May 30, 2012

The Honorable Stephen J. Pronai
Madison County Prosecuting Attorney
59 North Main Street
London, Ohio 43140

SYLLABUS: 2012-017

A person may serve simultaneously in the positions of mayor of the Village of West Jefferson and recycling coordinator for the Madison County-London City Health District provided that as mayor the person does not present the Village's annual tax budget to the county budget commission and does not participate in deliberations, discussions, or negotiations related to (1) an agreement entered into between the Village and the Health District, (2) the Village's annual tax budget, or (3) a tax levy for tax revenue in excess of the ten-mill limitation. If the mayor also is a member of the Health District's district advisory council, the person must abstain from deliberating, discussing, negotiating, or voting upon a recommendation of the district advisory council that would directly affect her employment as recycling coordinator of the Health District. As recycling coordinator for the Madison County-London City Health District, the person may not participate in deliberations, discussions, or negotiations related to an agreement entered into between the Village and the Health District.

MIKE DEWINE
OHIO ATTORNEY GENERAL

Opinions Section
Office 614-752-6417
Fax 614-466-0013

30 East Broad Street, 15th Floor
Columbus, Ohio 43215
www.OhioAttorneyGeneral.gov

May 30, 2012

OPINION NO. 2012-017

The Honorable Stephen J. Pronai
Madison County Prosecuting Attorney
59 North Main Street
London, Ohio 43140

Dear Prosecutor Pronai:

You have requested an opinion whether a person may serve as the recycling coordinator for the Madison County-London City Health District ("Health District") while also serving as the mayor of the Village of West Jefferson ("Village"). The Village is located within the jurisdiction of the Health District. The Village has adopted a charter form of government pursuant to Article XVIII, § 7 of the Ohio Constitution. The Health District is a combined general health district, created by the union of a general health district and city health district pursuant to R.C. 3709.07.[1] *See generally* 2010 Op. Att'y Gen. No. 2010-022, at 2-152 to 2-153; 2008 Op. Att'y Gen. No. 2008-026, at 2-278 n.1.

The following analysis is 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?

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[1] A combined general health district is administered by the board of health or health department of a city, the board of health of the original general health district, or a combined board of health, as agreed upon in the contract establishing the district. R.C. 3709.07. Unless otherwise provided, statutory provisions applicable to general health districts also are applicable to combined general health districts. 2011 Op. Att'y Gen. No. 2011-029, at 2-236 n.1.

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 that are controlling?

7. Is there a federal, state, or local departmental regulation applicable?

2011 Op. Att'y Gen. No. 2011-023, at 2-186; *see also* 2 Ohio Admin. Code 123:1-46-02.

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, an officer or employee in the classified service of the state, the several counties, cities, city school districts, and civil service townships from holding partisan political offices and employments. R.C. 124.57 does not expressly mention officers or employees in the service of a village; therefore, the statute does not apply to a village mayor. *See* 2007 Op. Att'y Gen. No. 2007-023, at 2-229; 1987 Op. Att'y Gen. No. 87-013, at 2-81 to 2-82. Similarly, because R.C. 124.57 does not refer to officers or employees of a general health district, the statute does not apply to a recycling coordinator employed by a general health district. *See* 2001 Op. Att'y Gen. No. 2001-040, at 2-239. Therefore, R.C. 124.57 does not apply to prohibit a person employed as recycling coordinator for the Health District from serving simultaneously as mayor of the Village of West Jefferson.

Question two asks whether there is a constitutional provision or statute prohibiting the holding of both positions at the same time. We find no constitutional or statutory provision prohibiting the recycling coordinator for the Health District from also serving as the mayor of the Village of West Jefferson.[2]

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[2] In a noncharter village, the village mayor is the president of the village's legislative authority. R.C. 733.24. The mayor presides over meetings of the legislative authority and may vote on a matter before the legislative authority when there is a tie. *Id.* Accordingly, other Attorney General opinions have considered whether a mayor of a noncharter village is subject to R.C. 731.12, which prohibits members of a village legislative authority from holding "any other public office." *See, e.g.*, 2007 Op. Att'y Gen. No. 2007-023, at 2-230 n.6 (concluding that village mayor is not subject to R.C. 731.12's prohibition because the duties imposed upon a village mayor by R.C. 733.24 do not make the mayor a member of the village's legislative authority). A charter village may, however, establish procedures that are different from those provided in R.C. Title 7. Ohio Const. art. XVIII, §§ 3 and 7; *see State ex rel. Bindas v. Andrish*, 165 Ohio St. 441, 136 N.E.2d 43 (1956) (syllabus, paragraph 2); 2008 Op. Att'y Gen. No. 2008-037, at 2-379 to 2-380 (in charter cities, a statute regarding a matter of local self-government involving procedure applies unless there is a conflicting charter provision). Pursuant to the Charter of the Village of West Jefferson ("West Jefferson Charter" or "Charter"), the mayor does

