OPINION NO. 85-006

Syllabus:

1. The offices of member of the board of education of a local school district and trustee of a township which is located within the school district are incompatible. (1966 Op. Att'y Gen. No. 66-060; 1949 Op. Att'y Gen. No. 951, p. 598; 1927 Op. Att'y Gen.

No. 2, vol. I, p. 5; 1910-1911 Annual Report of the Att'y Gen. at 909, followed. 1909-1910 Annual Report of the Att'y Gen. at 677, overruled.)

2. If a board of education determines that a member of the board has, after accepting his office as member of the board, accepted a second office whose duties are incompatible with those of member of the board of education, the board may determine that the member has, in effect, resigned from the board of education, may recognize a vacancy on the board, and may fill the vacancy pursuant to R.C. 3313.11.

3. If an individual simultaneously accepts the office of member of the board of education of a local school district and the office of trustee of a township which is located within the school district, the board of education may request that a prosecuting attorney or the Attorney General bring an action in quo warranto under R.C. 2733.05 to determine the authority of the individual to continue to serve in both offices.

To: Michael Ward, Athens County Prosecuting Attorney, Athens, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, March 5, 1985

You have asked for an opinion on the question whether one person may simultaneously hold the position of member of the board of education of a local school district and the position of trustee of a township which is located within the school district. The facts you have presented concern the Alexander Local School District, which encompasses four townships in Athens County and one township—Columbia Township—in Meigs County. The individual in question has been elected both member of the Alexander Local Board of Education and trustee of Columbia Township in Meigs County. You have, further, asked, if these positions are found to be incompatible, what action the school board should take with respect to a member of the school board who is also serving as township trustee.

As your letter of request indicates, 1966 Op. Att'y Gen. No. 66-060 addressed the issue of compatibility of the positions of township trustee and member of the board of education of a local school district which includes part of the township. That opinion considered a situation in which a school district which was located primarily in one county encompassed part of a township in another county. The individual in question resided in the part of the township in the other county which was located within the school district; he was elected both to the board of education and to the board of township trustees. Without discussing the fact that two counties were involved, Op. No. 66-060 concluded that there was no statutory prohibition against the same person simultaneously holding both positions, but that the positions were incompatible at common law because, as evidenced by various statutory provisions, the two bodies might be in competition for available funds. That result was based on 1958 Op. Att'y Gen. No. 2202, p. 361, which concluded that the positions of clerk of a local school board and township trustee were incompatible, and was consistent with a number of earlier opinions. See 1949 Op. Att'y Gen. No. 951, p. 598 (the office of township trustee and the office of member of a local board of education located within the township are incompatible); 1927 Op. Att'y Gen. No. 2, vol. I, p. 5 (the offices of township trustee and member of the township board of education are incompatible); 1910-1911 Annual Report of the Att'y Gen. at 909. But see 1909-1910 Annual Report of the Att'y Gen. at 677 (finding no incompatibility between the offices of township trustee and member of the township board of education).

The general theory behind this line of opinions is that a township and a local school district are political subdivisions which may be in competition for the same funds and, thus, an individual who serves on both the board of trustees and the board of education may have conflicting duties and loyalties. See R.C. 5705.01(A) (defining both a township and a local school district as a "subdivision" for purposes of R.C. Chapter 5705); R.C. 5705.01(C) (defining both a board of township trustees

and a board of education as a "taxing authority" for purposes of R.C. Chapter 5705); R.C. 5705.28 (taxing authority of each subdivision adopts a tax budget for each fiscal year); R.C. 5705.30 (subdivision submits its budget to the county auditor); R.C. 5705.31 (county auditor presents annual tax budgets of various subdivisions to the county budget commission); R.C. 5705.32 (county budget commission may, to a limited extent, adjust amounts within the various budgets; representatives of the various subdivisions may appear before the county budget commission to explain their financial needs); R.C. 5705.37 (a dissatisfied subdivision may appeal the action of the budget commission); 1927 Op. No. 2 at 5 ("in the preparation of annual budgets, the disposition of public moneys as between the school district and the township and the fixing of tax levies. . .the result might be that the two boards would be placed in the position of adversaries"). Cf. 1983 Op. Att'y Gen. No. 83-016 (concluding that the positions of township trustee and member of a county board of education are compatible and noting that, since a county board of education is not a tax levying body and does not receive funds from the county budget commission, there is no possibility of disputes arising as to the disposition of public moneys which would place the two bodies in the position of adversaries). See also 1939 Op. Att'y Gen. No. 1575, vol. III, p. 2346; 1931 Op. Att'y Gen. No. 2896, vol. I, p. 145.

