

**OPINION NO. 2011-043****Syllabus:**

2011-043

The offices of member of the board of education of a local school district and county recorder are compatible.

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**To: Anneka P. Collins, Highland County Prosecuting Attorney, Hillsboro, Ohio**

**By: Michael DeWine, Ohio Attorney General, November 29, 2011**

You have requested an opinion whether a person may serve simultaneously

as a member of the board of education of a local school district and county recorder within the same county.<sup>1</sup> For the reasons that follow, it is our opinion that the two offices are compatible.

The following analysis is used to determine whether a person may serve simultaneously in two public positions:

1. Is either of the positions a classified employment within the terms of R.C. 124.57?
2. Does a constitutional provision or statute prohibit the holding of both positions at the same time?
3. Is one position subordinate to, or in any way a check upon, the other?
4. Is it physically possible for one person to discharge the duties of both positions?
5. Is there an impermissible conflict of interest between the two positions?
6. Are there local charter provisions, resolutions, or ordinances that are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

2011 Op. Att’y Gen. No. 2011-023, at 2-186; *see also* 2 Ohio Admin. Code 123:1-46-02.

Question one asks whether either of the offices is a classified employment within the terms of R.C. 124.57. With certain exceptions, R.C. 124.57 prohibits persons in the classified service of the state, the several counties, cities, city school districts, and civil service townships from holding partisan political offices and employments. R.C. 124.57 does not expressly mention officers or employees in the service of a local school district; therefore, the statute does not apply to a member of the board of education of a local school district. *See* R.C. 124.01(A); 1989 Op. Att’y Gen. No. 89-069, at 2-315. Further, a member of the board of education of a local school district and a county recorder, as elected officers, hold unclassified civil

<sup>1</sup> Article XVII, § 1 of the Ohio Constitution, which prescribes the time for holding elections for various public offices, provides, in part: “Elections for state and *county officers* shall be held . . . in *even numbered years*; and all elections for *all other elective officers* shall be held . . . in the *odd numbered years*.” (Emphasis added.) Because a county recorder is a county officer, *see* 1959 Op. Att’y Gen. No. 447, p. 218, at 218, a person seeking election to that office would do so in an even-numbered year. A person seeking election to the office of member of the board of education of a local school district would do so in an odd-numbered year. Therefore, a person will not compete for the offices of county recorder and member of the board of education of a local school district at the same general election.

service positions. *See* R.C. 124.11(A)(1); R.C. 317.01; R.C. 3313.01; 1997 Op. Att’y Gen. No. 97-018, at 2-98. Therefore, R.C. 124.57 does not apply to prohibit a member of the board of education of a local school district from simultaneously serving as county recorder.

Question two asks whether a constitutional provision or statute prohibits a person from holding both offices simultaneously. We find no constitutional or statutory provision that bars a member of the board of education of a local school district from serving simultaneously as county recorder.

Next, question three asks whether one position is subordinate to, or in any way a check upon, the other. A member of the board of education of a local school district and a county recorder are both elected officers and are directly responsible to the electorate. *See* R.C. 317.01; R.C. 3313.01. The offices, therefore, operate independently of each other, and neither is required to assign duties to or supervise the other. Therefore, neither office is subordinate to, or in any way a check upon, the other.

The fourth question of the compatibility test asks whether it physically is possible for one person to perform the duties of both positions. This is a factual question that is best addressed by local officials because they may determine more accurately the time constraints and demands imposed upon the offices in question. *See* 2009 Op. Att’y Gen. No. 2009-010, at 2-90.

We caution, however, that a member of the board of education of a local school district and a county recorder, as elected officers, are required to perform duties imposed by statute. When the nature of such duties requires a member of the board of education of a local school district or the county recorder to be present at a particular time or place, or act in a particular manner, he must be able to do so. *See generally* R.C. 3.17 (member of a board forfeits office if he fails to attend at least three-fifths of the regular and special meetings held during any two-year period); 2009 Op. Att’y Gen. No. 2009-010, at 2-90.

Question five asks whether there is an impermissible conflict of interest between the two positions.<sup>2</sup> A person may not hold two public positions concurrently if he would be subject to divided loyalties, conflicting duties, or the temptation to act other than in the public’s best interest. 2009 Op. Att’y Gen. No. 2009-005, at

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<sup>2</sup> The Ohio Ethics Commission, rather than the office of the Attorney General, is required by R.C. 102.08 to address the application of the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43. We will, therefore, refrain from interpreting and applying these provisions by way of a formal opinion. 1987 Op. Att’y Gen. No. 87-033 (syllabus, paragraph 3). Questions concerning the interpretation and application of these provisions in your particular situation should instead be directed to the Ohio Ethics Commission. *See, e.g.*, Ohio Ethics Comm’n, Advisory Op. No. 88-005, slip op. at 3 (R.C. 1724.10, which requires a city official to serve on the governing board of a community improvement corporation designated as an agency by the city, does not exempt the official from the provisions of R.C. Chapter 102).

