

October 10, 2017

The Honorable D. Vincent Faris
Clermont County Prosecuting Attorney
101 East Main Street
Batavia, Ohio 45103

SYLLABUS:

2017-034

A person may not serve simultaneously as Clermont County Auditor and member or Treasurer of the Board of Trustees of the Clermont County Convention and Visitors Bureau.



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OPINION NO. 2017-034

The Honorable D. Vincent Faris
Clermont County Prosecuting Attorney
101 East Main Street
Batavia, Ohio 45103

Dear Prosecutor Faris:

You have requested an opinion whether a person may serve simultaneously as member of the Clermont County Board of Commissioners, Clermont County Auditor, Chief Deputy Auditor of Clermont County, or an employee of the Clermont County Department of Community and Economic Development and as member or Treasurer of the Board of Trustees of the Clermont County Convention and Visitors Bureau.¹ For clarity and ease of organization, we divided your questions among four separate opinions. This opinion addresses whether a person may serve simultaneously as Clermont County Auditor and member or Treasurer of the Board of Trustees of the Clermont County Convention and Visitors Bureau.

Whether a public position and private position are compatible depends upon the answers to the following five questions:

1. Is the public position in the classified civil service of the state, a county, a city, a city school district, or a civil service township as defined in R.C. 124.57?
2. Do any constitutional provisions or statutes prohibit a person from serving in both positions at the same time?

¹ The Clermont County Convention and Visitors Bureau is a private, nonprofit corporation incorporated pursuant to the provisions of R.C. Chapter 1702. The Board of Trustees of the Clermont County Convention and Visitors Bureau is the entity vested with the authority to conduct the affairs of the corporation. *See* R.C. 1702.30(A) (“[e]xcept where the law, the articles, or the regulations require that action be otherwise authorized or taken, all of the authority of a corporation shall be exercised by or under the direction of its directors”); *see also* R.C. 1702.01(K) (“[d]irectors’ means the persons vested with the authority to conduct the affairs of the corporation irrespective of the name, such as trustees, by which they are designated”).

3. Is there a conflict of interest between the two positions?
4. Are there any controlling local charter provisions, resolutions, or ordinances?
5. Does a federal, state, or local departmental regulation prevent a person from holding both positions?

See 2012 Op. Att’y Gen. No. 2012-040, at 2-349 to 2-350. All of these questions must yield answers in favor of compatibility to support a finding that the two positions are compatible. *Cf.* 2013 Op. Att’y Gen. No. 2013-008, at 2-78 (in analyzing the compatibility of two public positions, all questions of the compatibility test “must yield answers in favor of compatibility in order to conclude that two positions are compatible”).

The third question of the compatibility test asks whether a conflict of interest exists between the two positions. 2016 Op. Att’y Gen. No. 2016-004, at 2-43. A conflict of interest exists if the duties and responsibilities of one position are of such a nature as to influence the duties and responsibilities of the other position, thereby subjecting the person holding those positions to influences which may cause the person to act other than in the public’s best interest.² 2017 Op. Att’y Gen. No. 2017-004, at 2-34; 2012 Op. Att’y Gen. No. 2012-040, at 2-351 to 2-352. “The mere existence of a conflict of interest does not automatically render two positions incompatible.” 2017 Op. Att’y Gen. No. 2017-004, at 2-34. When “the possibility of conflict is remote and speculative” and can be mitigated or avoided, “the conflict of interest rule is not violated.” 1993 Op. Att’y Gen. No. 93-016, at 2-91; *see also* 2004 Op. Att’y Gen. No. 2004-019, at 2-158 (“[w]here it can be demonstrated that the conflicts may be sufficiently avoided or eliminated entirely, the person may serve in both positions”).

