

February 9, 2016

The Honorable Dennis Watkins
Trumbull County Prosecuting Attorney
106 High Street N.W.
Warren, Ohio 44481-1092

SYLLABUS:

2016-004

1. The positions of safety and compliance manager for a county engineer and member of a county board of elections are incompatible when the county engineer by whom the safety and compliance manager is employed is a candidate for election to a public office. (2004 Op. Att'y Gen. No. 2004-019, followed.)
2. A county engineer is not required by law to take action when a person serves simultaneously in the positions of safety and compliance manager for a county engineer and member of a county board of elections and the county engineer by whom the safety and compliance manager is employed is a candidate for election to a public office.



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OPINION NO. 2016-004

The Honorable Dennis Watkins
Trumbull County Prosecuting Attorney
106 High Street N.W.
Warren, Ohio 44481-1092

Dear Prosecutor Watkins:

We have received your request whether the positions of safety and compliance manager for a county engineer and member of a county board of elections are compatible when the county engineer by whom the safety and compliance manager is employed is a candidate for public office. You ask whether the compatibility analysis changes if the county engineer runs unopposed in the primary or general elections. If the positions of safety and compliance manager for a county engineer and member of a county board of elections are incompatible, you ask whether any principles of common law or provisions in the Revised Code require a county engineer to take action to address the incompatibility.¹

Whether the positions of safety and compliance manager for a county engineer and member of a county board of elections are compatible depends upon the outcome of a seven-part test. *See* 2014 Op. Att’y Gen. No. 2014-045, at 2-391 (“[a] seven-question compatibility test is used to determine whether a person may serve simultaneously in multiple public positions”);

¹ In your letter, you ask whether anything is required of an “appointing authority” when a county employee also serves as a member of a board of elections and it is determined that those public positions are incompatible. The county engineer is the appointing authority of the safety and compliance manager. *See* R.C. 325.17 (authorizing a county engineer to employ necessary employees). The Secretary of State is the appointing authority of a member of a county board of elections. *See* R.C. 3501.06 (providing for the appointment of members of a board of elections by the Secretary of State); R.C. 3501.07 (requiring the Secretary of State to appoint members of a board of elections when recommended by the political party entitled to the appointment “unless the secretary of state has reason to believe that the elector would not be a competent member”). You have informed us that you wish to know whether principles of common law or provisions in the Revised Code require a county engineer to take action when an employee of the county engineer also holds another position of public service that is incompatible with the person’s employment by the county engineer. Therefore, we shall not address the responsibilities of the Secretary of State in this opinion. *See* R.C. 109.14 (“the attorney general shall advise the prosecuting attorneys ... respecting their duties”).

2004 Op. Att’y Gen. No. 2004-019, at 2-153 to 2-154 (setting forth the seven-part compatibility test); 1979 Op. Att’y Gen. No. 79-111, at 2-367 to 2-368 (the seven-part compatibility test applies to the simultaneous holding of a public office and a public employment by the same person); *see also* 2013 Op. Att’y Gen. No. 2013-008, at 2-79 (concluding that a member of a county board of elections is a public office); Ohio Ethics Comm’n, Advisory Op. No. 76-006, 1976 WL 192177, at *2 (employees of a county engineer’s office are public employees). Pursuant to this test, a person may not hold two public positions simultaneously if there is a conflict of interest between the two positions. 2012 Op. Att’y Gen. No. 2012-040, at 2-351. 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] to influences which may prevent [the person’s] decisions from being completely objective.”” 2006 Op. Att’y Gen. No. 2006-041, at 2-397 (quoting 1980 Op. Att’y Gen. No. 80-035, at 2-149); *see also* 1993 Op. Att’y Gen. No. 93-016, at 2-89; 1979 Op. Att’y Gen. No. 79-111, at 2-371. As explained in 1979 Op. Att’y Gen. No. 79-111:

[O]ne in the public service “owes an undivided duty to the public. It is contrary to public policy for a public officer to be in a position which would subject him to conflicting duties or 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).

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”). Whether a conflict of interest is remote and speculative requires the consideration of several factors including “the probability of the conflict, the ability of the person to remove himself from the conflict (should it arise), whether the person exercises decision-making authority in both positions, and whether the conflict relates to the primary functions of each position, or to financial or budgetary matters.” 2004 Op. Att’y Gen. No. 2004-019, at 2-158 to 2-159.

