

OPINION NO. 86-038**Syllabus:**

1. The position of health commissioner of the general health district of a county is incompatible with the position of member of the board of education of a city school district when one of the school buildings and part of the territory of the city school district lie within the territorial jurisdiction of the health district.

2. The position of health commissioner of the general health district of a county is incompatible with the position of member of the board of education of a joint vocational school district when the joint vocational school and part of the territory of the joint vocational school district lie within the territorial jurisdiction of the health district.

To: David Tobin, Columbiana County Prosecuting Attorney, Lisbon, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, May 28, 1986

I have before me your request for my opinion concerning the compatibility of the position of health commissioner of the general health district of a county and the position of member of the board of education of a city school district or a joint vocational school district. Your letter raises the following questions:

1. Is the position of health commissioner of the general health district of a county compatible with the position of member of the board of education of a city school district, when one of the school buildings and part of the territory of the city school district lie within the territorial jurisdiction of the general health district?
2. Is the position of health commissioner of the general health district of a county compatible with the position of member of the board of education of a joint vocational school district, when the joint vocational school and part of the territory of the joint vocational school district lie within the territorial jurisdiction of the general health district?

In 1979 Op. Att'y Gen. No. 79-111, my predecessor set forth seven questions which should be addressed in determining whether two public positions are incompatible. Among the questions to be considered is the question whether the empowering statutes of either position limit the outside employment permissible. Also of relevance are the common law rules that positions are considered incompatible if one is subordinate to or a check upon the other, or if an individual serving in both positions would be subject to a conflict of interest. See, e.g., State ex rel. Hover v. Wolven, 175 Ohio St. 114, 191 N.E.2d 723 (1963); State ex rel. Attorney General v. Gebert, 12 Ohio C.C. (n.s.) 274 (Franklin County 1909); Pistole v. Wiltshire, 90 Ohio L. Abs. 525, 189 N.E.2d 654 (C.P. Scioto County 1961).

No statutory provision expressly prohibits a member of a board of education from concurrently serving as the health commissioner of a general health district. Cf. R.C. 3313.13 (prohibiting a prosecuting attorney, city director of law, or other official acting in a similar capacity from being a member of a board of education); R.C. 3313.70 (prohibiting a member of a board of education in any district from being appointed to the position of school physician, school dentist, or school nurse during the period for which he is elected). Thus, a finding of incompatibility is not indicated on that basis. An examination of the statutes setting forth powers and duties of health commissioners and school board members does, however, show that an individual who served in both positions would be subject to a conflict of interest.

In enumerating the duties of the board of health of a city or general health district, R.C. 3709.22 states in part as follows:

Each board of health of a city or general health district shall study and record the prevalence of disease within its district and provide for the prompt

diagnosis and control of communicable diseases. The board may also provide for the medical and dental supervision of school children, for the free treatment of cases of venereal diseases, for the inspection of schools, public institutions, jails, workhouses, children's homes, infirmaries, and county homes, and other charitable, benevolent, and correctional institutions. (Emphasis added.)

In addition, R.C. 3707.03 states:

The board of health of a city or general health district shall abate all nuisances and may remove or correct all conditions detrimental to health or well-being found upon school property by serving an order upon the board of education, school board, or other person responsible for such property, for the abatement of such nuisance or condition within a reasonable but fixed time. The board of health may appoint such number of inspectors of schools and school buildings as is necessary to properly carry out this section. (Emphasis added.)

See also R.C. 3707.26 (providing that the board of health shall inspect the sanitary condition of all schools and school buildings within its jurisdiction, and authorizing the board to disinfect any school building or, during epidemics or threatened epidemics, to close any school).

From the above-referenced sections, it is clear that the board of health of a general health district has the responsibility of inspecting school premises and the power to issue orders upon school officials as necessary for the protection of health and the abatement of nuisances. The health commissioner, by virtue of R.C. 3709.11, is the executive officer of the board and has the duty to carry out all orders of the board and of the department of health. The health commissioner will, therefore, be involved in the execution of the activities of the board of health.

Under R.C. 3313.47, each city board of education has responsibility for the management and control of the public schools within its district. See also R.C. 3313.20 ("[t]he board of education shall make such rules as are necessary for its government and the government of its employees, pupils of its schools, and all other persons entering upon its school grounds or premises"). A member of a city board of education may, therefore, be the recipient of an order from the board of health. See generally 1984 Op. Att'y Gen. No. 84-090.

In 1950 Op. Att'y Gen. No. 2469, p. 721, my predecessor concluded that the office of member of a city board of health and that of member of a city board of education of the same city are incompatible. 1950 Op. No. 2469 states, with respect to G.C. 4424, the predecessor to R.C. 3707.03:

It is quite clear that this statute imposes a duty on a member of a city health board to participate in the making and enforcement of orders pertaining to health measures, such orders being directed to the members of the city board of education. Accordingly, where one individual is a member of both boards it would become his duty as a member of the health board to participate in the making of an order directed to himself as member of the education board. This

situation inescapably gives rise to a division of loyalty of such individual between his two offices, and where such a division of loyalty exists the individual concerned will find it impossible to devote such unprejudiced attention to the duties of either office as sound public policy requires.

