


AVOIDING CONFLICTS OF INTEREST

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AVOIDING CONFLICTS OF INTEREST

THIS SESSION WILL SURVEY THE VARIOUS CONFLICTS OF INTEREST WHICH CAN ARISE FOR PUBLIC OFFICIALS, INCLUDING COMPATIBILITY OF PUBLIC OFFICES, POSITIONS, AND EMPLOYMENT, AS WELL AS REVIEW THE MOST COMMON TYPES OF SITUATIONAL CONFLICTS WHICH CAN OCCUR. WHEN IS RECUSAL OPTIONAL AND WHEN IS IT NECESSARY?



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COMPATIBILITY OPINIONS INDEX

Among the questions presented to the Attorney General for resolution by way of formal opinion are those that concern the compatibility of public offices or positions. An issue of compatibility is presented whenever one person wishes to hold simultaneously two or more positions of public service.

This index lists specific public positions or offices that are either compatible or incompatible, and enumerates the various Attorney General opinions that have made those determinations.

[HTTPS://WWW.OHIOATTORNEYGENERAL.GOV/FILES/GOVERNMENT-ENTITIES/COMPATIBILITY-OF-PUBLIC-OFFICES-OR-POSITIONS-INDEX.ASPX](https://www.ohioattorneygeneral.gov/files/government-entities/compatibility-of-public-offices-or-positions-index.aspx)



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1. Conflicts of Interest

1.1 What types of conflicts?

1.1.1 Common Law – Conflicts of public offices. Common Law Principals:

- Can't serve two masters
- Can the person holding both public offices exercise independent judgment in connection with the discharge of the duties of each?
- Is one position subordinate to or a check upon the other?
- Can the person physically perform the job duties of both?
- When the conflict is remote or speculative, no conflict exists.



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1. Conflicts of Interest (Contd.)

1.1 What types of conflicts?

1.1.2 Evolution and expansion of common law and statutory law. See 1979 Ohio Atty. Gen. Ops. No. 79-111. Conflicts of public office, employment, or public service (public positions).

- Conflicts of public office, employment, or public service (public positions)
- Public office v. public office (Township Trustee / Trustee of Regional District); (Township Trustee / Commissioner of Jurors); (Township Trustee / County Commissioner); (Township Trustee / Director of County Land Reutilization Corporation)
- Public office v. public employment (Township Trustee / Deputy Sherriff); (Township Trustee / Deputy County Engineer)
- Public office v. public service (Township Trustee / Volunteer Fire Fighter)




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2. Seven criterion are used to determine whether two public positions are compatible:

1. Is either of the positions a classified employment within the terms of R.C. 124.57?
2. Does a constitutional provision or the empowering statutes of either position limit or restrict 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 an impermissible 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?



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3. Question 1: Is either position a classified employment within the terms of R.C. 124.57?

3.1 R.C. 124.57 prohibits a member of the classified service from seeking election or appointment to, or holding, a partisan political office, or engaging in other partisan political activities, and prevents a partisan political officeholder from serving simultaneously as an office or employee in the classified service. See OAC 123:1-46-02(C).

3.1.1. Classified service and political activity defined under OAC 123:1-46-02

3.1.2. OAC also provides examples of permissible activities for classified service employees, such as voting or attending political rallies



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4. Question 2: Does a constitutional provision or the empowering statutes of either position limit employment in another position or the holding of another public office?

4.1. This is a factual question which involves analysis of the state constitution and the empowering statute of the position

4.1.1. Example: R.C. Chapter 505 for township trustees, R.C. 505.032 for township administrators, R.C. 504.15 for limited home rule township law directors



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5. Question 3: Is one position subordinate to, or in any way a check upon, the other?

5.1. The compatibility issue arises, typically, when one position appoints the other

5.1.1. GENERAL RULE: A public officer is disqualified from serving on a board or commission to which he makes appointments, unless a statute authorizes the officer to hold both positions, or otherwise eliminates the conflict

5.1.1.1. See 1984 Ohio Atty. Gen. Ops. No. 84-044



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5. Question 3: Is one position subordinate to, or in any way a check upon, the other? (Contd.)

