June 10, 2002

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SYLLABUS: 2002-013

A person may serve simultaneously as a member of the Sylvania Township board of trustees and equipment manager in the Ohio Department of Transportation, provided that as a township trustee he does not participate in any deliberations, discussions, negotiations, or votes concerning the township's construction, improvement, maintenance, or repair of a state road, an agreement between the township and the Department to use township funds to construct, repair, or improve a federal, state, or county road, or an agreement between the township and a board of county commissioners to have the Department construct a road improvement.

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OPINION NO. 2002-013

Truman A. Greenwood
Sylvania Township Law Director
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Dear Law Director Greenwood:

You have requested an opinion whether the positions of member of the Sylvania Township board of trustees and equipment manager in the Ohio Department of Transportation (ODOT) are compatible. Sylvania Township has adopted a limited home rule government pursuant to R.C. Chapter 504.[1] The members of the Sylvania Township board of trustees are elected on a nonpartisan ballot.[2]

R.C. 5501.17 authorizes the state through the Director of Transportation (Director of ODOT) to appoint equipment managers in ODOT. You have informed us that the position of equipment manager in question is a full-time position in the classified service of the state. *See generally* R.C. 124.11(B) ("[t]he classified service shall comprise all persons in the employ of the state … not specifically included in the unclassified service").

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[1] R.C. 504.01 authorizes a township to adopt a limited home rule government under which the township exercises limited powers of self-government and limited police powers as authorized by R.C. Chapter 504. Pursuant to R.C. 504.04(A), a limited home rule government township may "[e]xercise all powers of local self-government within the unincorporated area of the township, other than powers that are in conflict with general laws," and may "[a]dopt and enforce within the unincorporated area of the township local police, sanitary, and other similar regulations that are not in conflict with general laws or otherwise prohibited by [R.C. 504.04(B)]."

[2] Candidates for township trustee are nominated by petition, rather than in a primary election, unless a majority of the township electors petition for a primary election. R.C. 3513.01. Candidates nominated by petition appear on a nonpartisan ballot. R.C. 3505.04.

The following seven questions are used for determining whether two public positions are compatible:

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

2. Do the empowering statutes of either position limit 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 a 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?

2000 Op. Att'y Gen. No. 2000-025 at 2-166 and 2-167.

Questions six and seven concern the applicability of charter provisions, resolutions, ordinances, and federal, state, and local regulations. There are no applicable charter provisions, or state or federal regulations. ODOT has informed us that there is no applicable departmental regulation. Whether there is an applicable township resolution or ordinance is a matter for local officials to determine. For the purpose of this opinion, it is assumed that there is no township resolution or ordinance that controls in this instance.

The first question asks whether either of the positions is a classified employment within the terms of R.C. 124.57. This statute 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.[3]

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[3] 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,*

R.C. 124.57 has been construed as prohibiting a classified officer or employee who is covered by the terms thereof from being elected to a public office in a partisan election or accepting a party-sponsored appointment to a public office that is normally filled by partisan election.[4] *See* 2 Ohio Admin. Code 123:1-46-02(C)(1), (6); 2001 Op. Att'y Gen. No. 2001-034 at 2-202; *see also Heidtman v. City of Shaker Heights*, 163 Ohio St. 109, 126 N.E.2d 138 (1955). R.C. 124.57 does not, however, prohibit a classified officer or employee from being elected to a public office in a nonpartisan election or accepting appointment to a public office that is normally filled by nonpartisan election. 2001 Op. Att'y Gen. No. 2001-034 at 2-203; *see* rule 123:1-46-02(C).

Reduced to its simplest terms, R.C. 124.57 does the following: it prohibits an officer or employee in the classified service from running for 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. 2001 Op. Att'y Gen. No. 2001-034 at 2-203.

A township trustee is in the unclassified service since a person is elected to that position. *See* R.C. 124.11(A)(1); R.C. 505.01. R.C. 124.57's prohibition thus does not apply to a township trustee.

As stated previously, the members of the Sylvania Township board of trustees are elected in a nonpartisan election. *See* note two, *supra*. Accordingly, R.C. 124.57 does not prohibit an ODOT equipment manager in the classified service of the state from seeking election to, or serving as a member of, the Sylvania Township board of trustees. *See* rule 123:1-46-02(C); 1993 Op. Att'y Gen. No. 93-051 at 2-246; 1988 Op. Att'y Gen. No. 88-020 at 2-76. The prohibition of R.C. 124.57, therefore, does not operate to prevent a person from holding both of those positions at the same time.

