

March 21, 2018

The Honorable Bradford W. Bailey
Hardin County Prosecuting Attorney
One Courthouse Square, Suite 50
Kenton, Ohio 43326-1575

SYLLABUS:

2018-008

A person may serve simultaneously as a member of a board of county commissioners and member of the board of directors of a bank that is a depository of the county's active or inactive moneys, provided that the person does not (1) deliberate, discuss, or vote on the award of contracts to depositories of the county's active and inactive moneys; or (2) serve on the county investment advisory committee. (1965 Op. Att'y Gen. No. 65-137, modified.)



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OPINION NO. 2018-008

The Honorable Bradford W. Bailey
Hardin County Prosecuting Attorney
One Courthouse Square, Suite 50
Kenton, Ohio 43326-1575

Dear Prosecutor Bailey:

You have requested an opinion whether a person may serve simultaneously as a member of a board of county commissioners and member of the board of directors of a bank that is a depository of county moneys.¹

¹ A “public depository” is generally defined as “an institution which receives or holds public deposits.” *See* R.C. 135.01(J); R.C. 135.182(A)(1); *see also* R.C. 135.31(D). For purposes of designating eligible institutions to serve as public depositories of county moneys and for county investment policies under R.C. 135.31-40, the Revised Code, at R.C. 135.31, provides:

(A) “Active moneys” means an amount of public moneys in public depositories determined to be necessary to meet current demands upon a county treasury, and deposited in any of the following:

(1) A commercial account and withdrawable, in whole or in part, on demand;

(2) A negotiable order of withdrawal account as authorized in the “Consumer Checking Account Equity Act of 1980,” 94 Stat. 146, 12 U.S.C.A. 1832(a);

(3) A money market deposit account as authorized in the “Garn-St. Germain Depository Institutions Act of 1982,” 96 Stat. 1501, 12 U.S.C. 3503.

(B) “Inactive moneys” means all public moneys in public depositories in excess of the amount determined to be needed as active moneys.

R.C. 135.31(A), (B). For the purpose of this compatibility opinion, we make no distinction between a bank that is a depository of a county’s active moneys and a bank that is a depository of a county’s inactive moneys.

Compatibility Test

The following five questions are used to determine whether a person may hold a public position and private position simultaneously:

1. Is the public position a classified employment within the terms of R.C. 124.57?
2. Does a constitutional provision or statute prohibit a person from serving in both positions at the same time?
3. Is there an impermissible conflict of interest between the two positions?
4. Are there local charter provisions, resolutions, or ordinances that are controlling?
5. Is there a federal, state, or local departmental regulation applicable?

2018 Op. Att’y Gen. No. 2018-003, slip op. at 2-3; 2012 Op. Att’y Gen. No. 2012-040, at 2-349 to 2-350; *see also* 2011 Op. Att’y Gen. No. 2011-024, at 2-196 (“[t]he Attorney General has developed the [preceding] five-question inquiry to determine whether a person may hold a public position and private position at the same time”); 1989 Op. Att’y Gen. No. 89-105, at 2-512. “All of these questions must yield answers in favor of compatibility to support a finding that the two positions are compatible.” 2017 Op. Att’y Gen. No. 2017-034, at 2-334.

The first question of the compatibility test asks whether the public position is a classified employment within the terms of R.C. 124.57, which prohibits an officer or employee in the classified service of a county from participating in certain political activities:

No officer or employee in the classified service of the ... several counties ... shall directly or indirectly, orally or by letter, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political party or for any candidate for public office; ... nor shall any officer or employee in the classified service of the ... several counties ... be an officer in any political organization or take part in politics other than to vote as the officer or employee pleases and to express freely political opinions.

