

July 15, 2016

The Honorable Keller J. Blackburn  
Athens County Prosecuting Attorney  
1 South Court Street  
Athens, Ohio 45701

SYLLABUS:

2016-024

A person may not hold simultaneously, within the same county, the positions of member of a village legislative authority and deputy county auditor when the deputy county auditor may serve in place of the county auditor on the county board of revision, a hearing board of the county board of revision, or the county budget commission. (2006 Op. Att’y Gen. No. 2006-034, followed.)



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OPINION NO. 2016-024

The Honorable Keller J. Blackburn  
Athens County Prosecuting Attorney  
1 South Court Street  
Athens, Ohio 45701

Dear Prosecutor Blackburn:

You have requested an opinion whether a deputy auditor of Athens County may serve simultaneously as a member of a village legislative authority of a village located within Athens County.

The following seven questions are used to determine whether two public offices or 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 a conflict of interest between the two positions?
6. Are there local charter provisions or ordinances which are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

1999 Op. Att’y Gen. No. 99-045, at 2-279. If each of the seven questions is answered in favor of compatibility, then a person may hold the positions simultaneously. *Id.* However, if one of the questions does not favor compatibility, the person may not serve in both positions at the same time. If “the empowering statutes of either position limit outside employment[,]” the positions are incompatible. 2013 Op. Att’y Gen. No. 2013-008, at 2-78 (quoting 1990 Op. Att’y Gen. No. 90-059, at 2-255). Similarly, two positions are incompatible if an impermissible conflict of interest is found to exist between the two positions. 2012 Op. Att’y Gen. No. 2012-008, at 2-53.

As is discussed below, the two positions involved in your inquiry are incompatible based upon a statutory limitation on holding another position and the existence of impermissible conflicts of interest.

### **Statutory Limits on Holding Multiple Positions**

We begin with the second question of the compatibility analysis, whether a statutory provision prohibits a person who serves in one office or employment from holding another position. No statute prohibits a deputy county auditor from serving as a member of a village legislative authority. R.C. 731.12 prohibits a member of a village legislative authority from “hold[ing] any other public office, be[ing] interested in any contract with the village, or hold[ing] employment with said village[.]”<sup>1</sup> We must, therefore, determine whether the position of deputy county auditor is a public office. The following criteria are used to determine whether a position is a public office: “durability of tenure, oath, bond, emoluments, the independency of the functions exercised by the appointee, and the character of the duties imposed upon him.” *State ex rel. Landis v. Bd. of Comm’rs of Butler Cnty.*, 95 Ohio St.157, 159, 115 N.E. 919 (1917). Those criteria have been restated in opinions of the Attorney General as follows:

“(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.”

2009 Op. Att’y Gen. No. 2009-018, at 2-128 to 2-129 (quoting 1963 Op. Att’y Gen. No. 3548, p. 58, 61). The Ohio Supreme Court explained that the determinative factor is “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.” *State ex rel. Landis v. Bd. of Comm’rs of Butler Cnty.*, 95 Ohio St. at 159. “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.” *Id.*

A deputy county auditor is not elected or appointed to a statutory term, but is appointed by the county auditor and holds the position at the pleasure of the county auditor. R.C. 3.06(A) (“[a] deputy or clerk, appointed in pursuance of law, holds the appointment only during the pleasure of the officer appointing him”); R.C. 319.05 (“[t]he county auditor may appoint one or more deputies to aid him in the performance of his duties”); 2006 Op. Att’y Gen. No. 2006-042, at 2-412. The compensation paid to a deputy county auditor is determined by the county auditor,

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<sup>1</sup> A member of a village legislative authority “may be a notary public, a member of the state militia, or a volunteer fireman of said village, provided that such member shall not receive any compensation for his services as a volunteer fireman of the village in addition to his regular compensation as a member of the legislative authority.” R.C. 731.12.

who may also require a bond from a person appointed as a deputy county auditor. R.C. 325.17. Thus, the county auditor, rather than a statute, assigns duties to the deputy county auditor, who performs those duties on behalf of the county auditor. R.C. 319.05; *see* R.C. 5715.02.

A member of your office has explained that the duties of the deputy county auditor involved in your letter are the following: maintaining real property records, including property descriptions; performing financial reporting; completing payroll processes; conducting budgetary accounting; and working with financial data. In the performance of those duties, the deputy county auditor is subject to the direction and control of the county auditor. We have been informed, however, that the duties of the deputy county auditor involved in your inquiry also include standing in the county auditor's place on the county board of revision, a hearing board of the county board of revision, and the county budget commission.

