March 25, 2009

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: 2009-010

A person may serve simultaneously in the positions of director of a countywide emergency management agency and member of a charter city legislative authority, provided no local charter provision, resolution, ordinance, or departmental regulation prohibits such simultaneous service and the person, as a member of the legislative authority, abstains from participating in any deliberations, discussions, negotiations, or votes concerning the making of contributions of public moneys to the countywide emergency management agency.

RICHARD CORDRAY
OHIO ATTORNEY GENERAL

March 25, 2009

OPINION NO. 2009-010

The Honorable Robin N. Piper
Butler County Prosecuting Attorney
Government Services Center, 11th Floor
P.O. Box 515
315 High Street
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Dear Prosecutor Piper:

You have requested an opinion whether the positions of director of a countywide emergency management agency (CEMA) and member of a charter city legislative authority are compatible. For the reasons that follow, a person may serve simultaneously in these two positions, provided no local charter provision, resolution, ordinance, or departmental regulation prohibits such simultaneous service and the person, as a member of the legislative authority, abstains from participating in any deliberations, discussions, negotiations, or votes concerning the making of contributions of public moneys to the CEMA.

Compatibility Test

The following seven questions are used to determine whether a person may serve simultaneously in two public positions:

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

2. Does a constitutional provision or statute prohibit the holding of both positions at the same time?

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 2007 Op. Att'y Gen. No. 2007-037 at 2-377; *see also* 2 Ohio Admin. Code 123:1-46-02.

Discussion of R.C. 124.57

Question one asks whether either of the positions is a classified employment within the terms of R.C. 124.57. This statute prohibits, except as provided therein, persons in the classified service of counties and cities from holding partisan political offices.[1] *See* rule 123:1-46-02(C)(1), (6).

Let us now consider whether a person holding either of the positions in question is in the classified service of a county or city. A member of a city legislative authority, as an elected officer of the city, is in the unclassified service of the city. *See* R.C. 124.11(A)(1); R.C. 731.01. R.C. 124.57 thus does not apply to this position.

The position of director of a CEMA also is not subject to R.C. 124.57's prohibition. While a CEMA is statutorily designated as a county board, *see* R.C. 5502.26(C), the officers and employees of such an agency are not in the classified service of the county for purposes of R.C. 124.57.

As stated above, R.C. 124.57's prohibition applies to persons in the *classified service* of counties. For purposes of R.C. 124.57, "classified service" means "the competitive classified *civil service*." R.C. 124.01(C) (emphasis added). R.C. 124.01(A) further states that the "civil service" of the counties includes "all offices and positions of trust or employment … *in the service of the counties*." (Emphasis added.) Accordingly, in order for R.C. 124.57's prohibition to apply, a person must hold a position that is in the service of a county. *See* 1985 Op. Att'y Gen. No. 85-012 at 2-47.

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[1] A provision in a city charter, ordinance, resolution, or collective bargaining agreement may authorize an officer or employee in the classified service of the city to hold a partisan political office. 2006 Op. Att'y Gen. No. 2006-005 at 2-47 n.6; 1991 Op. Att'y Gen. No. 91-065 (syllabus, paragraph one).

A position is in the service of a county under R.C. Chapter 124 when (1) the position constitutes a position of trust or employment with the county and (2) the person holding the position is compensated, in whole or in part, from county moneys. *See Portage County Comm'rs v. Schwab*, Case No. 1518, 1985 Ohio App. LEXIS 7671 (Portage County May 17, 1985); *In re Appeal of Ford*, 3 Ohio App. 3d 416, 446 N.E.2d 214 (Franklin County 1982). Because a CEMA is created and financed by a county and other political subdivisions within the county, *see* R.C. 5502.26; R.C. 5502.31, the officers and employees of a CEMA are in the service of an entity that is separate and distinct from the county and other political subdivisions that established the agency. *See* 1989 Op. Att'y Gen. No. 89-063 at 2-281; 1954 Op. Att'y Gen. No. 4224, p. 460, 464-65; 1952 Op. Att'y Gen. No. 1122, p. 67.

As explained in 1954 Op. Att'y Gen. No. 4224, p. 460, 464-65, it would be utterly futile to attempt to operate "a semi-autonomous entity having an existence apart from and in a sense independent of the several subdivisions which joined in its creation … as though it constituted a subordinate administrative agency of each of the several subdivisions concerned." Rather, when an entity is created and financed by multiple political subdivisions, the officers and employees of that entity are in the service of that entity instead of any one of the political subdivisions. *See* 1989 Op. Att'y Gen. No. 89-063 at 2-281; 1954 Op. Att'y Gen. No. 4224, p. 460, 464-65; 1952 Op. Att'y Gen. No. 1122, p. 67. Thus, since a CEMA is created and financed by multiple political subdivisions, the director of such an agency is not in the service of the county that participated in the creation of the agency. Accordingly, the prohibition of R.C. 124.57 does not apply to the position of director of a CEMA and does not operate to prevent such a director from serving simultaneously as a member of a city legislative authority.

