

January 11, 2023

The Honorable Bradford W. Bailey
Hardin County Prosecuting Attorney
One Courthouse Square, Suite 50
Kenton, Ohio 43326-1575

SYLLABUS: 2023-001

1. Impermissible conflicts of interests prevent a person from simultaneously serving as a secret-service officer and township constable within the same county when the person lacks an ability to abstain.
2. Impermissible conflicts of interests prevent a person from simultaneously serving as a secret-service officer and municipal-police officer with a special commission within the same county when the person lacks an ability to abstain. (1970 Op. Att’y Gen. No. 70-170, Clarified)
3. The warrantless-arrest authority of township constables is limited, and is not the same as their warrant-arrest authority. *See* R.C. 2935.03.
4. A township constable may execute an arrest warrant throughout the

county in which the served township sits.

5. Because a secret-service officer has no arrest authority, any arrest conducted by an individual serving as a secret-service officer and township constable must occur while the person is acting as a constable.
6. When a person holds two-public positions, the entity that assumes liability for any unlawful acts is the entity for which the person is working at the moment when the unlawful act occurs.
7. A county prosecutor has no authority to enter into a memorandum of understanding with a township to provide that the township incurs no liability for any unlawful acts done by a person who serves as both a secret-service officer and township constable within the same county.
8. The ultimate determination as to whether a county prosecutor potentially incurs liability when authorizing a secret-service officer to both arrest and execute search warrants is left to the courts.
9. A board of county commissioners has no authority to use the general fund to pay for the liability insurance of a secret-service officer who is also employed as a township constable when the person is serving in the capacity of a constable.

10. The determination as to when the appointment of a special prosecutor is necessary is not within my discretion to answer, it is up to the court to decide.



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OPINION NO. 2023-001

The Honorable Bradford W. Bailey
Hardin County Prosecuting Attorney
One Courthouse Square, Suite 50
Kenton, Ohio 43326-1575

Dear Prosecutor Bailey:

You have requested an opinion regarding a person serving as a secret-service officer for a county prosecutor and as either a township constable or as a municipal-police officer with a special commission within the same county. I have framed your questions as follows:

1. Is the position of secret-service officer for the county prosecutor compatible with the position of township constable within the same county?
2. Is the position of secret-service officer compatible with the position of municipal-police officer with a special commission that carries with it all the powers of a peace officer, including the power to arrest under R.C. 2935.03, within a city located within the same county?
3. Does a township constable appointed pursuant to R.C. 509.01 have the power under

R.C. 509.05 to make a warrantless arrest for a felony, traffic, or misdemeanor offense outside the township that appointed them; or is his warrantless-arrest authority governed by R.C. 2935.03?

4. May a township constable arrest a person outside the township's territory pursuant to a lawful-arrest warrant?
5. If a person serves as a township constable and secret-service officer within the same county, which entity, county or township, is the employing entity when the person makes an arrest within the township and outside the township's territory?
6. If a person serving as a secret-service officer and township constable within the same county conducts arrests and engages in other peace-officer activities, is the township, the county, or both held liable for damages if the person's actions are found unlawful?
 - a. May a memorandum of understanding between a prosecuting attorney and a board of township trustees provide that no liability is imposed upon the township when an appointment is made of a secret-service officer as a township constable when the document is not approved by the board of county commissioners?

- b. Does a prosecutor lose absolute or blanket immunity under *Imbler v. Pachtman* 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), *Willitzer v. McCloud*, 6 Ohio St.3d 447, 453 N.E.2d 693 (1983), and R.C. 2744.03(A)(7) by permitting secret-service officers employed by that office to engage in peace-officer activities, which includes making arrests and applying for and executing search warrants?
7. May a board of county commissioners pay for liability insurance using the county general fund for a secret-service officer also appointed as a township constable within the same county when the person is serving in the capacity of a constable?
8. Is there a sufficient conflict of interest that requires the appointment of a special prosecutor when a secret-service officer who also serves as a township constable makes a felony arrest and will testify in a trial in which the county prosecutor will prosecute?

I

Your first and second question regard compatibility. First, you ask if a secret-service officer may also serve as a township constable within the same county. Second, you ask if a secret-service officer may also serve as a municipal-police officer with a special commission

within the same county. Because both questions regard compatibility, I address them together.

