OPINION NO. 2004-003

Syllabus:

1. The Attorney General is unable to determine, by means of a formal opinion, whether the service of a judge upon a judicial corrections board contravenes the principle of separation of powers among the legislative, executive, and judicial branches of government, as established by the Constitution of the State of Ohio. Rather, the authority to decide that question rests with the judiciary.

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2. Unless a court finds to the contrary, it is presumed that a judge who serves upon a judicial corrections board under R.C. 2301.51 is performing functions of his or her office as judge and does not hold another office of profit or trust in violation of Ohio Const. art. IV, § 6(B) or R.C. 141.04(D).

To: Robert L. Becker, Licking County Prosecuting Attorney, Newark, Ohio
By: Jim Petro, Attorney General, January 22, 2004

We have received your request for an opinion concerning judges who serve on judicial corrections boards that administer community-based correctional facilities and programs. You have raised two questions, which may be phrased as follows:

1. Does a judge's service upon a judicial corrections board contravene the principle of separation of powers among the legislative, executive, and judicial branches of government, as established by the Constitution of the State of Ohio?

2. Does a judge who serves upon a judicial corrections board under R.C. 2301.51 thereby hold an office of profit or trust for purposes of Ohio Const. art. IV, § 6(B), which prohibits judges from holding "any other office of profit or trust, under the authority of this state, or of the United States"?

Judicial Corrections Boards

To address your questions, it is necessary first to review the organization and functions of a judicial corrections board. A judicial corrections board is a group of judges who are involved in the creation and administration of a community-based correctional facility and program, R.C. 2301.51(A)(1), or a district community-based correctional facility and program, R.C. 2301.51(A)(2). A community-based correctional facility and program is established by the court of common pleas of a single county, and a district community-based correctional facility and program is established by the courts of common pleas of two or more adjoining or neighboring counties. R.C. 2301.51(A). A judicial corrections board consists of not more than eleven members, all of whom are judges of the court or courts of common pleas that establish the community-based correctional facility or district community-based correctional facility. R.C. 2301.51(A); *see also* 1997 Op. Att'y Gen. No. 97-013. The courts that establish correctional facilities and programs are empowered to dissolve them, or to withdraw from participation, by entering their intent upon their journals and notifying the Division of Parole and Community Services in the Department of Rehabilitation and Correction. R.C. 2301.51(D).

Pursuant to R.C. 2301.51-.58, a judicial corrections board is given responsibility for proposing, establishing, and administering correctional facilities and programs. *See, e.g.*, R.C. 2301.51. Each proposal must provide for a secure physical facility, containing lockups, that will be used for purposes of the confinement or detention of offenders. R.C. 2301.52(A); *see also State v. Snowder*, 87 Ohio St. 3d 335, 720 N.E.2d 909 (1999); 15 Ohio Admin. Code 5120:1-14-01(A) and (B). Each proposal must also provide for an intake officer to screen each felony offender who is sentenced by a court that the facility serves and to make recommendations concerning the admission of the offender to the facility and program. R.C. 2301.52(D) and (E).

The creation of correctional facilities and programs is accomplished in coordination with the Department of Rehabilitation and Correction. Each proposal for a community-based correctional facility and program or a district community-based correctional facility and program must be approved by the Division of Parole and Community Services in the Department of Rehabilitation and Correction before it may be implemented. R.C. 2301.51(B); R.C. 5120.10(D); *see also* R.C. 5120.06. The facility and program must comply with rules adopted by the Division of Parole and Community Services and must provide a general treatment program that meets prescribed standards. R.C. 2301.52; *see also* R.C. 5120.111; R.C. 5120.112; 15 Ohio Admin. Code 5120:1-14-03 (establishing minimum standards for the operation of community-based correctional facilities). Further, the judicial corrections board must obtain the approval of the Director of Rehabilitation and Correction in order to formulate more than one proposal. R.C. 2301.51(A).

The judicial corrections board is given administrative responsibility for the operation of the correctional facilities and programs that it establishes. With respect to each facility and program, the judicial corrections board is required to appoint and fix the compensation of a director and other necessary professional, technical, and clinical employees. R.C. 2301.55(A)(1); *see also* 15 Ohio Admin. Code 5120:1-14-01(C). Judicial corrections boards are empowered to contract with counties for the provision of buildings, goods, and services. R.C. 2301.55(A)(2). They may accept, use, or transfer donations or grants that are made available for their facilities or programs. R.C. 2301.55(B); *see* 1995 Op. Att'y Gen. No. 95-037. Each judicial corrections board is required to adopt rules for the admission of persons to its facility and program and for the operation of its facility and program, and to enter those rules upon its journal. R.C. 2301.55(A)(3). A judicial corrections board also appoints some members of citizens advisory boards and provides the boards with necessary staff assistance. R.C. 2301.53; R.C. 2301.55(C); *see also* R.C. 2301.54(E).

