March 16, 2011

The Honorable David W. Phillips
Union County Prosecuting Attorney
221 West Fifth Street, Suite 333
Marysville, Ohio 43040

SYLLABUS: 2011-008

A person may serve simultaneously as director of the Union County department of job and family services and as member of the legislative authority of the City of Marysville, provided that as a member of the city legislative authority he does not participate in any deliberations, discussions, negotiations, or votes concerning agreements with the county department of job and family services, present the city's annual tax budget to the county budget commission, or participate in any discussions or votes on tax levies or bond issues for additional funding if the county has placed such a levy or bond issue on the ballot. As director of the Union County department of job and family services, he may not participate in any discussions or negotiations related to agreements with the city, exercise final decision-making authority with respect to any such agreement, or present the county's annual tax budget to the county budget commission.

MIKE DEWINE
OHIO ATTORNEY GENERAL

Opinions Section
Office 614-752-6417
Fax 614-466-0013

30 East Broad Street, 15th Floor
Columbus, Ohio 43215
www.OhioAttorneyGeneral.gov

March 16, 2011

OPINION NO. 2011-008

The Honorable David W. Phillips
Union County Prosecuting Attorney
221 West Fifth Street, Suite 333
Marysville, Ohio 43040

Dear Prosecutor Phillips:

You have requested an opinion whether a person may serve as director of the Union County department of job and family services while also serving as a member of the legislative authority of the City of Marysville. The City of Marysville has adopted a charter form of government pursuant to Article XVIII, § 7 of the Ohio Constitution. For the reasons that follow, it is our opinion that the two positions are compatible.

The following analysis is used to determine whether a person may serve simultaneously in two public positions:

1. Is either of the positions a classified employment within the terms of R.C. 124.57?

2. Does a constitutional provision or statute prohibit the holding of both positions at the same time?

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 that are controlling?

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

2009 Op. Att'y Gen. No. 2009-018, at 2-127 and 2-128; *see also* 2 Ohio Admin. Code 123:1-46-02.

Discussion of R.C. 124.57

Question one asks whether either of the positions is a classified employment within the terms of R.C. 124.57. With certain exceptions, R.C. 124.57 prohibits persons in the classified service of counties and cities from holding partisan political offices and employments. A member of the Marysville city council is, pursuant to Article III, § 3.02 of the City of Marysville City Charter (hereinafter referred to as "the Marysville Charter" or "the Charter"), an elected officer of the city and, therefore, is in the unclassified service of the city. R.C. 124.11(A)(1). The director of a county department of job and family services also is in the unclassified civil service. R.C. 124.11(A)(22); R.C. 329.02. Because both positions are in the unclassified service, R.C. 124.57's prohibition does not apply.

Applicability of Constitutional Provisions, Statutes, Charter Provisions, Resolutions, or Ordinances Prohibiting the Holding of Another Public Position

For ease of discussion, questions two and six are addressed together. First, question two asks whether a constitutional provision or statute prohibits a person from holding both positions at the same time. No constitutional provision bars a member of a city legislative authority from serving simultaneously as director of a county department of job and family services.

With respect to whether a statute prohibits a person from holding both positions simultaneously, R.C. 731.02 generally prohibits members of a city legislative authority from holding "any other public office." A charter city, however, may establish qualifications for members of its legislative authority that are different from those provided in R.C. 731.02. Ohio Const. art XVIII, §§ 3 and 7; *State ex rel. Bindas v. Andrish*, 165 Ohio St. 441, 136 N.E.2d 43 (1956) (syllabus, paragraph 2); s*ee also* 2008 Op. Att'y Gen. No. 2008-037, at 2-379 and 2-380 (in charter cities, a statute regarding a matter of local self-government involving procedure applies unless there is a conflicting charter provision); 2008 Op. Att'y Gen. No. 2008-032, at 2-326 n.1 and 2-330 through 2-335 (same as previous parenthetical).

