August 19, 2002

The Honorable Robin N. Piper
Butler County Prosecuting Attorney
Government Services Center, 11th floor
P.O. Box 515
315 High Street
Hamilton, Ohio 45012-0515

SYLLABUS: 2002-022

The positions of executive director of a children services board that is a county's public children services agency and county commissioner within the same county are incompatible.

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Dear Prosecutor Piper:

You have requested an opinion of the Attorney General concerning the compatibility of two public positions, county commissioner and executive director of the children services board, within the same county. According to information you provided, a current member of the board of county commissioners questions whether he may also serve as executive director of the county's children services board, while maintaining his office as county commissioner. After examining the statutory framework for the funding and operation of a county children services board and the role of the board of county commissioners in those matters, we believe that the two positions are incompatible and may not be held simultaneously by the same person.

The seven questions for 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 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?

See 1979 Op. Att'y Gen. No. 79-111 at 2-367 and 2-368. In this instance, however, the clear incompatibility of the two positions under the common law test of compatibility renders unnecessary our consideration of the remaining questions.

Rather, we begin our analysis with examination of the long-standing common law principle governing the compatibility of two public positions. As summarized in 1997 Op. Att'y Gen. No. 97-061 at 2-376:

> The common law principle governing compatibility was set forth in the following language: "Offices are considered incompatible when one is subordinate to, or in any way a check upon, the other; or when it is physically impossible for one person to discharge the duties of both." *State ex rel. Attorney Gen. v. Gebert*, 12 Ohio C.C. (n.s.) 274, 275 (Cir. Ct. Franklin County 1909); *see also State ex rel. Baden v. Gibbons*, 17 Ohio L. Abs. 341, 344 (Ct. App. Butler County 1934) ("it has long been the rule in this state that one may not hold two positions of public employment when the duties of one may be so administered and discharged that favoritism and preference may be accorded the other").

Whether the positions of county commissioner and executive director of a children services board within the same county are incompatible on the basis of subordination of one position to the other or due to impermissible conflicts of interest depends upon the nature of the statutory powers and duties of each position.

Because the powers and duties of the executive director of a children services board are fewer than those of a county commissioner, we will first examine the position of executive director. Pursuant to R.C. 5153.02, each county is required to have a public children services agency (PCSA). Among the entities that may serve as a county's PCSA is a county children services board. R.C. 5153.02.[1] A children services board that serves as a county's PCSA is a part of county government. *See* R.C. 5153.15 (referring to a county children services board as an "agency of county government").

Few statutes address the powers and duties of a children services board. *See, e.g.*, R.C. 5153.03 (in part, requiring the county commissioners to appoint most members of a county children services board, "[i]f [the] county children services board is [the] public children services agency for [the] county"); R.C. 5153.04 (organization of a children services board that is appointed under R.C. 5153.03); R.C. 5153.05 (stating, in part, "[i]f a county children services

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[1] R.C. 5153.02 states:

> Each county shall have a public children services agency. Any of the following may be the public children services agency:
> (A) A county children services board;
> (B) A county department of job and family services;
> (C) A private or government entity designated under [R.C. 307.981].

board appointed under [R.C. 5153.03] is a public children services agency for a county, the board may appoint an advisory committee on children services"). Rather, the primary powers and duties of such a children services board are those vested in it by virtue of its designation as a PCSA under R.C. 5153.02.[2] For ease of discussion, we will refer to a children services board that serves as a county's PCSA under R.C. 5153.02 simply as a children services board.

One of the powers possessed by a children services board in its capacity as the county's PCSA is that of designating an executive director. Specifically, R.C. 5153.10 provides that each PCSA, whether or not a county children services board, "shall designate an executive officer known as the 'executive director,' who shall not be in the classified civil service.[3] The superintendent of the children's home, the county director of job and family services, or other individual may serve as the executive director." (Footnote added.)

