

**OPINION NO. 90-084****Syllabus:**

An individual may serve simultaneously as a member of the county board of elections and member of the board of directors of a port authority operating under R.C. 4582.01-.20, provided that such simultaneous service does not constitute a violation of a local departmental regulation, charter provision, or ordinance.

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**To: Robert L. Herron, Columbiana County Prosecuting Attorney, Lisbon, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, November 14, 1990**

I have before me your request for my opinion as to whether the positions of member of the county board of elections and member of the board of directors of a port authority are compatible. Information provided indicates that the port authority in question is organized and operated under the provisions set forth in R.C. 4582.01 through R.C. 4582.20.<sup>1</sup> I shall therefore use the term "port authority"

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<sup>1</sup> R.C. Chapter 4582 provides two sets of provisions concerning the creation and operation of port authorities. R.C. 4582.01 through R.C.

throughout this opinion to refer to a port authority operating under R.C. 4582.01 through R.C. 4582.20.

In 1979 Op. Att'y Gen. No. 79-111, my predecessor set out seven questions for ascertaining whether two public positions are compatible. The seven questions are:

1. Is either of the positions a classified employment within the terms of R.C. 124.57?
2. Do the empowering statutes of either position limit the outside employment permissible?
3. Is one office 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 a conflict of interest between the two positions?
6. Are there local charter provisions or ordinances which are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

Op. No. 79-111 at 2-367 and 2-368; *see also Esler v. Summit County*, 39 Ohio Misc. 2d 8, 9, 530 N.E.2d 973, 974-75 (C.P. Summit County 1985). All seven questions must yield an answer in favor of compatibility before two public positions can be found compatible.

The first question asks whether either of the positions is a classified employment within the purview of R.C. 124.57, which prohibits employees or officers in the classified service of the state, the several counties, cities, and city school districts thereof, and civil service townships from engaging in partisan political activity other than to vote and express their political views. *See* 1978 Op. Att'y Gen. No. 78-022 at 2-52. Pursuant to R.C. 124.11(A)(2), the position of member of the county board of elections is in the unclassified service. A member of the board of directors of a port authority is in the service of the port authority. *See generally* R.C. 4582.03(A) ("[e]ach member of the board of directors of a port authority shall be entitled to receive from the port authority such sum of money as the board of directors may determine as compensation for his services as director and reimbursement for his reasonable expenses in the performance of his duties"). A port authority is a separate political subdivision of this state. *See* R.C. 2744.01(F) (a port authority operating under R.C. 4582.01 through R.C. 4582.20 is a political subdivision for purposes of R.C. Chapter 2744); R.C. 4582.06(N) (a "port authority shall have the powers and rights granted to other subdivisions under section 9.20 of the Revised Code"); 1960 Op. Att'y Gen. No. 1158, p. 111 (syllabus) (a port authority created as provided in R.C. Chapter 4582<sup>2</sup> is a political subdivision of the state

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4582.20 govern the creation and operation of a port authority in existence on July 9, 1982, unless the subdivision or subdivisions creating the port authority have adopted a resolution or ordinance, pursuant to R.C. 4582.201(B), authorizing the port authority to operate under R.C. 4582.21 through R.C. 4582.59. R.C. 4582.201(A); *see also* R.C. 4582.02. R.C. 4582.21 through R.C. 4582.59 govern a port authority created after July 9, 1982, or to a port authority in existence on that date which, by action of the subdivisions creating it, is authorized to operate under these sections. R.C. 4582.202; *see also* R.C. 4582.201.

<sup>2</sup> I note that prior to July 9, 1982, R.C. Chapter 4582 only authorized the creation and operation of port authorities under R.C. 4582.01 through R.C. 4582.20. 1990 Op. Att'y Gen. No. 90-060, slip op. at 1 n.2; *see* 1981-1982

within the meaning of R.C. 5739.02(B)(1)). *See generally* 1972 Op. Att'y Gen. No. 72-035 (syllabus) ("[a] political subdivision of the State is a limited geographical area wherein a public agency is authorized to exercise some governmental function"). Since R.C. 124.57 does not expressly include a port authority among the political subdivisions whose classified employees and officers are prohibited from engaging in partisan political activity, the statute does not apply to the position of member of the board of directors of a port authority. *Cf.* 1989 Op. Att'y Gen. No. 89-069 at 2-315 ("R.C. 124.57 does not expressly mention officers or employees in the service of a village or local school district; thus, the statute does not apply to such officers or employees"). *See generally* Ohio Const. art. XV, §10; R.C. 124.01(A). The prohibition set forth in R.C. 124.57, therefore, does not apply.