Whether a person employed as a safety and compliance manager by a county engineer and who serves as a member of a board of elections is thereby subject to a conflict of interest requires an examination of the duties and responsibilities of each position. *See id.* at 2-158 (“[i]n order to determine whether a person who holds two public positions simultaneously is subject to a conflict of interest, we must review the powers, duties, and responsibilities conferred upon the person in each position”). You provided us a list of duties the county engineer has delegated to the safety and compliance manager. These powers and duties include developing and managing safety policies; inspecting facilities, equipment, and worksites for compliance with safety standards; making recommendations and providing technical assistance to a Safety Committee; preparing reports as required by various statutes and codes; serving as a safety consultant on construction projects; investigating workplace accidents or injuries; ensuring that the office of

the county engineer is in compliance with various laws and regulations; representing the county engineer in discussions and meetings with regulatory agencies, community groups, or other official bodies; contributing to safety publications disseminated by the county engineer; and providing safety counseling and training to staff.

The types of construction projects or worksites that a safety and compliance manager may be required to monitor and inspect include, among others, emergency repairs on roads, bridges, and culverts, R.C. 315.13; the construction or improvement of roads, highways, bridges, and culverts, R.C. 5543.09, 5575.07; the construction of sidewalks, R.C. 5543.10; the inspection of drainage channels and bridges, R.C. 5543.20, R.C. 6137.14; the removal or alteration of culverts, bridges, fences, or floodgates, R.C. 6131.47; and the repair and maintenance of county and joint county ditches, drains, and watercourses, R.C. 6137.06. *See generally* 1989 Op. Att’y Gen. No. 89-105, at 2-514 (summarizing the duties of a county engineer). Nothing in the listed duties of a safety and compliance manager for a county engineer appears in any way to involve the duties and responsibilities undertaken by a member of a board of elections.

A member of a board of elections has many duties and is empowered with a wide range of authority with respect to the conduct of elections. *See generally* 1986 Op. Att’y Gen. No. 86-077, at 2-429. R.C. 3501.11 enumerates the bulk of the powers and duties conferred upon a board of elections. These powers include establishing election precincts, R.C. 3501.11(A), R.C. 3501.18; providing places to hold primary and general elections, R.C. 3501.11(B), R.C. 3501.29; appointing and removing employees and other election officials, R.C. 3501.11(D), R.C. 3501.22; issuing rules or directives “necessary for the guidance of election officers and voters,” R.C. 3501.11(E); investigating violations of R.C. Title 35 and the nonperformance of duties by election officers and others, R.C. 3501.11(J), R.C. 3505.32(C); examining nominating petitions and papers to determine the validity of the petitions and sufficiency of the signatures thereon, R.C. 3501.11(K), R.C. 3501.39, R.C. 3513.262; canvassing the returns of elections, R.C. 3501.11(L), R.C. 3505.32, R.C. 3513.22; issuing certificates of election, R.C. 3501.11(M); declaring the results of elections, R.C. 3505.33; examining declarations of candidacy and petitions to determine the validity of the petitions and signatures thereon, R.C. 3501.39, R.C. 3513.05; and hearing protests against declarations of candidacy and nomination petitions, R.C. 3501.39, R.C. 3513.05, R.C. 3513.262.

On paper, the duties and powers of a safety and compliance manager for a county engineer and the duties and powers of a member of a board of elections may not appear to conflict. None of the duties of either position overlap. However, the county engineer by whom the safety and compliance manager is employed is seeking reelection. This circumstance presents a conflict of interest that renders the position of safety and compliance manager for a county engineer and the office of member of a county board of elections incompatible. In 2004 Op. Att’y Gen. No. 2004-019, we determined, upon a similar set of facts, that “[t]he positions of member of a board of elections and chief deputy treasurer or administrative assistant for the county treasurer are incompatible when the treasurer is a candidate for an office to be filled at an election.” 2004 Op. Att’y Gen. No. 2004-019 (syllabus, paragraph 2). We observed that the responsibilities of a board of elections relate to the conduct of an election in which a county

treasurer is a candidate, and the exercise of those responsibilities requires a member of a board of elections to make decisions that may affect the outcome of such an election. *Id.* at 2-162 to 2-163. We stated that “[i]n such situations, the board member’s loyalty to the county treasurer may prevent him from making completely objective decisions.” *Id.* at 2-163. We determined that it was not possible for this conflict of interest to be avoided and therefore concluded that the positions were incompatible. *See id.* at 2-163 to 2-165.

