

OPINION NO. 2004-030**Syllabus:**

Pursuant to R.C. 120.39(C), the positions of municipal court magistrate and member of a county public defender commission are incompatible.

To: Rebecca Ferguson, Preble County Prosecuting Attorney, Eaton, Ohio
By: Jim Petro, Attorney General, August 25, 2004

You have requested an opinion whether the positions of municipal court magistrate and member of a county public defender commission are compatible. For the reason that follows, these two positions are incompatible.

Two public positions are incompatible, if, *inter alia*, the empowering statutes of either of the positions limit a person from being employed in another position or holding another public office. 2001 Op. Att'y Gen. No. 2001-009 at 2-53; 1999 Op. Att'y Gen. No. 99-036 at 2-231; 1989 Op. Att'y Gen. No. 89-069 at 2-321. R.C. 120.39(C) states that, "no judge or court employee shall serve on ... any county or joint county public defender commission."¹ This statute unequivocally prohibits a person who is a "court employee" from serving on any county public defender commission.

A municipal court magistrate is appointed by a court.² Ohio R. Civ. P. 53(A); Ohio R. Crim. P. 19(A); Ohio Traf. R. 14(A); Ohio Sup. R. 19; *see also* R.C. 1925.01(B).³ *See generally* Ohio Sup. R. 8(B) (each municipal court "shall adopt a local rule of court governing appointments made by the court"). The compensation and duties of a municipal court magistrate are established by the court. Ohio R. Civ. P. 53(B)-(C); Ohio R. Crim. P. 19(B)-(C); *see* R.C. 1925.01(B); Ohio Traf. R. 14; Ohio Sup. R. 19. A municipal court magistrate exercises various judicial powers on behalf of the court that appoints him, including the power to rule on motions, hear cases, issue subpoenas for the attendance of witnesses and the production of evidence, rule upon the admissibility of evidence, and enter orders in criminal and civil proceedings.⁴ Ohio R. Civ. P. 53(C); Ohio R. Crim. P. 19(C); 1996 Op. Att'y

¹Pursuant to R.C. 120.13, a board of county commissioners may establish a county public defender commission. The duties of this commission include, but are not limited to, appointing a county public defender, determining the qualifications and size of the county public defender's support staff and facilities, recommending to the board of county commissioners an annual operating budget, and entering into contracts to provide legal representation to indigent criminal defendants. R.C. 120.14.

²Prior to 1995, "magistrates" were titled "referees." 2001 Op. Att'y Gen. No. 2001-009 at 2-54 n.1; 1996 Op. Att'y Gen. No. 96-024 at 2-86.

³The Ohio Rules of Civil Procedure, Ohio Rules of Criminal Procedure, Ohio Traffic Rules, and Rules of Superintendence for the Courts of Ohio are applicable in all municipal courts. Ohio R. Civ. P. 1(A); Ohio R. Crim. P. 1(A); Ohio Traf. R. 1(A); Ohio Sup. R. 1(A).

⁴Although a municipal court magistrate is permitted to exercise certain judicial powers, a magistrate is not a judge except for the limited purpose of complying with the Ohio Code of Judicial Conduct. *See* 1996 Op. Att'y Gen. No. 96-062 at 2-253 n.1; *see also* Ohio Code of Judicial Conduct, Compliance Section (a magistrate is a judge for the purpose of the Ohio Code of Judicial Conduct). By law the positions of municipal court judge and municipal court magistrate are separate and distinct. *Compare* R.C. 1901.07 (providing for the election

Gen. No. 96-024 at 2-86; *see* 1992 Op. Att’y Gen. No. 92-041 at 2-163 n.3; 1990 Op. Att’y Gen. No. 90-089 at 2-381 and 2-382. A municipal court magistrate thus holds a paid position with the municipal court that appoints him.