Question two asks whether the empowering statutes of either position limit a person from being employed in another public position or holding another public office. Except as provided in R.C. 124.57, no other statute prohibits an ODOT equipment manager in the classified service of the state from being elected to, or serving as a member of, a board of township trustees. Also,

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

[4] An officer or employee in the classified service may participate in partisan politics if the terms of a collective bargaining agreement authorize such participation. *See* 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").

no statute prohibits a township trustee from being employed as an ODOT equipment manager. This question thus may be answered in the negative.

The third question asks whether one position is subordinate to, or in any way a check upon, the other. 1985 Op. Att'y Gen. No. 85-080, which advised that the positions of township trustee and ODOT equipment operator are compatible,[5] addressed several situations in which the Director of ODOT or an employee appointed by him could act as a check upon a board of township trustees. *Cf.* 1991 Op. Att'y Gen. No. 91-036 at 2-194 (pursuant to R.C. 5521.11, the Director of ODOT or one of his employees may act as a check upon the legislative authority of a village). The opinion noted that ODOT officials could act as a check upon a board of township trustees in approving and supervising the performance of the board's functions with regard to state highways under the jurisdiction of ODOT. 1985 Op. Att'y Gen. No. 85-080 at 2-317 and 2-318; *see*, *e.g.*, R.C. 5521.11 (township plans for the construction of part of the state highway system must be approved by ODOT and the construction must be supervised and inspected by ODOT); R.C. 5571.01 (ODOT must approve any township construction, reconstruction, resurfacing, or improving of any intercounty or state highway); R.C. 5571.02 (ODOT must approve any township maintenance or repair of an intercounty or state highway); *see also*, *e.g.*, R.C. 5501.03(C) (ODOT oversees any road construction project that a township agrees to administer for ODOT); R.C. 5535.06 (ODOT must indicate what changes or improvements a township must make in order to convert an intercounty road to a state road); R.C. 5535.15 (ODOT must approve any township maintenance, repair, construction, reconstruction, improvement, or widening of any section of road under the control of the state).

In addition, certain ODOT officials may act as a check upon a board of township trustees' enforcement of township parking regulations on state highways, R.C. 505.17(C), and use of state moneys and equipment in the construction of roads under the control of a township, R.C. 5531.08; R.C. 5573.22. ODOT officials may also act as a check upon the board of township trustees' authority to place traffic control devices and traffic signs, R.C. 4511.10; R.C. 4511.11; R.C. 5571.01(F); *see also* R.C. 4511.98, purchase or manufacture traffic control devices, R.C. 4511.11, designate dangerous highway crossings over railroad tracks and erect stop signs thereat, R.C. 4511.61, designate school zones, R.C. 4511.21; R.C. 4511.212, and establish speed limits, R.C. 4511.21. Thus, there are various situations in which the appropriate ODOT officials could act as a check upon a board of township trustees.

1985 Op. Att'y Gen. No. 85-080 advised, however, that the fact that ODOT officials may act as a check upon a board of township trustees does not render the positions of township trustee and ODOT equipment operator incompatible. As explained in 1985 Op. Att'y Gen. No. 85-080 at 2-318:

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[5] The duties of the ODOT equipment operator in 1985 Op. Att'y Gen. No. 85-080 included performing "assigned work such as filling berms, patching potholes, installing berms, and operating a road grader." *Id.* at 2-314. The ODOT equipment operator had no supervisory duties and received "his work assignments and orders from the county superintendent." *Id.*

> [T]he fact that the trustee in question is an employee of the Department of Transportation does not per se result in that employment being a check upon the office of township trustee. I can conceive of no situation in which this particular employee, in performing the ordinary work of an equipment operator, would be in a position to work a check upon the office of township trustee. A situation could arise in which the township trustees would be answerable to an employee of the Department of Transportation insofar as the Director of the Department had delegated or assigned to that employee the responsibility of assisting him in the performance of his duties under R.C. 5521.11, R.C. 5571.01, or R.C. 5571.02. Indeed, R.C. 5521.11 specifically states an employee of the Department of Transportation may supervise and inspect construction work on the state highway system undertaken by the township trustees. It seems very unlikely, however, that duties pertaining to the approval of construction, improvement, maintenance or repair of state highways or work either of a supervisory nature or involving duties of inspection would be delegated or assigned to an equipment operator.