The factors considered in determining whether conflicts of interest are remote and speculative and can be mitigated or avoided “include the probability of the conflicts arising, the ability of the person to remove himself from any conflicts that may arise, whether the person exercises decision-making authority in each position, and whether the conflicts relate to the primary functions of each position or to financial or budgetary matters.” 2012 Op. Att’y Gen. No. 2012-040, at 2-352. If a conflict of interest between a public position and a private position is not remote and speculative and cannot be mitigated or avoided to ensure the person is not tempted to act in other than the public’s best interest, a person may not hold those positions simultaneously. As explained in 1979 Op. Att’y Gen. No. 79-111, “[i]t is contrary to public policy for a public officer to be in a position which would subject him to conflicting duties or

² 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 those provisions apply to the positions at issue in this opinion, we recommend that you contact the Ohio Ethics Commission. *Id.*

expose him to the temptation of acting in any manner other than the best interest of the public.” 1979 Op. Att’y Gen. No.79-111, at 2-371 (quoting 1970 Op. Att’y Gen. No. 70-168, at 2-336).

Whether a person who serves simultaneously as Clermont County Auditor and member or Treasurer of the Board of Trustees of the Clermont County Convention and Visitors Bureau is subject to a conflict of interest requires an examination of the duties and responsibilities of each position. *See* 2012 Op. Att’y Gen. No. 2012-040, at 2-352. “[A] county auditor is responsible for maintaining the financial records of the county, certifying moneys into the county treasury, and issuing warrants for all moneys payable from the county treasury.” 2002 Op. Att’y Gen. No. 2002-005, at 2-25. R.C. 319.13 requires a county auditor to “certify all moneys into the county treasury,” (except as to moneys collected on the tax duplicate), “specifying by whom to be paid, what fund to be credited,” and to charge the treasurer with such moneys. A county auditor accounts for the moneys deposited into the county treasury by, among other things, preparing a monthly statement of the county’s finances pursuant to R.C. 319.15. “The monthly financial statement must include ‘the amount of money received to the credit of each fund and account, the amount disbursed from each, the balance remaining to the credit of each, and the balance of money in the treasury and depository.’” 2002 Op. Att’y Gen. No. 2002-005, at 2-24 (quoting R.C. 319.15). R.C. 319.16 requires a county auditor, when issuing a warrant on the county treasury that authorizes the disbursement of county moneys, to keep a record of the warrant “showing the number, date of issue, amount for which drawn, in whose favor, for what purpose, and on what fund.” *See* 2002 Op. Att’y Gen. No. 2002-005, at 2-24 (“[b]efore moneys in a county treasury may be disbursed, the county auditor must issue warrants on the county treasurer authorizing the disbursements”).

The duties and responsibilities of a member or Treasurer of the Board of Trustees of the Clermont County Convention and Visitors Bureau are set forth in the bylaws adopted by the Bureau’s Board of Trustees. The Clermont County Convention and Visitors Bureau is a private, nonprofit organization incorporated pursuant to the provisions of R.C. Chapter 1702. *See* 1999 Op. Att’y Gen. No. 99-028, at 2-184 n.1 (“R.C. Chapter 1702 provides for the creation, merger, consolidation, and dissolution of a nonprofit corporation”). Under R.C. Chapter 1702, a person or group of persons may form a nonprofit corporation by filing articles of incorporation with the Secretary of State. R.C. 1702.04(A). The articles of incorporation shall include the corporation’s name, the location of the corporation’s principal office in Ohio, and the purposes for which the corporation is formed. R.C. 1702.04(A)(1)-(3). “After the articles [of incorporation] have been filed and at any time prior to a meeting of voting members, the incorporators ... may adopt regulations for the government of the corporation” and elect additional directors. R.C. 1702.10; *see also* R.C. 1702.11 (governing the content of regulations adopted pursuant to R.C. 1702.10). “Except where the law, the articles [of incorporation], or the regulations require that action be otherwise authorized or taken, all of the authority of a corporation shall be exercised by or under the direction of its directors.” R.C. 1702.30(A); *see also* R.C. 1702.12 (authority of nonprofit corporation). The board of directors, “[f]or their own government, ... may adopt bylaws that are not inconsistent with the articles or the regulations.” R.C. 1702.30(A).

