

OPINION NO. 2001-040**Syllabus:**

A person who is appointed as an assistant prosecuting attorney to prosecute criminal cases in the court of common pleas may serve simultaneously as a member of a board of health of a combined general health district created pursuant to R.C. 3709.07 or R.C. 3709.071, provided that as an assistant prosecuting attorney he does not represent or serve as legal counsel for the board of health, serve in place of the prosecuting attorney on the county budget commission that reviews and approves the annual budget of the board of health, or participate in the prosecution or other resolution of any criminal cases referred to the prosecuting attorney by the board of health. In addition, as a member of the board of health he may not participate in deliberations, discussions, negotiations, or votes concerning the board of health's employment of legal counsel to enforce R.C. 3734.01-.13, and rules, orders, and terms and conditions of permits, licenses, and variances adopted or issued thereunder.

To: James J. Mayer, Jr., Richland County Prosecuting Attorney, Mansfield, Ohio
By: Betty D. Montgomery, Attorney General, October 1, 2001

You have requested an opinion whether a person who is appointed as an assistant prosecuting attorney to prosecute criminal cases in the court of common pleas may serve

simultaneously as a member of a board of health of a combined general health district. The combined general health district is a union of a general health district and city health district.¹ The person, as an assistant prosecuting attorney, is compensated by, and under the supervision of, the county prosecuting attorney, rather than the board of health of the combined general health district.²

The following seven questions are used for determining whether a person may serve simultaneously in two public positions:

1. Is either of the positions a classified employment within the terms of R.C. 124.57?
2. Do the empowering statutes of either position limit employment in another public position or the holding of another public office?
3. Is one position subordinate to, or in any way a check upon, the other?
4. Is it physically possible for one person to discharge the duties of both positions?
5. Is there a conflict of interest between the two positions?
6. Are there local charter provisions, resolutions, or ordinances which are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

2000 Op. Att'y Gen. No. 2000-025 at 2-166 and 2-167.

Questions six and seven concern the applicability of charter provisions, resolutions, ordinances, and federal, state, and local departmental regulations. In this particular instance, there are no applicable charter provisions, resolutions, ordinances, or state or federal regulations. Whether there is an applicable local departmental regulation is a matter for local officials to determine. For the purpose of this opinion, we will assume that there is no such regulation.

Question one concerns the application of R.C. 124.57 to each of these positions. R.C. 124.57 is the statute that prohibits an officer or employee in the classified service of the state, or of a county, city, city school district or civil service township from taking part in a variety of activities that occur as part of the regular political process and are partisan in nature.³ See

¹A combined general health district may be created pursuant to R.C. 3709.07 or R.C. 3709.071 by the union of a general health district and one or more city health districts. See 1991 Op. Att'y Gen. No. 91-016 at 2-80. R.C. 3709.07 authorizes the formation of a combined general health district when a majority of the members of the district advisory council of the general health district and the members of the legislative authority of each city vote affirmatively on the creation of the district. Under R.C. 3709.071, a combined general health district may be established when the electors of a general health district and one or more city health districts vote in favor of the establishment of such a district.

²A county prosecuting attorney may appoint an assistant prosecuting attorney who is employed and compensated by a board of health pursuant to R.C. 3734.57 to enforce R.C. 3734.01-.13, and rules, orders, and terms and conditions of permits, licenses, and variances adopted or issued under R.C. 3734.01-.13. 1990 Op. Att'y Gen. No. 90-106.

³R.C. 124.57(A) provides as follows:

generally Heidtman v. City of Shaker Heights, 163 Ohio St. 109, 126 N.E.2d 138 (1955); *see also Gray v. City of Toledo*, 323 F. Supp. 1281 (N.D. Ohio 1971).

We must first determine, therefore, whether an assistant prosecuting attorney or member of the board of health of a combined general health district is a position within the classified service as described by the language of R.C. 124.57. If neither of the positions is within the classified service as so described, then R.C. 124.57 will not apply so as to prohibit a person from holding both of those positions at the same time.

R.C. 124.57 applies only to officers and employees in the service of “the state, the several counties, cities, and city school districts thereof, and civil service townships.” It does not expressly refer to officers and employees in the service of a combined general health district. *See generally* 1991 Op. Att’y Gen. No. 91-016 at 2-80 (“[t]he health districts are political subdivisions of the state, governed by state law, and are separate from any city, county, township, or other local government”). R.C. 124.57’s prohibition, therefore, does not apply to a member of the board of health of a combined general health district. 1997 Op. Att’y Gen. No. 97-026 at 2-151; 1981 Op. Att’y Gen. No. 81-079 at 2-311.