Some question as to the appropriateness of the conclusion reached in Op. No. 66-060 is reflected in 1961 Op. Att'y Gen. No. 2480, p. 532. 1961 Op. No. 2480 concluded that there is no incompatibility between the office of township clerk and the office of member of the board of education for the local school district in which the township is located, on the basis that, even though both bodies submit their budgets to the county budget commission and defend their budgets before that commission, the revenue which is available for a local school district is clearly fixed by statute, so that there is no possibility of conflict between the two bodies in connection with the distribution of taxes. It has, further, been noted in a recent opinion of this office that, "while each taxing authority submits a tentative budget, it is the budget commission which actually allocates money to the various subdivisions after adjusting the rates of taxation, fixing the amount of taxes to be levied, and adjusting the estimates of balances and receipts from available sources." 1981 Op. Att'y Gen. No. 81-010 at 2-33. It might, therefore, be argued that the mere fact that two bodies have their budgets reviewed by the county budget commission is not sufficient to make membership on the two bodies incompatible. Cf. 1972 Op. Att'y Gen. No. 72-109 at 2-426 (concluding that the positions of township clerk and county highway department employee are incompatible because, "since the township clerk is the fiscal officer, he might be ordered to appear before the budget commission to defend the township budget, and tempted to subordinate his interests in that budget in favor [of] the budget of the county highway department"); 1963 Op. Att'y Gen. No. 559, p. 566 (concluding that the positions of township clerk and member of the board of health of a general health district are incompatible because both bodies appear before the budget commission); 1961 Op. No. 2480 at 534 ("[s]ince 1927, when the Budget Law went into effect, it often happens that officers of different political subdivisions of the state find themselves on opposite sides in the contest for a share of the tax dollar and that, thus, incompatibility not apparent at first blush, is discovered where there was none before").

I note, further, that the situation which you have described may be somewhat different from the typical case because the school district encompasses territory in two counties. R.C. 5705.32 provides generally that the county budget commission may adjust amounts within the budgets of various subdivisions, within the limits provided by law. R.C. 5705.48 contains provisions specifically addressing the situation in which a taxing district is located in two or more counties, as follows:

> Whenever a taxing district is located in two or more counties, the budget commission of the counties in which such district is located shall meet in joint session at the call of the chairman of the commission of the county in which the greatest value of taxable property of such taxing district is located, and adjust the rates of taxation for the purpose of such district so as to enforce the limitations on the tax rate prescribed by law and to produce uniform rates throughout the district. The levies for such taxing district

> purposes shall not be reduced by such joint budget commission below what would be required to enforce such limitation in the part of such district in which the least reduction of such levies is necessary to enforce such limitation, and such levies so fixed shall be applied uniformly throughout such district.

Pursuant to this scheme, the chairman of the budget commission of the county in which the greater value of taxable property of the Alexander Local School District is located—i.e., Athens County—should call a joint session with the budget commission of Meigs County to consider the budget of the school district. In contrast, the budget of Columbia Township is, under R.C. 5705.32, subject to review and adjustment only by the Meigs County budget commission. The procedure established by statute thus seems to provide that the school board and the township trustees will appear before two different (but overlapping) budget commissions.

As noted above, Op. No. 66-060 considered a similar factual situation and, without discussing the fact that the school district included territory in two counties, concluded that a conflict existed under the general rule outlined above. It is, however, unnecessary for me to consider the applicability of that rule to the facts which you have presented, since I am aware of one statutory provision which would, regardless of the nature of county boundaries, present a direct conflict of loyalties to an individual who served both as a township trustee and as a member of a local board of education which served the township. R.C. 5731.48 states in part:

> Sixty-four per cent of the gross amount of taxes levied and paid under this chapter [estate tax], shall be for the use of the municipal corporation or township in which the tax originates, and shall be credited as follows:
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> . . . .
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> (C) To the general revenue fund or to the board of education of the school district of which the township is a part, for school purposes, as the board of township trustees by resolution may approve, in the case of a township.