Article II, Section 1 of the Bylaws of the Clermont County Convention and Visitors Bureau (“Bylaws”) states that “[t]he government and policy-making responsibilities of the Bureau shall be vested in the Board of Trustees, ... which shall control [the Bureau’s] property, be responsible for its finances, and direct its affairs.” The Board of Trustees may, among other things, “[p]urchase or otherwise acquire, ... invest in, ... sell, exchange, transfer, and dispose of property,” Bylaws, Art. II, Sec. 2A, and “[b]orrow money, and issue, sell, and pledge [the Bureau’s] notes, bonds, and other evidences of indebtedness,” Bylaws, Art. II, Sec. 2E.

In addition to the powers conferred upon all members of the Board of Trustees, the Treasurer of the Board of Trustees of the Clermont County Convention and Visitors Bureau is responsible for keeping “[t]he books and accounts of the Bureau,” Bylaws, Art. VII, Sec. 3, and serves on the Executive Committee, which “perform[s] such duties as may be delegated by the Board from time to time.” Bylaws, Art. IV, Sec. 1. The Executive Committee is responsible for adopting and submitting to the Board for revision or approval “a budget of anticipated revenues and expenses,” Bylaws, Art. VII, Sec. 2, and may approve or order the “disbursements of money or other property of the Bureau,” Bylaws, Art. VII, Sec. 1.

A review of the duties and responsibilities of these positions reveals an impermissible conflict of interest that renders the office of Clermont County Auditor incompatible with member or Treasurer of the Board of Trustees of the Clermont County Convention and Visitors Bureau. The Clermont County Convention and Visitors Bureau is funded, in part, by revenue derived from an excise tax levied by the Clermont County Board of Commissioners pursuant to R.C. 5739.09. R.C. 5739.09(A)(1) authorizes a board of county commissioners to “levy an excise tax not to exceed three per cent on transactions by which lodging by a hotel is or is to be furnished to transient guests.” Divisions (A)(1) through (12) of R.C. 5739.09 set forth various ways in which revenue arising from the tax shall be distributed. *See, e.g.*, R.C. 5739.09(A)(12)(b) (a board of county commissioners with a population between 190,000 and 200,000 that levies an excise tax under R.C. 5739.09(A)(1) “may increase the rate of the tax by not more than one per cent ... for the purposes of paying the costs of constructing, improving, and maintaining a professional sports facility in the county and paying expenses considered necessary by the convention and visitors’ bureau ... to promote travel and tourism with respect to that professional sports facility”). Generally, however, except as provided in the circumstances described in those divisions, a portion of the revenue arising from an excise tax levied pursuant to R.C. 5739.09(A)(1) “shall be spent solely to make contributions to the convention and visitors’ bureau operating within the county.”³ The portion of the revenue

³ R.C. 5739.09(A)(1) states, in pertinent part:

A board of county commissioners may ... levy an excise tax not to exceed three per cent on transactions by which lodging by a hotel is or is to be furnished to transient guests. The board shall establish all regulations necessary to provide for the administration and allocation of the tax. The regulations may prescribe the time for payment of the tax, and may provide for the imposition of a penalty or

earmarked for the convention and visitors' bureau is placed into a separate fund in the county treasury before it is disbursed in accordance with R.C. 5739.09(A)(1).

As set forth above, before moneys in the Clermont County treasury may be disbursed, the Clermont County Auditor "must issue warrants ... authorizing the disbursements." 2002 Op. Att'y Gen. No. 2002-005, at 2-24. R.C. 319.16 states, in pertinent part:

The county auditor shall issue warrants ... on the county treasurer for all moneys payable from the county treasury, upon presentation of the proper order or voucher and evidentiary matter for the moneys, and keep a record of all such warrants showing the number, date of issue, amount for which drawn, in whose favor, for what purpose, and on what fund. The auditor shall not issue a warrant for the payment of any claim against the county, unless it is allowed by the board of county commissioners, except where the amount due is fixed by law or is allowed by an officer or tribunal, ... so authorized by law. If the auditor questions the validity of an expenditure that is within available appropriations and for which a proper order or voucher and evidentiary matter is presented, the auditor shall notify the board, officer, or tribunal who presented the voucher. If the board, officer, or tribunal determines that the expenditure is valid and the auditor continues to refuse to issue the appropriate warrant on the county treasury, a writ of mandamus may be sought. The court shall issue a writ of mandamus for issuance of the warrant if the court determines that the claim is valid.

