

March 29, 2016

The Honorable Scott A. Haselman
Fulton County Prosecuting Attorney
152 South Fulton Street, Suite 240
Wauseon, Ohio 43567

SYLLABUS:

2016-011

1. A board of township trustees that is the appointing authority of the board of trustees of a regional water district established under R.C. Chapter 6119 may appoint to a vacancy on the board of trustees of the regional water district a person who is a plaintiff in a civil action filed against the regional water district.
2. A member of a board of trustees of a regional water district who is a plaintiff in a civil action filed against the regional water district shall not participate in any discussions, deliberations, negotiations, or votes concerning the civil action or the proposed water line expansion project that is the subject of the civil action while the civil action is pending and the board member continues to be a plaintiff in the action. The board member also shall not be present during any discussions or meetings with legal counsel for the regional water district or any discussions or meetings in which privileged matters relating to the civil action are addressed.
3. A member of a board of trustees of a regional water district who is a plaintiff in a civil action filed against the regional water district who fails to abstain from any discussions, deliberations, negotiations, or votes concerning the civil action or the proposed water line expansion project that is the subject of the civil action or refuses to remove himself from discussions or meetings with legal counsel for the regional water district or any discussions or meetings in which privileged matters relating to the civil action are addressed while that action is pending and while he is a plaintiff in the action may be subject to removal by a board of township trustees for misfeasance, nonfeasance, or malfeasance in office pursuant to R.C. 6119.071.



March 29, 2016

OPINION NO. 2016-011

The Honorable Scott A. Haselman
Fulton County Prosecuting Attorney
152 South Fulton Street, Suite 240
Wauseon, Ohio 43567

Dear Prosecutor Haselman:

You have requested an opinion about the appointment of a person to a vacancy on the board of trustees of the Swancreek Water District, which is a regional water district established pursuant to R.C. Chapter 6119.¹ You have explained that the Swancreek Township Board of Trustees appoints the five members of the board of trustees of the Swancreek Water District. Several applicants for the vacant regional water district trustee position are plaintiffs in a civil action filed against the Swancreek Water District with respect to a proposed water line expansion project. You have informed a member of my staff that the plaintiffs in the civil action against the Swancreek Water District have sought equitable relief, rather than monetary damages, but have requested an award of attorney's fees. You ask the following questions:

1. Can the Board of [Township] Trustees appoint someone to the Water District board who is currently a plaintiff in the civil litigation that has been brought against the Water District or would the inherent conflict preclude the appointment?
2. If you do not believe that the Board of [Township] Trustees is precluded from making such an appointment, what steps would have to be taken to alleviate the conflict? For example, would the conflicted Water District board member be required to abstain from any discussions/votes involving the lawsuit/proposed water expansion project? Likewise, if the Water District board retired to executive session to consult with the attorney who is representing it in the current civil litigation, would the conflicted Water District board member be required to excuse himself/herself from the executive session?

¹ A "regional water and sewer district" that is organized and operated for either the purpose of supplying water or the purpose of collecting, treating, and disposing of waste water may be designated a "regional water district" or a "regional sewer district," respectively. R.C. 6119.011(U).

3. Finally, if you do not believe that the Board of [Township] Trustees is precluded from making such an appointment, and that certain steps such as the conflicted Water District board member abstaining from discussions/votes and/or excusing himself/herself from an executive session that is held for purposes of consulting with the attorney who is representing the Water District would be required to alleviate or ameliorate the conflict, would the Board of [Township] Trustees, as the “appointing authority,” have grounds to remove the conflicted Water District board member for “misfeasance, nonfeasance, or malfeasance in office” under the terms of R.C. 6119.071, if the conflicted Water District board member did not abstain from such discussions/votes or refused to excuse himself/herself from the executive session?

