

**OPINION NO. 98-017****Syllabus:**

A person may serve simultaneously as mayor of a nonchartered village and member of the board of education of an exempted village school district, provided the person, as mayor, abstains from any votes on contracts with the exempted village school district, tax exemptions with respect to improvements to real property that affect the exempted village school district, disbursement of estate taxes paid to the village, adoption of the village's tax budget, and placement of tax levies and bond issues on the ballot. Further, in his service as a member of the board of education of the exempted village school district, the person must abstain from voting upon any contracts with the village or tax exemptions with respect to improvements to real property that may be granted by the village.

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**To: Joseph A. Flautt, Perry County Prosecuting Attorney, New Lexington, Ohio**  
**By: Betty D. Montgomery, Attorney General, June 15, 1998**

You have requested an opinion whether the positions of mayor of a nonchartered village and member of the board of education of an exempted village school district are compatible. You have indicated that the village is located within the territorial jurisdiction of the school district. You also state in your letter that certain contractual relationships exist between the village and school district. These include a lease of village property to the school district for use as a football stadium, a lease of a village building to the school district preschool program, and the provision of police services to the school district for various school activities. You also note that negotiations are in progress between the village and a local manufacturing company for a tax abatement.

Prior opinions of the Attorneys General have determined that an individual may serve simultaneously in the positions of village mayor and member of the board of education of an exempted village school district. 1913 Op. Att'y Gen. No. 465, vol. II, p. 1372; *see* 1959 Op. Att'y Gen. No. 778, p. 482; 1918 Op. Att'y Gen. No. 1321, vol. I, p. 924; *see also* 1934 Op. Att'y Gen. No. 2155, vol. I, p. 21 (syllabus) ("[t]he offices of mayor of an incorporated village and member of a rural board of education are compatible"). These opinions were issued prior to the formation and implementation of the modern seven-question test for analyzing and determining whether two public positions are compatible. *See generally* 1979 Op. Att'y Gen. No. 79-111 at 2-367 and 2-368 (setting forth the seven basic questions that must be answered before it may be concluded that two positions are compatible). Thus, while these

prior opinions indicate that the positions of village mayor and member of the board of education of an exempted village school district are compatible, it is proper that we reexamine the compatibility of these two positions in light of the questions set forth in 1979 Op. Att'y Gen. No. 79-111.

The seven questions used currently for analyzing and determining whether two public positions are compatible are as follows:

1. Is either of the positions a classified employment within the terms of R.C. 124.57?
2. Do the empowering statutes of either position limit the outside employment permissible?
3. Is one office subordinate to, or in any way a check upon, the other?
4. Is it physically possible for one person to discharge the duties of both positions?
5. Is there a conflict of interest between the two positions?
6. Are there local charter provisions or ordinances which are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

1979 Op. Att'y Gen. No. 79-111 at 2-367 and 2-368. Questions six and seven address matters of local concern, and it is assumed, for purposes of this opinion, that there are no departmental regulations or ordinances that would prevent a person from holding simultaneously the positions of village mayor and member of the board of education of an exempted village school district. Our research discloses that there are no applicable state or federal regulations. In addition, since the village has not adopted a charter, there are no applicable charter provisions.

Question number one asks whether either of the positions is a classified employment within the terms of R.C. 124.57, which prohibits officers or employees in the classified service from participating in partisan political activities, other than to vote or express their political opinions. *Heidtman v. City of Shaker Heights*, 163 Ohio St. 109, 126 N.E.2d 138 (1955); *see Gray v. Toledo*, 323 F. Supp. 1281 (N.D. Ohio 1971). The positions of village mayor and member of the board of education of an exempted village school district are elected positions. R.C. 733.24; R.C. 3313.01. Therefore, neither position is a classified employment within the meaning of R.C. 124.57, *see* R.C. 124.11(A)(1), and R.C. 124.57 does not prevent a person from serving simultaneously in those two positions.