The second question asks whether the empowering statutes of either position limit outside employment. Members of the board of directors of a port authority are appointed and compensated in accordance with the provisions of R.C. 4582.03(A), while members of a county board of elections are appointed by the secretary of state, R.C. 3501.06. I find nothing in either section that prohibits or limits outside employment. R.C. 3501.15, however, does prohibit an individual from serving as a member of the board of elections when the individual "is a candidate for any office to be filled at an election, except the office of delegate or alternate to a convention, member of the board of directors of a county agricultural society, presidential elector, or a member of a party committee." Since the position of member of the board of directors of a port authority is not filled by election, *see* R.C. 4582.03(A), the prohibition set out in R.C. 3501.15 does not apply. Consequently, question two may be answered in the negative.

Questions three and four constitute the common law test of incompatibility. 1989 Op. Att'y Gen. No. 89-022 at 2-103. *See generally State ex rel. Attorney General v. Gebert*, 12 Ohio C.C. (n.s.) 274, 21 Ohio C.C. Dec. 355 (Cir. Ct. Franklin County 1909) (setting forth the common law test of incompatibility). The third question asks whether one position is subordinate to, or a check upon, the other. An answer to this question requires an examination of the duties of the two positions to determine whether one position controls the other, either directly or indirectly, or whether either position is a check upon the other. *See* 1987 Op. Att'y Gen. No. 87-085 at 2-568.

Members of the board of directors of a port authority are appointed by the political subdivisions creating and comprising the port authority. R.C. 4582.03(A). The members of the board of directors are vested by statute with various powers and duties related to the administration of the port authority. *See id.*; *see also* R.C. 4582.07 (a board of directors "shall prepare or cause to be prepared a plan for the future development, construction, and improvement of the port and its facilities"); R.C. 4582.08 (the board of directors shall have the power to modify, amend or extend its official plan); R.C. 4582.13 (the board of directors shall annually prepare a budget for the port authority and may pay the surplus rents and charges received by the port authority into the general funds of the political subdivisions creating and comprising the port authority).

The members of the county board of elections, as stated above, are appointed by the secretary of state. R.C. 3501.06. The county board of elections is empowered to conduct elections and, in pursuance of that grant of power, is authorized to exercise those powers granted to a county board of elections by R.C. Title 35. R.C. 3501.11; *see also* 1986 Op. Att'y Gen. No. 86-077 at 2-429. The responsibilities of a county board of elections include, but are not limited to, establishing election precincts, R.C. 3501.11(A); fixing and providing the places for registration of voters and for holding primaries and elections, R.C. 3501.11(B); providing for the purchase, preservation, and maintenance of election fixtures and

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Ohio Laws, Part II, 2742 (Am. Sub. H.B. 439, eff. July 9, 1982) (authorizing the creation and operation of port authorities under R.C. 4582.21 through R.C. 4582.59). Hence, 1960 Op. Att'y Gen. No. 1158, p. 111 specifically concerned port authorities operated under R.C. 4582.01 through R.C. 4582.20.

equipment used in registration, nominations, and elections, R.C. 3501.11(C); advertising and contracting for the printing of all ballots and supplies used in registrations and elections, R.C. 3501.11(F); providing for the issuance of all notices, advertisements, and publications concerning elections, R.C. 3501.11(G); reviewing, examining, and certifying the sufficiency and validity of petitions and nomination papers, R.C. 3501.11(K); receiving the returns of elections, canvassing the returns, making abstracts thereof, and transmitting such abstracts to the proper authorities, R.C. 3501.11(L); and issuing certificates of election on forms to be prescribed by the secretary of state, R.C. 3501.11(M). Since the two positions about which you ask serve different appointing authorities and operate independently of each other, neither position controls the other. See 1989 Op. Att'y Gen. No. 89-052 at 2-219. See generally *Pistole v. Wiltshire*, 22 Ohio Op. 2d 464, 467, 189 N.E.2d 654, 657-58 (C.P. Scioto County 1961) (a township trustee is responsible to the people who elected him and a deputy sheriff is responsible to the county sheriff who appointed him; neither position is subordinate to the other).

There is a possibility, however, that the position of member of the county board of elections could act as a check upon the position of member of the board of directors of a port authority. Under R.C. 4582.14, the board of directors of a port authority is required to "be the taxing authority within sections 5705.01 and 133.10 of the Revised Code." In accordance with this responsibility, the board of directors may, on behalf of the port authority, issue bonds or notes in compliance with R.C. Chapter 133, R.C. 4582.06(D), or levy upon the property within its jurisdiction a tax, R.C. 4582.14. R.C. Chapter 133 bonds and notes may not be issued, nor a tax levied, however, unless the electors residing within the territory of the port authority authorize, pursuant to a vote, such action. See R.C. 4582.06(D); R.C. 4582.14.

As indicated above, it is the duty of a county board of elections to make all the necessary arrangements for the submission of issues<sup>3</sup> to the electors. See R.C. 3501.11; see also R.C. 3505.06. See generally R.C. 3501.02(F) ("[a]ny question or issue, except a candidacy, to be voted upon at an election shall be certified, for placement upon the ballot, to the board of elections not less than seventy-five days before the day of the election"). If a county board of elections is required to submit issues to the electors of the political subdivisions creating and comprising a port authority, the county board of elections would be required to make the arrangements for the submission of the port authority's R.C. Chapter 133 bond and note, and tax issues to the electors. Hence, in this respect, the position of member of the county board of elections may be a check upon the position of member of the board of directors of a port authority.