Further provision has been made regarding the appointment of the executive director of a children services board. Pursuant to R.C. 5153.06, as enacted in Sub. H.B. 94, 124th Gen. A. (2001) (eff., in pertinent part, Sept. 5, 2001):

> The county children services board may enter into a written contract with the board's executive director specifying terms and conditions of the executive director's employment. The executive director shall not be in the classified civil service. The period of the contract shall not exceed three years. *Such a contract shall in no way abridge the right of the county children services board to terminate the employment of the executive director as an unclassified employee at*

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[2] Prior to the enactment of Sub. H.B. 408, 122nd Gen. A. (1997) (eff. Oct. 1, 1997), county children services boards were created pursuant to former R.C. 5153.07. *See* 1985-1986 Ohio Laws, Part II, 3672, 4130 (Sub. H.B. 428, eff., in pertinent part, Dec. 23, 1986).

[3] The meaning of similar statutory language that required another entity of county government to appoint an executive director "who ... shall be employed in the unclassified service," was explained in 1996 Op. Att'y Gen. No. 96-040 at 2-154, as follows:

> Under Ohio law, civil service is divided into the classified service and the unclassified service. R.C. 124.11; *see* Ohio Const. art. XV, § 10. Classified civil servants attain their positions through a merit system based primarily on competitive examinations and are afforded procedural protection from arbitrary removal. R.C. 124.23, .34. In contrast, unclassified civil servants are appointed at the discretion of the appointing authority and serve at the pleasure of the appointing authority. Unclassified employees may be dismissed at any time without cause, provided that dismissal is not made for discriminatory or other unlawful reasons.

> *will*, but may specify terms and conditions for any such termination. (Emphasis added.)[4]

Under both R.C. 5153.10 and R.C. 5153.06, the selection and retention of the executive director is within the discretion of the children services board. Once selected, the executive director must administer the work of the board in accordance with rules adopted by the board. R.C. 5153.11. In addition, the executive director's authority to appoint employees is subject to approval of the children services board. *Id*.

The individual serving as executive director of a children services board is thus selected and subject to removal by the children services board and is governed in the performance of his duties as executive director by the rules of the board, all but one of whose members are appointed by the board of county commissioners.[5] The position of county commissioner is, therefore, at least an indirect check upon the position of children services board executive director. *See* 1992 Op. Att'y Gen. No. 92-055 (finding the position of county school district board member to be an indirect check upon the position of substitute teacher in a local school district within the county school district).[6] A children services board director who also served as a county commissioner would be in the position of appointing and removing the people who serve as his supervisors.

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[4] *See generally* R.C. 305.27 (stating in part, "[n]o county commissioner shall be concerned, directly or indirectly, in any contract for work to be done or material to be furnished for the county").

[5] *See generally* R.C. 5153.03 (stating in part, "[t]he elected chairperson of any citizens advisory committee established under [R.C. 5153.05] shall be an ex officio voting member of the county children services board").

[6] As more fully explained in 1992 Op. Att'y Gen. No. 92-055 at 2-224 to 2-225:

> [T]he positions of substitute teacher and member of a county board of education would be incompatible for the reason that a substitute teacher who serves as a member of a county board of education would be placed in a position of appointing, reappointing, evaluating, compensating, and terminating the person who serves as his or her supervisor. *See* Op. No. 84-003 at 2-6. The substitute teacher would be, as a member of the county board of education, at least indirectly, a check upon the superintendent who is in charge of the substitute teaching position. Thus, it is clear that the position of member of a board of education of a county school district would be a check upon the position of substitute teacher in a local school district that is located within the county school district.

