

OPINION NO. 75-032

Syllabus:

The position of a county commissioner is incompatible with that of membership on a county board of mental retardation pursuant to R.C. 5126.01.

To: Roger V. Bacon, Defiance County Pros. Atty., Defiance, Ohio
By: William J. Brown, Attorney General, May 15, 1975

Your request for an opinion reads as follows:

"I request your opinion as to whether or not the position of County Commissioner and a position of board member of the county board of mental retardation are compatible.

"I would appreciate your opinion as to whether or not these two positions are compatible or incompatible."

There are no constitutional or statutory provisions which would prevent one individual from serving simultaneously on a board of county commissioners and on the county board of mental retardation. Resort must be had, therefore, to the common law test of incompatibility. See 1973 Op. Att'y Gen. No. 73-064, 1973 Op. Att'y Gen. No. 73-024 and Op. Att'y Gen. No. 73-016.

The common law test applied in determining incompatibility is set forth in State, ex rel. Attorney General v. Gebert, 12 Ohio C.C.R. (n.s.) 274, 275 (1909) as follows:

"Offices are considered incompatible when one is subordinate to or in any way a check upon the other; or when it is physically impossible for one person to discharge the duties of both."

Another formulation of the common law rule appears in State, ex rel. Wolf v. Shaffer, 6 Ohio N.P. (n.s.) 219, 221 (1906), as follows:

"It was early settled at common law that it was not unlawful per se for a man to hold two offices; if the offices were incompatible with each other, that is, if the attempt to fill one disqualified the officer from performing the duties of the other, so that, for instance, in one position the officer was superior in functions to himself filling the other, * * * then he could hold but one, but if the duties of one were not in conflict with the duties of the other, then both could be held."

See also State, ex rel. Hover v. Wolven, 175 Ohio St. 114 (1963).

Furthermore, some authorities suggest that another test of incompatibility is whether the incumbent of one office has the power of appointment to the other office, or the power to remove its incumbent. See Ehlinger v. Clark, 117 Tex. 537 (1928); Attorney General ex rel. Moreland v. Detroit Common Council, 112 Mich. 145 (1897).

In light of the foregoing principles, I now consider those statutes which are relevant to the offices of a county commission and of a county board of mental retardation, in order to discover whether such a conflict occurs between those offices as to render them incompatible.

It is unnecessary to set forth the many Sections of the Revised Code dealing with the office and powers of county commissioners, because it is my opinion that R.C. 5126.01, which provides for the creation of the county board of mental retardation, clearly indicates that a conflict between these two offices exists. R.C. 5126.01 provides in pertinent part:

"There is hereby created in each county a county board of mental retardation consisting of seven members, five of whom shall be appointed by the board of county commissioners of the county, and the other two shall be the probate judge of the county or his delegate and one other person appointed by him."

(Emphasis added.)

In addition, R.C. 5126.03 provides that the county commissioners shall levy taxes and make appropriations to the county board of mental retardation. R.C. 5126.03 reads, in part, as follows:

"The board of county commissioners shall levy taxes and make appropriations sufficient to enable the county board of mental retardation to perform its functions and duties as provided by this section."

The plain terms of the above quoted provisions of R.C. 5126.01 and R.C. 5126.03 compel the conclusion that the county board of mental retardation is indeed subordinate to the board of county commissioners.

In this respect, a conflict was noted in Bd. of Mental Retardation v. Bd. of Commrs., 41 Ohio St. 2d 103 (1975), in which the board of mental retardation filed a mandamus action against the board of county commissioners, the budget commission, and each of the individual members of these boards. The board of mental retardation asked the Court to order the commissioners to assess and levy on the tax duplicate an increase over the ten-mill limitation which was approved by the electors to provide sufficient funds for the proper operation of the mental retardation program. The Supreme Court held that the board of mental retardation had the power to bring an action in mandamus to compel the board of county commissioners to perform its statutory duty pursuant to R.C. 5705.341. *Id.* at 106. Conceivably, a similar situation could arise in your county, and a person serving on both boards would obviously have a conflict of interest.

In Op. No. 73-024, *supra*, I had occasion to consider whether the possibility of a conflict between two positions is too remote and speculative to be given any weight. In Op. No. 73-024, *supra*, I stated with regard to the conflict between the board of governors of a joint township hospital and the board of county commissioners that:

"Although some might argue that such a conflict is *de minimis* and requires a broader inquiry into legislative intent, I cannot depart from the meaning of a statute plain on its face. Nor can I rule here, as I have done previously (Opinion No. 71-081, Opinions of the Attorney General for 1971, and Opinion No. 72-066, Opinions of the Attorney General for 1972), that the possibility of a conflict between the two positions is too remote and speculative to be given any weight. In those two Opinions, I considered the 'indirect influence' of one position over another via the power of appointment. In the present circumstance, the influence of one position over the other is more appropriately denominated as 'direct', since the legislature has expressly declared that the board of governors of a joint township hospital may employ counsel and instigate legal action for the collection of delinquent accounts only 'with the approval of the county commissioners.'"

I do not consider the positions in your case to be too remote for the possibility of a conflict.

In any event, I conclude that the General Assembly intended for the board of county commissioners to serve as a check upon the county board of mental retardation when it provided that the county commissioners had the power of appointment and the power to make appropriations to the county board of mental retardation.

In specific answer to your question, it is my opinion and you are so advised, that the position of county commissioner is incompatible with that of membership on a county board of mental retardation pursuant to R.C. 5126.01.