Question number two asks whether the empowering statutes of either position limit outside employment. No provision within the Revised Code prohibits the simultaneous holding of the positions of village mayor and member of the board of education of an exempted village school district.<sup>1</sup> Cf. R.C. 3313.13 ("no prosecuting attorney, city director of

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<sup>1</sup>The mayor of a village is the president of the village's legislative authority. R.C. 733.24. Pursuant to R.C. 731.12, members of the legislative authority of a village are prohibited from dual office holding:

No member of the legislative authority [of a village] shall hold any other public office, be interested in any contract with the village, or hold employment with said village, except that such member may be a notary public, a member of the state militia, or a volunteer fireman

law, or other official acting in a similar capacity shall be a member of a board of education"); R.C. 3313.70 ("[n]o member of the board of education in any district shall be eligible to the appointment of school physician, school dentist, or school nurse during the period for which the member is elected or appointed"). The second question, thus, may be answered in the negative.

Question number three asks whether one position is subordinate to, or in any way a check upon, the other. A review of the duties of the respective positions reveals that the positions operate independently of each other, and that neither is responsible for assigning duties to or supervising the other. *See generally* R.C. 733.24 (setting forth the powers of a village mayor); R.C. 733.30 (setting forth the general duties of a village mayor); R.C. Chapter 3313 (general powers and duties of a board of education). Therefore, neither position is subordinate to, or a check upon, the other.

Question number four asks whether it is physically possible for one person to perform the duties of both positions. This is a factual question, which is best answered by the interested persons because they may more precisely determine the time demands of each position. *See* 1997 Op. Att'y Gen. No. 97-045 at 2-282. It is possible, however, that these two positions can be filled competently by the same person if there is no direct conflict in the working hours of each position.

Question number five asks whether there is a conflict of interest between the two positions. 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 public. 1985 Op. Att'y Gen. No. 85-042 at 2-150.

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of said village, provided that such member shall not receive any compensation for his services as a volunteer fireman of the village in addition to his regular compensation as a member of the legislative authority.

Because a member of a board of education holds a public office, R.C. 731.12 prohibits a member of the legislative authority of a village from serving on a board of education. *See* 1989 Op. Att'y Gen. No. 89-069 at 2-321; *see also* 1983 Op. Att'y Gen. No. 83-091 (R.C. 731.02, which is analogous to R.C. 731.12, prohibits a member of city council from being a member of the board of education of a city school district).

1913 Op. Att'y Gen. No. 465, vol. II, p. 1372 advised, however, that a village mayor is not subject to the prohibition against holding another public office set forth in former G.C. 4218, now R.C. 731.12. In this regard, 1913 Op. Att'y Gen. No. 465, vol. II, p. 1372 reasoned that, although the mayor of a village is the president of the village's legislative authority and is required to preside at the meetings of the legislative authority and vote in the case of ties, these duties do not make the mayor a member of the village's legislative authority. *Id.* at 1372-73; *see also* 1953 Op. Att'y Gen. No. 2367, p. 69, at 70-71 ("[C]ertainly it could not be asserted that the mayor of a village is a *member* of the council merely by virtue of his power to vote in case of a tie"). Moreover, under R.C. 733.23, a village mayor holds office and serves within the executive branch of village government. A village mayor thus is not a member of the legislative authority of a village. Therefore, a village mayor is not prohibited by R.C. 731.12 from holding another public office. *Cf.* 1946 Op. Att'y Gen. No. 744, p. 68 (president of city council is not a member of city council, and is not prohibited by statute from holding another public office).

Our review of the statutory responsibilities and duties of the positions of village mayor and member of the board of education of an exempted village school district discloses that a person who serves simultaneously in these two positions may be exposed to influences that may prevent his decisions from being completely objective. As a member of the board of education, he may be required to vote on a proposed contract or agreement between the board of education and the village's legislative authority. *See R.C. 721.02* (a village may convey real property to a board of education); *R.C. 721.23* (a board of education may use municipal buildings); *R.C. 721.25* (a board of education may acquire or lease real property from a village for school farms); *R.C. 3313.59* (a board of education may cooperate with the legislative authority of a village in providing for educational, social, civic and recreational activities in buildings and upon grounds in the custody and under the management of the legislative authority); *R.C. 3313.95* (a board of education and the legislative authority of a village may enter into a contract under which the legislative authority provides police services in alcohol and drug programs). As a member of the board of education, he also may have to vote on the approval of tax exemptions granted by the village with respect to improvements to real property. *See, e.g., R.C. 725.02; R.C. 725.021; R.C. 3735.67; R.C. 3735.671; R.C. 5709.40; R.C. 5709.41; R.C. 5709.62; R.C. 5709.83.* A potential conflict of interest, thus, exists because this person, as a member of the board of education, may be predisposed to vote in accordance with the views of the village on a contract with the village or a tax exemption granted by the village. *See generally 1994 Op. Att'y Gen. No. 94-013 at 2-61 ("[a] public officer who participates on both sides of a contract is 'exposed to conflicting loyalties and to the potential temptation of acting in a manner not in the best interest of the public'" (quoting 1981 Op. Att'y Gen. No. 81-027 at 2-101)); 1980 Op. Att'y Gen. No. 80-035 at 2-149* (a conflict of interest occurs when a person's responsibilities in one position "are such as to influence the performance of his duties in the other position, thereby subjecting him to influences which may prevent his decisions from being completely objective").