In addition, a judicial corrections board is given certain responsibilities for securing funding for its community-based correctional facilities and programs or district community-based correctional facilities and programs. A judicial corrections board may apply to the Division of Parole and Community Services for state financial assistance for the renovation, maintenance, and operation of any of its facilities and programs. R.C. 2301.56(A). To receive state financial assistance, a judicial corrections board must agree to "make a reasonable effort to augment the funding received from the state." R.C. 5120.112(C)(9). Similarly, a facility and program receiving state funding must agree to attempt to accept and treat at least fifteen percent of the eligible adult felony offenders sentenced in the area it serves. R.C. 5120.112(C)(8).

The judicial corrections board may also request county financing, but the counties are not required to appropriate funds. *See* R.C. 2301.51(C). Specifically:

> The judicial corrections board has no recourse against a board or boards of county commissioners, either under Chapter 2731. of the Revised Code, under its contempt power, or under any other authority, if the board or boards of county commissioners do not appropriate money for funding any facility or program or if they appropriate money for funding a facility and program in an amount less than the total amount of the submitted request for funding.

Id.; *accord* R.C. 2301.56(A).

Thus, a judicial corrections board has authority to propose, establish, and administer correctional facilities and programs, as provided by statute. Judges serving on such a board undertake duties and responsibilities relating to the creation and operation of correctional facilities and programs.

Separation of Powers

You have asked, initially, if a judge's service upon a judicial corrections board contravenes the principle of separation of powers that is one of the foundations of the Ohio Constitution. *See* Ohio Const. art. II, § 1 ("[t]he legislative power of the state shall be vested in a general assembly," with rights of initiative and referendum reserved to the people); Ohio Const. art. III, § 1 ("[t]he executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, and an attorney general"); Ohio Const. art. IV, § 1 ("[t]he judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the supreme court as may from time to time be established by law"). The principle of separation of powers has been described by the Ohio Supreme Court as follows:

> [W]hile the constitution of Ohio does not in express terms forbid the conferring of powers belonging to one branch of the state government on any co-ordinate branch, yet the fact that these governmental powers have been severally distributed by the constitution to the legislative, executive and judicial departments of our state government, clearly evidences a purpose that the powers and duties of each, shall be separate from and independent of the powers and duties of the other co-ordinate branches, and the distribution so made to the several departments, by clear implication operates as a limitation upon and a prohibition of the right to confer or impose upon either powers that belong distinctively to one of the other co-ordinate branches.

State ex rel. Montgomery v. Rogers, 71 Ohio St. 203, 216-17, 73 N.E. 461 (1905); *see also State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 462, 715 N.E.2d 1062 (1999) ("[t]he power and duty of the judiciary to determine the constitutionality and, therefore, the validity of the acts of the other branches of government have been firmly established as an essential feature of the Ohio system of separation of powers"); *City of Columbus v. Anderson*, 27 Ohio App. 3d 307, 309, 500 N.E.2d 1384 (Franklin County 1985) ("the separation of powers doctrine prohibits the General Assembly from conferring on one branch powers that belong to another"). Your concern is that the duties placed upon a judicial corrections board with regard to the administration of correctional facilities and programs exceed the duties that may properly be placed upon judicial officers and include functions that may appropriately be assigned only to members of the legislative or executive branches of government. *See State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St. 3d at 475 ("[a] statute that violates the doctrine of separation of powers is unconstitutional").

We recognize the serious nature of your concerns. As discussed above, a judicial corrections board is given responsibility for proposing, establishing, and administering correctional facilities and programs used for the confinement of offenders, and for establishing rules governing those facilities and programs. The judges are authorized to commit offenders to those facilities and programs, thereby raising questions concerning the independence of the judiciary. *See, e.g.*, R.C. 2301.51; R.C. 2301.55. Further,in carrying out its

statutory responsibilities, a judicial corrections board is not permitted to act with complete independence, but must comply with requirements and obtain the approval of the Department of Rehabilitation and Correction. *See* R.C. 2301.51; R.C. 5120.111. In addition, the judicial corrections board is responsible for securing funding for its community-based correctional facilities and programs or district community-based correctional facilities and programs, and the facilities and programs have numerical goals for the participation of offenders. *See* R.C. 2301.51; R.C. 2301.56; R.C. 5120.112. The statutory provisions governing judicial corrections boards thus raise questions about the independence of the judiciary and the appropriateness of investing the judiciary with administrative and managerial responsibility for correctional facilities and programs.