Therefore, before moneys in the Clermont County treasury may be disbursed to the Clermont County Convention and Visitors Bureau, the Clermont County Auditor is responsible for issuing a warrant authorizing the disbursement. "A county auditor's duty to issue warrants requires the exercise of discretion; it is not simply a ministerial duty." 2012 Op. Att'y Gen. No. 2012-040, at 2-354.

interest, or both, for late payments, provided that the penalty does not exceed ten per cent of the amount of tax due, and the rate at which interest accrues does not exceed the rate per annum prescribed pursuant to [R.C. 5703.47]. Except as provided in divisions (A)(2)[-](12) of this section, the regulations shall provide, after deducting the real and actual costs of administering the tax, for the return to each municipal corporation or township that does not levy an excise tax on the transactions, a uniform percentage of the tax collected in the municipal corporation or in the unincorporated portion of the township from each transaction, not to exceed thirty-three and one-third per cent. The remainder of the revenue arising from the tax shall be deposited in a separate fund and shall be spent solely to make contributions to the convention and visitors' bureau operating within the county.

The Treasurer of the Board of Trustees of the Clermont County Convention and Visitors Bureau keeps the Bureau's books and accounts and has the authority, as a member of the Executive Committee, to approve or order disbursements of the Bureau's moneys or property. Moreover, all members of the Board of Trustees of the Clermont County Convention and Visitors Bureau are responsible for the Bureau's finances and have the authority to make decisions regarding the ways in which the Bureau shall expend its moneys, including revenue derived from an excise tax levied by the Clermont County Board of Commissioners pursuant to R.C. 5739.09(A)(1). A member and the Treasurer of the Board of Trustees of the Clermont County Convention and Visitors Bureau both possess responsibilities that involve the receipt or expenditure of county moneys. Accordingly, a person serving simultaneously as Clermont County Auditor and as member or Treasurer of the Board of Trustees of the Clermont County Convention and Visitors Bureau may have conflicting duties and loyalties that prevent him from making completely disinterested decisions when transferring county moneys from the county treasury to the Clermont County Convention and Visitors Bureau and thereafter accounting for those moneys.

The same conflict of interest arose in 2012 Op. Att'y Gen. No. 2012-040 in the course of determining whether the office of county auditor was compatible with the position of treasurer of a county land reutilization corporation that received county moneys. In that opinion, we determined that "the immediacy of the conflict of interest arising from the disbursement of moneys from the county treasury to the county land reutilization corporation indicate[d] that the conflict [could not] be sufficiently avoided or eliminated." *Id.* at 2-354. We explained:

Significantly, the conflict relates to financial and budgetary matters. It also relates to the primary responsibilities of both a county auditor and the treasurer of a county land reutilization corporation. Further, the conflict is not one that would occur only on an infrequent basis. A county auditor has an ongoing duty to issue warrants for the disbursement of funds to a county land reutilization corporation, and the treasurer of a county land reutilization corporation has an ongoing duty to oversee receipt of those funds and to accurately account for the corporation's moneys. Because the conflict cannot be eliminated or sufficiently avoided, a person holding the positions of county auditor and treasurer of a county land reutilization corporation is subject to an impermissible conflict of interest.

Id.

Similarly, the conflict of interest facing a person serving simultaneously as Clermont County Auditor and as member or Treasurer of the Board of Trustees of the Clermont County Convention and Visitors Bureau relates to financial and budgetary matters and is certain to occur. The Clermont County Board of Commissioners has levied an excise tax pursuant to R.C. 5739.09(A)(1). A portion of the revenue derived from that tax is required by statute to be spent solely to make contributions to the Clermont County Convention and Visitors Bureau. Thus, there is no question that the Clermont County Auditor will be required to issue warrants for the

disbursement of moneys to the Clermont County Convention and Visitors Bureau in accordance with R.C. 5739.09.

