

December 29, 2014

The Honorable Daniel P. Fry
Belmont County Prosecuting Attorney
Courthouse Annex No. 1
147-A West Main Street
St. Clairsville, Ohio 43950

SYLLABUS:

2014-045

Because the Director of the Belmont County Department of Job and Family Services (BCDJFS) oversees the position of chief financial officer of the department, the Director of BCDJFS may not hold simultaneously the chief financial officer position. A director of a county department of job and family services is, however, required by law to perform certain fiscal and budgetary functions on behalf of the department and may assume additional fiscal and budgetary responsibilities as local officials deem appropriate.



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OPINION NO. 2014-045

The Honorable Daniel P. Fry
Belmont County Prosecuting Attorney
Courthouse Annex No. 1
147-A West Main Street
St. Clairsville, Ohio 43950

Dear Prosecutor Fry:

You have requested an opinion whether one person may serve simultaneously as Director of the Belmont County Department of Job and Family Services (BCDJFS) and chief financial officer of that department.¹ From the information provided to us by your office, it appears that the current Director of BCDJFS had been serving as chief financial officer of the department prior to his appointment as director. Since his appointment as director, he has continued to hold the chief financial officer position. If we determine that one person may simultaneously hold these two positions, you ask whether it is prudent for one person to do so and what internal controls should be put into place when one person serves in both positions.²

¹ Your request letter refers to the second position that the director of the county department of job and family services would like to hold as “chief financial officer.” However, other documents provided to us by your office refer to the position as “fiscal officer,” “fiscal administrator,” “business administrator,” or “business/fiscal administrator.” For purposes of this opinion, we will refer to the position as “chief financial officer” because that is the title you chose to use in your request letter.

² The Ohio Ethics Commission is authorized to issue advisory opinions concerning the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43. R.C. 102.08. In light of this grant of authority, we believe it is proper to refrain from interpreting such provisions by way of a formal opinion and recommend that you consult with the Ohio Ethics Commission for advice and interpretations of these statutory provisions. We note that R.C. 2921.42(A)(4) may be of particular relevance to the facts you have presented. R.C. 2921.42(A)(4) prohibits a public official from knowingly having “an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which the public official is connected[.]” See R.C. 2921.01(A) (as used in R.C. 2921.42, “[p]ublic official” means any elected or appointed officer, or employee, or agent of ... any political subdivision”); R.C. 2921.42(I)(1)(a) (for purposes of R.C. 2921.42, the term “[p]ublic contract” includes “the employment

Powers, Duties, and Responsibilities of the Respective Positions

It is helpful to begin with a brief description of each of the positions in question. The director of a county department of job and family services is appointed by the board of county commissioners. R.C. 329.01. The director is in the unclassified civil service and serves at the pleasure of the board of county commissioners. R.C. 329.02. He is responsible for overseeing the day-to-day operations of the department “[u]nder the control and direction of the board of county commissioners.” *Id.*; *see also* 2011 Op. Att’y Gen. No. 2011-008, at 2-61. Pursuant to R.C. 329.02, “the county director of job and family services shall have full charge of the county department of job and family services.” The director’s duties include preparing an annual tax budget estimate for the department and submitting that tax budget estimate to the board of county commissioners. R.C. 329.02; *see also* R.C. 5705.28(C)(1). The director also is responsible for appointing all necessary personnel for the department with approval of the board of county commissioners.³ R.C. 329.02.

No statutory provision creates the position of chief financial officer of a county department of job and family services. However, there are two apparent ways in which a chief financial officer may be appointed for a county department of job and family services. The county director of job and family services may, with approval of the board of county commissioners, appoint all necessary assistants and employees, which may include a chief financial officer. R.C. 329.02; *see also* R.C. 329.01 (a county department of job and family services shall consist of the director and “such assistants and other employees as are necessary for the efficient performance of the functions of the county department”). Alternatively, a chief financial officer may be appointed by the board of county commissioners pursuant to R.C. 329.021. R.C. 329.021 authorizes a board of county commissioners to appoint a certain number of “administrators,” which may include a chief financial officer, “to oversee services provided by the county department of job and family services[.]” R.C. 329.021(A); *see also* R.C. 329.021(D) (defining “administrator” for purposes of that section as meaning, *inter alia*, a “fiscal officer or director”). In a county with a population of forty thousand or more, but less than one hundred thousand, such as Belmont County, the board of county commissioners is authorized to appoint up to two administrators for the county department of job and family services. R.C. 329.021(A)(4). From the information provided to us by your office, it appears that the person was

