June 5, 2006

The Honorable David P. Joyce
Geauga County Prosecuting Attorney
Courthouse Annex
231 Main Street, Suite 3A
Chardon, Ohio 44024-1235

SYLLABUS: 2006-023

A person may not serve simultaneously as a township police chief and member of the board of education of a local school district that has territory in the township.

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OPINION NO. 2006-023

The Honorable David P. Joyce
Geauga County Prosecuting Attorney
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Chardon, Ohio 44024-1235

Dear Prosecutor Joyce:

You have requested an opinion whether a person may serve simultaneously as a township police chief and member of the board of education of a local school district that has territory in the township. In such a situation, the positions are incompatible.

In Ohio a person may not serve simultaneously in two public positions when he is subject to impermissible conflicts of interest. 2003 Op. Att'y Gen. No. 2003-010 at 2-70; 2002 Op. Att'y Gen. No. 2002-039 at 2-249. Such conflicts occur when the person is "subject to divided loyalties and conflicting duties or exposed to the temptation of acting other than in the best interest of the public." 1985 Op. Att'y Gen. No. 85-021 at 2-82; *accord* 2003 Op. Att'y Gen. No. 2003-010 at 2-70.

We must first review the powers, duties, and responsibilities of a member of a board of education of a local school district and township police chief so as to determine whether there are any conflicts of interest between the positions. This review will enable us to determine whether the person will be subject to conflicts of interest when exercising the powers, duties, and responsibilities in either or both positions. 2003 Op. Att'y Gen. No. 2003-010 at 2-70. If our review discloses such conflicts, we must next determine the immediacy of the conflicts to see whether the conflicts may be sufficiently avoided or eliminated entirely so as to allow the person to serve simultaneously in both positions. *Id.* at 2-76. The pertinent factors used in making this determination include, but are not limited to, the probability of the conflict, the ability of the person to remove himself 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.*

The powers, duties, and responsibilities of a member of a board of education of a local school district primarily include governing the public schools in the district and handling the district's fiscal and budgetary matters. In order to administer and operate the public schools in its district, a board of education is empowered to enter into contracts and acquire, hold, possess, and dispose of real and personal property on behalf of the district, R.C. 3313.17; establish rules

for the government of the district, R.C. 3313.20; manage and control the public schools in its district, R.C. 3313.47; provide for the free education of youths of the district at the most convenient places for the attendance of the largest number of youths, R.C. 3313.48; and employ superintendents, teachers, and other necessary employees, R.C. 3313.47, R.C. 3319.01, R.C. 3319.07. As to financial and budgetary matters, a board of education is designated as the school district's taxing authority for purposes of R.C. Chapters 133 (uniform public securities law) and 5705 (tax levy law). *See* R.C. 133.01(NN)(3); R.C. 5705.01(C). In this capacity, the board issues securities for the purpose of providing funds with which to pay one or more final judgments rendered against the school district, R.C. 133.14, issues securities for the purpose of paying all or any portion of the costs of any permanent improvement that the district is authorized to acquire, improve, or construct, R.C. 133.15, prepares the district's annual tax budget, R.C. 5705.28, and levies taxes and assessments on real property within the district, R.C. 133.56; R.C. 5705.03; R.C. 5705.07; R.C. 5705.194; R.C. 5705.21; R.C. 5705.212; R.C. 5705.213.

We will now examine the duties and responsibilities performed by a township police chief. A township police chief is appointed by the board of township trustees to manage the township's police department. R.C. 505.49. As the township's chief law enforcement officer and peace officer, *see* R.C. 2901.01(A)(11)(a); R.C. 2935.01(B), the chief is responsible for assigning duties to the police officers of the township and supervising the provision of police protection services and the keeping of the peace by such officers. *See* R.C. 505.49. *See generally* R.C. 2935.02 ("[i]f an accused person flees from justice, or is not found in the county where a warrant for his arrest was issued, the officer holding the same may pursue and arrest him in any county in this state"); R.C. 2935.03 (township police officers may arrest persons without a warrant); R.C. 2935.10 (township police officers may arrest persons with a warrant); Ohio R. Crim. P. 4 (township police officers may arrest persons with or without a warrant). A township police chief also may participate, as a director or member of an organized task force, in an investigation of organized criminal activity. R.C. 505.49(G).