Similarly, a person who serves simultaneously as a member of the board of education of an exempted village school district and as village mayor is also exposed to influences that may prevent his decisions, as mayor, from being completely objective. As indicated above, there may be occasions when the village's legislative authority and the board of education wish to enter into a contract or agreement, or the legislative authority of the village wishes to grant a tax exemption with respect to improvements to real property that affects the school district. In addition, *R.C. 5731.48* gives the legislative authority of a village the authority to vote to determine whether the village or the board of education of the village is to receive estate tax moneys levied and paid to the village.

Pursuant to *R.C. 733.24*, the mayor of a village is the president of the village's legislative authority. As president of the village's legislative authority, a village mayor is required to vote when there is a tie. *R.C. 733.24*. Because a village mayor, as president of the village's legislative authority, may be required to vote on a matter before the village's legislative authority, a mayor who serves as a member of a board of education may be predisposed to vote in favor of a position favorable to the board of education. Accordingly, a potential conflict of interest exists because a village mayor who serves on the board of education of an exempted village school district is exposed to influences that may prevent him from making completely objective, disinterested decisions. *See generally 1994 Op. Att'y Gen. No. 94-013 at 2-61; 1980 Op. Att'y Gen. No. 80-035 at 2-149.*

There are other possible conflicts of interest facing a person who serves in these two positions. For instance, there are potential budgetary and taxing conflicts. Under *R.C.*

5705.28-.32, the legislative authority of a village and the board of education of an exempted village school district, as taxing authorities, *see* R.C. 5705.01(C), must prepare, adopt, and submit an annual tax budget to the county budget commission. The county budget commission revises and adjusts the estimate of balances and receipts from all sources for each fund within each subdivision's tax budget. R.C. 5705.32; *see* R.C. 5705.31. Based on the revised and adjusted estimates, the county budget commission then adjusts the levies of the village and the school district within the limits of the law. R.C. 5705.31. The determination of the county budget commission directly affects the potential revenue of each subdivision. *See* 1988 Op. Att'y Gen. No. 88-011 at 2-41 and 2-42.

The budget and tax provisions of R.C. 5705.28-.32 thus situate the members of different taxing authorities within the same county in adverse positions. A person who serves simultaneously as a member of the legislative authority of a village and member of the board of education of an exempted village school district, which compete for the same funds, "would be faced with a conflict of interest while preparing the budget of each subdivision, since in both positions he would be attempting to obtain the greatest possible share of the available funds, at the expense of the other subdivision." 1981 Op. Att'y Gen. No. 81-010 at 2-33; *see* 1958 Op. Att'y Gen. No. 1962, p. 215 at 217-18 (in the preparation of the annual tax budget it may well occur that any proposed modifications or reductions with respect to one subdivision's budget could be detrimental to another subdivision's budget, "and where the same person participates in the preparation of two such budgets there may be a conscious or unconscious bias or prejudice on his part"). It is, therefore, readily apparent that the possibility for conflict exists, in your situation, because of the competition for tax moneys and advantageous budget decisions.

In addition, because the board of education and the legislative authority of the village are taxing authorities for partially coextensive subdivisions, an additional conflict of interest might arise beyond the potential conflict over inside millage. As taxing authorities, such entities have the power to place levies on the ballot for taxes in excess of the ten mill limitation. R.C. 5705.07; *see also* R.C. 5705.19; R.C. 5705.191; R.C. 5705.21. Both entities are also authorized to submit to the electors of their respective subdivisions the question of issuing bonds under R.C. Chapter 133. *See* R.C. 133.18.

