OPINION NO. 73-024

Syllabus:

The position of a member of a board of governors of a joint township hospital is incompatible with that of a county commissioner.

To: Forrest H. Bacon, Wyandot County Pros. Atty., Upper Sandusky, Ohio
By: William J. Brown, Attorney General, March 20, 2973

I have before me your request for my opinion, which reads as follows:

> This area is served by a Hospital formed under Chapter 513 of the Revised Code of Ohio and is known as a Joint Township Hospital. The question posed is, Is the Office of County Commissioner of Wyandot County, Ohio, compatible with the Office of the Board of Governors of such Hospital?

In determining whether or not two positions are incompatible, initial reference is made to those constitutuonal and statutory provisions (such as Article II, Section 4; Article III, Section 14, and Article IV, Section 14 of the Ohio Constitution, and R.C. 3.11, 143.41, 309.02, 311.04, 315.02, 319.07, 705.02, 731.12, 2919.08, 2919.09, 2919.10, and 3501.02) which might be controlling of the issue. I have reviewed the above provisions with respect to the present inquiry and find none of them to be dispositive.

In the absence of controlling constitutional or statutory provisions, reference must be made to the common law rule of

incompatibility. As Judge Killits stated in State, ex rel. Wolf v. Shaffer, 6 Ohio N.P. (n.s.) 219, 221 (1906):

> * * * [W]e have several sections dealing with specific offices prohibiting the holders thereof from holding any other offices of trust or profit in the state. But as to all offices not within these special prohibitions, the rules of the common law unquestionably obtain, and, in this particular the issue here is governed wholly by the common law.

This office has frequently discussed the common law rule of incompatibility. A lengthy discussion of the rule and the circumstances in which it is to be applied appears in Opinion No. 65-150, Opinions of the Attorney General for 1965. In Syllabus No. 1 of that Opinion, my predecessor stated:

> The Ohio common law test of incompatibility of officers, as stated in State ex rel. Attorney General v. Gebert, 12 C.C. (N.S.) 274, may be applied to preclude the same person from holding two positions in public service only when at least one of such positions qualifies under the common law as a public office. (Emphasis added.)

In accordance with the above emphasized language, I must proceed to a determination of whether or not either of the two positions here under consideration, that of the office of county commissioner and that of the office of board of governors of a joint township hospital, constitutes a public office under the common law.

The test of a public office was propounded in State, ex rel. Landis v. County Commissioners, 95 Ohio St. 157, 159 (1917), as follows:

> 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.

After referring to R.C. 305.12 et seq., and 513.17, respectively, I find that the positions of county commissioner and board of governors of a joint township hospital are both public offices under the above test. As to the functions of a board of governors, see Opinion No. 72-117, Opinions of the Attorney General for 1972. Consequently, I conclude that the present inquiry qualifies for scrutiny under the common law rule of incompatibility.

State ex rel. Attorney General v. Gebert, 12 Ohio C.C.R. (n.s.) 274, 275 (1909), is often cited for the following common law rule:

> 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, supra, which stated the following, at page 221:

> 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).

In light of the foregoing principles, I now consider those statutes relevant to the offices of county commissioner and board of governors of a joint township hospital, 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, since it is my opinion that R.C. 513.17, which specifies the powers of the board of governors of a joint township hospital, clearly indicates that a conflict between these two offices exists. R.C. 513.17 provides in pertinent part:

> The board of hospital governors with the approval of the county commissioners may employ counsel and instigate legal action in its own name for the collection of delinquent accounts. The board may also employ any other lawful means for the collection of delinquent accounts. Counsel employed under this section shall be paid from the hospital's funds. (Emphasis added.)

The plain meaning of the above quoted provision of R.C. 513.17 compels the conclusion that the board of governors of a joint township hospital is indeed subordinate to the board of county commissioners.

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."

While I cannot speculate as to how often such a conflict of positions is likely to arise, the fact that one of my predecessors, in Opinion No. 1234, Opinions of the Attorney General for 1960, considered the question of who is the proper legal adviser to the board of hospital governors is some evidence of the likelihood of such an occurrence.

In any event, I must presume that the legislature intended for the board of county commissioners to serve as a check upon the office of board of hospital governors when it chose the language "with the approval of."

In specific answer to your question it is my opinion, and you are so advised, that the position of a member of a board of governors of a joint township hospital is incompatible with that of a county commissioner.