March 28, 2003

The Honorable Robert Junk
Pike County Prosecuting Attorney
Courthouse, First Floor
100 East 2nd Street
Waverly, Ohio 45690

SYLLABUS: 2003-010

The positions of member of the board of education of a local school district and principal of a school in a joint vocational school district that includes the territory of the local school district are incompatible.

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OPINION NO. 2003-010

The Honorable Robert Junk
Pike County Prosecuting Attorney
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100 East 2nd Street
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Dear Prosecutor Junk:

You have requested an opinion whether the positions of member of the board of education of a local school district and principal of a school in a joint vocational school district that includes the territory of the local school district are compatible. In addition, you wish to know whether there is "a conflict of interest for the principal to calculate attendance, and exercise any discretion therein, of the students from the local school district (at which he is a member of the Board of Education), when the local school district stands to be affected financially as a result of the attendance calculation at the vocational school." (Emphasis omitted.)

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 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?

See 2002 Op. Att'y Gen. No. 2002-021 at 2-132 and 2-133. In your particular situation, however, the two positions are incompatible because of the existence of impermissible conflicts of interest between the two positions.

It is well established that a person may not serve simultaneously in two public positions when he is subject to impermissible conflicts of interest. 2002 Op. Att'y Gen. No. 2002-039 at 2-249; 2002 Op. Att'y Gen. No. 2002-012 at 2-66. Impermissible conflicts of interest occur when a person is "subject to divided loyalties and conflicting duties or exposed to the temptation of acting other than in the best interest of the public." 1985 Op. Att'y Gen. No. 85-021 at 2-82; *accord* 1980 Op. Att'y Gen. No. 80-035 at 2-149.

In order to determine whether a person who holds two public positions simultaneously is subject to impermissible conflicts of interest, we must first review the powers, duties, and responsibilities conferred upon the person in each position. 2002 Op. Att'y Gen. No. 2002-021 at 2-135. This review will enable us to determine whether the person will confront conflicts of interest when he exercises the powers, duties, and responsibilities in either or both positions. *Id*.

We will consider, first, the powers, duties, and responsibilities of a member of the board of education of a local school district. A board of education of a local school district is responsible for governing the public schools in the district. *See generally* R.C. Chapter 3313 (setting forth the general powers and duties of boards of education); *Sewell v. Bd. of Educ.*, 29 Ohio St. 89 (1876) (syllabus, paragraph one) ("[b]oards of education are authorized by law to adopt and enforce necessary rules and regulations for the government of the schools under their management and control"). The responsibilities of such a board include, *inter alia*, the establishment of rules for the government of the district, R.C. 3313.20, procuring liability insurance against damage or injury to persons and property, R.C. 3313.201, providing insurance and other fringe benefits to employees of the district, R.C. 3313.202, providing a free education to the youths of the district, R.C. 3313.48, management and control of the public schools in the district, R.C. 3313.47, and contracting for police services in alcohol and drug programs, R.C. 3313.95.

The board of education of a local school district also handles fiscal and budgetary matters on behalf of the school district. *See, e.g.*, R.C. 135.04(C) (awards the school district's active deposits of public moneys to an eligible institution); R.C. 135.14 (invests the school district's interim moneys). A board of education of a local school district is designated as the taxing authority of the school district for purposes of R.C. Chapters 133 (uniform public securities law) and 5705 (tax levy law). *See* R.C. 133.01(NN)(3); R.C. 5705.01(C). As a taxing authority, a board of education is responsible for issuing securities for the purpose of providing funds with which to pay one or more final judgments rendered against the school district, R.C. 133.14, issuing securities for the purpose of paying all or any portion of the costs of any permanent improvement that the school district is authorized to acquire, improve, or construct, R.C. 133.15, preparing the school district's annual tax budget, R.C. 5705.28, and levying taxes, R.C. 133.56; R.C. 5705.03; R.C. 5705.194; R.C. 5705.21; R.C. 5705.212; R.C. 5705.213.