of an individual by ... any ... political subdivision[.]”). R.C. 2921.42(A)(4) has been interpreted by the Ohio Ethics Commission to prohibit a public official from “holding employment with, or being hired as an independent contractor to provide services to, the political subdivision with which he serves as a public official.” Ohio Ethics Comm’n, Advisory Op. No. 92-020, slip op. at 2.

³ However, the county director of job and family services does not appoint administrators of the department, as administrators are appointed by the board of county commissioners pursuant to R.C. 329.021. R.C. 329.02; *see also* R.C. 329.021(D) (defining “administrator” for purposes of that section). The county director of job and family services also does not appoint employees of institutions under the jurisdiction of the department. R.C. 329.02.

appointed to fill the position of chief financial officer not as an administrator under R.C. 329.021, but rather as an employee appointed by the director of the county department of job and family services, with the approval of the board of county commissioners. See Feb. 18, 2004 “Resolution of the Belmont County Board of County Commissioners Authorizing the Hiring and Establishing Compensation for the Fiscal Officer of the Belmont County Department of Job and Family Services” (“WHEREAS ... the Belmont County Board of Commissioners (“Commissioners”) is the co-appointing authority for the Belmont County Department of Job and Family Services”).⁴

The position of chief financial officer is not created by statute and thus has no statutory duties for us to examine. You have, however, provided us a job description for the position. According to this job description, the chief financial officer is responsible for overseeing “all fiscal and budgetary functions for [the] Department” and planning, coordinating, and administering clerical administrative support functions. The chief financial officer also “[d]evelops, implements, maintains, and supervises all fiscal and budgetary functions” for the department. Because BCDJFS operates as the county’s public children’s services agency, workforce development agency, and child support enforcement agency, the chief financial officer also performs fiscal and budgetary functions for those entities. See R.C. 330.04(A); R.C. 3125.10; R.C. 5153.02(B). Other responsibilities of the chief financial officer include preparing and monitoring annual budgets for each division within the agency, authorizing expenditures, monitoring allocations, auditing receipts, and providing technical advice to department personnel.

Compatibility Analysis

A seven-question compatibility test is used to determine whether a person may serve simultaneously in multiple public positions. 2007 Op. Att’y Gen. No. 2007-023, at 2-228. Pursuant to this test, a person may not hold two public positions simultaneously if one position is subordinate to, or in any way a check upon, the other. *Id.*; see also *City of Cleveland ex rel. Kay v. Riebe*, No. 34889, 1976 WL 190965, at *4 (Cuyahoga County July 29, 1976); 1977 Op. Att’y Gen. No. 77-037, at 2-132. As explained by the Ohio Supreme Court:

“One of the most important tests as to whether offices are incompatible is found in the principle that incompatibility is recognized whenever one office is subordinate to the other in some of its important and principal duties, or is subject to supervision or control by the other * * * or is in any way a check upon the other[.]”

State ex rel. Hover v. Wolven, 175 Ohio St. 114, 116-17, 191 N.E.2d 723 (1963) (quoting 44 Ohio Jur. 2d Public Officers § 37, at 524).

⁴ If the person was instead appointed to the position of chief financial officer as one of the county department of job and family services’ two administrators, our conclusion remains that the director may not hold simultaneously the chief financial officer position.

