May 13, 2004

The Honorable Dennis Watkins
Trumbull County Prosecuting Attorney
4th Floor Administration Building
160 High Street N.W.
Warren, Ohio 44481-1092

SYLLABUS: 2004-019

1. A person may serve as a member of a board of elections and chief deputy treasurer or administrative assistant for the county treasurer, provided that as chief deputy treasurer or administrative assistant he does not serve on the county budget commission, or account for and disburse the moneys in the county treasury that have been appropriated to the board of elections.

2. The positions of member of a board of elections and chief deputy treasurer or administrative assistant for the county treasurer are incompatible when the treasurer is a candidate for an office to be filled at an election. (1964 Op. Att'y Gen. No. 897, p. 2-97, questioned.)

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OPINION NO. 2004-019

The Honorable Dennis Watkins
Trumbull County Prosecuting Attorney
4th Floor Administration Building
160 High Street N.W.
Warren, Ohio 44481-1092

Dear Prosecutor Watkins:

You have requested an opinion concerning the propriety of a member of a board of elections serving simultaneously in another public position. Specifically, you ask the following three questions:

1. Is the position of chief deputy treasurer compatible with the position of member of the county board of elections?

2. Is the position of administrative assistant within the county treasurer's office compatible with the position of member of the county board of elections?

3. If either of these positions is determined compatible with the position of member of the county board of elections, does the candidacy of the county treasurer affect the issue of compatibility?

For ease of discussion, we will consider your three questions together.

Compatibility Test

When determining whether two public positions are compatible, the following seven-question analysis is used:

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?

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. 2003-010 at 2-69 and 2-70.

The sixth and seventh questions of this analysis relate to the applicability of charter provisions, resolutions, ordinances, and federal, state, and local regulations. In your particular situation, there is no applicable charter provision, resolution, ordinance, or state or federal regulation. Whether there is an applicable local departmental regulation is a matter for local officials to determine. For the purpose of this opinion, it is assumed that there is no local departmental regulation that prevents a member of the board of elections from serving as a chief deputy treasurer or administrative assistant for the county treasurer.

Discussion of R.C. 124.57

Question one of the analysis concerns the application of R.C. 124.57 to each of the positions with which you are concerned. R.C. 124.57 prohibits an officer or employee in the classified service of the state, or of a county, city, city school district, or civil service township, from taking part in a variety of activities that occur as part of the regular political process and are partisan in nature.[1] In simple terms, R.C. 124.57 does the following: it prohibits an officer or

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[1] R.C. 124.57(A) provides, in part, as follows:

> *No officer or employee in the classified service of the state, the several counties, cities, and city school districts thereof, and civil service townships,* shall directly or indirectly, orally or by letter, solicit or receive, or be in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political party or for any candidate for public office; … *nor shall any officer or employee in the classified service of the state, the several counties, cities, and city school districts thereof, and civil service townships,* be an officer in any political organization or *take part in politics* other than to vote as the

employee in the classified service from seeking election or appointment to, or holding, a partisan political office, or engaging in other partisan political activities, and it prevents a partisan political officeholder from serving simultaneously as an officer or employee in the classified service.[2] 2001 Op. Att'y Gen. No. 2001-034 at 2-203; *see* 2 Ohio Admin. Code 123:1-46-02(C); *see also Heidtman v. City of Shaker Heights*, 163 Ohio St. 109, 126 N.E.2d 138 (1955).

We must first determine whether the position of member of a board of elections, chief deputy treasurer, or administrative assistant is one that is subject to R.C. 124.57's prohibition. According to your first assistant, the positions of chief deputy treasurer and administrative assistant are in the unclassified service of the county. *See generally* R.C. 124.11(A)(9) (the unclassified service includes "those persons employed by and directly responsible to elected county officials or a county administrator and holding a fiduciary or administrative relationship to such elected county officials or county administrator, and the employees of such county officials whose fitness would be impracticable to determine by competitive examination"); R.C. 124.11(A)(28) (for counties the unclassified service includes "the deputies and assistants of elective or principal executive officers authorized to act for and in the place of their principals or holding a fiduciary relation to their principals"). The prohibition of R.C. 124.57 thus does not apply to the positions of chief deputy treasurer and administrative assistant for the county treasurer.

Pursuant to R.C. 124.11(A)(2), a member of a board of elections, as an election officer, *see* R.C. 3501.01(U)(5), is in the unclassified service. R.C. 124.57's prohibition, therefore, does not apply to a member of a board of elections.

In light of the foregoing, none of the positions is in the classified service of the state, or of a county, city, city school district, or civil service township for purposes of R.C. 124.57.

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officer or employee pleases and to express freely political opinions. (Emphasis added.)