The Marysville Charter sets forth the qualifications for members of the Marysville city council. Marysville Charter, art. III, § 3.02. Pursuant to the Charter, a city council member cannot be "the occupant of an incompatible office." *Id.* While R.C. 731.02 prohibits a city council member from holding any other public office, the Marysville Charter prohibition is narrower in scope, only prohibiting a city council member from holding another "incompatible office" as opposed to any public office. The qualifications set forth in the Marysville Charter therefore expressly conflict with the broader prohibition of the statute. Accordingly, the prohibition in R.C. 731.02 does not apply. *See* 2008 Op. Att'y Gen. No. 2008-037, at 2-379 and 2-380; 2008 Op. Att'y Gen. No. 2008-032, at 2-330. Because no constitutional provision prohibits a person from holding both positions simultaneously and the Marysville Charter prevails over the statutory prohibition, question two may be answered in the negative.

Next, question six asks whether any local charter provisions, resolutions, or ordinances apply. For purposes of this opinion, we assume that there is no local resolution or ordinance of either the City of Marysville or Union County that prohibits an individual from serving simultaneously as a member

of the Marysville city council and as director of the Union County department of job and family services.

As we have just explained, the qualifications for members of city council set forth in the Marysville Charter control in this instance. Whether a charter provision prohibits an individual from holding two positions simultaneously is an issue traditionally left to the discretion of local officials. After reviewing the Marysville Charter, however, we do not believe that the Charter prohibits an individual from holding both positions simultaneously.

The Charter prohibits a city council member from holding "an incompatible office." Marysville Charter, art. III, § 3.02. For purposes of this opinion, it is not necessary to determine conclusively whether the position of director of a county department of job and family services is an "office." Even if the position of director of a department of job and family services is an office, we do not believe that a person serving in that position is prohibited by Article III, § 3.02 of the Marysville Charter from also serving as a member of the city council. The Marysville Charter prohibits a person from holding these positions simultaneously only if the director of a county department of job and family services is an "*incompatible* office." Marysville Charter, art. III, § 3.02 (emphasis added). We read this provision to mean that a member of the city council may hold another office if the seven-question common law compatibility test set forth in this opinion is applied and the offices are found to be compatible. In other words, even if the position of director of a county department of job and family services is an office, this determination alone does not prohibit a Marysville city council member from holding such position. Rather, if the two positions are found compatible under the common law compatibility test, it is immaterial whether the director of a county department of job and family services is considered an "office." Pursuant to the Marysville Charter, a Marysville city council member may hold another public office as long as that office is compatible with the office of city council member. As explained hereafter, we believe that the positions are compatible under the common law compatibility test. Accordingly, even if the position of director is an "office," he is not prohibited by the Charter from holding both positions simultaneously. Moreover, if the director position is considered employment rather than an office, we find no other provision in the Marysville Charter that would prohibit an individual from holding both positions simultaneously.

Because we do not believe the Marysville Charter prohibits a person from serving simultaneously as a member of the Marysville city council and as director of the Union County department of job and family services, question six may be answered in the negative unless there is a local resolution or ordinance of either the city or county to the contrary.

Subordination and Control

Question three asks whether one position is subordinate to, or in any way a check upon, the other. Here, neither position is responsible for appointing or removing a person from the other position. A Marysville city council member is an elected city officer pursuant to Article III, § 3.02 of the Marysville Charter and serves and is responsible to the city's electorate. *See also* R.C. 731.01. The director of a county department of job and family services is appointed and removed by the board of county commissioners and is subject to the board's control and direction. R.C. 329.01-.02.

Additionally, the positions operate independently of each other, and neither is required to assign duties to or supervise the other. Therefore, neither position is subordinate to, or in any way a check upon, the other.

Physical Ability to Perform Duties of Both Positions

The fourth question of the compatibility test asks whether it physically is possible for one person to perform the duties of both positions. This is a factual question that is best addressed by local officials because they may determine more accurately the time constraints and demands imposed upon the positions in question. *See* 2009 Op. Att'y Gen. No. 2009-010, at 2-90. If local officials determine that it is physically possible for a person to perform the duties of both positions, a person may hold both positions at the same time.

We caution, however, that a member of a city council, as an elected city officer, is required to perform duties imposed by statute or by charter provisions. Where the nature of those duties requires him to be present at a particular time or place, or act in a particular manner, he must be able to do so. *See generally* 2009 Op. Att'y Gen. No. 2009-018, at 2-130. Thus, if a council member who also serves as the director of a county department of job and family services is required to perform his duties as council member during his regular work hours as the director, the council member must take approved vacation or personal leave, compensatory leave, or leave without pay for the time he is absent from his duties as director of a county department of job and family services. *See, e.g.,* 2009 Op. Att'y Gen. No. 2009-018, at 2-130.

