



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

ATTORNEY GENERAL OPINION
2018-11

The Honorable Greg McCortney
Oklahoma State Senate
2300 N. Lincoln Blvd., Room 528B
Oklahoma City, OK 73105

September 25, 2018

Dear Senator McCortney:

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following question:

In light of 11 O.S.2011, § 8-106, may a statutory town board of trustees appoint the same person to serve as both municipal judge and municipal court clerk?

I.
BACKGROUND

The statutory town board of trustees form of government is provided for in Title 11, Sections 12-101 through 12-114 of the Oklahoma Statutes. “Towns governed under the statutory town board of trustees form shall have all the powers, functions, rights, privileges, franchises and immunities granted, or which may be granted, to towns.” 11 O.S.2011, § 12-101. As the name suggests, such towns are governed by a board of either three or five trustees elected at large, *id.* § 12-102, and the board “shall elect from among its members a mayor.” *Id.* § 12-104. “All powers of a statutory town board of trustees town, including the determination of matters of policy, shall be vested in the board of trustees,” including, without limitation, the “[e]nact[ment] of municipal legislation subject to limitations...imposed by the Oklahoma Constitution and law[.]” *Id.* § 12-106.

Under the Oklahoma Municipal Code, all statutory municipalities are authorized to create by resolution of the governing body a Municipal Court not of record¹ that has jurisdiction to hear and determine municipal ordinance violations. *See* 11 O.S.2011, §§ 27-101 – 27-103. Municipal Court judges—who need not be licensed attorneys—are appointed by the mayor, with the consent of the

¹ By contrast, “municipal criminal courts of record” exist only in municipalities having more than 65,000 residents. 11 O.S.2011, § 28-101. Generally speaking, a “court of record” is one “that is required to keep a record of its proceedings,” and such record is “presumed accurate and cannot be collaterally impeached.” BLACK’S LAW DICTIONARY 407 (9th ed. 2009); *see also Ex parte Bochmann*, 1921 OK CR 203, 201 P. 537, 541 (“Presumptions of the regularity of proceedings of courts of record do not apply to municipal courts and other courts not of record.”). Otherwise, the jurisdiction of a “municipal criminal court of record” is comparable to that of a municipal court “not of record.” *Compare* 11 O.S.2011, § 28-102(A) *with id.* § 27-103.

municipality's governing body. *Id.* § 27-104. The town's municipal clerk, or a designated deputy, "shall be the clerk of the municipal court unless the governing body establishes or authorizes a position of chief municipal court officer to serve as court clerk." *Id.* § 27-109.²

II. DISCUSSION

A. Oklahoma law generally prohibits a person from holding two municipal offices.

Title 51, Section 6 of the Oklahoma Statutes sets forth the State's general prohibition against dual office holding:

Except as may be otherwise provided, no person holding an office under the laws of the state and no deputy of any officer so holding any office shall, during the person's term of office, hold any other office or be the deputy of any officer holding any office, under the laws of the state.

51 O.S.Supp.2017, § 6 (emphasis added).³ This section has been interpreted consistently to mean that, unless otherwise provided by law, all state, county, and municipal officers and deputies are prohibited from holding two offices simultaneously. *See* A.G. Opins. 2006-22, at 145, 2001-34, at 158, 1985-16, at 30, 1977-179, at 114. Nevertheless, as indicated by its introductory clause—"Except as may be otherwise provided"—the prohibition in Title 51, Section 6 may be superseded by contrary provisions of law. *See, e.g.*, A.G. Opin. 1981-31, at 61.

To answer your specific question, we must first determine whether a municipal judge and a municipal court clerk are both public officers as contemplated by Title 51, Section 6. With regard to the former, this office has consistently recognized municipal judges as "officers" for purposes of that statute. *See, e.g.*, A.G. Opins. 2001-34, at 158, 1985-16, at 30 (referencing A.G. Opins. 1980-7, 1974-118, 1970-228, and 1969-185), 1977-179, at 115.⁴ However, we are not aware of any authority having considered whether a municipal court clerk is also an "officer" subject to the dual office holding prohibition.⁵ As such, we look to the well-settled test first established by the

² By statute, the "town clerk" in a municipality with a statutory town board of trustees form of government is a municipal officer with specifically delineated duties. *See* 11 O.S.2011, § 12-109. In addition, "[t]he person who serves as town clerk may be employed by the town to perform duties not related to his position as town clerk." *Id.*

³ While the provision includes 29 specific exceptions, none appear to apply to the situation described in your question. *See* 51 O.S.Supp.2017, § 6(A)(1)-(29).