[2] An officer or employee in the classified service may participate in partisan politics if a charter provision or the terms of a collective bargaining agreement authorize such participation. *See Hudak v. Cleveland Civil Serv. Comm'n,* 44 Ohio App. 3d 15, 17, 540 N.E.2d 741 (Cuyahoga County 1988) ("[t]he city's charter generally controls its civil service practices, pursuant to its home rule powers"), *appeal dismissed*, 37 Ohio St. 3d 704, 531 N.E.2d 1316 (1988); *Harbarger v. Ballard,* 53 Ohio App. 2d 281, 283-84, 373 N.E.2d 390 (Summit County 1977) ("[t]he Supreme Court in *State, ex rel. Canada, v. Phillips* (1958), 168 Ohio St. 191, [151 N.E.2d 722,] has, in effect, established the principle that a city … has home rule powers under [Ohio Const. art. XVIII, § 3] in matters affecting civil service and public employee situations. It is obvious from this authority that [a city] is not bound by the state law"); 1991 Op. Att'y Gen. No. 91-065 (syllabus, paragraph one) ("[t]he terms of a collective bargaining agreement may provide that a classified employee may engage in partisan politics and, pursuant to R.C. 4117.10(A), such terms will prevail over the provisions of R.C. 124.57").

Accordingly, this statute does not apply when a member of a board of elections serves as a chief deputy treasurer or administrative assistant for the county treasurer.

Statutes Prohibiting the Holding of Another Public Position

Question two of the analysis asks whether the empowering statutes of either position limit a person from being employed in another public position or holding another public office. Also, in some situations, a provision in the Ohio Constitution may prohibit a person from serving in two public positions simultaneously.

Our research discloses no constitutional provision that prohibits a member of a board of elections from serving simultaneously as a chief deputy treasurer or administrative assistant for the county treasurer. However, pursuant to R.C. 3501.15, except as therein provided, a person may not serve as a member of a board of elections when he is a candidate for an office to be filled at an election. This statute provides as follows:

> No person shall serve as a member, director, deputy director, or employee of the board of elections who is a candidate[3] for any office to be filled at an election, except the office of delegate or alternate to a convention, member of the board of directors of a county agricultural society, presidential elector, or a member of a party committee. (Footnote added.)

The positions of chief deputy treasurer and administrative assistant for a county treasurer are filled by appointment, rather than through elections. R.C. 321.04; R.C. 325.17; *see also* R.C. 325.27. Thus, R.C. 3501.15 does not prohibit a person who is a chief deputy treasurer or

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[3] R.C. 3501.01(H) defines a "[c]andidate" for purposes of the statutes relating to elections and political communications as follows:

> "Candidate" means any qualified person certified in accordance with the provisions of the Revised Code for placement on the official ballot of a primary, general, or special election to be held in this state, or any qualified person who claims to be a write-in candidate, or who knowingly assents to being represented as a write-in candidate by another at either a primary, general, or special election to be held in this state.

It is assumed, for the purpose of this opinion, that the member of the board of elections is not a candidate for an office to be filled at an election. *See generally* 1949 Op. Att'y Gen. No. 924, p. 555 (syllabus) ("[t]he office of clerk [now director] of a county board of elections and the position of deputy county treasurer are compatible and may legally be held by one and the same person providing it is physically possible and he is not a candidate for an office to be filled at an election") (overruled, on other grounds, by 1958 Op. Att'y Gen. No. 1962, p. 215).

administrative assistant for the county treasurer from serving as a member of a board of elections.[4]

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[4] 1954 Op. Att'y Gen. No. 3930, p. 307 advised that R.C. 3501.15 prohibits a person from serving simultaneously as a member of a board of elections and an assistant prosecuting attorney when the prosecuting attorney is a candidate for elective office. The opinion thus explained its reasons for so advising:

> [R.C. 3501.15's] inhibition as to candidates is a statutory recognition of the potentially conflicting interests of candidates and election officials and we may readily conclude that such potential conflict would extend to an assistant prosecuting attorney, as well as to the superior to whom he owes his appointment, in situations where such superior is a candidate for elective office.

Id. at 308; *cf. also* 1933 Op. Att'y Gen. No. 860, vol. I, p. 763 (a deputy county auditor may not hold the office of member of a county board of elections because the county auditor may not hold such office); 1929 Op. Att'y Gen. No. 1330, vol. III, p. 1984 (same); 1920 Op. Att'y Gen. No. 1778, vol. II, p. 1280 (the office of county auditor is incompatible with any and all offices or employments which receive or pay out funds of the county, or where such offices or employments make a certificate to the county auditor for the payment of claims; hence the offices of county auditor and clerk (now the director) of the board of deputy state supervisors of elections (now the county board of elections) are incompatible).

We recently have questioned the proposition that a statutory disability applicable to a particular officeholder should apply without exception to the officeholder's assistants or deputies. *See* 1999 Op. Att'y Gen. No. 99-027 at 2-176 and 2-177 (addressing R.C. 731.02's prohibition against a member of the legislative authority of a city holding another public office, and stating that, "[t]he general principles of law that govern the conduct of assistants of public officers … do not compel the conclusion that an assistant of a public officer is not permitted to hold a position that his appointing officer is statutorily prohibited from holding[,]" and so "the fact that an assistant prosecuting attorney may be authorized to act for and in the place of the prosecuting attorney is insufficient in and of itself to find that an assistant prosecuting attorney may not hold a position that the prosecuting attorney may not hold[;]" the opinion thus concluded that while R.C. 731.02 prohibits a member of a city legislative authority from serving concurrently as a prosecuting attorney, it does not prohibit that member from serving as an assistant prosecuting attorney); *see also, e.g.,* 1993 Op. Att'y Gen. No. 93-016 (the positions of member of a city legislative authority and administrative assistant to the county engineer are compatible). We similarly decline to endorse that proposition in this instance. Rather, we believe that the better approach is to determine whether one or more of the standard compatibility criteria (*e.g.,* conflict of interest; subordination or control) argue against a deputy or assistant holding a position that his officeholder is barred by statute from holding.

