

OPINION NO. 2011-041

Syllabus:

2011-041

R.C. 3313.13 prohibits an assistant prosecuting attorney from serving as a member of a board of education of a city school district located within the county in which he is employed as an assistant prosecuting attorney. (2004 Op. Att’y Gen. No. 2004-049 and 1969 Op. Att’y Gen. No. 69-133, approved and followed.)

To: Stanley E. Flegm, Crawford County Prosecuting Attorney, Crawford County Courthouse, Bucyrus, Ohio

By: Michael DeWine, Ohio Attorney General, November 14, 2011

You have requested an opinion whether an assistant prosecuting attorney may serve simultaneously as a member of a board of education of a city school district located within the county in which he is employed as an assistant prosecuting attorney.

An assistant prosecuting attorney may not serve simultaneously in another

public position when a statute or constitutional provision prohibits such dual service. 2004 Op. Att’y Gen. No. 2004-049 at 2-416. R.C. 3313.13 prohibits a person who serves as a prosecuting attorney or other official acting in a similar capacity from serving on a board of education unless an exception set forth therein applies: “Except as otherwise provided in this section, *no prosecuting attorney, city director of law, or other official acting in a similar capacity shall be a member of a board of education.*” (Emphasis added.)

Bennett v. Celebrezze, 34 Ohio App. 3d 260, 518 N.E.2d 25 (Lorain County 1986), 2004 Op. Att’y Gen. No. 2004-049, and 1969 Op. Att’y Gen. No. 69-133, have considered whether R.C. 3313.13 prohibits an assistant prosecuting attorney from serving as a member of a board of education of a city school district. In each instance, it was determined that R.C. 3313.13 applies to assistant prosecuting attorneys and bars them from serving on boards of education of city school districts even though prosecuting attorneys do not represent or serve as legal advisers to boards of education of city school districts.¹

As explained in 2004 Op. Att’y Gen. No. 2004-049 at 2-417 and 2-418:

[T]he prohibition in R.C. 3313.13 was read in *Bennett v. Celebrezze*, 34 Ohio App. 3d 260, 518 N.E.2d 25 (Lorain County 1986) and 1969 Op. Att’y Gen. No. 69-133 to prohibit a person from serving simultaneously as a member of a board of education of a city school district and assistant county prosecuting attorney. In reaching this conclusion, the court of appeals and Attorney General explained that the obvious purpose of R.C. 3313.13 is to bar prosecuting attorneys, city directors of law, and other officials acting in a similar capacity from serving on boards of education. Because assistant county prosecuting attorneys carry out many of the same duties and responsibilities as county prosecuting attorneys, the court of appeals and Attorney General determined that an assistant county prosecuting attorney is barred by R.C. 3313.13 from serving on any board of education.

Current law continues to support the analyses and conclusions set forth in *Bennett v. Celebrezze* and 1969 Op. Att’y Gen. No. 69-133.

¹ R.C. 3313.35 states: “In city school districts, the city director of law shall be the legal adviser and attorney for the board thereof, and shall perform the same services for such board as required of the prosecuting attorney for other boards of the county. Such duties shall devolve upon any official serving in a capacity similar to that of prosecuting attorney or city director of law for the territory wherein a school district is situated regardless of his official designation.” Thus, except when a city has exercised its home rule powers under Article XVIII, §§ 3 and 7 of the Ohio Constitution and superseded R.C. 3313.35, the city director of law or person acting in a similar capacity for the city is the “legal adviser and attorney” for the board of education of the city school district that includes the city. *See* 2008 Op. Att’y Gen. No. 2008-032; *see also* R.C. 3313.13.

Although R.C. 3313.13 has been amended twice in the last fifty years, *see* 1987-1988 Ohio Laws, Part II, 2025, 2027 (Am. H.B. 110, eff. Sept. 9, 1988); 1977-1978 Ohio Laws, Part II, 2091, 2117 (Am. Sub. H.B. 219, eff. Nov. 1, 1977), the General Assembly has made no change to the plain language of the statute that prohibits a “prosecuting attorney” or “other official acting in a similar capacity” from serving as a member of a board of education.

Moreover, the General Assembly has not changed the duties or role of assistant county prosecuting attorneys. Assistant county prosecuting attorneys are appointed by county prosecuting attorneys and continue to act in their stead. As explained in 1971 Op. Att’y Gen. No. 71-050 at 2-172, “it has long been the accepted opinion in this state that an assistant is, for all practical purposes, the alter ego of the prosecuting attorney and is authorized to act in his place in almost all matters.”

