the general personal property tax list and duplicate, R.C. 319.29, determines the amount of tax to be levied upon each tract of real property, R.C. 319.30, ascertains the net amount of taxes collected for each particular purpose, R.C. 319.451, and serves as county sealer of weights and measures, R.C. 319.55.

In addition to the provisions set forth in R.C. Chapter 319, a county auditor certifies the amount collected from a hospital levy to the township clerk, R.C. 513.04, serves as a member of the county budget commission, R.C. 5705.27, files a certificate that the total appropriation from a fund does not exceed the official estimate or amended official estimate, R.C. 5705.39, certifies to bond issuing authorities and fiscal officers of subdivisions all data necessary to determine the indirect debt limitation, R.C. 5705.51, issues warrants against all of the undivided local government fund, R.C. 5747.50, and issues warrants against the undivided local government revenue assistance fund, R.C. 5747.61.

R.C. Chapter 507 sets forth the powers and duties of a township clerk. A township clerk is responsible for recording the proceedings of the township trustees, R.C. 507.04, notifying the board of elections of vacancies in township offices and of township boundary changes, R.C. 507.051, administering oaths and certifying affidavits, R.C. 507.06, and recording bonds, R.C. 507.08. Moreover, the township clerk is the fiscal officer of the township for purposes of R.C. Chapter 5705 (tax levy law). R.C. 5705.01(D). As such, he is required to "certify to the county auditor the names of the property owners and a description of their lands which are delinquent as to waste disposal service charges," R.C. 505.33, keep an accurate record of all the accounts and transactions of the board of township trustees, R.C. 507.04, prepare an annual statement of receipts and expenditures of the township, R.C.

507.07, countersign all orders for payment of township moneys, R.C. 507.11, and receive the proceeds of any township tax levy from the county, R.C. 5705.03.

Let us now consider whether a person who holds the positions of township clerk and deputy county auditor is subject to a conflict of interest. 1960 Op. Att'y Gen. No. 1650, p. 584 examined the compatibility of the positions of township clerk and deputy county auditor, and determined that the positions are incompatible. As stated in that opinion, the county auditor is a member of the county budget commission. *See* R.C. 5705.27. As a member of the county budget commission, a county auditor has a duty to determine a township's portion of the inside millage generated by the unvoted property tax. R.C. 5705.31; *see also* R.C. 5705.32.

Because a deputy county auditor may take the place of the county auditor on the county budget commission, *see* R.C. 3.06, a deputy county auditor who serves as a township clerk could be placed in a position of passing upon the budgetary needs of the township he serves as a clerk. *See* 1931 Op. Att'y Gen. No. 3791, vol. III, p. 1417 (finding incompatible the positions of city auditor and deputy county auditor); *see also State ex rel. Baden v. Gibbons*, 17 Ohio Law Abs. 341 (Ct. App. Butler County 1934) (finding incompatible the positions of city commissioner and deputy county auditor). In such a situation, a deputy county auditor would be exposed to influences that might prevent him from making completely objective decisions, thereby subjecting him to a conflict of interest that renders the positions of township clerk and deputy auditor incompatible. 1960 Op. Att'y Gen. No. 1650, p. 584. *See generally* 1980 Op. Att'y Gen. No. 80-035 at 2-149 (“[a]n individual who serves in dual public positions faces a situation which poses a conflict of interests when his 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”).

In reaching its conclusion, 1960 Op. Att'y Gen. No. 1650, p. 584 followed the rule that the mere possibility of a conflict of interest renders two positions incompatible. *See generally* 1952 Op. Att'y Gen. No. 1289, p. 257, at 259 (“[t]he fact that a conflict [of] interest is a mere possibility and not inevitable does not make the two offices any the less incompatible”). Subsequent opinions of the Attorneys General, however, have modified this rule, and have determined that “where possible conflicts are remote and speculative, the common law incompatibility or conflict of interest rules are not violated.” 1979 Op. Att'y Gen. No. 79-111 at 2-372; *accord* 1998 Op. Att'y Gen. No. 98-017 at 2-88 and 2-89; 1997 Op. Att'y Gen. No. 97-045 at 2-283; *see Rose v. Village of Wellsville*, 63 Ohio Misc. 2d 9, 20, 613 N.E.2d 262, 269 (C.P. Columbiana County 1993); *see also Esler v. Summit County*, 39 Ohio Misc. 2d 8, 10, 530 N.E.2d 973, 975 (C.P. Summit County 1985) (the mere possibility of a conflict of interest is not enough to render two positions incompatible).