Question three considers whether one position is subordinate to, or in any way a check upon, the other. Here neither position is responsible for appointing or removing a person from the other position. The mayor is, pursuant to § 3.01 of the Charter of the Village of West Jefferson ("West Jefferson Charter" or "Charter"), an elected village officer who serves and is responsible to the village's electorate. The recycling coordinator is employed at the discretion of the board of health of the Health District and is subject to the board's control. *See* R.C. 3709.13; R.C. 3709.16; 1995 Op. Att'y Gen. No. 95-030, at 2-155. The mayor is not responsible for appointing a person to or removing a person from the position of recycling coordinator for the Health District.[3] Additionally, the positions 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.

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 who can accurately determine the time constraints and demands imposed upon the person as a village mayor and recycling coordinator for the Health District. *See* 2007 Op. Att'y Gen. No. 2007-023, at 2-231.

We caution, however, that the mayor, as an elected village officer, is required to perform duties imposed by statute. Where the nature of those duties requires that the village mayor be present at a particular time or place, or act in a particular manner, she must be able to do so. *See, e.g.*, West Jefferson Charter, § 3.04 ("Mayor shall be recognized as the chief executive and the official and ceremonial head" of the Village and "should attend all meetings of [Village] Council"); 2007 Op. Att'y Gen. No. 2007-023, at 2-231. Further, a recycling coordinator for the Health District should not perform duties as mayor during her regular work hours as an employee of the Health District. If she is required to perform her duties as mayor during her regular work hours as recycling coordinator for the Health District, she must take appropriate vacation, personal, or compensatory leave or leave without pay for the time she is absent from her duties as recycling coordinator. *See* 2011 Op. Att'y Gen. No. 2011-034, at 2-270 to 2-271; 2011 Op. Att'y Gen. No. 2011-023, at 2-189; 2007 Op. Att'y Gen. No. 2007-023, at 2-231.

Question five considers whether there is an impermissible conflict of interest between the positions.[4] A person may not hold two public positions concurrently if she would be subject to

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not serve as president of the Village's legislative authority nor does she have the right to vote on matters before the legislative authority. West Jefferson Charter, §§ 3.04, 4.04. Accordingly, we do not need to consider R.C. 733.24 or the prohibitions set forth in R.C. 731.12.

[3] Although a village mayor may serve on the district advisory council of a combined general health district, *see* R.C. 3709.03 and R.C. 3709.07, the district advisory council is not involved in the appointment or removal of employees, such as a recycling coordinator, of the health district. *See* 1995 Op. Att'y Gen. No. 95-030, at 2-155.

[4] The Ohio Ethics Commission 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 therefore

divided loyalties and conflicting duties or be exposed to the temptation of acting other than in the best interest of the public. 2011 Op. Att'y Gen. No. 2011-023, at 2-189. In order to determine whether a conflict of interest exists, we must consider the powers, duties, and responsibilities of the respective positions to determine whether the person will be subject to a conflict of interest. *Id.* If a conflict does exist, we next consider the immediacy of the conflict to determine whether the conflict may be sufficiently avoided or eliminated entirely so as to allow the person to serve simultaneously in both positions. *Id.* at 2-189 to 2-190. The factors weighed in making this determination include the probability of the conflict, the ability of the person to remove herself from the conflict should it arise, whether the person exercises decision-making authority in both positions, and whether the conflict relates to the primary functions of each position or to financial or budgetary matters. *Id.* at 2-190.

Our consideration of the powers, duties, and responsibilities of mayor of the Village of West Jefferson and recycling coordinator for the Madison County-London City Health District discloses that there are potential conflicts of interest between the two positions. The first conflict may arise insofar as the Village and Health District may enter into an agreement with each other. *See, e.g.*, R.C. 3709.281 (board of health of a general health district and legislative authority of a municipality within the health district may enter into an agreement whereby the board of health is authorized to exercise powers, perform functions, or render services on behalf of the legislative authority). As mayor, the person may be required to deliberate, discuss, negotiate, or vote upon the terms of an agreement between the Village and the Health District. Because the mayor also is employed by the Health District, it might be difficult for her to perform her duties and exercise her discretion in an objective and disinterested manner. Similarly, if this person, as recycling coordinator for the Health District, were required to deliberate, discuss, negotiate, or vote upon an agreement with the Village, it might be difficult for her to exercise her discretion in an unbiased manner because of her position with the Village.