Our review of the statutory functions and activities of the two positions reveals several impermissible conflicts of interest between the two positions. A township police chief is responsible for disbursing moneys from the township's law enforcement trust fund.[1] Moneys in a township's law enforcement trust fund are disbursed by the township's police chief in accordance with the following:

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[1] R.C. 2933.43(D)(1)(c)(ii) requires a board of township trustees that intends to receive under R.C. 2933.41 any remaining proceeds from the sale of forfeited property or forfeited moneys to establish a law enforcement trust fund. Moneys in a township's law enforcement trust fund are allocated from the fund by the board of township trustees to the township police department. R.C. 2933.43(D)(1)(c)(ii).

> (D)(1).… [A] law enforcement trust fund shall be expended only in accordance with the written internal control policy so adopted by the recipient, and, subject to the requirements specified in [R.C. 2933.43(D)(3)(a)(ii)], only to pay the costs of protracted or complex investigations or prosecutions, to provide reasonable technical training or expertise, to provide matching funds to obtain federal grants to aid law enforcement, in the support of DARE programs or other programs designed to educate adults or children with respect to the dangers associated with the use of drugs of abuse, to pay the costs of emergency action taken under [R.C. 3745.13] relative to the operation of an illegal methamphetamine laboratory if the forfeited property or money involved was that of a person responsible for the operation of the laboratory, or for other law enforcement purposes that the … board of township trustees … determines to be appropriate….
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> ….
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> (3)(a)(i) Prior to being allocated or using any proceeds or forfeited moneys out of … a law enforcement trust fund under division (D)(1)(c) of this section, the … township police department … shall adopt a written internal control policy that addresses the … police department's … use and disposition of all the proceeds and forfeited moneys received and that provides for the keeping of detailed financial records of the receipts of the proceeds and forfeited moneys, the general types of expenditures made out of the proceeds and forfeited moneys, the specific amount of each general type of expenditure, and the amounts, portions, and programs described in division (D)(3)(a)(ii) of this section….
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> (ii) The written internal control policy of a … township police department … shall provide that at least ten per cent of the first one hundred thousand dollars of proceeds and forfeited moneys deposited during each calendar year in the … township's … law enforcement trust fund pursuant to [R.C. 2923.46(B)(7)(c)(ii)] or [R.C. 2925.44(B)(8)(c)(ii)] and at least twenty per cent of the proceeds and forfeited moneys exceeding one hundred thousand dollars that are so deposited, shall be used in connection with community preventive education programs.[2] The manner in which the described percentages are so used shall be determined by the … [police] department … after the receipt and consideration of advice on appropriate community preventive education programs from the county's board of alcohol, drug addiction, and mental health services, from the county's alcohol and drug addition services board, or through appropriate community dialogue. (Footnote added.)

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[2] As used in R.C. 2933.43(D)(3)(a)(ii), "'community preventive education programs' includes, but is not limited to, DARE programs and other programs designed to educate adults or children with respect to the dangers associated with the use of drugs of abuse." R.C. 2933.43(D)(3)(a)(ii).

R.C. 2933.43(D).

Pursuant to R.C. 2933.43(D), a township police chief, as the head of the township's police department, controls the amount of funding a DARE program or other community preventive education program that serves a local school district that includes territory in the township may receive from the township's law enforcement trust fund. Specifically, the police chief is responsible for adopting and revising the township's written internal control policy that addresses the police department's use and disposition of moneys allocated to the department from the township's law enforcement trust fund. This policy establishes the percentage of such moneys that are to be used for DARE programs and other community preventive education programs. In addition, the police chief determines the manner in which the percentage allotted for community preventive education programs is to be used.