While there may be other funds which are available only to a township or to a local school district and, thus, are not the subject of controversy between the two, see, e.g., R.C. 5747.01(Q) (for purposes of R.C. 5747.50-.55, relating to the county's undivided local government fund, "subdivision" includes a township but does not include a board of education); R.C. Chapter 5748 (school district income tax), the estate tax funds to which R.C. 5731.48 refers clearly are available to either the township or the local board of education, as the board of township trustees directs and regardless of the fact that the school district may cross county lines.

The common law standards for determining whether two public offices are incompatible were discussed in State ex rel. Hover v. Wolven, 175 Ohio St. 114, 191 N.E.2d 723 (1963). That opinion states, in part:

> 42 American Jurisprudence, 936, Section 70, makes this observation:
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> "They [offices] are generally considered incompatible where such duties and functions are inherently inconsistent and repugnant so that, because of a contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both. . . ."

175 Ohio St. at 117, 191 N.E.2d at 726. See State ex rel. Attorney General v. Gebert, 12 Ohio Cir. Ct. (n. s.) 274 (1909); 1984 Op. Att'y Gen. No. 84-068 at ____ ("[t]he common law rule against conflict of interest. . .prohibits a public officer from holding dual positions if he would be subject to conflicting duties or loyalties, or if he would be exposed to the temptation of acting in a manner that is not in the best interests of the public"); 1979 Op. Att'y Gen. No. 79-111.

It is true that this office has taken the position that, where conflicts between two public positions are remote and speculative, the positions need not be found to be incompatible, particularly if the individual may withdraw from participating in particular actions if an actual conflict should arise. See, e.g., 1981 Op. Att'y Gen. No. 81-090; 1981 Op. Att'y Gen. No. 81-087; 1980 Op. Att'y Gen. No. 80-035; 1979 Op. Att'y Gen. No. 79-112; Op. No. 79-111 at 2-372 ("[t]he factors to be considered with respect to questions of potential conflicts are the degree of remoteness of a potential conflict, the ability or inability of an individual to remove himself from the conflict, whether the individual exercises decision-making authority in both positions, whether the potential conflict involves the primary functions of each position, and whether the potential conflict may involve budgetary controls. Thus, not all potentialities for conflict will render positions incompatible. . ."). It has, however, also been noted that potential conflicts involving budgetary controls are of particular concern. See State ex rel. Baden v. Gibbons, 17 Ohio L. Abs. 341 (Ct. App. Butler County 1934); Op. No. 79-111.

Where, as in the case of R.C. 5731.48, 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. A township trustee who also served as a member of a local board of education would suffer from conflicting loyalties if he were placed in the position, as trustee, of participating in a decision as to whether the township or the board of education should receive funds under R.C. 5731.48. In 1961 Op. No. 2480 my predecessor considered an earlier version of this provision, then appearing at R.C. 5731.53, and concluded that it would not prevent a township clerk from serving on a local board of education because the township clerk would be without voice in the matter of whether the township or the school district should receive the estate tax funds. Clearly the opposite result must be reached with respect to a township trustee, who has the responsibility of serving the township in the exercise of functions under R.C. 5731.48. I conclude, therefore, that the offices of member of the board of education of a local school district and trustee of a township which is located within the school district are incompatible. I reach this conclusion as a matter of law, and note that, because the statutes relating to the two positions impose upon them responsibilities that are inconsistent, a single individual may not simultaneously hold both positions, notwithstanding the fact that there may, as a practical matter, be many areas in which no conflicts exist.

Your second question asks, if the positions of member of the board of education of a local school district and township trustee are found to be incompatible, what action should be taken by a local school board with respect to a member of the school board who is also serving as township trustee. The determination as to which course of action would be best in a particular situation is one which must be made by the local board of education, with the advice of its legal counsel, rather than by this office. I am, however, able to set forth a general discussion of legal principles relating to the situation which you have described.