R.C. 5715.02 requires a county auditor, along with the county treasurer and a member of the board of county commissioners, to serve on the county board of revision. Alternatively, when the county board of revision finds it necessary, the board may "provide for one or more hearing boards[.]" *Id.* Complaints regarding the valuation or assessment of real property shall be filed with the county auditor. R.C. 5715.19(A)(1)(d). The county board of revision, or a hearing board of the county board of revision, shall hear and determine complaints as to the valuation of real property. R.C. 5715.02; R.C. 5715.11. "Any decision by a hearing board shall be the decision of the board of revision." R.C. 5715.02. A county auditor may appoint a member of his office to serve in his place on the county board of revision or a hearing board of the county board of revision "for the purpose of hearing complaints as to the value of real property only[.]" R.C. 5715.02.

When appointed to those boards, the deputy county auditor has the same power as the county auditor to hear complaints and make determinations. *See* 2010 Op. Att'y Gen. No. 2010-031, at 2-229 ("[a]s a member of the hearing board, the person serves in place of the county auditor and has the same authority as the county auditor to hear complaints and render decisions as to the value of real property"). In addition, although the county auditor appoints the deputy county auditor to those positions, once appointed and while performing the duties required of that appointment, the deputy county auditor exercises independent judgment and is not subject to the direction or control of the county auditor. *Id.* at 2-229 to 2-230. Making determinations about the value of real property involves the exercise of a portion of the sovereign powers of the state. *Id.* at 2-230. Accordingly, a deputy county auditor appointed to serve in the place of the county auditor on the county board of revision or on a hearing board of the county board of revision thereby holds a public office. *Id.* at 2-229 ("a member of a hearing board of a county board of revision who is appointed by a county auditor holds a public office").

The same conclusion may be reached with respect to the appointment of a deputy county auditor to serve in the place of the county auditor on the county budget commission. The county budget commission, which consists of the county auditor, the county treasurer, and the county prosecuting attorney, R.C. 5705.27, reviews the tax budgets submitted by the taxing authorities and taxing units in the county, R.C. 5705.31. The county budget commission "ascertain[s] the

total amount proposed to be raised in the county for the purposes of each subdivision and other taxing units in the county” and determines whether certain tax levies have been “properly authorized[.]” R.C. 5705.31. In order to ensure that the property tax levies proposed in the county are within constitutional and statutory limits, the county budget commission is authorized, and required, to adjust the amounts requested by the subdivisions and taxing units in the county. R.C. 5705.32(A). Making such adjustments and determinations with respect to the tax budgets of the subdivisions and taxing units in the county involves an exercise of the sovereign power of the state. *See State ex rel. Pogue v. Groom*, 91 Ohio St. 1, 9, 109 N.E. 477 (1914) (“the duties of the county budget commission are an inherent part of the sovereign power of taxation”). When a deputy county auditor is appointed by the county auditor to serve in his place on the county budget commission, the deputy exercises independently the power that the county auditor has in his role as a member of the county budget commission. Accordingly, when a deputy county auditor serves in the place of the county auditor on the county budget commission, the deputy holds a public office for the purpose of R.C. 731.12.

Therefore, we conclude that the position of deputy county auditor is a public office for the purpose of R.C. 731.12 when the deputy county auditor serves in the place of the county auditor on the county board of revision, a hearing board of the board of revision, or the county budget commission. R.C. 731.12 prohibits a member of a village legislative authority from holding any other public office. It follows that R.C. 731.12 prohibits a person from serving simultaneously as a member of the village legislative authority and a deputy county auditor that serves in the place of the county auditor on a hearing board of the county board of revision, the county board of revision, or the county budget commission.

### **Conflict of Interest**

A conflict of interest exists “when an individual’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.’” 1989 Op. Att’y Gen. No. 89-052, at 2-220 (quoting 1985 Op. Att’y Gen. No. 85-100, at 2-427).<sup>2</sup> “[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.

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<sup>2</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.

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 that we have identified may be eliminated should it be presented.