Under the more recent interpretation, the particular duties and responsibilities assigned to each position must be examined to determine whether a finding of incompatibility is warranted. *See, e.g., Rose v. Village of Wellsville*, 63 Ohio Misc. 2d at 20, 613 N.E.2d at 269; 1999 Op. Att'y Gen. No. 99-001; 1997 Op. Att'y Gen. No. 97-044; 1997 Op. Att'y Gen. No. 97-026. If it is determined that a potential conflict of interest is remote and speculative, the conflict will not render two positions incompatible. *Rose v. Village of Wellsville*, 63 Ohio Misc. 2d at 20, 613 N.E.2d at 269; 1979 Op. Att'y Gen. No. 79-111 (syllabus, paragraph three). Accordingly, since 1960 Op. Att'y Gen. No. 1650, p. 584, did not examine the actual likelihood that a deputy county auditor would be required to serve on the county budget commission in place of the county auditor, it is appropriate to reexamine the immediacy of this particular conflict in your inquiry.

It is speculative whether the deputy county auditor in question will be required to serve in place of the county auditor on the county budget commission. You have stated that the duties of the deputy county auditor, do not include, nor will they ever include, substituting for the county auditor on the county budget commission. Because the person as a deputy county auditor is not required to serve on the county budget commission in place of the county auditor, the potential conflict of interest is remote and speculative. *See, e.g.*, 1999 Op. Att'y Gen. No. 99-027 at 2-182 and 2-183 (the potential for a conflict of interest involving budgetary matters is remote and speculative if an assistant prosecuting attorney is not required to serve in place of the prosecuting attorney on the county budget commission); 1997 Op. Att'y Gen. No. 97-034 at 2-199 (same). The possibility that this conflict of interest may occur thus does not prevent a deputy county auditor from serving as a township clerk, provided that as a deputy county auditor the person is not responsible for substituting for the county auditor on the county budget commission.¹ *See, e.g.*, 1999 Op. Att'y Gen. No. 99-027 (an assistant prosecuting attorney may serve as a member of the legislative authority of a statutory city if he is not required to serve in place of the prosecuting attorney on the county budget commission); 1997 Op. Att'y Gen. No. 97-034 at 2-199 (an assistant prosecuting attorney may serve as a village solicitor if he is not required to serve in place of the prosecuting attorney on the county budget commission).

An additional conflict of interest also exists if this person, as deputy county auditor, is required to issue warrants or certify the availability of funds. A county auditor and his deputies are responsible for issuing warrants for the disbursement of tax moneys to townships. *See, e.g.*, R.C. 321.31; R.C. 321.34; R.C. 321.341; R.C. 5747.50(B); R.C. 5747.61(E); *see also* R.C. 321.32 (when a township directs that its moneys remain in the county treasury, such moneys may be drawn by the proper officer on the warrant of the county auditor). In addition, the county auditor and his deputies are required to certify that sufficient unencumbered funds are available to satisfy township appropriations. *See, e.g.*, R.C. 513.04 (the county auditor shall certify the amount collected from a hospital levy "to the township clerk, who shall forthwith draw his warrant for such amount on the township treasury, payable to the treasurer of the hospital association or to the municipal corporation"); R.C. 5705.39 (no township appropriation measure "shall become effective until the county auditor files with the appropriate authority ... a certificate that the total appropriations from each fund, taken together with all other outstanding appropriations, do not exceed such official estimate or amended official estimate").

As explained previously, the township clerk is the fiscal officer of the township. In that capacity, the township clerk is responsible for keeping the accounts and financial records of the township and also for handling the township's moneys. 1989 Op. Att'y Gen. No. 89-022 at 2-104. Because a township clerk is responsible for the township's moneys, a person's responsibilities as township clerk may influence the performance of her duties as a deputy county auditor, thereby subjecting her to influences that may prevent her from

¹ Because the potential conflict of interest that results when a deputy county auditor serves on the county budget commission in place of the county auditor does not automatically render the positions of deputy county auditor and township clerk incompatible, 1960 Op. Att'y Gen. No. 1650, p. 584 is hereby clarified to the extent that it concluded that the mere potential for such conflict rendered the positions incompatible. The opinion, however, remains valid insofar as it concluded that, if a deputy county auditor who serves simultaneously in the position of township clerk is required to replace the county auditor on the county budget commission, the potential conflicts from the competition for tax moneys and advantageous budget decisions render the positions incompatible.

making completely objective and disinterested decisions in her position as deputy county auditor. *See generally* 1949 Op. Att'y Gen. No. 963, p. 610 (syllabus, paragraph one) ("[t]he office of county auditor is incompatible with any and all offices or employments which receive or pay out funds of the county, or where such offices or employments make a certificate to the county auditor for the payment of claims, and the county auditor cannot fill a second position when the duties of said second position or office require the incumbent to account for, receive or expend moneys or funds of the county, or to certify claims to the county auditor for payment").

