May 1, 1997

OPINION NO. 97-026

The Honorable Rocky A. Coss
Highland County Prosecuting Attorney
149 East Main Street
Hillsboro, Ohio 45133

Dear Prosecutor Coss:

You have requested an opinion whether the positions of president of the legislative authority of a non-charter city and member of the board of health of a general health district are compatible. Information provided indicates that the city is part of the general health district.

1979 Op. Att'y Gen. No. 79-111 established a seven question test for determining the compatibility of two public positions. The seven questions are as follows:

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 raise issues of local concern, and it is assumed, for purposes of this opinion, that there are no local departmental regulations, charter provisions, or ordinances that limit the holding of outside employment by a president of the legislative authority of a city or member of the board of health of a general health district. There are no applicable state or federal regulations.

Question one asks whether either of the positions is a classified employment 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 activity, other than to vote or express their political views. Neither the position of president of the legislative authority of a city nor member of the board of health of a general health district is a classified employment within the meaning of R.C. 124.57. *See* R.C. 124.11(A)(1); R.C. 3709.02. R.C. 124.57 thus does not prevent an individual from serving simultaneously in the positions in question.

Question two asks whether the empowering statutes governing either position limit outside employment. No statute prohibits the simultaneous holding of the positions of president of the legislative authority of a city and member of the board of health of a general health district.[1] Consequently, the second question may be answered in the negative.

Question three asks whether one position is subordinate to or a check upon the other. A review of the duties of the respective positions reveals that the positions operate independently of each other, and that neither is responsible for assigning duties to, or supervising, the other. Therefore, neither position is subordinate to, or a check upon, the other.

Question four concerns whether it is physically possible for one person to perform the duties of both positions. This is a factual question, which has traditionally been left to the discretion of local officials in the belief that these officials are more familiar with the time demands of each position and, therefore, better equipped to resolve this issue. It appears, however, that these two positions can be filled competently by the same individual if there is no direct conflict in their working hours.

The final question concerns the potential for 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 exposed to the temptation of acting other than in the best interest of the public. 1985 Op. Att'y Gen. No. 85-042 at 2-150.

Our research discloses that an individual who serves simultaneously in the positions of president of the legislative authority of a city and member of the board of health of a general health district may be exposed to influences that may prevent his decisions from being completely

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[1] R.C. 731.02 provides that a member of the legislative authority of a city must "not hold any other public office, except that of notary public or member of the state militia." The president of the legislative authority of a non-charter city is not a member of the legislative authority of the city. 1953 Op. Att'y Gen. No. 2367, p. 69; 1946 Op. Att'y Gen. No. 744, p. 68. Therefore, R.C. 731.02 does not prevent the president of the legislative authority of a non-charter from serving simultaneously as a member of the board of health of a general health district. 1953 Op. Att'y Gen. No. 2367, p. 69; 1946 Op. Att'y Gen. No. 744, p. 68.

objective. As a member of the board of health, an individual may be required to vote on matters that affect the city in which he serves as president of the legislative authority. Specifically, the individual as a member of the board of health may be required to discuss and vote on the following matters: (1) rules and regulations adopted by the legislative authority concerning the location, construction, and repair of water closets, privies, cesspools, sinks, plumbing, and drains, R.C. 3707.01,[2] (2) the destruction of an infected article, building, hut or other structure located in a city, R.C. 3707.12,[3] (3) the approval of plans and specifications pertaining to the construction by the legislative authority of a city of a hospital for the isolation, care, or treatment of persons suffering from dangerous contagious disease, R.C. 3707.29, (4) the approval of the legislative authority's location for a solid waste facility, R.C. 3707.39, (5) an agreement between the legislative authority of a city and the board of health, whereby the board of health undertakes, and is authorized by the legislative authority to exercise any power, perform any function, or render any service, in behalf of the legislative authority which the legislative authority may exercise, perform, or render, R.C. 3709.281, (6) the suitability of quarters furnished by the legislative authority of a city, R.C. 3709.34, and (7) a contract to obtain or provide a city with services pertaining to the prevention, control, or abatement of air pollution, R.C. 3709.085.