Before addressing the two compatibility questions, I must note a background fact. In this particular case, the person serving as a secret-service officer for the county prosecutor and as either a township constable or municipal-police officer with a special commission conducts all of the respective duties of each role. There is no way for the person at issue in this opinion to abstain from the duties of either position when situations that may create a conflict of interest arise.

“An issue of compatibility arises whenever one person wishes to hold simultaneously two or more positions of public service.” 2022 Op. Att’y Gen. No. 2022-007, Slip Op. at 2; 2-37, quoting 2022 Op. Att’y Gen. No. 2022-003, Slip Op. at 3; 2-12. A seven-part test was developed in 1979 for addressing the compatibility of two or more public-service positions. The questions ask:

1. Is either position in the classified services for purposes of R.C. 124.57?
2. Does a constitutional provision or statute prohibit a person from serving in both positions at the same time?
3. Is one position subordinate to, or in any way a check upon, the other position?
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?

2022 Op. Att’y Gen. No. 2022-003, Slip Op. at 3-4; 2-12; 2021 Op. Att’y Gen. No. 2021-005, Slip Op. at 2; 2-19 to 2-20; *see* 1979 Op. Att’y Gen. No. 79-111, at 2-367 to 2-368. All seven questions must be answered in favor of compatibility for the positions to be compatible. 2022 Op. Att’y Gen. No. 2022-007, Slip Op. at 3; 2-37. Here, question five of the compatibility test is dispositive for answering both question one and question two in this opinion.

“A person cannot serve simultaneously in two positions when an impermissible conflict of interest exists between the positions.” *E.g.*, 2021 Op. Att’y Gen. No. 2021-029, Slip Op. at 2; 2-105, quoting 2021 Op. Att’y Gen. No. 2021-027, Slip Op. at 2; 2-97. “A conflict of interests exists ‘when an individual’s responsibilities in one position are such as to influence the performance of his duties in the other position, thereby subjecting him to influences which may prevent his decisions from being completely objective.’” *E.g.*, 2021 Op. Att’y Gen. No. 2021-027, Slip Op. at 2; 2-97, quoting 1989 Op. Att’y Gen. No. 89-052, at 2-220.

A

Your first question asks about someone serving as a secret-service officer and township constable within the same county. A secret-service officer is appointed by the county prosecutor. R.C. 309.07. A township constable is appointed by the board of township trustees. R.C. 509.01(B). A secret-service officer is a law-enforcement officer. 2017 Op. Att’y Gen. No. 2017-004, Slip Op. at 2 fn. 1; 2-35 fn. 1 (“A secret service officer is a law enforcement officer of the county”); R.C. 2901.01(A)(11)(h). A township constable is also a law-enforcement officer. R.C. 2901.01(A)(11)(a).

Prior Attorney General opinions “concluded that an individual may not serve in two law enforcement positions, or two positions that have an investigatory function, in overlapping jurisdictions.” *E.g.*, 2017 Op. Att’y Gen. No. 2017-028, Slip Op. at 3; 2-290.

The incompatibility results follow from two well-established principles. *Id.* Slip Op. at 4; 2-291.

First, a person has a duty of loyalty to the law-enforcement agency that employs him, and a person serving two law-enforcement agencies would suffer from divided loyalty—particularly if one law-enforcement agency investigates the other. 2017 Op. Att’y Gen. No. 2017-028, Slip Op. at 4; 2-291. This is also apparent if, in one role, the person is influenced to conduct his duties in a way that favors or directly benefits his other employer. *Id.*; see 2017 Op. Att’y Gen. No. 2017-004, Slip Op. at 4; 2-37 (a coroner’s investigator who also serves as a secret-service officer may be influenced and

suffer from bias when conducting his duties as a coroner investigator so as to benefit the county prosecutor).