In arguing that the creation of judicial corrections boards attempts to grant judges powers that they are not constitutionally permitted to hold, it may be argued that the creation and operation of correctional facilities are uniquely executive and legislative matters, and that it would conflict with a judge's judicial powers to both place an offender in a facility and administer that facility. As the United States Supreme Court stated:

> Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint.

Turner v. Safley, 482 U.S. 78, 84-85 (1987); *see also Pell v. Procunier*, 417 U.S. 817, 827 (1974) (judgments regarding prison security "are peculiarly within the province and professional expertise of corrections officials").

In defense of the constitutionality of the statutory arrangement, it may be argued that the judges are merely granted authority to establish such correctional facilities and programs as they deem appropriate to serve their courts, and that these functions are related to the judicial powers of the judges and are appropriately granted to them as an extension of their powers. *See* R.C. 2301.51(A); *see also, e.g., State ex rel. Gordon v. Zangerle*, 136 Ohio St. 371, 381, 26 N.E.2d 190 (1940) (upholding statute authorizing judges to create a probation department and stating: "the authorization to appoint employees, whose duties are not strictly judicial, but necessary as an aid to the exercise of judicial functions, is within legislative power unless prohibited by constitutional provision, and this principle has been applied to probation officers"); *State ex. rel. Hogan v. Hunt*, 84 Ohio St. 143, 148, 95 N.E. 666 (1911) ("[t]he court may and does sometimes appoint deputies, and other auxiliaries such as interpreters, stenographers, and criminal bailiffs"); *State v. Kendle*, 52 Ohio St. 346, 356-57, 39 N.E. 947 (1895) (jury commissioners, appointed by the judges to assist in the administration of justice, are part of the judicial machinery, which also includes master commissioners and court constables); *Walker v. City of Cincinnati*, 21 Ohio St. 14, 50 (1871) (finding that the selection and appointment of trustees was an act of court requiring the exercise of judgment and discretion and thus was a judicial act).

The Attorney General is unable to use the formal opinions process to provide an authoritative analysis of the proper separation of powers among the judiciary, the legislature, and the executive branch of government with regard to service on a judicial corrections board, for the Attorney General is not empowered to make definitive determinations regarding the constitutionality of statutory provisions. *See* 2002 Op. Att'y Gen. No. 2002-032, at

2-210 n.1 ("the power to determine whether the enactments of a legislative body comply with the provisions of the United States Constitution or the Ohio Constitution rests exclusively with the judiciary, and ... such a determination cannot be made by means of a formal opinion of the Ohio Attorney General"); 2002 Op. Att'y Gen. No. 2002-006, at 2-32 n.10 ("the Office of the Attorney General has no authority to determine the constitutionality of a statute, either facially or as applied"). Instead, the authority to decide whether the principle of separation of powers permits common pleas judges to be responsible for the creation and administration of community-based correctional facilities and programs or district community-based correctional facilities and programs has been bestowed upon the courts. *See Beagle v. Walden*, 78 Ohio St. 3d 59, 62, 676 N.E.2d 506 (1997) ("[i]nterpretation of the state and federal Constitutions is a role exclusive to the judicial branch"); *State ex rel. Davis v. Hildebrant*, 94 Ohio St. 154, 169, 114 N.E. 55 (1916) ("[t]he power of determining whether a law or constitutional provision is valid or otherwise is lodged solely in the judicial department. The construction of the laws and constitution is for the courts"), *aff'd*, 241 U.S. 565 (1916). Accordingly, we are unable to determine, by means of a formal opinion, whether the service of a judge upon a judicial corrections board contravenes the principle of separation of powers among the legislative, executive, and judicial branches of government, as established by the Constitution of the State of Ohio. Rather, the authority to decide that question rests with the judiciary.

