

October 27, 2015

The Honorable Morris J. Murray  
Defiance County Prosecuting Attorney  
500 Court Street, Suite C  
Defiance, Ohio 43512

SYLLABUS:

2015-032

1. A deputy sheriff employed in the classified service may serve simultaneously as a member of the board of education of a city or local school district that is within the boundaries of the same county, provided he observes the limitations identified in syllabus paragraphs 2, 3, and 4 of this opinion.
2. As a member of the board of education, he shall (1) not appear before the county budget commission, (2) refrain from participating in any discussions, deliberations, and votes concerning a levy in excess of the ten-mill limitation when the county also has a levy for the benefit of the county sheriff's office on the ballot at the same election, and (3) not participate in any discussions, negotiations, deliberations, and votes concerning a contract between the county sheriff and the school district board of education.
3. As a deputy sheriff, he shall not (1) appear before the county budget commission, (2) participate in any investigation of a violation of the law involving employees or officials of the school district in which he serves as a member of the board of education, and (3) participate in the development of an internal control policy that determines how moneys deposited in the county sheriff's law enforcement trust fund may be allocated to community preventive education programs under R.C. 2981.13(D) when the school district in which he is a member of the board of education benefits from a drug abuse resistance education (D.A.R.E.) program.
4. A deputy sheriff may not be assigned, either as a D.A.R.E. officer or under a contract for police services pursuant to R.C. 311.29, to a school that is within the school district in which he is a member of the board of education.



October 27, 2015

OPINION NO. 2015-032

The Honorable Morris J. Murray  
Defiance County Prosecuting Attorney  
500 Court Street, Suite C  
Defiance, Ohio 43512

Dear Prosecutor Murray:

You have presented us two compatibility inquiries. You ask whether a deputy of the Defiance County Sheriff may serve simultaneously as a member of the board of education of the Defiance City School District, which is located entirely within Defiance County. Further, you ask whether a deputy of the Defiance County Sheriff may serve simultaneously as a member of the board of education of the Ayersville Local School District, which is located entirely within Defiance County.

A seven-question test is used to determine whether two public positions are compatible:

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 an impermissible 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?

2003 Op. Att’y Gen. No. 2003-010, at 2-69 to 2-70. “In order for two positions to be found compatible, all seven questions must be resolved in favor of compatibility.” 1989 Op. Att’y Gen. No. 89-052, at 2-218.

#### **Application of R.C. 124.57**

Question one asks whether one of the positions constitutes classified employment for purposes of R.C. 124.57. R.C. 124.57(A) provides, in part:

No officer or employee in the classified service of the state, the several counties, cities, and city school districts of the state, or the civil service townships of

the state 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 state, the several counties, cities, and city school districts of the state, or the civil service townships of the state 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 ... prohibits a classified employee from holding a partisan elective office or engaging in partisan political activities, but does not apply to non-partisan elective offices.” 1989 Op. Att’y Gen. No. 89-022, at 2-101.<sup>1</sup>

Whether a deputy sheriff constitutes a classified or unclassified employment depends upon the particular duties assigned to the deputy and whether the deputy holds a fiduciary relationship to the county sheriff. *In re Termination of Emp’t of Pratt*, 40 Ohio St. 2d 107, 114-115, 321 N.E.2d 603 (1974). Holding a fiduciary relationship “involves something more than the ordinary employer/employee relationship and connotes special confidence and trust thereby resulting in a superior position within the department.” *Davis v. Jones*, No. 93 CA 06, 1993 WL 405486, at \*5 (Hocking County Sept. 28, 1993). “A deputy sheriff is, more or less, presumed to be in classified civil service unless some special duties are demonstrated which would put him in the unclassified group.” *Id.*; accord *State ex rel. Byers v. Miami Cnty. Sheriff’s Office*, 2d Dist. No. 09-CA-42, 2011-Ohio-6125, 2011 WL 5925149, at ¶ 19. The determination of whether a particular deputy sheriff is in the classified service is a question of fact that is best determined by the local officials based upon an examination of the specific duties assigned to that deputy sheriff.

A member of a board of education of a city or local school is elected in a nonpartisan election, which you have indicated is the case for the two board member positions involved in your request. R.C. 3505.04 (“[o]n the nonpartisan ballot shall be printed the names of all nonpartisan candidates for election to ... office of member of a board of education”). Accordingly, regardless of whether these deputy sheriffs are classified or unclassified employees, R.C. 124.57(A) does not prohibit them from being elected as a member of a board of education in a nonpartisan election. As an elected official, a member of a city or local school district board of education is in the unclassified service. R.C. 124.11(A)(1) (“[a]ll officers elected by popular vote or persons appointed to fill vacancies in those offices” are in the unclassified service); 2014 Op. Att’y Gen. No. 2014-014, at 2-115; 1997 Op. Att’y Gen. No. 97-018, at 2-98. R.C. 124.57(A), therefore, does not apply to a member of a board of education of a city or local school district.

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<sup>1</sup> A classified employee may be permitted to participate in partisan political activities if the employee is permitted to do so by an applicable collective bargaining agreement or by a local charter provision. 2014 Op. Att’y Gen. No. 2014-032, at 2-278 n.4. For the purpose of this opinion, we assume that such a provision in an applicable collective bargaining agreement or a local charter does not exist with respect to the deputy sheriffs described in your letter.

