

OPINION NO. 95-023

Syllabus:

Absent a charter provision that provides otherwise, R.C. 731.12 prohibits a member of the legislative authority of a village from serving simultaneously as a member of the board of directors of a conservancy district established under R.C. Chapter 6101.

To: John R. Lentes, Meigs County Prosecuting Attorney, Pomeroy, Ohio
By: Betty D. Montgomery, Attorney General, September 22, 1995

You have requested an opinion regarding the compatibility of two public positions: member of an elected village council and member of the board of directors of a conservancy district. You have indicated that a member of the board of directors of a conservancy district intends to seek election to the legislative authority of a village. See R.C. 731.12. The village in question is located within the conservancy district, and the conservancy district supplies water and sewer service to the village.

Pursuant to the compatibility test that appears in 1979 Op. Att'y Gen. No. 79-111, two public positions are incompatible if, *inter alia*, the governing statutes of either position prohibit simultaneous service in the other position. The provisions of R.C. 6101.01-.99, which govern the organization and operation of conservancy districts, do not prohibit a member of the board of directors of a conservancy district from either seeking election or appointment to another public position, or serving in another public position. However, R.C. 731.12 establishes the qualifications of members of the legislative authority of a village, and states that "[n]o member of the legislative authority shall hold *any other public office*.... Any member who ceases to possess any of such qualifications or who removes from the village shall forfeit the member's office." (Emphasis added.) Because your question concerns service as a member of a village legislative authority, it is necessary to determine whether the position of member of the board of directors of a conservancy district is a public office for purposes of R.C. 731.12.¹

The Ohio Supreme Court has described the traditional criteria used to determine whether a position is a public office in the following manner:

The usual criteria in determining whether a position is a public office are durability of tenure, oath, bond, emoluments, the independency of the functions

¹ You have indicated that the village in question has not adopted a charter provision pursuant to Ohio Const. art. XVIII, §7 that alters the qualifications for members of a village legislative authority that appear in R.C. 731.12, and that specifically removes that section's prohibition against those members holding other public office. See *State ex rel. Ziegler v. Hamilton County Bd. of Elections*, 67 Ohio St. 3d 588, 621 N.E.2d 1199 (1993) (R.C. 731.12 creates an exclusive set of qualifications for village council members, which are procedural in nature; thus, a village that wishes to alter those qualifications may do so only by the adoption of a charter provision).

exercised by the appointee, and the character of the duties imposed upon him.... The chief and most-decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law. If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office and not an employment.

....
...[I]t is manifest that the functional powers imposed must be those which constitute a part of the sovereignty of the state.

State ex rel. Landis v. Board of Comm'rs, 95 Ohio St. 157, 159-60, 115 N.E. 919, 919-20 (1917).

One of my predecessors has similarly stated as follows:

The requisite elements of public office are: (1) the incumbent must exercise certain independent public duties, a part of the sovereignty of the state; (2) such exercise by the incumbent must be by virtue of his election or appointment to the office; (3) in the exercise of the duties so imposed, he can not be subject to the direction and control of a superior officer.

1963 Op. Att'y Gen. No. 3548, p. 58, 61.

Applying those criteria in the present situation, I conclude that the position of member of the board of directors of a conservancy district is a public office. The members of the board of directors of a conservancy district are, pursuant to R.C. 6101.10, appointed by the common pleas court to function as the governing body of the conservancy district. Members of the board of directors serve fixed "terms of office" in accordance with the provisions of R.C. 6101.10, are required to take and subscribe to an oath that they "will honestly, faithfully, and impartially perform the duties of [their] office," R.C. 6101.11, and receive compensation in an amount established by the common pleas court, R.C. 6101.67.

Members of the board of directors of a conservancy district perform specific duties and exercise various powers, all of which are prescribed by law and constitute a portion of the sovereignty of the state, including, but not limited to, the traditional sovereign powers of eminent domain, R.C. 6101.17, and property condemnation, R.C. 6101.18. R.C. 6101.44-.66 also confer upon the board of directors primary responsibility for the financial administration of the conservancy district. Included among the board's authority in that regard is the power to levy and collect taxes and assessments, and the power to issue and redeem bonds. *See* R.C. 6101.44-.57.

The members of the board of directors of a conservancy district act autonomously and independently in their exercise of the foregoing powers by virtue of their appointment to the board. With but few exceptions, *see, e.g.*, R.C. 6101.25, R.C. 6101.39, the board of directors is not subject to the direct control or supervision of any other office or entity of government. It follows, therefore, that the position of member of the board of directors of a conservancy

district is a public office² for purposes of R.C. 731.12. This means that a member of the legislative authority of a village may not serve simultaneously in that position.

It is, therefore, my opinion, and you are advised that absent a charter provision that provides otherwise, R.C. 731.12 prohibits a member of the legislative authority of a village from serving simultaneously as a member of the board of directors of a conservancy district established under R.C. Chapter 6101.

² In 1953 Op. Att'y Gen. No. 3249, p. 631 one of my predecessors stated, at 632, that "[i]t takes but a cursory examination of the statutes providing for the organization and operation of a conservancy district to conclude that the office of director of such district is 'an office of public trust' within the meaning of [R.C. 3.01]." R.C. 3.01 states that "[a] person holding an office of public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws of this state."