Before addressing your questions, it is important to recognize that a regional water district established pursuant to R.C. Chapter 6119 is a political subdivision of the state and is not an agency of the counties, municipal corporations, or townships comprising the district. R.C. 6119.04(B), (D); *Kucinich v. Cleveland Reg'l Sewer Dist.*, 64 Ohio App. 2d 6, 410 N.E.2d 795 (Cuyahoga County 1979) (syllabus); 1990 Op. Att’y Gen. No. 90-073, at 2-317. The board of trustees of a regional water district is neither a county board nor a township board. Accordingly, a regional water district board of trustees is not entitled to legal advice from the county prosecuting attorney. *See* 1990 Op. Att’y Gen. No. 90-073, at 2-317; *see generally* R.C. 309.09(A), (B)(1). However, your questions involve the powers and duties of the Swancreek Township Board of Trustees as the appointing authority of the regional water district board of trustees. Insofar as Swancreek Township has not adopted a limited home rule government, you are the legal adviser for the board of township trustees pursuant to R.C. 309.09(B)(1). Therefore, your questions involve matters related to your duties and may be the subject of a formal opinion of the Attorney General. R.C. 109.14.

I now turn to your first question, which asks whether a person who is a plaintiff in a lawsuit against a regional water district may be appointed to serve as a member of the board of trustees of the regional water district. A person in a public position faces a conflict of interest when the person is “subject to divided loyalties, conflicting duties, or to the temptation to act other than in the public’s best interest.” 2012 Op. Att’y Gen. No. 2012-040, at 2-350.² When a person in a public office is subject to influences that may prevent him from acting in a completely objective manner, a conflict of interest exists. 1992 Op. Att’y Gen. No. 92-041, at 2-162. It is well established that “[a] public office is a public trust and the prosecution of such a trust must always be consonant with the fiduciary and confidential relationship that the office imposes.” *Halliday v. Norfolk & W. Ry. Co.*, 62 N.E.2d 716, 719 (App. Franklin County 1945). “The self interest of the public official and the public interests

² A person serving as a member of the board of trustees of a regional water or sewer district established pursuant to R.C. Chapter 6119 holds a public position. *See* 2006 Op. Att’y Gen. No. 2006-047 (addressing the compatibility of a village street and water department employee and trustee of a regional sewer district).

which he represents, must not be brought into conflict.” *State ex rel. Taylor v. Pinney*, 13 Ohio Dec. 210, 212 (C.P. Franklin County 1902).

Numerous opinions of the Attorney General have concluded that a conflict of interest exists when, in his capacity as a public official, a person is on opposing sides of a legal action. *See, e.g.*, 2006 Op. Att’y Gen. No. 2006-047, at 2-455; 2006 Op. Att’y Gen. No. 2006-003, at 2-33; 2001 Op. Att’y Gen. No. 2001-016, at 2-94; 2001 Op. Att’y Gen. No. 2001-015, at 2-88; 1992 Op. Att’y Gen. No. 92-041, at 2-163 to 2-164; 1991 Op. Att’y Gen. No. 91-036, at 2-196 to 2-197. If a person who is a plaintiff in a civil action filed against the Swancreek Water District is appointed as a member of the board of trustees of the regional water district, he will be on opposing sides of the litigation, and may be subject to divided loyalties or the temptation to act other than in the best interest of the regional water district. He will face a conflict of interest between acting in the best interest of the regional water district and acting to benefit his own interest in the civil action. *See* 2006 Op. Att’y Gen. No. 2006-022, at 2-198 (a “township trustee who is requesting reimbursement [of his legal fees incurred as a result of a removal action] has an unmistakable conflict between acting in the best interest of the township or benefiting his own pecuniary interests”).³

A person may not serve in a public position when a conflict of interest associated with that service cannot be avoided or mitigated. 2014 Op. Att’y Gen. No. 2014-014, at 2-116. The following factors are used to determine whether a conflict of interest may be avoided or mitigated: “the probability of the conflict[] arising, the ability of the person to remove himself from any conflicts that may arise, whether the person exercises decision-making authority in [the] position, and whether the conflicts relate to the primary functions of [the] position or to financial or budgetary matters.” *Id.* I will examine each of those factors separately.