A similar issue also arises from the relationship between a children services board and the board of county commissioners under R.C. 307.981.[7] Pursuant to division (B)(3) of that statute,

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[7] R.C. 307.981 states in pertinent part:

> (B) To the extent permitted by federal law, including subpart F of 5 C.F.R. part 900, and subject to any limitations established by the Revised Code, including division (H) of this section, a *board of county commissioners may designate any private or government entity* within this state to serve as any of the following:
>
> ...
>
> (3) A public children services agency;
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> ....
>
> (C) A board of county commissioners may change the designation it makes under division (B) of this section by designating another private or government entity.
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> ....
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> (F) A board of county commissioners shall enter into a written contract with each entity it designates under division (B) or (C) of this section specifying the entity's responsibilities and standards the entity is required to meet.
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> (G) This section does not require a board of county commissioners to abolish the child support enforcement agency, county department of job and family services, or public children services agency serving the county on October 1, 1997, and designate a different private or government entity to serve as the county's child support enforcement agency, county department of job and family services, or public children services agency.
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> (H) If a county children services board appointed under [R.C. 5153.03] serves as a public children services agency for a county, the board of county commissioners *may not redesignate* the public children services agency *unless* the board of county commissioners does all of the following:
>
> (1) Notifies the county children services board of its intent to redesignate the public children services agency. In its notification, the board of county commissioners shall provide the county children services board a written explanation of the administrative, fiscal, or performance considerations causing the board of county commissioners to seek to redesignate the public children services agency.
>
> (2) Provides the county children services board an opportunity to comment on the proposed redesignation before the redesignation occurs;
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> (3) If the county children services board, not more than sixty days after receiving the notice under division (H)(1) of this section, notifies the board of county commissioners that the county children services board has voted to oppose the redesignation, votes unanimously to proceed with the redesignation. (Emphasis added.)

a board of county commissioners, with certain limitations, may designate any private or governmental entity within the state to serve as the county's PCSA. The county commissioners may also change the designation made under R.C. 307.981(B)(3). R.C. 307.981(C). Thus, in a situation in which a county children services board serves as the county's PCSA, the continuing authority of that board to serve as a county's PCSA is a matter within the discretion of the board of county commissioners. R.C. 307.981(C).

Moreover, in accordance with R.C. 307.981(H)(3), if a county children services board has been designated as the county's PCSA, any change in that designation, if opposed by the children services board, may not occur without unanimous consent of the board of county commissioners to make such change. Thus, in his capacity as county commissioner, a person serving as executive director of a children services board that is the county's PCSA would be in a position to prevent the replacement of the children's services board as the county's PCSA, where he serves as the executive director.

A person serving as both county commissioner and executive director of a children services board is thus subject to conflicting interests. In his capacity as county commissioner, an individual must act in the best interests of the county as a whole in determining whether to retain the children services board as the county's PCSA or whether an entity other than the children services board may better serve as the county's PCSA. At the same time, however, an individual holding both positions would be tempted to act in his best interest in preserving his employment as director of the children services board.

Furthermore, R.C. 307.981(F) requires each board of county commissioners to "enter into a written contract with each entity it designates under division (B) or (C) of this section specifying the entity's responsibilities and standards the entity is required to meet." *See also* R.C. 307.983 (requiring a board of county commissioners to enter into a plan of cooperation with, among others, the county's public children services agency for various purposes, including the coordination and enhancement of services and assistance to individuals and families). As county commissioner, an individual who is also executive director of the county's PCSA would establish responsibilities and standards on behalf of the county to which the agency of which he is executive director would be contractually bound.

As noted in 1981 Op. Att'y Gen. No. 81-027 at 2-101:

> It is a well-established common law principle that a public officer may not deal with himself, directly or indirectly. *See State ex rel. Taylor v. Pinney*, 13 Ohio Dec. 210 (C.P. Franklin County 1902). By participating on both sides of a contract, a public officer would be exposed to conflicting loyalties and to the potential temptation of acting in a manner not in the best interest of the public. *See* 1979 Op. Att'y Gen. No. 79-111. A public officer may not be in a position to control services delivered pursuant to contract, while at the same time passing upon the adequacy of the services delivered.