Prohibition of Ohio Const. art. IV, § 6(B) Against Holding Another Position of Profit or Trust

You have also asked whether a judge who serves upon a judicial corrections board thereby holds an office of profit or trust in violation of Ohio Const. art. IV, § 6(B). This provision of the Ohio Constitution states, in pertinent part: "Judges shall receive no fees or perquisites, *nor hold any other office of profit or trust*, under the authority of this state, or of the United States." Ohio Const. art. IV, § 6(B) (emphasis added). This language prohibits a judge from holding a position "other" than that of judge, when the position is an office of profit or trust under the authority of the State of Ohio or the United States. *See, e.g., State ex rel. Bricker v. Gessner*, 129 Ohio St. 290, 195 N.E. 63 (1935) (Ohio Const. art. IV, § 14 [predecessor to Ohio Const. art. IV, § 6(B), *see* note 2, *infra*] prohibits a judge from serving as a member of a county charter commission); 2001 Op. Att'y Gen. No. 2001-009 (Ohio Const. art. IV, § 6(B) prohibits a part-time county court judge from serving simultaneously as a part-time domestic relations magistrate of a court of common pleas in an adjacent county); 1996 Op. Att'y Gen. No. 96-024 (Ohio Const. art. IV, § 6(B) prohibits an acting judge of a county court from also serving as a magistrate of a court of common pleas); 1990 Op. Att'y Gen. No. 90-089 (Ohio Const. art. IV, § 6(B) prohibits an individual from serving simultaneously as an acting judge and referee of a municipal court); 1986 Op. Att'y Gen. No. 86-004 (Ohio Const. art. IV, § 6(B) prohibits a judge of a municipal court from also serving as a member of the board of education of a local school district); 1973 Op. Att'y Gen. No. 73-082 (Ohio Const. art. IV, § 6(B) prohibits an assistant county prosecuting attorney from also serving as a part-time municipal court judge).

A similar prohibition is imposed by statute. R.C. 141.04(D) states: "Neither the chief justice of the supreme court nor any justice or judge of the supreme court, the court of appeals, the court of common pleas, or the probate court shall hold any other office of trust or profit under the authority of this state or the United States." *See* 1928 Op. Att'y Gen. No. 2669, vol. III, p. 2258.

It is clear, initially, that the types of functions performed by persons who serve on a judicial corrections board are those of officers. The general criteria indicating that a position

is a public office are that it is a charge or trust conferred by public authority for a public purpose, and that the duties involve the exercise of discretion in the performance of sovereign powers. *See, e.g., State ex rel. Bricker v. Gessner*; 1991 Op. Att'y Gen. No. 91-010, at 2-52; 1990 Op. Att'y Gen. No. 90-089. *See generally* 1991 Op. Att'y Gen. No. 91-001. Judges who serve on a judicial corrections board have the statutory responsibility of organizing and operating a correctional facility and program. They exercise discretion in proposing and establishing the facility and program, and in employing the persons who operate it. Their functions are defined by statute and serve a public purpose. It cannot seriously be argued that their functions in this regard are not those of officers.

The question whether Ohio Const. art. IV, § 6(B) or R.C. 141.04(D) prohibits a judge from serving on a judicial corrections board turns on whether service on a judicial corrections board is an office "other" than the office of judge, so as to bring the prohibition into play. This determination depends upon the nature of the judicial corrections board and the manner in which the judges are authorized to undertake responsibility for its activities. While the statutory provisions are not entirely consistent in this regard, our review of the entire statutory scheme indicates that the General Assembly has established the responsibilities of judges who serve on judicial corrections boards as responsibilities arising from and relating to their service as judges, rather than as separate offices of profit or trust.

The power to formulate a community-based correctional proposal (which upon implementation, provides a community-based correctional facility and program) is granted by statute to the court of common pleas of a county with a population of two hundred thousand or more. The proposed community-based correctional facility and program is "for the use of that court." R.C. 2301.51(A)(1). By virtue of holding the office, "[t]he presiding judge of the court or, if the presiding judge is not a judge of the general division of the court, the administrative judge of the general division" is required to designate those judges of the court who form the judicial corrections board that administers the facility and program. *Id.* The judge who designates the members of the board must serve as its chairperson. *Id.*

The courts of common pleas of two or more adjoining or neighboring counties with an aggregate population of two hundred thousand or more are empowered to form a judicial corrections board, organize a district, and formulate a district community-based correctional facility and program, which, upon implementation, provides a district community-based correctional facility and program "for the use of the member courts." R.C. 2301.51(A)(2). By virtue of holding the office, "[t]he presiding judge of the court of common pleas of the county with the greatest population or, if that presiding judge is not a judge of the general division of that court, the administrative judge of the general division of that court shall serve as chairperson of the board." R.C. 2301.51(A)(2). The judicial corrections board must consist of no more than eleven judges of the member courts of common pleas, and each member court must be represented on the board by at least one judge. *Id.*

The persons serving on a judicial corrections board thus serve by virtue of their judicial offices. Statutory use of the word "may" indicates that a court of common pleas has discretion in the first instance to determine whether to formulate a proposal to provide a correctional facility and program. R.C. 2301.51(A). Once the court decides to begin the process, however, a judicial corrections board must be formed and only judges may serve on the board.