Where both the village and exempted village school district contemplate asking the voters for a tax levy or bond issue for additional moneys in excess of the ten mill limitation, a person serving as a member of the taxing authority of both subdivisions might find himself subject to divided loyalties. *See* 1988 Op. Att'y Gen. No. 88-011 at 2-43. For instance, if the village has authorized a tax levy for additional operating funds, *see* R.C. 5705.07; R.C. 5705.19, a person who is a member of the board of education of an exempted village school district that includes the village might be apprehensive about placing a school levy on the ballot for fear that the voters in the village would reject the village levy in favor of the school levy. *See* 1988 Op. Att'y Gen. No. 88-011 at 2-43. "Questions of competing concerns before the electorate may be critical to determining whether or when a board might consider bringing requests for additional tax moneys before the voters." *Id.* A potential conflict of interest thus exists over competition for funds generated by taxes in excess of the ten mill limitation. *See id.*

It is, however, well settled that a person is not prohibited from serving simultaneously in two public positions because he is exposed to influences that may prevent him from discharging his duties in either position objectively and in a completely disinterested manner. Rather, an inquiry must be made into the immediacy of potential conflicts of interest,

and where the potential for conflicts of interest is remote and speculative, the conflict of interest rule is not violated. 1979 Op. Att'y Gen. No. 79-111 at 2-372. Factors used in analyzing the immediacy of conflicts of interest include the degree of remoteness of potential conflicts, the ability or inability of an individual to remove himself from the conflicts, whether the individual exercises decision-making authority in both positions, whether the potential conflicts involve the primary functions of each position, and whether the potential conflicts involve budgetary controls. *Id.*

Let us first examine the immediacy of the conflict of interest that exists because a person who serves simultaneously as a village mayor and member of the board of education of an exempted village school district may be subject to influences that may prevent him from making completely objective, disinterested decisions when voting on contracts between the village and school district, tax exemptions with respect to improvements to real property that affect the school district, and the disbursement of estate taxes paid to the village. Votes concerning contracts between a village and exempted village school district, tax exemptions, and the disbursement of estate tax moneys are not matters that regularly come before the legislative authority of a village or board of education. Thus, the instances in which the legislative authority of a village or board of education will be called upon to vote on a contract between the village and school district, a tax exemption that affects the school district, or the disbursement of estate taxes will be rare. As village mayor, this person is further removed from the potential conflict of interest because he does not vote on matters before the legislative authority unless there is a tie. The potential conflict of interest, therefore, is remote and does not involve the primary functions of each position. In addition, the potential conflict of interest that exists when this person, as mayor or as a member of the board of education, has to vote on a contract between the village and school district does not involve budgetary controls.

However, the potential conflict of interest that results over votes concerning the granting of tax exemptions with respect to improvements to real property that affect the school district and the disbursement of estate taxes does involve budgetary controls. In addition, a person who serves as a village mayor and member of the board of education of an exempted village school district does exercise decision-making authority with respect to entering into a contract between the village and the school district, the granting of tax exemptions that affect the school district, and the disbursement of estate tax moneys. Given that such matters are likely to arise only occasionally, the individual should be able to remove himself from any votes concerning these matters. Accordingly, the potential conflict of interest that results over votes concerning contracts between the village and school district, tax exemptions that affect the school district, and the disbursement of estate taxes is remote and speculative, and such conflict does not render the positions of village mayor and member of the board of education of an exempted village school district incompatible.

Let us turn now to an examination of the immediacy of the conflicts presented by budgetary and tax-related issues. Although voting on the adoption of the village's tax budget or the placing of tax levies or bond issues on the ballot involves budgetary controls, the potential for such conflicts on the part of a person who serves as village mayor and member of the exempted village school district board of education is remote and speculative. As indicated above, the legislative authority of a village is responsible for preparing the village's tax budget and placing tax levies and bond issues on the ballot. See R.C. 133.18; R.C. 5705.07; R.C. 5705.19; R.C. 5705.28. A village mayor is not a member of the legislative authority of a village, however. See note one, *supra*. Rather, a village mayor, as president of a village's legislative authority, votes on matters before the legislative authority only when

there is a tie. R.C. 733.24. Thus, a person who serves as a village mayor and member of a board of education of an exempted village school district is not a member of two governmental bodies that have their tax budgets reviewed by the county budget commission or that compete for tax moneys. It is, therefore, only speculative whether the person, as village mayor, will be required to vote on the adoption of the village's tax budget or the placing of tax levies or bond issues on the ballot.