Although an assistant prosecuting attorney is in the service of a county, *see* R.C. 309.06, R.C. 124.11(A)(11) provides that the position of assistant prosecuting attorney is in the unclassified service. An assistant prosecuting attorney thus is not subject to the language of R.C. 124.57. 1999 Op. Att’y Gen. No. 99-027 at 2-172. Accordingly, the prohibition set forth in R.C. 124.57 does not apply to either of these positions, and so does not operate to prevent a person from holding both of these positions at the same time.

Question two asks whether the empowering statutes of either position limit a person from being employed in another public position or holding another public office. No statute prohibits a person from serving simultaneously in the positions of assistant prosecuting attorney and member of the board of health of a combined general health district. *Cf.* R.C. 3.11 (“[n]o person shall hold at the same time by appointment or election more than one of the following offices: sheriff, county auditor, county treasurer, clerk of the court of common pleas, county recorder, prosecuting attorney, and probate judge”); R.C. 309.02 (“[n]o prosecuting attorney shall be a member of the general assembly of this state or mayor of a municipal corporation”); R.C. 3313.13 (“[n]o prosecuting attorney ... shall be a member of a board of education”); R.C. 3709.16 (“[n]o member of the board [of health of a city or general

No officer or employee in the classified service of the state, the several counties, cities, and city school districts thereof, and civil service townships, 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 person solicit directly or indirectly, orally or by letter, or be in any manner concerned in soliciting any such assessment, contribution, or payment from any officer or employee in the classified service of the state and the several counties, cities, or city school districts thereof, or civil service townships; nor shall any officer or employee in the classified service of the state, the several counties, cities, and city school districts thereof, and civil service townships, 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. (Emphasis added.)

health district] shall be appointed as health officer or ward physician"). This question thus may be answered in the negative.

Question three asks whether one position is subordinate to, or in any way a check upon, the other. An assistant prosecuting attorney is appointed by and serves at the pleasure of the county prosecuting attorney. *See* R.C. 309.06. *See generally* 1991 Op. Att'y Gen. No. 91-011 at 2-58 ("individuals in the unclassified service hold their positions at the pleasure of their appointing authority, and are subject to dismissal from their positions without cause"). Members of a board of health of a combined general health district created pursuant to R.C. 3709.07 or R.C. 3709.071 may be appointed by the city or cities they represent, by the general health district advisory council, or as provided in the contract or petition creating the combined health district.⁴ R.C. 3709.07; R.C. 3709.071; 1997 Op. Att'y Gen. No. 97-029 at 2-174. The members of a combined general health district are accountable to the authorities that appoint them and the citizens of the combined general health district. The positions thus serve different masters, and neither is required to assign duties to, or supervise, the other. Accordingly, neither position is subordinate to, or in any way a check upon, the other.

Question four asks whether it is physically possible for one person to perform the duties of both positions. This is a factual question that is best answered by the interested persons because they may more precisely determine the time constraints imposed by each position. 1999 Op. Att'y Gen. No. 99-027 at 2-177. It seems likely, however, that the duties of these two positions can be discharged competently by the same person if there is no direct conflict in the working hours of each position.

Question five question asks whether there is a conflict of interest between the two positions.⁵ A person may not hold two public positions simultaneously if he would be subject to divided loyalties and conflicting duties or be exposed to the temptation of acting other than in the best interest of the respective agencies or offices he serves. 2000 Op. Att'y Gen. No. 2000-025 at 2-168.

In 1924 Op. Att'y Gen. No. 1547, vol. I, p. 324 the Attorney General advised that, because a prosecuting attorney is a member of the county budget commission, a prosecuting attorney may not serve as a member of a board of health.⁶ In that opinion the Attorney

⁴A combined health district created pursuant to R.C. 3709.07 or R.C. 3709.071 may be administered by the board of health or health department of a city within the district, by the board of health of the original general health district, or by a combined board of health. R.C. 3709.07; R.C. 3709.071; 1997 Op. Att'y Gen. No. 97-029 at 2-174.