A deputy county auditor is appointed to aid the county auditor in the performance of the county auditor’s duties. R.C. 319.05. A deputy county auditor may perform any of the county auditor’s duties that the county auditor assigns to him. R.C. 3.06(A). One may conclude that a deputy is precluded from holding any office or employment that, because of a conflict of interest, his principal is precluded from holding. *See* 2011 Op. Att’y Gen. No. 2011-023, at 2-189 n.2. However, “several Attorney General opinions have determined that when incompatibility is based on a conflict of interest, the facts may create an exception to the general rule that a deputy may not hold any position that her principal may not hold.” *Id.* The opinions conclude that “when the facts set forth specific, limited duties that the deputy may perform, such that ‘performance of those duties in no way renders his position subordinate to or a check upon the [other position] or conflicts with any of the duties and responsibilities he undertakes’ in the other position, the two positions are not necessarily incompatible.” *Id.* at 2-189 to 2-190 n.2 (quoting 1986 Op. Att’y Gen. No. 86-035, at 2-184 n.2). Thus, in determining whether an impermissible conflict of interest exists between the positions of deputy county auditor and village legislative authority member, we shall consider the duties of a county auditor, as well as the specific duties assigned to the deputy county auditor involved in your opinion request.

The powers and duties of a county auditor are set forth in R.C. Chapters 319, 5705, and 5747 and have been summarized, in part, as follows:

A county auditor is responsible for preparing the county’s financial report, R.C. 319.11, certifying all moneys into the county treasury, R.C. 319.13, and issuing warrants on the county treasury for all moneys payable from the county treasury, R.C. 319.16; *see* R.C. 5747.50. The county auditor also endorses real property conveyances, R.C. 319.20, compiles the general personal property tax

list and duplicate, R.C. 319.29, determines the amount of tax to be levied upon each tract of real property, R.C. 319.30, ascertains the net amount of taxes collected for each particular purpose, R.C. 319.451, and serves as county sealer of weights and measures, R.C. 319.55. Additional duties of a county auditor include serving as a member of the county budget commission, R.C. 5705.27, filing a certificate that the total appropriation from a fund does not exceed the official estimate or amended official estimate, R.C. 5705.39, and certifying to bond issuing authorities and fiscal officers of subdivisions all data necessary to determine the indirect debt limitation, R.C. 5705.51.

2008 Op. Att’y Gen. No. 2008-020, at 2-214.

The duties of the deputy county auditor in this matter are the following: maintaining real property records, including property descriptions; performing financial reporting; completing payroll processes; conducting budgetary accounting; and working with financial data. The deputy county auditor is subject to the direction and control of the county auditor in the performance of those duties. The deputy county auditor may also be assigned to stand in the county auditor’s place on the county board of revision, a hearing board of the county board of revision, and the county budget commission.

A village legislative authority is the legislative branch of village government and has the general responsibility of managing and governing the village. R.C. 731.09(A) (“the legislative power of the each village shall be vested in, and exercised by, a legislative authority”); R.C. 731.47 (“[t]he legislative authority shall have the management and control of the finances and property of the municipal corporation, except as otherwise provided”); 1991 Op. Att’y Gen. No. 91-036, at 2-191 (“[i]n general, members of the legislative authority of a village perform duties related to the government of the village”). The legislative authority has the authority to contract on behalf of the village, R.C. 731.14, to pass ordinances or resolutions, R.C. 731.17(A)(4), and to levy taxes upon the real and personal property in the village for the benefit of the village, R.C. 5705.01(C); R.C. 5705.03(A). The legislative authority also is responsible for adopting the village’s tax budget for submission to the county budget commission. R.C. 5705.28(A); 2004 Op. Att’y Gen. No. 2004-025, at 2-227 to 2-228.

In 2006 Op. Att’y Gen. No. 2006-034, the Attorney General was asked “whether a member of a city legislative authority may serve within the same county as a chief deputy treasurer for the county treasurer when the chief deputy treasurer may serve in place of the county treasurer on the county budget commission and a hearing board of the county board of revision.” *Id.* at 2-308 to 2-309. The opinion also considered “whether a member of a city legislative authority may serve within the same county as a deputy treasurer for the county treasurer when the assigned duties of the deputy treasurer include serving in place of the county treasurer on a hearing board of the county board of revision.” *Id.* at 2-309.

