

OPINION NO. 88-011**Syllabus:**

The positions of member of a board of county commissioners and member of a board of education of a local school district located in whole or in part within the same county are incompatible.

To: William M. Owens, Coshocton County Prosecuting Attorney, Coshocton, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, March 29, 1988

I have before me your request for my opinion on whether an individual may simultaneously serve as a member of a board of county commissioners and as a member of a board of education of a local school district lying almost wholly within the same county.

Discussions with your staff reveal that the school district in question lies primarily within Coshocton County, with a portion in an adjoining county. The school district does not comprise the majority of Coshocton County. In your letter of request, you ask whether 1940 Op. Att'y Gen. No. 3088, vol. II, p. 1036, governs this situation. In that opinion, one of my predecessors concluded that the position of county commissioner was incompatible with the position of a member of a board of education of a rural school district within the same county.¹ You also ask whether the question of the compatibility of the two positions may be resolved by application of the principles set forth in 1979 Op. Att'y Gen. No. 79-111. The compatibility analysis laid out by my predecessor in Op. No. 79-111 at 2-367 asks seven questions:

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?

I have consistently followed these principles in analyzing issues of compatibility. *See, e.g.*, 1987 Op. Att'y Gen. No. 87-013.

The questions posed by my predecessor in Op. No. 79-111 embody the common law principles of compatibility. My predecessor's discussion of the question which asks whether a conflict exists between the two positions listed several factors to be considered in determining whether a potential conflict might render the positions incompatible. The factors include "the degree of remoteness of a potential conflict, the ability or inability of an individual to remove himself from the conflict, whether the individual exercises decision-making authority in both positions, whether the potential conflict involves the primary functions of each position, and

¹ The rural school district no longer exists. That classification, which was contained in G.C. 4679, was not included in the General Code when the law dealing with the public schools was revised in 1943. 1943-44 Ohio Laws 475 (H.B. 217, eff. June 17, 1943). *See* 1949 Op. Att'y Gen. No. 398, p. 131.

whether the potential conflict may involve budgetary controls." Op. No. 79-111 at 2-372. You have asked that I weigh these factors in reconsidering 1940 Op. No. 3088.

In your letter, you state that the school board position in question is that of member of a board of education of a local school district. Local school districts are those other than city, exempted village, county or joint vocational school districts. See R.C. 3311.03. An exempted village or city school district which declares itself to be supervised by the county board of education pursuant to R.C. 3311.09 may also be known as a local school district. Boards of education of local school districts are given broad authority over management of public schools in the district, especially in regard to budgetary matters. See R.C. 3313.01, R.C. 3313.17-.203. R.C. 133.01 and R.C. 5705.01 designate the board of education as the taxing authority for the school district.

The board of county commissioners has authority over county budgetary matters by virtue of R.C. 5705.01 which designates the board of county commissioners as the "taxing authority" of the county for purposes of R.C. Chapter 5705.² Moreover, the county commissioners control expenditures from the county treasury. See generally 1986 Op. Att'y Gen. No. 86-024. See R.C. 319.16 ("[t]he [county] auditor shall not issue a warrant for the payment of any claim against the county, unless it is allowed by the board of county commissioners"); R.C. 307.55 ("[n]o claims against the county shall be paid otherwise than upon the allowance of the board of county commissioners, upon warrant of the county auditor").

Under R.C. 5705.28 the taxing authority of each subdivision is bound to adopt a proposed tax budget for the subdivision, and submit it, through the county auditor, to the county budget commission. See R.C. 5705.30. The county budget commission examines the tax budget submitted by the taxing authority, and, pursuant to R.C. 5705.31, adjusts the estimated amounts in order to bring the tax levies required within the limits of the law. Once the levies are adjusted, the budget commission certifies the tax levies for each subdivision to the taxing authority. See R.C. 5705.34.

When an individual who is a member of both the school board and the board of county commissioners appears before the budget commission in his or her capacity as a member of one taxing authority, a conflict may result since there is a limited pool of funds to which each board may make claim. That conflict was the basis for the finding of incompatibility in 1940 Op. No. 3088, the opinion referred to in your letter.³ While the statutory scheme has been amended over the decades, thereby altering the circumstances of the taxing authorities and the discretionary powers of the county budget commission, instances of conflict before the budget commission may still arise.

