

**OPINION NO. 99-036****Syllabus:**

The positions of member of the board of health of a general health district and member of the legislative authority of a statutory village are incompatible.

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**To: Brent A. Saunders, Gallia County Prosecuting Attorney, Gallipolis, Ohio**

**By: Betty D. Montgomery, Attorney General, June 15, 1999**

You have requested an opinion concerning the compatibility of two public positions. Specifically, you wish to know whether the positions of member of the board of health of a general health district and member of the legislative authority of a statutory village are compatible.

1979 Op. Att'y Gen. No. 79-111 sets forth seven criteria for determining whether two public positions are incompatible. Two public positions are incompatible, if, *inter alia*, the empowering statutes of either position limit a person from being employed in another position or holding another public office.

Limitations on the secondary employment and officeholding of members of the legislative authority of a statutory village are delineated in R.C. 731.12. This statute provides, in part:

*No member of the legislative authority shall hold any other public office, be interested in any contract with the village, or hold employment with said village, except that such member may be a notary public, a member of the state militia, or a volunteer fireman of said village, provided that such member shall not receive any compensation for his services as a volunteer fireman of the village in addition to his regular compensation as a member of the legislative authority. (Emphasis added.)*

Accordingly, pursuant to R.C. 731.12, no member of the legislative authority of a statutory village may hold another public office.<sup>1</sup> Resolution of your question, therefore, turns on whether the position of member of the board of health of a general health district is a public office for purposes of R.C. 731.12.

The Ohio Supreme Court has set forth the following criteria for determining whether a position is a public office rather than an employment:

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<sup>1</sup> Pursuant to Ohio Const. art. XVIII, § 3, which grants municipalities the powers of local self-government, a village may alter the qualifications for members of its legislative authority. As indicated in *State ex rel. Ziegler v. Hamilton County Bd. of Elections*, 67 Ohio St. 3d 588, 621 N.E.2d 1199 (1993), since R.C. 731.12's qualifications for members of a village legislative authority are procedural in nature, a village that wishes to alter those qualifications may do so by the adoption of a charter provision pursuant to Ohio Const. art. XVIII, § 7. Because you have indicated that the village in question has not adopted a charter provision pursuant to Ohio Const. art. XVIII, § 7, that alters the qualifications for members of its legislative authority, the qualifications that appear in R.C. 731.12 are applicable.

The usual criteria in determining whether a position is a public office are durability of tenure, oath, bond, emoluments, the independency of the functions exercised by the appointee, and the character of the duties imposed upon him.... The chief and most-decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law. If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office and not an employment.

*State ex rel. Landis v. Board of Comm'rs*, 95 Ohio St. 157, 159, 115 N.E. 919, 919 (1917); accord *State ex rel. Milburn v. Pethtel*, 153 Ohio St. 1, 90 N.E.2d 686 (1950) (citing *State ex rel. Landis v. Board of Comm'rs* with approval).

1979 Op. Att'y Gen. No. 79-102, which addressed in-term increases in the compensation of members of a board of health of a general health district for purposes of Ohio Const. art. II, § 20,<sup>2</sup> applied these criteria to the position of member of the board of health of a general health district, and concluded that the position was a public office. In this regard, the opinion states at 2-314:

As is evident from R.C. 3709.02, set forth above,<sup>3</sup> the members are appointed for a specified term. R.C. 3709.22 sets forth the powers and duties of the board of health. In examining these powers, it is clear that the state has vested the board with an independent governmental function. As was stated in *State ex rel. Pansing v. Lightner*, 32 N.P. (n.s.) 376, 382-83 (Montgomery County C.P. 1934):

The court is of the opinion that the authority of the District Board of Health is anchored in the fundamental proposition that the protection of health is the exercise of a governmental power, as distinguished from a proprietary act.

The board also possesses the power to act with "speed and independence" so that it may expediently cope with contagious and infectious disease. *McGowen v. Shaffer*, 65 Ohio L. Abs. 138, 147 (Summit County C.P. 1953). Due to the fact that board members are appointed, that duties are delegated to them by statute, and that the duties so delegated are governmental in nature, I conclude that the members of a board of health of a general health district are public officers. (Footnote added.)

We approved and followed 1979 Op. Att'y Gen. No. 79-102's conclusion that members of a board of health of a general health district are public officers in 1997 Op. Att'y Gen. No. 97-005, which addressed the eligibility of members of a board of health of a general health district to be paid in accordance with certain amendments to R.C. 3709.02. 1997 Op. Att'y Gen. No. 97-005 at 2-24 and 2-25 states:

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<sup>2</sup> Ohio Const. art. II, § 20 provides as follows: "The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

<sup>3</sup> R.C. 3709.02 provides for the appointment and compensation of members of a board of health of a general health district.

Op. No. 79-102 accurately assessed the nature of the duties, powers, and responsibilities conferred upon the members of a board of health by the statutory provisions that appear in R.C. Chapter 3709, and appropriately drew therefrom the inference that such board members, in the course of fulfilling their statutory responsibilities, exercise continuing and independent governmental functions. It is apparent, in other words, that the powers thus conferred upon the members of a board of health of a general health district "constitute a part of the sovereignty of the state." It follows, therefore, that a member of a board of health of a general health district is a public officer for purposes of Ohio Const. art. II, § 20. (Citations omitted.)

A member of a board of health of a general health district is appointed to that position and serves a fixed term. R.C. 3709.02(A).<sup>4</sup> The powers and duties of such a board member are prescribed by statute and pertain to the protection of the public health. *See generally* R.C. 3707.04 (in time of epidemic or threatened epidemic, or when a dangerous communicable disease is unusually prevalent, the board of health of a general health district may make and enforce such rules and regulations as are wise and necessary for the protection of the health of the people of the community or state); R.C. 3709.21 (a "board of health of a general health district may make such orders and regulations as are necessary ... for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances"); R.C. 3709.22 (a "board of health of a city or general health district shall study and record the prevalence of disease within its district and provide for the prompt diagnosis and control of communicable diseases"). In the course of discharging his duties, a member of a board of health of a general health district acts autonomously and independently and is not subject to the direct control and supervision of any other office or entity of government.

Because the position of member of the board of health of a general health district is conferred by statute with duties that require the exercise of continuing and independent governmental functions, a part of the sovereignty of the state, the position is a public office. *Accord* 1997 Op. Att'y Gen. No. 97-005; 1979 Op. Att'y Gen. No. 79-102. *See generally State ex rel. Landis v. Board of Comm'rs*, 95 Ohio St. at 160-61, 115 N.E. at 920 ("[i]f specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers<sup>5</sup> of the state, ... then such functions are a part of the sovereignty of the state" (footnote added)). Therefore, pursuant to R.C. 731.12, a member of the legislative authority of a village is prohibited from holding the position of member of the board of health of a general health district. This means that these two positions are incompatible.

In conclusion, it is my opinion, and you are hereby advised that the positions of member of the board of health of a general health district and member of the legislative authority of a statutory village are incompatible.

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<sup>4</sup> Pursuant to R.C. 3709.02(A), the term of office of members of a board of health of a general health district "shall be five years from the date of appointment, except that of those first appointed one shall serve for five years, one for four years, one for three years, one for two years, and one for one year, and thereafter one shall be appointed each year."

<sup>5</sup> *Black's Law Dictionary* 1156 (6th ed. 1990) defines "police power" as "[t]he power of the State to place restraints on the personal freedom and property rights of persons for the protection of the public safety, health, and morals or the promotion of the public convenience and general prosperity."