Because the individual serves as president of the legislative authority of a city included within the general health district, the individual, as a member of the board of health, may be predisposed to vote in accordance with the views of the city in one or more of the foregoing matters. A potential conflict of interest, thus, exists because the individual, as a member of the board of health, may be subject to influences that may prevent him from discharging objectively and in a completely disinterested fashion his duties and responsibilities as a member of the board of health of a general health district.

Similarly, the individual is also exposed to influences that may prevent his decisions, as president of the legislative authority of a city, from being completely objective. As president of the legislative authority, the individual may vote on any matter that comes before the legislative authority and that results in a tie vote by the members of the legislative authority. R.C. 733.09(A).

In particular, an individual who serves as president of the legislative authority of a city may be required to vote on the following matters that may affect the general health district that includes the city: (1) rules and regulations concerning the location, construction, and repair of water closets,

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[2] A board of health of a general health district is required to approve only regulations and rules adopted by the legislative authority of a city that has a building department or that otherwise exercises the power to regulate the erection of buildings. R.C. 3707.01.

[3] Pursuant to R.C. 3707.13, the legislative authority of a city, upon the presentation of the original receipt or written statement of the appraisers for articles or houses destroyed pursuant to R.C. 3707.12, must "pay to the owner thereof, or other person authorized by him to receive such payment, the estimated value of such destroyed articles, or such sum as the legislative authority deems just compensation therefor."

privies, cesspools, sinks, plumbing, and drains, R.C. 3707.01,[4] (2) the construction of a hospital for the isolation, care, or treatment of persons suffering from dangerous contagious disease, R.C. 3707.29,[5] (3) suitable quarters for the general health district, R.C. 3709.34, (4) a contract to obtain or provide a general health district with services pertaining to the prevention, control, or abatement of air pollution, R.C. 3709.085, (5) an agreement between the legislative authority of a city and the board of health, whereby the board of health undertakes, and is authorized by the legislative authority to exercise any power, perform any function, or render any service, in behalf of the legislative authority which the legislative authority may exercise, perform, or render, R.C. 3709.281, (6) construction of a quarantine hospital, R.C. 3707.31,[6] (7) the empowerment of a board of health to employ scavengers for the removal of swill, garbage, and offal from the houses, buildings, yards, and lots within a city, R.C. 3707.39, and (8) adoption of the annual tax budget and the placement of bond issues and tax levies on the ballot, R.C. Chapter 133; R.C. Chapter 5705.[7]

Insofar as the individual, as president of the legislative authority, may be required to vote on one or more of the foregoing matters that concern the general health district, the individual may be predisposed to vote in favor of a position favorable to the general health district. The individual is

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[4] As indicated previously, any rules or regulations adopted by the legislative authority concerning the location, construction, and repair of water closets, privies, cesspools, sinks, plumbing, and drains must be approved by the board of health. R.C. 3707.01.

[5] "Hospital buildings constructed under section 3707.29 of the Revised Code shall be under the care and control of the board of health of the city or general health district in which such buildings are located." R.C. 3707.30.

[6] The board of health of the health district within which a quarantine hospital is located has exclusive control of the hospital. R.C. 3707.31.

[7] The legislative authority of a city is authorized by R.C. 5705.01 and 5705.03 to levy taxes and is required by R.C. 5705.05 to include in its general levy "amounts necessary for boards ... of health." In addition, the legislative authority of a city is empowered to submit to the electors of the subdivision the question of issuing bonds pursuant to R.C. Chapter 133. *See* R.C. 133.18.

Pursuant to R.C. 3709.28, the annual appropriation measure of a general health district is "submitted to the county budget commission which may reduce any item in such appropriation measure but may not increase any item or the aggregate of all items." Amounts which are not covered by other revenue are apportioned by the county auditor among the townships and municipal corporations in the general health district on the basis of taxable valuations in the townships and municipal corporations. The general health district is also authorized to have the board of county commissioners submit to the electorate a special levy for the general expenses of the health district when the taxes within the ten-mill limitation will be insufficient to meet the general expenses of the general health district. R.C. 3709.29. Consequently, a general health district and a city located within the general health district may compete for funds generated by the inside millage and for funds generated by taxes in excess of the ten-mill limitation.

thus exposed to influences that may prevent him from discharging his duties as president of the legislative authority objectively and in a completely disinterested manner.