The Attorney General found that a person serving simultaneously in those positions would be subject to conflicts of interest presented by the chief deputy treasurer or deputy

treasurer's service on the county budget commission and a hearing board of the county board of revision. *Id.* at 2-312 to 2-315. As a member of the county budget commission, a chief deputy treasurer or deputy treasurer who serves as a member of a city legislative authority located in the same county participates in the review and adjustment of the city's tax budget, as well as, the tax budgets of the other subdivisions and taxing units within the county. *Id.* at 2-312. "Any revisions and adjustments made by the county budget commission to a city's or another subdivision's funds affects the amount of tax money generated within the ten-mill limitation that will be allotted to the city." *Id.* at 2-313 (footnote omitted). The amount distributed to a city from the undivided local government fund and the undivided local government revenue assistance fund is determined by the county budget commission. *Id.* at 2-313 to 2-314. Similarly, the property tax revenue available to a city is affected by the value of real property located within the city. *Id.* at 2-315. When serving on a hearing board of the county board of revision, the chief deputy treasurer or deputy treasurer may be influenced by his role as a member of the city legislative authority to make determinations as to the value of real property that favor the city. *Id.*

The conflicts of interest were deemed impermissible as they "can not be sufficiently avoided or eliminated entirely[.]" *Id.* at 2-316. First, "[t]axing and budgeting issues routinely come before a city's legislative authority and the county budget commission." *Id.* Additionally, the conflicts relate to the primary duties of the legislative authority, county budget commission, and hearing board of the county board of revision and have an effect on the budget and finances of the city. *Id.* Finally, when the county treasurer appoints a deputy to serve in his place on the county budget commission or a hearing board of the county board of revision, the deputy is required to serve. *Id.* The deputy treasurer may not continually abstain from matters relating to the city lest he fail to fulfill the duties of his appointment to the county budget commission or the hearing board. *Id.* at 2-317. Further, "a member of a city legislative authority may not continually abstain from participating in discussions, deliberations, negotiations, and votes concerning the city's tax budget and finances since the making of decisions involving city budgetary and financial matters is a primary duty of a city legislative authority." *Id.* The opinion concluded that:

A person may not hold within the same county the positions of member of a city legislative authority and chief deputy treasurer or deputy treasurer for the county treasurer when the chief deputy treasurer or deputy treasurer may serve in place of the county treasurer on the county budget commission or a hearing board of the county board of revision.

*Id.* (syllabus).

The conclusion of 2006 Op. Att'y Gen. No. 2006-034 applies with equal force to the positions of member of a village legislative authority and deputy county auditor when the deputy county auditor may serve in place of the county auditor on the county board of revision, a hearing board of the county board of revision, or the county budget commission. A deputy county auditor serving in the place of the county auditor on the county board of revision, a



hearing board of the county board of revision, or the county budget commission performs the same duties as would a chief deputy treasurer or a deputy treasurer serving in those positions in the place of the county treasurer and would be subject to the same conflicts of interest. The conflicts of interest that exist between the positions of member of a village legislative authority and a deputy county auditor are impermissible as the person serving in both positions would be unable to sufficiently avoid or eliminate the conflicts for the same reasons stated in 2006 Op. Att’y Gen. No. 2006-034, at 2-316 to 2-317 and discussed above. Therefore, we conclude that the two positions are incompatible due to the existence of impermissible conflicts of interest. *See State ex rel. Baden v. Gibbons*, 17 Ohio Law Abs. 341, 344 (Butler County 1934). A person may not hold simultaneously, within the same county, the positions of member of a village legislative authority and deputy county auditor when the deputy county auditor may stand in the place of the county auditor on the county board of revision, a hearing board of the county board of revision, or the county budget commission.

Having found that two of the seven questions do not favor compatibility, it is unnecessary for us to consider the remaining five questions of the compatibility analysis. *See* 2016 Op. Att’y Gen. No. 2016-004, slip op. at 1-5; 2013 Op. Att’y Gen. No. 2013-008, at 2-79 (“[a]s one of the seven compatibility questions has yielded an answer disfavoring compatibility, it is unnecessary for us to address the remaining six questions”); 2012 Op. Att’y Gen. No. 2012-008, at 2-53 to 2-57. We conclude that the position of deputy county auditor, when the deputy auditor may stand in the place of the county auditor on the county board of revision, a hearing board of the county board of revision, or the county budget commission, is not compatible with the position of member of a village legislative authority within the same county. Therefore, a person may not hold those positions simultaneously.

### **Conclusion**

Based upon the foregoing, it is my opinion, and you are hereby advised that a person may not hold simultaneously, within the same county, the positions of member of a village legislative authority and deputy county auditor when the deputy county auditor may serve in place of the county auditor on the county board of revision, a hearing board of the county board of revision, or the county budget commission. (2006 Op. Att’y Gen. No. 2006-034, followed.)

Very respectfully yours,



MICHAEL DEWINE  
Ohio Attorney General