We believe that this conflict of interest is remote and speculative and can be sufficiently avoided. First, no provision of law mandates an agreement between a village and a health district; rather, it is only speculative whether a village and health district will enter into any such agreement. Second, the potential conflict does not involve the primary functions of either position. Third, even if an agreement between the Village and the Health District is considered, a person serving as mayor will be able to remove herself from any conflict of interest by abstaining from any deliberations, discussions, or negotiations concerning the agreement. Under § 3.04 of the West Jefferson Charter, the mayor is not entitled to vote on such an agreement. The Charter, however, does authorize the mayor to veto an act of Village council, which could require the mayor to approve and sign, or veto, any measure passed by the council to enter into an agreement with the Health District. West Jefferson Charter, § 3.05. A conflict of interest that arises under these circumstances may be sufficiently avoided if the mayor refrains from participating in the relevant acts of the Village council. Further,

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refrain from interpreting and applying these provisions by way of a formal opinion. 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph 3). Questions concerning the interpretation and application of these provisions to your situation should be directed to the Ohio Ethics Commission.

the Charter provides a process whereby an ordinance or resolution of the council may be enacted regardless of the mayor's approval or veto, thus providing a check upon the mayor's powers. *Id*. *See also* 2011 Op. Att'y Gen. No. 2011-023, at 2-192. Similarly, as recycling coordinator for the Health District, this person is not statutorily responsible for entering into discussions, deliberations, negotiations, or votes related to an agreement between the Health District and a village within the District. Instead, this responsibility is conferred upon the board of health. R.C. 3709.281. The board of health of the Health District may, however, ask the recycling coordinator to participate in discussions, deliberations, or negotiations regarding an agreement with the Village of West Jefferson if the board contemplates entering such an agreement. If this occurs, the recycling coordinator must abstain from any discussions, deliberations, or negotiations.

Finally, to the extent that the mayor is involved in agreements between the Village and the Health District, there is a presumption that she will perform her duties in a regular and lawful manner in the absence of evidence to the contrary. *See State ex rel. Speeth v. Carney*, 163 Ohio St. 159, 126 N.E.2d 449 (1955) (syllabus, paragraph 10); *see also* 2007 Op. Att'y Gen. No. 2007-023, at 2-237 to 2-238. In sum, this conflict of interest is remote and speculative and can be sufficiently avoided. Accordingly, the conflict is not sufficient to render the positions incompatible.

There is an additional conflict of interest that may arise if the Village and the Health District enter into an agreement with each other. The mayor may be required to sign an agreement on behalf of the Village.[5] In such a situation, the mayor's employment with the Health District may subject her to divided loyalties. Again, however, we find that this conflict is speculative and can be sufficiently avoided. As discussed previously, the Village and Health District are not required to enter into agreements with each other, and the signing of such agreements is not a duty that the mayor is regularly required to perform. Thus, the occasions on which the mayor will be required to sign an agreement between the Village and Health District should be infrequent. Moreover, prior Attorney General opinions have advised that in executing a village agreement, the mayor does not exercise decision-making authority. Rather, the mayor performs a ministerial duty. *See* 2011 Op. Att'y Gen. No. 2011-023, at 2-191; 2007 Op. Att'y Gen. No. 2007-023, at 2-237. It also is presumed that the mayor will perform her duties in a regular and lawful manner. *See State ex rel. Speeth*, 163 Ohio St. 159 (syllabus, paragraph 10); 2007 Op. Att'y Gen. No. 2007-023, at 2-237 to 2-238. Accordingly, this conflict is insufficient to render the two positions incompatible.

Additional conflicts of interest may be presented by budgetary and tax-related issues. A conflict may exist because of the competition for tax moneys generated within the ten-mill limitation.[6]

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[5] The West Jefferson Charter does not explicitly state whether the mayor is required to sign agreements or contracts entered into by the Village. The Charter does, however, grant all executive and administrative powers to the mayor. West Jefferson Charter, § 3.04.

[6] In Ohio, property may not be taxed in excess of one percent of its true value in money for state and local purposes unless approved by the voters or as provided for by a municipal charter. Ohio

A general health district and a village situated within the health district share in the amount of tax revenue generated within the ten-mill limitation. Consequently, the amount of such tax revenue available to a village or general health district is directly contingent upon the amount of such revenue sought by other governmental entities. *See* 2011 Op. Att'y Gen. No. 2011-048, at 2-383.