Subordination and Control

Question three of the analysis asks whether one position is subordinate to, or in any way a check upon, the other. Deputy treasurers and administrative assistants are appointed by, and serve the county treasurer. *See* R.C. 321.04; R.C. 325.17; *see also* R.C. 325.27. Members of a board of elections are appointed by the Secretary of State and serve as his representatives, R.C. 3501.06, *see* R.C. 3501.07, unless removed by the Secretary of State, R.C. 3501.16. Members of a board of elections thus are accountable to a different appointing authority than, and are not subordinate to, the positions of chief deputy treasurer and administrative assistant for the county treasurer. Also, a member of a board of elections is not required to assign duties to, or supervise, deputy treasurers and administrative assistants for the county treasurer.

Similarly, the positions of chief deputy treasurer and administrative assistant for the county treasurer are not subordinate to a board of elections. The positions of chief deputy treasurer and administrative assistant for the county treasurer operate independently of a board of elections, and neither of these positions is required to supervise the activities of, or assign duties to, a board of elections. Accordingly, the position of member of a board of elections is not subordinate to, or in any way a check upon, the position of chief deputy treasurer and administrative assistant for the county treasurer. Also, the positions of chief deputy treasurer and administrative assistant for the county treasurer are not subordinate to, or in any way a check upon, the position of member of a board of elections.

Physical Ability to Hold and Serve in Both Positions

Question four of the analysis asks whether it is physically possible for one person to perform the duties of both positions. This is a factual question that is best answered by the interested persons at the local level because they may more precisely determine the time constraints imposed by each position. 2000 Op. Att'y Gen. No. 2000-025 at 2-168.

It should be noted, however, that, in order to serve simultaneously as a member of a board of elections and a chief deputy treasurer or administrative assistant for the county treasurer, a person must be certain that he will be able to carry out the duties of both positions in a competent and timely manner.[5] This means that there should not be a direct conflict between the times when the person is needed to perform duties on behalf of the board of elections and the

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[5] If the chief deputy treasurer or administrative assistant is required to perform duties as a member of the board of elections during his regular work hours as chief deputy treasurer or administrative assistant, the person must take approved vacation or personal leave or leave without pay for the time he is absent from his duties as chief deputy treasurer or administrative assistant.

county treasurer.[6] *See* 2003 Op. Att'y Gen. No. 2003-006 at 2-32; 1986 Op. Att'y Gen. No. 86-057 at 2-317.

Conflicts of Interest

The final question of the analysis asks whether there is a conflict of interest between the two positions.[7] A person 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 respective agencies he serves. 2003 Op. Att'y Gen. No. 2003-006 at 2-32 and 2-33.

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[6] According to a job description you provided us, the position of administrative assistant is required to be "[a]vailable 24 hours [a day] to assist with alarm/safe problems." If an administrative assistant who serves as a member of a board of elections is required to be available at all times to assist the county treasurer with an alarm or safe problem, a direct conflict in the working hours of the two positions may occur.

We believe it unlikely that an administrative assistant will be required to assist the county treasurer with an alarm or safe problem and that any such problem will be limited in duration. Moreover, a member of a board of elections, as a public officer, *see State ex rel. Milburn v. Pethtel,* 153 Ohio St. 1, 90 N.E.2d 686 (1950), is not generally required to devote particular hours to his duties; instead, he schedules his work as he finds necessary to fulfill his responsibilities. 1990 Op. Att'y Gen. No. 90-014 at 2-57. *But cf.* R.C. 3505.30 (a board of elections "shall remain in session from the time of the opening of the polls, continuously, until the results of the election are received from every precinct in the county and such results are communicated to the secretary of state"). Accordingly, the fact that an administrative assistant must be available 24 hours a day to resolve alarm and safe problems should not make it physically impossible for one person to perform the duties of administrative assistant and member of the board of elections. *See* 2001 Op. Att'y Gen. No. 2001-036 at 2-218 n.6. *See generally* 1986 Op. Att'y Gen. No. 86-057 at 2-317 (a township clerk has considerable discretion and flexibility regarding the time and place of performance of certain of his or her duties and "may well be able to hold a full-time position other than that of township clerk").

[7] R.C. 102.08 authorizes the Ohio Ethics Commission to render advisory opinions regarding the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43. In light of this authority, the Attorney General will refrain from interpreting such provisions by way of a formal opinion. 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph three). Therefore, questions concerning the application of these provisions in the situation in which a person serves simultaneously as a member of a board of elections and chief deputy treasurer or administrative assistant for the county treasurer should be addressed to the Ohio Ethics Commission.

