

OPINION NO. 2006-018**Syllabus:**

The positions of member of a city school district board of education and unclassified employee of the Ohio Department of Education, who assists in the development of mathematics standards and curriculum, performs various research duties, and provides assistance in training, are compatible, so long as it is physically possible for an individual holding both positions fully and effectively to carry out the duties and responsibilities of each position.

To: Susan Tave Zelman, Superintendent of Public Instruction, Columbus, Ohio

By: Jim Petro, Attorney General, May 5, 2006

You have requested an opinion concerning the compatibility of two public positions, city school board member and unclassified employee of the Ohio Department of Education (ODE). By way of background, you have stated that, as an employee of the Department, the individual assists in the development and implementation of academic content standards, model curriculum, and state-wide assessments in the subject of mathematics, recommends the development of rules and policies related to such things as curriculum and testing programs, performs research into best practices, collaborates in the preparation of training materials, and works with various Department colleagues and local educators to provide high-quality mathematics programs for Ohio's students. The other position is member of a board of education of a city school district. *See generally* R.C. 3313.02 (election of members of boards of education of city school districts). For the reasons that follow, we find that the positions of member of the board of education of a city school district and unclassified employee of the Department of Education, who performs the duties you describe, are compatible, so long as it is physically possible for the person fully and effectively to carry out the duties and responsibilities of each position.

The test for determining whether two public positions are compatible consists of the following seven questions:

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?

With respect to the two positions you describe, several of these questions are easily resolved. For example, the first question asks whether either position is in the classified service for purposes of R.C. 124.57, which “prohibits an officer or employee in the classified service from seeking election or appointment to, or holding, a partisan political office, or engaging in other partisan political activities, and it prevents a partisan political officeholder from serving simultaneously as an officer or employee in the classified service.” 2003 Op. Att’y Gen. No. 2003-041 at 2-336. As explained in 2000 Op. Att’y Gen. No. 2000-033 at 2-202:

The courts have interpreted R.C. 124.57 as prohibiting an employee in the classified service from engaging in *partisan* political activity. *See Heidtman v. City of Shaker Heights*, 163 Ohio St. 109, 126 N.E.2d 138 (1955) (syllabus, paragraph 2) (the term “politics” as used in what is now R.C. 124.57 “must be defined as politics in its narrower partisan sense”). *See also Gray v. City of Toledo*, 323 F. Supp. 1281, 1286 (N.D. Ohio 1971) (upholding the constitutionality of R.C. 124.57, using the narrow interpretation of “politics” adopted in *Heidtman*, and indicating that if “politics” were read more broadly as referring to “the science of government and civil polity,” R.C. 124.57 would be unconstitutional).

You have informed us, however, that the individual you describe is an unclassified employee, rather than a classified employee, of ODE. *See generally* R.C. 124.11 (in part, dividing the civil service into the classified and unclassified service, and listing positions that are in the unclassified civil service); *Yarosh v. Becane*, 63 Ohio St. 2d 5, 406 N.E.2d 1355 (1980) (explaining that the nature of the duties performed by deputy sheriffs determines whether they are in the unclassified or classified service of the county). Thus, R.C. 124.57 does not apply to that position. Similarly, R.C. 124.57 has no application to city school board members, who are elected in nonpartisan elections. *See* R.C. 3505.04.

Concerning question six, we have found no state or federal regulation that prohibits a person from serving as both a city school board member and unclassified employee of ODE.¹ In addition, with respect to the seventh question of the compatibility analysis, you have informed us that no ODE regulation prohibits an individ-

¹ R.C. 3301.13 describes the organization of the Ohio Department of Education (ODE), in part, as follows:

The department of education hereby created, shall be the administrative unit and organization through which the policies, directives, and powers of the state board of education and the duties of the superintendent of public instruction are administered by such superintendent as executive officer of the board.

ual from holding these two positions. Whether the city school district has imposed any restrictions upon the employment of its board members is a question for local officials to answer. It is assumed, for purposes of this opinion, that no such local provisions exist. Also, the fourth question, whether it is physically possible for an individual to perform the duties of both positions, is a question of fact that may best be resolved by those familiar with the precise time requirements of each position. *See generally, e.g.*, 2004 Op. Att’y Gen. No. 2004-025 (compatibility of the positions of exempted village school board member and clerk-treasurer of a noncharter village located within the territory of the school district).