### **Constitutional and Statutory Limitations on Holding Multiple Positions**

Question two asks whether the empowering statutes of either position limit the holding of other public employment or another public office. The holding of another position may also be prohibited by the state constitution. 2004 Op. Att’y Gen. No. 2004-051, at 2-437. R.C. 311.01(A) creates the office of sheriff in each Ohio county. R.C. 311.04(B)(1) authorizes a county sheriff to appoint deputies. The powers and duties of a county sheriff and a deputy sheriff are set forth in R.C. Chapter 311. *See generally* R.C. 3.06(A) (“[a] deputy, when duly qualified, may perform any duties of his principal”). Two statutory provisions limit the holding of another public office by a deputy sheriff. The first is R.C. 311.04(B)(1), which prohibits a county court judge or a mayor from being appointed as a deputy sheriff. The second is R.C. 3.11, which provides that “[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.” Although R.C. 3.11 prohibits a sheriff from holding one of the other delineated offices, 1961 Op. Att’y Gen. No. 2066, p. 132, 135 reasoned that because a deputy sheriff may perform the duties of the sheriff, the prohibition of R.C. 3.11 should also apply to a deputy sheriff.

Two statutes limit the holding of another position by a member of a school district board of education. The first is R.C. 3313.13, which provides “no prosecuting attorney, city director of law, or other official acting in a similar capacity shall be a member of a board of education.”<sup>2</sup> The second statute is R.C. 3313.70, which prohibits a member of a board of education from also serving as a “school physician, school dentist, or school nurse” during the member’s term of office.

No provision of the Ohio Constitution prohibits either a deputy sheriff or a member of a city or local school district board of education from holding another public office or position of public employment. Therefore, a deputy sheriff is not prohibited by the Ohio Constitution or a provision of the Revised Code from serving simultaneously as a member of a city or local school district board of education.

### **Subordination and Control**

Question three asks whether either position is subordinate to or under the control of the other position or whether either position is a check upon the other. For the most part, a member of a board of education of a city or a local school district and a deputy sheriff perform their duties independently of one another, and neither has direct control over the other. A deputy sheriff is assigned duties by the county sheriff, while a board of education member’s duties are determined by statute. R.C. Chapter 3313; 1991 Op. Att’y Gen. No. 91-063, at 2-300 (“county sheriffs ... are responsible for determining the duty status of, and the duties to be performed by, the individuals employed within their law enforcement agency”). A deputy sheriff is appointed by and is under the control of the county sheriff. R.C. 311.04; *see In re Termination of Emp’t of Pratt*, 40 Ohio St. 2d at 114. A member of a local

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<sup>2</sup> R.C. 3313.13 provides exceptions that do not apply to the positions about which you inquire.

school district board of education is an elected official. R.C. 3313.01. Generally, a member of a city school district board of education is also an elected official. R.C. 3313.02.<sup>3</sup> As elected officials, the school board members “are directly responsible to the electorate.” 2011 Op. Att’y Gen. No. 2011-043, at 2-352; *see also* 2006 Op. Att’y Gen. No. 2006-018, at 2-161.

An aspect of the subordination and control analysis is whether one position assigns duties to the other position. *See* 2011 Op. Att’y Gen. No. 2011-043, at 2-352 (“neither [a member of a local school district board of education nor a county recorder] is required to assign duties to or supervise the other”). A board of education of a school district may contract with a county sheriff to assign a deputy sheriff to schools in the school district for the purpose of “assisting guidance counselors and teachers in working with students concerning the use of alcohol and drugs of abuse[.]” R.C. 3313.95. When a school district board of education contracts with a county sheriff for such services, the duties to be performed by a deputy sheriff that is assigned to a school shall be specified in the contract. *Id.* Through the process of negotiating the terms of the contract, a board of education member may have a role in determining the duties to be performed by the deputy sheriff that is ultimately assigned to the school. You have explained that the deputy sheriff who wishes to serve as a member of the board of education of a city school district holds the position of drug abuse resistance education (D.A.R.E.) officer in the same city school district.

The requirement of R.C. 3313.95 that the contract specify the duties of the deputy sheriff assigned to a school within the contracting school district is not sufficient to conclude that the deputy sheriff holds a position that is subordinate to or under the control of the contracting school district board of education. The contracting board of education does not unilaterally determine the duties to be performed by a deputy sheriff that is assigned to the school district. Rather, those duties are negotiated as a contract term by the county sheriff and the board. Additionally, the job description you provided to us regarding the deputy sheriff who is a D.A.R.E. officer states that the deputy sheriff reports to the sheriff. The job description further indicates that the deputy “[p]erforms duties and responsibilities of a deputy when not performing D.A.R.E. and crime prevention functions.” Thus, the deputy’s activities that are the subject of a contract entered into pursuant to R.C. 3313.95 are one part of the regular duties performed by that deputy. To the extent that the deputy sheriff is assigned to a school by the sheriff, R.C. 3313.95, and reports to the sheriff, the authority to remove the deputy sheriff lies not with the school district board of education, but with the county sheriff. This also

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<sup>3</sup> Members of a city school district may be appointed under R.C. 3311.71(B) “[w]henver any municipal school district is released by a federal court from an order requiring supervision and operational, fiscal, and personnel management of the district by the state superintendent[.]” You have indicated that the local and city school board member positions involved in your request are elective positions. *See also* R.C. 3311.71(F). Therefore, we assume that R.C. 3311.71(B) does not apply.

weighs in favor of concluding that a deputy sheriff assigned to a school pursuant to a contract entered under R.C. 3313.95 is not subordinate to or under the control of a school district board of education.<sup>4</sup>

In addition, a city or local school district may promulgate rules “necessary for ... the government of its employees, pupils of its schools, and all other persons entering upon its school grounds or premises.” R.C. 3313.20(A). This authority is also not sufficient to conclude that a board of education of a school district that contracts with a county sheriff for the services of a deputy sheriff in a school under R.C. 3313.95 exercises control over the deputy sheriff or that the deputy sheriff is subordinate to the board of education for purposes of the compatibility analysis. Therefore, we conclude that none of the positions involved in your request is subordinate to or under the control of the other position.