In order to determine whether a person who holds two public positions simultaneously is subject to a conflict of interest, we must review the powers, duties, and responsibilities conferred upon the person in each position. This review will enable us to determine whether the person will confront a conflict of interest when he exercises the powers, duties, and responsibilities in either or both positions. If this review discloses any such conflicts, we must then determine the immediacy of each conflict. Where it can be demonstrated that the conflicts may be sufficiently avoided or eliminated entirely, the person may serve in both positions. Factors to be considered in that regard include the probability of the conflict, the ability of the person to remove himself from the conflict (should it arise), whether the person exercises decision-making authority in both positions, and whether the conflict relates to the primary functions of each position, or to financial or budgetary matters. *Id.* at 2-33.

The duties and responsibilities of a chief deputy treasurer and an administrative assistant for the county treasurer are assigned by the county treasurer. *See* R.C. 3.06; R.C. 321.04; R.C. 325.17; *see also* R.C. 325.27. As a general matter, the duties and responsibilities of these two positions may include keeping accounts of all moneys received and disbursed by the treasurer, R.C. 321.07, receiving taxes and assessments collected by the treasurer, R.C. 321.08; R.C. 323.12; R.C. 323.132; R.C. 323.14; R.C. 323.15, and providing statements to the county auditor concerning the amount and crediting of taxes collected by the treasurer, R.C. 321.09-.10. In addition, these positions may be responsible for redeeming warrants, R.C. 321.16, depositing redeemed warrants with the county auditor, R.C. 321.20, settling with the county auditor for all taxes and assessments that the treasurer has collected, R.C. 321.24, *see* R.C. 321.29, accepting liquidated claims and certificates, R.C. 323.02-.05, and enforcing tax liens, R.C. 323.25. A deputy or an assistant of the county treasurer may also serve in place of the treasurer on the county budget commission.[8] 1934 Op. Att'y Gen. No. 3605, vol. III, p. 1721; *see* 1943 Op. Att'y Gen. No. 6186, p. 363.

With respect to your specific inquiry, you have provided us with a job description for the positions of chief deputy treasurer and administrative assistant for the county treasurer. The job description for the chief deputy treasurer position states that his duties include analyzing investment policies, programs, and opportunities; recommending investments; directing and supervising the activities of employees in the preparation of tax bills and the collection of taxes; determining daily balances and reconciling the amount of monies received against the amount due on tax payments; delivering statements to the county auditor; and depositing daily receipts in the bank. The chief deputy treasurer also approves purchase orders and the purchase of office supplies, assists the prosecuting attorney in foreclosure proceedings, prepares and maintains monthly financial statements, and maintains the treasurer's investment records.

The job description of the administrative assistant states that the duties of this position include the following:

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[8] The county treasurer is a member of the county budget commission. R.C. 5705.27.

> Plans, assigns, and reviews the work of employees involved in tax collections, maintenance of tax collection records, the tax billing process and the compilation of mandated reports. Lock and unlock safe. Available 24 hours to assist with alarm/safe problems. Acts as Human Resources Manager for Treasurer's office in performing of personnel [*sic*], recommends promotions, pay increases, and disciplinary actions as required; trains and orientates new employees. Supervise delinquent tax investigation program. Recommends and approves foreclosure proceedings. Maintains a table of organization of office staff; compose job descriptions. Monitor payroll and time clock operation, approve/disapprove vacation and sick leave.
>
> Requisitions all supplies; approves and authorizes departmental expenditures; prepares purchase order; maintains records regarding requisitions and purchases. Prepares vouchers for payment of bills; submit vouchers to Auditor's office for payment; answers telephone and in-person inquir[i]es regarding taxes, bills, etc.[;] counsel delinquent taxpayers. Reviews and authorize payment plans. Serve as liaison with software program administrators.

The duties of a board of elections include numerous and varied functions relating to the registration of voters, the conduct of elections, and the investigation of election irregularities. R.C. 3501.11. Specifically, the board establishes, defines, provides, rearranges, and combines election precincts; fixes and provides places for voter registration and holding primaries and elections; furnishes polling places with suitable stalls and other required supplies; and appoints a director, deputy director, employees, and registrars, judges, and other officers of elections. R.C. 3501.11; R.C. 3501.18; R.C. 3501.22; R.C. 3501.29; R.C. 3501.30; R.C. 3501.301. The board is also required to investigate irregularities, nonperformance of duties, or violations of R.C. Title 35 by election officers and other persons; review, examine, and certify the sufficiency and validity of petitions and nomination papers; receive the returns of elections, canvass the returns, make abstracts thereof, and transmit such abstracts to the proper authorities; investigate and determine the residence qualifications of electors and candidates; and maintain voter registration records. R.C. 3501.11.