⁵The Ohio Ethics Commission is vested with the authority to issue advisory opinions regarding the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43. *See* R.C. 102.08(A). The authority to issue advisory opinions concerning the rules and canons set forth in the Supreme Court Rules for the Government of the Bar of Ohio and the Code of Professional Responsibility is conferred upon the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court. Ohio Gov. Bar R. V § 2(C); *see* R.C. 102.08(A). In light of this express grant of authority, we believe that it is proper to refrain from interpreting such ethical provisions, canons, and rules by way of a formal opinion. 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph three). It is, therefore, recommended that you contact these agencies for advice concerning the ethical and professional responsibilities that will confront an assistant prosecuting attorney who also serves as a member of the board of health of a combined general health district.

⁶Pursuant to R.C. 5705.27, the prosecuting attorney is a member of the county budget commission.

General explained that as a member of the county budget commission, a prosecuting attorney would be required to review and approve the annual budget of the board of health.⁷ In such a situation, the prosecuting attorney, as a member of the county budget commission, would “pass upon his own acts as a member of the board of health,” *id.* at 326, thus presenting an impermissible conflict of interest that rendered the positions of prosecuting attorney and member of a board of health incompatible. *Cf.* 1983 Op. Att’y Gen. No. 83-035 at 2-136 (“a county treasurer who, as a member of the county budget commission, is responsible for objectively reviewing and adjusting the county’s proposed appropriations, would be subject to [an impermissible] conflict of interest if he served as a director of the county agricultural society”). *See generally* 1989 Op. Att’y Gen. No. 89-007 at 2-29 (“[a] member of the county budget commission has a duty to render unbiased determinations”).

Prior opinions of the Attorney General have concluded that an assistant prosecuting attorney is not permitted to hold any position that the prosecuting attorney may not hold because an assistant prosecuting attorney is empowered to act for and in the place of the prosecuting attorney in most matters. *See, e.g.,* 1988 Op. Att’y Gen. No. 88-049 at 2-224 (“a prosecuting attorney may not serve upon a board of township trustees for which he also acts as legal adviser and counsel.... Similarly, it follows that an assistant appointed by such prosecuting attorney ... also may not serve upon such board of township trustees”); 1983 Op. Att’y Gen. No. 83-030 (because R.C. 5126.03(A)(1) (now R.C. 5126.021(A)(1)) prohibits a prosecuting attorney from serving as a member of a county board of mental retardation and developmental disabilities, an assistant prosecuting attorney may not serve on such a board). More recent opinions have questioned this proposition, however. 2001 Op. Att’y Gen. No. 2001-027, slip op. at 5-6; 1999 Op. Att’y Gen. No. 99-027 at 2-175 through 2-177. These opinions have reasoned that, because an assistant prosecuting attorney does not, by virtue of his appointment to that position, assume all of the duties of a prosecuting attorney, an assistant prosecuting attorney who is assigned to perform only limited duties or functions on behalf of the prosecuting attorney may be permitted to hold a position that the prosecuting attorney would not otherwise be able to hold. 2001 Op. Att’y Gen. No. 2001-027, slip op. at 5-6; 1999 Op. Att’y Gen. No. 99-027 at 2-175 and 2-176.

1999 Op. Att’y Gen. No. 99-027 thus explains at 2-175 and 2-176:

[T]he role of an assistant prosecuting attorney is limited to aiding or assisting the prosecuting attorney in the performance of his numerous statutory responsibilities. Assistants enable the prosecuting attorney to perform effectively the duties of his office. Without assistants, a prosecuting attorney would be unable to completely and appropriately perform the duties of his office.

An assistant prosecuting attorney thus performs his duties on behalf of the prosecuting attorney. This means that an assistant prosecuting attorney does not act for or stand in the place of the prosecuting attorney in a particular matter unless so authorized and directed by the prosecuting attorney. An assistant prosecuting attorney is not, by virtue of his appointment to that position, conferred all of the powers, duties, and responsibilities of the prosecuting attorney. Nor is he empowered to act for or in the place of the

⁷R.C. 3709.28 requires the board of health of a general health district to submit an annual appropriation measure “to the county budget commission which may reduce any item in such appropriation measure but may not increase any item or the aggregate of all items.”

prosecuting attorney in all matters. Rather, an assistant prosecuting attorney may perform only those duties or functions that the prosecuting attorney assigns to him. Thus, it is only with regard to those duties assigned to him by the prosecuting attorney that an assistant prosecuting attorney acts for or in the place of the prosecuting attorney. (Citations omitted.)

