January 11, 1999

OPINION NO. 99-001

The Honorable Joseph T. Deters
Treasurer of State
30 East Broad Street, 9th Floor
Columbus, Ohio 43266-0421

Dear Treasurer Deters:

You have requested an opinion whether the positions of Treasurer of State and member of the board of trustees of the University of Cincinnati are compatible. 1979 Op. Att'y Gen. No. 79-111 sets forth the following seven questions 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 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?

Id. at 2-367 and 2-368.

The sixth and seventh questions address the applicability of charter provisions, ordinances, and federal, state, and local departmental regulations. There are no applicable charter provisions or ordinances, or federal or state regulations that bear upon the compatibility of these two positions. Further, whether there is an applicable departmental regulation is a matter for the interested parties to determine. It seems unlikely that either the Treasurer of State or the board of trustees of the University of Cincinnati have adopted a departmental regulation that would prohibit a person from serving simultaneously as Treasurer of State and as a member of the board of trustees of the University of Cincinnati, and thus we will assume, for purposes of this opinion, that no such departmental regulation exists.

Question number one asks whether either of the positions is a classified employment within the terms of R.C. 124.57. R.C. 124.57 prohibits, *inter alia*, a classified officer or employee of the state from participating in partisan political activity other than to vote as he pleases or express freely his political opinions. The Treasurer of State is an elected officer of the state, Ohio Const. art. III, § 1; R.C. 113.01; thus, he is in the unclassified civil service, *see* R.C. 124.11(A)(1). A trustee of the University of Cincinnati is appointed by the Governor with the advice and consent of the Senate. R.C. 3361.01(A); *see also* 1975 Op. Att'y Gen. No. 75-044 at 2-169 ("members of a board of trustees of a state university are public officers"). Pursuant to R.C. 124.11(A)(3), members of a board appointed by the Governor are in the unclassified civil service. Accordingly, a member of the board of trustees of the University of Cincinnati is in the unclassified civil service. Because neither position is in the classified civil service, the prohibition of R.C. 124.57 is not applicable.

Question two asks whether the empowering statutes of either position limit outside employment. No provision within the Revised Code limits the outside employment of a trustee of the University of Cincinnati. Except for Ohio Const. art. III, § 14, which prohibits the Treasurer of State from executing the office of Governor, no constitutional or statutory provision prohibits the Treasurer of State from serving simultaneously as a member of the board of trustees of the University of Cincinnati. Therefore, the second question of the compatibility analysis may be answered in the negative.

Question three asks whether one position is subordinate to, or in any way a check upon, the other. The Treasurer of State, as an elected officer of the state, Ohio Const. art. III, § 1; R.C. 113.01, serves and is responsible to the citizens of Ohio. A trustee of the University of Cincinnati is appointed by the Governor with the advice and consent of the Senate, R.C. 3361.01(A), and may be removed by the Governor in accordance with the provisions of R.C. 3.04.[1] The positions thus operate independently of each other, and neither position is responsible

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[1] R.C. 3.04 provides that an officer who holds his office by appointment of the Governor with the advice and consent of the Senate may be removed from office by the Governor with the advice and consent of the Senate, if it is found that such officer is inefficient or derelict in the

for assigning duties to or supervising the other. Accordingly, neither position is subordinate to, or a check upon, the other.

Question 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. 1994 Op. Att'y Gen. No. 94-022 at 2-98. It seems likely, however, that the duties of these two positions can be discharged competently by the same person.

The final question asks whether there is a conflict of interest between the two positions. It is well-settled that 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. Resolution of the compatibility issue of conflict of interest requires that we examine the powers, duties, and responsibilities conferred upon each position. Such an examination enables us to determine whether a person who holds two positions simultaneously will confront a conflict of interest when he exercises the powers, duties, and responsibilities in either or both positions.

The general powers and duties of the Treasurer of State are set forth in R.C. Chapters 113 and 135. A review of these chapters discloses that the Treasurer of State is primarily responsible for presiding over and managing the moneys of the state deposited into the state treasury, R.C. 113.05(A); *see* R.C. 113.13, maintaining custody of moneys in custodial funds that are not part of the state treasury, R.C. 113.05(B); R.C. 113.051, making payments of moneys from the state treasury and custodial funds when properly ordered, R.C. 113.11; R.C. 113.12, and investing moneys belonging to the state and moneys in custodial funds, R.C. 113.051; R.C. 135.143; R.C. 135.45; R.C. 135.46. In addition, the Treasurer of State may open as many receiving offices as are necessary for the expedient collection of taxes and fees, R.C. 113.06, adopt rules governing the remittance of taxes by electronic funds transfer, R.C. 113.061, and adopt rules prescribing the times and manner in which state officers, employees, and agents are to pay to the Treasurer of State all money, checks, and drafts received for the state, or for the use of the officer, employee, or agent, from taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals, or otherwise, R.C. 113.08.