Second, a law-enforcement officer is expected to follow the policies, procedures, and techniques of his law-enforcement agency. 2017 Op. Att’y Gen. No. 2017-028, Slip Op. at 5; 2-291 to 2-292. “When the same person is serving as a law enforcement officer for two separate agencies at the same time, the person may be required to follow different polices, procedures, and techniques.” *Id.* Slip Op. at 5; 2-291 to 2-292; *see* 1989 Op. Att’y Gen. No. 89-044, at 2-189 (“a township police constable, however, is expected to comply with the requirements established by the board of township trustees”); 2016 Op. Att’y Gen. No. 2016-037, Slip Op. at 4; 2-457 (the prosecuting attorney has reasonable discretion to identify the areas and type of work to be performed by each secret-service officer in the collection and discovery of material and relevant evidence).

Given that the person in question would serve as a secret-service officer and township constable within the same county without an ability to abstain from actions and duties that give rise to conflicts of interests, I answer question five of the compatibility test in the negative. Since all seven questions are not answered in favor of compatibility, the positions are not compatible.

B

Your second question asks about someone serving as a secret-service officer and municipal-police officer with a special commission that carries with it all the powers of a peace officer, including the power to arrest under

R.C. 2935.03, within a city that is located within the same county.

Like a secret-service officer and a township constable, a municipal-police officer is considered a law-enforcement officer. R.C. 2901.01(A)(11)(a). While you note that the person here is a specially commissioned municipal-police officer with all the powers of a peace officer, this additional fact does not alter the application of my analysis set forth above. Since this question, like question one, deals with two law-enforcement officers operating in overlapping jurisdictions, I conclude that the same conflicts of interests set forth above apply here. For this reason, I find that question five of the compatibility test is once again answered in the negative. Because all seven questions are not answered in favor of compatibility, the positions are not compatible.

I note that my determination here differs from the conclusion reached in 1970 Op. Att’y Gen. No. 70-170. That opinion found that the positions of municipal-police officer and secret-service officer are compatible. The opinion found that a person serving in both roles could avoid any potential conflicts through abstention. 1970 Op. Att’y Gen. No. 70-170, at 2-339. Here, you indicate that the person in question has no ability to abstain. The inability to abstain in this case distinguishes 1970 Op. Att’y Gen. No. 70-170.

II

Your third question asks if township constables have power under R.C. 509.05 to make a *warrantless* arrest outside the township that appoints them, or if R.C.

2935.03 governs their warrantless-arrest authority. I conclude that R.C. 2935.03 sets forth general warrantless-arrest authority.

R.C. 509.05 indicates that township constables have jurisdiction throughout the county in which their township sits. 1971 Op. Att’y Gen. No. 71-076, at 2-257. That jurisdiction is broad. And it includes, as discussed in Part III below, the power to make *warrant-based* arrests.

But does R.C. 509.05 empower constables to make *warrantless* arrests? No. The power to make warrantless arrests is governed specifically by R.C. 2935.03, which places limits on warrantless arrests discussed in greater detail below. *See Cincinnati v. Alexander*, 54 Ohio St.2d 248, 251, 375 N.E.2d 1241 (1978) (“An examination of the legislative history of R.C. 2935.03 and related statutes negates the claim that the General Assembly intended to devolve statewide arrest powers upon officers named in the first paragraph of the statute by the omission of a territorial restriction to the respective political subdivisions relating to the enumerated officers”); *State v. Brown*, 143 Ohio St.3d 444, 2015-Ohio-2438, 39 N.E.3d 496, ¶¶ 13-14; *State v. Schmidt*, 12th Dist. Clermont No. CA90-02-016, 1990 Ohio App. LEXIS 50570 (Nov. 26, 1990) *6 -7 (“Having purposely conferred arrest authority on constables only under limited circumstances, the General Assembly intended R.C. 2935.03 to limit the arrest powers accorded to constables under R.C. 509.05”); *State v. Smigelski*, 6th Dist. Lucas No. L-94-183, 1995 Ohio App. LEXIS 2434 (June, 9, 1995) *6-7; *see also* R.C. 1.51.

R.C. 2935.03(A)(1) states that a township constable shall arrest and detain, *until a warrant can be obtained*, someone found violating, *within the limits of the appointing political subdivision*, a law of the state, ordinance of a municipal corporation, or a resolution of a township. When a constable has reasonable grounds to believe that any of the following offenses was committed within the limits of his appointing political subdivision, he may arrest and detain the person believed to be guilty until a warrant can be obtained:

- (1) violence;
- (2) criminal child enticement;
- (3) public indecency;
- (4) domestic violence;
- (5) violation of a protection order;
- (6) menacing by stalking;
- (7) aggravated trespass;
- (8) theft; or
- (9) felony drug abuse.