Let us now examine the second question of the compatibility test: whether the empowering statutes of either position limit employment in another public position or the holding of another public office. As stated above, R.C. 124.57 does not apply to a position as an unclassified employee of the Ohio Department of Education. No other statute prohibits such an employee from simultaneously holding another public position.² In contrast, membership on a city school board is restricted by R.C. 3313.13, which prohibits, with certain exceptions not here applicable, a prosecuting attorney, city director of law, or “other official acting in a similar capacity” from serving as a member of a city school board. The provisions of R.C. 3313.70 also prohibit members of a city school board from being appointed as a “school physician, school dentist, or school nurse during the period for which the member is elected or appointed.” Neither R.C. 3313.13 nor R.C. 3313.70, however, prohibits a city school board member from serving as an employee of the Ohio Department of Education. Thus, there are no statutes that prohibit an individ-

The department of education shall consist of the state board of education, the superintendent of public instruction, and a staff of such professional, clerical, and other employees as may be necessary to perform the duties and to exercise the required functions of the department.

The General Assembly has specified duties to be performed by ODE, the Superintendent of Public Instruction, or the State Board of Education. Because ODE is the organizational unit through which these duties are performed, this opinion will, for ease of discussion, refer to the duties imposed upon all three entities simply as duties of ODE.

² As summarized in 2004 Op. Att’y Gen. No. 2004-044 at 2-380 n. 7, concerning statutory ethical requirements and prohibitions applicable to public officers and employees:

The authority to issue advisory opinions regarding the application of the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43 is conferred upon the Ohio Ethics Commission pursuant to R.C. 102.08. In light of the duties conferred upon the Ohio Ethics Commission, the Attorney General will refrain from interpreting and applying these provisions by way of a formal opinion. 1987 Op. Att’y Gen. No. 87-033 (syllabus, paragraph three). Accordingly, any questions about the interpretation or application of these provisions in your particular situation should be addressed by the Ohio Ethics Commission.

ual who is an unclassified employee of the Ohio Department of Education from serving as a city school board member or that prohibit a city school board member from serving as an unclassified employee of the Ohio Department of Education.

The remaining two questions in the compatibility analysis, whether one position is in any way a check upon, or subordinate to, the other, and whether there exists an impermissible conflict of interest between such positions, require a brief review of the powers and duties of each position. As explained in your opinion request, the ODE employee you describe devotes the bulk of his time to the development of academic content standards, model curricula and state-wide assessments in the subject of mathematics, and also conducts research of best practices and creates professional training programs in mathematics.³ You also state that the individual is an unclassified employee of the Ohio Department of Education. Other than those employed as assistant superintendents or division heads, employees of ODE who are engaged in educational or research duties are appointed by the Superintendent of Public Instruction. R.C. 3301.13.⁴

The other position, member of a city school district board of education, is, in most instances, an elective position. *See* R.C. 3313.02. City school boards possess certain powers and duties prescribed by statute. For example, pursuant to R.C. 3313.47, a city school board possesses the authority to manage and control all the schools it operates throughout the district. In exercising this authority, a city school board shall adopt rules for “its government and the government of its employees, pupils of its schools, and all other persons entering upon its school grounds or

³ *See generally, e.g.*, R.C. 3301.07(B) (in part, requiring the State Board of Education to provide consultative and advisory services to school districts “relating to instruction and instructional material”); R.C. 3301.07(D) (State Board of Education’s authority to prescribe minimum standards “for the purpose of requiring a general education of high quality”); R.C. 3301.07(K) (authorizing the State Board of Education to “employ competent persons to analyze and publish data, promote research, advise and counsel with boards of education, and encourage the training of teachers in the special instruction of gifted children”); R.C. 3301.079 (requiring State Board of Education to adopt academic standards and model curricula); R.C. 3301.27 (requiring ODE to “conduct research on the factors that improve education effectiveness in school districts”).

⁴ R.C. 3301.13 states:

The superintendent of public instruction shall recommend, for approval by the board, the organization of the department of education, and the assignment of the work within such department. The appointment, number, and salaries of assistant superintendents and division heads shall be determined by the state board of education after recommendation of the superintendent of public instruction. Such assistant superintendents and division heads shall serve at the pleasure of the board. The superintendent of public instruction may appoint, fix the salary, and terminate the employment of such other employees as are engaged in educational or research duties.

premises,” R.C. 3313.20(A), and may, among other things, acquire property for school purposes, R.C. 3313.37, appropriate land, R.C. 3313.39, dispose of real and personal property of the district, R.C. 3313.41, and provide educational television courses and programs, R.C. 3313.606. A city school board is also charged with the duty to prescribe a curriculum for its schools in various subjects, including mathematics. R.C. 3313.60. Thus, the powers and duties of a city school board member extend to the control and management of the schools, pupils, and personnel of schools within that school district.