As a state university, the government of the University of Cincinnati is vested in its board of trustees. 1986 Op. Att'y Gen. No. 86-046 at 2-243 and 2-244; *see also* R.C. 3345.011 (the term "state university" includes the University of Cincinnati). The general powers of a state university are set forth in R.C. Chapter 3345. Pursuant to this chapter, the board of trustees of a

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discharge of his duties, commits a violation of R.C. Chapter 102, R.C. 2921.42, or R.C. 2921.43, or uses his office corruptly.

state university is vested with broad powers. In this respect, R.C. 3345.021 states that, "[t]he board of trustees of any college or university, which receives any state funds in support thereof, shall have full power and authority on all matters relative to the administration of such college or university." Provisions in R.C. Chapter 3345 also confer upon a state university and its board of trustees a variety of specific powers. *See, e.g.*, R.C. 3345.01 (tuition may be charged nonresidents); R.C. 3345.022 (provision of legal services to students through a group legal services insurance plan); R.C. 3345.04 (designation of state university law enforcement officers); R.C. 3345.05 (disposition of fees); R.C. 3345.07 (acquisition, construction, and maintenance of housing and dining facilities); R.C. 3345.11 (use of auxiliary facilities or educational facilities); R.C. 3345.16 (acceptance of donations and investment of endowment donations); R.C. 3345.18 (conveyance of university-owned lands); R.C. 3345.28 (establishment and administration of faculty improvement programs).

In addition, R.C. Chapter 3361, which provides for the creation of the University of Cincinnati, confers additional authority upon the board of trustees of the University of Cincinnati. R.C. 3361.03 requires such board to employ, fix the compensation of, and remove the president and such number of professors, teachers, and other employees, as may be deemed necessary, and do all things necessary for the creation, proper maintenance, and successful and continuous operation of the university. The board is also authorized to adopt and amend bylaws and rules for the conduct of the board and the government and conduct of the university, and accept donations of lands and moneys for the purposes of the university. R.C. 3361.03; R.C. 3361.04. Finally, the board may "make and enter into all contracts and agreements necessary or incidental to the acquisition of property for, or the operation of the university." R.C. 3361.04.

We shall now consider whether a person who holds these two positions will find the exercise of his Treasurer of State duties compromised by reason of his service as a member of the board of trustees of the University of Cincinnati. A review of the statutory duties and powers of the Treasurer of State summarized above discloses that this possibility exists with respect to the Treasurer of State's payment and investment responsibilities in relation to moneys held in the state treasury and moneys held in custodial funds. We shall explain how this may occur.

The Treasurer of State is the custodian of all moneys and other assets in the state treasury. *See* R.C. 113.05(A); R.C. 113.09; *see also* R.C. 9.38. Money in the state treasury is paid out by the Treasurer of State upon the warrant of the Auditor of State. *See* R.C. 113.11; R.C. 113.12; R.C. 117.45; 2 Ohio Admin. Code 113-1-03(A). Pursuant to R.C. 3361.05, the University of Cincinnati is supported, in part, by General Assembly appropriations of moneys in the state treasury. Accordingly, we must determine whether the payment of moneys from the state treasury to the University of Cincinnati exposes a person who serves simultaneously as Treasurer of State and trustee of the University of Cincinnati to a conflict of interest.

Although the Treasurer of State is responsible for paying all warrants drawn on the state treasury by the Auditor of State, the Treasurer's duties with respect to such payments are ministerial in nature. *Cf. State ex rel. Reynoldsburg v. Banks*, 37 Ohio St. 2d 56, 307 N.E.2d 260

(1974) (where a warrant submitted to the city treasurer for his signature has been authorized by an ordinance of the city council and is regular and valid on its face, the treasurer by law is required to sign the warrant. Payment of the warrant is a ministerial duty of the city treasurer). R.C. 113.12 states that "[t]he treasurer of state, on presentation, *shall pay* all warrants drawn on him by the auditor of state." (Emphasis added.) R.C. 113.12 clearly and unequivocally mandates that the Treasurer of State pay all warrants drawn on him by the Auditor of State. *See generally Department of Liquor Control v. Sons of Italy Lodge 0917*, 65 Ohio St. 3d 532, 534, 605 N.E.2d 368, 370, (1992) ("the word 'shall' denotes that compliance with the commands of that statute is *mandatory*").