As explained earlier, the director of a county department of job and family services is responsible for overseeing the day-to-day operations of the department. The director has “full charge” of the department. R.C. 329.02; *see also Carman v. Erie Cnty.*, No. 3:13 CV 922, 2014 WL 4662101, at *3 (N.D. Ohio Sept. 16, 2014) (the Director of the Erie County Department of Job and Family Services “oversees all four divisions” of the department and “is effectively the CEO of the agency”). Because the director of the county department of job and family services oversees the entire department, the chief financial officer of the department is necessarily subject to the director’s oversight. Accordingly, the chief financial officer is subordinate to the director. *See generally* 1945 Op. Att’y Gen. No. 130, p. 92, at 94 (the language of what is now R.C. 329.01, which authorizes a county director of job and family services to appoint employees and require any employee “under the director’s jurisdiction” to give a bond, “appear[s] to give the county director complete executive authority in the management of the department”). The job description that you provided us for the chief financial officer position further illustrates that the position is subordinate to the Director of BCDJFS. After setting forth the duties and responsibilities of the position, the job description is signed, under the heading “SUPERVISOR/DEPARTMENT HEAD,” by the person who was serving as Director of BCDJFS at the time the job description was prepared.

Other documents provided to us by your office indicate that the Director of BCDJFS has, in the past, recommended title changes and pay range adjustments for the chief financial officer position. Ohio law has long recognized that “[o]ne person may not hold two public offices where the duties of one may be so administered that favoritism and preference may be accorded the other, and result in the accomplishment of purposes and duties of the second position which otherwise could not be effected.” *State ex rel. Hover v. Wolven*, 175 Ohio St. at 117 (quoting 44 Ohio Jur. 2d Public Officers § 37, at 524). This principle seeks to avoid situations in which a public official may be in a position to provide himself preferential treatment, including changes in title and pay range adjustments. Here, if the Director of BCDJFS simultaneously holds the chief financial officer position, he would be susceptible to providing himself such preferential treatment.

Furthermore, it appears that the person originally was appointed to the position of chief financial officer by a previous director of the county department of job and family services, with the approval of the board of county commissioners. *See* 1983 Op. Att’y Gen. No. 83-023, at 2-87 (“[t]he power to appoint a county welfare department [now a county department of job and family services] employee is a two step process, requiring that the initial appointment be made by the director of the welfare department and approval be given by the board of county commissioners”). It is well established that “all officers having appointive power are disqualified for the positions to which they may appoint.” 1979 Op. Att’y Gen. No. 79-086, at 2-277; *accord* 1998 Op. Att’y Gen. No. 98-009, at 2-51. Adherence to this principle “serves to avoid conflict of interest situations that arise when an officer is responsible for supervising his own actions in another public position and is consistent with the common law compatibility principle that prohibits a person from holding two public positions simultaneously when one is subordinate to, or a check upon, the other.” 2007 Op. Att’y Gen. No. 2007-020, at 2-209 (questioned, in part, on other grounds by 2014 Op. Att’y Gen. No. 2014-016). Based on the foregoing, we are of the opinion that because the Director of BCDJFS oversees and

appoints the department's chief financial officer, the director may not hold simultaneously the chief financial officer position.

Director's Performance of Financial Duties

Although we have determined that the Director of BCDJFS may not hold simultaneously the position of chief financial officer of the department, we recognize that a director of a county department of job and family services has certain fiscal and budgetary responsibilities assigned to him by law. The director is responsible and answerable for the activities and spending of the department. *See generally* 2002 Op. Att'y Gen. No. 2002-005, at 2-26 ("the director of a county workforce development agency established under R.C. 330.04(B) is an official of the agency who is responsible for managing and accounting for the moneys of the agency"). He is required by law to "prepare the annual budget estimate of the department and submit it to the board [of county commissioners]." R.C. 329.02; *see also* R.C. 5705.28(C)(1); 14B Ohio Admin. Code 5101:9-7-29(C)(2)(a) (rule by reference) (the director of a county department of job and family services is responsible for certifying the accuracy of information contained in the department's quarterly financial statement and submitting the statement to the county auditor for signature before it is submitted to the Ohio Department of Job and Family Services).

In addition to these expressly stated fiscal and budgetary responsibilities, a county director of job and family services has "full charge" of the department "[u]nder the control and direction of the board of county commissioners[.]" R.C. 329.02. A prior Attorney General opinion explained that "having 'full charge' of a department necessarily includes the authority to make specific duty assignments or to select employees to perform certain functions." 1983 Op. Att'y Gen. No. 83-023, at 2-87 to 2-88. Thus, a county director of job and family services is responsible for assigning duties within the department, including those duties that could be performed by a chief financial officer. Although a county department of job and family services is not required by law to have a chief financial officer, the county director is responsible for ensuring that any necessary duties that could be assigned to a chief financial officer are carried out. *Cf.* 2005 Op. Att'y Gen. No. 2005-016, at 2-160 (while a board of county commissioners is not required to employ a county administrator, the board is responsible for ensuring that any necessary duties that could be assigned to an administrator are fulfilled). The director has overall responsibility for the operation of the department and must ensure the efficient performance of the department's functions. *See* R.C. 329.01; R.C. 329.02.