We reach the same conclusion with respect to the positions of township trustee and ODOT equipment manager. The ODOT position description that you included with your letter provides that the duties of an ODOT equipment manager[6] include developing, implementing, and enforcing policies, procedures, and safety practices relating to ODOT's equipment maintenance program, determining the equipment needs of ODOT, reviewing and approving the purchase of equipment, parts, and supplies by ODOT, and inspecting ODOT's equipment. In addition, an ODOT equipment manager inventories all ODOT's equipment, supplies, and parts, investigates discrepancies between inventory records and physical count, and writes specifications for equipment, parts, and supplies to be purchased by ODOT.

An ODOT equipment manager is not responsible for approving road construction plans or specifications or supervising or inspecting road construction on state highways. An ODOT equipment manager also is not required to approve a township's enforcement of parking regulations on state highways or use of state moneys or equipment for the construction of roads under the control of a township. Finally, an ODOT equipment manager is not responsible for regulating the placement of traffic control devices and traffic signs, approving the purchase or manufacture of traffic control devices, designating dangerous highway crossings over railroad tracks, designating school zones, or establishing speed limits. Accordingly, there are no instances in which an ODOT equipment manager acts as a check upon a board of township trustees.

There are also no instances in which a board of township trustees supervises an ODOT equipment manager. Further, neither position is required to assign duties to the other.

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[6] The formal class title of an ODOT equipment manager, as set forth in the ODOT position description, is "Transportation Manager 3."

Therefore, neither position is subordinate to, or in any way a check upon, the other. *See* 1985 Op. Att'y Gen. No. 85-080 at 2-318; *see also* 1991 Op. Att'y Gen. No. 91-036 at 2-195.

The fourth question asks whether it is physically possible for one person to discharge the duties of both positions. This is a factual question that is best answered by the concerned persons because they may more precisely determine the time constraints imposed by each position. 1999 Op. Att'y Gen. No. 99-027 at 2-177. It seems likely, however, that the duties of these two positions can be discharged competently by the same person if there is no direct conflict in the working hours of each position.[7]

The fifth and final question asks whether there is a conflict of interest between the two positions.[8] 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 or offices he serves. 2000 Op. Att'y Gen. No. 2000-025 at 2-168. However, although a person who serves simultaneously in two public positions is subject to a conflict of interest, a consideration of various factors may demonstrate that the conflict may be sufficiently avoided or eliminated entirely, thus making it possible for the person to serve in both positions. 2001 Op. Att'y Gen. No. 2001-027 at 2-157. 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*.

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[7] You have informed us that you previously determined that "there does not appear to be significant evidence suggesting that it would be physically impossible" for a person to perform the duties and responsibilities of Sylvania Township trustee and ODOT equipment manager. In fact, the person's normal working hours as an ODOT equipment manager are from 7:30 A.M. to 4:30 P.M., and the person is not required to be on call 24 hours a day in that position. You thus suggest that it is likely that the person will be able to perform his duties as a township trustee during the time he is not scheduled to work as an ODOT equipment manager. *See generally* 1990 Op. Att'y Gen. No. 90-014 at 2-57 (an elected public officer, such as a township trustee, is not required to devote particular hours to his duties; instead, he schedules his work as he finds necessary to fulfill his responsibilities).

[8] R.C. 102.08 authorizes the Ohio Ethics Commission to issue advisory opinions concerning the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43. We, therefore, believe it proper to refrain from interpreting such provisions by way of a formal opinion, and recommend that you contact the Ohio Ethics Commission for advice and interpretations concerning these provisions in the situation in which a trustee of Sylvania Township serves simultaneously as an ODOT equipment manager. *See* 2000 Op. Att'y Gen. No. 2000-025 at 2-170 n.4.

There are several instances in which a person who holds the positions of township trustee and ODOT equipment manager may be subject to a conflict of interest. First, various statutes authorize a board of township trustees to construct, maintain, improve, or repair state roads that are under the control of ODOT.[9] *See*, *e.g.*, R.C. 5501.03(C); R.C. 5521.11; R.C. 5535.06; R.C. 5535.15; R.C. 5571.01(A); R.C. 5571.02. *See generally* R.C. 5535.07 ("[t]his section does not prevent the authorities of any … township from co-operating with the state in the construction, maintenance, or repair of any section of [intercounty] highways within such … township"). If a township trustee who serves as an ODOT equipment manager were required to deliberate, discuss, negotiate, or vote on such a matter, it might be difficult for the trustee to perform his duties and exercise his discretion in a completely objective and disinterested manner because of his employment relationship with ODOT. *See* 1985 Op. Att'y Gen. No. 85-080 at 2-321.