Political subdivisions are subject to certain limitations on their authority to impose unvoted property taxes. Article XII, §2 of the Ohio Constitution provides that property may not be taxed in excess of one percent of its true value without a vote. This constitutional limitation has been codified in R.C. 5705.02 which states:

The aggregate amount of taxes that may be levied on any taxable property in any subdivision or other taxing unit shall not in any one year exceed ten mills on each dollar of tax valuation of such

² R.C. 5705.01(A) defines both the county and a school district other than a county school district as "subdivisions" for purposes of Chapter 5705.

³ Historically, conclusions of incompatibility of office have been reached involving the positions of various school board members and the office of member of the board of county commissioners due to conflicts before the budget commission. See 1945 Op. Att'y Gen. No. 104 at 56; 1928 Op. Att'y Gen. No. 2975, vol. IV, at 2777.

subdivision or other taxing unit, except for taxes specifically authorized to be levied in excess thereof.

This limit on the total unvoted tax is known as the "ten-mill limitation," sometimes referred to as "inside millage." 1979 Op. Att'y Gen. No. 79-063. Each subdivision is allocated a portion of that levy according to a formula set forth in R.C. 5705.31(D). R.C. 5705.31(D) requires that the budget commission ascertain and authorize without modification:

A minimum levy within the ten-mill limitation for the current expense and debt service of each subdivision or taxing unit, which shall equal two-thirds of the average levy for current expenses and debt service allotted within the fifteen-mill limitation to such subdivision or taxing unit during the last five years the fifteen-mill limitation was in effect unless such subdivision or taxing unit requests an amount requiring a lower rate. Except as provided in section 5705.312 of the Revised Code, if the levies required in divisions (B) and (C) of this section for the subdivision or taxing unit equal or exceed the entire minimum levy of the subdivision as fixed, the minimum levies of the other subdivisions or taxing units shall be reduced by the commission to provide for the levies and an operating levy for the subdivision. Such additional levy shall be deducted from the minimum levies of each of the other subdivisions or taxing units, but the operating levy for a school district shall not be reduced below a figure equivalent to forty-five per cent of the millage available within the ten-mill limitation after all the levies in divisions (B) and (C) of this section have been provided for.

Under R.C. 5705.31, a minimum portion of the tax levied within the ten-mill limitation is guaranteed to the board of education. When, by combination of taxing districts, the minimum levies prescribed by R.C. 5705.31(D) exceed the ten-mill limitation, it becomes the duty of the county budget commission to reduce these levies proportionately to bring their aggregate within the limitation. Although there is a bottom limit or "floor", equivalent to forty-five percent of the millage available within the ten mill limitation after providing for all of the levies in R.C. 5705.31(B) and (C), the extent to which the school levy funds may be reduced is a matter which could be argued by the board members before the commission. In the event that the commission reduces the millage for a particular subdivision, members of the county commissioners and members of the school board would both be in the position of arguing that their budgets need not be reduced. This presents a conflict.

In an opinion by my predecessor it was noted that "while each taxing authority submits a tentative budget it is the budget commission which actually allocates money to the various subdivisions, after adjusting the rates of taxation, fixing the amount of taxes to be levied, and adjusting the estimates of balances and receipts from available sources." 1981 Op. Att'y Gen. No. 81-010 at 2-33. I took note of this observation in 1985 Op. Att'y Gen. No. 85-006, at 2-17, stating that "it might, therefore, be argued that the mere fact that two bodies have their budgets reviewed by the county budget commission is not sufficient to make membership in the two bodies incompatible." I should note however, that while the funds which might be in dispute may be limited, a potential dispute before the budget commission has long been held to be a basis for a finding of incompatibility, since inconsistent loyalties may result. See 1928 Op. Att'y Gen. No. 2975, vol. IV, p. 2777 (holding that the offices of county commissioner and member of a rural school district are incompatible). Thus, your situation raises a potential conflict with regard to distribution of a limited pool of funds, in this case inside millage, generated by the unvoted property tax.