R.C. 124.57(A); *see also* 2A Ohio Admin. Code 123:1-46-02(A), (C) (2017-2018 Supplement) (describing the prohibited political activities for employees in the classified civil service of the state). The classified civil service comprises “all persons in the employ of the ... several counties” unless specifically excluded from the classified civil service or specifically included in the unclassified civil service. *See* R.C. 124.11(B); *see also* 2017 Op. Att’y Gen. No. 2017-035, at 2-342. Specifically included in the unclassified civil service are “[a]ll officers elected by popular vote or persons appointed to fill vacancies in those offices.” R.C. 124.11(A)(1).

As an elected officeholder, a member of a board of county commissioners is in the county's unclassified service, rather than the classified service. *See* R.C. 124.11(A)(1); R.C. 305.01. Thus, R.C. 124.57 does not apply to the position of a member of a board of county commissioners and so does not prohibit a county commissioner from serving on the board of directors of a bank that is a depository for the county's active or inactive moneys. The first question of the compatibility test is, therefore, resolved in favor of compatibility.

The second question of the compatibility test asks whether a constitutional provision or statute prohibits a person from serving in both positions at the same time. No constitutional provision or statute of which we are aware prohibits the service in question. Accordingly, the second question of the compatibility test is resolved in favor of compatibility.

The third question of the compatibility test asks whether there are any impermissible conflicts of interest between the two positions.² A person may not serve simultaneously in two positions when a conflict of interest exists between the two positions. 2017 Op. Att'y Gen. No. 2017-014, at 2-130. "[C]onflicts of interest occur when a person who holds two positions at the same time is subject to divided loyalties, conflicting duties, or to the temptation to act other than in the public's best interest." 2009 Op. Att'y Gen. No. 2009-005, at 2-30. Determining whether a conflict of interest exists between two positions first requires us to examine the "powers, duties, and responsibilities of the respective positions." *Id.* Then, if our review finds a conflict of interest between the two positions does indeed exist, we will next need to determine whether the conflict may be sufficiently mitigated or eliminated entirely. "The mere existence of a conflict of interest does not automatically render two positions incompatible." 2017 Op. Att'y Gen. No. 2017-035, at 2-343. "When the possibility of conflict is remote and speculative and can be mitigated or avoided, the conflict of interest rule is not violated." *Id.*; *see also* 2004 Op. Att'y Gen. No. 2004-019, at 2-158 ("[w]here it can be demonstrated that the conflicts may be sufficiently avoided or eliminated entirely, the person may serve in both positions"). In determining whether a conflict of interest can be sufficiently avoided or mitigated, we consider factors that include, but are not limited to, "the probability of the conflicts occurring, the ability of the person to remove himself from any conflicts that may occur, whether the person exercises decision-making authority in both positions, and whether the conflicts relate to the primary functions of each position, or to financial or budgetary matters." 2004 Op. Att'y Gen. No. 2004-051, at 2-439.

We will first review the powers, duties, and responsibilities of a county commissioner. County commissioners are elected officeholders responsible for the governance of their respective counties. *See generally* R.C. Chapters 305 and 307 (setting forth the general powers and duties of a board of county commissioners). These powers, duties, and responsibilities include, among other

² Pursuant to R.C. 102.08, the Ohio Ethics Commission determines the applicability of the ethics and conflict of interest provisions of R.C. Chapter 102, R.C. 2921.42, and R.C. 2921.43. The Attorney General, therefore "refrain[s] from interpreting and applying [those] provisions by way of a formal opinion." 2011 Op. Att'y Gen. No. 2011-008, at 2-60 n.1. For a determination of whether those provisions apply to the positions at issue in this opinion, we recommend that you contact the Ohio Ethics Commission. *See id.*

things, procuring group insurance for county employees. R.C. 305.171. They also include entering into contracts on behalf of the county with other governmental entities, R.C. 307.15, creating a county office of economic development, R.C. 307.07, providing offices for county officers, R.C. 307.01-.02, and providing ambulance, emergency medical, firefighting, or nonemergency patient transport services, *see, e.g.*, R.C. 9.60; R.C. 307.05; R.C. 307.052.