An arrangement of this sort is not necessarily considered to be the holding of another office of profit or trust. Rather, it may constitute a statutory grant of power in addition to the power the judge already possesses. *See State ex rel. Stanton v. Powell*, 109

Ohio St. 383, 142 N.E. 401 (1924) (syllabus, paragraph 2) ("[t]he imposition of additional duties upon an existing office, to be performed under a different title, does not constitute the creation of a new office"). That the functions of a judicial corrections board are in effect the functions of the court is evidenced by the fact that a community-based correctional facility and program is established by a court of common pleas "for the use of that court," and a district community-based correctional facility and program is established by a judicial corrections board representing two or more courts of common pleas "for the use of the member courts." R.C. 2301.51(A)(1) and (2). Further, the facilities and programs may be dissolved by the court or courts by entry upon each court's journal and notification of the Division of Parole and Community Services. R.C. 2301.51(D).

The conclusion that service on a judicial corrections board is an additional responsibility placed upon a judge, rather than a separate office or position, is consistent with Ohio Const. art. IV, § 18, which states that judges, including judges of the courts of common pleas, "shall ... have and exercise such power and jurisdiction, at chambers, or otherwise, as may be directed by law." *See State ex rel. Stanton v. Powell*, 109 Ohio St. at 389 (finding that Ohio Const. art. IV, § 18 provides authority for the General Assembly to impose upon a court duties that are more than incidental and extend beyond its inherent power). In this regard, the authority of a court to establish community-based correctional facilities and programs is similar to the authority of a court to establish a probation department. Pursuant to R.C. 2301.27, the court of common pleas may establish a county department of probation by making an entry on the journal of the court and notifying the officers and boards of the county. The court is then responsible for appointing a chief probation officer and other employees, fixing their salaries, and supervising their work. Judges of the courts of two or more counties may combine to jointly establish a probation department. R.C. 2301.27(A)(1) and (2). The validity of this statutory scheme has been upheld by the courts. *See State ex rel. Gordon v. Zangerle*;[1] *see also State ex rel. Hillyer v. Tuscarawas County Bd. of Comm'rs*, 70 Ohio St. 3d 94, 100, 637 N.E.2d 311 (1994); 2002 Op. Att'y Gen. No. 2002-004. The fact that R.C. 2301.51 provides for action by an entity called a judicial corrections board does not appear to be so substantial a distinction as to require a different result in the case of

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[1]The syllabus to *State ex rel. Gordon v. Zangerle*, 136 Ohio St. 371, 26 N.E.2d 190 (1940), states, in part:

> 3. Section 1554-1, General Code [now R.C. 2301.27], in authorizing a judge or judges of the Court of Common Pleas to create a probation department of the county, appoint persons to positions therein and fix their salaries, does not constitute a delegation of legislative power, nor confer other than judicial power upon the judicial branch of the government, nor contravene Section 20 of Article II of the state Constitution which ordains: "The General Assembly, in cases not provided for in this Constitution, shall fix the term of office and compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."
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> 4. The power of probation may be conferred by the General Assembly upon trial judges and magistrates as a judicial function without violating the constitutional provisions as to the distribution of powers, executive, legislative and judicial; and it is not beyond the legislative power to clothe the judge or judges of the Court of Common Pleas with authority to create a probation department and appoint persons to positions therein as an adjunct to the judicial function.

community-based correctional facilities and programs, because each judicial corrections board is composed entirely of judges of one or more courts of common pleas, who serve by virtue of the judicial offices they hold.

Further, the conclusion that service on a judicial corrections board does not constitute the holding of another office of profit or trust is compelled by the general principle that, in enacting legislation, the General Assembly is presumed to be familiar with the provisions of the Ohio Constitution and to have acted in a manner that is consistent with those provisions. *Derhammer v. Medina County Bd. of Comm'rs*, 38 Ohio Op. 439, 441, 83 N.E.2d 400 (C.P. Medina County 1948) ("[i]t must be presumed when the legislature enacts a statute, it has in mind all the constitutional provisions applicable to the subject matter thereof"). Thus, statutes are presumed to be constitutional, and ambiguities are construed so as to preserve constitutionality. *See* R.C. 1.47 ("[i]n enacting a statute, it is presumed that: (A) Compliance with the constitutions of the state and of the United States is intended"); *Fabrey v. McDonald Village Police Dep't*, 70 Ohio St. 3d 351, 352, 639 N.E.2d 31 (1994) ("[s]tatutes are presumed to be constitutional unless shown beyond a reasonable doubt to violate a constitutional provision"); *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59 (1955) (syllabus, paragraph 1); *Wilson v. Kennedy*, 151 Ohio St. 485, 492, 86 N.E.2d 722 (1949) ("[i]t is the duty of a court where constitutional questions are raised to liberally construe a statute to save it from constitutional infirmities"); *State v. Kendle*, 52 Ohio St. at 356 (if there is reasonable doubt about the constitutionality of legislation, "the doubt should be resolved in favor of the law and the judgment of the legislature").