Moreover, since the board of education and the board of county commissioners described in your letter are taxing authorities for partially coextensive subdivisions, I am fearful that an additional budgetary conflict might arise beyond the potential conflict over inside millage. Both boards, as taxing authorities, have the power to place a levy on the ballot for taxes in excess of the ten mill limitation. R.C. 5705.07. See also R.C. 5705.19, R.C. 5705.191, and R.C.

5705.21. In addition to their authority to put a levy on the ballot for the general purposes described in R.C. 5705.19, R.C. 5705.191, and R.C. 5705.21 both boards have the authority to place a special levy on the ballot. The board of county commissioners is empowered to submit to the electorate special levies for support of supplemental appropriations or additional funds for the county hospital pursuant to R.C. 5705.22, for community mental health services pursuant to R.C. 5705.221, or for children services pursuant to R.C. 5705.24. The school board may determine that an additional tax is necessary to avoid an operating deficit, pursuant to R.C. 5705.194. In addition, both boards are empowered to submit to the electors of the subdivision the question of issuing bonds pursuant to R.C. Chapter 133. See R.C. 133.09; R.C. 133.24 (permitting the taxing authority of any subdivision to submit a bond issue to the voters). R.C. 133.05, R.C. 133.06, and R.C. 133.061 permit notes and bonds to be issued by the counties for county needs. Similarly, under R.C. 133.04, R.C. 133.041, R.C. 133.301, and 133.302 a school district may issue notes and bonds.

In a situation in which both subdivisions contemplate going to the electorate for a levy or bond issue for additional funds, an individual sitting on the taxing authority of both subdivisions might find himself torn by divided loyalties. For example, where the school board has authorized a levy for additional funds, an individual who is also a member of the board of county commissioners might hesitate to approve placing a county levy on the ballot for fear that the voters in the local school district would reject the school levy in favor of the county levy. Questions of competing concerns before the electorate may be critical to determining whether or when a board might consider bringing requests for additional taxes before the voters, particularly requests for special levies. Therefore, a potential conflict exists over competition for funds generated by taxes in excess of the ten mill limitation, as well as by competition for funds generated by inside millage.

There are other possible conflicts between the two positions in addition to the potential budgetary and taxing conflicts. For example, a conflict would arise if the county and local school district contract with one another. R.C. 307.15 permits a board of county commissioners to contract with legislative authorities of other subdivisions, including school districts.⁴ Under such contracts, the board of county commissioners may "exercise any power, perform any function, or render any service, in behalf of the contracting subdivision or legislative authority, which said subdivision or legislative authority may exercise...." *Id.* In a similar fashion, the board of education of a local school district is empowered by R.C. 3313.59 to make agreements with boards of county commissioners or other public officials having custody and management of public parks, libraries, museums and public buildings. These cooperative agreements also represent a potential conflict for an individual.

In Op. No. 79-111, my predecessor noted that the mere possibility of a conflict does not automatically render two positions incompatible. Rather the gravity of the potential conflict must be weighed in light of "[t]he degree of remoteness of a potential conflict, the ability or inability of an individual to remove himself from the conflict, whether the individual exercises decision-making authority in both positions, whether the potential conflict involves the primary functions of each position, and whether the potential conflict may involve budgetary controls." Op. No. 79-111 at 2-372. In applying these factors to this situation I am constrained to conclude that the positions are incompatible. The potential conflict over competition for funds and possible budget decisions could arise each year, since the budget and its funding are matters which come before both the board of education and the board of county commissioners on an annual basis. Since there are only three members of the board of county commissioners, R.C. 305.01, and five members of a board of education, R.C. 3313.01, it would, as a practical matter, be difficult for the individual to remove himself from the conflict by abstaining from taxing and budgetary matters. Significantly, the conflict over budgetary matters

⁴ R.C. 307.14(A) defines the legislative authority as the board of county commissioners, board of township trustees, or the board, council or commission of a contracting subdivision, as used in R.C. 307.14-.19.

concerns a primary function of both boards. Finally, members of both boards have discretionary authority over the matters in conflict. Having concluded that the conflict over budgetary matters renders the positions incompatible, I need not address whether the potential conflict which would arise under a contract or agreement between the school district and the county is sufficient, in itself, to render the positions incompatible.

Therefore, it is my opinion, and you are so advised, that the positions of member of a board of county commissioners and member of a board of education of a local school district located in whole or in part within the same county are incompatible.