The principles set forth in 2004 Op. Att’y Gen. No. 2004-019 apply with equal force here. A board of elections is authorized, and in some cases required, to examine and certify the validity of a county engineer’s declaration of candidacy and petition and to hear any protests filed against the declaration or petition. R.C. 3501.39; R.C. 3513.05; R.C. 3513.262; *see also* 2004 Op. Att’y Gen. No. 2004-019, at 2-162 to 2-163. A board of elections canvasses the returns of elections at which a county engineer is elected, declares the results of such elections, and issues certificates of election. R.C. 3501.11(L)-(M); R.C. 3505.32-.33; R.C. 3513.22; *see also* 2004 Op. Att’y Gen. No. 2004-019, at 2-163. Additionally, when any candidate in the election fails to file a statement as required by R.C. Chapter 3517, a board of elections is required to file a complaint with the Ohio Elections Commission or report the violation to the prosecuting attorney. *See* R.C. 3517.11(C)(1); *see also* 2004 Op. Att’y Gen. No. 2004-019, at 2-163.

A board of elections possesses a host of responsibilities that require its members to make decisions and take actions that directly affect a county engineer’s candidacy and election. As explained in 2004 Op. Att’y Gen. No. 2004-019, at 2-163, the conflicts that may arise when a person serves simultaneously in the positions of member of a board of elections and employee of a public official and the public official is a candidate for election to a public office cannot be sufficiently avoided or mitigated:

The role of the board of elections in conducting an election in which a public officer who employs a member of the board is a candidate for election to an office presents numerous conflicts which may be avoided only by the member’s abstention from all discussions, deliberations, and votes on matters that directly or indirectly affect such an election. Because many of the matters handled by a board of elections may affect an election in which a public officer is a candidate, it is conceivable that a member of the board of elections who is employed by the public officer will be abstaining often from matters under consideration by the board. Continual abstention by a board of elections’ member from matters relating to the administration of elections will not serve the best interests of the electorate.

Given that a member of a board of elections would have to abstain from the primary functions of her position to avoid any potential conflicts, we do not believe it is possible for a person to effectively fulfill the duties required of a member of a board of elections when that person is employed by a county official that is a candidate for election to a public office. Accordingly, we conclude that the positions of safety and compliance manager for a county

engineer and member of a county board of elections are incompatible when the county engineer by whom the safety and compliance manager is employed is a candidate for election to a public office.

Whether the Positions are Incompatible When the County Engineer Seeks Election as an Unopposed Candidate

Your second question asks whether our answer to your first question changes if the county engineer runs unopposed in the primary or general election. The responsibility of a board of elections to examine and certify the validity of a county engineer's declaration of candidacy and petition and to hear any protests filed against the declaration or petition exists notwithstanding whether the county engineer runs unopposed in the election. *See* R.C. 3501.39 (board of elections is not required to accept declarations of candidacy, nominating petitions, or other petitions if, among other circumstances, there is a protest against the petition or candidacy and the board determines the petition is invalid or that it violates any requirements established by law); R.C. 3513.05 (“[e]ach person desiring to become a candidate for a party nomination at a primary election or for election to an office or position to be voted for at a primary election,” subject to certain exceptions, “shall ... file a declaration of candidacy and petition”); R.C. 3513.262 (requiring a board of elections to “examine and determine the sufficiency of the signatures on” nominating petitions, determine the validity of the nominating petitions, and hear protests against nominating petitions). Moreover, the requirements that a candidate file statements pursuant to R.C. Chapter 3517 are imposed upon candidates notwithstanding whether the candidate faces opposition in the primary or general election. *See generally* R.C. 3517.081-.17 (requiring candidates to file statements of contributions and expenditures, among other things). Accordingly, the requirement that a board of elections file a complaint with the Ohio Elections Commission or report violations to the prosecuting attorney when a candidate fails to file a statement as required by R.C. Chapter 3517 exists whether or not there is more than one candidate seeking election to an office. *See generally* R.C. 3517.11(C)(1) (requiring a board of elections to file a complaint with the Ohio Elections Commission or report the violation to the prosecuting attorney in accordance with R.C. 3501.11(J)).