⁴ While municipal judges are subject to the dual office-holding prohibition of Title 51, Section 6, they are explicitly *excluded* from a similar provision of the Oklahoma Constitution that applies to the State judiciary. *See* OKLA. CONST. art. VII, § 11 ("No Justices or Judges, *except those of Municipal Courts*, shall engage in the practice of law nor hold any other office or position of profit under the United States or this State or any municipal corporation or political subdivision of this State, nor shall hold office in any political party.") (emphasis added).

⁵ While the Oklahoma Municipal Code defines an "officer" as "any person who is *elected* to an office in municipal government or is *appointed to fill an unexpired term* of an elected office, and the clerk and the treasurer whether elected or appointed," *see* 11 O.S.2011, § 1-102 (emphasis added), this office has on many occasions concluded that the dual office holding prohibition of Title 51 applies to a broader range of municipal officials than set

Oklahoma Supreme Court in *Oklahoma City v. Century Indemnity Company*, 1936 OK 589, 62 P.2d 94, which sets forth the three essential characteristics of a public office:

(a) The specific position must be *created or authorized by law*; (b) there must be certain *definite duties imposed by law* on the incumbent; and (c) they must involve the *exercise of some portion of the sovereign power*, a position which has these three elements is presumably an “office,” while one which lacks any of them is a mere “employment.”

Id. 21, 62 P.2d at 97 (emphasis added).

The position of municipal court clerk is created, or authorized to be created, under Title 11, Section 27-109, which also sets forth the clerk’s duties:

The [municipal] court clerk shall have authority to carry out the duties of the position as required by law; provided, that the person who serves as court clerk may separately perform other duties for the municipality. The clerk of the court shall:

1. Assist the judge in recording the proceedings of the court, preparation of writs, processes, or other papers;
2. Administer oaths required in judicial or other proceedings before the court;
3. Be responsible for the entry of all pleadings, processes, and proceedings in the dockets of the court;
4. Perform such other clerical duties in relation to the proceedings of the court as the judge shall direct; and
5. Receive and give receipt for and disburse or deliver to the municipal treasurer all fines, forfeitures, fees, deposits, and sums of money properly payable to the municipal court. Such funds and sums of money while in the custody of the clerk shall be deposited and disbursed upon vouchers as directed by the municipal governing body.

11 O.S.2011, § 27-109.

With regard to the third element—whether these duties involve the exercise of some portion of the sovereign power—the Territorial Supreme Court in *Guthrie Daily Leader v. Cameron*, 1895 OK 71, 41 P. 635, explained:

The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a

forth in that provision. *See* A.G. Opin. 2000-58 (municipal police officers); A.G. Opin. 1982-35 (commissioner of a municipal urban renewal authority); A.G. Opin. 1977-179 (associate municipal judge and municipal planning commission member).

delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the country, either legislative, executive, *or judicial*, attaches for the time being, to be exercised for the public benefit.

Id. 10, 41 P. at 636 (emphasis added). This office has similarly described the distinction between an “office” and mere employment:

A public officer ordinarily exercises some part of the State’s sovereign power. His tenure of office, his compensation, and his *duties are usually fixed by law*. The taking of an oath of office, the receipt of a formal commission, *and the giving of a bond* all indicate that a public office is involved, although no single factor is ever conclusive[.]

A.G. Opin. 1979-41, at 71 (quoting *Maddox v. State*, 249 S.W.2d 972 (Ark. 1952)) (emphasis added).

For two reasons, we conclude that a municipal court clerk exercises some portion of the sovereign power. First, under Oklahoma law a *district* court clerk is a “county officer and an officer or ‘arm’ of the court.” *Speight v. Presley*, 2008 OK 99, ¶ 14, 203 P.3d 173; OKLA. CONST. art XVII, § 2 (creating the “office” of the “Clerk of the District Court”)(emphasis added). And district and municipal court clerks have similar responsibilities under certain provisions of Oklahoma law. *See, e.g., Carlson v. Mesigh*, 1996 OK CR 61, 932 P.2d 18 (describing the coextensive responsibilities of district and municipal court clerks regarding bond forfeiture under the Bail Bondsmen Act, 59 O.S.Supp.1995, §§ 1301-1336).

