Note from the Attorney General's Office:

1955 Op. Att'y Gen. No. 55-5565 was disapproved in part by 1979 Op. Att'y Gen. No. 79-111.

5565

COMPATIBLE OFFICE — OFFICE OF TOWNSHIP TRUSTEE AND DIRECTOR OF PUBLIC SAFETY — CITY LOCATED IN TOWNSHIP.

SYLLABUS:

The offices of township trustee and director of public safety in a city located in the township are compatible and may be held by one and the same person.

Columbus, Ohio, August 1, 1955

Hon. C. H. Anderson, Prosecuting Attorney
Trumbull County, Warren, Ohio

Dear Sir:

I have before me your request for my opinion, which reads as follows:

"We have been presented with the question as to whether or not the offices of township trustee and director of public safety of a city are compatible. The statutes involved are R. C. Section 505.01, providing for boards of township trustees, and Section 737.01 R. C., providing for the appointment of a director of public safety in cities.

"It is anticipated that a member of the board of township trustees who resides in a city entirely within the township in which he was elected, may be appointed Director of Public Safety.

"We will greatly appreciate your opinion as to whether the same person may hold the offices of township trustee and director of public safety."

Dual offices in the public service are prohibited by statute and also by the common law doctrine of incompatibility. As to the former, Section 3.11 Revised Code provides:

"No person shall hold at the same time by appointment or election more than one of the following offices: sheriff, county auditor, county treasurer, clerk of the court of common pleas, county recorder, prosecuting attorney, probate judge, and justice of the peace."

It is apparent from these provisions of the statute that they apply only to offices therein specified, but not to the offices of township trustee and director of public safety, here considered. Nor are we dealing with a problem involving holders of civil service positions who may not hold an elective office and civil service position at the same time. State ex rel. Neffner v. Hummel, 142 Ohio St. 324; 9 Ohio Jurisprudence (2d), page 477, Section 136. Accordingly, unless the offices are within the prohibitive terms of the statute, or are incompatible at common law, a person may simultaneously hold as many offices as he may be elected or appointed to. State ex rel. Peters v. McCollister, 11 Ohio, 46; State v. Kinney, 20 C. C., 325, 11 C. D., 261; State v. Shaffer, 6 N. P., n. s. 219, 18 O. D., 303.

In order to come within the duality rule involved, each of the positions must be an "office" in the statutory sense and as defined by the courts. The Supreme Court has held that the following elements must be present to constitute a public office: (1) the incumbent must exercise certain independent public duties, a part of the sovereignty of the state; (2) such exercise by the incumbent must be by virtue of his election or appointment to the office; (3) in the exercise of the duties so imposed, he cannot be subject to the direction and control of a superior officer. In other words, a public officer as distinguished from an employee, is one who is invested by law with a portion of the sovereignty of the state, and who is authorized to exercise functions either of an executive, legislative, or judicial character. Thus, a fireman appointed by city council to perform the usual duties of a fireman and who is subject to the directions of the chief of his department, was held to be a mere employee, while members of a county board of elections upon whom authority is conferred by statute to perform governmental duties, such as organizing and conducting public elections, were held to be public officers. State ex rel. Attorney General v. Jennings, 57 Ohio St., 415; State ex rel. Milburn v. Pethtel, 153 Ohio St., 1. Similarly, township trustees, being elected for a term and invested with powers of local government under the provisions of Chapter 505, Revised Code, are public officers performing duties in behalf of the state, as distinguished from holding mere subordinate positions in the public service. Trustees v. White, 48 Ohio St., 577, at 587; Koch v. State, 32 Ohio St., 353, at 356; 32 Ohio Jurisprudence, page 887. The character of the office of township trustee and its incidence of sovereignty is thus described in 39 Ohio Jurisprudence, page 290, Section 23:

> "While townships are mere agencies of the state in the administration of its government, the officers thereof derive their power from within the limits of the township, and may exercise it only within those limits. And where the state seeks to exercise its sovereign power through the agencies of township officers, the statute creating the office and providing for the election and compensation of the incumbent must conform to the constitutional provisions with reference to such officers."