To find that service on a judicial corrections board constitutes the holding of another office of profit or trust would be to find that the General Assembly created an office that no one is able to hold. The Ohio Supreme Court considered a similar question in a *quo warranto* proceeding involving a statute that gave a common pleas judge the title and responsibilities of supervising judge. The court rejected the argument that the position of supervising judge was a separate and distinct office, stating:

> Finally, if the position of supervising judge be an office, how, under the constitution, (section 14, article IV),[2] which provides that judges of the court of common pleas shall not "hold any other office of profit or trust under the authority of this state or of the United States," could a judge of the court of common pleas be eligible to it? Surely, if an office at all, it is an office of trust. This court is not at liberty to assume that the law-makers were ignorant of this constitutional inhibition, nor that they intended to disregard it. *Nor can we assume that the general assembly intentionally committed the folly of creating an office, by the same act limiting its occupancy to certain persons, no one of whom would be eligible to fill it, but in fact all such persons distinctly, and by constitutional provision, prohibited from filling it.* And yet this is exactly what the general assembly did do, if the position of supervising judge is an office.

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[2]When *State ex rel Hogan v. Hunt*, 84 Ohio St. 143, 95 N.E. 666 (1911), was decided, the prohibition against judges holding another office of profit or trust appeared in Ohio Const. art. IV, § 14. Article IV, § 14 was repealed and replaced by art. IV, § 6. *See* 1967-1968 Ohio Laws, Part II-III, 2878 (Am. Sub. H.J.R. 42); *see also City of Euclid v. Heaton*, 15 Ohio St. 2d 65, 238 N.E.2d 790 (1968); 1969 Op. Att'y Gen. No. 69-131.

State ex rel. Hogan v. Hunt, 84 Ohio St. at 153 (footnote and emphasis added); *see also Walker v. City of Cincinnati*, 21 Ohio St. at 49 (upholding authority of judges to appoint trustees and stating: "[i]t is clearly the case of an additional power or duty annexed to existing offices, and not the creation of a new office"); *State ex rel. Att'y Gen. v. Judges of the Court of Common Pleas*, 21 Ohio St. 1, 14 (1871) ("[w]hat [the judges] are authorized to do they can only do by virtue of their office as judges .... New duties may ... be attached to an existing office ...."), *overruled on other grounds by State ex rel. Guilbert v. Lewis*, 69 Ohio St. 202, 69 N.E. 132 (1903); 1996 Op. Att'y Gen. No. 96-031, at 2-123 (discussing circumstances in which a judge of one division of a court of common pleas is expressly permitted to sit or hold court in another division of that court and stating: "Such authorized assignments are simply an addition of duties to the originally held judicial position and thus do not violate the prohibition against holding another office").

As in the *Hunt* case, the judges in the instant case receive no compensation for the additional responsibilities imposed. They do not have a separate bond, oath, or commission. The additional responsibilities cannot continue after the office of judge is vacated. Therefore, it appears that the additional duties are devolved "under authority of the statute and not independent duties, thus making of the place but an adjunct to that judge's general duties as judge." *State ex rel. Hogan v. Hunt*, 84 Ohio St. at 147. It appears, accordingly, that, rather than creating another office, the language providing for membership on a judicial corrections board merely describes an additional function of certain common pleas court judges. Like the *Hunt* court, we are unwilling to find that the General Assembly established a statutory program that is in direct violation of Ohio Const. art. IV, § 6(B). Therefore, we conclude that a judge who serves upon a judicial corrections board under R.C. 2301.51 is performing functions of his or her office as judge and does not hold another office of profit or trust in violation of Ohio Const. art. IV, § 6(B).