In 1974 Op. Att'y Gen. No. 74-006, my predecessor examined this very type of subordination problem while determining the compatibility of the positions of member of a board of education and member of a board of elections. In determining that the position of member of the board of elections does not act as a check upon the position of member of a board of education, my predecessor reasoned as follows:

The second area of contact between the two boards involves the submission of issues to the electors for approval. These issues include tax levies in excess of the ten-mill limitation, the approval of bond issues, and a variety of proposals to change boundaries of existing school districts, or to create new districts. The duty of a board of elections in such cases is to make all the "necessary arrangements" for the submission of the question to the electors. See for example R.C. 5705.21, R.C. 5705.25, and R.C. 3311.20 through R.C. 3311.38. However, I find nothing in these or other statutes which would authorize a board of elections to make a determination of the correctness or wisdom of a proposal of a board of education. Rather,

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<sup>3</sup> "As used in the sections of the Revised Code relating to elections... 'issue' means any... issue certified in accordance with the Revised Code for placement on an official ballot at a general or special election to be held in this state." R.C. 3501.01(M).

the primary concern of a board of elections is to insure that the issues are properly presented on the ballot and that the election is conducted efficiently. R.C. 3501.11.

Op. No. 74-006 at 2-24; *see also* 1964 Op. Att'y Gen. No. 897, p. 2-97; 1952 Op. Att'y Gen. No. 1730, p. 594.

In accordance with the reasoning of my predecessor in Op. No. 74-006, I find that a county board of elections is not required to make a determination as to the merits of the issues of bond or note issuance under R.C. Chapter 133 or the levying of a tax proposed by a port authority, but rather is statutorily charged with the limited duty of properly presenting these issues to the electors. *See* R.C. 3501.11; *cf. State ex rel. Schultz v. Cuyahoga County Bd. of Elections*, 50 Ohio App. 2d 1, 6, 361 N.E.2d 477, 481 (Cuyahoga County 1976) (a "board of elections has no power to determine that an issue should not be placed on the ballot because if passed it would be unconstitutional or otherwise illegal"), *aff'd per curiam*, 48 Ohio St. 2d 173, 357 N.E.2d 1079 (1976); *State ex rel. McGovern v. Board of Elections of Cuyahoga County*, 24 Ohio Misc. 135, 136, 263 N.E.2d 586, 587 (C.P. Cuyahoga County 1970) (the powers of a board of elections do not include the "power or right to make judicial determinations of the legality or nonlegality of issues to be presented to the people. If in fact the proposed charter amendment was duly passed by council and procedural requirements were met before its submission to the board of elections, the board was duty bound to put it on the ballot for a vote of the people"). I, therefore, find that the position of member of the county board of elections does not operate as a check upon the position of member of the board of directors of a port authority.

Question number four asks whether it is physically possible for one individual to discharge the duties of both positions. This question requires an inquiry into the time demands of each position; hence it is a factual question which can best be answered by the interested parties. 1988 Op. Att'y Gen. No. 88-020 at 2-78; Op. No. 79-111 at 2-373. *See generally* 1983 Op. Att'y Gen. No. 83-057 at 2-232 ("[t]his office is not equipped to serve as a fact-finding body.... I shall not attempt to make final determinations where issues of fact are involved").

Question number five asks whether there is a conflict of interest between the two positions. An individual may not hold two public positions if he would be subject to conflicting loyalties or subject to the temptation of acting other than in the best interest of the public. 1985 Op. Att'y Gen. No. 85-042 at 2-150; *see also* Op. No. 79-111 at 2-371 and 2-372. I am not aware of a situation which would place an individual holding the positions of member of the county board of elections and member of the board of directors of a port authority in a position of conflicting interests.

The sixth and seventh questions concern the applicability of state and federal departmental regulations, and local departmental regulations, charter provisions, and ordinances. I note that I am unaware of any state or federal regulation inhibiting an individual from simultaneously holding the positions of member of the county board of elections and member of the board of directors of a port authority. The question of whether there is an applicable local departmental regulation, charter provision, or ordinance is of a local concern and must be determined on a case by case basis. Op. No. 89-052 at 2-220; Op. No. 79-111 at 2-368. Hence, for purposes of this opinion, I assume that there are no local departmental regulations, charter provisions, or ordinances which would prevent the simultaneous holding of the positions with which you are concerned.

Based upon the foregoing, it is my opinion, and you are hereby advised, that an individual may serve simultaneously as a member of the county board of elections and member of the board of directors of a port authority operating under R.C. 4582.01-20, provided that such simultaneous service does not constitute a violation of a local departmental regulation, charter provision, or ordinance.