A board of county commissioners is also responsible for the county's budget and handling other fiscal matters. For instance, a board of county commissioners is the taxing authority of the county for purposes of Ohio's uniform public securities law and its tax levy law. *See* R.C. 133.01(NN)(1); R.C. 5705.01(C). In its capacity as taxing authority, a board of county commissioners may issue securities for the purpose of providing funds with which to pay one or more final judgments rendered against the county, R.C. 133.14, and may issue securities for the purpose of paying all or any portion of the costs of any permanent improvement that the county is authorized to acquire, improve, or construct. R.C. 133.15. A board of county commissioners also adopts the county's annual tax budget, R.C. 5705.28, and levies taxes, *see, e.g.*, R.C. 133.25; R.C. 5705.03; R.C. 5705.07; R.C. 5705.19.

Moreover, a board of county commissioners designates, by resolution, eligible institutions to serve as depositories of the county's active moneys upon the recommendation of the county treasurer.³ R.C. 135.33(C); *see also* note 1, *supra*. A board of county commissioners shall meet every four years to designate public depositories of the county's active moneys for the succeeding four-year period. R.C. 135.33(A). Prior to the meeting at which the board of county commissioners designates public depositories, the board must notify all eligible institutions that might desire to be designated as public depositories, the date on which the designation is to be made, the amount that has been estimated to be available for deposit, and the last date on which applications may be submitted. *Id.*

Through the county investment advisory committee, a board of county commissioners directs the manner in which the county's moneys are invested by the county treasurer. *See* R.C. 135.341. A county investment advisory committee consists of two county commissioners designated by the board of county commissioners, as well as the county treasurer. R.C. 135.341(A). The board of county commissioners may declare that the county investment advisory committee shall consist of all three county commissioners, the county treasurer, and the clerk of the court of common pleas of the county. *See id.* The committee is required to establish written county investment policies and meet at least quarterly to review or revise those policies. R.C. 135.341(C). The county treasurer serves as the county investing authority, unless another entity becomes the county investing authority pursuant to one of the circumstances recognized by statute. *See* R.C. 135.31(C); *see also* R.C. 135.34; R.C.

³ An institution that is eligible to serve as a depository of county moneys is “[a]ny national bank, any bank doing business under authority granted by the superintendent of financial institutions, or any bank doing business under authority granted by the regulatory authority of another state of the United States, located in this state ... subject to [R.C. 135.31 to R.C. 135.40].” R.C. 135.32(A); *see also* R.C. 135.33(B).

135.341(E). The county treasurer, as the county investing authority, adheres to the written county investment policies within his or her reasonable discretion. If the board of commissioners determines that the treasurer has failed to invest the moneys of the county as provided by law, or in substantial disregard of the written county investment policies, the board of commissioners may designate a different county investing authority. *See* R.C. 135.34. Thus, although the county treasurer, as the county investing authority, has discretion in making certain county investment decisions, that discretion is “subject to the policies and limitations established by the county investment advisory committee.” *See* 1992 Op. Att’y Gen. No. 92-025, at 2-88.