Constitutional Provisions and Statutes Prohibiting the Holding of Another Public Position

Question two asks whether a constitutional provision or statute prohibits a person from holding both positions at the same time. R.C. 731.02 prohibits a member of a city legislative authority from holding "any other public office, except that of notary public or member of the state militia."[2] A member of a city legislative authority who violates this provision of R.C. 731.02 "shall forthwith forfeit" his office. R.C. 731.02.

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[2] A charter city through its powers of local self-government may "determine upon qualifications for its councilmen which may be different from those provided by [R.C. 731.02]." *State ex rel. Bindas v. Andrish*, 165 Ohio St. 441, 136 N.E.2d 43 (1956) (syllabus, paragraph two). *See generally* 2008 Op. Att'y Gen. No. 2008-032 at 2-330 and 2-331 (in charter cities a statute concerning a matter of local self-government involving procedure applies unless there is either (1) a conflicting charter provision or (2) a charter provision that reserves home rule authority to permit enactment of legislation at variance with the statute and accompanying legislation that conflicts with the statute).

It has long been held in Ohio that the requisite elements in determining whether a position is a public office are:

> (1) the incumbent must exercise certain independent public duties, a part of the sovereignty of the state; (2) such exercise by the incumbent must be by virtue of his election or appointment to the office; (3) in the exercise of the duties so imposed, he can not be subject to the direction and control of a superior officer.

1963 Op. Att'y Gen. No. 3548, p. 58, 61; *accord State ex rel. Landis v. Bd. of Comm'rs of Butler County*, 95 Ohio St. 157, 159-60, 115 N.E. 919 (1917); *State ex rel. Attorney General v. Jennings*, 57 Ohio St. 415, 49 N.E. 404 (1898) (syllabus, paragraph two).

Applying the foregoing criteria to the position of director of a CEMA, it is readily apparent that the position is not a public office. Pursuant to R.C. 5502.26(A)(4), a director is "responsible for coordinating, organizing, administering, and operating emergency management in accordance with the agency's program [for emergency management], subject to the direction and control of the executive committee" of the CEMA. A director of a CEMA thus performs his duties and responsibilities under the direction and control of the executive committee of the CEMA. Accordingly, in the exercise of his duties, a director of a CEMA does not act independently in the performance of a governmental function and, as such, does not hold a public office.

Because the position of director of a CEMA is not a public office, R.C. 731.02 does not prohibit a director from serving as a member of a city legislative authority. Therefore, question two of the compatibility test may be answered in the negative.

Subordination and Control

Question three asks whether one position is subordinate to, or in any way a check upon, the other. The director of a CEMA is appointed and removed by, and subject to the direction and control of, the executive committee of the CEMA. R.C. 5502.26. A member of a city legislative authority, as an elected city officer, *see* R.C. 731.01, serves and is responsible to the city's electorate. Thus, neither position is responsible for appointing or removing a person from the other position. The positions also operate independently of each other, and neither is required to assign duties to, or supervise, the other. Therefore, neither position is subordinate to, or in any way a check upon, the other.

Physical Ability to Hold and Serve in Both Positions

Question four asks whether it is physically possible for one person to perform the duties of both positions. This is a factual question that is best addressed by local officials since they may more accurately determine the time constraints and demands imposed upon the positions in question. *See* 2008 Op. Att'y Gen. No. 2008-020 at 2-213.

We caution, however, that a member of a city legislative authority, as an elected city officer, is required to perform duties imposed by statute and, where the nature of such duties requires the member to be present at a particular time or place, or act in a particular manner, the member must be able to do so. *See generally* R.C. 3.17 ("[a]ny member of a board, commission, council, board of trustees of an institution of higher education, or other public body of the state, except a member of the general assembly or a judge of any court in the state, who fails to attend at least three-fifths of the regular and special meetings held by that board, commission, council, board of trustees, or public body during any two-year period forfeits the member's position on that board, commission, council, board of trustees, or public body"). Also, if a member of a city legislative authority who is employed as a director of a CEMA is required to perform his duties as a member of the legislative authority during his regular work hours as a director, the member must take approved vacation or personal leave or leave without pay for the time he is absent from his duties as director.

Conflicts of Interest

Question five asks whether there is a conflict of interest between the two positions.[3] It is a well-settled principle that a person may not hold two public positions concurrently if the "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." 1980 Op. Att'y Gen. No. 80-035 at 2-149.

A study of the powers, duties, and responsibilities of the positions discloses that the legislative authority of a charter city may make contributions of public moneys to a CEMA.[4] R.C. 5502.26; R.C. 5502.31. If a member of a city legislative authority who serves as the director of a CEMA were required to deliberate, discuss, negotiate, or vote on the making of contributions of public moneys to the CEMA, it might be difficult for the member of the

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[3] The Ohio Ethics Commission, rather than the office of the Attorney General, is required by R.C. 102.08 to address the application of the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43. We will, therefore, refrain from interpreting and applying these provisions by way of a formal opinion. 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph three). Questions concerning the interpretation and application of these provisions in your particular situation should instead be directed to the Ohio Ethics Commission. *See, e.g.*, Ohio Ethics Comm'n, Advisory Op. No. 88-005, slip op. at 3 (R.C. 1724.10, which requires a city official to serve on the governing board of a community improvement corporation designated as an agency by the city, does not exempt the official from the provisions of R.C. Chapter 102).