In your situation, if a person who is a plaintiff in a civil action that has been filed against the Swancreek Water District is appointed as a member of the board of trustees of the regional water district, the conflict of interest has a high probability of arising. If the civil action is pending against the regional water district at the time that the person is appointed and takes office as a board member, the possibility of the conflict of interest arising is neither remote, nor speculative. Rather, the conflict of interest will be actual. In addition, as a member of the board of trustees of the regional water district, the person exercises decision-making authority for the water district. *See* R.C. 6119.07 (“[a]ll the capacity of a regional water and sewer district shall be vested in and its authority shall be exercised by a board of trustees which shall manage and conduct the affairs of the district”). That decision-making authority includes making decisions regarding the conduct of the litigation, the position the

³ The Ohio Ethics Commission is authorized to provide advisory opinions regarding R.C. Chapter 102 and R.C. 2921.42-.43. R.C. 102.08(A). Accordingly, this opinion does not consider the application of those statutes to the questions you have presented. I recommend that you or the board of township trustees consult the Ohio Ethics Commission for a determination of whether the ethics laws prohibit a person who is plaintiff in a civil action filed against a regional water district from being appointed as a member of the board of trustees of the regional water district.

board of trustees of the regional water district will take in the litigation, and the continuation and administration of the water line expansion project that is the subject of the litigation. Those decisions relate to the primary functions of a member of the board of trustees of a regional water district. Additionally, insofar as a request for attorney's fees has been made by the plaintiffs, the conflict of interest relates to financial matters.

The final factor is whether a person who is a member of the board of trustees of a regional water district and is a plaintiff in a civil action filed against the regional water district may remove himself from the conflict of interest arising from his involvement on opposing sides of the litigation. "Prior opinions of the Attorney General have determined that when a public officer is exposed to influences that may prevent him from making completely objective, disinterested decisions in a particular matter, the public officer should abstain from any discussions or votes concerning that matter, if such abstention is possible." 1994 Op. Att'y Gen. No. 94-079, at 2-394 (quoting 1994 Op. Att'y Gen. No. 94-039, at 2-201). This principle of abstaining from participating in matters in which a public officer has a conflict of interest has been described as a duty that is imposed upon the public officer. See 2001 Op. Att'y Gen. No. 2001-016, at 2-95.

Accordingly, a member of the board of trustees of the regional water district has a duty to abstain from any deliberations, discussions, negotiations, or votes concerning the civil action and the proposed water line expansion project that is the subject of the civil action while the civil action is pending and while he is a plaintiff in the action. Abstaining from any deliberations, discussions, negotiations, or votes concerning the civil action includes not being present during any discussions or meetings with legal counsel for the Swancreek Water District or any discussions or meetings in which privileged matters relating to the civil action are addressed.⁴ The Swancreek Water District board of

⁴ An attorney-client relationship exists between a political subdivision and an attorney that represents the political subdivision. 2011 Op. Att'y Gen. No. 2011-006, at 2-45 to 2-46. When a conversation is held between a client and an attorney in the presence of third parties who are not agents of the attorney, the confidentiality of the conversation is destroyed and the conversation is no longer privileged. *State v. Jurek*, 52 Ohio App. 3d 30, 32, 556 N.E.2d 1191 (Cuyahoga County 1989) ("the attorney-client privilege does not extend to those conversations because they clearly never were intended to be confidential since they were made in the presence of others"); *In re Fisher's Will*, 67 Ohio App. 6, 9, 35 N.E.2d 784 (Lucas County 1941) ("[c]ommunications between an attorney and client in the presence of a third party are not confidential, hence not privileged").

