

OPINION NO. 2005-016**Syllabus:**

If a county discontinues funding for the position of county administrator, a county commissioner may not simultaneously hold both positions of commissioner and county administrator. The board of county commissioners may, however, assign the duties associated with the position of county administrator to one of the county commissioners. The commissioner may receive no additional compensation for assuming those duties previously performed by the county administrator.

To: Paul J. Gains, Mahoning County Prosecuting Attorney, Youngstown, Ohio

By: Jim Petro, Attorney General, April 15, 2005

You have asked whether the chairman of the board of county commissioners may act as the county administrator. You have explained that, until recently, the board of commissioners employed a full-time county administrator and assistant county administrator. Due to budgetary constraints, however, the county can no longer fund either position. The chairman of the board of commissioners has

indicated his desire to act as the county administrator,¹ and you wish to know whether he may simultaneously act as both county commissioner and county administrator. The commissioner does not seek additional compensation for assuming the duties of county administrator. *See* note 4, *infra*. For the reasons set forth below, we conclude that, although a county commissioner may not simultaneously hold the positions of commissioner and county administrator, the board of commissioners may assign to one of its members the duties previously performed by the county administrator.

Board of County Commissioners

We begin with a brief discussion of the powers and duties of a board of county commissioners, and the relationship between the board and the position of county administrator. A board of county commissioners is responsible for governing the county, and is statutorily endowed with a myriad of powers and duties. *See, e.g.*, R.C. Chapters 305 and 307. *See also* Ohio Const. art. X, § 1 (“[t]he general assembly shall provide by general law for the organization and government of counties”); *Blacker v. Wiethel*, 16 Ohio St. 2d 65, 68, 242 N.E.2d 655 (1968) (“Section 1 of Article X authorizes the General Assembly by general law to delegate to the board of county commissioners limited legislative power relating to the government of a county”); *State ex rel. Bd. of County Commissioners v. Allen*, 86 Ohio St. 244, 250, 99 N.E. 312 (1912) (“[t]he board of county commissioners is the body ... in whom is vested by law the title to all the property of the county. In one sense they are the agents of the county, and in another sense they are the county itself” (citation omitted)); 2003 Op. Att’y Gen. No. 2003-006.

In order to secure assistance and provide for the efficient operation of the county, a board of commissioners may appoint a county administrator, “who shall be the administrative head of the county under the direction and supervision of the board and who shall hold office at the pleasure of the board.” R.C. 305.29. *See also* 1999 Op. Att’y Gen. No. 99-043. A county administrator is typically someone who has been educated and trained as a professional manager, and is experienced in running governmental organizations.² While the elected board retains all of its statutory

¹ A board of county commissioners consists of three members, each of whom is elected to a four-year term of office. R.C. 305.01. The board is required each January to elect one of its members as president for a term of one year. R.C. 305.05. We understand that responsibility for the additional duties would not rotate with the position of chairman (or president), but that the same commissioner would retain responsibility for these duties during his term of office.

² According to the International City/County Management Association, “[m]any of today’s city, town, and county managers hold bachelor’s degrees in public administration, political science, or business. Increasingly, these individuals enter the profession with a master’s degree, often in public administration.” <http://www.icma.org/main/bc.asp?bcid=62&hsid=1&ssid1=17&ssid2=21&ssid3=262>. And, as reported by the Ohio City/County Management Association, “[d]ata compiled by ICMA indicate that 77 percent of those appointed to manager positions

powers and its role as policy maker, the administrator is responsible for making policy recommendations to the board, implementing the board's programs, policies, and decisions, coordinating the work of county departments and the delivery of county services, and performing such other duties as are assigned by the board of county commissioners. R.C. 305.30. See web site of International City/County Management Association, <http://www.icma.org/main/bc.asp?bcid=62&hsid=1&ssid1=17&ssid2=21&ssid3=262>.

