January 6, 2004

The Honorable Donald R. Burns, Jr.
Carroll County Prosecuting Attorney
49 Public Square
Carrollton, Ohio 44615

SYLLABUS: 2004-001

The positions of member of the board of education of a local school district and employee of a board of library trustees that is subject to the jurisdiction of the board of education are incompatible.

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OPINION NO. 2004-001

The Honorable Donald R. Burns, Jr.
Carroll County Prosecuting Attorney
49 Public Square
Carrollton, Ohio 44615

Dear Prosecutor Burns:

You have requested an opinion concerning the compatibility of the positions of member of the board of education of a local school district and employee of a school district free public library. The free public library was established by the board of education of the local school district and is under the control and management of a board of library trustees appointed by the board of education pursuant to R.C. 3375.15.[1]

The compatibility of two public positions is determined by using the following seven questions:

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 an impermissible conflict of interest between the two positions?

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[1] R.C. 3375.15 provides, in part: "In any school district in which a free public library has been established, by resolution adopted by the board of education of such school district, prior to September 4, 1947, such library shall be under the control and management of a board of library trustees consisting of seven members."

6. Are there local charter provisions, resolutions, or ordinances which are controlling?

7. Is there a federal, state, or local departmental regulation applicable?

2003 Op. Att'y Gen. No. 2003-015 at 2-112. In your particular situation, it is our view that the two positions are incompatible because the position of member of the board of education is a check upon the position of employee of the school district free public library. Thus, it is unnecessary for us to consider the remaining questions of the compatibility test.

It is a well-established principle that a person may not serve simultaneously in two public positions when one position is a check upon the other. *Id.* at 2-113; 2002 Op. Att'y Gen. No. 2002-022 at 2-140; 1990 Op. Att'y Gen. No. 90-021 at 2-80; 1979 Op. Att'y Gen. No. 79-099 at 2-308. A position is a check upon another when the position is responsible for appointing and removing the people who serve in a supervisory capacity over the other position.[2] *See, e.g.,* 2002 Op. Att'y Gen. No. 2002-022 at 2-142; 1992 Op. Att'y Gen. No. 92-055 at 2-224 and 2-225; 1984 Op. Att'y Gen. No. 84-003 at 2-6; *see also* 1983 Op. Att'y Gen. No. 83-070.

Pursuant to R.C. 3375.40(G), the employees of a school district free public library are appointed, removed, and compensated by the library's board of trustees. *See* 2001 Op. Att'y Gen. No. 2001-034 at 2-204. *See generally* 1992 Op. Att'y Gen. No. 92-017 at 2-60 (the power to appoint a person to an employment position includes the implied power to remove the person from the position). The duties of the employees of the library are prescribed by the board of library trustees.[3] *See* R.C. 3375.15; R.C. 3375.40(G), (H). In addition, all activities and

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[2] As explained in 1992 Op. Att'y Gen. No. 92-055 at 2-224 and 2-225, which advised that the position of member of the board of education of a county school district is a check upon the position of substitute teacher in a local school district within the county school district:

> [T]he positions of substitute teacher and member of a county board of education would be incompatible for the reason that a substitute teacher who serves as a member of a county board of education would be placed in a position of appointing, reappointing, evaluating, compensating, and terminating the person who serves as his or her supervisor. *See* Op. No. 84-003 at 2-6. The substitute teacher would be, as a member of the county board of education, at least indirectly, a check upon the superintendent who is in charge of the substitute teaching position. Thus, it is clear that the position of member of a board of education of a county school district would be a check upon the position of substitute teacher in a local school district that is located within the county school district.

[3] Your letter states that the duties of the employee in question include placing book orders for the library, facilitating the public disbursement and receipt of library materials, answering

functions performed by an employee of the board of library trustees in discharging his assigned duties are subject to the control and management of the board of library trustees. R.C. 3375.15; R.C. 3375.40(H). All of the employees of a school district free public library thus are employed by, and perform their duties under the supervision of, the library's board of trustees.

