

OPINION NO. 72-011**Syllabus:**

The position of acting administrator of a county board of mental retardation is incompatible with the position of full-time teacher at the school over which the board has supervision, and the county auditor may not legally pay for the employee's services as acting administrator.

To: George F. Burkhart, Monroe County Pros. Atty., Woodsfield, Ohio
By: William J. Brown, Attorney General, February 7, 1972

Your request for my opinion reads as follows:

"May an employee of the county board of Mental Retardation serve as the acting administrator of the board and be paid in both capacities?

"To be specific, the employee is a full-time teacher at the Mentally Retarded School and has acted in the capacity of acting administrator, for which services she has billed the county.

"May the county auditor legally pay for the employee's services as acting administrator?"

The function of a county board of mental retardation is to administer and supervise such training centers and programs for the mentally retarded as may be established under Section 5127.01, Revised Code. See Opinion No. 71-067, Opinions of the Attorney General for 1971, and Opinion No. 71-070, Opinions of the Attorney General for 1971. The powers and duties of the board are prescribed by Section 5126.03, Revised Code, which provides, in pertinent part, as follows:

"The county board of mental retardation, subject to the rules, regulations, and standards of the commissioner of mental retardation shall:

"(A) Administer and supervise facilities, programs, and services established under section 5127.01 of the Revised Code and exercise such powers and duties as prescribed by the commissioner;

" * * * * *"

"(C) Employ such personnel and provide such services, facilities, transportation, and equipment as are necessary;

" * * * * *"

The board is required to appoint an administrator to carry on the administration of its functions and to assist it in the appointment of all necessary employees. Section 5126.04, Revised Code, provides as follows:

"The county board of mental retardation shall appoint an administrator or executive secretary who shall administer the work of the board of mental retardation, subject to the regulations of such board.

"With the approval of the board, such administrator or executive secretary shall appoint all other employees necessary to fulfill the duties invested in such board."

I find no statutory prohibition against a full-time teacher in a mental retardation center acting simultaneously as administrator for the county board of mental retardation. We must, therefore, look to the rule of the common law as to compatibility of employment. In Ohio, the general rule on this subject has been stated in State, ex rel. Attorney General v. Gebert, 12 Ohio C.C.R. (n.s.) 274, 275 (1909) as follows:

"Officers are considered incompatible when one is subordinate to, or in any way a check upon, the other; or when it is physically impossible for one person to discharge the duties of both."

See Opinion No. 71-025, Opinions of the Attorney General for 1971, and Opinion No. 71-027, Opinions of the Attorney General for 1971.

It may be argued, of course, that both the administrator and the teacher are mere employees of the board, and that the two positions cannot, therefore, be incompatible. See, for example, Opinion No. 71-027, *supra*; Opinion No. 2797, Opinions of the Attorney General for 1962; Opinion No. 3717, Opinions of the Attorney General for 1926; and Opinion No. 1023, Opinions of the Attorney General for 1920. I think, however, that the potential authority of the position of administrator under the above quoted statutes is such that the administrator is inherently a check upon the other employees of the board.

Under Section 5126.03, *supra*, the county board has the primary responsibility for the administration of the mental retardation facilities and programs, and it has the primary responsibility for employment of personnel. On the other hand, the administrator is also given authority under Section 5126.04, *supra*, to administer the facilities and programs subject to the board's regulations, and, with the approval of the board, to appoint all personnel. Obviously, if the county board's regulations retain only ultimate authority and delegate the details of administration and personnel work to the administrator, the teachers will be subordinate to the administrator. The case, therefore, is similar to that confronted by one of my predecessors who held that the superintendent of a county children's home could not also act as visiting agent of the board of the home when the superintendent was charged with supervision of the visiting agent. Opinion No. 790, Opinions of the Attorney General for 1914, Volume I, page 272. The principle has been stated in *State, ex rel. Hover v. Wolven*, 175 Ohio St. 114 (1963), which held that membership on a county board of education were incompatible since the former was subordinate to the latter. The Court said, at page 118, as follows:

"The statutes make the local board subordinate to the county board. The latter supervises the former. In some instances the county board takes over entirely the responsibilities and duties of the local board. The county board may even terminate the existence of the local board. * * *"

Opinion No. 70-005, Opinions of the Attorney General for 1970, rendered by my predecessor at your request, is clearly distinguishable, for it found no possibility under the statutory framework that the administrator of a county board of mental retardation could ever be "subordinate to, or in any way a check upon," the director of a county welfare department. It is conceivable that the regulations of a particular county board of mental retardation might so limit the administrator to purely clerical and ministerial functions as to leave him no authority over the teaching staff. Under the facts as stated in your letter, however, I am not at liberty to assume that that is the case here.

In specific answer to your question it is my opinion, and you are so advised, that the position of acting administrator of a county board of mental retardation is incompatible with the position of full-time teacher at the school over which the board has supervision, and the county auditor may not legally pay for the employee's services as acting administrator.