While the employment of a county administrator clearly enhances the efficient operation and modern management of county government, the work of an administrator is performed under the direction and supervision of the board of commissioners. R.C. 305.29; R.C. 305.30. The position has no independent power; rather, the incumbent derives all of his authority from, and in accordance with the limitations established by, the board of county commissioners. The nature of the duties that a board may, as a statutory matter, assign to an administrator bears out this relationship. A county administrator may be required to:

(A) Assist in the administration, enforcement, and execution of the policies and resolutions of the board;

(B) Supervise and direct the activities of the affairs of the divisions of county government *under the control or jurisdiction of the board*;

(C) Attend all meetings of the board *at which the administrator's attendance is required by that body*;

(D) Recommend measures for adoption to the board;

(E) Prepare and submit to the board reports required by that body, or reports that *it considers advisable*;

(F) Keep the board fully advised on the financial conditions of the county, preparing and submitting a budget for the next fiscal year;

(G) Contract on behalf of the board within limits provided by a resolution of the board, provided that the resolution authorizing such actions shall also specify the types of contracts upon which the administrator may act without further resolution of the board;

(H) Allow and pay claims for goods received and services rendered within limits provided by a resolution of the board, provided that the county department receiving those goods and services certifies their receipt before the administrator allows the claim;

(I) Perform any or all personnel functions otherwise conferred or incumbent upon the board of county commissioners under Chapter 124, or any other chapter or section of the Revised Code, provided that the

in recent years have come directly from other governmental positions, and 63 percent of the managers surveyed have a master's degree.'" <http://www.ocmaohio.org/C-Mform.asp>.

board, by resolution, has delegated the specific functions to the administrator;

(J) Perform any or all functions conferred or incumbent upon the board of county commissioners in the case of a disaster or emergency, provided that the board, by resolution, has delegated the specific functions or all of the functions to the administrator....

(K) Perform such additional duties as the board may determine by resolution.

The board of county commissioners *may assign* to such county administrator any office, position, or duties under its control, such office, position, and duties to be performed *under the direction and supervision of the board* and to be in addition to those set forth in this section. (Emphasis added.)

R.C. 305.30. As summarized in 1957 Op. Att’y Gen. No. 1229, p. 626 , 630, “[i]t is quite clear, under Section 305.29 and 305.30, Revised Code, that the county administrator acts under the direction of the board of county commissioners and is wholly subordinate to such board.”

Appointment of Commissioner as County Administrator

A board of county commissioners may, but is not required to, employ a county administrator. In this instance, the board had previously employed a county administrator and assistant administrator, but was forced to forgo funding the positions due to budget constraints. As you point out, explicit provision is made in statute for the eventuality that the county administrator may be “absent from his office by reason of illness, death, vacation, resignation, or removal.” R.C. 305.29. These occurrences relate only to the absence or lack of an incumbent, however, and the arrangements that the board is statutorily authorized to make³ are based on the expectation that the incumbent will return to his duties or that the board will appoint someone new to the position. *Id.* In this instance, there is no present intention to fill the position, and no funds are currently appropriated for that purpose. Thus, R.C. 305.29 is not applicable. We must determine, therefore, whether the board of commissioners may provide, under these circumstances, for the performance of the duties associated with the administrator’s position by assigning those duties to one of the commissioners.

It is well established, as a matter of common law, that “a board with authority to make appointments to a particular position may not appoint one of its own

³ If the county administrator is “absent from his office by reason of illness, death, vacation, resignation, or removal,” the chairman of the board of commissioners “or a qualified person designated by him with the approval of the board shall act as county administrator and perform all duties of such office, until such time as the county administrator returns to his duties or the board appoints a new county administrator to fill the vacancy.” R.C. 305.29.

members to that position.” 1996 Op. Att’y Gen. No. 96-022 at 2-78. This is true regardless of whether that member personally participates in the appointment process. *Id.* It is also true regardless of whether the appointee is entitled to compensation⁴ —the conflict arises not only from any monetary gain a member of the ap-