R.C. 113.12 does not authorize the Treasurer of State to refuse the payment of a warrant drawn on the state treasury by the Auditor of State. The authority to determine whether money should be paid from the state treasury is vested with the Director of Budget and Management. In this regard, R.C. 126.07 provides, in part, as follows:

> No contract, agreement, or obligation involving the expenditure of money chargeable to an appropriation, nor any resolution or order for the expenditure of money chargeable to an appropriation, *shall be valid and enforceable unless the director of budget and management first certifies that there is a balance in the appropriation not already obligated to pay existing obligations, in an amount at least equal to the portion of the contract, agreement, obligation, resolution, or order to be performed in the current fiscal year*….
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> In order to make a payment from the state treasury, a state agency shall first submit to the director all invoices, claims, vouchers, and other evidentiary matter related to the payment. If the director approves payment to be made, the director shall submit the approval to the auditor of state for the drawing of a warrant as provided in section 117.45 of the Revised Code. *The director shall not approve payment to be made if the director finds that there is not an unobligated balance in the appropriation for the payment, that the payment is not for a valid claim against the state that is legally due, or that insufficient evidentiary matter has been submitted.* (Emphasis added.)

See also R.C. 117.45(A) ("the auditor of state shall draw warrants against the treasurer of state pursuant to all requests for payment that the director of budget and management has approved under section 126.07 of the Revised Code").

The Treasurer of State thus does not have discretionary authority to refuse the payment of a warrant drawn on the state treasury by the Auditor of State. *See* 1982 Op. Att'y Gen. No. 82-082 (syllabus, paragraph two) ("[t]he Treasurer of State has no duty or authority to examine the propriety of vouchers presented for payment by an officer, board or commission which has been authorized to approve expenditures from custodial accounts"); *cf. State ex rel. Reynoldsburg v. Banks* (the payment of a warrant by the city treasurer is a ministerial duty); 1996 Op. Att'y Gen. No. 96-008 at 2-34 (a clerk-treasurer of a non-charter village exercises no discretionary authority

with respect to the certification of warrants). Absent such authority on the part of the Treasurer of State, the payment of moneys from the state treasury to, or on behalf of, the University of Cincinnati does not expose a person who serves simultaneously as Treasurer of State and member of the board of trustees of the University of Cincinnati to a conflict of interest.

In addition to holding moneys appropriated to the University of Cincinnati within the state treasury, the Treasurer of State may receive and hold moneys of the University of Cincinnati in a custodial fund. *See* R.C. 113.05(B); R.C. 113.051; 2 Ohio Admin. Code 113-2-01(A); *see also* R.C. 113.20. *See generally* 1982 Op. Att'y Gen. No. 82-082 (syllabus, paragraph one) ("[t]he General Assembly may create custodial accounts which are maintained by the Treasurer of State but are not part of the state treasury for purposes of appropriation as provided for by Ohio Const. art. II, § 22"). Pursuant to R.C. 3361.03, R.C. 3361.04, and R.C. 3361.05, the University of Cincinnati is authorized to receive and hold moneys from sources other than the General Assembly. *See also* R.C. 3345.16 (a board of trustees of a state university may receive and hold in trust any donation of money). In order to safeguard such moneys, the Treasurer of State may establish a custodial fund on behalf of the University of Cincinnati.[2]

The establishment of such a custodial fund by the Treasurer of State, though, does not expose a person who serves simultaneously as Treasurer of State and trustee of the University of Cincinnati to a conflict of interest. As in the case of moneys in the state treasury, the Treasurer of State does not have discretionary authority to refuse the payment of moneys from a custodial fund. *See* 1982 Op. Att'y Gen. No. 82-082 (syllabus, paragraph two). Upon the presentation of a proper order by the official of the University of Cincinnati authorized to pay money out of the custodial fund, the Treasurer of State must disburse the money from the custodial fund. *See* R.C. 113.11; rule 113-2-01; 1982 Op. Att'y Gen. No. 82-082. The responsibility for determining whether the withdrawal of moneys from the custodial fund is proper and for a legitimate use of such moneys rests with the University of Cincinnati. *See* rule 113-2-01(G).