Second, a municipal court clerk is required to give a bond to the governing body, *see* 11 O.S.2011, § 27-111, which, as noted above, is one characteristic of a public office in which the power of the sovereign is vested. *See* A.G. Opin. 1979-41, at 71. Based on the foregoing, both municipal judge and municipal court clerk are “offices” to which the prohibitions of Title 51, Section 6 apply.

B. A statutory town board of trustees may provide that a person may serve as both municipal judge and municipal court clerk, notwithstanding the dual office holding provision of Title 51, Section 6.

Having found that Title 51, Section 6 would generally prohibit a person from serving both as municipal judge and municipal court clerk, we next consider whether other provisions of law would provide for an exception. As you note in your request, Section 8-106 of Title 11 provides, in relevant part, that:

A person *may hold more than one office* or position in a municipal government *as the governing body may ordain*.

11 O.S.2011, § 8-106 (emphasis added). In addition to Section 8-106, a provision specific to the statutory town board of trustees form of government permits the board of trustees to “combine, merge, or consolidate *by ordinance* any of the various offices of town government as it deems

necessary and convenient for the administration of the affairs or government of the town.” *Id.* § 12-112 (emphasis added).

While “ordain” is not defined under Oklahoma law, it is commonly understood to mean “to establish, by appointment, decree, or law.” WEBSTER’S THIRD NEW INT’L DICTIONARY 1587 (2002). More specifically, in the context of municipal governance “ordain” means to “make an ordinance.” BLACK’S LAW DICTIONARY 1246 (rev. 4th ed. 1976); *see also* 11 O.S.2011, § 14-104 (requiring the enacting clause of any municipal ordinance to begin with “Be it ordained by the [governing body]”). The Oklahoma Municipal Code defines an “ordinance” as “a formal legislative act of a municipal governing body which has the force and effect of a continuing regulation and a permanent rule of conduct or government for the municipality.” 11 O.S.2011, § 1-102.

Accordingly, Section 8-106 of the Oklahoma Municipal Code permits a municipality to pass an ordinance permitting multiple municipal offices to be held by a single person. Likewise, Section 12-112 of the Oklahoma Municipal Code permits a statutory town board of trustees to pass an ordinance combining, merging, or consolidating offices of the town’s government as “necessary and convenient for the administration of the affairs or government of the town.” In either case, such an ordinance⁶ will take precedence over the dual office-holding prohibition of Title 51, Section 6. *See* A.G. Opins. 2008-15, 1981-31; *see also Sw. Bell Tel. Co. v. Oklahoma Cty. Excise Bd.*, 1980 OK 97, ¶ 12, 618 P.2d 915, 919 (“[I]t is a long-standing rule of construction in this jurisdiction that where there are two statutory provisions, one of which is special and clearly includes the matter in controversy, and prescribes different rules and procedures from those in a general statute, the special statute and not the general statute applies.”).⁷

⁶ Such ordinances must be properly considered and voted upon, *see* 11 O.S.2011, § 14-102, enacted, *see id.* § 14-104, compiled and enrolled, *see id.* § 14-105, published, *see id.* §§ 14-106, 14-107, and § 14-109, and adopted by resolution, *see id.* § 14-110, all in accordance with Article XIV of the Oklahoma Municipal Code.

⁷ This opinion does not address whether a municipal judge’s activities as a municipal court clerk could potentially run afoul of the Code of Judicial Conduct. The interpretation and application of the provisions of the Code of Judicial Conduct is best left to the Supreme Court, the Court on the Judiciary, or the Judicial Ethics Advisory Panel. *See* 5 O.S.2011, Ch. 1, App. 1-A, R. 1.6; *id.* App. 4-A, R. 4; 5 O.S.Supp.1998, ch. 1, App. 1.

It is therefore, the official Opinion of the Attorney General that:

A statutory town board of trustees may enact an ordinance (i) permitting the same person to serve as both municipal judge and municipal court clerk pursuant to 11 O.S.2011, § 8-106, or (ii) “combine, merge, or consolidate” the office of municipal judge and municipal court clerk as “necessary and convenient for the administration of the affairs or government of the town” pursuant to 11 O.S.2011, § 12-112. In either case, such an ordinance would be an exception to the dual office-holding prohibition of 51 O.S.Supp.2017, § 6. See A.G. Opins. 2008-15, 1981-31; Sw. *Bell Tel. Co. v. Oklahoma Cty. Excise Bd.*, 1980 OK 97, ¶ 12, 618 P.2d 915, 919.



MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA



RACHEL ROGERS
ASSISTANT ATTORNEY GENERAL