A person serving simultaneously as Clermont County Auditor and member or Treasurer of the Board of Trustees of the Clermont County Convention and Visitors Bureau is not able to eliminate or mitigate this conflict of interest, as Clermont County Auditor, by delegating to a deputy county auditor the duty to issue warrants for the disbursement of moneys to the Clermont County Convention and Visitors Bureau. *See* R.C. 319.05 (authorizing the appointment of one or more deputy auditors to aid the auditor in the performance of his duties). A county auditor supervises, and is responsible for, the actions of his subordinates. *Cf.* 2016 Op. Att’y Gen. No. 2016-017, at 2-180 (recognizing the same with regard to the county treasurer). Thus, a deputy county auditor to which the duty to issue warrants for the disbursement of moneys to the Clermont County Convention and Visitors Bureau has been assigned may be adversely influenced by the interests of his superior. *Cf. id.* (“a county treasurer’s delegation of specific duties to a deputy treasurer to avoid or mitigate a conflict of interest facing the county treasurer does not eliminate the possibility that the deputy treasurer may be adversely influenced by the interests of his superior”). A person serving simultaneously as Clermont County Auditor and member or Treasurer of the Board of Trustees of the Clermont County Convention and Visitors Bureau therefore does not avoid this conflict of interest by delegating to a deputy auditor the responsibility to issue warrants to the Clermont County Convention and Visitors Bureau. *Cf. id.* at 2-181 (“a county treasurer may not abstain from participating in financial matters or the exercise of his statutory duties by delegation to a subordinate to avoid a conflict of interest”).

A person serving simultaneously as Clermont County Auditor and member or Treasurer of the Board of Trustees of the Clermont County Convention and Visitors Bureau also is not able to eliminate or mitigate this conflict of interest by abstaining, as member or Treasurer of the Board of Trustees of the Clermont County Convention and Visitors Bureau, from any discussions or decisions relating to the receipt or expenditure of county moneys. The Board of Trustees of the Clermont County Convention and Visitors Bureau is able to take action as the governing body of the Bureau even when one of its nine members abstains from any discussions or decisions that present the member with a conflict of interest. *See generally Dolin v. Appointing Auth. of the Bd. of Cuyahoga Cnty. Hosp. Trs.*, App. No. 46416, 1983 Ohio App. LEXIS 14757, at *5 (Cuyahoga County Dec. 8, 1983) (recognizing that a board of trustees may take action when a quorum is present and the action is approved by a majority of the votes cast); Bylaws, Art. II, Sec. 1 (“[t]here shall be nine (9) trustees with voting privileges”); Bylaws, Art. VI, Sec. 4 (“[a]t all meetings of the Board a majority of the number of the Board of Trustees with voting privileges shall constitute a quorum”). However, a member’s abstention from any discussions or decisions regarding the Bureau’s receipt or expenditure of county moneys does not adequately eliminate or mitigate the conflict of interest that arises when the member serves simultaneously as Clermont County Auditor. Even if the person, as member or Treasurer abstains from discussions or decisions that relate to the receipt or expenditure of county moneys, the person, as Clermont County Auditor, will continue to be subject to influences derived from his loyalty to the Clermont County Convention and Visitors Bureau.

In this instance, a person that serves simultaneously as Clermont County Auditor and member or Treasurer of the Board of Trustees of the Clermont County Convention and Visitors Bureau will be subject to influences that may induce the person, as county auditor, to act in a way other than in the county's best interests. *See* 2012 Op. Att'y Gen. No. 2012-040, at 2-353 ("a county auditor may not hold or serve in another position where the second position or office receives or pays out funds of the county and where the second position requires the person to receive or expend moneys of the county"). This conflict of interest is not remote and speculative and cannot be mitigated or avoided. Accordingly, it is our opinion, and you are hereby advised that a person may not serve simultaneously as Clermont County Auditor and member or Treasurer of the Board of Trustees of the Clermont County Convention and Visitors Bureau.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General