As is indicated in the materials which you provided to me, a situation similar to that which you have outlined was considered by the Ohio Supreme Court in State ex rel. Hover v. Wolven. That case involved a member of a local school board who took office as a member of the county school board. The court found that the two offices were incompatible and held: "Where an individual accepts a second office whose duties are incompatible with those of another office already held by such individual, the first held office is thereby vacated." Id. (syllabus, paragraph 3). The court then found that the local board of education was authorized to recognize a vacancy on the board and fill it pursuant to statute. See R.C. 3313.11.

State ex rel. Hover v. Wolven constitutes an application of the common law rule that "the acceptance by an officer of a second office which is incompatible with the one already held is a vacation of the original office and amounts to an implied resignation or abandonment of the same." State ex rel. Witten v. Ferguson, 148 Ohio St. 702, 707-08, 76 N.E.2d 886, 890 (1947) (citations omitted). The rule has been found applicable "whether the incompatibility is based on the common law or

by reason of a constitutional mandate, or because of an express statutory direction." State ex rel. Baden v. Gibbons, 17 Ohio L. Abs. at 346 (quoting 22 R.C.L. 418, §63). Pursuant to this rule, if a member of a local board of education accepts an office which is, under common law principles, incompatible with membership on the school board, he may be found to have abandoned or resigned from his position on the school board. But see Ohio Const. art. II, §38 ("[l] aws shall be passed providing for the prompt removal from office, upon complaint and hearing, of all officers. . .for any misconduct involving moral turpitude or for other cause provided by law. . ."); 1983 Op. Att'y Gen. No. 83-095; 1954 Op. Att'y Gen. No. 4058, p. 367. In such event, the local board of education may find that a vacancy exists and fill the vacancy pursuant to R.C. 3313.11, which states, in part:

> A vacancy in any board of education may be caused by death, nonresidence, resignation, removal from office, failure of a person elected or appointed to qualify within ten days after the organization of the board or of his appointment or election, removal from the district, or absence from meetings of the board for a period of ninety days, if such absence is caused by reasons declared insufficient by a two-thirds vote of the remaining members of the board, which vote must be taken and entered upon the records of the board not less than thirty days after such absence. Any such vacancy shall be filled by the board at its next regular or special meeting, not earlier than ten days after such vacancy occurs. A majority vote of all the remaining members of the board may fill any such vacancy.

If the local board of education fails to fill a vacancy pursuant to this section, the county board of education may act under R.C. 3313.85, as follows: "If the board [of education] of any local school district. . .fails to fill a vacancy in such board within a period of thirty days after such vacancy occurs, the county board of education in which such district is located, upon being advised and satisfied of such failure, shall act as such board and perform all duties imposed upon such board." See State ex rel. Hover v. Wolven, 175 Ohio St. at 119-20, 191 N.E.2d at 727 (Taft, C. J., concurring).

It is, however, not clear that the common law rule discussed above is directly applicable to the situation with which you are concerned. You have described a situation in which a single individual was, at the general election in November, 1983, elected as both township trustee and member of a local board of education. Pursuant to R.C. 505.01, the term of an individual who is elected township trustee at a general election begins on the first day of January following his election. Pursuant to R.C. 3313.09, the term of office of a member of a board of education begins on the first day of January after his election. Before entering upon the duties of either office, the elected individual must qualify by taking an oath, Ohio Const. art. XV, §7; R.C. 3.22-.23; R.C. 3301.10, and, in the case of a township trustee, by giving bond, R.C. 505.02. Assuming, however, that the individual about whom you have inquired qualified for both positions prior to January 1, it appears that he may be found to have accepted both offices simultaneously on January 1, when the term of each began. See generally R.C. 503.25-.27; R.C. 3313.11 (vacancy in any board of education may be caused by failure of a person elected to qualify within ten days of his election); State ex rel. Gahl v. Lutz, 132 Ohio St. 466, 9 N.E.2d 288 (1937); State ex rel. Lease v. Turner, 111 Ohio St. 38, 144 N.E. 599 (1924); State ex rel. Maxwell v. Wilson, 106 Ohio St. 224, 140 N.E. 183 (1922); State ex rel. Witham v. Nash, 65 Ohio St. 549, 63 N.E. 83 (1902); 1981 Op. Att'y Gen. No. 81-085; 1928 Op. Att'y Gen. No. 1579, vol. I, p. 109; 1918 Op. Att'y Gen. No. 967, vol. I, p. 179. I am aware of no common law rule for determining, in such a case, which of two incompatible positions should be deemed to have been accepted later, and which position should be deemed to have been abandoned. I am, therefore, unable to conclude that the local school board has a clear right to recognize and fill a vacancy pursuant to R.C. 3313.11.[1]