Conflicts of Interest

Question five asks whether there is a conflict of interest between the two positions.[1] A person may not hold two public positions simultaneously if he would be subject to divided loyalties, conflicting duties, or the temptation to act other than in the public's best interest. 2009 Op. Att'y Gen. No. 2009-005, at 2-30. Resolution of this question requires an examination of the powers, duties, and responsibilities of the respective positions.

The powers, duties, and responsibilities of a member of a city legislative authority primarily relate to exercising the legislative power of the city (Marysville Charter, art. IV, § 4.01; *see also* R.C.

---

[1] The Ohio Ethics Commission, rather than the office of the Attorney General, is required by R.C. 102.08 to address the application of the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43. We will, therefore, refrain from interpreting and applying these provisions by way of a formal opinion. 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph 3). Questions concerning the interpretation and application of these provisions in your particular situation should instead be directed to the Ohio Ethics Commission. *See, e.g.,* Ohio Ethics Comm'n, Advisory Op. No. 88-005, slip op. at 3 (R.C. 1724.10, which requires a city official to serve on the governing board of a community improvement corporation designated as an agency by the city, does not exempt the official from the provisions of R.C. Chapter 102).

731.01; R.C. 731.05) and managing and controlling the property and finances of the city (Marysville Charter, art. X; *see also* R.C. 731.47). The budgetary and financial duties of a city legislative authority include adopting and submitting an annual tax budget to the county budget commission (Marysville Charter, art. X, § 10.03; R.C. 5705.28) and levying and imposing taxes (R.C. Chapter 718; R.C. 5705.03; R.C. 5705.07; R.C. 5705.19). With respect to financial and budgetary matters, a city legislative authority is designated as the city's taxing authority for purposes of R.C. Chapter 133 (uniform public securities law) and R.C. Chapter 5705 (tax levy law). R.C. 133.01(NN)(2); R.C. 5705.01(C).

A county department of job and family services provides a wide variety of aid and assistance to both individuals and families. R.C. 329.04-.06. In order to discharge this duty, a county department of job and family services has the authority to enter into agreements with local governmental entities:

> The county department of job and family services may administer or assist in administering any state *or local* family services duty in addition to those mentioned in [R.C. 329.04], supported wholly or in part by public funds from any source provided by agreement between the board of county commissioners and the officer, department, board, or agency in which the administration of such activity is vested. Such officer, department, board, or agency may enter into such agreement and confer upon the county department of job and family services, to the extent and in particulars specified in the agreement, the performance of any duties and the exercise of any powers imposed upon or vested in such officer, board, department, or agency, with respect to the administration of such activity. (Emphasis added.)

R.C. 329.05. Such an agreement must be approved by resolution of the board of county commissioners. *Id.*

The director of a county department of job and family services is appointed by the board of county commissioners. R.C. 329.01. The director is responsible for overseeing the general day-to-day operations of the department "[u]nder the control and direction of the board of county commissioners." R.C. 329.02 (director shall have "full charge" of the department). The director's duties include preparing an annual budget estimate for the department and submitting that tax budget estimate to the board of county commissioners. *Id.*; *see also* R.C. 5705.28(C)(1). The only other duties specifically prescribed by R.C. Chapter 329 for the director of a county department of job and family services include appointing necessary personnel with approval of the board of county commissioners. R.C. 329.02.

In addition, in your situation it appears that the Union County department of job and family services also serves as the county's public children services agency pursuant to R.C. 5153.02(B).[2] *See also* R.C. 307.981. The director of the Union County department of job and family services thus may also serve as the "executive director" of the public children services agency and exercise any of the powers and duties conferred upon him in that capacity. *See, e.g.*, R.C. 5153.01(B)(4); R.C. 5153.10-.11. Significant for purposes of this opinion, the public children services agency has authority to enter into an agreement with a municipal corporation "respecting the operation, acquisition, or maintenance of any children's home, training school, or other institution for the care of children maintained by such municipal corporation." R.C. 5153.16(A)(9). Pursuant to such an agreement, a municipal corporation may contribute funds for the maintenance and operation of children's training schools by a public children services agency and may also "expend moneys from their general funds for maintaining and operating the joint children's training school." R.C. 5153.162. An agreement with a municipal corporation, however, is subject to the approval of the board of county commissioners. R.C. 5153.16(A)(9).