⁴ Significantly, the commissioner does not seek to be paid for assuming the duties of county administrator. Such payment would be barred as a violation of Ohio Const. art. II, § 20, which prohibits any change, whether an increase or decrease, in a public officer’s salary during his term of office, *even where* he undertakes or is assigned additional duties that are within the scope of his office, or where additional duties are statutorily imposed upon his office mid-term. *See State ex rel. Mikus v. Roberts*, 15 Ohio St. 2d 253, 239 N.E.2d 660 (1968) (syllabus, paragraph five) (“[a] public officer takes his office *cum onere*, and so long as he retains it he undertakes to perform its duties for the compensation fixed, whether such duties be increased or diminished during his term of office”); *Donahey v. State ex rel. Marshall*, 101 Ohio St. 473, 476, 129 N.E. 591 (1920) (“[i]t is a familiar rule that when a public officer takes office he undertakes to perform all of its duties, although some of them may be called into activity for the first time by legislation passed after he enters upon his term”).

Various statutes provide additional compensation for an officer who assumes certain, additional responsibilities. *See, e.g.*, R.C. 315.14 (the county engineer shall perform such other duties as the board of commissioners requires, although certain duties may only be performed pursuant to agreement, and the board shall determine the engineer’s compensation for performance of these duties); R.C. 519.16 (“[t]he township clerk may be appointed secretary of the township zoning commission, secretary of the township board of zoning appeals, and zoning inspector, and he may receive compensation for such services in addition to other compensation allowed by law”); R.C. 3375.32 (a board of library trustees “shall elect and fix the compensation of a clerk, who may be a member of the board, and who shall serve for a term of one year”). If such a statute is in effect prior to the commencement of an officer’s term, the officer’s acceptance of such additional compensation, as described by statute, would not run afoul of Ohio Const. art. II, § 20. *See State ex rel. Mack v. Guckenberger*, 139 Ohio St. 273, 39 N.E.2d 840 (1942). In the absence of such statutory authority, however, additional compensation may not be accepted by a public officer, regardless of whether the compensation is made available before or after the commencement of his term. *See State ex rel. Mikus v. Roberts* (syllabus, paragraph six); *Jones v. Commissioners of Lucas County*, 57 Ohio St. 189, 209, 48 N.E. 882 (1897) (“‘where a service for the benefit of the public is required by law, and no provision for its payment is made, it must be regarded as gratuitous, and no claim for compensation can be enforced’ ... the auditor’s services in making the report for the commissioners must be deemed, if not gratuitous, at least satisfied by the salary attached to his office, and that he is not entitled to extra compensation for such services, payable out of the county treasury” (citations omitted)). In this instance, no statutory authority exists for the payment of additional compensation to a county commissioner who assumes the duties

pointing board could secure for himself, but from the nature of the appointment process itself. As stated in *State ex rel. Louthan v. Taylor*, 12 Ohio St. 130, 134 (1861), “[t]he word *appoint*, when used in connection with an office, *ex vi termini*, implies the conferring of authority upon *another*.... the [statutory] language, ‘the board of directors shall *appoint* a superintendent,’ *necessarily* means, that the person *appointed* shall be different from those who *appoint*” (emphasis in original). *See also* 2001 Op. Att’y Gen. No. 2001-034 at 2-204 ([i]t is well established that ‘all officers having appointive power are disqualified for the positions to which they may appoint.’ ... ‘[t]here can be a no stronger case of subordination, and therefore, incompatibility, than a direct employer-employee relationship’”) (citations omitted). Applying this precedent to your question, we conclude that the board of county commissioners may not appoint one of its members to hold the position of county administrator, even where the member would receive no additional compensation for serving in that position.