We will next review the powers, duties, and responsibilities of a member of the board of directors of a bank. The authority of a bank is exercised by a board of directors.⁴ R.C. 1103.03; R.C. 1105.01(A). A bank has all of the powers, rights, and privileges of a corporation that is organized under Ohio’s general corporate law, unless expressly limited by Chapters 1101 to 1127 of the Revised Code. *See* R.C. 1109.01; R.C. 1701.13. In particular, a bank may receive money on deposit and establish the terms of each deposit contract, R.C. 1109.05(A), provide safes and safe deposit boxes for the benefit of the bank’s customers, R.C. 1109.08, and loan money with or without security. R.C. 1109.15(A)(1)(a). A bank may also invest in, among other things, real estate, R.C. 1109.31, stock, R.C. 1109.39, and bonds, notes, or other debt securities. R.C. 1109.32. Further, a bank is authorized to be the depository of public moneys of the state, school districts, townships, municipal corporations, and counties, among other public entities, provided that the amount of public moneys deposited in the bank does not exceed thirty percent of the bank’s total assets. *See* R.C. 135.01(D); R.C. 135.03; R.C. 135.32. Any eligible banking institution that has an office within the territorial limits of the county may file a timely, written application with the board of county commissioners to become a public depository of the county’s active moneys. *See* R.C. 135.33(B); *see also* R.C. 135.32(A). Inactive moneys of a county may be deposited in the savings or deposit accounts of eligible banking institutions, or invested in various financial instruments made through eligible banking institutions. *See* R.C. 135.35(A); *see also* R.C. 135.32. Finally, “[a] bank has and may exercise all powers, perform all acts, and provide all services that are otherwise a part of or incidental to the business of banking.” R.C. 1109.02(B)

⁴ The Ohio Revised Code defines “bank” as follows:

“Bank” means a corporation that solicits, receives, or accepts money or its equivalent for deposit as a business, whether the deposit is made by check or is evidenced by a certificate of deposit, passbook, note, receipt, ledger card, or otherwise. “Bank” also includes a state bank or a corporation doing business as a bank or savings bank under authority granted by the bank regulatory authority of another state of the United States or another country, but does not include a savings association, savings bank, or credit union.

R.C. 1101.01(B).

Review of the powers, duties, and responsibilities of the respective positions reveals that a board of county commissioners may enter into an agreement with a bank that designates the bank as a public depository of the county's active or inactive moneys. A county commissioner is required to deliberate, discuss, or vote on the designation of eligible institutions to serve as public depositories of the county's active or inactive moneys, including the institution on whose board the county commissioner sits. A county commissioner might find it difficult to perform his or her public duties and exercise discretion in a completely disinterested manner because of the commissioner's position on the board of directors of a bank that is applying to be a depository of the county's moneys or is currently a depository of county moneys. Therefore, conflicts of interest may exist between the positions of county commissioner and member of the board of directors of a bank that is a depository of the county's active or inactive moneys. Accordingly, we must determine whether the potential conflicts of interest between these two positions may be sufficiently mitigated or avoided entirely such that the conflict of interest rule is not violated.

A preliminary issue arises over whether a person who serves simultaneously as a county commissioner and director of a bank that is a depository of county moneys has a direct or indirect interest in a contract for work to be done or materials to be furnished for the county. R.C. 305.27 generally prohibits a county commissioner from having a direct or indirect concern in a contract for work to be done for a county and states, in relevant part:

No county commissioner shall be concerned, directly or indirectly, in any contract for work to be done or material to be furnished for the county. For a violation of this section, a commissioner shall forfeit not less than two hundred nor more than two thousand dollars, to be recovered by a civil action, in the name of the state, for use of the county. Such commissioner shall also forfeit, in like manner, any compensation he may have received on such contract.

Despite R.C. 305.27's prohibition against a county commissioner having a direct or indirect concern in a contract for work to be done or material to be furnished for the county, the General Assembly has stated that a person who serves simultaneously on a board of county commissioners and board of directors of a bank that is a depository of county moneys does not have a direct or indirect interest in the bank's contract to act as a depository of county moneys. Specifically, the Ohio Revised Code provides:

An officer, director, stockholder, employee, or owner of any interest in a public depository receiving public deposits pursuant to sections 135.31 to 135.40 of the Revised Code shall not be deemed to be interested, either directly or indirectly, as a result of such relationship, in the deposit of such public moneys for the purpose of any law of this state prohibiting an officer of any county from being interested in any contract of the county.

R.C. 135.38. In light of the above statutory provision, a person who serves simultaneously as a member of a board of county commissioners and member of the board of directors of a bank that is a

depository of county moneys does not have a direct or indirect concern in a county contract for purposes of R.C. 305.27.