Id. at 722. The reasoning of 1950 Op. No. 2469 was applied in 1951 Op. Att'y Gen. No. 787, p. 520, in which it was held that the office of member of a county health board and that of member of a local board of education are incompatible. 1951 Op. No. 787 states, at 522, that the "power of inspection of schools would seem to create a conflict of interest which would render freedom of action on the part of a member serving on both boards difficult, if not impossible."¹ See also 1970 Op. Att'y Gen. No. 70-004.

The analysis set forth in 1950 Op. No. 2469 and applied in 1951 Op. No. 787 leads to the conclusion that the position of health commissioner of the general health district of a county is incompatible with the position of member of a city board of education under the facts you have presented--that is, when one of the school buildings and part of the territory of the city school district lie within the territorial jurisdiction of the general health district.² An individual who attempted to hold both positions would be subject to a conflict of interest

¹ A similar analysis was applied in 1961 Op. Att'y Gen. No. 2206, p. 248, in which it was found that the duty of a board of health to inspect schools in the district created a conflict of interest between the positions of clerk of the board of education of a local school district and member of the board of health of a general health district and between the positions of member of a county board of education and employee (sanitarian) of the board of health of the general health district of the county. 1961 Op. No. 2206 was questioned in 1979 Op. Att'y Gen. No. 79-111 for the reason that 1961 Op. No. 2206 suggested that a conclusion of incompatibility was compelled if a conflict of interest was possible, even if such conflict was not inevitable. Op. No. 79-111 adopted instead the rule that, "[w]here possible conflicts are remote and speculative, common law incompatibility or conflict of interest rules are not violated." Op. No. 79-111 (syllabus, paragraph three). I am not, in this opinion, commenting upon the merits of 1961 Op. No. 2206. I do find that the possible conflicts between the positions about which you have inquired are not remote and speculative so as to bring into play the exception discussed in Op. No. 79-111.

² R.C. 3707.01 states that "[t]he board of health of a city or general health district shall abate and remove all nuisances within its jurisdiction." R.C. 3709.01 provides that the "general health district" of a county consists of a combination of the townships and villages in each county, and further provides that each city constitutes a health district to be known as a "city health district." I concluded in 1985 Op. Att'y Gen. No. 85-033 that "[i]t is implicit throughout the statutory scheme governing health districts that a general health district does not include territory within a city unless a special arrangement is made to bring that territory into the district." Id. at 2-117 (citations omitted).

in being involved in the management and operation of schools and having a duty of loyalty to the board of health.

Boards of health and city boards of education also have responsibilities which may overlap in other respects. For example, R.C. 3313.67(A) and R.C. 3313.671(B) require a board of health, on application of the board of education of the district, to provide the means of immunization to pupils who are not so provided by their parents or guardians. R.C. 3313.68 authorizes a city board of education to delegate to the board of health its function of providing a system of medical and dental inspection of school children, if the board of health is willing to assume that function. See R.C. 3313.69; 3709.22. R.C. 3313.73 provides that, if a city board of education has not employed a school physician, the board of health shall conduct the health examination of school children. R.C. 3313.72 authorizes a city board of education to contract with a health district for the provision of services of a school physician, dentist, or nurse. While these provisions impose powers and duties upon the board of health, rather than upon the health commissioner, it is clear that the health commissioner is involved in the operations of the board of health. It is apparent that an individual who attempted to act as both health commissioner and city school board member, where the jurisdiction of the two bodies overlap, would be subject to a conflict of interest in serving both bodies.

Like a member of a city school district board of education, a member of a joint vocational school district board of education has responsibilities relating to the management and operation of the school district. See generally R.C. 3311.18-.19. R.C. 3311.19(D) states that "a joint vocational school district board of education shall have the same powers, duties, and authority for the management and operation of such joint vocational school district as is granted by law to a board of education of a city school district, and shall be subject to all the provisions of law that apply to a city school district." As discussed above, the health commissioner of a general health district has responsibilities on behalf of the board of health for carrying out its orders. It is clear that an individual who attempted to serve both as health commissioner of the general health district of a county and as a member of the board of education of a joint vocational school district, where the jurisdiction of the two bodies overlap, would be placed in a position of divided loyalties.

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

1. The position of health commissioner of the general health district of a county is incompatible with the position of member of the board of education of a city school district when one of the school buildings and part of the territory of the city school district lie within the territorial jurisdiction of the health district.
2. The position of health commissioner of the general health district of a county is incompatible with the position of member of the board of education of a joint vocational school district when the joint vocational school and part of the territory of the joint vocational school district lie within the territorial jurisdiction of the health district.