We believe, however, that this conflict of interest can be sufficiently avoided or mitigated. The responsibility for the construction, maintenance, improvement, and repair of state roads is conferred upon ODOT, not townships. R.C. 5501.11(A); *see* R.C. 5535.07; R.C. 5535.08; *see also* R.C. 5535.01. The construction, maintenance, improvement, and repair of state roads thus is not a primary function of a board of township trustees. As a result, the occasions in which the person, as a township trustee, will have to deliberate, discuss, negotiate, or vote on such a matter will be rare, indeed. 1985 Op. Att'y Gen. No. 85-080 at 2-323.

Even when such a matter is presented to the board of township trustees, a trustee who is employed as an ODOT equipment manager will be able to remove himself from any such deliberations, discussions, negotiations, or votes because the board is capable of functioning and performing its statutory duties when one of its members abstains from a matter. *See id*. *See generally State ex rel. Saxon v. Kienzle*, 4 Ohio St. 2d 47, 48, 212 N.E.2d 604, 605 (1965) ("[i]n the absence of a statute to the contrary, any action by a board requires that a quorum participate therein, and that a majority of the quorum concur"). Moreover, a township trustee, as a public official, has a duty to abstain from participating in any matter that would impair his objectivity. 2000 Op. Att'y Gen. No. 2000-025 at 2-170. Accordingly, this potential conflict of interest does not prohibit a trustee of Sylvania Township from serving simultaneously as an ODOT equipment manager, provided the trustee does not participate in any deliberations, discussions, negotiations, or votes concerning the township's construction, improvement, maintenance, or repair of a state road.

A second conflict of interest may occur because a board of township trustees may enter into an agreement with ODOT to use township funds to construct, repair, or improve a federal, state, or county road. *See* 1985 Op. Att'y Gen. No. 85-080 at 2-319 and 2-320; *see*, *e.g.*, R.C. 5531.02 (a township and ODOT may agree to use township funds for a proposed road improvement on a secondary or feeder road); R.C. 5535.08 (a township and the state may agree

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[9] Pursuant to R.C. 5501.11(A), ODOT is required "[t]o establish state highways on existing roads, streets, and new locations and to construct, reconstruct, widen, resurface, maintain, and repair the state system of highways and the bridges and culverts thereon."

to expend moneys to construct, repair, or improve roads inside a village). If a township trustee who serves as an ODOT equipment manager were required to deliberate, discuss, negotiate, or vote on an agreement between the township and ODOT, it could be difficult for the trustee to set aside his loyalty to ODOT. Such a predisposition of loyalty could prevent the trustee from making completely objective decisions with regard to such an agreement. *See* 1985 Op. Att'y Gen. No. 85-080 at 2-320.

We believe, nonetheless, that this potential conflict of interest can also be sufficiently avoided or mitigated. Townships are not required to fund the construction, repair, or improvement of federal, state, or county roads. Nor are townships required to enter into a contract with ODOT to fund these projects. Instead, townships are only responsible for funding and administering the construction, repair, and improvement of township roads. *See* R.C. 5535.01(C); R.C. 5535.08; R.C. 5571.02. Because the construction, repair, and improvement of federal, state, and county roads is not a primary function of a board of township trustees, it appears that a trustee of Sylvania Township will not be required to consider such matters frequently.

Further, should such a matter come before the board of township trustees, a trustee who also is employed as an ODOT equipment manager will be able to remove himself from any deliberations, discussions, negotiations, or votes in the matter since the board is capable of carrying out its duties when one of its members abstains from a matter. *See* 2000 Op. Att'y Gen. No. 2000-025 at 2-170. In addition, as explained above, a township trustee is under an obligation to abstain from participating in any matter in which his ability to carry out his duty in a completely objective fashion might be impaired. *Id*. Accordingly, this potential conflict of interest does not prohibit a trustee of Sylvania Township from serving simultaneously as an ODOT equipment manager, provided the trustee does not participate in any deliberations, discussions, negotiations, or votes concerning an agreement between the township and ODOT to use township funds to construct, repair, or improve a federal, state, or county road.