Thus, a township police chief who also serves as a member of a board of education of a local school district that includes territory in the township is subject to a conflict of interest when determining the amount of funding, if any, to allocate to a DARE program or other community preventive education program that serves the board of education on which he is a member.[3] In such a situation, it would be difficult for the township police chief to set aside his loyalty to the board of education. Such a predisposition of loyalty could prevent the police chief from making completely objective and disinterested decisions in matters concerning the use of moneys allocated to the township's police department from the township's law enforcement trust fund or result in preferential treatment being accorded to a DARE program or other community preventive education program that serves the board of education on which he is a member. *See* 1989 Op. Att'y Gen. No. 89-101 at 2-489; 1989 Op. Att'y Gen. No. 89-052 at 2-220; 1989 Op. Att'y Gen. No. 89-022 at 2-106; 1985 Op. Att'y Gen. No. 85-006 at 2-18 and 2-19; *see also*

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[3] If moneys from a township's law enforcement trust fund are used to fund a DARE program or other community preventive education program that serves a local school district, the board of education of that district may not be required to use any of the district's moneys to fund the services performed by the DARE program or other community preventive education program. *See, e.g.,* R.C. 3313.95 (the board of education of a local school district and board of township trustees may enter into a contract under which the trustees assign one or more police officers to the district's schools upon such terms and conditions as are set forth in the contract. "The contract shall specify the police officer's duties, which shall be limited to assisting guidance counselors and teachers in working with students concerning the use of alcohol and drugs of abuse…. The contract shall also specify the amount to be paid to the township … by the board of education as compensation for all or part of the salary and benefits of any police officer assigned to its schools in accordance with such contract"); 1993 Op. Att'y Gen. No. 93-068 (syllabus) ("R.C. 505.43 authorizes a township to enter into a contract with a municipal corporation or county sheriff for a law enforcement officer to implement within a local school district that serves the township a program designed to educate children with respect to the dangers associated with the use of illicit drugs").

State ex rel. Baden v. Gibbons, 17 Ohio Law Abs. 341, 344, 1934 Ohio Misc. LEXIS 1224 (Ct. App. Butler County 1934) (a conflict of interest results when the duties of one position may be administered in such a way as to result in favoritism and preference being accorded to the other position); 1958 Op. Att'y Gen. No. 1962, p. 215, at 217-18 (in the preparation of the annual tax budget it may well occur that any proposed modifications or reductions with respect to one subdivision's budget could be detrimental to another subdivision's budget).

A conflict of interest may also exist with regard to the donation of unclaimed property in the possession of the township police department. R.C. 505.108 provides that, "[i]f authorized to do so by a resolution adopted by the board of township trustees … and if the property involved is not required to be disposed of pursuant to another section of the Revised Code, the head of [a] department … may contribute property that is unclaimed for ninety days or more to one or more public agencies." If the township police chief were authorized to dispose of unclaimed property pursuant to R.C. 505.108, this person could be required to determine whether to contribute unclaimed property to the board of education on which he is a member. When making such a determination, it would be difficult for the person as police chief to set aside his loyalty to the board of education and make an unbiased decision as to the disposition of the property or refrain from giving preferential treatment to the needs of the board of education when disposing of unclaimed property. 1989 Op. Att'y Gen. No. 89-101 at 2-489; 1985 Op. Att'y Gen. No. 85-006 at 2-18 and 2-19.

A final conflict of interest exists between the two positions because the township police department is required to investigate teachers and other employees and officers of the local school district for failing to report known or suspected threats of child abuse or child neglect in accordance with R.C. 2151.421(A)(1)[4] or disseminating without authorization the contents of a

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[4] R.C. 2151.421(A)(1) imposes a duty upon school teachers, school employees, and school authorities to report known or suspected threats of child abuse or child neglect:

> No person described in [R.C. 2151.421(A)(1)(b)] who is acting in an official or professional capacity and knows or suspects that a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired child under twenty-one years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child, shall fail to immediately report that knowledge or suspicion to the entity or persons specified in this division.

