

OPINION NO. 97-044**Syllabus:**

An individual may hold simultaneously the positions of assistant county prosecuting attorney and administrative hearing officer for a child support enforcement agency (CSEA) that is within the county department of human services, provided that the individual, as an administrative hearing officer, does not preside over a hearing in which one of the parties is represented by the county prosecuting attorney who employs him as an assistant county prosecuting attorney or sit in judgment of his own professional work for, and legal advice to, the county department of human services or the CSEA. In addition, the individual, as an assistant county prosecuting attorney, may not conduct civil or criminal proceedings, under R.C. 117.27-.29, R.C. 309.12, R.C. 2733.04, and R.C. 2733.05, against officers of the county department of human services or the CSEA that appoints him as an administrative hearing officer, or initiate criminal or civil proceedings against defendants who fail to comply with child support orders.

To: Gary A. Nasal, Miami County Prosecuting Attorney, Troy, Ohio
By: Betty D. Montgomery, Attorney General, September 23, 1997

You have requested an opinion whether an individual may hold simultaneously the positions of assistant county prosecuting attorney and administrative hearing officer for a child

support enforcement agency (CSEA). You note in your letter that, prior to October 1, 1997, the board of county commissioners for Miami County designated the Miami County Department of Human Services as the CSEA for Miami County. *See* R.C. 2301.35(A).¹ Accordingly, the position of administrative hearing officer is within the county department of human services.

1979 Op. Att'y Gen. No. 79-111 at 2-367 and 2-368 established the following seven question test for determining the compatibility of two public positions:

1. Is either of the positions a classified employment within the terms of R.C. 124.57?
2. Do the empowering statutes of either position limit the outside employment permissible?
3. Is one office 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 a conflict of interest between the two positions?
6. Are there local charter provisions or ordinances which are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

Questions six and seven raise issues of local concern, and it is assumed, for purposes of this opinion, that there are no local departmental regulations, charter provisions, or ordinances that limit the holding of outside employment by an assistant county prosecuting attorney or an administrative hearing officer for the CSEA. Our research discloses that there are no applicable state or federal regulations.

Question one asks whether either of the positions is a classified employment within the terms of R.C. 124.57, which prohibits employees or officers in the classified service of the state, the several counties, cities, city school districts, and civil service townships from participating in political activity, other than to vote or express their political opinions. *See Heidtman v. Shaker Heights*, 163 Ohio St. 109, 126 N.E.2d 138 (1955); [1996-1997 Monthly Record] Ohio Admin.

¹ R.C. 2301.35(A), as amended by Sub. H.B. 408, 122nd Gen. A. (1996) (eff. Oct. 1, 1997), states:

Each county shall have a child support enforcement agency. A government entity designated under this section prior to [October 1, 1997,] the effective date of this amendment[,] or a private or government entity designated under section 307.981 of the Revised Code on or after that date may serve as a county's child support enforcement agency.

Code 123:1-46-02 at 598. The position of assistant county prosecuting attorney is in the unclassified service. R.C. 124.11(A)(11). Information provided indicates that the position of administrative hearing officer is in the classified service. *See* R.C. 329.02. As such, an individual who serves as an administrative hearing officer is prohibited by R.C. 124.57 from participating in political activity.

For purposes of R.C. 124.57, the phrase "political activity" is "limited to those activities designed to further party interests, or to further the election or defeat of a candidate." 1928 Op. Att'y Gen. No. 2276, vol. II, p. 1582 at 1584; *accord Heidtman v. Shaker Heights*; rule 123:1-46-02. Because appointment to the position of assistant county prosecuting attorney does not further party interests or the election or defeat of a candidate, an administrative hearing officer in the classified service does not engage in impermissible political activity when he performs the official duties of an assistant county prosecuting attorney.² *See generally* 1989 Op. Att'y Gen.

² Pursuant to [1996-1997 Monthly Record] Ohio Admin. Code 123:1-46-02(C) at 598, an administrative hearing officer in the classified service is prohibited by R.C. 124.57 from performing the following political activities:

- (1) Candidacy for public office in a partisan election;
- (2) Candidacy for public office in a nonpartisan general election if the nomination to candidacy was obtained in a partisan primary or through the circulation of nominating petitions identified with a political party;
- (3) Filing of petitions meeting statutory requirements for partisan candidacy to elective office;
- (4) Circulation of official nominating petitions for any candidate participating in a partisan election;
- (5) Service in an elected or appointed office in any partisan political organization;
- (6) Acceptance of a party-sponsored appointment to any office normally filled by partisan election;
- (7) Campaigning by writing for publications, by distributing political material, or by writing or making speeches on behalf of a candidate for partisan elective office, when such activities are directed toward party success;
- (8) Solicitation, either directly or indirectly, of any assessment, contribution or subscription, either monetary or in-kind, for any political party or political candidate;
- (9) Solicitation of the sale, or actual sale, of political party tickets;
- (10) Partisan activities at the election polls, such as solicitation of votes for other than nonpartisan candidates and nonpartisan issues;
- (11) Service as recorder, checker, watcher, challenger, judge or board of election pollworker for any party or partisan committee;
- (12) Participation in political caucuses of a partisan nature; and
- (13) Participation in a political action committee which supports partisan activity.

An administrative hearing officer in the classified service who engages in political activity in violation of R.C. 124.57 may be removed or otherwise disciplined pursuant to R.C. 124.34 or prosecuted pursuant to R.C. 124.62. Rule 123:1-46-02(D); 1983 Op. Att'y Gen. No. 83-095.

No. 89-016 at 2-78 ("merely being in the employ of an elected official ... does not constitute political activity"); 1984 Op. Att'y Gen. No. 84-070 at 2-225 n.2 (appointment as deputy sheriff did not in itself constitute political activity under R.C. 124.57). R.C. 124.57 thus does not prevent an individual from serving simultaneously in the positions in question.

Question two asks whether the empowering statutes governing either position limit outside employment. No statute limits the outside employment activities of an administrative hearing officer for a CSEA. An assistant county prosecuting attorney is prohibited from holding any position the county prosecuting attorney is statutorily barred from holding. 1983 Op. Att'y Gen. No. 83-030 at 2-112 and 2-113. No statute, however, prohibits a county prosecuting attorney or an assistant county prosecuting attorney from serving as an administrative hearing officer for a CSEA. Thus, question two may be answered in the negative.

Question three asks whether one position is subordinate to, or a check upon, the other. Although neither the position of assistant county prosecuting attorney nor administrative hearing officer for a CSEA is responsible for assigning duties to, or supervising, the other, the positions may interact with each other. As indicated in the materials submitted in conjunction with your opinion request, an administrative hearing officer for the CSEA is responsible for conducting administrative hearings and issuing administrative orders concerning the existence or nonexistence of a parent and child relationship and the payment of child support. R.C. 2301.358. An assistant county prosecuting attorney may be required to appear on behalf of a CSEA in a hearing before an administrative hearing officer of the CSEA. *See* R.C. 3111.20(C); 12 Ohio Admin. Code 5101:1-30-23; 1987 Op. Att'y Gen. No. 87-090; *see also* R.C. 309.09(A) (a county prosecuting attorney is required to represent all county officers and boards).

You have indicated, however, that the county prosecuting attorney is not responsible for representing the CSEA in hearings before the administrative hearing officers of the CSEA. Rather, the CSEA has employed staff attorneys pursuant to R.C. 2301.354 to represent the CSEA in the performance of its functions pertaining to the enforcement of support orders. In this regard, R.C. 2301.354 provides as follows:

Without the authorization of the court of common pleas or the consent of the prosecuting attorney and without engaging in competitive bidding to obtain the legal services, *any child support enforcement agency may employ, through its appointing authority, staff attorneys to advise, assist, and represent the agency in its performance of its functions pertaining to the enforcement of support orders.* The option to employ the staff attorneys shall be in addition to any other options available to the agency to obtain necessary legal services in connection with its performance of its functions pertaining to the enforcement of support orders, including the use of legal services provided by the prosecuting attorney pursuant to contract or otherwise or the obtaining of legal services through a competitive

bidding process.³ (Footnote and emphasis added.)

Because the county prosecuting attorney does not represent the CSEA in hearings pertaining to the enforcement of support orders,⁴ the assistant county prosecuting attorney in question does not represent the CSEA in hearings before the administrative hearing officers of the CSEA. Accordingly, neither position is subordinate to, or 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 answered by the interested parties because they may more precisely determine the time demands of each position. See 1993 Op. Att'y Gen. No. 93-051 at 2-247. You have indicated, however, that both positions in question are part-time. It would seem likely, therefore, that the positions can be filled competently by the same individual if there is no direct conflict in the working hours of each position.