Accord 2001 Op. Att'y Gen. No. 2001-027, slip op. at 5-6.

For this reason, the resolution of the compatibility issue of conflict of interest in the case of an assistant prosecuting attorney who wishes to serve simultaneously in another public position requires a factual examination of the particular duties and responsibilities assigned to and to be performed by the assistant prosecuting attorney. 2001 Op. Att'y Gen. No. 2001-027, slip op. at 6; 1999 Op. Att'y Gen. No. 99-027 at 2-178. "And where the facts in a particular situation demonstrate that an assistant prosecuting attorney performs, on behalf of the prosecuting attorney, duties that are confined to certain categories of cases or matters, or certain clients of the prosecuting attorney, that in no way conflict with any of the duties and responsibilities the assistant undertakes in the other position, then the assistant may hold the other position even though the prosecuting attorney would otherwise be prohibited from serving in that position." 2001 Op. Att'y Gen. No. 2001-027, slip op. at 6; *accord* 1992 Op. Att'y Gen. No. 92-041 at 2-164; 1986 Op. Att'y Gen. No. 86-035 at 2-184 n.2; *see also* 1999 Op. Att'y Gen. No. 99-027; 1997 Op. Att'y Gen. No. 97-044; 1997 Op. Att'y Gen. No. 97-034.

Let us now turn to your specific inquiry. As you are aware, the prosecuting attorney is the legal advisor and representative of the board of health of a combined general health district. *See generally* R.C. 3709.33 ("[i]n general health districts the prosecuting attorney of the county constituting all or a major part of such district shall act as the legal advisor of the board of health. In a proceeding in which the board is a party the prosecuting attorney of the county in which such proceeding is instituted shall act as the legal representative of the board"); 1935 Op. Att'y Gen. No. 4292, vol. I, p. 624 (syllabus, paragraph five) (in a combined general health district created under R.C. 3709.07 "it is the duty of the prosecuting attorney of the county embraced within such combined health district, to act as attorney for the board of health of such combined health district"). Thus, the assistant prosecuting attorney in question will be subject to an impermissible conflict of interest if he is assigned duties as legal counsel for the board of health of which he is a member, or is required to represent such board in any suit or action involving the board or its officers or employees. *See* 2001 Op. Att'y Gen. No. 2001-027, slip op. at 8 n.7 ("if a person who serves simultaneously in the positions of assistant prosecuting attorney and township trustee is required by the prosecuting attorney to serve as the legal adviser to the board of township trustees, the conflict that results from such service as the board's legal adviser renders the positions incompatible").

In addition, the prosecuting attorney is a member of the county budget commission. R.C. 5705.27. The county budget commission is responsible for reviewing and approving the annual budget of a board of health that serves the county. An assistant prosecuting attorney may be required by the prosecuting attorney to serve in place of the prosecuting attorney on the county budget commission. *See generally* 1943 Op. Att'y Gen. No. 6186, p. 363 (syllabus) (an assistant prosecuting attorney "may, when authorized so to do by the prosecuting attorney, sit as a member of the county budget commission and perform the functions enjoined upon the prosecuting attorney"). Because a member of the county budget commission has a duty to render unbiased determinations, this assistant prosecuting attorney will also be subject to a conflict of interest if he serves in place of the prosecuting attorney on the

county budget commission that reviews and approves the annual budget of the board of health of which he is a member. *See generally* 1997 Op. Att'y Gen. No. 97-034 (an assistant prosecuting attorney may not serve within the same county as a village solicitor if he serves in place of the prosecuting attorney on the county budget commission).

Finally, an assistant prosecuting attorney who serves as a member of a board of health will be subject to a conflict of interest if he is required to prosecute criminal cases referred to the prosecuting attorney by the board of health of which he is a member. *See, e.g.*, R.C. 3733.08(B) (a prosecuting attorney, upon complaint of a board of health, shall prosecute any person violating R.C. 3733.01-.08 or the rules adopted thereunder); R.C. 3733.29 (a prosecuting attorney, upon complaint of a board of health, shall prosecute any person violating R.C. 3733.21-30 or the rules adopted thereunder); R.C. 3733.47 (a prosecuting attorney, upon complaint of a board of health, shall prosecute any person violating R.C. 3733.41-.49); R.C. 3734.10 (a prosecuting attorney, upon complaint of a board of health, shall prosecute any person violating R.C. Chapter 3734, rules adopted thereunder, or terms or conditions of permits, licenses, variances, or orders issued under R.C. Chapter 3734).⁸ In such a situation, the assistant's responsibilities as a member of the board of health may unduly influence the performance of his duties as an assistant prosecuting attorney by impairing his judgment or objectivity as an assistant prosecuting attorney. *See* 2001 Op. Att'y Gen. No. 2001-027, slip op. at 12 n.10; 1999 Op. Att'y Gen. No. 99-027 at 2-181. *See generally* 1985 Op. Att'y Gen. No. 85-052 at 2-194 (participation in development of regulations may conflict with duty to objectively review facts which might constitute a violation of the regulation).