The board of library trustees of a school district free public library is a body politic and corporate[4] that is subject to the jurisdiction of the board of education of the school district that established the library. *See Swanton Local School Dist. Library v. Budget Comm. of Lucas County,* 55 Ohio St. 2d 41, 47, 378 N.E.2d 139 (1978); 1998 Op. Att'y Gen. No. 98-009 at 2-51; 1985 Op. Att'y Gen. No. 85-017 at 2-67; 1959 Op. Att'y Gen. No. 119, p. 59, at 61; *see also* 1964 Op. Att'y Gen. No. 1300 at 2-330 (syllabus, paragraph one). *See generally* R.C. 3375.43 (a board of library trustees of a school district free public library may request the board of education "to whose jurisdiction the board is subject to submit to the electors of [the district] the question of issuing bonds for the purpose of purchasing, erecting, constructing, enlarging, extending, or improving a building for library purposes"); R.C. 5705.23 (a board of library trustees of a school district free public library may request the taxing authority of the school district to whose jurisdiction the board is subject to submit to the electors of the district the question of a special tax levy for the library); R.C. 5705.28(B)(1) ("[b]efore the first day of June in each year, the board of trustees of a school library district entitled to participate in any appropriation or revenue of a school district or to have a tax proposed by the board of education of a school district shall file with the board of education of the school district a tax budget for the ensuing fiscal year. On or before the fifteenth day of July in each year, the board of education of a school district to which a school library district tax budget was submitted under this division shall adopt such tax budget on behalf of the library district").

The initial members of a board of library trustees of a school district free public library are appointed by the board of education that established the library. R.C. 3375.15. The board of education also fills any vacancies that may occur on the board of library trustees. *Id.* The board of education's authority to appoint persons to a board of library trustees includes the concomitant power to remove persons from the board. *State ex rel. Bd. of Educ. v. Miller,* 102 Ohio App. 85, 86, 141 N.E.2d 301 (Lawrence County 1956); *Mahoning County Bd. of Comm'rs v. Palkovic,* 12 Ohio L. Abs. 280, 281 (Ct. App. Mahoning County 1932); *Kelley v. City of Cincinnati,* 7 Ohio N.P. 360, 362, 9 Ohio Dec. 611 (C.P. Hamilton County 1899); *Longley v. City of Bedford,* 2 Ohio Misc. 86, 89, 201 N.E.2d 922 (Bedford Mun. Ct. 1964); 1992 Op. Att'y Gen. No. 92-017 at 2-60; 1945 Op. Att'y Gen. No. 130, p. 92, at 95. Accordingly, a board of education of a local

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reference questions for library patrons, shelving books, and performing such other duties as may be assigned.

[4] R.C. 3375.33 provides that, "[t]he boards of library trustees appointed pursuant to [R.C. 3375.15] are bodies politic and corporate."

school district is responsible for appointing and removing the members of a board of library trustees that is subject to the jurisdiction of the board of education.

The positions of member of the board of education of a local school district and employee of a board of library trustees that is subject to the jurisdiction of the board of education are incompatible because an employee who serves as a member of the local board of education is placed in a position of appointing and removing the library trustees who serve as her supervisors. *See* 2002 Op. Att'y Gen. No. 2002-022 at 2-142; 1992 Op. Att'y Gen. No. 92-055 at 2-224 and 2-225; 1984 Op. Att'y Gen. No. 84-003 at 2-6; *see also* 1983 Op. Att'y Gen. No. 83-070. As a member of the local board of education the employee would be able to act as a check upon the members of the board of library trustees who employ her at the library. Therefore, it is our opinion that such a situation renders these two positions incompatible.

Based upon the foregoing, it is my opinion, and you are hereby advised that the positions of member of the board of education of a local school district and employee of a board of library trustees that is subject to the jurisdiction of the board of education are incompatible.

Respectfully,

JIM PETRO
Attorney General