Bearing in mind the descriptions of both positions, let us now examine whether either position is a check upon, or subordinate to, the other. As explained by the court in *State ex rel. Hover v. Wolven*, 175 Ohio St. 114, 116-17, 191 N.E.2d 723 (1963):

“* * * One of the most important tests as to whether offices are incompatible is found in the principle that incompatibility is recognized whenever one office is subordinate to the other in some of its important and principal duties, or is subject to supervision or control by the other * * * or is in any way a check upon the other, or where a contrariety and antagonism would result from an attempt by one person to discharge the duties of both. * * *” (Citation omitted.)

We note first that, an ODE employee and a city school board member are responsible in the performance of the duties of each position to different entities: the former to the Superintendent of Public Education and the latter to the electorate of the city school district. We also recognize that, although ODE has been granted various supervisory responsibilities and control over local school districts,⁵ including city school districts, neither of the two positions you describe has authority to assign duties to, or supervise, the other. We conclude, therefore, that neither position is subordinate to, or a check upon, the other.

Finally, we must determine whether there is an impermissible conflict of interest between the two positions. As explained in 1980 Op. Att’y Gen. No. 80-035 at 2-149, a conflict of interest occurs when a person’s “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.”

⁵ See, e.g., R.C. 3302.03 (in part, requiring ODE to do an annual review of each school district with respect to various performance indicators); R.C. 3302.031 (requiring ODE to conduct annual review of each school district concerning, among other things, funding and expenditures and school safety and discipline); R.C. 3302.07 (authorizing school districts, with approval of the Superintendent of Public Instruction in accordance with standards adopted by the State Board of Education, to conduct innovative education pilot programs that require exemptions from statutory provisions or rules). Your description of the duties of the ODE employee about whom you ask does not indicate that the employee has any decision-making authority with respect to ODE’s review or approval of the operation of local school districts.

In answering this question, we first note that, we can find nothing in an individual's service as a city school board member that would prevent him from objectively performing his duties for ODE, *i.e.*, assisting in the development of mathematics standards and curriculum, performing various research duties, and providing assistance in training. Rather, service as a school board member appears to enhance his ability to perform his particular duties as an ODE employee. *See, e.g.*, R.C. 3301.079(E) (requiring ODE or the State Board of Education, when consulting persons in the development of standards, diagnostic assessments, achievement tests, or model curricula under R.C. 3301.079(E), first to consult with parents of pupils, "active Ohio classroom teachers, other school personnel, and administrators with expertise in the appropriate subject area[, and] [w]henver practicable, the state board and department shall consult with teachers recognized as outstanding in their fields"); R.C. 3301.0710 (stating, in part, "[t]he state board of education shall adopt rules establishing a statewide program to test student achievement. The state board shall ensure that all tests administered under the testing program are aligned with the academic standards and model curricula adopted by the state board and are created with input from Ohio parents, Ohio classroom teachers, Ohio school administrators, and other Ohio school personnel pursuant to [3301.079]").

Similarly, this individual's duties as an ODE employee do not prevent him from performing his duties as city school board member in an objective manner, but, instead, enhance his ability to perform his duties for the city school district by making him more knowledgeable about certain standards and objectives established by ODE with which the school district must comply.⁶ Thus, we find no impermissible conflicts of interest between these two positions.

Based upon the foregoing, it is my opinion, and you are hereby advised that, the positions of member of a city school district board of education and unclassified employee of the Ohio Department of Education, who assists in the development of mathematics standards and curriculum, performs various research duties, and provides assistance in training, are compatible, so long as it is physically possible for an individual holding both positions fully and effectively to carry out the duties and responsibilities of each position.

⁶ We also point out that, although ODE has various responsibilities to assist and oversee school districts, *see, e.g.*, R.C. 3301.16 (authority of ODE to revoke school district charter and to dissolve school district); note 5, *supra*, your description of the duties performed by this particular ODE employee indicates that he possesses no authority to decide matters related to the revocation of a school district's charter or the dissolution of such a district. Thus, although this individual possesses an interest in assuring the continuation of the city school district for which he serves as a board member, he is not in a position, as an ODE employee, to determine whether or not such school district will retain its charter.