A plaintiff in a civil action against a regional water district has an interest in the action that is adverse to the regional water district. So long as the board member is a plaintiff in that action, he cannot fully divest himself of his personal interest in the litigation and fulfill his duties as a member of the board of trustees of the regional water district with respect to the litigation in an unbiased and disinterested manner. He cannot separate his status as plaintiff from his role as board member. In this way, the conflict of interest that a board member of the regional water district has as a result of being a plaintiff in the litigation filed against the regional water district places that board member in a position similar to that of a third party for the purpose of assessing confidential attorney-client

trustees is composed of five members. Insofar as four members are sufficient for the regional water district board of trustees to take official action on behalf of the Swancreek Water District, the regional water district will be able to fulfill its duties with the remaining four members when the board member with a conflict of interest abstains. *See generally* R.C. 6119.02(A)(6) (the petition for the establishment of a regional water district shall specify, *inter alia*, the number of members of the board of trustees); R.C. 6119.06(A) (the board of trustees of a regional water district may “[a]dopt bylaws for the regulation of its affairs, the conduct of its business, and notice of its actions”). Thus, it is possible for the member of the regional water district board of trustees to abstain from any deliberations, discussions, negotiations, or votes. By abstaining, the member of the regional water district board of trustees avoids or eliminates the conflict of interest.

Therefore, a board of township trustees that is the appointing authority of the board of trustees of a regional water district established under R.C. Chapter 6119 may appoint to a vacancy on the board of trustees of the regional water district a person who is a plaintiff in a civil action filed against the regional water district. A member of a board of trustees of a regional water district who is a plaintiff in a civil action filed against the water district shall not participate in any discussions, deliberations, negotiations, or votes concerning the civil action or the proposed water line expansion project that is the subject of the civil action while the civil action is pending and the board member continues to be a plaintiff in the action. The board member also shall not be present during any discussions or meetings with legal counsel for the Swancreek Water District or any discussions or meetings in which privileged matters relating to the civil action are addressed.

I have concluded that it is possible for the board member to mitigate or avoid the conflict of interest by abstaining from or not participating in certain discussions, but depending upon the frequency in which the conflict of interest affects the functioning of the regional water district board of trustees, it may prove impractical to appoint a person as a member of the board of trustees when that person is a plaintiff in a civil action against the regional water district. *See* 2006 Op. Att’y Gen. No. 2006-003, at 2-34. If the board member who is also a plaintiff is frequently abstaining from official business as a result of the conflict of interest, it is questionable whether that board member is fulfilling his duties. *See* 2015 Op. Att’y Gen. No. 2015-032, slip op at 16. Furthermore, “the board’s ability to function efficiently may be curtailed if the board must spend an inordinate amount of time determining whether one of its members has a conflict of interest that requires his recusal.” *Id.* Thus, a board of township trustees should consider carefully the practical implications of appointing a person as a member of the board of trustees of a regional water district who is a plaintiff in a civil action filed against the regional water district.

communications. Consequently, the presence of that board member in discussions with the regional water district’s attorney or in discussions about privileged matters related to the litigation would defeat the confidential nature of those discussions. Therefore, to preserve the confidential nature of the communications, the board member who is also a plaintiff shall not be present for discussions with the regional water district’s attorney or discussions about privileged matters related to the litigation.