An assistant county prosecuting attorney is thus appointed to perform the duties of, and exercise the powers conferred upon, the county prosecuting attorney. *See* R.C. 309.06(A); 1999 Op. Att’y Gen. No. 99-027 at 2-173 and 2-174. Accordingly, an assistant county prosecuting attorney acts in a similar capacity as the county prosecuting attorney, and . . . is prohibited by R.C. 3313.13 from serving as a member of a board of education of a city school district. (Citations and footnote omitted.)

See Bennett v. Celebrezze, 34 Ohio App. 3d at 262 (rejecting the argument that “[t]he legislature . . . could never have intended to prohibit prosecuting attorneys, city solicitors, and their staff attorneys from serving on any and all boards of education”); 1969 Op. Att’y Gen. No. 69-133 at 2-291 (“it is obvious that a prosecuting attorney shall not be a member of any board of education”); *see also* 1979 Op. Att’y Gen. No. 79-100 at 2-311 (overruled, in part, on other grounds by 2008 Op. Att’y Gen. No. 2008-032) (“[t]he obvious import of [R.C. 3313.13] is that [assistant city solicitors] may not serve on any board of education whether or not they are required by statute or charter to represent the board”).

We continue to find persuasive the analyses and conclusions set forth in *Bennett v. Celebrezze*, 2004 Op. Att’y Gen. No. 2004-049, and 1969 Op. Att’y Gen. No. 69-133. The General Assembly still requires assistant prosecuting attorneys to perform the duties of, and exercise the powers conferred upon, prosecuting attorneys.² *See* R.C. 309.06(A). Also, since the issuance of 2004 Op. Att’y Gen. No. 2004-049, the General Assembly has not amended the language of R.C. 3313.13

² An assistant prosecuting attorney is subject to the direction and control of the prosecuting attorney when performing the duties or exercising the powers of the prosecuting attorney. 2004 Op. Att’y Gen. No. 2004-049 at 2-418 n.2. An assistant prosecuting attorney thus may only perform the duties and exercise the powers that are assigned or granted to him by the prosecuting attorney. *Id.*

that prohibits a “prosecuting attorney” or “other official acting in a similar capacity” from serving as a member of a board of education.³ Accordingly, R.C. 3313.13 prohibits an assistant prosecuting attorney from serving as a member of a board of education of a city school district unless an exception set forth therein authorizes such dual service.⁴

Only one exception in R.C. 3313.13 applies to assistant prosecuting attorneys. This exception provides as follows:

An assistant prosecuting attorney may serve as a member of a board of education of a school district *in any county other than the county* in which the assistant prosecuting attorney is employed if the board of education’s school district is not contiguous to the county in which the assistant prosecuting attorney is employed. (Emphasis added.)

The plain and unequivocal language of this exception declares that an assistant prosecuting attorney may serve simultaneously as a member of a board of education of a school district when the school district is located in any county other than the county in which he is employed as an assistant prosecuting attorney and so long as the school district is not contiguous to the county in which the assistant prosecuting attorney is employed. Thus, the fact that the General Assembly has exempted an assistant prosecuting attorney from R.C. 3313.13’s prohibition when the school district is located outside of, and not contiguous to, the county in which the assistant prosecuting attorney is employed indicates that an assistant prosecuting attorney may not serve as a member of a board of education of a school district located within the county in which he is employed as an assistant prosecuting attorney. *See generally Thomas v. Freeman*, 79 Ohio St. 3d 221, 224-25, 680 N.E.2d 997 (1997) (the rule of statutory construction, *expressio unius est exclusio alterius*, means that “the expression of one thing is the exclusion of the other,” and “[u]nder this maxim, ‘if a statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded’” (citations omitted)); *Pioneer Linen Supply Co. v. Evatt*, 146 Ohio St. 248, 251, 65 N.E.2d 711 (1946) (“exceptions to a general law are not favored and must be strictly construed, and what is not clearly excluded from the operation of a law is clearly included therein”).

That this was the intent of the General Assembly is buttressed by the legisla-

³ R.C. 3313.13 has been amended twice since the issuance of 2004 Op. Att’y Gen. No. 2004-049. *See* 2005-2006 Ohio Laws, Part III, 5870, 5870 (Am. H.B. 455, eff. Feb. 2, 2006); 2005-2006 Ohio Laws, Part III, 5261, 5263 (Sub. H.B. 33, eff. Dec. 20, 2005). Neither Am. H.B. 455 nor Sub. H.B. 33 amended the language of R.C. 3313.13 that prohibits a “prosecuting attorney” or “other official acting in a similar capacity” from serving as a member of a board of education.

