

OPINION NO. 91-001

Syllabus:

1. A person who serves as an Administrative Law Judge in the United States Social Security Administration holds a "public position of trust or profit" within the meaning of R.C. 3301.031.
2. R.C. 3301.031 prohibits a member of the Ohio State Board of Education from simultaneously serving as an Administrative Law Judge in the United States Social Security Administration.

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**To: Paul Bricker, President, State Board of Education, Columbus, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, January 8, 1991**

I have before me your request for my opinion regarding the qualifications for service on the State Board of Education under R.C. 3301.031. Specifically, you ask:

1. Does a person who serves as an Administrative Law Judge with the United States Social Security Administration hold a "public position of trust or profit" within the meaning of Section 3301.031 of the Ohio Revised Code?
2. Is a person who serves as an Administrative Law Judge in the United States Social Security Administration eligible to contemporaneously serve as a member of the Ohio State Board of Education?

Members of the State Board of Education are elected pursuant to R.C. 3301.011. R.C. 3301.031, which establishes the qualifications of board members, provides, *inter alia*, that "[a] member of the board shall not during his term of office hold any other public position of trust or profit...."

Administrative law judges (ALJs) of the United States Social Security Administration are appointed by the Secretary of the Department of Health and Human Services pursuant to the authority granted in 5 U.S.C. §3105. They are members of the federal competitive civil service, *see* 5 U.S.C. §§2101, 2102; 5 C.F.R. §930.203, and are entitled to pay prescribed by the Office of Personnel Management, independent of the appointing agency's recommendations or ratings. *See* 5 U.S.C. §5372; 5 C.F.R. §930.210. The ALJs of the Social Security Administration adjudicate appeals of agency determinations regarding disability benefits under Titles II and XVI of the Social Security Act, 42 U.S.C. §§401 *et seq.* and §§1381 *et seq.* *See generally* 20 C.F.R. §§404.929-404.961 (Title II hearings); 20 C.F.R. §§416.1429-416.1461 (Title XVI hearings); 20 C.F.R. §§422.201-422.203 (describing general procedures for hearings before Social Security Administration ALJs). An ALJ serves as the fact finder and decision-maker in these hearings and is empowered to "issue decisions within the requirements of the Administrative Procedures Act [(APA), 5 U.S.C. §§551 *et seq.* and §§701 *et seq.*], which decisions are completely independent and final, signed only by him, and published to the parties in interest without prior review...." *Association of Administrative Law Judges, Inc. v. Heckler*, 594 F. Supp. 1132, 1141 (D.D.C. 1984) (Appendix, Position Description, Administrative Law Judge, Social Security Administration). The APA contains provisions designed to safeguard the decisional independence of ALJs from the agency for which they work. *See, e.g.*, 5 U.S.C. §554(d) (ALJ may not be supervised or directed by officers or employees of agency involved in investigation or prosecution; ALJ may not make *ex parte* contacts about facts of case with anyone inside or outside of agency); 5 U.S.C. §3105 (ALJ may not perform agency duties inconsistent with judicial responsibilities); 5 U.S.C. §4301(2)(D) (ALJ exempted from performance appraisal systems applicable to other agency employees); 5 U.S.C. §5372 (salary not dependent on agency

recommendations). Thus, while an ALJ is an employee<sup>1</sup> of the appointing executive agency, the U.S. Supreme Court has described the role of an ALJ as "functionally comparable" to that of a federal judge. *Butz v. Economou*, 438 U.S. 478, 513 (1978).

Your first question asks whether an ALJ for the Social Security Administration holds a "public position of trust or profit" within the meaning of R.C. 3301.031. As none of the terms involved are expressly defined by state statute, I am guided by the rule of construction that, absent statutory definition, words should be accorded their common, everyday meaning. *See generally State ex rel. Celebrezze v. Board of County Comm'rs*, 32 Ohio St. 3d 24, 27, 512 N.E.2d 332, 334 (1987); *Eastman v. State*, 131 Ohio St. 1, 1 N.E.2d 140 (1936) (syllabus, paragraph 5); R.C. 1.42.