We will now look to the powers, duties, and responsibilities conferred upon a principal of a school in a joint vocational school district. The management and control of a joint vocational school district is vested in its joint vocational school district board of education.[1] R.C. 3311.19(A). In order to discharge its duties, the board is authorized to enter into written contracts for the employment of principals to manage the schools in the district.[2] R.C. 3319.02; R.C. 3319.08; *see* R.C. 3311.19(D), (E); 1990 Op. Att'y Gen. No. 90-063 at 2-269 n.2.

The duties of a principal include maintaining order in the school to which he is assigned and imposing discipline upon pupils whenever such discipline is necessary to preserve order. *See, e.g.,* R.C. 3313.66 (may suspend a pupil from school); R.C. 3319.41 (may inflict or cause to be inflicted reasonable corporal punishment upon a pupil when such punishment is permitted by the board of education); 1981 Op. Att'y Gen. No. 81-010 at 2-34 ("a principal must deal with discipline and emergency situations as the need arises"). A principal is required to report child abuse or neglect to a public children services agency or a municipal or county peace officer, R.C. 2151.421(A)(1)(b), notify a law enforcement agency that a pupil may be a missing child, R.C. 3313.672, and request the school's photographer to provide the school with one photograph for inclusion in the school's student files, R.C. 3319.322. In addition, a principal may be required to operate a school savings bank, R.C. 3313.82, review truancy cases and send appropriate notices and warnings, R.C. 3321.19, and perform such other duties as are set forth in the principal's employment contract and regulations enacted by the joint vocational school district board of education, *see* R.C. 3313.20; R.C. 3319.08; 1981 Op. Att'y Gen. No. 81-010 at 2-34.

Given the respective duties of the positions, we believe that a person who serves simultaneously as a member of the board of education of a local school district and principal of a school in a joint vocational school district that includes the territory of the local school district would be subject to numerous impermissible conflicts of interest. First, conflicts of interest may arise because the boards of education of a local school district and a joint vocational school district may enter into contracts or agreements with each other.[3] *See, e.g.,* R.C. 3311.212 ("[t]he

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[1] A joint vocational school district board of education has the same powers, duties, and authority for the management and operation of the joint vocational school district "as is granted by law, except by [R.C. Chapters 124, 3311, 3317, 3323, and 3331] to a board of education of a city school district, and [is] subject to all the provisions of law that apply to a city school district, except such provisions in [R.C. Chapters 124, 3311, 3317, 3323, and 3331]." R.C. 3311.19(D).

[2] *See generally* R.C. 3319.09(A) (for purposes of R.C. 3319.08-.18, which govern the employment, compensation, and discipline of teachers, the term "teacher" includes, *inter alia,* principals).

[3] Pursuant to R.C. 2921.42(A)(4), a public official may not knowingly "[h]ave an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected." If the local school district and joint vocational school district enter into a contract with each other, a person

board of education of a school district which is a part of a joint vocational school district and the board of education of such joint vocational school district may enter into agreements to permit the school buildings of the district first noted to be used for the purposes of carrying on a vocational school program"); R.C. 3313.84 (boards of education may contract for the exchange of teaching services); R.C. 3313.841 (the boards of education of local and joint vocational school districts may contract for the sharing on a cooperative basis of teachers and other licensed personnel necessary to conduct approved cooperative classes for special education and related services and gifted education); R.C. 3313.842 ("[t]he boards of education of any two or more school districts may enter into an agreement for joint or cooperative establishment and operation of any educational program"); R.C. 3313.91 (the board of education of any local or joint vocational school district may contract with any public agency,[4] board, or bureau for the purchase of any vocational education or vocational rehabilitation service for any resident of the district under the age of twenty-one years and may pay for such services with public funds); R.C. 3313.92(A) ("[t]he boards of education of any two or more school districts may … enter into agreements for the joint or cooperative construction, acquisition, or improvement of any building, structure, or facility benefiting the parties thereto"); R.C. 3323.08(B)(1) (a school district may arrange, by a cooperative agreement or contract with a joint vocational school district "to provide for the identification, location, and evaluation of handicapped children, and classes or other suitable education programs for such children that meet the standards established

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who holds a position with each of these entities could be determined to have an interest in the profits or benefits of a public contract. *See generally* Ohio Ethics Comm'n Advisory Op. No. 92-002 (syllabus, paragraph two) (R.C. 2921.42(A)(4) prohibits a member of the Ohio Grape Industries Committee from having an interest in a public contract entered into between the Committee and another public agency that employs him, unless the exception of R.C. 2921.42(C) applies).

