

OPINION NO. 84-059

Syllabus:

The positions of township trustee and trustee of a regional water and sewer district established pursuant to R.C. Chapter 6119 are incompatible.

To: Lynn C. Slaby, Summit County Prosecuting Attorney, Akron, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, October 18, 1984

I have before me your request for my opinion concerning whether the positions of trustee of a regional water and sewer district and township trustee are compatible when the township which the township trustee serves is part of the water and sewer district. You state in your letter that one participating township has a contract with the district to provide the district with a meeting room, office space, a copier, and various office services. You also state that the regional water and sewer district contracts with participating townships for emergency repair services for the district's plant and equipment.

1979 Op. Att'y Gen. No. 79-111 sets forth seven criteria for determining whether two public positions are incompatible. Two positions are considered incompatible if, inter alia, one is subordinate to or a check upon the other, or if an individual serving in both positions would be subject to a conflict of interest. See State ex rel. Attorney General v. Gebert, 12 Ohio C.C. (n.s.) 274 (Franklin County 1909).

R.C. 6119.01 provides as follows:

Any area situated in any unincorporated part of one or more contiguous counties or in one or more municipal corporations, or both, may be organized as a regional water and sewer district in the manner and subject to the conditions provided in Chapter 6119. of the Revised Code, for either or both of the following purposes:

- (A) To supply water to users within and without the district;
- (B) To provide for the collection, treatment, and disposal of waste water within and without the district.

In order to organize a regional water and sewer district, a petition must be filed in the court of common pleas by one or more municipal corporations, one or more counties, or by one or more townships, or by any combination thereof. R.C. 6119.02. The filing of such petition must be authorized by the legislative authority of each

participating subdivision and each legislative authority may act on behalf of any part of its respective subdivision. R.C. 6119.02. The petition must set forth various information about the proposed district, including a description of the territory to be included in the district, R.C. 6119.02(E), and the manner of selection, the number, term, and compensation of the board of trustees of the district, R.C. 6119.02(F). See R.C. 6119.07 ("[a]ll the capacity of a regional water and sewer district shall be vested in and its authority shall be exercised by a board of trustees which shall manage and conduct the affairs of the district"). The petition is heard by a court of common pleas. R.C. 6119.03; R.C. 6119.04. If, after various hearings, "it appears that the proposed district is necessary, that it and the plan for the operation of the district is conducive to the public health, safety, convenience, and welfare and that the plan for the operation of the district is economical, feasible, fair, and reasonable," the court must declare the district to be organized and empowered as a political subdivision. R.C. 6119.04. See Kucinich v. Cleveland Regional Sewer District, 64 Ohio App. 2d 6, 410 N.E.2d 795 (Cuyahoga County 1979).

In your request you indicated that the petition in the instant matter provides that three trustees of the regional water and sewer district shall be selected by each of the two participating townships and the seventh trustee shall be selected by alternating appointments by each township for a three year term. It is well established that an officer may not serve on a board to which he makes appointments. See 1979 Op. Att'y Gen. No. 79-086 (because a mayor appoints the director of public safety, one person may not serve in both positions); 1965 Op. Att'y Gen. No. 65-069 (the offices of township trustee and county commissioner are incompatible with that of member of a regional planning commission since the boards of township trustees and county commissioners exercise a power of appointment with respect to the commission); 1947 Op. Att'y Gen. No. 1526, p. 23 (the positions of township trustee and member of a township memorial board of trustees are incompatible since the township trustees appoint the trustees of the township memorial board). Accordingly, because the township trustees select the members of the board of trustees of the regional water and sewer district, the township trustees may not themselves serve as members of such board.

Even if the petition establishing the organization of the water district did not provide for the appointment of the district trustees by the township trustees, there are numerous instances which may be found in R.C. Chapter 6119 which present a conflict of interest between the regional water and sewer district and a township or which render one body subordinate to the other. For example, a water and sewer district has the authority pursuant to R.C. 6119.08 to promulgate and enforce rules to, inter alia, protect its projects and "prescribe the manner of their use by any person or political subdivision" R.C. 6119.08(A), and to "prescribe the permissible uses of the water supply and the manner of its distribution and to prevent the pollution or unnecessary waste of such water supply," R.C. 6119.08(C). The board may enforce its rules by mandamus, injunction, and other legal remedies, and "[a]ny person or political subdivision which willfully fails to comply with such rules and regulations shall be liable for damage caused by such failure and for the cost of restoring or replacing any construction damaged or destroyed." R.C. 6119.08. Because a water and sewer district may regulate the actions of a township with respect to the use of the district's projects and the use and distribution of the water supply, the district trustees act as a check upon the township trustees. See R.C. 505.37(A) (a board of township trustees may provide a water supply for fire-fighting purposes); R.C. 511.32(C) (a board of township trustees may construct and maintain fountains).