The General Assembly has not defined the word “employee” for purposes of R.C. 120.39(C). It is a fundamental rule of statutory construction that, absent a specialized meaning, whether by legislative definition or otherwise, words must be read in context and construed according to the rules of grammar and common usage. R.C. 1.42. In common, everyday language a person who is appointed by and holds a paid position with a court is a court employee. *See generally Webster’s New World Dictionary* 459 (2nd college ed. 1986) (an “employee” is “a person hired by another, or by a business firm, etc., to work for wages or salary”). Moreover, the context in which it is used indicates that the General Assembly intended for “employee,” as used in R.C. 120.39(C), to be accorded its common, everyday meaning. *See generally* 1990 Op. Att’y Gen. No. 90-014 at 2-58 n.2 and 2-59 n.3 (the meaning of the word “employee” is determined by the context in which it is used); 1981 Op. Att’y Gen. No. 81-049 at 2-191 (“[t]he controlling test for whether a person is an employee for the purposes of R.C. 124.39 is whether the person meets the requirements set forth in R.C. 124.01(F)”) (overruled, in part, on other grounds by 1990 Op. Att’y Gen. No. 90-014); 1981 Op. Att’y Gen. No. 81-046 at 2-182 n.5 (whether a particular person is viewed as an employee depends upon the context in which that term is used); 1980 Op. Att’y Gen. No. 80-065 at 2-261 (a person is an employee for purposes of R.C. 124.38 when he meets the requirements set forth in R.C. 124.01) (overruled, in part, on other grounds by 1990 Op. Att’y Gen. No. 90-014).

R.C. 120.39(C) expressly provides: “No prosecuting attorney, city director of law or similar officer or their assistants and employees, and no judge or court employee shall serve on the state public defender commission, or any county or joint county public defender commission.” The purpose of this provision is to prevent a member of a public defender commission from holding another public position that has duties and responsibilities that conflict with the duties and responsibilities imposed upon that person as a commission member. *See generally* 2001 Op. Att’y Gen. No. 2001-027 at 2-153 (“[a] person is prohibited from holding two public positions simultaneously if he would be subject to divided loyalties and conflicting duties or be exposed to the temptation of acting other than in the best interest of the respective agencies or offices he serves”).

of municipal court judges) and R.C. 1901.08 (establishing the “number of, and the time for election of,” municipal court judges) with Ohio R. Civ. P. 53 (establishing the position of municipal court magistrate) and Ohio R. Crim. P. 19 (same) and Ohio Traf. R. 14 (same) and Ohio Sup. R. 19(A) (“[a]ll municipal courts having more than two judges shall appoint one or more magistrates”). In addition, the judicial powers conferred upon a municipal court magistrate are not conterminous with a municipal court judge’s powers, but rather, are subject to the specifications and limitations established by the court that appoints him. Ohio R. Civ. P. 53(C); Ohio R. Crim. P. 19(C); *see* 1972 Op. Att’y Gen. No. 72-073 at 2-293. The primary purpose of a municipal court magistrate is to assist judges in the disposition of cases, and, as such, a magistrate’s decision in a case is not binding upon the parties in the case until it is adopted by the court. Ohio R. Civ. P. 53(E); Ohio R. Crim. P. 19(E); *see* Ohio Traf. R. 14(C); *see* 1996 Op. Att’y Gen. No. 96-062 at 2-253 n.1. A municipal court magistrate thus serves the judges of the court that appoint him, and is not himself a judge of that court. 1996 Op. Att’y Gen. No. 96-062 at 2-253 n.1.

A review of the powers and duties of public defender commissions discloses that these commissions are responsible for overseeing the provision of legal representation to indigents in criminal proceedings. *See* R.C. 120.03; R.C. 120.06; R.C. 120.13-.16; R.C. 120.23-.26. *See generally* 1979 Op. Att’y Gen. No. 79-084 (syllabus, paragraph one) (“[m]embers of a county or joint county public defender commission ... are invested with independence in the exercise of sovereign functions of the state”). Prosecuting attorneys, city law directors, and other similar officers are required to prosecute persons accused of violating provisions of the state criminal code or municipal ordinances that impose criminal penalties. *See* R.C. 309.08; R.C. 733.51-.52; R.C. 1901.34; R.C. 2938.13. Judges and other court officers are required to mete out justice in criminal proceedings in a fair and impartial manner. *See* Ohio Code of Judicial Conduct Canon 3. Hence, with respect to criminal proceedings, the primary responsibilities and objectives of public defender commissions, prosecutory officials, and court officials are distinctly different.

