April 15, 1997

OPINION NO. 97-018

The Honorable Russell V. Leffler
Huron County Prosecuting Attorney
85 Benedict Avenue
Norwalk, Ohio 44857

Dear Prosecutor Leffler:

You have requested an opinion concerning the compatibility of positions. Specifically, you ask:

1. Are the positions of county public defender and member of a county MR/DD board compatible?

2. Are the positions of clerical employee in the county prosecuting attorney's office and member of the board of education of a local school district compatible?

1979 Op. Att'y Gen. No. 79-111 sets forth the following seven questions for analyzing and 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 the outside employment permissible?

3. Is one office 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?

Id. at 2-367 and 2-368. Questions six and seven address, in large part, matters of local concern, and

it is assumed, for purposes of this opinion, that there are no departmental regulations, charter provisions, or ordinances that would limit or prevent the holding of outside employment by a county public defender, member of a county MR/DD board, clerical employee in the county prosecuting attorney's office, or member of the board of education of a local school district. Our research discloses that there are no applicable state or federal regulations.

In addition, question number four, which asks whether it is physically possible for one person to perform the duties of both positions, is a factual question that is best answered by the interested individuals because they may more precisely determine the time demands of each position. *See, e.g.,* 1993 Op. Att'y Gen. No. 93-051 at 2-247. It seems likely, however, that in both of the situations presented in your letter the two positions can be filled competently by the same person.

Your first question asks whether the positions of county public defender and member of a county MR/DD board are compatible. Resolution of this inquiry requires a determination whether the remaining questions of the compatibility test yield an answer in favor of compatibility.

Question number one asks whether either of the positions is a classified position within the terms of R.C. 124.57, which prohibits employees or officers in the classified service of the state, the several counties, cities, city school districts, and civil service townships from participating in partisan political activities, other than to vote or express their political views. A review of the statutes creating the positions of county public defender and member of a county MR/DD board indicates that neither of these positions is in the classified service. *See* R.C. 120.14-.15; R.C. 5126.02. The prohibition of R.C. 124.57 thus does not prohibit a county public defender from serving on a county MR/DD board.

Question number two asks whether the empowering statutes of either position limit outside employment. R.C. 120.39 and R.C. 5126.021 set forth restrictions on the outside employment of a county public defender and a member of the county MR/DD board, respectively. Neither of these statutes, however, prohibits the simultaneous holding of the positions of county public defender and member of the county MR/DD board.

Question number three asks whether one position is subordinate to, or in any way a check upon, the other. An examination of the duties of the positions in question discloses that the positions operate independently of each other, and that neither is responsible for assigning duties to, or supervising, the other. *See* R.C. 120.13-.18; R.C. Chapter 5126. Accordingly, neither position is subordinate to, or a check upon, the other.

The final question asks whether there is a conflict of interest between the two positions. An individual 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. Given the respective duties of the positions of county public defender and member of a county MR/DD board, it does not appear that an individual who serves in these positions simultaneously is subject to a conflict of interest.

In light of the foregoing, I find that all seven questions of the compatibility test yield an answer in favor of compatibility. Therefore, the positions of county public defender and member of a county MR/DD board are compatible.

Your second question asks whether the positions of clerical employee in the county prosecuting attorney's office and member of the board of education of a local school district are compatible. As above, resolution of this inquiry requires an examination whether the remaining questions of the compatibility test result in a finding in favor of compatibility.

As stated above, R.C. 124.57 prohibits employees or officers in the classified service from participating in partisan political activities, other than to vote or express their political views. Information provided indicates that the clerical position in the county prosecuting attorney's office is in the unclassified service. A member of the board of education of a local school district, as an elected officer, holds an unclassified position. *See* R.C. 124.11(A)(1). R.C. 124.57 thus does not prohibit an individual from serving in both positions.

Other than R.C. 124.57, there is no statutory limitation on the outside employment of clerical employees in the county prosecuting attorney's office. A member of the board of education of a local school district is subject to the membership restrictions of R.C. 3313.13, which provides, in pertinent part, that "no prosecuting attorney, city director of law, or other official acting in a similar capacity shall be a member of a board of education." In addition, R.C. 3313.70 states that "[n]o member of the board of education in any district shall be eligible to the appointment of school physician, school dentist, or school nurse during the period for which he is elected." Although R.C. 3313.13 and R.C. 3313.70 place some limitations on additional employment by a member of the board of education of a local school district, such limitations do not apply to holding the position of clerical employee in the county prosecuting attorney's office. Therefore, no statute prohibits an individual from holding simultaneously the positions of clerical employee in the county prosecuting attorney's office and member of the board of education in a local school district.

The next issue to be addressed is whether one position is subordinate to, or in any way a check upon, the other. A clerical employee in the county prosecuting attorney's office is employed by the county prosecuting attorney, R.C. 309.06(A), and is thus accountable to the county prosecuting attorney that employs him. A member of a local board of education as an elected official, R.C. 3313.01, is directly responsible to the people who elected him. The positions, therefore, operate independently of each other and neither is subordinate to the other. There also is no area in which one position acts as a check upon the other. Accordingly, the positions are not subordinate to, or in any way a check upon, each other.

The final issue to be examined is whether there is a conflict of interest between the two positions. Pursuant to R.C. 3313.35, the county prosecuting attorney is the legal adviser to the board of education of a local school district. In addition, R.C. 2733.05 authorizes a county prosecuting

attorney to bring quo warranto actions against members of a local school board.[1] Thus, the office of the county prosecuting attorney provides legal representation to a local board of education and is authorized to bring a quo warranto action against any member of a local school board.

However, insofar as a clerical employee in the county prosecuting attorney's office is not directly responsible for representing local school districts or bringing quo warranto actions, I believe that neither R.C. 3313.35 nor R.C. 2733.05 subjects an individual who holds simultaneously the positions of clerical employee in the county prosecuting attorney's office and member of the board of education of a local school district to an impermissible conflict of interest. However, as a practical matter, the county prosecuting attorney should restrict the clerical employee's access to files pertaining to the representation of the local school district and quo warranto actions against any member of the local school board. In light of the foregoing, I find that the positions of unclassified clerical employee in the county prosecuting attorney's office and member of the board of education of a local school district are compatible.

In conclusion, it is my opinion, and you are hereby advised as follows:

1. The positions of county public defender and member of a county MR/DD board are compatible.

2. The positions of unclassified clerical employee in the county prosecuting attorney's office and member of the board of education of a local school district are compatible.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

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[1] Under R.C. 2733.01, a civil action in quo warranto may be brought in the name of the state against a person who usurps, intrudes into, or unlawfully holds or exercises a public office, or against a public officer who does or suffers an act which, by law, works a forfeiture of his office.

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SYLLABUS: 97-018

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