In addition, the Treasurer of State is not required to determine whether any investment of the moneys of a custodial fund is permissible, prudent, or appropriate. R.C. 113.051(A) states, in part:

> The custodial duties of the treasurer of state include safekeeping the custodial funds and investment assets of an owner; collecting principal, dividends, distributions, and interest on custodial funds and investments of an owner; and paying for, transferring, and collecting the purchase or sale price of investments. The duties of the treasurer of state do not include making investment decisions of

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[2] A member of the staff of the office of the Treasurer of State has informed us that the Treasurer of State does not currently maintain a custodial fund for the University of Cincinnati.

> an owner or its authorized agents or monitoring compliance with an owner's internal investment policies. The treasurer of state is not responsible for the investment decisions of an owner or agent, compliance with the owner's internal investment policies, or any unlawful activities of an owner or its authorized agents.

See also rule 113-2-01(D) (if a state agency has established a custodial fund with the Treasurer of State, the agency must provide the Treasurer of State with a list of three persons who are authorized to provide investment instructions).

Thus, the Treasurer of State does not exercise decision-making authority regarding the withdrawal or investment of moneys in custodial funds. Therefore, the establishment of a custodial fund on behalf of the University of Cincinnati by the Treasurer of State does not expose a person who serves simultaneously as Treasurer of State and member of the board of trustees of the University of Cincinnati to a conflict of interest.

As a final matter, the Treasurer of State may have an opportunity to invest moneys in his custody in bonds or other obligations issued by, or on behalf of, the University of Cincinnati. *See* R.C. 113.051(A); R.C. 135.143; R.C. 135.46. By way of example, R.C. 135.143(A)(3) authorizes the Treasurer of State to invest the interim moneys of the state in bonds and obligations of the Ohio Public Facilities Commission. R.C. 154.21, in turn, authorizes the Ohio Pubic Facilities Commission to issue obligations to pay costs of capital facilities for the University of Cincinnati. *See* R.C. 154.21(A) ("[s]ubject to authorization by the general assembly under section 154.02 of the Revised Code, the Ohio public facilities commission may authorize and issue obligations pursuant to this chapter to pay the cost of capital facilities for state-supported and state-assisted institutions of higher education"); *see also* R.C. 154.01(F) (as used in R.C. Chapter 154, "'[i]nstitutions of higher education' and 'state supported or state assisted institutions of higher education' means the state universities identified in section 3345.011 of the Revised Code").[3] If a person who serves simultaneously as Treasurer of State and member of the board of trustees of the University of Cincinnati is required to determine whether to invest moneys in his custody as Treasurer of State in bonds or other obligations issued by, or on behalf of, the University of Cincinnati, he would be exposed to influences that may prevent him from making a completely objective, disinterested decision.

It is well-established, however, that the potential for a conflict of interest does not automatically render two positions incompatible. "Where possible conflicts are remote and speculative, common law incompatibility or conflict of interest rules are not violated." 1979 Op. Att'y Gen. No. 79-111 (syllabus, paragraph three).

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[3] R.C. 3345.011 identifies the University of Cincinnati as a "state university."

With respect to your specific inquiry, it is only speculative whether the Treasurer of State will be required to determine whether to invest moneys in his custody in bonds or other obligations issued by, or on behalf of, the University of Cincinnati. It is unlikely that such investment opportunities will occur often. Moreover, the Treasurer of State may refrain from purchasing such bonds or obligations, thereby avoiding the conflict of interest. Finally, there is no conflict of interest if the owner of moneys in the custody of the Treasurer of State directs the Treasurer of State to invest such moneys in bonds or other obligations issued by, or on behalf of, the University of Cincinnati. *See* R.C. 113.051(A) (the Treasurer of State is not permitted to make investment decisions on behalf of an owner of moneys held by the Treasurer of State in a custodial fund); *see also* rule 113-2-01(D) (a "state agency shall provide to the treasurer a list of three persons who are authorized to provide investment instructions"). In such a situation, the Treasurer of State does not exercise decision-making authority regarding the investment of the moneys. Therefore, the investment powers conferred upon the Treasurer of State by R.C. Chapters 113 and 135 will not subject a person who serves in that position and as a member of the board of trustees of the University of Cincinnati to an impermissible conflict of interest, provided that, as Treasurer of State, he does not invest moneys in his custody in bonds or other obligations issued by, or on behalf of, the University of Cincinnati, unless the owner of the moneys otherwise directs him to make such an investment.