The General Assembly, however, has not authorized a person's simultaneous service in both positions *per se*; rather, the legislature has stated that a person shall not be deemed to have a direct or indirect interest in a contract with the bank on whose board of directors the person sits. In other circumstances, the General Assembly has enacted laws that permit simultaneous service in two positions that might otherwise be incompatible, with all of the rights and privileges attendant to each position. *See, e.g.*, R.C. 715.70(G) (membership on the board of directors of a joint economic development district "shall not constitute an interest, either direct or indirect," in a contract with a political subdivision with which the member may be connected *and* the member shall not forfeit or be disqualified from holding public office or employment); R.C. 1724.10(B)(1) (same for membership on governing board of community improvement corporation); *see also* 2000 Op. Att'y Gen. No. 2000-015, at 2-86 n.2 ("[i]n some cases, the General Assembly has expressly permitted an individual to serve in two positions that might involve conflicting interests"); 1999 Op. Att'y Gen. No. 99-023, at 2-156 n.7 ("[w]hen the General Assembly has intended that an individual be permitted to participate in two different capacities that might have prohibited interests, it has expressly so stated"); 1990 Op. Att'y Gen. No. 90-037, at 2-153 (under R.C. 505.011, the General Assembly has permitted a township trustee to serve simultaneously as a member of a private fire company with which the township contracts notwithstanding that R.C. 511.13 generally prohibits a township trustee from having an interest in a contract entered into by the board of township trustees). Accordingly, we must determine whether there are any impermissible conflicts of interest, apart from the strictures of R.C. 305.27, which would prohibit a person's simultaneous service as a county commissioner and director of a bank that is a depository for county moneys.

One conflict of interest arises when the board of county commissioners designates, once every four years, those eligible institutions that will serve as the public depositories for the county's active and inactive moneys for the following four-year period. As part of the process of designating public depositories, the bank on whose board of directors the county commissioner sits might apply to be a depository of the county's active or inactive moneys, or both. *See* R.C. 135.32; R.C. 135.33; R.C. 135.35. Consequently, the county commissioner might be faced with the decision of whether to vote to designate the bank of which he is a director to be a public depository. Such a situation would subject the county commissioner to divided loyalties or the temptation to act other than in the public's best interests. Namely, the county commissioner might be tempted to vote in a way that either favors the bank on whose board of directors he sits or disfavors another bank that has applied to be a public depository of the county's moneys. However, the county commissioner may be able to remove himself from any deliberations or discussions on the designation of public depositories, and abstain from any votes on the matter. *See* 1994 Op. Att'y Gen. No. 94-039, at 2-201 ("[p]rior opinions of the Attorney General have determined that when a public officer is exposed to influences that may prevent him from making completely objective, disinterested decisions in a particular matter, the public officer should abstain from any discussions or votes concerning that matter," if such abstention is possible). A member of a board of county commissioners is able to abstain from any deliberations, discussions, or votes on the designation of public depositories when the board is capable of functioning and performing its statutory duties in the abstaining member's absence. *See* 2017 Op.

Att’y Gen. No. 2017-043, at 2-418; *see also State ex rel. Saxon v. Kienzle*, 4 Ohio St. 2d 47, 48, 212 N.E.2d 604 (1965) (“[i]n the absence of a statute to the contrary, any action by a board requires that a quorum participate therein, and that a majority of the quorum concur”). Thus, as long as a county commissioner who also serves as a member of the board of directors of a bank that has applied to be a public depository of county moneys abstains from discussing, deliberating, or voting on matters that designate the bank as a public depository, this conflict may be sufficiently mitigated.