For the reasons that follow, we find that this conflict of interest is remote and speculative. It is speculative whether the person, as a deputy county auditor, will be required to issue warrants or certify the availability of appropriations. You have stated that the duties of this person, as deputy county auditor, are limited to handling payroll for county employees, assisting in writing and issuing checks on behalf of the county to vendors, aiding in the collection of county moneys erroneously disbursed to vendors or county employees, and issuing insurance billings on behalf of the county. As deputy county auditor, this person has no duties with respect to the issuing of warrants for the disbursement of tax moneys to townships or certifying the availability of township appropriations, and the delegation of such duties is not contemplated at this time. Thus, it is unlikely that there will be occasions in which this person, as a deputy county auditor, will be required to issue a warrant for the disbursement of tax moneys to the township or certify that sufficient unencumbered funds are available to satisfy township appropriations. Accordingly, this person is not subject to an impermissible conflict of interest if, as a deputy county auditor, she does not issue warrants for the disbursement of tax moneys to townships or certify the availability of township appropriations.²

As a final matter, the court in *Chronister v. Trumbull County Prosecuting Attorney*, 39 Ohio Misc. 2d 10, 531 N.E.2d 785 (C.P. Trumbull County 1988) found the positions of township clerk and deputy county auditor incompatible. In this regard, the court stated:

The incompatibility can and does arise under the proposition that one office is subordinate to or a check upon the other, or the corollary of that proposition, that there is a conflict of interest in the two positions.

....

The plaintiff has, in the past, functioned in capacities as deputy auditor which serve as a check upon township clerks and officials. As township clerk he would function in situations which are subordinate to the county auditor. Certainly, there are conflicts which have arisen and will arise. Under the present facts, it is not remote that the auditor could and very probably would assign him duties which would conflict with his duties as township clerk. Further, the two positions demand loyalties which clearly conflict and have long-term effects regardless of the ability to remove oneself from the immediate conflict.

² The fact that a deputy county auditor holds another public position that receives tax moneys from the county treasury is, in and of itself, an insufficient reason to find that the deputy county auditor is subject to an impermissible conflict of interest. If such reason were sufficient, a deputy county auditor would not be permitted to hold any office or employment with a political subdivision that also receives tax moneys from the county treasury.

Id. at 11, 531 N.E.2d at 786.

Although *Chronister v. Trumbull County Prosecuting Attorney* addresses your particular question, the decision of that case is not dispositive of your inquiry. In that particular case, the duties of the deputy county auditor who served as a township clerk were not limited by the county auditor. The court determined further that the county auditor "probably would assign him duties which would conflict with his duties as township clerk." *Chronister v. Trumbull County Prosecuting Attorney*, 39 Ohio Misc. 2d at 11, 531 N.E.2d at 786. The deputy county auditor thus performed duties that subjected him continually to conflicts of interest and placed him in the position of acting as a check upon township clerks. In addition, since the county auditor was likely to assign the deputy county auditor duties that would subject the deputy to conflicts of interest, the person's ability to remove himself from such conflicts was not sufficient to mitigate the immediacy of the conflicts.

With respect to your inquiry, you have stated that the county auditor has specifically limited the duties of the deputy county auditor to ensure that there will be no conflicts of interest between the two positions. In addition, if it is necessary, the county auditor is willing to restrict the deputy county auditor's duties in the future. The deputy county auditor thus is not currently subject to a conflict of interest, nor does he act as a check upon township clerks. Furthermore, because the county auditor will not assign the deputy county auditor any duties in the future that will subject the deputy to a conflict of interest, there will be no instances in which the deputy will have to remove himself from a conflict. As such, the deputy county auditor will be able to perform all the duties assigned to him by the county auditor.

In light of the foregoing, it is clear that the facts set forth in *Chronister v. Trumbull County Prosecuting Attorney* are distinguishable from the facts presented in your letter. Accordingly, we are not constrained by the decision in *Chronister v. Trumbull County Prosecuting Attorney* to conclude that a person who serves simultaneously as a deputy county auditor and township clerk is subject to an impermissible conflict of interest that prohibits the person from serving in both positions.

Based on the foregoing, it is my opinion, and you are hereby advised that a person may serve simultaneously as a deputy county auditor and township clerk within the same county, provided that as deputy county auditor the person does not substitute for the county auditor on the county budget commission, issue warrants for the disbursement of tax moneys to townships, or certify the availability of township appropriations. (1960 Op. Att'y Gen. No. 1650, p. 584, clarified.)