### **Physical Ability to Discharge Duties**

Question four asks whether it is physically possible for one person to simultaneously hold two positions and fully perform all of the duties required of each position. “This is a factual question that is best resolved by the interested local officials since they may more precisely determine the time constraints and demands imposed upon the person” in each position. 2004 Op. Att’y Gen. No. 2004-051, at 2-438. In resolving this inquiry, it is important to consider that “a person must be certain that he will be able to carry out the duties of both positions in a competent and timely manner [, which] means that there may not be a direct conflict between the times when the person is needed to perform duties” in each position. *Id.* at 2-439. If, as a member of a city or local school district board of education, the person is required to be available during the hours in which he is working as a deputy sheriff, the person must use approved leave commensurate with the amount of time in which he is absent from his duties as a deputy sheriff. 2011 Op. Att’y Gen. No. 2011-008, at 2-60.

### **Conflicts of Interest**

The fifth question asks whether a conflict of interest exists when one person serves simultaneously in the two positions.<sup>5</sup> A conflict of interest exists “when an individual’s

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<sup>4</sup> A county sheriff and a board of education of a city or local school district may enter into a contract pursuant to which the county sheriff provides police protection services to the school district. R.C. 311.29(B). It is possible that under such a contract, the board of education of the contracting school district may be given the authority to evaluate the services that are provided pursuant to the contract. *See State ex rel. Scioto Cnty. Prosecutor v. Murphy*, Scioto App. No. 02CA2831, 2003-Ohio-4550, 2003 WL 22017242, at ¶ 33; 2014 Op. Att’y Gen. No. 2014-032, at 2-280 n.6. When such authority is provided under a contract, the board of education may serve as a check upon the activities of a deputy sheriff who works in the school district pursuant to the contract. 2014 Op. Att’y Gen. No. 2014-032, at 2-280 n.6. You have not indicated that a contract for police services under R.C. 311.29 exists between the city and local school district boards of education and the Defiance County sheriff. Therefore, that aspect of the subordination and control analysis is not an issue here.

‘responsibilities in one position are such as to influence the performance of his duties in the other position, thereby subjecting him to influences which may prevent his decisions from being completely objective.’” 1989 Op. Att’y Gen. No. 89-052, at 2-220 (quoting 1985 Op. Att’y Gen. No. 85-100, at 2-427). “[A] conflict of interest exists when a public servant is subject to divided loyalties and conflicting duties or exposed to the temptation of acting other than in the best interest of the public.” 1998 Op. Att’y Gen. No. 98-033, at 2-188 to 2-189.

Finding the existence of a potential conflict of interest between the two positions does not necessarily mean that a person is prohibited from holding both positions. 1998 Op. Att’y Gen. No. 98-033, at 2-189. Rather, whether a potential conflict of interest is impermissible depends upon several factors. *Id.* 2006 Op. Att’y Gen. No. 2006-010, at 2-86 to 2-87 summarized the approach taken if a conflict of interest is found to exist between the two positions:

[i]f our review discloses such conflicts, we must next determine the immediacy of the conflicts to see whether the conflicts may be sufficiently avoided or eliminated entirely so as to allow the person to serve simultaneously in both positions. The pertinent factors used in making this determination include, but are not limited to, the probability of the conflict, the ability of the person to remove himself from the conflict (should it arise), whether the person 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.

We now examine the powers, duties, and responsibilities of the two positions to determine whether a conflict of interest exists. We will then determine whether a conflict of interest we identify may be eliminated should it be presented. Insofar as a deputy sheriff may perform the duties of the county sheriff, *see* R.C. 3.06(A), we look to the statutes that set forth the powers and duties of a county sheriff. The primary duty of a county sheriff is to “preserve the public peace[.]” R.C. 311.07(A); 1998 Op. Att’y Gen. No. 98-033, at 2-187. Specifically, a “sheriff shall ... cause all persons guilty of any breach of the peace, within the sheriff’s knowledge or view, to enter into recognizance with sureties to keep the peace and to appear at the succeeding term of the court of common pleas, and the sheriff shall commit such persons to jail in case they refuse to do so.” R.C. 311.07(A). “[T]he duty to preserve the public peace necessarily requires the county sheriff and his deputies to investigate crimes that occur within the county.” 1998 Op. Att’y Gen. No. 98-033, at 2-187. Additionally, a county sheriff provides security to a court of common pleas and the court of appeals. R.C. 311.07(A) (“sheriff shall attend upon the court of common pleas and the court of

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<sup>5</sup> As the Ohio Ethics Commission is authorized to determine the applicability of the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43, R.C. 102.08, the Attorney General “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 R.C. Chapter 102, R.C. 2921.42, or R.C. 2921.43 applies to the positions at issue in this opinion, we recommend that you contact the Ohio Ethics Commission. 2011 Op. Att’y Gen. No. 2011-008, at 2-60 n.1.

appeals during their sessions, and, when required, shall attend upon the probate court [and] such sheriff shall have charge of the court house”). Subject to certain requirements found in R.C. 311.07(C), a county sheriff has a duty to “execute all warrants, writs, and other process directed to the sheriff by any proper and lawful authority of this state, and those issued by a proper and lawful authority of any other state.” R.C. 311.07(A). Finally, a sheriff or a deputy sheriff may be part of an organized crime task force. *Id.* As described by another opinion, “[t]he sheriff and his deputies are the chief law enforcement officers of the county[.]” 1984 Op. Att’y Gen. No. 84-028, at 2-82. A deputy sheriff shall perform such other duties as are assigned by the county sheriff. 1991 Op. Att’y Gen. No. 91-063, at 2-300 (“county sheriffs ... are responsible for determining the duty status of, and the duties to be performed by, the individuals employed within their law enforcement agency”).