In the situation you describe, the individual, as county commissioner, would serve as a check upon the performance of his duties as children services board executive director. Moreover, this individual would be involved on both sides of any such contracts between the children services board and the county commissioners.[8] *See* 1986 Op. Att'y Gen. No. 86-029 (position of director of port authority is incompatible with that of county commissioner within the authority's jurisdiction due to various potential conflicts, including holding positions of trust on two public bodies that contract with each other).

In addition to the foregoing, numerous potential conflicts of interest arise from the county commissioners' role as taxing authority and appropriating authority for agencies of county government, including the county's PCSA. For example, a board of county commissioners, as the taxing authority of the county, R.C. 5705.01(C), is required to adopt an annual tax budget and appropriation measure for the county. R.C. 5705.28; R.C. 5705.38. Pursuant to R.C. 5705.38(C), such appropriation measure "shall be classified so as to set forth separately the amounts appropriated for each office, department, and division, and, within each, the amount appropriated for personal services." County moneys may be spent only in accordance with such appropriation. *See* R.C. 5705.41(B) (prohibiting a county or board of county commissioners, among others, from making any expenditure unless funds have been appropriated therefor in accordance with R.C. Chapter 5705). Thus, in the execution of his duty as county commissioner to adopt the county's annual appropriation measure, an individual who was also director of the county's children services board would be subject to divided loyalties, trying to balance the needs of the county board of which he is director against the competing financial needs of other entities entitled to participate in county funds.[9]

Pursuant to R.C. 5705.24, further discretion is vested in a board of county commissioners with respect to the funding of a children services board, as follows:

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[8] *See also, e.g.*, R.C. 5153.121(A) (board of county commissioners and a county children services board may agree to share the services, as well as the payment of compensation, of a children services employee or a county department of job and family services employee); R.C. 5153.16(A)(17) (requiring a PCSA to "[e]nter into a plan of cooperation with the board of county commissioners" for cooperation among various entities with respect to, among other things, family services duties and workforce development activities).

[9] *See* 1997 Op. Att'y Gen. No. 97-001 (discussing the discretion vested in the board of county commissioners in determining the various county funds from which a county may provide moneys to its children services board). *See generally* R.C. 5705.36(A)(5) ("[t]he total appropriations made during the fiscal year from any fund shall not exceed the amount set forth as available for expenditure from such fund in the official certificate of estimated resources, or any amendment thereof, certified prior to the making of the appropriation or supplemental appropriation").

> The board of county commissioners of any county, at any time and in any year, after providing the normal and customary percentage of the total general fund appropriations for the support of children services and the care and placement of children, by vote of two-thirds of all the members of said board may declare by resolution that the amount of taxes which may be raised within the ten-mill limitation will be insufficient to provide an adequate amount for the support of such children services, and that it is necessary to levy a tax in excess of the ten-mill limitation to supplement such general fund appropriations for such purpose. Taxes collected from a levy imposed under this section may be expended for any operating or capital improvement expenditure necessary for the support of children services and the care and placement of children.
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> ....
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> If the majority of the electors voting on a levy to supplement general fund appropriations for the support of children services and the care and placement of children vote in favor thereof, the board may levy a tax within such county at the additional rate outside the ten-mill limitation during the period and for the purpose stated in the resolution or at any less rate or for any of the said years.

Again, a county commissioner who is also executive director of a children services board that is the county's PCSA would be subject to divided loyalties in determining the benefit of such a levy to the county as a whole, as opposed to the primary benefit to the children services board he directs.