A board of health is required to prepare, adopt, and submit an annual appropriation measure to the county budget commission. R.C. 3709.28; *see also* 1997 Op. Att'y Gen. No. 97-026, at 2-154 to 2-155 n.7. Similarly, except as provided in R.C. 5705.28 or R.C. 5705.281, the legislative authority of a village is required to prepare, adopt, and submit an annual tax budget to the county budget commission. R.C. 5705.01(C); R.C. 5705.28(A); *see also* R.C. 5705.29-.32. Once the tax budgets and appropriation measures are submitted, the county budget commission evaluates them, revises and adjusts the estimates of balances and receipts from all sources for funds within these measures and, if necessary, adjusts tax levies within the ten-mill limitation. *See* R.C. 3709.28; R.C. 5705.31; R.C. 5705.32. Adjustments and revisions with respect to a combined general health district's appropriation measure or the tax budget of a village situated within the health district will affect the amount of tax revenue that is available to the village or health district, respectively. This creates competition between a health district and a village situated within the health district for tax moneys generated within the ten-mill limitation.

In the case of the Village of West Jefferson, the mayor is required to prepare the annual appropriations budget for the Village and to submit that budget to the Village council. West Jefferson Charter, § 3.08. The council then must adopt a budget that will be submitted to the county budget commission. *Id*. at § 4.05. Additionally, the mayor may be required to explain the Village's financial needs to the county budget commission. *See* R.C. 5705.32(E). A mayor who also serves as an employee of a general health district that competes for moneys from the same funds could be subject to influences that might prevent her from making completely objective decisions when preparing the Village's budget or if she were required to explain the Village's financial needs to the county budget commission.

An additional budgetary conflict may exist because of competition for moneys in excess of the ten-mill limitation. A general health district and a village situated within the health district may each place a levy on the ballot for tax revenue in excess of the ten-mill limitation. *See* R.C. 3709.29; R.C. 5705.19; *see also* 2007 Op. Att'y Gen. No. 2007-023, at 2-241; 1997 Op. Att'y Gen. No. 97-026, at 2-154 to 2-155 n.7. When the health district and village contemplate asking the voters for this additional funding, a person who serves simultaneously as an employee of the health district and mayor of the village might be subject to divided loyalties and influences that may prevent her decisions as mayor, about the need for additional funding, from being completely objective and disinterested. For example, if the health district has authorized placement of a tax levy issue on the ballot for additional funds, the person as village mayor might be reluctant to advocate in favor of placing a village levy on

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Const. art. XII, § 2. This is known as the "ten-mill limitation." *See* R.C. 5705.02-.03; 2007 Op. Att'y Gen. No. 2007-023, at 2-238 n.12.

the ballot for fear that the health district levy might be rejected in favor of the village levy. *See* 2007 Op. Att'y Gen. No. 2007-023, at 2-241.

We find, however, that the foregoing tax and budgetary conflicts of interest are remote and speculative and can be sufficiently avoided or mitigated. First, a recycling coordinator for the Health District is not required by statute to prepare, adopt, or explain the Health District's tax appropriations measure. Nor is the recycling coordinator statutorily required to determine whether a levy for funds in excess of the ten-mill limitation is required for the Health District. Rather, these duties are performed by the board of health of the Health District. R.C. 3709.29. Thus, as recycling coordinator, this person is not subject to conflicts of interest involving the budget of the Health District or obtaining tax moneys from the county budget commission. Nor is the recycling coordinator subject to a conflict of interest involving a tax levy for funds in excess of the ten-mill limitation.

As mayor, the person is responsible for preparing the Village's annual budget, but her role is limited. West Jefferson Charter, § 3.08. The budget must be adopted by the Village council, and the mayor is not entitled to vote on the budget. *Id.* at §§ 3.04, 4.05. The tax budget is then subject to the review, adjustment, and approval of the county budget commission. R.C. 5705.31; R.C. 5705.32; *see also* R.C. 5705.29-.32; 2007 Op. Att'y Gen. No. 2007-023, at 2-238. Therefore, although two separate and competing tax authorities each prepare and submit an annual tax budget or appropriation measure, it is the county budget commission that actually allocates the tax proceeds within the ten-mill limitation. *See, e.g.*, 2011 Op. Att'y Gen. No. 2011-008, at 2-66. Similarly, the mayor is not entitled to vote upon a measure considered by the Village council regarding whether to place a levy on the ballot for tax revenue in excess of the ten-mill limitation. West Jefferson Charter, § 3.04. Although the mayor does have veto authority over measures passed by the council, including the budget and a proposed tax levy for funds in excess of the ten-mill limitation, the council may nonetheless pass a measure even if the mayor chooses to exercise her veto authority. *Id.* at § 3.05. Nonetheless, a mayor must abstain from participating in deliberations, discussions, or negotiations regarding the village budget and a proposed levy for tax revenue in excess of the ten-mill limitation. The mayor also must abstain from presenting the Village's annual tax budget to the county budget commission. *See* 2011 Op. Att'y Gen. No. 2011-008, at 2-66.