Question five asks whether there is a conflict of interest between the two positions. An individual is prohibited from holding simultaneously two public positions if he would be 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. 85-042 at 2-150. A conflict of interest occurs when 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. Accordingly, resolution of the compatibility issue of conflict of interest in the case of an assistant county prosecuting attorney who wishes to hold another public position requires a factual analysis of the particular duties and responsibilities assigned to and to be performed by the individual in each of

³ The General Assembly enacted R.C. 2301.354 in 1991. See 1991-1992 Ohio Laws, Part III, 3987 (Am. Sub. H.B. 298, eff. July 26, 1991). Prior thereto a county prosecuting attorney was required to advise and represent a child support enforcement agency (CSEA) in the enforcement of support orders, unless the CSEA employed other counsel pursuant to R.C. 305.14(A). See R.C. 309.09(A). R.C. 305.14(A), which provides for the employment of counsel other than the county prosecuting attorney, provides:

The court of common pleas, upon the application of the prosecuting attorney and the board of county commissioners, may authorize the board to employ legal counsel to assist the prosecuting attorney, the board, or any other county officer in any matter of public business coming before such board or officer, and in the prosecution or defense of any action or proceeding in which such board or officer is a party or has an interest, in its official capacity.

⁴ Notwithstanding the provisions of R.C. 2301.354, you have informed us that your office does provide general legal counsel and representation to the CSEA in a variety of areas, including employment and personnel matters, the review of contracts, competitive bidding issues, certification of home child care providers, estate cases, Medicaid and Medicare issues, food stamp fraud cases, and criminal prosecutions for nonpayment of child support and welfare theft. See note seven, *infra*.

the two positions.⁵ *Rose v. Village of Wellsville*, 63 Ohio Misc. 2d 9, 613 N.E.2d 262 (C.P. Columbiana County 1993); 1997 Op. Att'y Gen. No. 97-034; 1992 Op. Att'y Gen. No. 92-041.

Our review of the duties of an assistant county prosecuting attorney and administrative hearing officer for a CSEA discloses that an individual who holds simultaneously these two positions may be exposed to influences that may prevent his decisions or actions in each position from being completely objective. As indicated above, a county prosecuting attorney or one of his assistants may be required to appear on behalf of a CSEA in a hearing before an administrative hearing officer of the CSEA. A potential conflict of interest exists in that the individual, as an administrative hearing officer, may be required to preside over a hearing in which one of the parties is represented by the county prosecuting attorney who employs him as an assistant county prosecuting attorney. See 1992 Op. Att'y Gen. No. 92-041 at 2-162; 1990 Op. Att'y Gen. No. 90-005 at 2-19. In this situation, it would be difficult for the individual, as an administrative hearing officer, to set aside his loyalty to the county prosecuting attorney. Such a predisposition of loyalty may affect the ability of the individual holding both positions to conduct an impartial hearing or render an impartial decision as an administrative hearing officer. See 1992 Op. Att'y Gen. No. 92-041 at 2-162; 1990 Op. Att'y Gen. No. 90-005 at 2-20.

In addition, the individual, as an administrative hearing officer, may sit in judgment of his own professional work as an assistant county prosecuting attorney, regardless of the county's or county prosecuting attorney's participation in the controversy. See 1992 Op. Att'y Gen. No. 92-041 at 2-162; 1990 Op. Att'y Gen. No. 90-005 at 2-20. If the individual, as an assistant county prosecuting attorney, performs legal work or provides legal advice to the CSEA or county department of human services, the individual, as an administrative hearing officer, may be

⁵ The court in *Rose v. Village of Wellsville*, 63 Ohio Misc. 2d 9, 613 N.E.2d 262 (C.P. Columbiana County 1993) and recent opinions of the Attorneys General, see 1997 Op. Att'y Gen. No. 97-034; 1992 Op. Att'y Gen. No. 92-041, have determined that the specific duties of an assistant county prosecuting attorney who wishes to serve in another public position must be examined to determine whether that assistant county prosecuting attorney would be subject to an impermissible conflict of interest while serving simultaneously in those two positions. As stated in 1992 Op. Att'y Gen. No. 92-041 at 2-164 and 2-165, which determined that the positions of assistant county prosecuting attorney and mayor's court magistrate are compatible:

When incompatibility is based on ... a conflict of interest, however, the facts can create an exception to the general rule that an assistant county prosecuting attorney may not hold any position that the county prosecuting attorney may not hold. Op. No. 86-035 at 2-184 n.2; see also 1916 Op. Att'y Gen. No. 2115, vol. II, p. 1919. This exception provides that an assistant county prosecuting attorney "who performs, on behalf of the prosecuting attorney, only limited duties of a specialized nature, such that his performance of those duties in no way renders his position subordinate to or a check upon the [other position] or conflicts with any of the duties and responsibilities he undertakes" in the other position, may hold the other position even though the county prosecuting attorney may not hold the position. Op. No. 86-035 at 2-184 n.2; see, e.g., 1988 Op. Att'y Gen. No. 88-086 (syllabus, paragraph three) ("[a]n assistant prosecuting attorney whose only duty is to prosecute criminal cases may also serve as an assistant city law director employed for the exclusive purpose of prosecuting criminal cases in municipal court["]).

presented with a situation that requires him to sit in judgment of such work or advice. *See* 1964 Op. Att'y Gen. No. 1023, p. 2-185 at 2-187. In such a situation the individual is exposed to influences that may prevent him from discharging his duties as an administrative hearing officer objectively and in a completely disinterested manner.

You have indicated, however, that the county prosecuting attorney is not responsible for representing the CSEA in hearings before the administrative hearing officers of the CSEA. Additionally, this individual, as an assistant county prosecuting attorney, has not been assigned any responsibilities for providing representation or legal advice to the county department of human services or the CSEA. It is unlikely, therefore, that the individual, as an administrative hearing officer, would be required to preside over a hearing in which one of the parties is represented by the county prosecuting attorney who employs him as an assistant county prosecuting attorney or to sit in judgment of his own professional work for, and legal advice to, the county department of human services or the CSEA. The possibility of a conflict would thus appear to be remote and speculative. "Where possible conflicts are remote and speculative, common law incompatibility or conflict of interest rules are not violated." 1979 Op. Att'y Gen. No. 79-111 (syllabus, paragraph three). Accordingly, if the individual, as an administrative hearing officer, does not preside over a hearing in which one of the parties is represented by the county prosecuting attorney who employs him as an assistant county prosecuting attorney or sit in judgment of his own professional work for, and legal advice to, the county department of human services or the CSEA, the conflict of interest rule is not violated.⁶

A second potential conflict of interest exists in that the individual, as an assistant county prosecuting attorney, may be required to initiate criminal or civil proceedings against defendants who fail to comply with child support orders issued by him as an administrative hearing officer for the CSEA. *See* R.C. 2919.21; R.C. 2301.372. In such a situation, the individual, as an assistant county prosecuting attorney, may be required to sit in judgment of his work as an administrative hearing officer for the CSEA. As indicated above, an individual who holds

⁶ Under the ethical provisions of R.C. Chapter 102 or the rules and canons governing the professional responsibilities of assistant county prosecuting attorneys and administrative hearing officers for a CSEA that is within the county department of human services, an administrative hearing officer may be prohibited from presiding over a hearing in which one of the parties is represented by a county prosecuting attorney who employs him as an assistant county prosecuting attorney or sitting in judgment on his own professional work for, and legal advice to, the county department of human services or the CSEA. However, since "[t]he Attorney General will abstain from rendering an opinion where another governmental entity has been granted the authority to render advisory opinions concerning the relevant subject matter," 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph three), it is appropriate that we refrain from advising you concerning the ethical and professional responsibilities of assistant county prosecuting attorneys and administrative hearing officers. *See generally* R.C. 102.08(A) (the Ohio Ethics Commission is authorized to render advisory opinions construing the provisions of R.C. Chapter 102 (ethics law)); Ohio Gov. Bar R. V § 2(C) (the Board of Commissioners on Grievances and Discipline of the Supreme Court is authorized to issue advisory opinion letters concerning the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary of Ohio, the Code of Professional Responsibility, the Code of Judicial Conduct, or the Attorney's Oath of Office).

simultaneously two public positions is subject to a conflict of interest when his responsibilities in one position influence the performance of his duties in the other position.

Because the individual in his capacity as an assistant county prosecuting attorney is not responsible for initiating criminal or civil proceedings against defendants who fail to comply with child support orders, the potential conflict of interest is remote and speculative.⁷ This assertion is further supported by the fact that you have indicated that it is unlikely that the individual in question will be delegated responsibility for initiating such proceedings. Thus, if the individual, as an assistant county prosecuting attorney, does not initiate criminal or civil proceedings against defendants who fail to comply with child support orders, the individual will not be required to sit in judgment of his work as an administrative hearing officer, and the conflict of interest rule will not be violated.