We believe that a county director of job and family services' authority to oversee the department and make specific duty assignments within the department permits him to assume additional duties and responsibilities as he sees fit, when such duties and responsibilities are not assigned to another individual by law. The county director of job and family services has discretion to determine which duties, including fiscal and budgetary duties, will be performed by which employees. *See* 1983 Op. Att'y Gen. No. 83-023, at 2-88 (the county director of job and family services "is in a position to be more knowledgeable than the board of county commissioners about the skill, capability, and other responsibilities of his employees"). In exercising that discretion, the director may determine that he may appropriately perform certain duties or that certain duties may be properly left unfulfilled.

Cf. 2005 Op. Att’y Gen. No. 2005-016, at 2-160 (because a county is not required to have a county administrator, a board of county commissioners has discretion to determine whether the duties associated with that position will be performed by a member or members of the board of county commissioners, by a county administrator, or by another county employee, or that those duties may be properly left unfulfilled). *See generally State ex rel. Kahle v. Rupert*, 99 Ohio St. 17, 19, 122 N.E. 39 (1918) (“[e]very officer of this state or any subdivision thereof not only has the authority but is required to exercise an intelligent discretion in the performance of his official duty”); 1986 Op. Att’y Gen. No. 86-099, at 2-554 (“in the absence of specific direction regarding the manner and method of performance of a duty, public officers have the implied authority to exercise reasonable discretion in performing their statutory duties”). In delegating assignments, a county director of job and family services may decide that certain tasks may be performed most efficiently himself. The director is responsible for the overall operation and efficiency of the department and may, therefore, assume additional duties under such circumstances. Accordingly, we are of the opinion that a county director of job and family services may perform fiscal and budgetary duties for the department when such duties are not assigned to another individual by law, and the director determines he can accurately and efficiently perform those duties. *Cf.* 2005 Op. Att’y Gen. No. 2005-016 (concluding that although a county commissioner may not hold simultaneously the position of county administrator because it is subordinate to the board of county commissioners, a county commissioner may assume the duties associated with the county administrator position if the county discontinues funding for that position).

The director’s performance of duties on behalf of the county department of job and family services is, of course, subject to the board of county commissioners’ control and direction. *See* R.C. 329.01; R.C. 329.02; R.C. 329.04(B); 2011 Op. Att’y Gen. No. 2011-008, at 2-59 (“[t]he director of a county department of job and family services is appointed and removed by the board of county commissioners and is subject to the board’s control and direction”); 2005 Op. Att’y Gen. No. 2005-044, at 2-479 n.2 (“[t]he county department of job and family services is an agency of county government with a wide variety of powers and duties that it performs under the control and direction of the board of county commissioners”); 2004 Op. Att’y Gen. No. 2004-031, at 2-284 (“[i]n authorizing the county department of job and family services and its director to exercise powers and duties relating to family services duties or workforce development activities, the board of county commissioners must maintain control and direction over the department and the director”). In controlling and directing the county department of job and family services, the board of county commissioners must ensure that duties undertaken by the director are performed in a lawful and efficient manner. In that regard, the board of county commissioners acts as a check upon the county director of job and family services, who serves at the pleasure of the board.

Based on the foregoing, it is my opinion, and you are hereby advised that because the Director of the Belmont County Department of Job and Family Services (BCDJFS) oversees the position of chief financial officer of the department, the Director of BCDJFS may not hold simultaneously the chief financial officer position. A director of a county department of job and family services is, however, required by law to perform certain fiscal and budgetary functions on behalf of the

The Honorable Daniel P. Fry

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department and may assume additional fiscal and budgetary responsibilities as local officials deem appropriate.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive style with a large initial "M" and a long, sweeping tail.

MICHAEL DEWINE
Ohio Attorney General