See id. at (B)(1); *see also id.* at (C) (stating additional circumstances for a peace officer to stop and detain a person). Pursuant to R.C. 2935.03(D), constables may go outside their territorial limits to pursue, arrest, and detain someone until a warrant can be obtained if certain factors are met. The factors are:

- (1) the pursuit takes place without unreasonable delay after the offense is committed;
- (2) the pursuit is initiated within the constable's territorial limits; and
- (3) the offense is either a:
 - (a) felony;

- (b) misdemeanor of the first degree, or a substantially equivalent municipal ordinance;
- (c) misdemeanor of the second degree, or a substantially equivalent municipal ordinance; or
- (d) any offense which points are chargeable under R.C. 4510.036.

Subdivision (E)(2) allows a constable with a certificate from the Ohio Peace Officer Training Commission to arrest and detain someone, until a warrant can be obtained, for violating R.C. 4503.11, 4503.21, or 4549.01, R.C. 4549.08 to 4549.12, 4549.62, or R.C. Chapter 4511 or 4513, but not R.C. 4513.33 and R.C. 4513.34, *on the portion of any street or highway that is located immediately adjacent to the boundaries of the unincorporated territory of the served township*. But if the population of the township is sixty thousand or less, a constable may not make an arrest under division (E)(2) on a state highway that is included as part of the interstate system. *Id.*

In sum, while R.C. 509.05 indicates that township constables have jurisdiction throughout the county in which their township sits, R.C. 2935.03 limits when and where a township constable may make a warrantless arrest. *See* R.C. 1.51; *see also* R.C. 2935.05, 2935.07, and 2935.08. The specific statute prevails over the general. I note, however, that other limited grants of authority do exist. *See* R.C. 2935.04 (any person may arrest without a warrant if they have reasonable grounds to believe that a felony was committed); *see also* R.C. 4513.39(B)-(C) (stating certain power to make stops and arrests on highways); *State v. Dawley*, 2016-Ohio-2904, 65 N.E.3d 79, ¶¶19-20 (5th Dist.),

citing *State v. Dunn*, 131 Ohio St.3d 325, 2012-Ohio-1008, 964 N.E.2d 1037, syllabus (explaining the community-caretaking and emergency-aid exceptions to the Fourth Amendment).

III

Your fourth question asks if a township constable may arrest a person outside the township's territory pursuant to a lawful arrest warrant. I answer this question in the affirmative.

"The territorial jurisdiction of a township police constable extends through the county in which his township is located." 1971 Op. Att'y Gen. No. 71-076, at syllabus paragraph 1; 1989 Op. Att'y Gen. No. 89-044, at 2-189. R.C. 509.05 states that township constables shall "keep and preserve the peace within the county." Constables "may execute all writs and process, in criminal cases, throughout the county in which they reside, and in which they were elected or appointed." *Id.* More succinctly, "[t]he authority of a constable in serving any process, either civil or criminal, and in so doing his duties generally shall extend throughout the county in which he is appointed[.]" *Id.*; see R.C. 509.10. Expanding the jurisdictional limits, R.C. 2935.02 states: "If an accused person flees from justice, or is not found in the county where a warrant for his arrest was issued, the officer holding the same may pursue and arrest him in *any county* in this state." (Emphasis added). So, when a warrant is issued, a constable's jurisdiction extends throughout the county in which the township sits, and may even extend beyond the county's jurisdiction at times.

IV

Your fifth question asks which entity is the employing entity, the county or township, when someone simultaneously serving as a secret-service officer and township constable within the same county makes arrests within and outside of the served township's territory. Because I found the positions incompatible, this question is largely moot. But you ask me to answer this question without regard to the compatibility finding.

A secret-service officer does not have arrest authority. 2016 Op. Att'y Gen. No. 2016-037, Slip Op. at 4; 2-456, citing 1980 Op. Att'y Gen. No. 80-088, at 2-344; 1973 Op. Att'y Gen. No. 73-036, at 2-144; 1933 Op. Att'y Gen. No. 1668, vol. II, p.1532, at 1533 ("There is no indication in this statute that [a secret-service officer] is to engage in the activities of a police officer or of a deputy sheriff"); *see* R.C. 2935.01(B) (setting forth definition of "peace officer"); *but see* R.C. 2935.04. Any arrest by an individual serving in both roles, therefore, must occur while the person is acting as a township constable.