A review of the powers, duties, and responsibilities of the positions of member of a city legislative authority and director of a county department of job and family services discloses that there are potential conflicts of interest between the two positions. The first conflict may exist insofar as a county department of job and family services may enter into agreements with a city. *See, e.g.*, R.C. 329.05; R.C. 5153.16(A)(9); R.C. 5153.162. If the director of a county department of job and family services deliberates, discusses, negotiates, or makes decisions to approve or reject agreements that may affect the city in which he serves as a member of the city council, it may be difficult for the director to exercise his discretion in an objective and disinterested manner because of his position as a member of city council. Similarly, if this person, as a member of the city council, were required to deliberate, discuss, negotiate, or vote on any agreements with the county department of job and family services, it might be difficult for him to exercise his discretion in a completely unbiased manner because of his position as director of the county department of job and family services.

The fact that an individual is subject to potential conflicts of interest, however, does not necessarily render two positions incompatible. Rather, each potential conflict requires a determination of the immediacy of the conflict. If the possibility of conflict is remote and speculative, the conflict of interest rule is not violated, and the two positions are compatible. 1997 Op. Att'y Gen. No. 97-026, at 2-154; 1993 Op. Att'y Gen. No. 93-067, at 2-315. The factors used in making this decision include the probability of the conflicts arising, the ability of the person to remove himself from any conflicts that may arise, whether the person exercises decision-making authority in both positions, and whether the conflicts relate to the primary functions of each position or to financial or budgetary matters. 2006 Op. Att'y Gen. No. 2006-034, at 2-309.

---

[2] Union County, Ohio, Department of Job and Family Services, Children's Protective Services, http://w2.co.union.oh.us/djfs/Job___Family_Services/Social_Services/Children_s_Protective_Services/children_s_protective_services.html (last visited March 15, 2011).

Consideration of these factors leads to the conclusion that the potential conflict presented above is remote and speculative and may be sufficiently avoided. First, no provision of law mandates agreements between a city and a county department of job and family services; rather, it is only speculative whether a city and a county department of job and family services will enter into any such agreements. *See* R.C. 329.05; R.C. 5153.16(A)(9); R.C. 5153.162. Second, the potential conflict does not involve the primary functions of either position. For these reasons, the occasions in which the person, as either a member of a city council or as director of a county department of job and family services, will have to deliberate, discuss, negotiate, or vote on such an agreement will be rare.

Third, even if an agreement with the county department of job and family services is considered by a city council, a city council member who serves as director of the county department of job and family services will be able to remove himself from any conflict of interest by abstaining from any deliberations, discussions, negotiations, or votes concerning the agreement. *See* 2009 Op. Att'y Gen. No. 2009-018, at 2-131 (if person serving in two positions removes himself from the conflict of interest by abstaining from participating in deliberations, discussions, negotiations, or votes pertaining to the conflict, the person may serve in both positions simultaneously); 1993 Op. Att'y Gen. No. 93-016, at 2-91 (member of city legislative authority may remove himself from any conflict of interest by abstaining from voting upon or discussing matters related to the conflict). In fact, a city council member has a duty to abstain from participating in any matter that would impair his objectivity. 2009 Op. Att'y Gen. No. 2009-010, at 2-91. Similarly, because it is speculative whether the city and county department of job and family services will enter into any agreement, and insofar as handling such agreements is not among the primary duties of the director of a county department of job and family services, it is likely that the director also could abstain from any participation related to such an agreement.