⁴ At the time that *Bennett v. Celebrezze*, 34 Ohio App. 3d 260, 518 N.E.2d 25 (Lorain County 1986) was decided, and 2004 Op. Att’y Gen. No. 2004-049 and 1969 Op. Att’y Gen. No. 69-133 were issued, no exception to R.C. 3313.13’s prohibition applied to assistant prosecuting attorneys.

tive history of R.C. 3313.13. *See generally* R.C. 1.49(C) (legislative history may be used in determining the intention of the legislature). In 2005, the General Assembly amended R.C. 3313.13 to permit an assistant prosecuting attorney to serve as a member of a board of education of a school district when the school district is not located in, and contiguous to, the county in which the assistant prosecuting attorney is employed. *See* 2005-2006 Ohio Laws, Part III, 5261, 5263 (Sub. H.B. 33, eff. Dec. 20, 2005). In its analysis of Sub. H.B. 33, the Legislative Service Commission stated:

Membership of assistant prosecuting attorney on certain boards of education

Continuing law prohibits a prosecuting attorney, city law director, or other official acting in a similar capacity from being a member of a board of education of a school district (R.C. 3313.13). The Attorney General has opined that this prohibition prevents an *assistant* prosecuting attorney from being the member of a board of education of a city school district. 2004 Op. Att’y Gen. No. 2004-049.

The act authorizes an assistant prosecuting attorney to be a member of a board of education in any county other than the county in which the assistant prosecuting attorney is employed if the board of education’s school district is not contiguous to the county in which the assistant prosecuting attorney is employed (R.C. 3313.13).

Ohio Legislative Service Comm’n, Analysis, Sub. H.B. 33, as passed by the General Assembly, at p. 3 (2005).

The language of the foregoing bill analysis demonstrates that when the General Assembly amended R.C. 3313.13 in Sub. H.B. 33, it was aware that R.C. 3313.13 had been read as prohibiting an assistant prosecuting attorney from serving as a member of a board of education of a school district. The bill analysis indicates further that the General Assembly approved of the interpretation of R.C. 3313.13 set forth in *Bennett v. Celebrezze*, 2004 Op. Att’y Gen. No. 2004-049, and 1969 Op. Att’y Gen. No. 69-133. *See generally Geiger v. Geiger*, 117 Ohio St. 451, 468-69, 160 N.E. 28 (1927) (in interpreting statutes, it is presumed that the General Assembly acted with full knowledge of the existing law on the subject under consideration); 2002 Op. Att’y Gen. No. 2002-007 at 2-39 (“[a]lthough an opinion of the Attorney General is not a judicial decision, the same argument may be made that the 1934 opinion has been known for many years, during which the General Assembly has amended R.C. Chapter 4713 without overturning the conclusion of the 1934 opinion, thus implying legislative approval of the opinion’s interpretation of the law”).

Finally, the bill analysis expressly notes that the General Assembly intended the exception for assistant prosecuting attorneys to apply only when an assistant prosecuting attorney serves as a member of a board of education of a school district located outside of, and not contiguous to, the county in which the assistant prosecuting attorney is employed. Therefore, the legislative history of R.C. 3313.13

provides additional support for the conclusion that R.C. 3313.13 prohibits an assistant prosecuting attorney from serving as a member of a board of education of a city school district located within the county in which he is employed as an assistant prosecuting attorney. *See generally Meeks v. Papadopulos*, 62 Ohio St. 2d 187, 191, 404 N.E.2d 159 (1980) (although a court is not bound by a Legislative Service Commission's analysis, the court may refer to it when the court finds it helpful and objective); 2009 Op. Att'y Gen. No. 2009-054 at 2-407 (“[a]nalyses by the Ohio Legislative Service Commission are not binding as a matter of law, but they may be reflective of the intention behind legislation and may serve as an aid to statutory construction”).

Based on the foregoing, it is my opinion, and you are hereby advised that R.C. 3313.13 prohibits an assistant prosecuting attorney from serving as a member of a board of education of a city school district located within the county in which he is employed as an assistant prosecuting attorney. (2004 Op. Att'y Gen. No. 2004-049 and 1969 Op. Att'y Gen. No. 69-133, approved and followed.)