Moreover, a person cannot carry out the duties of both a secret-service officer and township constable at the same time. To put it another way: the person cannot wear two hats at once. *See* 2006 Op. Att'y Gen. No. 2006-005, at 2-50, fn. 9 (a person cannot perform the duties of a public service position when they are on duty and being paid to perform the duties of another public position); *see also* 1985 Op. Att'y Gen. No. 85-042, at 2-150 (finding two positions incompatible because the work schedule for each job overlap, which is

not allowed). For these reasons, any arrest must occur while the person is acting as a township constable, which means that the employer is the township.

V

Your sixth question has three parts that all regard liability. Although I determined that the underlying positions cannot be held simultaneously, you ask that I provide an answer even if the positions are incompatible.

A

Part one asks whether the county, the township, or both would be held liable if arrests and other peace-officer activities conducted by a person serving as a secret-service officer and township constable were found to be unlawful.

As I stated in my answer to your fifth question, a secret-service officer lacks arrest power. 2016 Op. Att’y Gen. No. 2016-037, Slip Op. at 4; 2-456, citing 1980 Op. Att’y Gen. No. 80-088, at 2-344; R.C. 309.07; 1933 Op. Att’y Gen. No. 1668, vol. II, p.1532, at 1533 (“There is no indication in this statute that [a secret-service officer] is to engage in the activities of a police officer or of a deputy sheriff”); *see* R.C. 2935.01(B) (setting forth definition of “peace officer”); *but see* R.C. 2935.04. Regarding general placement of liability when a person holds two-public positions, the determination depends on which role the person assumes at the moment when the action that causes liability occurs. *See* 2006 Op. Att’y Gen. No. 2006-005, at 2-50 fn. 9 (a person cannot

perform the duties of a public service position when they are on duty and being paid to perform the duties of another public position). If the person is acting as a secret-service officer, it is the county. If the person is acting as a township constable, it is the township.

B

The second part of question six asks if a memorandum of understanding between a prosecuting attorney and a board of township trustees may provide that no liability is imposed upon the township when a prosecutor's secret-service officer is appointed as a township constable when the memorandum is not approved by the board of county commissioners.

Before answering whether the board of county commissioners must give their approval, I must first determine if the county prosecutor has the power to absolve a township of liability in this situation. "As a creature of statute, the county prosecuting attorney has those powers and duties imposed upon him by statute." *E.g.*, 1992 Op. Att'y Gen. No. 92-080, at 2-332. I find nothing that indicates that a prosecuting attorney has the power to absolve a township of liability for any unlawful actions done by a secret-service officer serving as a township constable, particularly when any activity as a constable occurs while the person is acting within the sole employment of the township. Given the lack of authority, I answer this question in the negative. Whether the board of county commissioners must approve the memorandum is therefore moot.

C

The third part of question six asks if a county prosecutor loses absolute or blanket immunity if he or she allows secret-service officers to conduct peace-officer activities, including making arrests and applying for and executing search warrants.

R.C. 309.07 states: “The prosecuting attorney may appoint secret service officers whose duty it shall be to aid him in the collection and discovery of evidence to be used in the trial of criminal cases and matters of a criminal nature.” The role of a secret-service officer is to investigate. 1970 Op. Att’y Gen. No. 70-170, at 2-339 (“[A secret-service officer’s] duties are narrowly limited to investigation”). As previously stated, secret-service officers have no arrest power. 2016 Op. Att’y Gen. No. 2016-037, Slip Op. at 4; 2-456, citing 1980 Op. Att’y Gen. No. 80-088, at 2-344; 1973 Op. Att’y Gen. No. 73-036, at 2-144; 1933 Op. Att’y Gen. No. 1668, vol. II, p.1532, at 1533. A secret-service officer also lacks the authority to execute a search warrant. *State v. Martins Ferry Eagles* (1979), 62 Ohio Misc. 3, 6, 404 N.E.2d 177.