5.1.2. Exceptions

- R.C. 6119.02(A)(6) "The original or properly amended petition...may permit one or more elected officials from any appointing authority to serve on the board. However, elected officials from the same political subdivision shall not comprise a majority of the members of the board."
- Conflict between R.C. sections 731.02, 731.12, and 6119.02(A)(6).
 - R.C. sections 731.02 and 731.12 prohibit municipal council members from holding other public office except notary and state militia.
- General prohibition vs. special exception



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5. Question 3: Is one position subordinate to, or in any way a check upon, the other? (Contd.)

5.1.3. Example: The position of township clerk ad deputy county auditor are incompatible because, under the circumstances, the township clerk was subordinate to the deputy county auditor. See Chronister v. Trumbull County Prosecuting Attorney, 531 N.E.2d 785 (Trumbull County Ct. of Common Pleas)



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6. Question 4: Is it physically possible for one person to discharge the duties of both positions?

6.1 This is a factual question that examines the time restraints and demands of both positions

6.1.1. Example: A township fiscal officer has working hours of Monday-Friday, 8am - 5pm. A county engineer has hours of Monday-Friday, 8am - 5pm. It is physically impossible for one person to serve both of these positions



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7. Question 5: Is there an impermissible conflict of interest between the two positions?

- 7.1. It is well settled that a person may not hold two public positions at the same time if the "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." 1980 Ohio AG Opinion 035. (DIVIDED LOYALTIES OR CONFLICTING DUTIES)
- 7.2. This question involves the longest and most in-depth analysis
- 7.3. Must look to the powers, duties, and responsibilities of both positions to determine if there are any conflicts between the two
 - 7.3.1. Review the statutory scheme that creates the position, and the local regulations that further define the position, if any



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7.Question 5: Is there an impermissible conflict of interest between the two positions? (Contd.)

- 7.3.2. If there is a conflict, then determine whether the conflict can be avoided or eliminated entirely, thus allowing the person to service in both positions
- 7.3.3. Factors used in making this determination include:
 - 7.3.3.1. Probability of conflicts occurring
 - 7.3.3.2. Ability of the person to remove themselves from any conflicts that may occur (recusal)
 - > See 2016 Ohio Atty. Gen. Ops. No. 2016-011. Appointment by township trustees of person to district board who is in litigation with the district
 - > Divided loyalties and conflicting duties
 - > No conflict exists in appointment
 - > Person must recuse themselves from discussion, deliberation, or vote regarding the lawsuit and the water project.

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7.Question 5: Is there an impermissible conflict of interest between the two positions? (Contd.)

- 7.3.3.3. Whether the person exercises decision-making authority in both positions
- 7.3.3.4. Whether the conflicts relate to the primary functions of each position, or to financial or budgetary matters
 - > See 2012 Ohio Atty. Gen. Ops. No. 2012-08 (Township trustee / County commissioner)
 - > Conflict exists due to competition for tax revenue generated within the ten-mill limitation
 - > See 2017 Ohio Atty. Gen. Ops. No. 2017-043 (Township trustee / Commissioner of jurors)
 - > No conflict exists. No divided loyalties or conflicting duties.
 - > See 1986 Ohio Atty. Gen. Ops. No. 86-65 (County board of health member / member of board of education).
 - > Conflict exists / Board of Health inspects schools



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7. Question 5: Is there an impermissible conflict of interest between the two positions? (Contd.)

- 7.4. Even if a conflict is, or potentially is, present, it does not automatically mean that two positions are incompatible. A conflict can be avoided in the following ways:
 - 7.4.1. A person can be absent from the meeting or when the decision is made
 - 7.4.2. A person can abstain from discussions, deliberations, or voting on the matter (recusal)



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7. Question 5: Is there an impermissible conflict of interest between the two positions? (Contd.)

- 7.5 In a small, limited number of circumstances, a conflict cannot be avoided
 - 7.5.1 County commissioners, township officers and employees, and members of a municipal legislative authority cannot have an interest in any contract unless the contract meets certain limited exceptions. (See R.C. 305.27, R.C. 511.13, R.C. 731.02, and R.C. 731.12).
 - 7.5.1.1. This type of conflict cannot be avoided or eliminated – even if the public official abstains from discussions, deliberations, or voting on the contract
 - 7.5.1.2. Broader application than R.C. 2921.42 but does not provide for criminal sanctions



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7. Question 5: Is there an impermissible conflict of interest between the two positions? (Contd.)