We are aware, however, that there are several statutory provisions that are not entirely consistent with this analysis and raise the possibility that service on a judicial corrections board might constitute another office of profit or trust. The statutory provisions governing judicial corrections boards refer to the governing entities of the correctional facilities and programs as "boards," thereby suggesting that they are entities separate from the courts. R.C. 2301.51. Further, in the case of a district community-based correctional facility and program, the statute provides for the organization of a "district." R.C. 2301.51(A)(2). The statutory provisions do not specify how the district is to be created, and it appears that the district consists simply of the area over which the participating courts have jurisdiction. *See* 15 Ohio Admin. Code 5120:1-14-01(E) (defining "district" to mean "a geographic area comprised of two or more neighboring or adjoining counties in the state of Ohio with a total combined population of two-hundred thousand or more"). The district has no taxing authority. However, a judicial corrections board is permitted to accept and use gifts, donations, devises, bequests, grants, or appropriations for the benefit of its facility and program. R.C. 2301.55(B). The board may also sell, lease, convey, or otherwise transfer real or personal property in accordance with the procedures set forth in R.C. 307.09, R.C. 307.10, and R.C. 307.12, which apply generally to boards of county commissioners. *Id.* Thus, a judicial corrections board is empowered to hold property for a correctional facility and program apart from property of the courts of common pleas.

It appears, also, that, as an employer, a judicial corrections board may be considered an independent entity, rather than an agency of a court, the state, or a political subdivision. *See* 15 Ohio Admin. Code 5120:1-14-03(M) ("[e]mployees of judicial corrections boards are not employees of the state or any political subdivision thereof"); 15 Ohio Admin. Code 5120:1-14-03(N) ("[a]ll persons who staff the community-based correctional facility

and programs including those who receive some or all of their salaries from state financial assistance ... are not employees of the department of rehabilitation and correction"); 15 Ohio Admin. Code 5120:1-14-03(P) ("[p]ersons hired to staff community-based correctional facilities and programs shall be unclassified employees of judicial corrections boards or contract providers. Each judicial corrections board shall develop and adopt personnel policies and procedures for hiring, promoting, demoting, suspending, and removing its employees"). Similarly, for purposes of liability, defense, and indemnity, a judicial corrections board may be considered an entity separate from the court or courts that created it. *See generally* R.C. 109.36-.366; R.C. 2744.01(F) and (I); R.C. 2744.02-.03.

Further, as recently amended, R.C. 2301.56 states that "[c]ommunity-based correctional facilities and programs and district community-based correctional facilities and programs are public offices under [R.C. 117.01] and are subject to audit under [R.C. 117.10]." R.C. 2301.56(E)(1); *see* Sub. H.B. 510, 124th Gen. A. (2002) (eff. Mar. 31, 2003). If a private or nonprofit entity performs the day-to-day operation of a facility and program, that entity is also subject to audit. The audits include financial audits and, in specified circumstances, performance audits by the Auditor of State. R.C. 2301.56. Costs of audits may fall upon the Department of Rehabilitation and Corrections or the judicial corrections board. Ohio Legislative Service Comm'n, Fiscal Note & Local Impact Statement, 124th Gen. A., Sub. H.B. 510 (As Passed by the Senate) (Dec. 6, 2002).

These provisions do not directly address the question whether membership on a judicial corrections board is an office separate from the office of judge. They do indicate, however, that correctional facilities and programs may be separate from the courts for some purposes and, thus, support the conclusion that questions may exist regarding the status of judicial corrections boards and their correctional facilities and programs. *See also* Sub. H.B. 510, 124th Gen. A. (2002) (eff. Mar. 31, 2003) (sec. 3, uncodified) ("[n]othing in this act authorizes, or is intended to authorize, a private or nonprofit entity to operate any community-based correctional facility and program or district community-based correctional facility and program"); R.C. 117.01(D) (defining "[p]ublic office" to mean "any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government").

Additional questions regarding the status of a judicial corrections board arise from Opinion 2003-9 of the Board of Commissioners on Grievances and Discipline ("Board") of the Ohio Supreme Court. The syllabus of that opinion states: "Under Canon 4(C)(2), Canon 2(B) and Canon 2(A) of the Ohio Code of Judicial Conduct, common pleas court judges should not serve on judicial corrections boards for community-based correctional facilities and programs." In Opinion 2003-9, the Board applied a three-part test, initially set forth in the Board's Opinion 2002-9, for determining whether it is proper for a judge to accept an appointment to serve on a governmental committee or commission, or in another governmental position. The test is as follows:

1. Would a judge's participation cast doubt on the judge's ability to act impartially, demean the judicial office, or interfere with performance of judicial duties?

2. Is it likely that the governmental entity will be engaged in proceedings that ordinarily would come before the judge or be engaged in adversary proceedings with frequency in the court of which the

judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member?