See generally R.C. 2151.421(A)(1)(b) (R.C. 2151.421(A)(1)(a) "applies to any person who is [a] … school teacher; school employee; [or] school authority").

child abuse or neglect report in violation of R.C. 2151.421(H)(2).[5] Because a person who violates R.C. 2151.421(A)(1) or R.C. 2151.421(H)(2) is guilty of a misdemeanor of the fourth degree, R.C. 2151.99(A), township law enforcement officers have a duty to investigate instances in which it is alleged that a person has violated either of these divisions of R.C. 2151.421. Accordingly, a township police chief and the police officers of his department have a duty to investigate instances in which it is alleged that a teacher or other employee or officer of a local school district has failed to report known or suspected threats of child abuse or child neglect or disseminated without authorization the contents of a child abuse or neglect report.

As discussed in 1989 Op. Att'y Gen. No. 89-022 at 2-106:

> Prior opinions have held that when a public position requires an individual to conduct an objective investigation or review of another entity, a conflict arises when the individual holds a second position which creates a loyalty to that entity or a predisposition toward the outcome of the review or investigation. This occurs even if the second position does not involve direct authority over or responsibility for the matter being reviewed or investigated.
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> Review of the positions of township clerk, city planning commissioner, and member of a citizens advisory committee to a school board shows that all three positions are subject to a conflict of interest if the individuals in those positions are required to participate in or supervise an audit of the subdivision in which they serve…. If the duties of an assistant auditor require involvement in an audit of the township, municipality, or school district where he or she serves in one of the above positions, the potential for conflict is immediate, not remote and speculative. (Citations omitted.)

Accord 2006 Op. Att'y Gen. No. 2006-010 at 2-89 and 2-90; 1989 Op. Att'y Gen. No. 89-052 at 2-220.

If a township police department were required to conduct an investigation involving an alleged violation of R.C. 2151.421(A)(1) or (H)(2) by a teacher or other officer or employee of the board of education of the local school district, it would be difficult for a township police chief who serves as a member of a board of education of the local school district to set aside his loyalty to the board of education during the investigation. *See generally Yates v. Mansfield Bd. of Educ.*, 102 Ohio St. 3d 205, 2004-Ohio-2491, 808 N.E.2d 861 (2004) (a board of education may be held liable when its failure to report the sexual abuse of a minor student by a teacher in violation of R.C. 2151.421 proximately results in the sexual abuse of another minor student by the same teacher); *Campbell v. Burton*, 92 Ohio St. 3d 336, 750 N.E.2d 539 (2001) (a board of education may be held liable for failure to perform a duty expressly imposed by R.C. 2151.421). Even when the investigation is conducted by a township police officer, rather than the police

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[5] R.C. 2151.421(H)(2) states that "[n]o person shall permit or encourage the unauthorized dissemination of the contents of any report made under [R.C. 2151.421]."

chief, the chief is exposed to the temptation of acting other than in the best interest of the public since the chief is responsible for supervising and reviewing all investigations conducted by the officers of his department. A township police chief who serves on a board of education of a local school district and the police officers of his department thus may have a predisposition toward an outcome in an investigation into alleged violations of R.C. 2151.421(A)(1) and (H)(2) by the officers and employees of the board of education, and, as such, accord preferential treatment to the board and its officers and employees during an investigation. *See* 1989 Op. Att'y Gen. No. 89-052 at 2-220; 1989 Op. Att'y Gen. No. 89-022 at 2-106; *see also* 2006 Op. Att'y Gen. No. 2006-010 at 2-89 and 2-90; 2004 Op. Att'y Gen. No. 2004-044 at 2-382.