A second conflict of interest arises when a county commissioner who sits on the board of directors of a public depository also serves on the county investment advisory committee. As discussed above, two county commissioners and the county treasurer are required to serve on the committee, and are required to create written investment policies for the county. R.C. 135.341(C). The committee meets at least once every three months to review or revise its policies and to advise the investing authority on the county investments. *Id.* “A county treasurer is the county’s investing authority, unless the board of county commissioners makes an alternative designation under R.C. 135.34.”⁵ 2014 Op. Att’y Gen. No. 2014-039, at 2-347; *see also* R.C. 135.31(C). The county investment advisory committee provides guidance to the county treasurer as to the investment of the county’s inactive moneys. *See* R.C. 135.341(C); R.C. 135.35; R.C. 135.353; R.C. 135.354. You note in your letter that the bank on whose board of directors one of the members of the Hardin County Board of Commissioners has been asked to sit is currently designated as a depository for the county’s inactive moneys. You indicate that this bank will soon be invited to apply to again be a public depository for the county’s moneys for the succeeding four-year period; other local banks will also be invited to apply to be depositories of the county’s public moneys. Given the role that the county investment advisory committee plays in providing guidance as to the deposit and investment of county moneys, the committee would be required to develop policy that affects the investment of moneys

⁵ R.C. 135.34 provides:

The board of county commissioners may review semiannually the investment procedures of the investing authority and the investing authority shall provide the necessary information to accomplish such review. When it is determined that the investing authority has failed to invest the inactive moneys of the county as provided by law, or in documented substantial, material, and continuing disregard of the advice or written policies of the county investment advisory committee pursuant to section 135.341 of the Revised Code, the board shall inform, by written notice, the investing authority of its finding. When, at the time of the next succeeding semiannual review, the board finds that such procedures, as included in the written notice, have not been corrected, the board may designate, by resolution, the board as a whole, one of its members, or one of its employees as the investing authority, and thereafter, until such action is rescinded by resolution of the board, the investing authority shall be as designated by the board.

held by the bank on whose board of directors the county commissioner sits. Serving on both the county investment advisory committee and board of directors of a bank that is a depository of county moneys, therefore, would subject the county commissioner to a conflict of interest because the commissioner would be tempted to act other than in the public's best interest.

A county investment advisory committee has significant authority to establish the county's investment policies. The county treasurer, as the county investing authority, is "required to adhere to the investment policies established by the county investment advisory committee," lest the board of county commissioners remove the treasurer from his role as investing authority for failing to act within the scope of the county's investment policies. *See* 2014 Op. Att'y Gen. No. 2014-039, at 2-352; R.C. 135.34. In addition, all entities that conduct business with the county's investing authority "shall sign the investment policy of that investing authority," which has been approved by the investing authority and filed with the Auditor of State. *See* R.C. 135.35(K)(1). Moreover, "[t]he committee's policies may establish a limit on the period of time that moneys may be invested in any particular type of investment." R.C. 135.341(C). Although the committee is required to meet once every three months, any member of the committee may call a meeting of the committee, with five days' notice, for the purpose of reviewing or revising investment policies and advising the investing authority on the county's investments. *See id.*

The conflict of interest presented by the county commissioner's service on the county investment advisory committee cannot be sufficiently mitigated by the commissioner's abstention from discussing, deliberating, or voting on matters relating to the county's investment policies. Indeed, the primary purpose of a county investment advisory committee is to establish, review, and revise the county's investment policies, and to provide advice to the investing authority on those policies. A commissioner would regularly face the conflict of interest because the county investment advisory committee is required by statute to meet once every three months, and any individual member of the committee may call a meeting at any time with only five days' notice to the other committee members. To avoid violating the conflict of interest rule, therefore, a county commissioner should refrain from serving on the county investment advisory committee entirely. This is possible because the committee is only required to have two county commissioners serve on the committee. *See* R.C. 135.341(A).⁶

⁶ Other circumstances also counsel against a county commissioner who serves on the board of directors of a depository of county moneys from serving simultaneously on the county investment advisory committee. Pursuant to R.C. 135.341(E), a county investment advisory committee shall act as the investing authority for the county whenever the county treasurer has failed to complete the statutorily required investment education training programs before taking office, *see* R.C. 321.46(E)(1), (F)(2), or when the county treasurer is deficient in continuing education hours. *See* R.C. 321.47. Although the occasions on which these circumstances will transpire are presumably rare, they are another reason that a county commissioner who also serves as a director of a public depository should refrain from serving on the county investment advisory committee.