It does not necessarily follow that an assistant prosecuting attorney who wishes to serve simultaneously in another public position is prohibited from such dual service simply because the assistant may face a conflict of interest. *See* 1999 Op. Att'y Gen. No. 99-027 at 2-180. As our prior compatibility opinions have advised, consideration of various factors may demonstrate that the conflict of interest may be sufficiently avoided or eliminated entirely, thus making it possible for an assistant prosecuting attorney to serve simultaneously in other public positions. 2001 Op. Att'y Gen. No. 2001-027, slip op. at 9. Factors to be considered in that regard include the probability of the conflict, the ability of the assistant to remove himself from the conflict (should it arise), whether the assistant exercises decision-making authority in both positions, and whether the conflict relates to the primary functions of each position, or to financial or budgetary matters. *Id.*

With respect to your particular inquiry, your office has informed us that this specific assistant prosecuting attorney is responsible for representing the State of Ohio in criminal

⁸*See also* R.C. 3733.08(A) (no person shall violate R.C. 3733.01-.08 or the rules adopted thereunder); R.C. 3733.30 (no person shall violate R.C. 3733.21-29 or the rules adopted thereunder); R.C. 3733.48 (no person shall violate R.C. 3733.41-.471 or the rules adopted thereunder); R.C. 3733.99 (setting forth criminal penalties for violations of R.C. 3733.08(A), R.C. 3733.30, and R.C. 3733.48); R.C. 3734.11 (no person shall violate any section of R.C. Chapter 3734, any rule adopted thereunder, or any order issued under R.C. 3734.13); R.C. 3734.99 (setting forth criminal penalties for violations of R.C. Chapter 3734, rules adopted thereunder, orders issued under R.C. 3734.13, and terms or conditions of permits or licenses issued under various provisions of R.C. Chapter 3734). *See generally* 1990 Op. Att'y Gen. No. 90-106 at 2-470 ("the investigatory power of a board of health and the prosecutorial duties of the county prosecutor are closely related and, in fact, are complementary parts of the implementation and enforcement of R.C. 3734.01-.13").

cases pending before the court of common pleas.⁹ This assistant is not assigned duties as legal counsel for the board of health, nor is he required to represent the board of health in any suit or action involving the board of health or its officers or employees. Because this assistant will not be required to represent or serve as legal counsel for the board of health of which he is a member, he will not be subject to the impermissible conflict of interest that exists for either the prosecuting attorney, or for an assistant prosecuting attorney who is assigned to represent or serve as legal counsel for the board. *See, e.g.*, 2001 Op. Att'y Gen. No. 2001-027, slip op. at 8 ("if a person who serves simultaneously in the positions of assistant prosecuting attorney and township trustee within the same county does not serve as the legal adviser to the board of township trustees, no conflict of interest exists to render those two positions incompatible").

We are also informed that this assistant prosecuting attorney is not required to serve in place of the prosecuting attorney on the county budget commission. Because he will not be serving in place of the prosecuting attorney on the county budget commission that reviews and approves the annual budget of the board of health of which he is a member, the assistant will not be subject to the impermissible conflict of interest that exists for either the prosecuting attorney as a member of the county budget commission, or for an assistant prosecuting attorney who is assigned to serve in place of the prosecuting attorney on the county budget commission. *See generally* 1997 Op. Att'y Gen. No. 97-034 (an assistant prosecuting attorney may serve within the same county as a village solicitor, provided he does not serve in place of the prosecuting attorney on the county budget commission).