Moreover, since a village mayor, as a general matter, is not required to vote on the adoption of the village's tax budget or the placing of tax levies or bond issues on the ballot, these potential budgetary and taxing conflicts do not involve the primary functions of, or the exercise of decision-making authority by, a village mayor. Finally, a village mayor, as president of a village's legislative authority, may refrain from voting on a matter before the village's legislative authority in which he is interested. *See* 1937 Op. Att'y Gen. No. 1330, vol. III, p. 2278 (the president of the legislative authority of a city may not be compelled by mandamus or otherwise to cast the deciding vote in a matter should he desire not to do so). *See generally* 1994 Op. Att'y Gen. No. 94-079 at 2-394 (when a public official is exposed to influences that may prevent him from making completely objective, disinterested decisions in a particular matter, the official should abstain from any votes concerning that matter). Accordingly, it is our view that the potential budgetary and tax-related conflicts of interest that may confront a person by reason of his simultaneous service as a village mayor and member of an exempted village school district board of education are remote and speculative, and do not render those positions incompatible. *See* 1997 Op. Att'y Gen. No. 97-026 at 2-155 (the conflict presented when the president of the legislative authority of a city must vote on tax issues is insufficient, in itself, to render the positions of president of the legislative authority of a city and member of the board of health of a general health district incompatible).

Our consideration of the question whether a conflict of interest may confront a person who serves simultaneously as village mayor and member of the board of education of an exempted village school district does not constitute an opinion on potential conflicts of interest or questions of ethics that may arise under the provisions of R.C. Chapter 102, R.C. 2921.42, or R.C. 2921.43. *See, e.g.*, R.C. 102.03(D) (prohibiting a public official or employee from using the authority or influence of his office or employment "to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties"); R.C. 2921.42 (prohibiting the use of official influence to obtain contracts that benefit a public officer or his family, and providing exceptions for certain situations in which the public officer does not participate); R.C. 2921.43 (prohibiting the receipt of improper compensation by a public official or public employee); *see also* R.C. 3313.33 (no member of a board of education "shall have, directly or indirectly, any pecuniary interest in any contract of the board or be employed in any manner for compensation by the board of which he is a member"); 1989 Op. Att'y Gen. No. 89-030. Pursuant to R.C. 102.08(A), the Ohio Ethics Commission is authorized to render advisory opinions regarding the application of the provisions of R.C. Chapter 102, R.C. 2921.42, and R.C. 2921.43 to the conduct of public officials. Further, an opinion from the Ohio Ethics Commission on such matters can provide a public official with immunity from criminal prosecution, civil suits, or actions for removal. R.C. 102.08(B).

In light of this express statutory grant of power to the Ohio Ethics Commission, it is our policy to refrain from issuing formal opinions on questions that are within the Commission's exclusive jurisdiction. 1997 Op. Att'y Gen. No. 97-044 at 2-275 n.6; 1989 Op. Att'y

Gen. No. 89-037 at 2-166 and 2-167; 1989 Op. Att'y Gen. No. 89-022 at 2-101 n.2; 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph three). Therefore, should you have questions concerning the propriety of particular actions by a person who serves simultaneously as village mayor and member of an exempted village school district's board of education under the provisions of R.C. Chapter 102, R.C. 2921.42, or R.C. 2921.43, we would recommend that you seek guidance from the Ohio Ethics Commission.

In conclusion, it is my opinion, and you are hereby advised that a person may serve simultaneously as mayor of a nonchartered village and member of the board of education of an exempted village school district, provided the person, as mayor, abstains from any votes on contracts with the exempted village school district, tax exemptions with respect to improvements to real property that affect the exempted village school district, disbursement of estate taxes paid to the village, adoption of the village's tax budget, and placement of tax levies and bond issues on the ballot. Further, in his service as a member of the board of education of the exempted village school district, the person must abstain from voting upon any contracts with the village or tax exemptions with respect to improvements to real property that may be granted by the village.