I turn first to the meaning of "public." In the context of R.C. 3301.031, "public" clearly refers to the distinction between governmental and private positions. *See generally Websters New World Dictionary* 1148-49 (2d college ed. 1984) ("public...2. for the use or benefit of all; esp. supported by public funds [a public park]...4. acting in an official capacity on behalf of the people as a whole [a public prosecutor];" "public servant an elected or appointed government official or a civil service employee"); *Black's Law Dictionary* 1227, 1229 (6th ed. 1990) ("public...pertaining to a state, nation, or whole community;" "public entity...includes a nation, state, county, city and county, city, district, public authority, public agency, or any other political subdivision"). An ALJ for the Social Security Administration is clearly in a governmental position.

That the ALJ's position is with the federal government, rather than the state or a political subdivision thereof, does not render it any less public. I note that one of my predecessors, in determining that R.C. 3301.031 prohibits a state board member from serving as a representative to Congress, apparently believed it so obvious that "public" included all governmental positions that he felt it unnecessary to discuss the issue of whether federal positions should be excluded from the scope of that prohibition. *See* 1960 Op. Att'y Gen. No. 1861, p. 715. Upon a closer examination of this issue, it is apparent, moreover, that R.C. 3301.031 does not contain any express language limiting the meaning of the word "public" and it cannot be argued that the state lacks authority to include federal positions within the meaning of "public" for purposes of R.C. 3301.031. While the state has no authority to establish job qualifications for federal offices or employments, the state clearly has authority to set qualifications for its own offices and employments. *See generally Mason v. State ex rel. McCoy*, 58 Ohio St. 30, 53-54, 50 N.E. 6, 9 (1898); *State ex rel. Attorney General v. Covington*, 29 Ohio St. 102, 118 (1876). A federal officer or employee is just as bound to meet such requirements as any other individual seeking to hold the state position. I am, therefore, constrained to construe the word "public" broadly, in accord with the principle of statutory construction that exceptions not made cannot be read into a statute. *See generally Lima v. Cemetery Assoc.*, 42 Ohio St. 128 (1884).

I turn now to the meaning of the word "position." As I have already noted, federal statutes and regulations refer to the job of ALJ as a position. *See* note 1, *supra*. This federal language is not dispositive, however, of whether an ALJ holds a "position" for purposes of R.C. 3301.031. Under Ohio law, whether an individual holding a public office or employment can simultaneously serve in another public

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<sup>1</sup> 5 C.F.R. Part 930, Subpart B (Appointment, Pay, and Removal of ALJs) refers throughout to the "position" of ALJ. "Position," for purposes of federal civil service job classifications, is defined as "the work, consisting of the duties and responsibilities, assignable to an employee," 5 U.S.C. §5102(a)(3), and "employee" is defined as "an individual employed in or under an agency," 5 U.S.C. §5102(a)(2). Generally, for purposes of the federal civil service, the term employee includes both "officers," as statutorily defined at 5 U.S.C. §2104, and certain other appointive positions. *See* 5 U.S.C. §2105 (defining employee).

capacity is sometimes expressly dependent on whether the second public function is an office or an employment.<sup>2</sup> See, e.g., R.C. 3357.05 (technical college board members "shall not be employees of any governmental agency"); R.C. 141.04(D) (certain judges may not hold "any other office of trust or profit"). The word "position," however, in the context of describing a work role, is defined as "a post of employment; office; job." *Webster's New World Dictionary* 1111 (2d college ed. 1984). Thus, by definition, the term "position" should ordinarily be construed to encompass both of these categories. See, e.g., 1981 Op. Att'y Gen. No. 81-078 at p. 2-307 (analysis of whether two public "positions" are compatible applies when two public offices or a public office and public employment are involved). Nonetheless, even when a statute has used the broader term "position," past opinions have sometimes construed it to refer only to offices or to employments. See, e.g., 1990 Op. Att'y Gen. No. 90-014 (holding that, for purposes of R.C. 124.01(F), the term "position" does not include "offices"); 1961 Op. Att'y Gen. No. 2202, p. 238 (suggesting that the term "position" as used in R.C. 121.12, does not include "mere employment").