A review of the foregoing duties and responsibilities discloses several instances in which a person who serves simultaneously in the positions of member of a board of elections and chief deputy treasurer or administrative assistant for the county treasurer could be subject to an impermissible conflict of interest. First, a chief deputy treasurer or administrative assistant may serve in place of the county treasurer on the county budget commission. 1934 Op. Att'y Gen. No. 3605, vol. III, p. 1721; *see* 1943 Op. Att'y Gen. No. 6186, p. 363. The county budget commission reviews the county's annual tax budget and revises and adjusts the estimate of balances and receipts from all sources for each fund within the county's tax budget. R.C. 5705.32; *see* R.C. 5705.31; *see also* R.C. 5705.01 (for purposes of R.C. Chapter 5705, a county is a "[s]ubdivision" and a board of county commissioners is a "[t]axing authority"). After revising and adjusting the estimates, the county budget commission then adjusts the levies of the county and other subdivisions and taxing units within the limits of the law. R.C. 5705.31.

A chief deputy treasurer or administrative assistant who serves as a member of a board of elections and who serves in place of the county treasurer on the county budget commission thus could be required to make determinations that affect the funding the county provides to the board of elections. *See* 1957 Op. Att'y Gen. No. 24, p. 1; *see also* R.C. 3501.17(A) ("[t]he expenses of the board of elections shall be paid from the county treasury, in pursuance of appropriations by the board of county commissioners, in the same manner as other county expenses are paid"); 1983 Op. Att'y Gen. No. 83-035 at 2-136 ("a county agricultural society is entitled to an appropriation from the county general fund pursuant to R.C. 1711.22, which may be adjusted by the budget commission within the limits set in R.C. 1711.22"). In such a situation, the judgment of a chief deputy treasurer or administrative assistant who serves in place of the county treasurer may be improperly influenced. *See* 1999 Op. Att'y Gen. No. 99-045 at 2-281; 1989 Op. Att'y Gen. No. 89-007 at 2-30. Prior opinions of the Attorneys General have advised that "[a]voidance of exposure to the temptation to act in a manner counter to the interest of the public by making a biased determination requires that one person not hold two such public positions." 1989 Op. Att'y Gen. No. 89-007 at 2-30. Accordingly, a person who serves simultaneously in the positions of member of a board of elections and chief deputy treasurer or administrative assistant for the county treasurer may not serve in place of the county treasurer on the county budget commission. *See* 1999 Op. Att'y Gen. No. 99-045 at 2-281; 1989 Op. Att'y Gen. No. 89-007 at 2-30; *see also* 1957 Op. Att'y Gen. No. 24, p. 1 (syllabus) ("[t]he offices of county treasurer and member of a county board of elections are incompatible").

In your particular situation, however, you have stated that neither the chief deputy treasurer nor the administrative assistant is required to serve in place of the county treasurer on the county budget commission. Also, the delegation of this responsibility to the chief deputy treasurer or administrative assistant is not contemplated by the county treasurer at this time. The chief deputy treasurer or administrative assistant who serves as a member of a board of elections thus will not be subject to the aforementioned impermissible conflict of interest. It reasonably follows, therefore, that this conflict does not prevent a person from serving simultaneously in these two positions so long as the chief deputy treasurer or administrative assistant does not serve in place of the county treasurer on the county budget commission. *See, e.g.,* 1999 Op. Att'y Gen. No. 99-045 (syllabus) ("[a] person may serve simultaneously as a deputy county auditor and township clerk within the same county, provided that as deputy county auditor the person does not substitute for the county auditor on the county budget commission"); 1999 Op. Att'y Gen. No. 99-027 (syllabus) ("[a] person may serve simultaneously as an assistant prosecuting attorney and member of the legislative authority of a statutory city, provided that as an assistant prosecuting attorney he does not … substitute for the prosecuting attorney on the county budget commission").

We will now consider a second conflict of interest that a chief deputy treasurer or administrative assistant may confront while serving as a member of a board of elections. Pursuant to R.C. 3501.17(A), the expenses of a board of elections are "paid from the county treasury, in pursuance of appropriations by the board of county commissioners, in the same

manner as other county expenses are paid."[9] *See generally* R.C. 5705.38(C) (in the adoption of the county's annual appropriation measure, a board of county commissioners must separately identify the amounts appropriated to each office, department, or division within the county). An accounting record of the moneys in the county treasury that have been appropriated to a board of elections is kept by the county treasurer. *See* R.C. 321.07; R.C. 321.09; R.C. 321.10; R.C. 5705.38; R.C. 5705.39; R.C. 5705.40; *see also* R.C. 319.14 ("[t]he county auditor shall keep an accurate account current with the county treasurer, showing all moneys paid into the treasury, the amount of such moneys, the time when, by whom, from what source, and to what fund paid, and showing all moneys paid out, the amount of such moneys, the time when, to whom, for what purpose, and from what fund paid"). *See generally* 2 Ohio Admin. Code 117-5-01(A) ("[f]unds: to demonstrate legal compliance, financial accountability and to provide management with financial information for decision making, counties shall maintain financial records on a fund basis. Funds shall be established by each county based on statutory requirements and accounting needs").