A final conflict of interest may arise in the event the board of county commissioners designates itself or one of the board's members to serve as the county investing authority in the place of the county treasurer. *See* R.C. 135.34; *see also* note 5, *supra*. If the board designates itself as the investing authority under the procedure described in R.C. 135.34, then a county commissioner that also serves on the board of directors of a bank that is a depository of county moneys would be subject to divided loyalties. However, R.C. 135.34 allows the board to choose a member of the board of county commissioners who does not have a conflict of interest or one of the board's employees to serve as the investing authority. Moreover, the instances in which the board of county commissioners would feel compelled to remove the county treasurer from the treasurer's designation as investing authority are presumably remote. Therefore, we conclude that this conflict of interest is sufficiently speculative and remote as to not render the positions of county commissioner and member of the board of directors of a bank that is a depository of county moneys incompatible.

In short, although conflicts of interest between the positions of county commissioner and director of a bank that is a depository of county moneys may arise, the conflicts can be sufficiently mitigated or avoided entirely. Accordingly, we conclude that question three of the compatibility test may be answered in favor of compatibility.

The fourth question of the compatibility test asks whether any local charter provisions, resolutions, or ordinances prohibit the holding of the two positions. Whether any local charter provisions, resolutions, or ordinances apply is a matter of local concern. In other words, it is a fact-based question that local officials are best equipped to answer. *See* 2009 Op. Att'y Gen. No. 2009-005, at 2-24 to 2-25. We assume, for the purpose of this opinion, that no local charter provision, resolution, or ordinance prohibits a person's simultaneous service as a member of a board of county commissioners and member of the board of directors of a bank that is a depository of county moneys. Thus, the fourth question of the compatibility test may be answered in favor of compatibility.

The fifth and final question of the compatibility test asks whether any state, local, or federal departmental regulations prohibit a person from serving simultaneously as a member of a board of county commissioners and member of the board of directors of a bank that is a depository of county moneys. Because there are no state, local, or federal departmental regulations that are applicable to this situation, the final question may also be answered in favor of compatibility. Accordingly, having answered all five questions of the compatibility test in favor of compatibility, a person may serve simultaneously as a member of a board of county commissioners and member of the board of directors of a bank that is a depository of county moneys, subject to the conditions discussed above.

1965 Op. Att'y Gen. No. 65-137

You also ask whether the advice provided in 1965 Op. Att'y Gen. No. 65-137 remains sound in light of statutes that have been enacted in the years since the issuance of the opinion. In that opinion, the Attorney General concluded that "[a] board of county commissioners, authorized to create public depositories only through a procedure prescribed by statute, may legally enter into a depository contract for active or inactive funds with a bank having as a stockholder and director one of the county commissioners, so long as the statutory requirements are met." 1965 Op. Att'y Gen. No.

65-137 (syllabus). The question addressed to the Attorney General was whether a board of county commissioners was legally permitted to enter into a depository contract with a bank on whose board of directors one of the county commissioners sat. That question was answered in the affirmative.