In examining whether the meaning of "position" should be limited for purposes of R.C. 3301.031, I find that these opinions do not dispute that, by general definition, both offices and employments are types of positions. Their holdings are based, instead, on a finding that, by express language or by application of the entire statutory scheme involved, the legislature has singled out one of these categories for different treatment than other types of positions. In contrast, R.C. 3301.031 contains no such qualifications, either express or implied, on the meaning of the word position. I note, additionally, that R.C. 3301.031 states that "[a] member of the board shall not...hold any *other* public position." (Emphasis added.) As elected officials with defined statutory duties, board members are themselves public officers. See generally *State ex rel. Bricker v. Gessner*, 129 Ohio St. 290, 293-94, 195 N.E. 63, 65 (1935) (defining public office). Thus, use of the word "other" indicates that the legislature intended to include offices in the types of positions prohibited, see *Webster's New World Dictionary* 1007 (2d college ed. 1984) ("other...further or additional"), while use of the broader term "position" indicates an intent not to limit the prohibition to offices alone, see generally *Lake Shore Electric Ry. v. Public Utilities Comm'n*, 115 Ohio St. 311, 319, 154 N.E. 239, 242 (1926) (had the legislature intended a term to have a particular meaning, "it would

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<sup>2</sup> The most important distinction between an office and an employment is the nature of the duties involved. "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." *State ex rel. Landis v. Board of Comm'rs*, 95 Ohio St. 157, 159, 115 N.E. 919, 919 (1917). The statutory duties imposed must constitute part of the sovereignty of the state, which has been defined to include independent duties in relation to the exercise of the police power, independent power in the disposition of public property, power to incur financial obligations upon the government, and power to act on behalf of the government in transactions between it and individuals. *Id.* at 160-61, 115 N.E. at 920. See also *State ex rel. Bricker v. Gessner*, 129 Ohio St. 290, 295, 195 N.E. 63, 65 (1935) (an office is a "position authorized by the organic law of the state, which prescribes the general duties to be performed" in which the officer "exercises independent prerogatives and is not amenable to superior authority"); *State ex rel. [Attorney General] v. Brennan*, 49 Ohio St. 33, 38, 29 N.E. 593, 594 (1892) (public office is a position "where, by virtue of law, a person is clothed, not as an incidental or transient authority, but for such time as denotes duration and continuance, with independent power to control the property of the public, or with public functions to be exercised in the supposed interest of the people"). In contrast, a mere employment is characterized by lack of control over governmental actions taken or over public property, other than to use it as required in the course of employment. Employees "are subject on all occasions and in whatever they do in the course of their employment, to the direction and control of [a superior]." *State ex rel. Attorney General v. Jennings*, 57 Ohio St. 415, 426, 49 N.E. 404, 406 (1898).

not have been difficult to find language which would express that purpose"). It is, therefore, not necessary for me to determine whether, under the principles applicable in Ohio law, an ALJ for the Social Security Administration holds an office or an employment, since, for purposes of R.C. 3301.031, either constitutes a "position."<sup>3</sup>

Having determined that an ALJ for the Social Security Administration holds a public position, I must next determine whether it is a public position of trust or profit. The powers and authority vested in an ALJ of the Social Security Administration by federal statutes and regulations are clearly to be exercised for the benefit of the public, rather than for personal gain. This duty to the public is at the heart of the concept of trust.<sup>4</sup> Positions involving the exercise of independent judicial authority have traditionally been regarded as involving a charge of public trust. *See, e.g.*, 1990 Op. Att'y Gen. No. 90-089 (referee of a municipal court, a position administratively analogous to ALJ, holds an office of trust); 1969 Op. Att'y Gen. No. 69-131 (referees of the probate and domestic relations divisions of the court of common pleas hold offices of trust). The authority of an ALJ, who is part of the executive branch of government, is more properly termed "quasi-judicial." Given the decisional independence of the ALJ, however, I do not find this distinction meaningful, with respect to characterizing the position as one of trust.