The responsibilities of a board of elections that require its members to make decisions and take actions that affect a county engineer's candidacy and election exist notwithstanding whether the county engineer runs unopposed in the primary or general election. Accordingly, that a county engineer is a candidate for election to an office for which there is no opposition does not affect our conclusion that the positions of safety and compliance manager for a county engineer and member of a county board of elections are incompatible when the county engineer by whom the safety and compliance manager is employed is a candidate for election to a public office.

Duties of the County Engineer

Your third question asks whether principles of common law or any provisions in the Revised Code require a county engineer to take action in light of a determination that the

positions of safety and compliance manager for a county engineer and member of a county board of elections are incompatible and the same person serves simultaneously in those positions.

R.C. 325.17 authorizes a county engineer to employ and discharge necessary employees. The civil service of a county is “divided into the unclassified service and the classified service.” R.C. 124.11. R.C. 124.11(A)(9) provides that “those persons employed by and directly responsible to elected county officials ... and holding a fiduciary or administrative relationship to such elected county officials” are in the unclassified service of the county. *See also* R.C. 315.01 (county engineer is an elected county official). *Cf.* 1993 Op. Att’y Gen. No. 93-016, at 2-85 (recognizing that R.C. 124.11(A)(9) is applicable to the position of administrative assistant to the county engineer). A fiduciary relationship exists when an employee’s position “connotes special confidence and trust” and is a superior position within the office. 2015 Op. Att’y Gen. No. 2015-032, slip op. at 2 (quoting *Davis v. Jones*, No. 93 CA 06, 1993 WL 405486, at *5 (Hocking County Sept. 28, 1993)); *see also* 2B Ohio Admin. Code 124-1-02(I) (“[f]iduciary relationship’ generally means a relationship where the appointing authority reposes a special confidence and trust in the integrity and fidelity of an employee to perform duties which could not be delegated to the average employee with knowledge of the proper procedures. These qualifications are over and above the technical competency requirements to perform the duties of the position”). An administrative relationship exists when “an employee has substantial authority to initiate discretionary action and/or in which the appointing authority must rely on the employee’s personal judgment and leadership abilities.” 2B Ohio Admin. Code 124-1-02(C).

The materials included with your opinion request describe the position of safety and compliance manager for a county engineer as an unclassified management position under the county engineer’s “general direction.”² Whether a safety and compliance manager for a county

² That an employee’s job title identifies the position as unclassified does not conclusively establish that the position is in the unclassified service. *See In re Termination of Emp’t of Pratt*, 40 Ohio St. 2d 107, 115, 321 N.E.2d 603 (1974) (determining whether a fiduciary relationship exists “is one of fact, not of title”); *Henslee v. State Pers. Bd. of Review*, 15 Ohio App. 2d 84, 239 N.E.2d 121 (Franklin County 1968) (syllabus, paragraph 1) (“[t]he mere fact that a state employee is carried on the payroll as in the unclassified service does not establish that classification”); 1969 Op. Att’y Gen. No. 69-150, at 2-325. Determining the classification of a given position depends upon an analysis of the position’s job duties, not the position’s title or designation. *See In re Termination of Emp’t of Pratt*, 40 Ohio St. 2d at 115 (determining whether a fiduciary relationship exists “can only be answered by examination of the duties assigned to and performed by the [employee]”); *Freeman v. Ohio Dep’t of Human Servs.*, No. 95APE03-359, 1995 WL 739882, at *5 (Franklin County App. Dec. 14, 1995) (“[a]lthough both parties ... extensively discuss [the employee’s] ... position number, his title, and his department designations, those factors play no role in an analysis of [the employee’s] job duties”). It is the responsibility of the State Personnel Board of Review to analyze a position’s duties and determine whether those duties qualify the position for the unclassified service within the terms of R.C. 124.11(A)(9). *See* 2B Ohio Admin. Code 124-1-01(B) (“[u]nless exempted from the

engineer holds a fiduciary or administrative relationship to the county engineer within the meaning of R.C. 124.11(A)(9) is a question of fact to be determined by the State Personnel Board of Review. *See* note 2, *supra*. A determination in this regard is not appropriate for a formal opinion of the Attorney General. *See* 2009 Op. Att’y Gen. No. 2009-037, at 2-280 (“[w]hether circumstances exist that affect the civil service status of a particular public employee is a question of fact that cannot be made by means of a formal opinion of the Attorney General”). For the purpose of this opinion, however, we will presume that the safety and compliance manager is an unclassified service position within the meaning of R.C. 124.11(A)(9).