If it were determined that this person has an interest in a public contract for purposes of R.C. 2921.42(A)(4), the person could be prohibited from holding both positions. The determination whether a public official has an interest in a public contract for purposes of R.C. 2921.42(A)(4) is one that must be made by the Ohio Ethics Commission. 1990 Op. Att'y Gen. No. 90-040 at 2-161 n.1. *See generally* 2001 Op. No. 2001-036 at 2-218 n.7 ("R.C. 102.08(A) 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. Therefore, questions concerning the application of these provisions in the case of a person who serves in these two positions should be addressed to the Ohio Ethics Commission" (citation omitted)).

[4] 1990 Op. Att'y Gen. No. 90-063 at 2-269 determined that, "a school board, as the governing body of a political subdivision of the state, is a governmental agency as that term is commonly understood."

by the state board of education under [R.C. Chapter 3323]"); R.C. 3327.04 (a board of education of a local school district and a joint vocational school district board of education may contract "for the admission or transportation, or both, of pupils into any school in such other district, on terms agreed upon by such boards").

If a member of the board of education of the local school district who serves as a principal of a school in a joint vocational school district were required to deliberate, discuss, negotiate, or vote on a contract or agreement between the local school district and joint vocational school district, it might be difficult for the member to set aside his loyalty to the joint vocational school district because of the employment relationship he has with that district. *See* 1997 Op. Att'y Gen. No. 97-044 at 2-274. Such a predisposition of loyalty could prevent the member from performing his duties and exercising his discretion in a completely objective and disinterested manner. The member may also be influenced not to perform his duties and exercise his discretion with respect to matters involving the joint vocational school district in a completely objective manner for fear of reprisals by the joint vocational school district board of education. *See id.* at 2-277.

Other conflicts of interest may arise because the person, as a member of the board of education of the local school district, may have to deliberate, discuss, negotiate, or vote on matters that affect directly or indirectly the joint vocational school district that employs him as a school principal. Pursuant to R.C. 3311.217, a board of education of a local school district that participates in a joint vocational school district may vote to dissolve the joint vocational school district. R.C. 3313.90 also authorizes boards of education of local school districts to provide vocational education to pupils by establishing and maintaining a vocational education program, being a member of a joint vocational school district, or contracting for vocational education with a joint vocational school district or another school district. Thus, in his capacity as a member of the board of education, a person serving as a principal of a school in a joint vocational district would be in a position to determine whether the local school district, the joint vocational school district, or some other entity will provide vocational education to the pupils of the local school district. *See generally* R.C. 3317.17(A) (the board of education of a local school district may apply to the Department of Education for funds, provided the district after incurring the debt implements a change in the manner of providing vocational education to the students of the district).

In making this determination, the person, as a member of the board of education of the local school district, must act in the best interests of the local school district. At the same time, however, a person serving as both a member of the board of education of a local school district and school principal in a joint vocational school would be tempted to act in his best interest in preserving his employment as principal or maintaining the local school district's participation in the joint vocational school district. *See* 2002 Op. Att'y Gen. No. 2002-022 at 2-144; *see also* R.C. 3319.17(B)(2) (a joint vocational school district board of education may reduce the number of teachers when enrollment decreases); 5 Ohio Admin. Code 3301-61-04 (allocation of state construction funds to a joint vocational school district "shall be made only to [a] district which has a minimum enrollment of one thousand five hundred students in grades nine through

twelve…. Because of the limitation of funds, districts or combination of districts with a minimum of three thousand students in grades nine through twelve will be given priority").