Fourth, even if the director is not able to abstain, the director of a county department of job and family services does not have final decision-making authority with regard to such agreements. The director's decisions are subject to the control and direction of the board of county commissioners. *See* R.C. 329.02; R.C. 5153.16(A)(9). Accordingly, it is possible for a board of county commissioners to serve as a check upon any undue influence that the director who also serves as a city council member might exert. *See* 2010 Op. Att'y Gen. No. 2010-020, slip op. at p. 11 (a superintendent and treasurer of a school district are subject to direction of the board of education when performing their duties; accordingly, board of education could eliminate any undue influence the superintendent or treasurer might exert). Whether, in a given situation, the board of county commissioners has taken reasonable steps to eliminate the likelihood that the director of a county department of job and family services will participate in the determination of whether to enter an agreement that will affect the city in which the director serves as a city council member is a question of fact that is best answered at the local level. *Id.*

Finally, to the extent that the director is involved in agreements involving the city, there is a presumption that he will perform his duties in a regular and lawful manner in the absence of evidence to the contrary. *See State ex rel. Speeth v. Carney*, 163 Ohio St. 159, 126 N.E.2d 449 (1955) (syllabus, paragraph 10) ("[i]n the absence of evidence to the contrary, public officials, administrative officers, and public authorities, within the limits of the jurisdiction conferred upon them by law, will

be presumed to have properly performed their duties in a regular and lawful manner and not to have acted illegally or unlawfully"); *see also* 2007 Op. Att'y Gen. No. 2007-023, at 2-237 and 2-238.

In sum, the likelihood of this conflict of interest occurring is rare. Additionally, a city council member may refrain from participating in any deliberations, discussions, negotiations, or votes concerning an agreement between the city and a county department of job and family services, and the board of county commissioners may exercise its decision-making authority with respect to any agreements involving the city in order to eliminate any undue influence that the director who also serves as a city council member may exert. Accordingly, the above-mentioned conflict is not sufficient to render the positions incompatible.

A second conflict of interest between the two positions may exist because of budgetary and taxing issues. Except as provided in R.C. 5705.281, as the taxing authority of a city, the city legislative authority is required to prepare, adopt, and submit an annual tax budget to the county budget commission. R.C. 5705.01(C); R.C. 5705.28(A); *see also* R.C. 5705.29-.32. With respect to a county department of job and family services, the director must prepare an "annual budget *estimate* of the department" and submit it to the board of county commissioners. R.C. 329.02 (emphasis added); *see also* R.C. 5705.28(C)(1). The board of county commissioners is the "taxing authority" for the county and therefore must prepare, adopt, and submit an annual tax budget for the county, which includes the tax budget of the county department of job and family services, to the county budget commission. R.C. 5705.01(C); R.C. 5705.28(A). A conflict may exist because of the competition for tax moneys generated within the ten-mill limitation.[3]

After the annual tax budgets are submitted, including those submitted by a city legislative authority and by the board of county commissioners, the county budget commission is required to review the budgets and information, adjust tax levies as required by law, and certify appropriate taxes for collection. R.C. 5705.31-.32; R.C. 5705.34. Any revisions or adjustments made by the county budget commission to the taxing authorities' funds affect the amount of tax money generated within the ten-mill limitation that will be allotted to the taxing authorities. 2006 Op. Att'y Gen. No. 2006-034, at 2-313. When the county budget commission completes its work on the tax budget, taxing authorities such as city legislative authorities and the board of county commissioners authorize the necessary tax levies and certify them to the county auditor. R.C. 5705.34.

A member of a city council is required to participate in the preparation and adoption of the city's annual tax budget and may be required to explain it to the county budget commission. R.C.

---

[3] In Ohio, property may not be taxed in excess of one percent of its true value in money for state and local purposes unless approved by the voters or as provided for by a municipal charter. Ohio Const. art. XII, § 2; 2006 Op. Att'y Gen. No. 2006-034, at 2-313 n.5. This is known as the "ten-mill limitation." 2006 Op. Att'y Gen. No. 2006-034, at 2-313 n.5; *see also* R.C. 5705.02-.03; R.C. 5705.07. A subdivision's taxing authority may levy property taxes within the ten-mill limitation for the purpose of paying the current operating expenses of the subdivision. R.C. 5705.03(A); 2006 Op. Att'y Gen. No. 2006-034, at 2-313 n.5.

5705.01(C); R.C. 5705.28(A); R.C. 5705.32(E). Additionally, the director of a county department of job and family services is required to prepare the department's annual tax budget estimate and to submit it to the board of county commissioners. R.C. 329.02; *see also* R.C. 5705.28(C)(1). Accordingly, a person serving in both positions will be required to participate in the preparation of competing annual tax budgets and could be subject to influences that may prevent him from making objective, disinterested decisions.