The opinion also concluded that the positions of county commissioner and member of the board of directors of a bank that is a depository of county moneys were compatible. The opinion reasoned that “since the only manner by which a county depository may be selected is through competitive bidding as prescribed by statute, there is no area for an abuse of discretion on the part of the county commissioner, and therefore no reason to prohibit a contract with a bank in which the commissioner has an interest.” *Id.* at 2-311. Such reasoning could be interpreted to mean that the positions of county commissioner and member of the board of directors of a public depository are compatible, without limitation. As we have noted above, however, simultaneous service in both positions should be subject to certain conditions in light of the significant conflicts of interest that may arise between the two positions. Accordingly, to the extent that 1965 Op. Att’y Gen. No. 65-137 concluded that the positions of county commissioner and member of the board of directors of a bank that is a depository of county moneys are compatible without limitation, we now modify that opinion to include the conditions to such simultaneous service as are discussed above. Subject to those conditions, the conclusion provided in the syllabus of 1965 Op. Att’y Gen. No. 65-137 remains valid.

Since the issuance of 1965 Op. Att’y Gen. No. 65-137, the General Assembly has enacted various statutes that may be relevant to the question of whether a person may, under Ohio ethics law, simultaneously hold the positions of county commissioner and member of the board of directors of a bank that is a depository of county moneys.⁷ The General Assembly has, pursuant to R.C. 102.08, empowered the Ohio Ethics Commission to determine the applicability of Ohio ethics law to particular situations. *See* note 2, *supra*. An advisory opinion of the Ohio Ethics Commission may also insulate a person from civil and criminal liability when the Commission has issued an opinion based upon a specific set of facts. *See* 2017 Op. Att’y Gen. No. 2017-014, at 2-136. Consequently,

⁷ In particular, you draw our attention to R.C. 102.03, which provides, in relevant part:

No public official or employee shall use or authorize the use of the authority or influence of office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person’s duties.

R.C. 102.03(D). You also draw our attention to R.C. 2921.42, which prohibits a public official from having an unlawful interest in a public contract, among other prohibitions. *See* R.C. 2921.42(A)(1), (A)(4). The original versions of R.C. 2921.42 and R.C. 102.03 were enacted in 1972 and 1973, respectively. 1971-1972 Ohio Laws, Part II, 1866, 1954 (Am. Sub. H.B. 511, eff., in part, Jan. 1, 1974); 1973 Ohio Laws, Part I, 1160, 1165 (Am. Sub. H.B. 55, eff., in part, Jan. 1, 1974).

the Attorney General will refrain from interpreting such provisions of Ohio law by way of a formal opinion. We note that the Ohio Ethics Commission has opined on the applicability of Ohio ethics law to a person serving simultaneously on the board of directors of a public depository and as county treasurer, township clerk, or township trustee. *See* Ohio Ethics Comm'n, Advisory Op. No. 2004-02 (syllabus, paragraph 2) (a county treasurer is prohibited from serving as a member of the board of trustees of a depository bank that receives county moneys because the county treasurer would be unable to perform the statutorily mandated duties of his office); *see also* Ohio Ethics Comm'n, Advisory Op. No. 92-008 (syllabus, paragraphs 3 and 5) (a township clerk is prohibited by R.C. 2921.42 and R.C. 102.03 from holding the position of employee of a public depository receiving township moneys, although a township trustee is not *per se* prohibited from also holding the position of director of a public depository receiving township moneys, so long as the person abstains from any participation as a township trustee in matters affecting the interests of the bank). It does not appear that the Ethics Commission has determined whether particular provisions of R.C. Chapter 102 or related statutes, *see, e.g.*, R.C. 2921.42, prohibit a county commissioner from serving as a member of the board of directors of a public depository that receives county moneys. Accordingly, for a definitive answer as to whether such simultaneous service is permitted under Ohio ethics laws, we recommend that you seek the advice of the Ohio Ethics Commission.

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised that a person may serve simultaneously as a member of a board of county commissioners and member of the board of directors of a bank that is a depository for the county's active or inactive moneys, provided that the person does not (1) discuss, deliberate, or vote on the award of contracts to depositories of the county's active and inactive moneys; or (2) serve on the county investment advisory committee. (1965 Op. Att'y Gen. No. 65-137, modified.)

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is fluid and cursive, with a long, sweeping underline.

MICHAEL DEWINE
Ohio Attorney General