The office of director of public safety is of a similar executive nature as may be seen from the provisions of Section 737.02, Revised Code, which read as follows:

> "Under the direction of the mayor, the director of public safety shall be the executive head of the police and fire departments and the chief administrative authority of the charity, correction, and building departments. He shall have all powers and duties connected with and incident to the appointment, regulation and government of such departments except as otherwise provided by law. He shall keep a record of his proceedings, a copy of which, certified by him, shall be competent evidence in all courts."
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> "Such director shall make all contracts in the name of the city with reference to the management of such departments, for the erection or repair of all buildings or improvements in connection therewith, and for the purchase of all supplies necessary for such departments."

In the light of the nature of the duties attached to each of the offices by statutory provisions, it is my opinion that both offices of township trustee and director of public safety are public offices and governed by the restrictions relating thereto. But since these offices as heretofore shown are not embraced within the restrictions of Section 3.11, Revised Code, are they incompatible at common law?

It has been said that the test of incompatibility is not only whether it is physically possible for one person to perform the duties of each position but also whether the functions of the offices are inconsistent. Offices are considered incompatible when one is subordinate to, or in any way a check upon the other. State, ex rel. Attorney General v. Gebert, 12 C. C. (N. S.), 274; Allison v. Baynes, 65 Ohio Law Abs., 495. A case somewhat similar to the one here presented, was considered by one of my predecessors in Opinion No. 4664, Opinions of the Attorney General for 1941, page 1079, which involved the offices of township trustee and village marshal. It was held, following the Gebert case supra, that the offices of township trustee

and village marshal are compatible and may lawfully be held simultaneously by one person, unless it is physically impossible for one person to discharge the duties of both offices. In the course of the opinion it was said at page 1080:

> "Upon examination of the statutes setting forth the duties of office of township trustee and village marshal, I do not find that the two offices are in any wise a check upon each other or that one is in any respect subordinate to the other. Their duties lie in two different fields, and cannot at any time become adversary."

What was there said is equally applicable here, for an examination of the pertinent statutes fails to disclose such relationship between the two offices as would provide any points of conflict or division of loyalty on the part of the incumbents. In both instances, municipality and township, the offices involved operate within their respective territories, neither conflicting with, nor being a check upon the other, each retaining its separate political existence. Opinion No. 4642, Opinions of the Attorney General for 1954, page 648.

In reaching this conclusion, I am not unmindful of the provision in Section 505.44, Revised Code, under authority of which a township may contract with a municipality for fire protection. This section reads in part:

> "In order to obtain fire protection, or to obtain additional fire protection in times of emergency, any township may enter into a contract, for a period not to exceed three years, with one or more townships, municipal corporations, or private fire companies, upon such terms as are agreed to by them, for services of fire departments, or the use of fire apparatus, or the interchange of the service of fire departments or use of fire apparatus, within the several territories of the contracting subdivisions and private fire companies, if such contract is first authorized by the respective boards of township trustees or other legislative bodies."

The expression "or other legislative bodies," employed in a provision authorizing a contract by a municipal corporation, quite evidently has reference to the municipal council and evinces the intent that where a city is concerned such contract must first be authorized by the city council before the exeutive officers of the city may enter into it. Accordingly, even though the director of public safety should "make" such a contract "in the name of the city" as authorized in Chapter 737, Revised Code, with the township of which he is a trustee, it is clear that he has no *independent*

power to do so, being subject in this regard to the direction and control of council. This possibility would not in my opinion involve such a division of loyalty on the part of the officer concerned as would make the two offices incompatible.

Accordingly, in specific answer to your question, it is my opinion that the offices of township trustee and director of public safety in a city located in the township, are compatible and may be held by one and the same person.

Respectfully,
C. WILLIAM O'NEILL
Attorney General