We believe this tax and budgetary conflict also is remote and speculative and can sufficiently be avoided. First, the director of a county department of job and family services does not prepare or adopt an annual tax budget that is submitted to the county budget commission nor does the director present an annual tax budget to the county budget commission. Instead, R.C. 5705.28 requires the taxing authority of the county to adopt an annual tax budget. In the case of the county, "taxing authority" means the board of county commissioners. R.C. 5705.01(C). The director of a county department of job and family services prepares only a tax budget "estimate" that is then submitted to the board of county commissioners. R.C. 329.02; *see also* R.C. 5705.28(C)(1). The board of county commissioners then prepares and adopts a tax budget for the county, only one part of which is for the county department of job and family services. *See* R.C. 5705.01(C); R.C. 5705.28. Thus, the director of a county department of job and family services does not exercise independent decision-making authority in the preparation and presentation of annual tax budgets to the county budget commission.

Moreover, the director of a county department of job and family services generally is not required to present the department's tax budget to the county budget commission. Rather, the board of county commissioners may designate a representative to appear before the county budget commission to present the county's budget. R.C. 5705.32(E); *see also* R.C. 5705.01(C); R.C. 5705.28. In order to avoid the potential conflict, however, the director of a county department of job and family services cannot be required to present the department's tax budget, as part of the county's budget, to the county budget commission. *See* 2003 Op. Att'y Gen. No. 2003-006, at 2-36. "An impermissible 'conflict of interest exists where one person, who owes a duty of loyalty to each of two different governmental entities, is required to advocate a position on behalf of one entity to the potential detriment of the other.'" *Id.* (quoting 1999 Op. Att'y Gen. No. 99-018, at 2-131). Rather, the director of the county department of job and family services must abstain from presenting the county's annual tax budget to the county budget commission.

Accordingly, the director of a county department of job and family services is not subject to conflicts of interest involving the department's tax budget or obtaining moneys from the county budget commission so long as he abstains from presenting the county's tax budget to the county budget commission. *See* 2007 Op. Att'y Gen. No. 2007-023, at 2-239 (township fiscal officer is not subject to conflicts of interest involving township tax budget because township fiscal officer is not required to prepare the township's tax budget or present the budget to the county budget commission).

Second, even if a director is subject to any conflicts of interest, it is the board of county commissioners that is responsible for preparing and submitting the county tax budget to the county budget commission. The board of county commissioners, therefore, has the opportunity to counter

any undue influence that the director may have exerted in preparing the county department of job and family services' tax budget estimate. *See* 2010 Op. Att'y Gen. No. 2010-020, slip op. at p. 11.

Similarly, although a member of the Marysville city council is responsible for preparing and adopting the city's annual tax budget, his role is limited by the role others play in the budget process. Therefore, any undue influence a council member may exert can be mitigated. First, the city's annual tax budget is prepared by the city's Director of Finance under the direction of the Board of Control. Marysville Charter, art. X, § 10.03. Further, the proposed annual tax budget must be approved by the entire council, of which the person who also serves as director of the Union County department of job and family services is only one voting member. Finally, the annual tax budget submitted by the city council is subject to the review, adjustment, and approval of the county budget commission.

Further, to the extent that a person is involved in preparation of the annual tax budgets of a county department of job and family services and a city, there is a presumption that he will perform his duties in a regular and lawful manner in the absence of evidence to the contrary. *See State ex rel. Speeth v. Carney*, 163 Ohio St. 159 (syllabus, paragraph 10). Prior Attorney General opinions repeatedly have recognized that this is especially true in light of the fact that, while two separate taxing authorities each prepare and submit an annual tax budget, it is the county budget commission that actually allocates the tax proceeds within the ten-mill limitation. *E.g.*, 2007 Op. Att'y Gen. No. 2007-023, at 2-240; 2003 Op. Att'y Gen. No. 2003-006, at 2-35; 2000 Op. Att'y Gen. No. 2000-025, at 2-172; *see also* R.C. 5705.31-.32. "Accordingly, the potential conflicts of interest arising because of the competition over tax moneys generated within the ten-mill limitation … are, as a general matter, avoided." 2007 Op. Att'y Gen. No. 2007-023, at 2-240.