Let us now turn to the possible conflicts of interest that a member of the board of trustees of the University of Cincinnati may face if he were to also serve as Treasurer of State. As explained above, the Treasurer of State may receive and hold moneys of the University of Cincinnati in custodial funds. *See* R.C. 113.05(B); R.C. 113.051; *see also* R.C. 113.10 (providing for the establishment of the Treasurer of State's contingent fund, which shall not be part of the state treasury); 2 Ohio Admin. Code 113-3-01(B) ("[a]ny agency that receives money which the agency believes is provisional in nature or the disposition of which cannot be determined immediately, may request approval by the treasurer for deposit into the contingent fund"). A member of the board of trustees of the University of Cincinnati, therefore, may be required to discuss and vote on whether to deposit moneys of the university with the Treasurer of State, and with respect to that decision he may be predisposed to vote in a way that is favorable to the Treasurer of State. The person thus will be exposed to influences that may prevent him from discharging his duties as a member of the board of trustees of the University of Cincinnati objectively and in a completely disinterested manner.

The foregoing potential conflict of interest, however, is remote and speculative. First, it is only speculative whether the University of Cincinnati will consider placing its moneys in the custody of the Treasurer of State. As stated earlier, the Treasurer of State does not currently have moneys of the University of Cincinnati on deposit in a custodial fund. *See* note two, *supra*. Second, such a decision is not likely to occur very often. Finally, the person may remove himself from any discussions or votes on this particular issue. *See generally* 1997 Op. Att'y Gen. No. 97-026 at 2-155 ("a public official has a duty to abstain from voting on any matter that would impair his objectivity"). Accordingly, since the conflict of interest is remote and

speculative, the conflict does not prevent a member of the board of trustees of the University of Cincinnati from holding the office of Treasurer of State, provided the person, as trustee, abstains from discussing or voting on whether to deposit moneys of the university with the Treasurer of State. *See* 1979 Op. Att'y Gen. No. 79-111 (syllabus, paragraph three).

In addition, after carefully considering the various statutory powers and duties set forth in R.C. Chapters 3345 and 3361 that may be exercised by a person who serves as a member of the board of trustees of the University of Cincinnati, we have not identified any other instances in which the person, as trustee, will confront a conflict of interest in the exercise of those powers and duties as a result of his service as Treasurer of State. Hence, we believe that the powers and duties conferred upon a member of the board of trustees of the University of Cincinnati may be carried out in an objective and disinterested manner and free of any influence attributable to the person's position as Treasurer of State. Therefore, a member of the board of trustees of the University of Cincinnati who serves as Treasurer of State is not subject to an impermissible conflict of interest when he exercises his powers and duties as trustee, provided the person, as trustee, abstains from any discussions or votes on whether to deposit moneys of the university with the Treasurer of State.

Our review of the powers, duties, and responsibilities of the respective positions thus discloses that the conflict of interest rule is not violated if a member of the board of trustees of the University of Cincinnati who also serves as Treasurer of State abstains from discussing or voting on whether to deposit moneys of the university with the Treasurer of State. In addition, as Treasurer of State he must refrain from investing moneys in his custody in bonds or other obligations issued by, or on behalf of, the University of Cincinnati, unless the owner of the moneys directs him to invest the moneys in such bonds or obligations.

In light of the foregoing, it is my opinion, and you are hereby advised that a person may serve simultaneously in the positions of Treasurer of State and member of the board of trustees of the University of Cincinnati, provided that as a member of the board of trustees he abstains from discussing or voting on whether to deposit moneys of the university with the Treasurer of State. Further, as Treasurer of State he may not invest moneys in his custody in bonds or other obligations issued by, or on behalf of, the University of Cincinnati, unless the owner of the moneys directs him to invest the moneys in such bonds or obligations.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

January 11, 1999

The Honorable Joseph T. Deters
Treasurer of State
30 East Broad Street, 9th Floor
Columbus, Ohio 43266-0421

SYLLABUS: 99-001

A person may serve simultaneously in the positions of Treasurer of State and member of the board of trustees of the University of Cincinnati, provided that as a member of the board of trustees he abstains from discussing or voting on whether to deposit moneys of the university with the Treasurer of State. Further, as Treasurer of State he may not invest moneys in his custody in bonds or other obligations issued by, or on behalf of, the University of Cincinnati, unless the owner of the moneys directs him to invest the moneys in such bonds or obligations.