3. Is the governmental entity concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice?

Bd. of Comm'rs on Grievances and Discipline, Op. 2003-9, at 3 (Dec. 5, 2003). The Board determined that service on a judicial corrections board would violate all three prongs of this test. *Id.* The Board thus concluded that a judge should not so serve, even though Ohio statutes indicate that a judge may so serve. Opinion No. 2003-9 states, on the first page: "In determining whether it is proper to serve on a governmental committee, commission, or position, a judge must not base his or her decision on whether there is a statute specifying a judge's participation. A judge must consider his or her restrictions under the Ohio Code of Judicial Conduct."[3]

In Opinion 2003-9, the Board also mentioned Ohio Const. art. IV, § 6(B) and R.C. 141.04(D), which prohibit a judge from holding another office of profit or trust, but deferred to the Attorney General for a determination as to what constitutes an office of profit or trust. The Board stated, at page 2: "This Board has no advisory authority as to what constitutes an office of profit or trust under the authority of this state or of the United States; that authority

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[3]As a practical matter, we note that, on December 19, 2003, Richard Alkire, Chairman of the Board of Commissioners on Grievances and Discipline, issued the following news release:

> Advisory Opinion 2003-9 issued by the Board of Commissioners on Grievances and Discipline on December 5, 2003 is a non-binding advisory opinion addressing whether it is proper under the Ohio Code of Judicial Conduct for judges to serve on judicial corrections boards.
>
> The Board advised that it is not proper under Canon 4(C)(2), Canon 2(B) and Canon 2(A) of the Ohio Code of Judicial Conduct. However, judges currently serving on Judicial Corrections Boards for Community Based Correctional Facilities pursuant to statutory appointments should not resign from these duties at this time.
>
> Related and relevant issues are undergoing consideration by other entities. The Office of the Attorney General has under its review a request for an opinion as to whether such service on Judicial Corrections Boards violates the Ohio Constitution. The Ohio Judicial Conference is reviewing the issue and may consider whether to propose statutory changes to the legislature and or rule changes to the Supreme Court of Ohio.
>
> Due to ongoing review of the issues and the negative impact that would occur due to mass resignation of judges from judicial corrections boards, the Board of Commissioners on Grievances and Discipline advises that judges may continue to serve on such boards at this time. This serves the public interest in ensuring ongoing operation of important community based correctional facilities and programs.

lies with the Office of the Attorney General of Ohio." *See also* Bd. of Comm'rs on Grievances and Discipline, Op. 2002-9 (Aug. 9, 2002).

The Board's Opinion 2003-9 thus raises concerns about whether a common pleas judge may properly serve on a judicial corrections board.[4] Further, it raises concerns regarding the presumption that the statutory authorization for a judge to perform certain duties renders it permissible for the judge to perform those duties. Nonetheless, it is our position that, unless a court finds to the contrary, it is presumed that a judge who serves upon a judicial corrections board under R.C. 2301.51 is performing functions of his or her office as judge and does not hold another office of profit or trust in violation of Ohio Const. art. IV, § 6(B) or R.C. 141.04(D). We note, however, that this conclusion rests upon a presumption of constitutionality that may be subject to challenge before the courts. *See, e.g.*, 2000 Op. Att'y Gen. No. 2000-047, at 2-289 ("an enactment of the General Assembly is to be presumed constitutional, absent a decision by a court of law reaching a contrary holding").

Conclusions

Therefore, it is my opinion, and you are advised, as follows:

1. The Attorney General is unable to determine, by means of a formal opinion, whether the service of a judge upon a judicial corrections board contravenes the principle of separation of powers among the legislative, executive, and judicial branches of government, as established by the Constitution of the State of Ohio. Rather, the authority to decide that question rests with the judiciary.

2. Unless a court finds to the contrary, it is presumed that a judge who serves upon a judicial corrections board under R.C. 2301.51 is performing functions of his or her office as judge and does not hold another office of profit or trust in violation of Ohio Const. art. IV, § 6(B) or R.C. 141.04(D).

[4]In another opinion, 2003-4, the Board of Commissioners on Grievances and Discipline analyzed whether the President/CEO and employees of Oriana House (the entity that operates the Summit County Community Based Correctional Facility and Program) are judicial officials, judicial employees, or instrumentalities of the court for purposes of R.C. Chapter 102, which contains ethics provisions. While this opinion does not directly impact the question here before us, it raises concerns, if correct, about the legal status of both judicial corrections boards and the facilities and programs they establish.