The powers, duties, and responsibilities of a member of a board of education of a city or local school district are set forth in R.C. Chapter 3313. A board of education of a city or local school district is the administrative arm of the district and is charged with governing the schools in the district. 2014 Op. Att’y Gen. No. 2014-014, at 2-116; 2014 Op. Att’y Gen. No. 2014-012, at 2-95; 2011 Op. Att’y Gen. No. 2011-043, at 2-353; 2006 Op. Att’y Gen. No. 2006-018, at 2-160 to 2-161; 2003 Op. Att’y Gen. No. 2003-010, at 2-70. “Each city ... or local board of education shall have the management and control of all of the public schools ... that it operates in its respective district.” R.C. 3313.47. A city or local school district board of education has a responsibility to provide public schools to educate the children of the district and has the authority to acquire, construct, and improve buildings and real property for that purpose. R.C. 3313.37; R.C. 3313.48(A). A board of education of a city or local school district may also make policies and rules. R.C. 3313.20(A). As the taxing authority for the board’s respective school district, a board of education of a city or local school district also has a duty to make fiscal and budgetary decisions for the school district, including the issuing of securities, the levying of taxes, and the preparation of a tax budget for presentation to the county budget commission. R.C. 133.01(NN)(3); R.C. 133.18(A); R.C. 5705.01(C); R.C. 5705.28(A); 2003 Op. Att’y Gen. No. 2003-010, at 2-70.

Upon consideration of the powers, duties, and responsibilities of a deputy sheriff and a member of a board of education of a city or local school district, we discern several potential conflicts of interest. The first potential conflict arises from a competition between a county sheriff and a board of education of a city or local school district that is located within the boundaries of the county for tax moneys within the ten-mill limitation.<sup>6</sup> A board of county commissioners is the taxing authority for a

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<sup>6</sup> As explained in 2005 Op. Att’y Gen. No. 2005-002, at 2-11 n.1:

The 10-mill limitation is established in Ohio Const. art. XII, § 2 and R.C. 5705.02. Ohio Const. art. XII, § 2 provides that property may not be taxed “in excess of one percent of its true value in money for all state and local purposes” except by approval of the voters or provision of municipal charter. R.C. 5705.02 prohibits property taxes in excess of 10-mills, “except for taxes specifically authorized to be levied in excess thereof.”



county, and a board of education is the taxing authority for a city or local school district. R.C. 5705.01(C). “Except as provided in [R.C. 5705.28(B)(1) or (2) or in R.C. 5705.281], the taxing authority of each subdivision or other taxing unit shall adopt a tax budget for the next succeeding fiscal year[.]” R.C. 5705.28(A).<sup>7</sup> Therefore, a board of education of a city or local school district prepares the tax budget for the school district. A board of county commissioners prepares the tax budget for the county. A county sheriff provides assistance to the board of county commissioners in the preparation of the county’s tax budget. R.C. 5705.28(C)(1); 2014 Op. Att’y Gen. No. 2014-032, at 2-284.

Once the tax budgets are submitted to the county budget commission, “[t]he county budget commission reviews all the tax budgets submitted to it and revises and adjusts the estimate of balances and receipts from all sources for funds within those tax budgets and adjusts tax levies within the ten-mill limitation.” 2008 Op. Att’y Gen. No. 2008-024, at 2-256; *see* R.C. 5705.31; R.C. 5705.32(A). In this regard, the subdivisions that have submitted tax budgets compete with each other for the tax moneys generated within the ten-mill limitation. 2014 Op. Att’y Gen. No. 2014-032, at 2-284. Since the adjustments made by the county budget commission affect the amount of revenue available to a school district or a county, a representative of the city or local school district and the county may appear before the county budget commission. R.C. 5705.32(E)(2). A member of a board of education of a city or local school district that is also a deputy sheriff may be subject to influences that may affect his ability to act in a completely objective manner, especially if that person is the representative of the school district appearing before the county budget commission. An argument that advocates preserving tax moneys for the school district may simultaneously be an argument supporting the reduction of tax moneys for the county and the county sheriff. *See* 2014 Op. Att’y Gen. No. 2014-032, at 2-285.

We believe that this potential conflict of interest may be sufficiently avoided or eliminated. A deputy sheriff is not responsible for preparing a tax budget for the county or appearing before the county budget commission. 2014 Op. Att’y Gen. No. 2014-032, at 2-285. A member of a board of education of a city or local school district is responsible for preparing a tax budget, but he is only one of the several members of the board that votes upon the final tax budget. *See* R.C. 3313.01 (local school district boards of education have five members); R.C. 3313.02 (depending upon the size of the population of a city school district, there are at least three members or as many as nine members of a board of education);<sup>8</sup> R.C. 5705.28(A) (the taxing authority adopts the tax budget). Consequently,

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<sup>7</sup> R.C. 5705.28(B)(2)(a) provides “[t]he taxing authority of a taxing unit that does not levy a tax is not required to adopt a tax budget pursuant to [R.C. 5705.28(A)].” Additionally, a county budget commission may vote to excuse a taxing authority from the requirement to adopt a tax budget. R.C. 5705.281(A).