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[1] You may, of course, reach a different conclusion if your research into a particular situation discloses facts which are different from those set forth in this opinion.

It appears, instead, that this situation falls within the general rule discussed in State ex rel. Attorney General v. Craig, 69 Ohio St. 236, 245, 69 N.E. 228, 230 (1903), as follows:

> When there is some color of title, resort must first be had to quo warranto, but where there is no such color, but a mere nullity, a legal appointment may be made to fill the office, and then if the party in the wrong still persists in holding onto the office, he may be ousted by proceedings for that purpose.

The Craig case involved a situation in which members of the city council who were, by statute, ineligible to serve in other city offices, had been appointed to serve as members of the board of health. The court found that the appointment of such individuals to the board of health was a nullity and that their positions as members of the board of health might be considered vacant.

The facts in the situation which you have described are, clearly, distinguishable. No statute expressly prevents an individual from holding the two positions in question. The incompatibility between the offices may be determined only from an examination of statutes relating to the two positions, see R.C. 5731.48, and may, in fact, be the subject of some dispute. See generally Op. No. 81-090; Op. No. 80-035; Op. No. 79-111; 1961 Op. No. 2480. It appears, therefore, that the individual in question could hold either position, and that neither of his acceptances may be viewed as a nullity. Further, it is not clear from the facts before me that the individual in question accepted one office subsequent to accepting the other; thus, it is not clear that either of the offices may be deemed to have been vacated by an implied resignation. See State ex rel. Hover v. Wolven. The situation you have described, thus, appears to involve some color of title to the position of member of school board. I cannot, therefore, conclude that the school board may simply determine that the position is vacant and proceed to fill it. The better approach would appear to be to seek to have action taken to determine the right of the individual in question to serve as school board member. State ex rel. Attorney General v. Craig. See generally Ohio Const. art. II, §38; State ex rel. Baden v. Gibbons, 17 Ohio Law Abs. at 346 ("[n] o judicial determination is therefore necessary to declare the vacancy of the first, but the moment he accepts the new office the old one becomes vacant, as is said in one case 'His acceptance of the one was an absolute determination of his right to the other' and left him 'no shadow of title, so that neither quo warranto nor a motion was necessary' ") (quoting Mecham on Public Offices and Officers, §429).

It is firmly established in Ohio that the proper proceeding for inquiring into a public officer's title to his office is a proceeding in quo warranto. Jones v. Sater, 82 Ohio Law Abs. 597, 167 N.E.2d 362 (Ct. App. Franklin County 1960); State ex rel. Kay v. Nixon, 82 Ohio App. 264, 265, 81 N.E.2d 399, 400 (Adams County 1947) ("[i] t has been repeatedly held in Ohio that quo warranto is the only proper proceeding by which to test the title to an office"); Morrow v. City of Cleveland, 73 Ohio App. 460, 56 N.E.2d 333 (Cuyahoga County 1943). Actions in quo warranto are governed by R.C. Chapter 2733. R.C. 2733.01 states, in part:[2]

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[2] R.C. 2733.01(B) authorizes a civil action in quo warranto "[a]gainst a public officer, civil or military, who does or suffers an act which, by law, works a forfeiture of his office." It has been held that an action under R.C. 2733.01(B) will lie only where the act in question "has been made a cause of forfeiture or removal by statute." State ex rel. Attorney General v. McLain, 58 Ohio St. 313, 321, 50 N.E. 907, 908 (1898); see, e.g., State ex rel. Saxbe v. Franko, 168 Ohio St. 338, 154 N.E.2d 751 (1958) (where statute required that a municipal judge be admitted to the practice of law, revocation of the judge's status as a member of the legal profession worked a forfeiture of office and, under R.C. 2733.01(B), quo warranto was the proper remedy). Thus, where, as in the instant case, the incompatibility of offices is based on common law principles, it appears that the appropriate action in quo warranto would be brought under division (A), rather than division (B), of R.C. 2733.01.