In addition, the fact that a village mayor holds additional employment with a political subdivision that competes with the village for tax moneys generated within the ten-mill limitation or in excess of the ten-mill limitation is an insufficient reason to find that the mayor is subject to an impermissible conflict of interest. As noted in prior Attorney General opinions, if this reason were deemed sufficient, a village mayor would not be permitted to hold any employment or office with a political subdivision that competes with the village for tax moneys generated within the ten-mill limitation or in excess of the ten-mill limitation. 2007 Op. Att'y Gen. No. 2007-023, at 2-239 to 2-240 and 2-242. Further, it is unlikely that both the Village and the Health District will have a tax levy on the same ballot at every election. Therefore, deliberations, discussions, or votes by the village council, which might require the participation of the mayor, should be infrequent. *See id.* at 2-241.

Finally, it is presumed that a person holding the positions of mayor and recycling coordinator will perform her duties in a regular and lawful manner in the absence of evidence to the contrary. *See*

State ex rel. Speeth, 163 Ohio St. 159 (syllabus, paragraph 10); 2007 Op. Att'y Gen. No. 2007-023, at 2-237 to 2-238.

The final potential conflict of interest arises from the mayor's position on the district advisory council of the general health district. The mayor of a village may serve on the district advisory council of a combined general health district. *See* R.C. 3709.03 and R.C. 3709.07. The statutory duties of the district advisory council include "receiving and considering the annual or special reports from the board of health [of the combined general health district], and making recommendations to the board of health or to the department of health in regard to matters for the betterment of health and sanitation within the district or for needed legislation." R.C. 3709.03(A). A district advisory council member who also is an employee of the health district may be required to deliberate, discuss, negotiate, or vote upon a specific recommendation of the district advisory council regarding matters that would directly affect her employment with the health district.

This potential conflict of interest, however, is remote and may be sufficiently avoided. The possibility of the district advisory council considering such a specific recommendation is remote. Further, a member of a district advisory council may abstain from deliberating, discussing, negotiating, or voting upon a recommendation of the district advisory council that would directly affect her employment with the health district.

Questions six and seven ask about the applicability of local charter provisions, resolutions, or ordinances, and federal, state, and local regulations. We find no federal or state regulations prohibiting a person from serving simultaneously in the positions in question. Whether an applicable charter provision, local resolution, ordinance, or departmental regulation prohibits a person from serving in two positions at the same time is a question left for local officials to answer. After reviewing the West Jefferson Charter, however, we do not believe the Charter prohibits a person from simultaneously holding the position of mayor of the Village of West Jefferson and the position of recycling coordinator for the Madison County-London City Health District. Although § 3.02 of the Charter prohibits the mayor from holding another "elective office," the recycling coordinator is not an elected position. Section 3.02 of the Charter also prohibits the mayor from holding another employment position within the Village. The Health District, however, is an independent political subdivision, and employees of the Health District are not employed by the Village. *See* 2010 Op. Att'y Gen. No. 2010-022, at 2-152 ("[h]ealth districts are independent political subdivisions and are not part of a county or municipal government"). Accordingly, the Charter does not prohibit the mayor from being employed as the recycling coordinator for the Health District. Thus, absent a local resolution, ordinance, or departmental regulation rendering the positions of mayor of the Village of West Jefferson and recycling coordinator of the Madison County-London City Health District incompatible, the positions are compatible.

Based on the foregoing, it is my opinion, and you are hereby advised that a person may serve simultaneously in the positions of mayor of the Village of West Jefferson and recycling coordinator for the Madison County-London City Health District provided that as mayor the person does not present the Village's annual tax budget to the county budget commission and does not participate in deliberations, discussions, or negotiations related to (1) an agreement entered into between the Village

and the Health District, (2) the Village's annual tax budget, or (3) a tax levy for tax revenue in excess of the ten-mill limitation. If the mayor also is a member of the Health District's district advisory council, the person must abstain from deliberating, discussing, negotiating, or voting upon a recommendation of the district advisory council that would directly affect her employment as recycling coordinator of the Health District. As recycling coordinator for the Madison County-London City Health District, the person may not participate in deliberations, discussions, or negotiations related to an agreement entered into between the Village and the Health District.

Very respectfully yours,

MICHAEL DEWINE
Ohio Attorney General