The term "profit" is defined as "advantage, gain, benefit." *Webster's New World Dictionary* 1135 (2d college ed. 1984). *See also Black's Law Dictionary* 524 (6th ed. 1990) ("Emolument....The profit arising from office, employment, or labor; that which is received as a compensation for services, or which is annexed

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<sup>3</sup> I note, however, that the position of referee in various Ohio courts has been construed as an office rather than an employment. *See* 1990 Op. Att'y Gen. No. 90-089 (referee of municipal court); 1969 Op. Att'y Gen. No. 69-131 (referees of probate and domestic relations divisions of the court of common pleas). Although such referees serve in the judicial branch of government, while ALJs are members of the executive branch, the two positions are clearly analogous in that both have authority to conduct hearings and that neither are full judgeships. The authority to adjudicate claims bestowed on an ALJ is even greater and more independent than that exercised by such referees. *See, e.g.*, Ohio R. Civ. P. 53(C) (powers of referee subject to specifications and limitations stated in order of reference by appointing court); Ohio R. Civ. P. 53(E)(5) (referee's report "effective and binding only when approved and entered as a matter of record by the court," which must enter its own judgment on the issues).

<sup>4</sup> The concept of trust is most commonly discussed in the context of public offices, which are inherently charges of public trust. *See generally State ex rel Attorney General v. Hawkins*, 44 Ohio St. 98, 109, 5 N.E. 228, 233 (1886) ("[t]he incumbent of a public office has not, under our system of government, any property in it. His right to exercise it is not based upon any contract or grant. It is conferred on him as a public trust to be exercised for the benefit of the public"). The fiduciary duty conferred includes not only the obligation to administer actual property for the public benefit, in the more narrow legal sense of "trust," *see, e.g., Crane Township ex rel. Stalter v. Secoy*, 103 Ohio St. 258, 259-60, 132 N.E. 851, 851 (1921) ("public property and public money in the hands of or under the control of [a public] officer or officers constitute a trust fund, for which the official as trustee should be held responsible to the same degree as the trustee of a private trust"), but also the obligation to exercise the power and authority of the office in the public interest, *see, e.g., State ex rel. [Attorney General] v. Brennan*, 49 Ohio St. at 38, 29 N.E. at 594 (quoted at note 2, *supra*). Any public position, whether an office or not, involves some degree of responsibility to the public. The degree of responsibility necessary to raise the position to the level of a "position of trust" would appear to be related, as is the distinction between an office and an employment, to the degree of independence an individual has in the performance of the duties of that position.

to the possession of office as *salary, fees, and perquisites*") (emphasis added). Thus, positions involving compensation are recognized as positions of profit. *See, e.g.,* 1986 Op. Att'y Gen. No. 86-002 at p. 2-6 n.2 (acting municipal judge); 1965 Op. Att'y Gen. No. 65-061 (municipal judge); 1960 Op. No. 1861 (representative to Congress). Accordingly, the position of ALJ for the Social Security Administration involves profit as well as trust.

For the above reasons, I conclude in answer to your first question, that an ALJ for the Social Security Administration holds a public position of trust or profit within the meaning of R.C. 3301.031. Based on this conclusion, the response to your second question is clear. R.C. 3301.031 expressly prohibits a member of the board from holding "any other public position of trust or profit" during his term of office. Past opinions have construed this language as prohibiting a board member from serving as a substitute municipal judge, a position involving the exercise of judicial authority, *see* Op. No. 65-061, and from serving as a representative to Congress, a federal position, *see* 1960 Op. No. 1861. Thus, the language of the statute and past interpretation thereof compel the conclusion that a board member may not simultaneously serve as an ALJ with the Social Security Administration.

It is, therefore, my opinion, and you are hereby advised that:

1. A person who serves as an Administrative Law Judge in the United States Social Security Administration holds a "public position of trust or profit" within the meaning of R.C. 3301.031.
2. R.C. 3301.031 prohibits a member of the Ohio State Board of Education from simultaneously serving as an Administrative Law Judge in the United States Social Security Administration.