[4] Because you have not stated that the person as the director of a countywide emergency management agency will serve on the local emergency planning committee appointed under R.C. Chapter 3750 for the emergency planning district that includes his county, *see* R.C. 5502.38, we presume that the person will not do so.

legislative authority to perform his duties and exercise his discretion in a completely objective and disinterested manner because of his position with the CEMA.

Although conflicts of interest may arise between the positions in question, the General Assembly has authorized a member of a city legislative authority to serve as the director of a CEMA. R.C. 5502.26(A) states, in part, that "[t]he director/coordinator of emergency management may be an official or employee of any political subdivision entering into the countywide agreement, except that the director/coordinator shall not be the chief executive of any such political subdivision."[5]

In similar situations, prior Attorney General opinions have determined that, when the General Assembly has authorized a public officeholder to hold another public position, the officeholder may serve in the other position despite the existence of conflicts of interest between the two positions. *See, e.g.*, 2009 Op. Att'y Gen. No. 2009-005; 1990 Op. Att'y Gen. No. 90-037; 1977 Op. Att'y Gen. No. 77-034. Accordingly, pursuant to R.C. 5502.26(A), the positions of member of a city legislative authority and director of a CEMA are not rendered incompatible because of the possibility of conflicts of interest between the two positions.

Nevertheless, because the conflict of interest involves decision-making authority by the person as a member of the city legislative authority, he has a duty to abstain from participating in any deliberations, discussions, negotiations, or votes of the legislative authority concerning the making of contributions of public moneys to the CEMA. *See* 2000 Op. Att'y Gen. No. 2000-025 at 2-170; *see* note three, *supra*. Consequently, a person who serves as a member of a city legislative authority and director of a CEMA is not subject to impermissible conflicts of interest, provided the person, as a member of the legislative authority, abstains from participating in any deliberations, discussions, negotiations, or votes concerning the making of contributions of public moneys to the CEMA.

Applicability of Charter Provisions, Resolutions, or Ordinances, and Federal, State, and Local Regulations

Questions six and seven concern the applicability of charter provisions, resolutions, or ordinances, and federal, state, and local regulations. No federal or state regulation prohibits a person from serving simultaneously in the positions in question.[6] Whether an applicable local

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[5] The chief executive of a city for purposes of R.C. 5502.26 is the mayor or city manager. R.C. 5502.21(C).

[6] Except as provided in 5 U.S.C.S. § 1502(c) and 5 U.S.C.S. § 1503, if a local officer or employee is employed principally in connection with an activity that is financed in whole or in part by loans or grants made by the federal government, and exercises some function in connection with that activity, the local officer or employee may not be a candidate for elective

charter provision, resolution, ordinance, or departmental regulation prohibits a person from serving in two positions at the same time is a question for local officials to answer. Therefore, absent a local charter provision, resolution, ordinance, or departmental regulation rendering the positions of director of a CEMA and member of a charter city legislative authority incompatible, the positions are compatible.[7]

Conclusion

In sum, it is my opinion, and you are hereby advised that, a person may serve simultaneously in the positions of director of a countywide emergency management agency and member of a charter city legislative authority, provided no local charter provision, resolution, ordinance, or departmental regulation prohibits such simultaneous service and the person, as a member of the legislative authority, abstains from participating in any deliberations, discussions, negotiations, or votes concerning the making of contributions of public moneys to the countywide emergency management agency.

Respectfully,

RICHARD CORDRAY
Ohio Attorney General

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office. *See* 5 U.S.C.S. § 1501(4); 5 U.S.C.S. § 1502(a)(3); *see also* 5 C.F.R. § 151.101(d); 5 C.F.R. § 151.111(a); 5 C.F.R. § 151.121(c); 5 C.F.R. § 151.122.

Whether the foregoing prohibition applies in your situation is a question of fact that must be addressed by local officials or, ultimately, the courts. *See* 1999 Op. Att'y Gen. No. 99-007 at 2-55; 1983 Op. Att'y Gen. No. 83-057 at 2-232. For guidance in answering this question, local officials may contact the United States Office for Special Counsel. *See* 5 U.S.C.S. § 1504.

[7] A collective bargaining agreement entered into by a public employer and its employees pursuant to R.C. Chapter 4117 may contain language that might prohibit an employee covered by the agreement from holding another public position. *See* R.C. 4117.03(A)(4); R.C. 4117.08(A); R.C. 4117.10(A). Whether the provisions of a collective bargaining agreement apply in a given instance must be addressed on a case-by-case basis by the parties to the agreement. *See* 1991 Op. Att'y Gen. No. 91-065 at 2-311.