> A civil action in quo warranto may be brought in the name of the state:
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> (A) Against a person who usurps, intrudes into, or unlawfully holds or exercises a public office, civil or military, or a franchise, within this state. . . .

R.C. 2733.05 authorizes the Attorney General or a prosecuting attorney to bring an action in quo warranto, as follows:

> The attorney general or a prosecuting attorney may bring an action in quo warranto upon his own relation, or, on leave of the court, or of a judge thereof in vacation, he may bring the action upon the relation of another person. If the action is brought under division (A) of section 2733.01 of the Revised Code, he may require security for costs to be given as in other cases.

R.C. 2733.06 authorizes "[a] person claiming to be entitled to a public office unlawfully held and exercised by another" to bring "an action therefor by himself or an attorney at law, upon giving security for costs."

A person who unlawfully holds or exercises the office of member of a board of education is subject to an action in quo warranto. See Sutter v. State ex rel. Maul, 108 Ohio St. 309, 140 N.E. 783 (1923). See generally State ex rel. Corrigan v. Hensel, 2 Ohio St. 2d 96, 206 N.E.2d 563 (1965) (syllabus) (member of a local board of education will not be ousted from office by quo warranto "on the ground that by reason of his private occupation he might possibly or could secure personal monetary benefits by using his public office in a wrongful manner," where he had not committed, and was not about to commit, any acts in violation of law or of his oath of office) (emphasis in original). An action in quo warranto may lie where an individual holds two public positions which are alleged to be incompatible. Cf. State ex rel. Mikus v. Chapla, 1 Ohio St. 2d 174, 205 N.E.2d 663 (1965) (case is moot when respondent no longer holds both offices). There is no authority for a board of education to bring, on its own behalf, an action in quo warranto against a person who is attempting to exercise the office of member of the board. The board may, however, request that a prosecuting attorney or the Attorney General bring such an action under R.C. 2733.05. See State ex rel. Annable v. Stokes, 24 Ohio St. 2d 32, 262 N.E.2d 863 (1970) (an action in quo warranto may be brought by a private citizen only when he is personally claiming title to a public office; in other instances, it must be brought by the Attorney General or a prosecuting attorney). A prosecuting attorney or the Attorney General has discretion to determine whether to bring an action in quo warranto under R.C. 2733.05. See State ex rel.

With respect to removal for misconduct in office, State ex rel. Attorney General v. McClain states, in paragraph 2 of the syllabus: "Where the causes of removal from office are prescribed by statute which also provides a special mode of procedure for such removal, the statutory remedy is the exclusive one, and quo warranto will not lie." R.C. 3.07 authorizes an action against an officer "who willfully and flagrantly exercises authority or power not authorized by law, refuses or willfully neglects to enforce the law or to perform any official duty imposed upon him by law, or is guilty of gross neglect of duty, gross immorality, drunkenness, misfeasance, malfeasance, or nonfeasance," and has been found to be applicable to a member of a board of education. See 2,867 Signers v. Mack, 66 Ohio App. 2d 79, 419 N.E.2d 1108 (Medina County 1979); State ex rel. Stokes v. Probate Court, 17 Ohio App. 2d 247, 249, 246 N.E.2d 607, 610 (Cuyahoga County 1969), appeal dismissed, 22 Ohio St. 2d 120, 258 N.E.2d 594 (1970) (R.C. 3.07-.10 "provide a general, all-inclusive method for removal of any public official in the state of Ohio"). R.C. 3.08 sets forth a procedure for the removal of public officers on any of the grounds enumerated in R.C. 3.07, R.C. 3.09 provides for the appeal of a decision made under R.C. 3.08, and R.C. 3.10 provides for the subpoena of witnesses in proceedings under R.C. 3.07-.09. R.C. 3.07 specifies: "The proceedings provided for in [R.C. 3.07-.10] are in addition to impeachment and other methods of removal authorized by law, and such sections do not