Moreover, R.C. 3313.37(A)(1) provides:

> The board of education of any … local … school district may build, enlarge, repair, and furnish the necessary schoolhouses, purchase or lease sites therefor, or rights-of-way thereto, or purchase or lease real estate to be used as playgrounds for children or rent suitable schoolrooms, either within or without the district, and provide the necessary apparatus and make all other necessary provisions for the schools under its control.

R.C. 3311.212, in turn, states that, "[t]he board of education of a school district which is a part of a joint vocational school district and the board of education of such joint vocational school district may enter into agreements to permit the school buildings of the district first noted to be used for the purposes of carrying on a vocational school program."

Because a board of education of a local school district is required to provide vocational education to pupils in the district, R.C. 3313.90, the board may permit the joint vocational school district that provides such education to use the local school district's buildings and equipment. It is thus possible that a member of the board of education of the local school district may be required to consider the needs of the joint vocational school district when determining whether to build, enlarge, repair, or furnish a school building of the local school district. In such a situation, it might be difficult for a member of the board of education who also serves as a principal in the joint vocational school district to set aside his loyalty to the joint vocational school district when considering the building and equipment needs of the local school district. Such a predisposition of loyalty could impair the member's judgment in such matters.

In addition to the foregoing, conflicts of interest arise because of the competition over tax moneys generated within, and, in excess of, the ten-mill limitation.[5] Except as provided in R.C. 5705.28(B) or R.C. 5705.281,[6] the taxing authorities of local and joint vocational school districts

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[5] Ohio Const. art. XII, § 2 provides that no property may be taxed in excess of one percent of its true value in money for all state and local purposes, except when approved by the voters or provided for by charter of a municipal corporation. 1999 Op. Att'y Gen. No. 99-015 at 2-115 n.2. This is known as the "ten-mill limitation." 2001 Op. Att'y Gen. No. 2001-019 at 2-107 n.1; *see* R.C. 5705.02; R.C. 5705.03; R.C. 5705.07. R.C. 5705.03(A) authorizes the taxing authority of a subdivision to levy within the ten-mill limitation property taxes for the purpose of paying the current operating expenses of the subdivision. 2001 Op. Att'y Gen. No. 2001-019 at 2-107.

[6] R.C. 5705.28(B)(2)(a) provides that "[t]he taxing authority of a taxing unit that does not levy a tax is not required to adopt a tax budget pursuant to [R.C. 5705.28(A)]." R.C. 5705.281

are required to prepare, adopt, and submit annual tax budgets to the county budget commission. R.C. 5705.28(A); *see also* R.C. 5705.29-.32. *See generally* R.C. 5705.01(A) (defining both a local school district and joint vocational school district as a "subdivision" for purposes of R.C. Chapter 5705 (tax levy law)). As used in R.C. Chapter 5705, "taxing authority" means the board of education in the case of local and joint vocational school districts. R.C. 5705.01(C).

After the annual tax budgets are submitted, the county budget commission revises and adjusts the estimate of balances and receipts from all sources for each fund within the school districts' tax budgets, R.C. 5705.32; *see* R.C. 5705.31, and adjusts the levies of the school districts within the limits of the law, R.C. 5705.31. Because revisions and adjustments made by the county budget commission directly affect the amount of tax money generated within the ten-mill limitation that will be allotted to school districts, school districts are permitted to have representatives appear before the county budget commission to explain their financial needs. R.C. 5705.32(E).

Prior opinions of the Attorneys General have determined that political subdivisions appearing before the county budget commission are in adversarial positions and a person serving both subdivisions would be confronted with a conflict of interest. 1989 Op. Att'y Gen. No. 89-007 at 2-29; 1988 Op. Att'y Gen. No. 88-033 at 2-151; 1988 Op. Att'y Gen. No. 88-011 at 2-42. Thus, a member of a board of education of a local school district who serves as a school principal in a joint vocational school district is subject to conflicting interests when he participates in the preparation of the local school district's annual tax budget because the local school district competes with the joint vocational school district for tax moneys generated within the ten-mill limitation.