In addition, the county treasurer is responsible for disbursing moneys appropriated to the board of elections upon the presentation of a warrant issued by the county auditor. R.C. 3501.17(A); *see* R.C. 319.16. R.C. 321.16 states, if there is money in the county treasury or depository to the credit of the fund upon which the warrant is drawn, the county treasurer must redeem the warrant. R.C. 321.27 further provides that, "[w]hen a warrant is presented to the county treasurer for payment, and is not paid, for want of money belonging to the particular fund on which it is drawn, the treasurer shall record the warrant as not paid for want of funds." *See also* 1980 Op. Att'y Gen. No. 80-077 (R.C. 321.17 requires a county treasurer to refuse to redeem a warrant drawn against a fund having a zero or insufficient balance).

A chief deputy treasurer or an assistant administrator for the county treasurer may thus be responsible for keeping an accurate account of the moneys in the county treasury that have been appropriated to the board of elections and disbursing such moneys upon the presentation of a warrant issued by the county auditor. If a chief deputy treasurer or assistant administrator who is a member of the board of elections were required to perform these duties, the chief deputy treasurer or assistant administrator could control the amount and availability of moneys appropriated to the board of elections. In such a situation, a person's responsibilities as a member of a board of elections may influence the performance of his duties as a chief deputy treasurer or administrative assistant and may prevent him from discharging his duties for the county treasurer in a completely objective and disinterested manner. *See generally* 1981 Op. Att'y Gen. No. 81-004 (city auditor may not serve as volunteer firefighter because loyalty to fire department creates conflict of interest with duty to objectively examine accounts of the fire

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[9] Payments for the expenses of a board of elections from the county treasury are "made upon vouchers of the board … upon warrants of the county auditor." R.C. 3501.17(A); *accord* R.C. 319.16. *See generally* R.C. 321.15 ("[n]o money shall be paid from the county treasury, or transferred to any person for disbursement, except on the warrant of the county auditor").

department). *See generally also* 1989 Op. Att'y Gen. No. 89-022 at 2-106 ("when a public position requires an individual to conduct an objective investigation or review of another entity, a conflict arises when the individual holds a second position which creates a loyalty to that entity or a predisposition toward the outcome of the review or investigation").

The job descriptions for the positions of chief deputy treasurer and administrative assistant for the county treasurer that you furnished to us indicate that these two positions are not involved with accounting for the moneys of the board of elections and disbursing such moneys to pay the expenses of the board. However, whether the responsibilities of the chief deputy treasurer or administrative assistant include these particular duties is a question of fact to be determined on a case-by-case basis by local officials. *See* 1989 Op. Att'y Gen. No. 89-022 at 2-104 and 2-105 ("whether the job duties of a particular assistant auditor require any involvement with the particular township or municipality where he or she holds the additional position depends upon the organizational structure of the office of the auditor of state" and "whether the position of an assistant auditor below the rank of regional administrator operates as a check upon the public office of township clerk or city planning commissioner is a question of fact to be determined in each instance"). Accordingly, if the duties of a chief deputy treasurer or administrative assistant for the county treasurer do not include accounting for the moneys in the county treasury that have been appropriated to the board of elections and disbursing such moneys to pay the expenses of the board, the aforementioned conflict of interest does not prohibit a person from serving simultaneously in the positions of member of the board of elections and chief deputy treasurer or administrative assistant. *See generally* 1989 Op. Att'y Gen. No. 89-052 at 2-220 (if a person's duties as a county auditor employee do not involve conducting or participating in an audit of a law library association that employs him as a librarian, "then no conflict as such exists, and the two positions would not be incompatible in this regard").

A final conflict of interest exists because a board of elections performs duties that affect a county treasurer when he is a candidate for election to an office. For example, a board of elections is responsible for establishing election precincts, determining the qualifications of electors, and appointing judges and other election officers. R.C. 3501.11; R.C. 3501.18; R.C. 3501.22; R.C. 3505.03. Decisions concerning these matters made by a board of elections relate to the conduct of an election in which a county treasurer is a candidate.

Additionally, in any election in which the county treasurer is a candidate, whether for that office or another, the board of elections reviews, examines, and certifies the sufficiency and validity of the treasurer's candidacy petition, and that of his opponents; determines the qualifications of the treasurer and his opponents; canvasses the returns of the election and declares the results; recounts the votes cast in the election when necessary; and investigates irregularities, nonperformance of duties, or violations of R.C. Title 35 by election officers and other persons. R.C. 3501.11; R.C. 3501.39; R.C. 3505.32; R.C. 3505.33; R.C. 3513.05; R.C. 3513.22; R.C. 3513.262; R.C. 3513.263; R.C. 3515.04; R.C. 3515.05. The board also files a complaint with the Ohio Elections Commission when any candidate in the election fails to timely file a complete and accurate financial statement required by R.C. Chapter 3517. R.C. 3517.11(C)(1). Decisions made by the board of elections when performing these duties have the

potential of affecting the conduct and outcome of an election in which a county treasurer is a candidate. *See State ex rel. Democratic Executive Comm. of Lucas County v. Brown,* 39 Ohio St. 2d 157, 164-166, 314 N.E.2d 376 (1974) (per curiam) (Stern, J. concurring); *see also* R.C. 3517.11(D) ("[n]o certificate of nomination or election shall be issued to a person, and no person elected to an office shall enter upon the performance of the duties of that office, until that person or that person's campaign committee, as appropriate, has fully complied with [R.C. 3517.11, R.C. 3517.08, R.C. 3517.081, R.C. 3517.10, and R.C. 3517.13]"). Thus, if a board of elections conducts an election with respect to an office for which the county treasurer is a candidate, a member of the board who is a chief deputy treasurer or administrative assistant for the treasurer could participate in discussions, deliberations, and votes that could affect the conduct and outcome of that election. In such situations, the board member's loyalty to the county treasurer may prevent him from making completely objective decisions. *See* 2003 Op. Att'y Gen. No. 2003-010 at 2-72.