- 7.5.2. This conflict applies whether the contract is with a private entity or with another political subdivision. See 1999 Ohio Op. Atty. Gen. No. 99-023
 - Example: A person enters into an ongoing multi-year contract to supply a township with garage storage facilities for a number of years in the future and is subsequently elected to the office of township trustee. That person is either prohibited from serving as township trustee, or must, prior to taking office, divest himself or herself of the interest in the contract. See 2007 Ohio Op. Atty. Gen. No. 44.



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7. Question 5: Is there an impermissible conflict of interest between the two positions? (Contd.)

7.5.2.2. Example: A township trustee is also a deputy county sheriff. The township has a contract for services with the sheriff's department. Also, the contract for services required the sheriff to perform to the satisfaction of the township. The township trustee must resign from one of the positions, even if they abstain from discussions and voting. See State ex rel. Scioto County Prosecutor v. Murphy, 2003-Ohio-4550.

7.5.2.3. Example: See 1979 Ohio Op. Atty. Gen. Ops. No. 79-111 (Municipal council member / special deputy sheriff)

➤ No conflict exists; no contract existed. (Seems to imply that even if a contract exists, no conflict may exist. This is contrary to later A.G. Opinions).

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7. Question 5: Is there an impermissible conflict of interest between the two positions? (Contd.)

7.5.3. R.C. 511.13 sets forth an exception to the prohibition related to impermissible interests

7.5.3.1. If the township officer or employee is a shareholder, but not an officer or director, in a corporation and owns not more than 5% of the stock of such corporation and the value of which does not exceed \$500. R.C. 511.13.



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7. Question 5: Is there an impermissible conflict of interest between the two positions? (Contd.)

7.5.4. Ohio R.C. 9.482

7.5.4.1. Allows a political subdivision to contract with another political subdivision to exercise any power, perform any function, or render any service for the other contracting political subdivision that the other contracting political subdivision is otherwise legally authorized to exercise, perform, or render

7.5.4.2. With the ability of political subdivisions to contract with other political subdivisions for services, the 'interest in contract' conflict, it is likely to become more prevalent



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8. Question 6: Are these local charter provisions, resolutions, or ordinance which are controlling?

- 8.1. Attorney General rarely does analysis on this issue because it is a factual question that depends on local regulations
- 8.2 Municipal Charters, ordinances
 - Can adopt prohibitions on serving in other capacities
- 8.3 Limited self-government townships (“Home Rule” townships)
 - 8.3.1. R.C. 504.04(A)(1) – Cannot enact resolutions which encroach upon the powers, duties, or privileges of elected township officials



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9. Question 7: Is there a federal, state, or local department regulation applicable?

- 9.1. Attorney General rarely does analysis on this issue, other than noting when there is or is not a federal or state regulation on the matter
- 9.2. The Hatch Act, 5 U.S.C.A. Sections 1501-1508. Prohibits a state or local officer or employee from being a candidate for an elective office when the employee’s salary is paid completely, directly or indirectly, by loans or grants made by the United States or a federal agency.



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10. Criminal Conflict pursuant to R.C. 2921.42

11. Exceptions

- 11.1 Statutes stating the positions are “not holding of a public office”
 - 11.1.1. JEDDS – R.C. 715.72(P)(4)
 - 11.1.2 Community Improvement Corporations – R.C. 1724.10
 - 11.1.3. Regional Council of Governments – R.C. 167.07
 - 11.1.4. County Land Reutilization Corporation – R.C. 1724.10(B)(1); Township Trustee / County Land Reutilization Corporation; 2012 Ohio Atty. Gen. Ops. No. 2012-010



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12.Enforcement in Conflict Situations

12.1. Quo Warranto

➤ “Prosecutorial Actions against a person who usurps, intrudes upon, or unlawfully holds or exercise a public office....” See R.C. 2733.01



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QUESTIONS?

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