<sup>8</sup> It appears that the Defiance City School District Board of Education is composed of five members. *See* <http://www.defiancecityschools.org/boardofeducation.aspx> (last visited October 20, 2015).

any undue influence he may exert will be counterbalanced by the other members of the board. In addition, as one of several members of a board of education, a board member who is also a deputy sheriff is not the only board member that may appear before the county budget commission to represent the school district. Finally, the county budget commission has the ultimate decision-making authority as to the allocation of tax moneys within the ten-mill limitation to the various subdivisions and taxing units. R.C. 5705.31-.32; 2014 Op. Att’y Gen. No. 2014-032, at 2-285. Therefore, we conclude that a deputy sheriff who also serves as a member of a board of education of a city or local school district is not subject to an impermissible conflict of interest, provided that he does not appear before the county budget commission as a representative of the school district or the county.

A second potential conflict of interest results from a competition between the county and the board of education of a city or local school district for tax moneys generated in excess of the ten-mill limitation. A board of county commissioners, as the taxing authority for the county, may levy taxes in excess of the ten-mill limitation for the expenses of the county sheriff. R.C. 5705.01(C); R.C. 5705.07; R.C. 5705.19(J); 2014 Op. Att’y Gen. No. 2014-032, at 2-285 to 2-286. A board of education of a city or local school district also has authority to levy taxes in excess of the ten-mill limitation on behalf of the school district. R.C. 5705.01(C); R.C. 5705.07; R.C. 5705.194; R.C. 5705.199(A); R.C. 5705.21(A); R.C. 5705.211(B); R.C. 5705.212(A)(1); R.C. 5705.213(A)(1); R.C. 5705.217(A). As taxing authorities of subdivisions with partially coextensive boundaries, levies for taxes in excess of the ten-mill limitation may be placed upon the same ballot by the board of county commissioners and a board of education of a city or local school district. *See* R.C. 5705.07; R.C. 5705.19. In this regard, a county and a city or local school district may compete for tax revenues in excess of the ten-mill limitation. A deputy sheriff that is also a member of a city or local school district may be subject to an influence that may affect his ability to act in an objective manner when the county and the school district contemplate placing levies on the ballot in excess of the ten-mill limitation.

We also do not believe that this constitutes an impermissible conflict of interest as the conflict is remote and speculative, or may be sufficiently avoided. The likelihood that the county and the city or local school district may present levies to the voters at the same time is low. Even if the conflict does arise, the board of education member who is also a deputy sheriff may remove himself from the conflict by abstaining from any discussions, deliberations, and votes concerning a levy in excess of the ten-mill limitation when the county also has a levy for the benefit of the county sheriff’s office on the ballot at the same election. *See* 2014 Op. Att’y Gen. No. 2014-032, at 2-286. Furthermore, the sole fact that a person is employed by a subdivision that competes for tax revenues with another subdivision with which the person also holds a position is insufficient to conclude that an impermissible conflict of interest exists. 2004 Op. Att’y Gen. No. 2004-051, at 2-443; 2003 Op. Att’y Gen. No. 2003-006, at 2-35. Therefore, a deputy sheriff who is also a member of a board of education of a city or local school district is not subject to an impermissible conflict of interest resulting from competition for tax moneys in excess of the ten-mill limitation, provided that the deputy sheriff, in his

role as a member of the board of education refrains from participating in any discussions, deliberations, and votes concerning a levy in excess of the ten-mill limitation when the county also has a levy for the benefit of the county sheriff's office on the ballot at the same election.

We recognize that several opinions have concluded that a conflict of interest that exists for a member of a board of education of a school district arising from the school district's competition with another subdivision for tax moneys within or in excess of the ten-mill limitation cannot be avoided or mitigated. *See, e.g.*, 2014 Op. Att'y Gen. No. 2014-012 (syllabus) (“[t]he positions of member of the governing board of an educational service center and member of a board of education of a local school district that is served by the educational service center are incompatible”); 2011 Op. Att'y Gen. No. 2011-048, at 2-385 (“the conflict of interest [occurring between the positions of president of the board of health of a general health district and member of the board of education of a local school district] arising from the competition for tax revenue generated within the ten-mill limitation cannot be mitigated or eliminated”); 2008 Op. Att'y Gen. No. 2008-024, at 2-255 (“[a]n impermissible conflict of interest occurs [between the positions of member of the board of education of a local school district and township administrator] because of competition between the local school district and township for tax moneys generated within the ten-mill limitation”); 2003 Op. Att'y Gen. No. 2003-010 (syllabus) (“[t]he positions of member of the board of education of a local school district and principal of a school in a joint vocational school district that includes the territory of the local school district are incompatible”). Those opinions reasoned that the conflict could not be sufficiently avoided, in part, because both positions involved decision-making authority over fiscal and budgetary matters, and the exercise of that authority is among the primary duties of each of the positions. 2014 Op. Att'y Gen. No. 2014-012, at 2-103 to 2-104; 2011 Op. Att'y Gen. No. 2011-048, at 2-385 (“[t]he preparation of a tax budget or appropriation measure is an essential, nondelegable responsibility of a board of education and a board of health”); 2008 Op. Att'y Gen. No. 2008-024, at 2-257 to 2-258; 2003 Op. Att'y Gen. No. 2003-010, at 2-76.