We do not believe that this conflict of interest can be sufficiently avoided or mitigated. If a board of elections conducts an election for an office for which the county treasurer is a candidate, the board will be required to make decisions that relate to the election. Specifically, the board of elections will be required to review, examine, and certify the sufficiency and validity of candidacy petitions, R.C. 3501.11(K); *see* R.C. 3501.39, and receive the returns of the election, canvass the returns, make abstracts of them, and transmit those abstracts to the proper authorities, R.C. 3501.11(L). It is not, therefore, merely a remote possibility that a member of a board of elections who serves as a chief deputy treasurer or administrative assistant for the county treasurer will be subject to undue influence in the performance of his duties for the board when the treasurer is a candidate for election to an office.

In addition, this conflict of interest concerns the administration of elections, which is the primary function of a board of elections, and involves situations in which a member of the board of elections is required to exercise decision-making authority. The role of the board of elections in conducting an election in which a public officer who employs a member of the board is a candidate for election to an office presents numerous conflicts which may be avoided only by the member's abstention from all discussions, deliberations, and votes on matters that directly or indirectly affect such an election. Because many of the matters handled by a board of elections may affect an election in which a public officer is a candidate, it is conceivable that a member of the board of elections who is employed by the public officer will be abstaining often from matters under consideration by the board. Continual abstention by a board of elections' member from matters relating to the administration of elections will not serve the best interests of the electorate. *See* 2003 Op. Att'y Gen. No. 2003-010 at 2-76 and 2-77. *See generally* 2003 Op. Att'y Gen. No. 2003-006 at 2-40 (if a person who serves simultaneously as a township clerk and county commissioner within the same county "is continually removing himself from potential conflicts of interest, the township's or county's affairs may, in general, suffer or go unattended. In addition, the person as township clerk or county commissioner may not perform in a competent manner the important duties he is required by law to perform on behalf of the township or county, respectively. Finally, it is conceivable that the situation could reach the point where county and township officials are spending an inordinate amount of time

determining whether the person has a conflict of interest in particular matters"). Thus, it is impractical for a member of a board of elections who serves as a chief deputy treasurer or administrative assistant for the county treasurer to abstain from all election matters directly or indirectly affecting an election in which the county treasurer is a candidate.

This view is supported by the decision of the Ohio Supreme Court in *State ex rel. Democratic Executive Comm. of Lucas County v. Brown*. This case concerned a mandamus action brought to compel the Secretary of State to appoint a salaried employee of a member of the United States Congress to the board of elections. The court denied the writ of mandamus, and held that R.C. 3501.07, which authorizes the Secretary of State to appoint a person to a board of elections, confers absolute discretion on the Secretary of State to determine the competency of a person to serve on a board of elections. The court further held that the Secretary of State's refusal to appoint an employee of a member of the United States Congress to a board of elections because of potential conflicts of interest was not an abuse of discretion that warranted the granting of the writ of mandamus to compel the Secretary of State to appoint the employee to the board of elections. In reaching this conclusion, the court stated:

> In case No. 74-147, the Secretary of State refused to appoint Don R. Gosney to the Columbiana County Board of Elections. The Secretary of State set forth his reasons for this determination in a letter to Mr. Gosney, Chairman of the Democratic Executive Committee of Columbiana County, dated February 5, 1974, stating, in pertinent part:
>
> > "You are hereby notified of my refusal to reappoint you to the board of elections. My reason is that you are employed by Congressman Wayne Hays at a salary of $17,100 per year and that, therefore, you will not be able to properly function as a board member and as an employee of the Congressman, especially at a point in time during which Congressman Hays is a candidate for office. The two positions have the potential for conflict of interest.
> >
> > "I believe there are strong public policy reasons as well as legal reasons for the view that board of elections members should not be on the payroll of persons seeking election or re-election to public office. In such instances of dual public employment, the official duties may be so administered and discharged that favoritism and preference may be accorded to an employer. The public should be protected from possible misuse of any public office."
>
> The factual issues in this case have been admitted by the relators, and, although the Secretary of State's decision as to the existence of a conflict of interest is disputed, such decision is within the statutory discretion granted him under R.C. 3501.07. In view of the existence of the evidence establishing that Mr. Gosney is the salaried employee of an elected official, we are not inclined to

> interfere with the Secretary of State's exercise of discretion in refusing to appoint him.