A county engineer may remove an employee in the unclassified service of the county without cause, so long as the removal “is not otherwise unlawful.” *Curren v. City of Greenfield*, Highland App. No. 11CA30, 2012-Ohio-4688, 978 N.E.2d 632, at ¶21 (quoting *Slyman v. Shipman, Dixon & Livingston, Co., L.P.A.*, Miami App. No. 2008-CA-35, 2009-Ohio-4126, at ¶10); 1991 Op. Att’y Gen. No. 91-011, at 2-58 (“it is well established in Ohio that individuals in the unclassified service hold their positions at the pleasure of their appointing authority, and are subject to dismissal from their positions without cause”). No provision in the Revised Code requires a county engineer to discharge an employee or pursue other disciplinary action when the employee holds a public position that is incompatible with the person’s employment by the county engineer.³

A person who serves simultaneously in two incompatible public positions may be subject to a civil action in quo warranto in accordance with the provisions of R.C. Chapter 2733. *See, e.g.*, R.C. 2733.01 (enumerating the circumstances under which a quo warranto action may be instituted in the name of the state); R.C. 2733.05 (authorizing a prosecuting attorney to bring a

classified service by statute, all positions in the service of ... the counties ... are in the classified service. The [State Personnel Board of Review] has jurisdiction to determine whether any position, not specifically exempted, falls within the general exemptions set forth in [R.C. 124.11(A)]”); 2B Ohio Admin. Code 124-1-02(C) (“[w]hether one position occupies an administrative relationship to another is a question of fact to be determined by the [State Personnel Board of Review]”); 2B Ohio Admin. Code 124-1-02(I) (“[w]hether one position occupies a fiduciary relationship to another is a question of fact to be determined by the [State Personnel Board of Review]”); 2009 Op. Att’y Gen. No. 2009-037, at 2-281 (“[w]hether a particular position is fiduciary or administrative for purposes of R.C. 124.11(A)(9) is a question of fact”).

³ We are informed that the county engineer has not promulgated a policy that addresses what should happen if an employee holds another private or public position that is incompatible with his position with the county engineer. The Trumbull County Policies and Procedures Manual issued by the Trumbull County Board of Commissioners prohibits a county employee from having outside employment that conflicts with the employee’s county position. This policy does not state what shall be done when an employee holds another public position that is deemed incompatible with his county employment.

quo warranto action “upon his own relation, or, on leave of the court, or of a judge thereof in vacation, he may bring the action upon the relation of another person”); *see also State ex rel. Scioto Cnty. Prosecutor v. Murphy*, Scioto App. No. 02CA2831, 2003-Ohio-4550 (syllabus) (county prosecutor instituted quo warranto action against an individual holding two public positions; the court held that a conflict of interest existed and ordered the individual to resign from one of the positions); 1985 Op. Att’y Gen. No. 85-006, at 2-22 (“[a]n action in quo warranto may lie where an individual holds two public positions which are alleged to be incompatible”). Under R.C. 2733.05, a county engineer may request that the county prosecuting attorney bring an action in quo warranto. *Cf.* 1985 Op. Att’y Gen. No. 85-006, at 2-23 (finding that a local school board may request that the prosecuting attorney institute a quo warranto action against one of its members, but noting that the prosecuting attorney may bring the action “only with leave of court”). R.C. 2733.05 does not make the request mandatory.

Accordingly, we conclude that a county engineer is not required by law to take action when a person serves simultaneously in the positions of safety and compliance manager for a county engineer and member of a county board of elections when the county engineer is a candidate for election to a public office.

Conclusions

In sum, it is our opinion, and you are hereby advised that:

1. The positions of safety and compliance manager for a county engineer and member of a county board of elections are incompatible when the county engineer by whom the safety and compliance manager is employed is a candidate for election to a public office. (2004 Op. Att’y Gen. No. 2004-019, followed.)
2. A county engineer is not required by law to take action when a person serves simultaneously in the positions of safety and compliance manager for a county engineer and member of a county board of elections and the county engineer by whom the safety and compliance manager is employed is a candidate for election to a public office.

Very respectfully yours,



MICHAEL DEWINE
Ohio Attorney General