Brophy v. Crawford, 127 Ohio St. 580, 190 N.E. 221 (1934); Thompson v. Watson, 48 Ohio St. 552, 31 N.E. 742 (1891); State ex rel. Mikus v. Hirbe, 5 Ohio App. 2d 307, 215 N.E.2d 430 (Lorain County 1965), aff'd, 7 Ohio St. 2d 104, 218 N.E.2d 438 (1966). Cf. R.C. 2733.04 ("[w]hen directed by the governor, supreme court, secretary of state, or general assembly, the attorney general, or a prosecuting attorney, shall commence an action in quo warranto"). See generally State ex rel. Finley v. Lodwich, 137 Ohio St. 329, 29 N.E.2d 959 (1940) (syllabus, paragraph 2) ("[a] prosecuting attorney is not authorized to bring an action in quo warranto in the name of the state against an officer of the state neither performing nor asserting a right to perform any official duties in the county of such prosecuting attorney"). A prosecuting attorney or the Attorney General may bring an action under R.C. 2733.05 upon the relation of another person only with leave of court. See Lapides v. Doner, 248 F. Supp. 883, 896 (E.D. Mich. 1965).

Thus, where a local school board has some question as to the right of one of its members to serve on the school board, in light of the fact that he simultaneously accepted a position of township trustee, the school board may seek to have the prosecuting attorney or the Attorney General bring an action in quo warranto to settle the question. The board, however, has no authority to institute such an action on its own behalf. As Attorney General, I am not inclined to consider bringing a quo warranto action in a matter which appears purely local in nature as long as the prosecutor is under no disability from acting.

Based upon the foregoing, it is my opinion, and you are hereby advised, as follows:

1. The offices of member of the board of education of a local school district and trustee of a township which is located within the school district are incompatible. (1966 Op. Att'y Gen. No. 66-060; 1949 Op. Att'y Gen. No. 951, p. 598; 1927 Op. Att'y Gen. No. 2, vol. I, p. 5; 1910-1911 Annual Report of the Att'y Gen. at 909, followed. 1909-1910 Annual Report of the Att'y Gen. at 677, overruled.)

2. If a board of education determines that a member of the board has, after accepting his office as member of the board, accepted a second office whose duties are incompatible with those of member of the board of education, the board may determine that the member has, in effect, resigned from the board of education, may recognize a vacancy on the board, and may fill the vacancy pursuant to R.C. 3313.11.

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divest the governor or any other authority of the jurisdiction given in removal proceedings."

Under the rule set forth in McLain, it appears that any action to remove a school board member for misconduct in office should be brought under the statutory scheme established by R.C. 3.07-.10, rather than under the general provisions of R.C. 2733.01(B). I am aware of no Ohio cases indicating whether the holding of two incompatible offices may, in itself, be found to constitute misconduct under R.C. 3.07-.10. Cf. McMillen v. Diehl, 128 Ohio St. 212, 214-15, 190 N.E. 567, 568 (1934) (statutes authorizing the removal of an incumbent officer are quasi penal and should be strictly construed; evidence sustaining such removal should be clear and convincing). See generally Comment, The Right to Challenge Official Titles: An Ancient Writ Needs Revision, 1 Cap. Univ. L. Rev. 145, 147 and n. 15 (1972) (recognizing quo warranto as the exclusive remedy for trying title to an office and forfeiture by misconduct as an indirect means). In any event, R.C. 3.08 provides that proceedings for removal of public officers on any of the grounds enumerated in R.C. 3.07 may be commenced only by the filing of a complaint signed by qualified electors "not less in number than fifteen per cent of the total vote cast for governor at the last preceding election for the office of governor in the state or political subdivision whose officer it is sought to remove." Thus, a board of education, as such, has no authority to bring such an action.

3. If an individual simultaneously accepts the office of member of the board of education of a local school district and the office of trustee of a township which is located within the school district, the board of education may request that a prosecuting attorney or the Attorney General bring an action in quo warranto under R.C. 2733.05 to determine the authority of the individual to continue to serve in both offices.