Moreover, because both the local board of education and the joint vocational school district board of education are taxing authorities for partially coextensive subdivisions for purposes of R.C. Chapters 133 (uniform public securities law) and 5705 (tax levy law), R.C. 133.01(NN)(3); R.C. 5705.01(C), an additional budgetary conflict of interest arises beyond the aforementioned conflict over tax moneys generated within the ten-mill limitation. *See* 1988 Op. Att'y Gen. No. 88-011 at 2-42. As taxing authorities, both of these boards have the power to place a levy on the ballot for taxes in excess of the ten-mill limitation *See, e.g.,* R.C. 3311.21; R.C. 5705.07; R.C. 5705.194; R.C. 5705.21; R.C. 5705.212; R.C. 5705.213. Additionally, both boards are authorized to submit to the electors the question of issuing bonds. *See, e.g.,* R.C. 133.18; R.C. 133.24; R.C. 3311.20.

If both the board of education for the local school district and the joint vocational school district contemplate submitting tax levies or bond issues for additional funding, it is conceivable that a member of a board of education of a local school district who serves as a school principal in the joint vocational school district would be subject to divided loyalties while deliberating,

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authorizes the county budget commission to waive the requirement that the taxing authority of a subdivision adopt a tax budget pursuant to R.C. 5705.28.

discussing, or voting on the local school district's proposed tax levy or bond issue. As explained in 1988 Op. Att'y Gen. No. 88-011 at 2-43:

> [W]here the school board has authorized a levy for additional funds, an individual who is also a member of the board of county commissioners might hesitate to approve placing a county levy on the ballot for fear that the voters in the local school district would reject the school levy in favor of the county levy. Questions of competing concerns before the electorate may be critical to determining whether or when a board might consider bringing requests for additional taxes before the voters, particularly requests for special levies. Therefore, a potential conflict exists over competition for funds generated by taxes in excess of the ten mill limitation, as well as by competition for funds generated [within the ten-mill limitation].

Accordingly, a person who serves simultaneously in the positions of member of the board of education of a local school district and principal of a school in a joint vocational school district that includes the territory of the local school district is subject to conflicts of interest because of the competition over tax moneys generated within, and, in excess of, the ten-mill limitation.

Yet another conflict of interest arises because both a member of the board of education of a local school district and school principal in a joint vocational school district may be required to make decisions or determinations that affect the amount of funding their respective school districts receive from the state. R.C. 3317.21 provides, in part, as follows:

> There is hereby created in the state treasury the vocational school building assistance fund. Money in the fund shall be used solely to provide interest-free loans to school districts, including joint vocational school districts, under sections 3317.22 and 3317.23 of the Revised Code to assist in financing the construction of new vocational classroom facilities, the renovation of existing vocational classroom facilities, or the purchase of vocational education equipment or facilities.

See 5 Ohio Admin. Code 3301-61-14; *see also* R.C. 3313.90(B).

The boards of education of local school districts and joint vocational education school districts thus may compete under R.C. 3317.21 for moneys from the vocational school building assistance fund. Again, if a member of the board of education of a local school district who serves as a principal of a school in a joint vocational school district were required to deliberate, discuss, or vote on whether the local school district should apply for moneys from the vocational school building assistance fund, it might be difficult for the member to set aside his loyalty to the joint vocational school district because of his employment relationship with the joint vocational school district. Such a predisposition of loyalty could prevent the member from performing his duties and exercising his discretion in the best interest of the local school district.

Also, as explained in your letter, the person as school principal in the joint vocational school district "is responsible for determining and reporting the attendance at the vocational school." *See* R.C. 3317.033; 5 Ohio Admin. Code 3301-61-12; 5 Ohio Admin. Code 3301-61-15. In this capacity, the person exercises discretion in determining whether a pupil is present or absent from school and the average daily membership of the joint vocational school. Such determinations may affect the amount of funding the local school district receives from the state or the amount of funding that the local school district provides to the joint vocational school district. *See* R.C. 3317.014; R.C. 3317.024; R.C. 3317.03; R.C. 3317.16; 5 Ohio Admin. Code 3301-61-16; 5 Ohio Admin. Code 3301-67-01; 1972 Op. Att'y Gen. No. 72-083. Thus, a school principal in a joint vocational school district who is also a member of the board of education of a local school district that participates in the joint vocational school district is subject to influences that may prevent him from making objective determinations.