The fact that there is the potential for conflicts of interest does not, however, always render two positions incompatible. Rather, a further inquiry into the immediacy of the conflicts must be made, and "where possible conflicts are remote and speculative, the common law incompatibility or conflict of interest rules are not violated." 1979 Op. Att'y Gen. No. 79-111 at 2-372. Factors used in analyzing whether potential conflicts of interest render two positions incompatible include:

> the degree of remoteness of a potential conflict, the ability or inability of an individual to remove himself from the conflict, whether the individual exercises decision-making authority in both positions, whether the potential conflict involves the primary functions of each position, and whether the potential conflict may involve budgetary controls.

Id.

Application of these factors to the potential conflicts of interest that may result from the simultaneous holding of the two positions about which you ask indicates that the potential conflicts are remote and speculative. It is only speculative whether any of the conflicts listed above will occur. A review of the duties and responsibilities of the respective positions discloses that the potential conflicts of interest are not matters that regularly come before the legislative authority of the city or the board of health of a general health district for deliberation and decision. To the contrary, the potential conflicts do not involve the primary functions of either position. The circumstances will be infrequent in which the board of health of a general health district will be required to vote on plans pertaining to the construction of a hospital, contracts or agreements with a city, rules adopted by a legislative authority, the location of a solid waste facility, the suitability of the quarters of the board of health, or the destruction of an infected article, building, or structure. Similarly, it is unlikely that the legislative authority of a city will be called upon to vote on the provision of suitable quarters for the general health district, contracts or agreements with a general health district, plumbing and sewage rules that must be approved by the board of health, the empowerment of a board of health to employ scavengers, or the construction of a hospital for dangerous contagious diseases or a quarantine hospital. In addition, the position of president of the legislative authority is further removed from the potential conflicts of interest because the president of the city legislative authority does not vote on matters before the legislative authority unless there is a tie. It thus seems unlikely that an individual who serves simultaneously in the positions of president of the legislative authority of a city and member of a board of health of a general health district will be placed in situations in which he will be exposed to a conflict of interest.

Moreover, the president of the legislative authority of a city does not, as a general matter, exercise decision-making authority. As noted above, the president of the legislative authority only exercises such authority in the case of a tie. Further, if an individual who serves simultaneously in the positions of president of the legislative authority or member of the board of health is confronted with a potential conflict of interest, it would not be arduous for the individual, as the president of the

legislative authority or member of the board of health, to remove himself from the conflict by abstaining from voting on the matter in which his objectivity is impaired since the potential for conflicts is rare. Also, it is well established that a public official has a duty to abstain from voting on any matter that would impair his objectivity. *See* 1994 Op. Att'y Gen. No. 94-039 at 2-201 ("[p]rior opinions of the Attorney General have determined that when a public officer is exposed to influences that may prevent him from making completely objective, disinterested decisions in a particular matter, the public officer should abstain from any discussions or votes concerning that matter"); 1937 Op. Att'y Gen. No. 1330, vol. III, p. 2278 (the president of the legislative authority of a city may not be compelled by mandamus or otherwise to cast the deciding vote in a matter should he desire not to do so).

Finally, except for the tax issues mentioned in note seven, *supra*, the potential conflicts of interest do not involve budgetary controls. The conflict presented when the president of the legislative authority of the city must vote on tax issues, however, is insufficient, in itself, to render the positions in question incompatible. First, the president of the legislative authority is not required to vote on such issues unless there is a tie, which, as noted above, is generally unlikely. Second, the individual, as president of the legislative authority, may abstain from any votes on tax issues. Based on the foregoing, it follows that the potential conflicts of interest that confront an individual who serves in these two positions are remote and speculative, and do not render the positions of president of the legislative authority of a city and member of the board of health of a general health district incompatible.

In conclusion, it is my opinion and you are advised that an individual may serve simultaneously as president of the legislative authority of a non-charter city and member of the board of health of a general health district that includes the city, provided the individual, as president of the legislative authority, abstains from any votes that affect the functions, obligations, or operation of the general health district, and that the individual, as a member of the board of health, abstains from any votes that affect the exercise of his duties or responsibilities as president of the legislative authority.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

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SYLLABUS: 97-026

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