In addition, prior Attorney General opinions repeatedly have stated that the fact that a city council member holds an additional position with a political subdivision that competes with the city for tax moneys generated within the ten-mill limitation is, in and of itself, an insufficient reason to find that the council member is subject to an impermissible conflict of interest. *See, e.g.*, 2007 Op. Att'y Gen. No. 2007-023, at 2-239 and 2-240; 2003 Op. Att'y Gen. No. 2003-006, at 2-35. As previously noted, "[i]f this reason were deemed sufficient, a [city council member] would not be permitted to hold any employment or office with a political subdivision that competes with the [city] for tax moneys generated within the ten-mill limitation." 2007 Op. Att'y Gen. No. 2007-023, at 2-240.

Finally, in order to avoid the potential conflict based on budgetary and taxing matters, the person, as a member of city council, cannot be required to present the city's annual tax budget to the county budget commission. *See* 2003 Op. Att'y Gen. No. 2003-006, at 2-36. Accordingly, the council member must abstain from presenting the city's annual tax budget to the county budget commission.[4]

---

[4] An analysis similar to that applied above for potential conflicts arising because of the competition for tax moneys generated within the ten-mill limitation also will apply to taxing and

A third potential conflict of interest may exist because of competition for tax moneys in excess of the ten-mill limitation. As taxing authorities of coextensive subdivisions, a city council and a board of county commissioners are permitted to place levies on the ballot for taxes in excess of the ten-mill limitation and to submit bond issues to the electors. R.C. 133.18; R.C. 5705.01(C); R.C. 5705.07. Where both the board of county commissioners and a city council contemplate asking the voters for additional funding, a person who serves simultaneously as a city council member and director of a county department of job and family services might be subject to divided loyalties and influences that may prevent his decisions as a city council member from being completely objective and disinterested. *See* 2007 Op. Att'y Gen. No. 2007-023, at 2-241. For example, if the board of county commissioners has authorized a tax levy for additional funds, a city council member of a city within the same county may be hesitant to advocate for or vote in favor of placing a city levy on the ballot for fear that the county levy may be rejected in favor of the city levy. *See, e.g.*, R.C. 5705.19. "Questions of competing concerns before the electorate may be critical to determining whether or when a board might consider bringing requests for additional taxes before the voters." 1988 Op. Att'y Gen. No. 88-011, at 2-43.

Again, however, we believe that this potential conflict of interest is insufficient to render the positions of city council member and director of a county department of job and family services incompatible. Previous opinions have concluded that such a conflict is insufficient to render two positions incompatible, stating that

> [i]t is unlikely that both the village and township will have a tax levy or bond issue on the same ballot every election. Thus, deliberations, discussions, or votes by the legislative authority of the village concerning the placement of a tax levy or bond issue for additional funding on the ballot when the township has previously placed such a levy or bond issue on the ballot will be infrequent.

2007 Op. Att'y Gen. No. 2007-023, at 2-241. Similarly, it is unlikely that a city and county will both have a tax levy or bond issue on the same ballot every election. Nonetheless, a city council member should abstain from participating in deliberations, discussions, and votes on a city tax levy or bond issue for additional funding if the county already has placed a tax levy or bond issue on the ballot. 2004 Op. Att'y Gen. No. 2004-025, at 2-228.

Further, as previously stated, the fact that a city council member holds an additional position with a political subdivision that competes with the city for tax moneys generated outside the ten-mill limitation is, in and of itself, an insufficient reason to find that the council member is subject to an impermissible conflict of interest. *See, e.g.*, 2007 Op. Att'y Gen. No. 2007-023, at 2-242. Finally, there is a presumption that the person will perform his duties in a regular and lawful manner in the absence of evidence to the contrary. *See State ex rel. Speeth v. Carney*, 163 Ohio St. 159 (syllabus, paragraph 10).

---

budgetary issues that may arise in the distribution of the county undivided local government fund, R.C. 5747.51-.55, and the public library fund, R.C. 5747.46-.48.

Applicability of Federal, State, or Local Regulations

Finally, question seven of the compatibility test asks about the applicability of federal, state, and local regulations. No state regulation prohibits a person from serving simultaneously in the positions in question. Whether an applicable local regulation bars a person from holding these two positions simultaneously is a question for local officials to answer.