Commissioner’s Performance of Administrator’s Duties

Nothing prevents the board from agreeing to have one of its members assume the duties of administrator in addition to his duties as commissioner, however. 1957 Op. Att’y Gen. No. 1052, p. 482 addressed a question similar to yours—whether a member of a township zoning commission could act as the secretary of the zoning commission. The opinion found nothing to bar the zoning commissioner from doing so, noting that, “[t]he additional services or duties performed by the commissioner would be a mere *ex-officio* extension of his statutory duties as an incumbent commissioner. These mere additional duties are germane to his office and, therefore, give rise to no problem of incompatibility of offices. The election by the commission of a secretary from the membership of the commission, would be a proper exercise of the mandatory duty [imposed under R.C. 519.05] to organize and keep a record of commission actions and determinations.” *Id.*, at 483. *Accord* 1999 Op. Att’y Gen. No. 99-035 at 2-229 (“[b]ecause a zoning commission may provide for its own organization, and absent specific direction as to the manner in which a township zoning commission shall organize, it is within the discretion of the com-

of county administrator—duties that are within the scope of the board’s own authority to perform. Therefore, no county commissioner may accept additional compensation for assuming the duties of county administrator.

(This conclusion also avoids potential issues under R.C. 2921.42(A)(3) and R.C. 102.03(D) and (E), which are part of the Ohio Ethics Law. *See* Ohio Ethics Commission, Advisory Op. No. 87-008. The authority to issue advisory opinions regarding the application of the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-43 is conferred upon the Ohio Ethics Commission pursuant to R.C. 102.08. Accordingly, any questions about the interpretation or application of these provisions should be addressed to the Ohio Ethics Commission.)

mission to determine whether its record-keeping duties will be performed by a member of the commission or by an employee of the board’’).⁵

As in 1957 Op. Att’y Gen. No. 1052, p. 482, the performance of the county administrator’s duties by a county commissioner would be an ex-officio extension of his statutory duties as an incumbent commissioner. An administrator’s duties are naturally incident to the performance of the board’s own duties, and it is within the statutory authority of the board to assign the performance of the administrator’s duties to one or more of the commissioners.⁶ Although a board of county commissioners is not required to employ an administrator, it remains directly responsible for ensuring that any necessary duties that could be assigned to an administrator are carried out. The board has the discretion to determine whether the duties associated with the position of county administrator will be performed by a member or members of the commission, by a county administrator, or by another county employee, or that the duties may be properly left unfulfilled.⁷ If the county is facing a budgetary shortfall, it would be a reasonable exercise of the board’s discretion to assign those duties previously assigned to a county administrator to a commissioner who would receive no additional compensation for performing those duties (nor be entitled to receive compensation), rather than to a paid employee.

In conclusion, it is my opinion, and you are so advised, that if a county discontinues funding for the position of county administrator, a county commissioner may not simultaneously hold both positions of commissioner and county administrator. The board of county commissioners may, however, assign the duties associated with the position of county administrator to one of the county commissioners. The commissioner may receive no additional compensation for assuming those duties previously performed by the county administrator.

⁵ Consistent with the discussion in note 4, *supra*, 1957 Op. Att’y Gen. No. 1052, p. 482 further concluded that compensation of the commissioner would “contravene public policy”: “there is a general principle of public policy that, unless specifically authorized by law, a member of an administrative board may not be appointed by it to a salaried position under its authority” (citation omitted). *Id.* at 483-84. The opinion’s conclusion that a zoning commissioner could not be compensated for performing the duties of secretary to the commission was modified in 1999 Op. Att’y Gen. No. 99-035 due to statutory change. The “general principle of public policy” remains unchanged.

⁶ One commissioner cannot, of course, exercise the authority or fulfill the responsibilities imposed upon the board of county commissioners as a whole. *See generally* 1937 Op. Att’y Gen. No. 1262, vol. III, p. 2174.

⁷ For example, a board of commissioners may hire a full-time clerk of the board, and assistant clerks, who shall perform those duties required by the board. R.C. 305.13. *See* 1936 Op. Att’y Gen. No. 5328, vol. I, p. 401, 403 (the “duties that the Board may impose upon the Clerk or Assistant Clerks are those only which relate to matters coming under the jurisdiction of the Board of County Commissioners”).