An examination of the foregoing conflicts of interest discloses that the conflicts can not be sufficiently avoided or eliminated entirely so as to allow a person to serve simultaneously in the positions of township police chief and member of the board of education of a local school district that has territory in the township. Both the township police department and board of education may provide, fund, or participate in programs that educate school children about the dangers associated with the use of alcohol and drugs of abuse. Also, given that child abuse and neglect are pervasive in our society, an allegation that a teacher or other employee or officer of a local school district has failed to report known or suspected threats of child abuse or child neglect or disseminated without authorization the contents of a child abuse or neglect report may arise at any time. It is thus likely that the conflicts of interest will occur.

The conflicts of interest also involve matters that may impact on the school district's budget. For example, if township law enforcement trust fund money is used to fund a DARE program or other community prevention education program that serves the local school district, or if unclaimed property in the possession of the township police department is contributed to the board of education, the board would not be required to use its own funds or resources to provide or acquire the service or property provided or funded by the township police department. Similarly, an investigation concerning an allegation that a teacher or other employee or officer of a local school district has failed to report known or suspected threats of child abuse or child neglect or disseminated without authorization the contents of a child abuse or neglect report may ultimately lead to the board of education being held liable for failing to report the sexual abuse of a child. *See, e.g., Yates v. Mansfield Bd. of Educ.*; *Campbell v. Burton*.

Finally, when a conflict of interest does arise the person, as township police chief, is unable to remove himself from the conflict. As the head of the township's police department, the police chief may not abstain from overseeing or participating in all departmental matters or investigations insofar as the chief is responsible for exercising or delegating all departmental decision-making authority. This means that a township police chief is directly or indirectly involved in all departmental matters or investigations, and, as a result, exerts his influence in such matters or investigations. Hence, a township police chief who serves as a member of the board of education of a local school district that has territory in the township is responsible for, and may not abstain from, overseeing or participating in the disbursement of the township's law enforcement trust fund moneys under R.C. 2933.43, the donation of property under R.C. 505.108, and investigations concerning allegations that a person has failed to report known or

suspected threats of child abuse or child neglect or disseminated without authorization the contents of a child abuse or neglect report.

Accordingly, in light of the factors used for determining the immediacy of conflicts of interest, the conflicts of interest between the positions of township police chief and member of the board of education of a local school district that has territory in the township can not be satisfactorily avoided or eliminated so as to allow a person to serve simultaneously in these two positions. *See generally* 2006 Op. Att'y Gen. No. 2006-010 (syllabus) ("[a] person may serve simultaneously as a trustee of a township that has adopted a limited home rule government pursuant to R.C. Chapter 504 and investigator in the consumer services division of a county auditor's office when the person's duties as an investigator do not include reviewing matters, or conducting or participating in investigations, involving the township"); 1989 Op. Att'y Gen. No. 89-052 at 2-220 ("an impermissible conflict exists between the position of county auditor employee and law librarian if, as county auditor employee, the individual is required to conduct or participate in an audit of the law library association"); 1989 Op. Att'y Gen. No. 89-022 at 2-106 and 2-107 ("[i]f the duties of an assistant auditor require involvement in an audit of the township, municipality, or school district where he or she serves in one of the above positions, the potential for conflict is immediate, not remote and speculative…. Therefore, I find that an impermissible conflict of interest arises if an assistant auditor is required to participate in or supervise the audit of a township in which he or she serves as a township clerk, a municipality in which he or she serves on the city planning commission, or a school district in which he or she serves on a citizens advisory committee to the school board"); 1985 Op. Att'y Gen. No. 85-006 at 2-19 ("[w]here … a statute gives a member of a particular public body the authority to participate directly in a determination as to whether that public body or a different public body is to obtain the benefit of certain funds, I believe that it must be concluded, as a matter of law, that an individual may not serve in positions of trust and authority with respect to both bodies").

Based on the foregoing, it is my opinion, and you are hereby advised that a person may not serve simultaneously as a township police chief and member of the board of education of a local school district that has territory in the township.

Respectfully,

JIM PETRO
Attorney General