Having identified various conflicts of interest between the positions of member of the board of education of a local school district and principal of a school in a joint vocational school district that includes the territory of the local school district, we note that not all potential conflicts render two public positions incompatible. Rather, as explained in 2002 Op. Att'y Gen. No. 2002-021 at 2-135.

> 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. (Citations omitted.)

After examining the factors for determining the immediacy of conflicts of interest, it is apparent that the various conflicts identified above render the positions of member of the board of education of a local school district and principal of a school in a joint vocational school district that includes the territory of the local school district incompatible. In this regard, we note first that, the conflicts of interest cannot be sufficiently avoided or mitigated. A board of education of a local school district that participates in a joint vocational school district is continually making decisions that either directly or indirectly affect the funding or operation of the joint vocational school district. Moreover, pursuant to R.C. 3313.90, the board of education has a continuing duty to assess the feasibility of providing vocational education to the pupils of the local school district through the joint vocational school district. Similarly, it is not uncommon for joint vocational school principals to determine whether a pupil is present or absent from school and the school's average daily membership. It is not, therefore, merely a remote possibility that the person would be subject to the conflicts of interest set forth above.

Further, all of the conflicts of interest concern the education of pupils, which is the primary function of both positions, and involve situations in which the positions exercise

decision-making authority. Also, many of the conflicts concern taxing, financial, or budgetary matters.

Finally, the role of the board of education of a local school district in providing the pupils of the district with a free education, *see* R.C. 3313.48, presents numerous conflicts which could be avoided only by the member's abstention from all decisions involving the funding or operation of the joint vocational school district that employs him as a school principal. Because many of the matters handled by the board of education either directly or indirectly affect the funding or operation of the joint vocational school district, a member of the board who is employed by the joint vocational school district as a principal would continually be abstaining from such matters. Such continual abstention from board business does not serve the best interests of the citizens of the local school district. *See generally* 2003 Op. Att'y Gen. No. 2003-006, slip op. at 13 (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 our belief that it is impractical for the member to continually abstain from such matters. Therefore, the potential conflicts of interest here identified prohibit a person from serving simultaneously as a member of the board of education of a local school district and principal of a school in a joint vocational school district that includes the territory of the local school district.

As a final matter, we note that there may be an occasion in which the position of school principal in a joint vocational school district would be subordinate to the position of member of the board of education of a local school district. R.C. 3311.19(B) provides that, in certain instances, one or more members of boards of education of local school districts that are within the territory of the joint vocational school district may serve on the joint vocational school district board of education. As explained above, the position of school principal is employed by the joint vocational school district. *See* R.C. 3319.02; R.C. 3319.08; *see also* R.C. 3311.19(D), (E). Accordingly, if the person as a member of the board of education of the local school district were to serve on the joint vocational school district board of education that employs him as a school principal, the position of school principal would be subordinate to the position of member of the board of education of the local school district.

It is a well established tenet that "[t]here can be no stronger case of subordination, and, therefore, incompatibility, than a direct employer-employee relationship." 1979 Op. Att'y Gen. No. 79-099 at 2-308; *accord* 2002 Op. Att'y Gen. No. 2002-039 at 2-254; 2001 Op. Att'y Gen. No. 2001-034 at 2-204 and 2-205. Thus, the fact that the position of school principal could become subordinate to the position of member of the board of education of the local school district lends additional support for our conclusion that these positions are incompatible.

Based on the foregoing, it is our opinion, and you are hereby advised that the positions of member of the board of education of a local school district and principal of a school in a joint vocational school district that includes the territory of the local school district are incompatible.

Respectfully,

JIM PETRO
Attorney General