The potential conflict of interest here is distinguishable. A person who serves simultaneously as a deputy sheriff and a member of a city or local school district board of education should be able to avoid or mitigate a conflict of interest arising from the competition for tax revenues within and in excess of the ten-mill limitation between a county and a city or local school district located within the same county. Participating in the fiscal and budgetary process of the county sheriff is not part of a deputy sheriff's primary statutory duties. And, by not assigning those duties to a deputy sheriff who also is a member of a board of education, the county sheriff may ensure that the deputy sheriff does not exercise decision-making authority concerning budgetary and fiscal matters of the sheriff's office. Furthermore, any undue influence that the person may exert in his role as a member of a board of education may be mitigated by the participation of other members of the board in the fiscal and budgetary matters of the school district. *See* 2014 Op. Att'y Gen. No. 2014-032, at 2-285. Alternatively, when appropriate, a member of the board of education of the school district who is also a deputy sheriff may remove himself from all discussions, deliberations, and votes concerning tax levy issues when the county has a competing tax levy proposal that benefits the county sheriff's office. We presume, absent evidence to the contrary, that a public official will act in an ordinary and lawful

manner in the discharge of his duties. *State ex rel. Speeth v. Carney*, 163 Ohio St. 159, 126 N.E.2d 449 (1955) (syllabus, paragraph 10); 2014 Op. Att’y Gen. No. 2014-014, at 2-118; *see also* 2014 Op. Att’y Gen. No. 2014-032, at 2-285 (“it is unlikely that the person would use less than his best judgment in preparing the township’s tax budget or explaining the township’s financial needs to the budget commission”).

The third potential conflict of interest arises from a deputy sheriff’s duty to investigate crimes that may have been committed by an employee or a member of a board of education of a city or local school district that is located within the jurisdiction of the deputy sheriff’s county. Numerous opinions have recognized a potential conflict of interest when a person holds a position with one public entity that has a duty to investigate the other public entity with which he holds another position. *See, e.g.*, 2007 Op. Att’y Gen. No. 2007-037, at 2-386 to 2-387; 2006 Op. Att’y Gen. No. 2006-010, at 2-89 to 2-90; 1988 Op. Att’y Gen. No. 88-093, at 2-448; 1984 Op. Att’y Gen. No. 84-028, at 2-83. 1989 Op. Att’y Gen. No. 89-022, at 2-106 explained:

[W]hen a public position requires an individual to conduct an objective investigation or review of another entity, a conflict arises when the individual holds a second position which creates a loyalty to that entity or a predisposition toward the outcome of the review or investigation. This occurs even if the second position does not involve direct authority over or responsibility for the matter being reviewed or investigated.

In addition to a deputy sheriff’s duty to investigate crimes generally within his jurisdiction, a deputy sheriff has a duty to investigate violations of R.C. 2151.421(A)(1) and violations of R.C. 2151.421(H)(2).<sup>9</sup> *See* 2006 Op. Att’y Gen. No. 2006-023, at 2-204 to 2-205. A deputy sheriff that is required to investigate an alleged violation of the law by an employee or board member of the school district in which he serves as a member of the board of education may experience conflicting loyalties to the school district and his law enforcement responsibilities. *Id.* at 2-205 to 2-206.

We do not believe that this conflict is an impermissible conflict of interest so long as the deputy sheriff who is also a member of a board of education of a city or local school district does not participate in any investigation involving employees or officials of the school district. Whether a particular deputy sheriff may be removed from a specific investigation must be determined on a case-by-case basis by the local officials involved. *See* 2007 Op. Att’y Gen. No. 2007-037, at 2-387 n.11. It is likely, however, that a deputy sheriff who is also a member of a city or local school district board of education may be removed from such an investigation without jeopardizing the efficacy or integrity of the investigation. First, the duties of a deputy sheriff are assigned by the county sheriff. 1991 Op.

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<sup>9</sup> R.C. 2151.421(A)(1) requires, *inter alia*, school teachers, school employees, and school authorities to report suspected child abuse. R.C. 2151.421(H)(2) prohibits the disclosure of a report of suspected child abuse to an unauthorized recipient.

Att’y Gen. No. 91-063, at 2-300. Therefore, the county sheriff may assign a different deputy to investigate alleged violations of R.C. 2151.421 and other laws. *See* 2006 Op. Att’y Gen. No. 2006-010, at 2-90; 2004 Op. Att’y Gen. No. 2004-051, at 2-449.<sup>10</sup> Additionally, the county sheriff may not be the only law enforcement agency with jurisdiction to investigate a particular offense. If an investigation is conducted by a municipal or township law enforcement agency instead of the county sheriff, this potential conflict of interest for the deputy sheriff is eliminated.

The fourth potential conflict of interest arises from the possibility that a county sheriff and a board of education of a city or local school district may enter into contracts with one another. *See* R.C. 311.29(B) (county sheriff and a school district may contract for the provision of police services); R.C. 3313.95 (contract between a county sheriff and a board of education of a school district to assign a deputy sheriff for “assisting guidance counselors and teachers in working with students concerning the use of alcohol and drugs of abuse”). “It is a well-established common law principle that a public officer may not deal with himself, directly or indirectly.” 2002 Op. Att’y Gen. No. 2002-039, at 2-251 (quoting 1981 Op. Att’y Gen. No. 81-027, at 2-101). In other words, “a person may not hold positions of trust on two public entities that contract with each other.” 2002 Op. Att’y Gen. No. 2002-039, at 2-252 (footnote omitted). However, the determination of whether an impermissible conflict of interest exists as a result of the authority of two public entities to contract with each other is a fact-specific inquiry. *See* 2014 Op. Att’y Gen. No. 2014-032, at 2-282; *compare State ex rel. Scioto Cnty. Prosecutor v. Murphy* at ¶ 33-36 (finding that the positions of deputy sheriff and township trustee are incompatible when the county sheriff and the board of township trustees have entered into a contract for police protection services in the township, especially when the contract authorizes the board of township trustees to “evaluate whether the services rendered by the sheriff’s office, including its deputies, are satisfactory”) *with Pistole v. Wiltshire*, 90 Ohio Law Abs. 525, 189 N.E.2d 654, 659-60 (C.P. Scioto County 1961) (“we can see no conflict of interest resulting from the provision authorizing