A final conflict of interest may occur because R.C. 5573.22 authorizes a board of township trustees and the board of county commissioners to enter into an agreement whereby ODOT, upon application by the board of county commissioners, constructs a road improvement within a township road district created by the board of township trustees pursuant to R.C. 5573.21. If a township trustee who serves as an ODOT equipment manager were required to deliberate, discuss, negotiate, or vote on such an agreement, it could be difficult for the trustee to perform his duties and exercise his discretion in a completely objective and disinterested manner because of his employment relationship with ODOT. *See* 1985 Op. Att'y Gen. No. 85-080 at 2-320.

It is our belief, however, that this conflict of interest is not definite and immediate. First, it is speculative whether the board of township trustees will create a township road district pursuant to R.C. 5573.21 and enter into an agreement with a board of county commissioners under R.C. 5573.22 for ODOT to construct a road improvement. A board of township trustees is not required to create such a district or enter into such an agreement with a board of county

commissioners. Thus, it appears that this conflict does not involve a primary function of a board of township trustees or a matter that will arise frequently.

Further, were such a matter to be presented to the board of township trustees, the trustee could abstain from any such deliberations, discussions, negotiations, or votes because the board is capable of functioning and performing its statutory duties when one of its members removes himself from a matter. *See* 2000 Op. Att'y Gen. No. 2000-025 at 2-170. Moreover, as we already have stated, a township trustee who serves simultaneously as an ODOT equipment manager is required to abstain from participating in any matter in which his objectivity might be impaired. *Id*. Accordingly, this potential conflict of interest does not prohibit a trustee of Sylvania Township from serving simultaneously as an ODOT equipment manager, provided the trustee does not participate in any deliberations, discussions, negotiations, or votes concerning an agreement between the township and a board of county commissioners to have ODOT construct a road improvement.

Therefore, the potential conflicts of interest here identified do not prohibit a member of the Sylvania Township board of trustees from serving simultaneously as an ODOT equipment manager, provided he does not participate in any deliberations, discussions, negotiations, or votes concerning the township's construction, improvement, maintenance, or repair of a state road, an agreement between the township and ODOT to use township funds to construct, repair, or improve a federal, state, or county road, or an agreement between the township and a board of county commissioners to have ODOT construct a road improvement.[10]

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[10] 1985 Op. Att'y Gen. No. 85-080 at 2-318 and 2-319 explained that the Director of ODOT and a board of township trustees might appear in court as opponents in a proceeding brought by the Director to close a hazardous highway-railway grade crossing pursuant to R.C. 5523.33 (now R.C. 4907.475). In such a situation, an ODOT employee who also serves on the board of township trustees "would have a conflict of interest between his duties to the Director and his duties as township trustee." *Id*. at 2-319.

Since the issuance of 1985 Op. Att'y Gen. No. 85-080, the provisions of R.C. 5523.33 have been amended, and reenacted as R.C. 4907.475 by 1989-1990 Ohio Laws, Part II, 2331, 2533 (Am. Sub. H.B. 111, eff. Oct. 29, 1989). R.C. 4907.475 has been amended subsequently by 1991-1992 Ohio Laws, Part IV, 6055, 6058-59 (Sub. H.B. 667, eff. Mar. 15, 1993). Pursuant to Sub. H.B. 667, the duties of the Director of ODOT to close hazardous highway-railway grade crossings have been transferred to the Public Utilities Commission. In addition, a board of county commissioners, but not a board of township trustees, may appear in a court action to close a hazardous highway-railway grade crossing under R.C. 4907.475. Accordingly, the Director of ODOT and a board of township trustees will not appear in court as opponents in a court proceeding to close a hazardous highway-railway grade crossing pursuant to R.C. 4907.475, and thus, an ODOT employee who serves as a township trustee will not be subject to a conflict of interest under this statute.

Based on the foregoing, it is my opinion, and you are hereby advised that a person may serve simultaneously as a member of the Sylvania Township board of trustees and equipment manager in the Ohio Department of Transportation, provided that as a township trustee he does not participate in any deliberations, discussions, negotiations, or votes concerning the township's construction, improvement, maintenance, or repair of a state road, an agreement between the township and the Department to use township funds to construct, repair, or improve a federal, state, or county road, or an agreement between the township and a board of county commissioners to have the Department construct a road improvement.

Respectfully,

BETTY D. MONTGOMERY
Attorney General