State ex rel. Democratic Executive Comm. of Lucas County v. Brown, 39 Ohio St. 2d at 163-64, 314 N.E.2d 376.

In a concurring opinion, one justice further elaborated:

> In case No. 74-147 (Columbiana County) there appears to be a definite conflict of interest between the offices held by Mr. Gosney as a salaried employee to a congressman and as a member of the board of elections….
>
> ….
>
> Members of boards of elections in performing their official duties act in a quasi-judicial capacity. Government in a democracy is postulated upon the confidence the people have in all persons serving them in an official capacity, particularly in the conduct of our elections wherein our citizens express their views as to candidates, issues, constitutional proposals, etc.
>
> Based upon the record in case No. 74-147 it appears that Mr. Gosney as a paid employee of a publicly elected official cannot hold the office of a member of a board of elections, because there are too many instances where a conflict of interest could arise, affecting both his employer and his employer's political opponent in an election matter that would be manifestly unfair to all concerned, including the voting public.

Id. at 165-166, 314 N.E.2d 376 (Stern, J. concurring).

It is, therefore, our view that the positions of member of a board of elections and chief deputy treasurer or administrative assistant for the county treasurer are incompatible when the treasurer is a candidate for an office to be filled at an election.[10]

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[10] The syllabus of 1964 Op. Att'y Gen. No. 897, p. 2-97 advised that a member of a board of elections may serve as a secretary for a member of the United States Congress who is elected in an election conducted by the board, "notwithstanding the fact that that board of elections is required to tabulate and count the votes for election of a congressman from that district and that the board member's employer is seeking re-election." In light of the statements of the court in *State ex rel. Democratic Executive Comm. of Lucas County v. Brown,* 39 Ohio St. 2d 157, 314 N.E.2d 376 (1974) regarding impermissible conflicts of interest, we question the 1964 opinion to the extent that it suggests that a member of a board of elections may hold another public position when the member's employer in the other position is a candidate for an office to be filled at an election. *See generally* 1954 Op. Att'y Gen. No. 3930, p. 307 (syllabus) ("[t]here is no incompatibility between the offices of assistant prosecuting attorney and member of a county

Conclusions

Based on the foregoing, it is my opinion, and you are hereby advised as follows:

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board of elections unless such assistant or the prosecuting attorney whom he serves is currently a candidate for elective office within the meaning of [R.C. 3501.15]").

In *State ex rel. Hough v. Brown,* 50 Ohio St. 2d 329, 364 N.E.2d 275 (1977) the Ohio Supreme Court denied a writ of mandamus to compel the Secretary of State to remove a member of a board of elections or vacate his appointment to the board because of alleged conflicts of interest resulting from the member's employment by a board of county commissioners, two of whose members were candidates for offices to be filled at an election. In denying the writ of mandamus, the court examined R.C. 3501.16, which authorizes the Secretary of State to remove persons from boards of elections, and stated:

> The Secretary of State's power to remove members of boards of elections is controlled by R.C. 3501.16….
>
> R.C. 3501.16 does *not* grant the Secretary of State broad discretion in removing election board members. He is required to submit more than "his reasons for believing" the individual should be removed. Indeed, he cannot remove them except for certain specific reasons and "other good and sufficient cause." Given the language of the statute and the fact that an individual who is already an election board member has a greater constitutional interest in keeping that position than does an individual who has not yet been appointed (see Section 38, Article II of the Ohio Constitution; *State, ex rel. Hughes, v. Brown* [1972], 31 Ohio St. 2d 41; [285 N.E.2d 376,] and *State, ex rel. Democratic Executive Committee, supra*), we do not find that the Secretary of State has a clear legal duty to remove [the person in question] from, or vacate his appointment to, the Board of Elections of Mahoning County.

State ex rel. Hough v. Brown, 50 Ohio St. 2d at 332, 364 N.E.2d 275.

The court in *State ex rel. Hough v. Brown* addressed only the authority of the Secretary of State to remove a member of a board of elections pursuant to R.C. 3501.16 when he is also employed by a board of county commissioners, two of whose members were candidates for offices to be filled at an election. The court did not, however, discuss the immediacy of any potential conflicts of interest in such a situation, *see, e.g., State ex rel. Democratic Executive Comm. of Lucas County v. Brown,* or the propriety of removing the person from the board of elections pursuant to another statute, *see, e.g.,* R.C. 2733.01 (a quo warranto action to remove a person from public office may be brought against a person who "unlawfully holds or exercises a public office" or "does or suffers an act which, by law, works a forfeiture of his office").

1. A person may serve as a member of a board of elections and chief deputy treasurer or administrative assistant for the county treasurer, provided that as chief deputy treasurer or administrative assistant he does not serve on the county budget commission, or account for and disburse the moneys in the county treasury that have been appropriated to the board of elections.

2. The positions of member of a board of elections and chief deputy treasurer or administrative assistant for the county treasurer are incompatible when the treasurer is a candidate for an office to be filled at an election. (1964 Op. Att'y Gen. No. 897, p. 2-97, questioned.)

Respectfully,

JIM PETRO
Attorney General