With respect to federal law, the federal Hatch Act may be applicable in this situation. 5 U.S.C.S. §§ 1501-1508. The Hatch Act limits the rights of individuals who are principally employed by a state or local agency and who work in connection with programs that are financed in whole or in part by federal loans or grants to engage in partisan politics, including prohibiting such individuals from being a candidate for elective office.[5] 5 U.S.C.S. § 1501(4); 5 U.S.C.S. § 1502(a)(3); *see also* 5 C.F.R. § 151.101(d); 5 C.F.R. § 151.121(c). The law does exempt certain specified employees from the prohibition on candidacy for elective office, including the governor or lieutenant governor of a state, the mayor of a city, an elected head of an executive department of a state or municipality who is not classified under a state or municipal merit or civil service system, and an individual holding public elective office. 5 U.S.C.S. § 1502(c).

Your request letter indicates that the person in question first was elected to his position as member of the Marysville city council and subsequently was appointed as director of the Union County department of job and family services within the same county. The United States Office of Special Counsel ("OSC"), the federal agency charged with administering the Hatch Act, addressed an analogous situation as part of the "Frequently Asked Questions" section of its website:

> If I hold an elective position and I am then hired by the state or local government, do I have to resign my elected position?
>
> No. First, not all state or local positions are covered by the Hatch Act. Accordingly, just because an individual is hired by a state or local government does not automatically mean the individual becomes covered by the Hatch Act. (If an individual is concerned that he/she might be covered by the Hatch Act, he/she should contact OSC for an advisory opinion.) Second, the Hatch Act prohibits covered employees from being candidates for public office in a partisan political election. It does not prohibit individuals who hold an elective office from accepting a covered position with state or local governments. Accordingly, it is not a violation of the Hatch Act to hold a partisan political office and to be hired into a covered position. However, if an individual becomes employed in a covered position with a state or

---

[5] An agency such as a county department of job and family services often receives financial assistance from the federal government. *See* R.C. 329.09; 2004 Op. Att'y Gen. No. 2004-031, at 2-279 and 2-280 nn.5 and 7; *see also* United States Office of Special Counsel, Hatch Act: Who is Covered?, http://www.osc.gov/haStateLocalwhoiscovered.htm (last visited March 11, 2011).

> local government, the individual will be prohibited from seeking reelection to the partisan political office while holding the covered position.

United States Office of Special Counsel, Hatch Act: Frequently Asked Questions, http://www.osc.gov/haStateLocalfaq.htm (last visited March 11, 2011). Based on this statement, it does not appear that, in this situation, the Hatch Act prohibits the person from holding both positions simultaneously.

We understand that the person in question is not at present a candidate for a partisan elective office, and this opinion makes no determination whether the Hatch Act prohibits a person who seeks election or reelection to a partisan office from also serving as director of the Union County department of job and family services.

Moreover, whether the Hatch Act prohibition applies in this instance is a question that will have to be addressed by local officials or the courts. *See* 1999 Op. Att'y Gen. No. 99-007, at 2-55 (the Attorney General is not empowered to provide authoritative interpretations of federal law); 1983 Op. Att'y Gen. No. 83-057, at 2-232 (the Attorney General does not serve as fact-finding body). For specific guidance on that law's application, local officials may contact the United States Office of Special Counsel. *See* United States Office of Special Counsel, Hatch Act, http://www.osc.gov/hatchact.htm (last visited March 11, 2011). Absent a federal, state, or local regulation rendering the positions of director of the Union County department of job and family services and member of the Marysville city council incompatible, the positions are compatible.

In sum, it is my opinion, and you are hereby advised that a person may serve simultaneously as director of the Union County department of job and family services and as member of the legislative authority of the City of Marysville, provided that as a member of the city legislative authority he does not participate in any deliberations, discussions, negotiations, or votes concerning agreements with the county department of job and family services, present the city's annual tax budget to the county budget commission, or participate in any discussions or votes on tax levies or bond issues for additional funding if the county has placed such a levy or bond issue on the ballot. As director of the Union County department of job and family services, he may not participate in any discussions or negotiations related to agreements with the city, exercise final decision-making authority with respect to any such agreement, or present the county's annual tax budget to the county budget commission.

Respectfully,

MICHAEL DEWINE
Ohio Attorney General