We are further informed that it is unlikely that this assistant prosecuting attorney will be required, as a regular and continuing part of his duties, to prosecute criminal cases referred to him by the board of health of which he is a member. Such cases constitute only a small portion of the criminal caseload handled by the prosecuting attorney. Information provided to us also indicates that this person is one of thirteen assistant prosecuting attorneys appointed by the prosecuting attorney. Thus, the prosecution of criminal cases referred to the prosecuting attorney by the board of health of which the assistant is a member will generally be something that the assistant will have to handle fairly infrequently.

Moreover, when such a case is referred to the prosecuting attorney, this specific assistant can, as a practical matter, avoid involvement in the case's prosecution since the prosecuting attorney employs more than one assistant prosecuting attorney. An assistant prosecuting attorney's caseload is also generally assigned by either the prosecuting attorney or another member of the prosecuting attorney's staff to ensure that the assistant does not prosecute any criminal case in which the assistant may be interested. *See generally* note nine, *supra*. If a policy is adopted by the prosecuting attorney which avoids assigning board of health criminal cases to this specific assistant, the potential conflict of interest will be avoided.

In addition, if this assistant prosecuting attorney were to be assigned a criminal case referred to the prosecuting attorney by the board of health of which the assistant is a

⁹It is assumed, for the purpose of this opinion, that the assistant prosecuting attorney will not be responsible for prosecuting any criminal actions against himself as a member of the board of health, the other board members with whom he serves, or other officers and employees of the board of health. *See, e.g.*, R.C. 2921.41 (defining the criminal offense of theft in office). It is further assumed that the assistant's exercise of prosecutorial discretion is supervised by either the prosecuting attorney or another member of the prosecuting attorney's staff.

member, the assistant would have an ethical duty to withdraw from the case. 1999 Op. Att'y Gen. No. 99-027 at 2-181; *see also* 1981 Op. Att'y Gen. No. 81-010 at 2-33 (“[i]f an actual conflict of interest should arise between [two] positions, a person serving in both positions would be expected to appropriately remove himself from the matter”). The assistant would be required to remove himself from any case in which his objectivity might be impaired. Thus, if this assistant prosecuting attorney is not required, as a regular and continuing part of his duties, to prosecute criminal cases referred to him by the board of health of which he is a member, he will not be subject to the impermissible conflict of interest that exists for either the prosecuting attorney or for an assistant prosecuting attorney who is assigned to prosecute such criminal cases. *See generally* 2001 Op. Att'y Gen. No. 2001-027, slip op. at 12 n.10 (an assistant prosecuting attorney who serves as a township trustee is not subject to an impermissible conflict of interest if he is not required to prosecute any violation of a township resolution adopted under R.C. Chapter 504).

Accordingly, the potential for these conflicts of interest does not prohibit an assistant prosecuting attorney from serving simultaneously on the board of health of a combined general health district, provided he does not represent or serve as legal counsel for the board of health, serve in place of the prosecuting attorney on the county budget commission that reviews and approves the annual budget of the board of health, or participate in the prosecution or other resolution of any criminal cases referred to the prosecuting attorney by the board of health.

Let us next consider a conflict of interest that a member of the board of health of a combined general health district may confront in conjunction with his service as an assistant prosecuting attorney. Pursuant to R.C. 3734.10, a person who violates R.C. Chapter 3734, rules adopted thereunder, or terms or conditions of a permit, license, variance, or order issued under R.C. Chapter 3734 is to be prosecuted by the prosecuting attorney of the county where the violation occurred, is occurring, or may occur. 1990 Op. Att'y Gen. No. 90-106 advised, however, that a board of health may employ and compensate its own legal counsel to enforce R.C. 3734.01-.13, and rules, orders, and terms and conditions of permits, licenses, and variances adopted or issued thereunder, and that such legal counsel may be appointed by the prosecuting attorney as an assistant prosecuting attorney. In such a situation, an assistant prosecuting attorney who is employed and compensated by a board of health “would ... be given authorization to perform prosecutorial duties that relate to the enforcement of R.C. 3734.01-.13.” *Id.* at 2-472.