I now turn to your final question, whether a board member may be subject to removal pursuant to R.C. 6119.071 if he fails to take the appropriate actions to sufficiently avoid or eliminate entirely the conflict of interest. R.C. 6119.071 provides, in pertinent part, “[a] member of the board of trustees of a regional water district and sewer district who has been appointed to the board may be removed by the appointing authority for misfeasance, nonfeasance, or malfeasance in office.” “Misfeasance” is “[a] lawful act performed in a wrongful manner.” *Black’s Law Dictionary*, 1151 (10th ed. 2014); *see also Fisher v. Stonelick Twp.*, 12th Dist. No. CA2010-05-037, 2010-Ohio-4944, 2010 WL 3958825, at ¶11 (“‘misfeasance’ is the improper doing of an act that a person might lawfully do”). “Malfeasance” is “[a] wrongful, unlawful, or dishonest act[.]” *Black’s Law Dictionary*, 1100; *see also Fisher v. Stonelick Twp.* at ¶11 (“‘malfeasance’ is the doing of an act that a person ought not to do at all”). “Nonfeasance” is “[t]he failure to act when a duty to act exists.” *Black’s Law Dictionary*, 1216. When determining whether a public officer has committed misfeasance, malfeasance, or nonfeasance, it is necessary to determine whether the person “acted in bad faith or committed such a gross abuse of discretion as constitutes a substantial departure from the faithful performance of duty.” *In re Removal of Kuehnle*, 161 Ohio App. 3d 399, 2005-Ohio-2373, 830 N.E.2d 1173 (Madison County), at ¶88.

“In order to faithfully perform the duties of his office, a public officer must refrain from acting in situations where he has a conflict of interest.” 2006 Op. Att’y Gen. No. 2006-022, at 2-197. As explained above, a public officer should abstain from discussions, deliberations, negotiations, or votes that involve a matter in which he has a conflict of interest. 1994 Op. Att’y Gen. No. 94-079, at 2-394. The failure or refusal to abstain when the law requires an officer to do so may constitute malfeasance. *See* 1992 Op. Att’y Gen. No. 92-074 (syllabus) (“member [of the board of alcohol, drug addiction, and mental health services] may be removed from office for malfeasance in office if he or she participates in votes or other proceedings in which they have a direct pecuniary interest”). Participating in an otherwise lawful vote when the board member has a conflict of interest may also constitute misfeasance. *See In re Removal of Kuehnle* at ¶145 (voting on contracts involving family members constitutes “gross neglect of duty, misfeasance, malfeasance, and/or nonfeasance”). And, a board member who fails or refuses to fulfill his duty to abstain from deliberations, discussions, negotiations, or votes when he has a conflict of interest may also be found to have committed nonfeasance in office. *Id.* (same as previous parenthetical).

A member of a board of trustees of a regional water district who is a plaintiff in a civil action filed against the water district who fails to abstain from any discussions, deliberations, negotiations, or votes concerning the civil action or the proposed water line expansion project that is the subject of the civil action or refuses to remove himself from discussions or meetings with legal counsel for the regional water district or any discussions or meetings in which privileged matters relating to the civil action are addressed while that action is pending and while he is a plaintiff in the action may be subject to removal by the board of township trustees for misfeasance, nonfeasance, or malfeasance in office pursuant to R.C. 6119.071.

Based on the foregoing, it is my opinion, and you are hereby advised that:

1. A board of township trustees that is the appointing authority of the board of trustees of a regional water district established under R.C. Chapter 6119 may appoint to a vacancy on the board of trustees of the regional water district a person who is a plaintiff in a civil action filed against the regional water district.
2. A member of a board of trustees of a regional water district who is a plaintiff in a civil action filed against the regional water district shall not participate in any discussions, deliberations, negotiations, or votes concerning the civil action or the proposed water line expansion project that is the subject of the civil action while the civil action is pending and the board member continues to be a plaintiff in the action. The board member also shall not be present during any discussions or meetings with legal counsel for the regional water district or any discussions or meetings in which privileged matters relating to the civil action are addressed.
3. A member of a board of trustees of a regional water district who is a plaintiff in a civil action filed against the regional water district who fails to abstain from any discussions, deliberations, negotiations, or votes concerning the civil action or the proposed water line expansion project that is the subject of the civil action or refuses to remove himself from discussions or meetings with legal counsel for the regional water district or any discussions or meetings in which privileged matters relating to the civil action are addressed while that action is pending and while he is a plaintiff in the action may be subject to removal by a board of township trustees for misfeasance, nonfeasance, or malfeasance in office pursuant to R.C. 6119.071.

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