In order to preserve the integrity and independence of public defender commissions in carrying out their responsibilities vis-à-vis prosecutory officials and the courts, the General Assembly has determined that no employee of a prosecuting agency or a court shall serve upon a public defender commission. The context in which the word “employee” is used indicates that the General Assembly intended the word “employee,” as used in R.C. 120.39(C), to be accorded its common, everyday meaning. *See generally State ex rel. Antonucci v. Youngstown City School Dist. Bd. of Educ.*, 87 Ohio St. 3d 564, 565, 722 N.E.2d 69 (2000) (the “paramount concern in construing a statute is the legislative intent in its enactment”). R.C. 120.39(C), therefore, prohibits a person who holds any paid position with a prosecuting agency or court from serving on a public defender commission.

As previously stated, a municipal court magistrate holds a paid position with the municipal court that appoints him. A municipal court magistrate thus is a court employee for purposes of R.C. 120.39(C), and so is ineligible to serve as a member of a county public defender commission.⁵

⁵In a variety of circumstances, the common law recognizes a difference between “officers” and “employees.” *See, e.g., State ex rel. Newman v. Skinner*, 128 Ohio St. 325, 191 N.E. 127 (1934) (a public officer is not an employee); 1990 Op. Att’y Gen. No. 90-014 at 2-58 and 2-59 (“[t]he definition of ‘employee’ currently appearing in R.C. 124.01(F) and the contrasting usage of ‘offices’ and ‘positions’ in definitions relating to civil service have long been part of Ohio law. With few exceptions, those provisions have been read as excluding from the term ‘employee’ both elected officers and certain appointed officials” (citations and footnote omitted)); 1980 Op. Att’y Gen. No. 80-065 at 2-261 (“an ‘employee’ has generally been considered as differing from an ‘officer’”) (overruled, in part, on other grounds by 1990 Op. Att’y Gen. No. 90-014); 1980 Op. Att’y Gen. No. 80-035 at 2-148 (“[p]ublic officers are not ‘employees’ in the traditional sense since they are not subject to supervisory control in the manner in which they execute their duties”); 1979 Op. Att’y Gen. No. 79-084 at 2-269 (“a long line of cases has held that the phrase ‘public officer’ is a term of art separate and distinct from a ‘public employee,’ when used in a statute or the constitution”). This difference was succinctly explained in 1991 Op. Att’y Gen. No. 91-001 at 2-3 n.2 as follows:

The most important distinction between an office and an employment is the nature of the duties involved. “If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office and not an employment.” *State ex rel. Landis v. Board of Comm’rs*, 95 Ohio St. 157, 159, 115 N.E. 919, 919 (1917). The statutory duties imposed must

Based on the foregoing, it is my opinion, and you are hereby advised that, pursuant to R.C. 120.39(C), the positions of municipal court magistrate and member of a county public defender commission are incompatible.

constitute part of the sovereignty of the state, which has been defined to include independent duties in relation to the exercise of the police power, independent power in the disposition of public property, power to incur financial obligations upon the government, and the power to act on behalf of the government in transactions between it and individuals. *Id.* at 160-61, 115 N.E. at 920. In contrast, a mere employment is characterized by lack of control over governmental actions taken or over public property, other than to use it as required in the course of employment. Employees “are subject on all occasions and in whatever they do in the course of their employment, to the direction and control of [a superior].” *State ex rel. Attorney General v. Jennings*, 57 Ohio St. 415, 426, 49 N.E. 404, 406 (1898). (Citations omitted.)

The common-law distinction between “officers” and “employees” is not relevant, however, when the context of a statute indicates that the word “employee” is to be construed broadly so as to include any paid position. *See* 1990 Op. Att’y Gen. No. 90-014 at 2-58 n.2 and 2-59 n.3; 1981 Op. Att’y Gen. No. 81-049 at 2-191 (overruled, in part, on other grounds by 1990 Op. Att’y Gen. No. 90-014); 1981 Op. Att’y Gen. No. 81-046 at 2-182 n.5. Because the context in which the word “employee” is used in R.C. 120.39(C) indicates a legislative intent to include any paid position with a prosecuting agency or court, it does not matter whether the position of municipal court magistrate is classified as an officer or employee under the common law. *See* 1981 Op. Att’y Gen. No. 81-049 at 2-191 (a person is an employee for purposes of R.C. 124.39 when he meets the requirements set forth in R.C. 124.01(F), irrespective of the fact that he is classified as a public officer under common-law principles); 1980 Op. Att’y Gen. No. 80-065 at 2-261 (the “category [of persons defined as employees for purposes of R.C. Chapter 124] may easily contain some individuals who are public officers” under common-law principles).