Yet another potential conflict arises from the broad discretion vested in boards of county commissioners to appropriate additional funds to a children services board. Pursuant to R.C. 5153.35:

> The boards of county commissioners shall levy taxes and make appropriations sufficient to enable the public children services agency to perform its functions and duties under this chapter....
>
> In addition to making the usual appropriations, there may be allowed annually to the executive director an amount not to exceed one-half the executive director's official salary to provide for necessary expenses which are incurred by the executive director or the executive director's staff in the performance of their official duties. Upon the order of the executive director, the county auditor shall draw a warrant on the county treasurer payable to the executive director or such other person as the order designates, for such amount as the order requires, not exceeding the amount provided for in this section, and to be paid out of the general fund of the county. The bond of the executive director provided for by [R.C. 5153.13] shall at all times be in sufficient amount to cover the additional appropriations provided for by this section.
>
> The executive director, annually, before the first Monday of January, shall file with the auditor a detailed and itemized statement, verified by the executive director, as to the manner in which the fund has been expended during the current

> year, and if any part of such fund remains in the executive director's hands unexpended, forthwith shall pay that amount into the county treasury.

R.C. 5153.35 thus vests a broad discretion in the board of county commissioners to determine whether to appropriate an additional sum to the executive director of the PCSA "to provide for necessary expenses which are incurred by the executive director or the executive director's staff in the performance of their official duties." Again, it is clear that a county commissioner, who was director of the agency to which such an additional appropriation could be made, would not be able objectively to weigh the merits of such a determination.

Having examined various potential conflicts between the office of county commissioner and the position of executive director of a children services board, we note that not all potential conflicts of interest render two public positions incompatible.[10] Rather, as explained in 1979 Op. Att'y Gen. No. 79-111 at 2-372:

> [T]he better view is that no hard and fast rule should be laid down with respect to the question of whether a potential conflict will render positions incompatible, but that each compatibility question should be decided upon its particular facts. The factors to be considered with respect to questions of potential conflicts are the degree of remoteness of a potential conflict, the ability or inability of an individual to remove himself from the conflict, whether the individual exercises decision-making authority in both positions, whether the potential conflict involves the primary functions of each position, and whether the potential conflict may involve budgetary controls. Thus, not all potentialities for conflict will render positions incompatible, and to the extent that the earlier opinions cited herein state categorically that any possibility thereof necessitates a finding of incompatibility, they are hereby disapproved.

Examining the factors used to evaluate potential conflicts, it is apparent that the various conflicts set forth above render the positions of county commissioner and executive director of

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[10] This opinion does not address the ethics or conflict of interest provisions contained in R.C. Chapter 102 or in R.C. 2921.42-.43. Rather, such questions should be addressed to the Ohio Ethics Commission. *See, e.g.*, Ohio Ethics Commission Advisory Opinion No. 91-002 ("R.C. 2921.42(A)(4) prohibits an elected officer of a political subdivision from having a pecuniary interest in an employment contract with his own political subdivision"). *See also* 2001 Op. Att'y Gen. No. 2001-036 at 2-218 to 2-219, note seven ("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. 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph three). 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").

the county's children services board incompatible. In this regard, we note first that, the manner in which the executive director of a children services board is selected and serves renders that position subordinate, although indirectly, to that of county commissioner. Moreover, pursuant to 307.981(F), the board of county commissioners must enter into a contract concerning standards and responsibilities of a children services board that is the county's PCSA. It is not, therefore, merely a remote possibility that an individual serving as county commissioner and children services board director would be on both sides of any such contract. Similarly, such an individual, in his capacity as county commissioner, would be able to influence the board to act in his best interest under R.C. 307.981(B) and (C) to designate the children services board of which he is director to serve and to continue to serve as the county's PCSA. In addition, the role of the county commissioners, as the county's taxing authority, to perform various duties under R.C. Chapter 5705, including adoption of the county's annual appropriation measure, presents numerous potential conflicts which could be avoided only by the commissioner's abstention from all decisions involving funds that may otherwise be available for use by the agency he directs.

Based upon the foregoing, it is my opinion, and you are hereby advised, that the positions of executive director of a children services board that is a county's public children services agency and county commissioner within the same county are incompatible.

Respectfully,

BETTY D. MONTGOMERY
Attorney General