A final potential conflict of interest exists because a county prosecuting attorney is permitted, R.C. 2733.05, or, in certain instances, required, R.C. 2733.04, to bring an action in quo warranto against, *inter alios*, "a person who usurps, intrudes into, or unlawfully holds or exercises a public office, civil or military" or "a public officer, civil or military, who does or suffers an act which, by law, works a forfeiture of his office." R.C. 2733.01. Because the position of administrative hearing officer is a public office for purposes of R.C. Chapter 2733,⁸

⁷ With respect to the prosecution of felony nonsupport actions, you have stated that the interests of your office and the CSEA regularly coincide since you and the CSEA have jointly established a given dollar amount concerning such prosecutions. Specifically, if the amount of support owed is below the figure established, no prosecution will ensue. However, if the amount owed equals or is greater than the figure established, your office commences a felony nonsupport action against the obligor.

⁸ The Ohio Supreme Court has set forth the following criteria for determining whether a public position constitutes a public office:

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.* (Emphasis added.)

State ex rel. Landis v. Board of Comm'rs of Butler County, 95 Ohio St. 157, 159, 115 N.E. 919, 919 (1917).

Pursuant to R.C. 2301.358(A), an administrative hearing officer is responsible for the issuance of administrative orders determining the existence or nonexistence of a parent and child relationship and requiring the payment of child support. An administrative hearing officer in the discharge of his duties under R.C. 2301.358 exercises judicial powers. As stated in 1992 Op. Att'y Gen. No. 92-041 at 2-163 n.3, "[t]he exercise of judicial powers is clearly a sovereign function of government." Therefore, since the duties of an administrative hearing officer are prescribed by

an assistant county prosecuting attorney may have to determine whether to institute a quo warranto action against himself as an administrative hearing officer. A potential conflict of interest thus exists because the individual, as an assistant county prosecuting attorney, is exposed to the temptation of acting other than in the best interest of the public. *See* 1992 Op. Att'y Gen. No. 92-041 at 2-163.

In addition, there may be situations in which an assistant county prosecuting attorney may have to determine whether to institute civil or criminal actions against officials of the county department of human services or the CSEA to recover misused or misappropriated public moneys or property. *See* R.C. 117.27-.29; R.C. 309.12. Thus, there is a potential conflict of interest in that the individual, as an assistant county prosecuting attorney, may not bring an action under R.C. 117.27-.29 or R.C. 309.12 against officials of the county department of human services or the CSEA for fear of reprisals, in his position as administrative hearing officer, by the officials of the county department of human services or the CSEA.

In your letter, however, you have explained that the individual in his capacity as an assistant county prosecuting attorney is not required to review or prosecute quo warranto cases under R.C. 2733.04 or R.C. 2733.05 against officers of the county department of human services and the CSEA, or responsible for bringing legal actions under R.C. 117.27-.29 and R.C. 309.12 against officials of the county department of human services and the CSEA. Also, the delegation of such duties to the assistant county prosecuting attorney is not contemplated at this time. Thus, since the individual, as an assistant county prosecuting attorney, is not delegated responsibility for bringing quo warranto actions pursuant to R.C. 2733.04 or R.C. 2733.05 or legal actions to recover public moneys under R.C. 117.27-.29 or R.C. 309.12, the potential conflicts of interest do not render incompatible the specific positions with which you are concerned.

Based on the foregoing, it is my opinion, and you are hereby advised that an individual may hold simultaneously the positions of assistant county prosecuting attorney and administrative hearing officer for a child support enforcement agency (CSEA) that is within the county department of human services, provided that the individual, as an administrative hearing officer, does not preside over a hearing in which one of the parties is represented by the county prosecuting attorney who employs him as an assistant county prosecuting attorney or sit in judgment of his own professional work for, and legal advice to, the county department of human services or the CSEA. In addition, the individual, as an assistant county prosecuting attorney, may not conduct civil or criminal proceedings, under R.C. 117.27-.29, R.C. 309.12, R.C. 2733.04, and R.C. 2733.05, against officers of the county department of human services or the CSEA that appoints him as an administrative hearing officer, or initiate criminal or civil proceedings against defendants who fail to comply with child support orders.

statute and involve the exercise of a sovereign function of government, the position of administrative hearing officer is a public office for purposes of R.C. Chapter 2733. *Cf. id.* (the position of mayor's court magistrate is a public office); 1990 Op. Att'y Gen. No. 90-089 at 2-381 and 2-382 (the position of municipal court referee is a public office). *See generally* 1991 Op. Att'y Gen. No. 91-001 at 2-4 ("[p]ositions involving the exercise of independent judicial authority have traditionally been regarded as involving a charge of public trust").