“R.C. Chapter 2744 addresses political subdivision liability in tort actions and establishes civil immunities for political subdivisions and their officers and employees.” 2004 Op. Att’y Gen. No. 2004-032, at 2-298. R.C. 2744.01(B) defines “employee” as “an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of the officer’s, agent’s, employee’s or servant’s employment for a political subdivision.” The definition includes elected or appointed

officials of the political subdivision. *Id.* As noted in your request, R.C. 2744.03 sets forth immunity defenses for a political subdivision and its employees. A few immunities set forth in R.C. 2744.03 are relevant here. R.C. 2744.03(A)(1) states: “The political subdivision is immune from liability if the employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function.” Absent negligent conduct, actions required by law, authorized by law, or a necessary or essential act may receive immunity from liability. *Id.* at (A)(2). A political subdivision is also immune from liability for actions stemming from the discretion of the employee “with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.” *Id.* at (A)(3). On the side of incurring liability, immunity does not attach to an employee if the “acts or omissions were manifestly outside the scope of the employee’s employment or official responsibilities.” *Id.* at (A)(6)(a). An employee also may not receive immunity if his “acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner.” *Id.* at (A)(6)(b).

A county prosecutor is also entitled to additional liability protection set forth in the Revised Code and common law. R.C. 2744.03(A)(7). Your request notes *Willitzer v. McCloud*, which states that prosecutors receive absolute immunity “when their activities are ‘intimately associated with the judicial phase of the criminal process.’” *Willitzer v. McCloud*, 6 Ohio St.3d 447, 449, 453 N.E.2d 693 (1983), quoting *Imbler v. Pachtman*, 424 U.S. 409, 430, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). But when performing essentially investigative

or administrative functions, the prosecutor is entitled only to qualified immunity. *Willitzer* at 449; *see Kalina v. Fletcher*, 522 U.S. 118, 125-127, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997).

R.C. 2744.07 provides that, with listed exceptions, a political subdivision shall provide for the defense of an employee in state or federal court for “any civil action or proceeding which contains an allegation for damages for injury, death, or loss to person or property caused by an act or omission of the employee in connection with a governmental or proprietary function.” *Id.* at (A)(1). But a political subdivision does not have to provide for the defense of an employee if the employee did not act in good faith, acted manifestly outside the scope of employment or official responsibilities, or the civil action was commenced by or on behalf of a political subdivision. *See id.* at (A)(2)(a)-(c). In addition, a political subdivision shall indemnify and hold harmless an employee, other than for a judgment for punitive damages, for damages in connection with a governmental or proprietary function. *Id.* at (B)(1). However, a political subdivision does not have to do so if the employee did not act in good faith or acted outside the scope of their employment or official responsibilities. *See id.* (B)(2)(a)-(b).

Given that secret-service officers are authorized neither to make arrests nor to conduct search warrants, it appears that such actions are outside the scope of their employment. Actions that are outside the scope of employment, however, may still be treated as though they were taken “within the scope” if done in good faith and for the apparent intent of carrying out official powers

or duties. *See* 2004 Op. Att’y Gen. No. 2004-032, at 2-302. A court makes the ultimate decision as to whether someone acted within or outside the scope of employment. *Id.* at 2-300.

VI

Your seventh question asks: If a secret-service officer is appointed as a township police constable within the same county, may a board of county commissioners pay for liability insurance for that officer using the county general fund?

County commissioners “are creatures of statute, and ‘possess only those powers that are expressly provided by statute, either expressly or by necessary implication.’” 2021 Op. Att’y Gen. No. 2021-006, Slip Op. at 8; 2-27, quoting 2018 Op. Att’y Gen. No. 2018-009, Slip Op. at 2; 2-81. R.C. 307.441 lists employees for whom the board of county commissioners may provide liability insurance. The shared factor for the listed employees is that they work for the county. *See* R.C. 307.441; *see also* R.C. 9.83 (Any political subdivision may procure liability insurance for its employees and officers). I found no Revised Code section stating that a board of county commissioners may use the county general fund to pay for the liability insurance of another political subdivision’s employees. On the contrary, the Revised Code grants the township the authority to purchase insurance to indemnify its constables. R.C. 505.61. Given the lack of expressly-granted authority or implicitly-granted authority, I conclude that the answer to question six is “no.” *See* 2009 Op. Att’y Gen. No. 2009-038, at 2-283 (“The board of county

commissioners may expend public funds only pursuant to clear statutory authority, and any doubt as to the authority to make an expenditure must be resolved against the expenditure”).