2-30. In order to determine whether a conflict of interest exists, we must first review the powers, duties, and responsibilities of the respective positions to determine whether the person will be subject to a conflict of interest. If the review discloses such a conflict, we next consider the immediacy of the conflict to determine whether the conflict may be sufficiently avoided or eliminated entirely so as to allow the person to serve simultaneously in both positions. *Id.* The factors weighed in making this determination include 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. *Id.*

We first look at the powers, duties, and responsibilities of a member of the board of education of a local school district, which are set forth primarily in R.C. Chapter 3313. A board of education of a local school district is responsible for governing the public schools in the district and handling the district's fiscal and budgetary matters. *See generally* R.C. Chapter 3313; R.C. Chapter 5705; *Sewell v. Bd. of Educ.*, 29 Ohio St. 89 (1876) (syllabus, paragraph 1); 2006 Op. Att'y Gen. No. 2006-023, at 2-201. The responsibilities of such a board include the establishment of rules for the government of the district, R.C. 3313.20, providing a free education to the youth of the district, R.C. 3313.48, and management and control of the public schools in the district, R.C. 3313.47. A board of education of a local school district also is empowered to enter into contracts and acquire, hold, possess, and dispose of real and personal property on behalf of the district. R.C. 3313.17.

The powers, duties, and responsibilities of a county recorder include keeping records of various instruments presented to the recorder, including county deeds, mortgages, powers of attorney, plats, and leases. R.C. 317.08; *see also* R.C. 317.12-.13. The duties of a county recorder are ministerial in nature. *See, e.g., State ex rel. Preston v. Shaver*, 172 Ohio St. 111, 114, 173 N.E.2d 758 (1961); 1999 Op. Att'y Gen. No. 99-014, at 2-109 (discussing powers and duties of county recorder). In performing his duties, a county recorder must comply with all statutory requirements. 1999 Op. Att'y Gen. No. 99-014, at 2-109. Where a statute prescribes that something be done but does not prescribe the manner in which it is to be accomplished, the recorder "may exercise discretion and carry out the function in any reasonable manner that is consistent with the requirements of law." *Id.*

A person who serves simultaneously as a member of the board of education of a local school district and county recorder may be subject to a conflict of interest when the recorder is required to accept for filing and recording an instrument prepared on behalf of the school district. In such a situation, the county recorder may be tempted to act other than in the public's best interest.

We believe, however, that this potential conflict is insufficient to render the two public offices incompatible. When a county recorder accepts an instrument presented to him, the recorder performs a ministerial duty, or one that involves obedience to instructions or laws instead of discretion, judgment, or skill. *See State ex rel. Preston v. Shaver*, 172 Ohio St. at 114; 1999 Op. Att'y Gen. No. 99-014, at 2-109. It is, therefore, reasonable to presume, in the absence of evidence to the con-

trary, that when the county recorder is required to record an instrument prepared on behalf of the board of education of a local school district within the county, the county recorder will discharge his ministerial duties in a regular and lawful manner. *See State ex rel. Speeth v. Carney*, 163 Ohio St. 159, 126 N.E.2d 449 (1955) (syllabus, paragraph 10) (“[i]n the absence of evidence to the contrary, public officials, administrative officers, and public authorities, within the limits of the jurisdiction conferred upon them by law, will be presumed to have properly performed their duties in a regular and lawful manner and not to have acted illegally or unlawfully”); 2004 Op. Att’y Gen. No. 2004-025, at 2-230 (potential conflict between village clerk-treasurer and member of the board of education of an exempted village school district not sufficient to render positions incompatible because clerk-treasurer’s duties are ministerial). Accordingly, we conclude that the potential conflict of interest identified herein does not prohibit a person from serving simultaneously as member of the board of education of a local school district and county recorder.

Finally, questions six and seven concern the applicability of charter provisions, resolutions, or ordinances, and federal, state, and local regulations. We find no federal or state regulation or charter provision prohibiting a person from serving simultaneously as a member of the board of education of a local school district and county recorder.<sup>3</sup> In addition, whether an applicable local resolution, ordinance, or departmental regulation prohibits a person from holding these two offices at the same time is a question for local officials to answer. For purposes of this opinion, it is assumed that no local resolution, ordinance, or departmental regulations bars a person from serving simultaneously in these offices.

In light of the foregoing, we find that all seven questions of the compatibility test yield an answer in favor of compatibility. Therefore, it is my opinion, and you are hereby advised that the offices of member of the board of education of a local school district and county recorder are compatible.

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<sup>3</sup> Highland County has not adopted a charter in accordance with Article X, § 3 of the Ohio Constitution.