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<sup>10</sup> 2006 Op. Att’y Gen. No. 2006-023, at 2-200, considered whether a person may simultaneously hold the positions of township police chief and member of a board of education of a local school district that is located within the township. The opinion recognized that a conflict of interest arises from the township police department’s duty to investigate violations of R.C. 2151.421. 2006 Op. Att’y Gen. No. 2006-023, at 2-204 to 2-205. The opinion concluded that the conflict could not be sufficiently avoided because “the person, as township police chief, is unable to remove himself from the conflict.” *Id.* at 2-207. Specifically, “[a]s the head of the township’s police department, the police chief may not abstain from overseeing or participating in all departmental matters or investigations insofar as the chief is responsible for exercising or delegating all departmental decision-making authority.” *Id.* Undoubtedly, a distinction exists between the township chief of police and a deputy sheriff, who serves under and is subject to the control of the county sheriff. While the county sheriff, like the township chief of police, may not be able to remove himself from an investigation conducted by his office, the county sheriff may remove a particular deputy from an investigation by exercising his authority to assign duties to his deputies.

the sheriff to contract with the township trustees for police protection which would make the position of deputy sheriff incompatible with that of township trustee”).

With respect to the deputy sheriffs involved here, we do not believe that the potential conflict of interest resulting from the authority of a county sheriff and a board of education of a city or local school district to contract with each other for services under R.C. 311.29 or R.C. 3313.95 is an impermissible conflict of interest. You have not indicated that any contracts currently exist between the Defiance County Sheriff and the Defiance City School District Board of Education or the Ayersville Local School District Board of Education for police protection services under R.C. 311.29. Further, no statute requires the county sheriff to enter into a contract with either school district pursuant to R.C. 311.29. Therefore, any conflict of interest resulting from that possibility is speculative at this time. If a contract is later contemplated, the member of the board of education of the school district who is also a deputy sheriff may remove himself from any discussions or deliberations and abstain from any votes concerning the contract. *See* 2004 Op. Att’y Gen. No. 2004-051, at 2-445; 2003 Op. Att’y Gen. No. 2003-006, at 2-37. The deputy sheriff shall not be assigned to any schools in the district in which he is a member of the board of education under a contract for services pursuant to R.C. 311.29.

While a contract pursuant to R.C. 3313.95 may already exist between the Defiance County Sheriff and the Defiance City School District Board of Education for the services of the deputy sheriff as a D.A.R.E. officer, this contract has been negotiated between the school district board of education and the sheriff, rather than the deputy sheriff. Additionally, the sheriff assigns the deputy to the schools covered by the contract. R.C. 3313.95. Again, the deputy sheriff, in his capacity as a member of the city school district, may remove himself from any discussions, negotiations, deliberations, and votes concerning the contract. Furthermore, the deputy sheriff who is employed as a D.A.R.E. officer may not be assigned to a school that is within the school district in which he is a member of the board of education. Therefore, any conflict of interest in this regard may be sufficiently avoided.<sup>11</sup>

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<sup>11</sup> R.C. 3313.33 prohibits a member of a board of education of a school district from having “directly or indirectly, any pecuniary interest in any contract of the board” unless all of the following are true:

- (1) The member’s pecuniary interest in that contract is that the member is employed by a political subdivision, instrumentality, or agency of the state that is contracting with the board;
- (2) The member does not participate in any discussion or debate regarding the contract or vote on the contract;
- (3) The member files with the school district treasurer an affidavit stating the member’s exact employment status with the political subdivision, instrumentality, or agency contracting with the board.

The fifth potential conflict arises from the county sheriff's duty under R.C. 2981.13(D) to establish an internal control policy that determines the manner in which moneys deposited in the county sheriff's law enforcement trust fund is used in connection with community preventive education programs, which include D.A.R.E. programs. R.C. 2981.13(D). In carrying out this duty, the county sheriff decides how to allocate his law enforcement trust fund moneys in support of various community preventive education programs. If this duty of the sheriff is delegated to a deputy sheriff who is also a member of a board of education of a school district that benefits from a D.A.R.E. program, the deputy sheriff may find it difficult to allocate the moneys in a completely objective manner. *See* 2006 Op. Att'y Gen. No. 2006-023, at 2-203 to 2-204.

We believe that this potential conflict of interest may be sufficiently avoided or eliminated entirely. R.C. 2981.13(D) confers the duty to allocate law enforcement trust fund moneys on the county sheriff. Thus, a deputy sheriff's primary statutory duties do not include allocating moneys in the sheriff's law enforcement trust fund. The allocation of moneys requires the exercise of discretion, and a discretionary power of the county sheriff cannot be delegated absent statutory authority. *See Burkholder v. Lauber*, 6 Ohio Misc. 152, 154, 216 N.E.2d 909 (C.P. Fulton County 1965); 1992 Op. Att'y Gen. No. 92-028, at 2-105. Therefore, a deputy sheriff may also be a member of a board of education of a city or local school district that participates in a D.A.R.E. program, provided that the deputy sheriff does not participate in the development of an internal control policy that determines how moneys deposited in the sheriff's law enforcement trust fund may be allocated to community preventive education programs under R.C. 2981.13(D).