And while I do not believe that the following directly addresses your seventh question, I note R.C. 2744.081. R.C. 2744.081(A) states that, regardless of whether a political subdivision secures a policy or policies of liability insurance under R.C. 2744.08, the political subdivision may enter into a written agreement with other political subdivisions to establish and maintain a joint-self-insurance pool. The joint-self-insurance pool is used to cover any liability of the political subdivision or their employees in carrying out a governmental or proprietary function. *Id.* “Under a joint-insurance pool agreement, a political subdivision may, to the extent permitted under the written agreement, assume the risk of any other political subdivision, including the indemnification of its employees.” *Id.* at (C). So, while not directly addressing the question posed, R.C. 2744.081 might be worth reviewing.

VII

Your eighth question asks if there are sufficient conflicts of interest that require the appointment of a special prosecutor when a secret-service officer who also serves as a township constable makes a felony arrest and will testify in a trial that the county prosecutor will prosecute.

Although I have determined that the underlying positions are not compatible, you ask that I provide an answer regardless.

But, the determination as to when a special prosecutor is needed is not within my authority to make. Instead, it is the role of the court to appoint a special prosecutor if deemed necessary, either on its own accord or “at the behest of a prosecuting attorney in matters in which circumstances render it appropriate.” 2019 Op. Att’y Gen. No. 2019-021, Slip Op. at 8; 2-159; R.C. 2941.63; *State v. Dutiel*, 5th Dist. Perry No. 2012-CA-11, 2012-Ohio-5349, ¶13 (“Courts of common pleas possess inherent power to appoint special prosecutors in criminal matters”); *State ex rel. Laurie v. Ondrey*, 11th Dist. Geauga No. 2021-G-0008, 2021-Ohio-1991, ¶ 10 (“courts possess inherent power to appoint special prosecutors where a prosecutor asserts a conflict of interest”); see 1994 Op. Att’y Gen. No. 94-079, at 2-396 to 2-397 (stating the limits of the Attorney General’s authority to opine on matters assigned to the Board of Commissioners on Grievance and Discipline of the Supreme Court and to the Ohio Ethics Commission).

Conclusions

Accordingly, it is my opinion, and you are hereby advised that:

1. Impermissible conflicts of interests prevent a person from simultaneously serving as a secret-service officer and township constable

within the same county when the person lacks an ability to abstain.

2. Impermissible conflicts of interests prevent a person from simultaneously serving as a secret-service officer and municipal-police officer with a special commission within the same county when the person lacks an ability to abstain. (1970 Op. Att'y Gen. No. 70-170, Clarified)
3. The warrantless-arrest authority of township constables is limited, and is not the same as their warrant-arrest authority. *See* R.C. 2935.03.
4. A township constable may execute an arrest warrant throughout the county in which the served township sits.
5. Because a secret-service officer has no arrest authority, any arrest conducted by an individual serving as a secret-service officer and township constable must occur while the person is acting as a constable.
6. When a person holds two-public positions, the entity that assumes liability for any unlawful acts is the

entity for which the person is working at the moment when the unlawful act occurs.

7. A county prosecutor has no authority to enter into a memorandum of understanding with a township to provide that the township incurs no liability for any unlawful acts done by a person who serves as both a secret-service officer and township constable within the same county.
8. The ultimate determination as to whether a county prosecutor potentially incurs liability when authorizing a secret-service officer to both arrest and execute search warrants is left to the courts.
9. A board of county commissioners has no authority to use the general fund to pay for the liability insurance of a secret-service officer who is also employed as a township constable when the person is serving in the capacity of a constable.

10. The determination as to when the appointment of a special prosecutor is necessary is not within my discretion to answer, it is up to the court to decide.

Respectfully,

A handwritten signature in blue ink that reads "Dave Yost". The signature is written in a cursive, flowing style with a large initial "D" and a long, sweeping tail on the "Y".

DAVE YOST
Ohio Attorney General