A member of a board of health thus may have to discuss, or to deliberate, negotiate, or vote upon, whether to employ legal counsel other than the prosecuting attorney to enforce R.C. 3734.01-.13, and rules, orders, and terms and conditions of permits, licenses, and variances adopted or issued thereunder. In such a circumstance, it may be difficult for the member of the board of health to set aside his loyalty to the prosecuting attorney that employs him as an assistant prosecuting attorney. *See* 2001 Op. Att'y Gen. No. 2001-027, slip op. at 9. Such a predisposition of loyalty could prevent the member of the board of health from making completely objective decisions. *See id.* Furthermore, the board of health member may be unable to perform his duties with respect to such a matter in a completely objective manner because of the employment relationship he has with the prosecuting attorney. *See id.*

As a practical matter, it is likely that a board of health will not often find it necessary to engage in deliberations, discussions, negotiations, or votes concerning the board of health's employment of legal counsel other than the prosecuting attorney to enforce R.C. 3734.01-.13, and rules, orders, and terms and conditions of permits, licenses, and variances

adopted or issued thereunder. Moreover, when such a matter does come before the board of health, the member who also serves as assistant prosecuting attorney should be able to remove himself from any participation in the matter since the board of health is capable of discharging its duties when one of its members abstains from a matter. *See generally State ex rel. Saxon v. Kienzle*, 4 Ohio St. 2d 47, 48, 212 N.E.2d 604, 605 (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”). Finally, the member of the board of health, as a public official, has a duty to abstain from participating in any matter that would impair his objectivity. 1997 Op. Att’y Gen. No. 97-026 at 2-155.

Accordingly, this potential conflict of interest does not bar a person from serving simultaneously as an assistant prosecuting attorney and member of a board of health, provided that as a member of the board of health he does not participate in deliberations, discussions, negotiations, or votes concerning the board of health’s employment of legal counsel to enforce R.C. 3734.01-.13, and rules, orders, and terms and conditions of permits, licenses, and variances adopted or issued thereunder. *Cf.* 2001 Op. Att’y Gen. No. 2001-027 (a person who is appointed as an assistant prosecuting attorney for the exclusive purpose of handling criminal cases pending before the appellate courts may serve simultaneously as a township trustee, provided that as a township trustee he does not participate in any deliberations, discussions, negotiations, or votes concerning the township’s employment of an attorney other than the prosecuting attorney).

Our review of the powers, duties, and responsibilities of the respective positions thus discloses no impermissible conflicts of interest between the positions.¹⁰ Therefore, a person who is appointed as an assistant prosecuting attorney for the purpose of prosecuting criminal cases in the court of common pleas may serve simultaneously as a member of a board of health of a combined general health district created pursuant to R.C. 3709.07 or R.C. 3709.071, provided that as an assistant prosecuting attorney he does not participate in any criminal cases referred to the prosecuting attorney by the board of health of which the assistant is a member. In addition, as a member of the board of health he may not participate in deliberations, discussions, negotiations, or votes concerning the board of health’s employment of legal counsel to enforce R.C. 3734.01-.13, and rules, orders, and terms and conditions of permits, licenses, and variances adopted or issued thereunder.

Based on the foregoing, it is my opinion, and you are hereby advised that a person who is appointed as an assistant prosecuting attorney to prosecute criminal cases in the court of common pleas may serve simultaneously as a member of a board of health of a combined general health district created pursuant to R.C. 3709.07 or R.C. 3709.071, provided that as an assistant prosecuting attorney he does not represent or serve as legal

¹⁰There may be instances in which a member of a board of health who serves as an assistant prosecuting attorney may be required to participate in deliberations, discussions, negotiations, or votes that concern the county in which he serves as an assistant. *See, e.g.*, R.C. 3709.085 (a board of health may contract with a county to obtain or provide the county with services pertaining to the prevention, control, or abatement of air pollution); R.C. 3709.22 (a board of health may be required to abate or suppress a nuisance committed by the county); 1991 Op. Att’y Gen. No. 91-016 (a board of county commissioners may rent space to the board of health of a combined general health district created pursuant to R.C. 3709.07). However, because this person, in his capacity as an assistant prosecuting attorney, will not be responsible for representing the board of health or the county in such deliberations, discussions, negotiations, or votes, he will not, in those instances, confront a conflict of interest.

counsel for the board of health, serve in place of the prosecuting attorney on the county budget commission that reviews and approves the annual budget of the board of health, or participate in the prosecution or other resolution of any criminal cases referred to the prosecuting attorney by the board of health. In addition, as a member of the board of health he may not participate in deliberations, discussions, negotiations, or votes concerning the board of health's employment of legal counsel to enforce R.C. 3734.01-.13, and rules, orders, and terms and conditions of permits, licenses, and variances adopted or issued thereunder.