### **Other Applicable Federal, State, and Local Prohibitions**

The sixth and seventh questions ask about other federal, state, or local statutes, ordinances, charter provisions, or local departmental regulations that prohibit the holding of the two positions. Other than R.C. 124.57, which was discussed above, there are no state regulations that prohibit a person from simultaneously holding the positions of deputy sheriff and member of a local or city school district board of education. “[W]hether there is an applicable local charter provision, resolution, ordinance, or departmental regulation which prohibits a person from concurrently holding these two positions is a question for [local] officials to answer.” 2004 Op. Att'y Gen. No. 2004-051,

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A deputy sheriff who is also a member of the board of education of the city or local school district that has a contract under R.C. 311.29 or R.C. 3313.95 with the county sheriff that employs the deputy sheriff may have a pecuniary interest in the contract. R.C. 311.29(D) requires that a contract entered into under R.C. 311.29 “provide for the reimbursement of the county for the costs incurred by the sheriff for such policing including, but not limited to, the salaries of deputy sheriffs assigned to such policing[.]” Similarly, a contract entered into under R.C. 3313.95 “shall ... specify the amount to be paid to the ... county by the board of education as compensation for all or part of the salary and benefits of any police officer assigned to its schools[.]” The board of education member who is also a deputy sheriff shall comply with R.C. 3313.33.

at 2-434. It is assumed, for the purpose of this opinion, no local charter provisions, resolutions, ordinances, or departmental regulations apply. *See id.*

As for a federal law that may prohibit the holding of the two positions involved in this opinion, the Hatch Act, 5 U.S.C.A. §§ 1501-1508, may be applicable. The Hatch Act prohibits a state or local officer or employee from being a candidate for an elective office when the employee's salary "is paid completely, directly or indirectly, by loans or grants made by the United States or a Federal agency[.]" 5 U.S.C.A. § 1502(a)(3); *see also* 2011 Op. Att'y Gen. No. 2011-008, at 2-68. For purposes of the Hatch Act, a "state or local officer or employee" is defined as "an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency[.]" 5 U.S.C.A. § 1501(4).<sup>12</sup> A deputy sheriff who is employed as a D.A.R.E. officer may be covered by the Hatch Act if his salary is paid by a federal grant or loan. *See* R.C. 2981.13(C)(2)(a)(iii) (moneys in a county sheriff's law enforcement trust fund may be expended "[t]o provide matching funds to obtain federal grants to aid law enforcement, in the support of DARE programs or other programs designed to educate adults or children with respect to the dangers associated with the use of drugs of abuse").

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<sup>12</sup> 5 U.S.C.A. § 1501(4) excludes the following state or local officers and employees from the definition:

- (A) an individual who exercises no functions in connection with [an activity that is financed in whole or in part by loans or grants made by the United States or a Federal agency]; or
- (B) an individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by –
  - (i) a State or political subdivision thereof;
  - (ii) the District of Columbia; or
  - (iii) a recognized religious, philanthropic, or cultural organization.

Additionally, the following are excluded from the prohibition of 5 U.S.C.A. § 1502(a)(3):

- (1) the Governor or Lieutenant Governor of a State or an individual authorized by law to act as Governor;
- (2) the mayor of a city;
- (3) a duly elected head of an executive department of a State, municipality, or the District of Columbia who is not classified under a State, municipal, or the District of Columbia merit or civil-service system; or
- (4) an individual holding elective office.

5 U.S.C.A. § 1502(c).



The prohibition of 5 U.S.C.A. § 1502(a)(3) applies only to offices that are filled by a partisan election. 5 U.S.C.A. § 1503. A candidate for the board of education of the Defiance City School District or the Ayersville Local School District is elected in a nonpartisan election. Thus, even if one of the deputy sheriffs is an employee covered by the Hatch Act, the Act's prohibition will not apply to him. Therefore, questions six and seven may be answered in the negative.

Although we have concluded that the positions of deputy sheriff and member of a board of education of a city or local school district are compatible, subject to various qualifications, "we must caution you that given the number and nature of the potential conflicts of interest it may be impractical for a person to hold both of these positions simultaneously." 2003 Op. Att'y Gen. No. 2003-006, at 2-40; *see also* 2004 Op. Att'y Gen. No. 2004-051, at 2-450. If the board of education member frequently finds it necessary to remove himself from board deliberations, discussions, and decisions, one may question whether the person is competently and completely fulfilling his duties as a board member. *See* 2003 Op. Att'y Gen. No. 2003-006, at 2-40. In addition, the board's ability to function efficiently may be curtailed if the board must spend an inordinate amount of time determining whether one of its members has a conflict of interest that requires his recusal. *See* 2004 Op. Att'y Gen. No. 2004-051, at 2-450; 2003 Op. Att'y Gen. No. 2003-006, at 2-40. Therefore, a person contemplating holding both positions and the local officials involved should carefully evaluate whether he will be able to fulfill the duties of the two positions in the manner the law expects of him.

### **Conclusion**

Based on the foregoing, it is my opinion, and you are hereby advised that:

1. A deputy sheriff employed in the classified service may serve simultaneously as a member of the board of education of a city or local school district that is within the boundaries of the same county, provided he observes the limitations identified in syllabus paragraphs 2, 3, and 4 of this opinion.
2. As a member of the board of education, he shall (1) not appear before the county budget commission, (2) refrain from participating in any discussions, deliberations, and votes concerning a levy in excess of the ten-mill limitation when the county also has a levy for the benefit of the county sheriff's office on the ballot at the same election, and (3) not participate in any discussions, negotiations, deliberations, and votes concerning a contract between the county sheriff and the school district board of education.
3. As a deputy sheriff, he shall not (1) appear before the county budget commission, (2) participate in any investigation involving a violation of the law involving employees or officials of the school district in which he serves as a member of the board of education, and (3) participate in the development of an internal control policy that determines how moneys deposited in the county sheriff's law enforcement trust fund may be allocated to community preventive education programs under R.C. 2981.13(D) when the school

district in which he is a member of the board of education benefits from a drug abuse resistance education (D.A.R.E.) program.

4. A deputy sheriff may not be assigned, either as a D.A.R.E. officer or under a contract for police services pursuant to R.C. 311.29, to a school that is within the school district in which he is a member of the board of education.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE  
Ohio Attorney General