

OPINION NO. 2013-008**Syllabus:**

2013-008

The positions of member of a county board of elections and member of a village legislative authority are incompatible under R.C. 731.12, which prohibits a member of a village legislative authority from holding any other public office.

To: Joseph R. Burkard, Paulding County Prosecuting Attorney, Paulding, Ohio

By: Michael DeWine, Ohio Attorney General, March 21, 2013

You have requested an opinion regarding a person's simultaneous service as a member of a county board of elections and a member of the legislative author-

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ity of a village located within the same county.¹ You are particularly concerned with whether a conflict of interest arises with respect to the same individual approving the placement on the ballot of village tax levy renewals submitted to the county board of elections by the village in which the individual serves as a member of the legislative authority. For the reasons that follow, we find the two positions incompatible.

Seven questions are used to determine whether two public positions are compatible. 2011 Op. Att’y Gen. No. 2011-043, at 2-351. All seven questions must yield answers in favor of compatibility in order to conclude that two positions are compatible. 1996 Op. Att’y Gen. No. 96-062, at 2-252. “[T]wo public positions are considered incompatible if, *inter alia*, the empowering statutes of either position limit outside employment.” 1990 Op. Att’y Gen. No. 90-059, at 2-255. R.C. 731.12 sets forth the qualifications for a member of a village legislative authority and provides, in pertinent part, “[n]o member of the legislative authority shall hold any other public office.” We must, therefore, determine whether the position of member of a county board of elections is a public office.

The Ohio Supreme Court has delineated the standard for determining whether a position is a public office as follows:

The usual criteria in determining whether a position is a public office are durability of tenure, oath, bond, emoluments, the independency of the functions exercised by the appointee, and the character of the duties imposed upon him The chief and most-decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law. If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office and not an employment.

. . . [I]t is manifest that the functional powers imposed must be those which constitute a part of the sovereignty of the state.

State ex rel. Landis v. Board of Comm’rs of Butler County, 95 Ohio St. 157, 159-60, 115 N.E. 919 (1917); 1990 Op. Att’y Gen. No. 90-059, at 2-255.

We must now examine the duties of members of a county board of elections. County boards of elections perform numerous and varied duties and responsibilities with respect to the conduct of elections. *See generally* 2006 Op. Att’y Gen. No. 2006-041, at 2-398 to 2-399; 2004 Op. Att’y Gen. No. 2004-019, at 2-160. “[M]embers of boards of elections are the representatives of the Secretary of State in election matters.” 2006 Op. Att’y Gen. No. 2006-041, at 2-398. The members are appointed by the Secretary of State and serve four-year terms. R.C. 3501.06-.07.

¹ The village involved in your opinion request is the Village of Paulding. The Village of Paulding has not adopted a charter form of government pursuant to Ohio Const. art. XVIII, §§ 3, 7.

County boards of elections are required to perform activities related to the registration of voters, the conduct of elections, and the investigation of election irregularities. R.C. 3501.11; 2006 Op. Att’y Gen. No. 2006-041, at 2-398. 2006 Op. Att’y Gen. No. 2006-041, at 2-398 to 2-399 summarized the duties and responsibilities of members of county boards of elections as follows:

In particular, members of county boards of elections are responsible for establishing, defining, providing, rearranging, and combining election precincts; fixing and providing places for voter registration and holding primaries and elections; furnishing polling places with suitable stalls, voting machines and equipment, and other required supplies; and appointing a director, deputy director, employees, and registrars, judges, and other officers of elections. R.C. 3501.11; R.C. 3501.18; R.C. 3501.22; R.C. 3501.29; R.C. 3501.30; R.C. 3501.301. Members also investigate irregularities, nonperformance of duties, or violations of R.C. Title 35 by election officers and other persons; review, examine, and certify the sufficiency and validity of petitions and nomination papers; receive the returns of elections, canvass the returns, make abstracts thereof, and transmit such abstracts to the proper authorities; investigate and determine the residence qualifications of electors and candidates; and maintain voter registration records. R.C. 3501.11.

The position of member of a county board of elections has been found to be a public office for other purposes. *State ex rel. Milburn v. Pethtel*, 153 Ohio St. 1, 9, 90 N.E.2d 686 (1950) (members of a county board of elections are public officers for purposes of Ohio Const. art. II, § 20, which prohibits an in-term change in an officer’s compensation); 2011 Op. Att’y Gen. No. 2011-012, at 2-101 (county board of elections is a public office for purposes of R.C. Chapter 149); 2003 Op. Att’y Gen. No. 2003-027, at 2-228 (members of county boards of elections are public officers for the purposes of determining whether they may waive their compensation).

In light of the standard for determining whether a position is a public office established in *State ex rel. Landis v. Board of Comm’rs of Butler County*, 95 Ohio St. 157, 159-60, 115 N.E. 919 (1917), and the duties of members of a county board of elections as set forth in R.C. Chapter 3501, we conclude that service as a member of a county board of elections is a public office. The duties and responsibilities of election board members are conferred by statute and constitute an exercise of the state’s sovereignty. Accordingly, serving simultaneously as a member of a county board of elections and a member of a village legislative authority is prohibited by R.C. 731.12, and thus, we conclude that the positions of member of a county board of elections and member of a village legislative authority are incompatible. As one of the seven compatibility questions has yielded an answer disfavoring compatibility, it is unnecessary for us to address the remaining six questions.

It is, therefore, my opinion, and you are hereby advised that the positions of member of a county board of elections and member of a village legislative authority are incompatible under R.C. 731.12, which prohibits a member of a village legislative authority from holding any other public office.