R.C. 6119.09 provides in part:

A regional water and sewer district may charge, alter, and collect rentals or other charges, including penalties for late payment, for the use or services of any water resource project or any benefit conferred thereby and contract in the manner provided by this section with one or more persons, one or more political subdivisions, or any combination thereof, desiring the use or services thereof, and fix the terms, conditions, rentals, or other charges, including penalties for late payment, for such use or services. Such rentals or other charges

shall not be subject to supervision or regulation by any authority, commission, board, bureau, or agency of the state or any political subdivision, and such contract may provide for acquisition by such political subdivision of all or any part of such water resource project for such consideration payable over the period of the contract or otherwise as the district in its sole discretion determines to be appropriate, but subject to the provisions of any resolution authorizing the issuance of water resource revenue bonds or notes or water resource revenue refunding bonds of the district or any trust agreement securing the same. Any political subdivision, which has power to construct, operate, and maintain waste water facilities or water management facilities may enter into a contract or lease with the district whereby the use or services of any water resource project of the district will be made available to such political subdivision and pay for such use or services such rentals or other charges as may be agreed to by the district and such political subdivision.

R.C. 6119.09 goes on to deal specifically with agreements between a district and any political subdivision for the acquisition or construction of water resource projects. It is apparent that under R.C. 6119.09, a person who served as a district trustee and township trustee could be called upon to represent the interests of both the township and water and sewer district during a particular transaction and thus be subject to a conflict of interest.

R.C. 6119.06 also provides numerous examples of potential conflicts of interest between a district trustee and township trustee. See R.C. 6119.06(F) (a district may "[m]ake loans and grants to political subdivisions for the acquisition or construction of water resource projects"); R.C. 6119.06(G) (a district may "[a]cquire, construct, reconstruct, enlarge, improve, furnish, equip, maintain, repair, operate, lease or rent to or from, or contract for operation by or for, a political subdivision or person, water resource projects within or without the district"); R.C. 6119.06(H) (a district may make available the use or service of a water resource project to political subdivisions); R.C. 6119.06(M) (acquisition of land, including public lands); R.C. 6119.06(N) (adoption of regulations to protect the flow of the State's waters from depletion and the establishment of reasonable charges therefor); R.C. 6119.06(R) (power of eminent domain); R.C. 6119.06(S) (removal or acquisition of buildings and other structures); R.C. 6119.06(V) (charging and collection of rentals and other charges for the use of the services of any water resource project); R.C. 6119.06(Y) (the district may "[e]xercise the powers of the district without obtaining the consent of any other political subdivision, provided that all public or private property damaged or destroyed in carrying out the powers of the district shall be restored or repaired and placed in its original condition as nearly as practicable or adequate compensation made therefor by the district"); R.C. 6119.06(Z) (the district may require a land owner to connect his premises to a water resource project). See R.C. 6119.11 (condemnation of land); R.C. 6119.111 (acquisition of property).

R.C. 6119.06(O) authorizes a district to make contracts and other instruments necessary to the performance of its powers and duties and R.C. 6119.06(P) authorizes a district to contract with a person or political subdivision "to render services to such contracting party for any service the district is authorized to provide." You have indicated in your request that there are indeed contracts between the water and sewer district and township in question. The authority of the two boards to contract with each other and the actual contracts between the township and water and sewer district in this instance are further indications that one person who served as both township trustee and member of a water and sewer district would be subject to a conflict of interest. See 1973 Op. Att'y Gen. No. 73-016; 1958 Op. Att'y Gen. No. 1705, p. 81. See also R.C. 511.13; Op. No. 79-111.

From the foregoing, it appears that there are instances in which a board of trustees of a water and sewer district acts as a check upon a board of township trustees and that one person who served as a trustee of a water and sewer district and a township trustee would also be subject to conflicting interests and loyalties. I note that the potential conflicts between a water and sewer district and a

township under R.C. 6119.06, R.C. 6119.08, R.C. 6119.09, R.C. 6119.11, and R.C. 6119.111 could arise whether or not the township is organizationally part of the water and sewer district. A water and sewer district's enabling authority under these provisions is not limited to dealing with those subdivisions which are part of the district. See generally R.C. 6119.01(A) (a district may "supply water to use within and without the district"); R.C. 6119.06(G). See also R.C. 6119.02(E) (a water and sewer district need not be composed of contiguous territory). Thus, for the reasons set forth above, I conclude that a township trustee may not serve on the board of trustees of a regional water and sewer district, whether or not the township is part of the district.

In conclusion, it is my opinion, and you are advised, that the positions of township trustee and trustee of a regional water and sewer district established pursuant to R.C. Chapter 6119 are incompatible.