

July 10, 2017

The Honorable Steven D. Barnett  
Carroll County Prosecuting Attorney  
7 East Main Street  
Carrollton, Ohio 44615

SYLLABUS:

2017-021

A person appointed by a board of township trustees as a township highway superintendent may serve simultaneously as a member of a board of township trustees of another township within the same county provided that no contract exists between the townships. If the salary of the township highway superintendent is paid completely, directly or indirectly, by federal loans or grants, and the township highway superintendent is a “State or local officer or employee” as defined in 5 U.S.C.A. § 1501(4) (Thomson Reuters 2017) and 5 C.F.R. § 151.101(d) (2016), a person may serve simultaneously in these two positions only if the person seeks election to the office of member of a board of township trustees in a nonpartisan election.



# MIKE DEWINE

★ OHIO ATTORNEY GENERAL ★

Opinions Section  
Office 614-752-6417  
Fax 614-466-0013  
30 East Broad Street, 15<sup>th</sup> Floor  
Columbus, Ohio 43215  
[www.OhioAttorneyGeneral.gov](http://www.OhioAttorneyGeneral.gov)

July 10, 2017

OPINION NO. 2017-021

The Honorable Steven D. Barnett  
Carroll County Prosecuting Attorney  
7 East Main Street  
Carrollton, Ohio 44615

Dear Prosecutor Barnett:

We have received your request whether a person appointed by a board of township trustees as a township highway superintendent may serve simultaneously as a member of a board of township trustees of another township within the same county.<sup>1</sup> Whether two public offices or positions are compatible depends upon the answers to the following seven questions:

1. Is either position in the classified civil service of the state, a county, a city, a city school district, or a civil service township as defined in R.C. 124.57?
2. Do any constitutional provisions or the governing statutes of either position prohibit or otherwise limit employment in another public position or the holding of another public office?
3. Is one of the positions subordinate to, or in any way a check upon, the other?
4. Is it physically possible for one person to perform the duties of both positions?
5. Is there a conflict of interest between the two positions?
6. Are there any controlling local charter provisions, resolutions, or ordinances?
7. Does a federal, state, or local departmental regulation prevent a person from holding both positions?

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<sup>1</sup> In this instance, the person serving as the township highway superintendent for Center Township, Carroll County is considering seeking election to the board of township trustees of Harrison Township, Carroll County.

See 2014 Op. Att’y Gen. No. 2014-045, at 2-391 (“[a] seven-question compatibility test is used to determine whether a person may serve simultaneously in multiple public positions”); 2004 Op. Att’y Gen. No. 2004-019, at 2-153 to 2-154 (setting forth the seven-part compatibility test); 1979 Op. Att’y Gen. No. 79-111, at 2-367 to 2-368 (the seven-part compatibility test applies to the simultaneous holding of a public office and a public employment by the same person). All of these questions “must yield answers in favor of compatibility in order to conclude that two positions are compatible.” 2013 Op. Att’y Gen. No. 2013-008, at 2-78.

### **Question One: Classified Civil Service**

The first question of the compatibility analysis asks whether either of the two positions in question is in the classified civil service of “the state, the several counties, cities, and city school districts of the state, or the civil service townships of the state” within the meaning of R.C. 124.57.<sup>2</sup> R.C. 124.57(A); see also 2006 Op. Att’y Gen. No. 2006-041, at 2-394. R.C. 124.57(A) states that an officer or employee in the classified civil service of “the state, the several counties, cities, ... city school districts ... or the civil service townships of the state,” shall not “be an officer in any political organization or take part in politics other than to vote ... and to express freely political opinions.” R.C. 124.57(A) “prohibits an officer or employee in the classified service from seeking election or appointment to, or holding, a partisan political office, or engaging in other partisan political activities, and it prevents a partisan political officeholder from serving simultaneously as an officer or employee in the classified service.” 2006 Op. Att’y Gen. No. 2006-041, at 2-394 to 2-395 (quoting 2003 Op. Att’y Gen. No. 2003-041, at 2-336).

R.C. 124.57(A) restricts partisan political activity for only those officers or employees in the classified civil service “of the state, the several counties, cities, and city school districts ..., or the *civil service townships of the state*.” (Emphasis added.) Officers or employees of a township that is not a civil service township are not prohibited by R.C. 124.57(A) from participating in partisan political activity. 2003 Op. Att’y Gen. No. 2003-041, at 2-337 (“[R.C. 124.57] does not apply ... to officers and employees in the service of a township that is not a civil service township”). A “civil service township” is “any township with a population of ten thousand or more persons residing within the township and outside any municipal corporation, which has a police or fire department of ten or more full-time paid employees and which has a civil service commission established under [R.C. 124.40(B)].” R.C. 124.01(G). In this instance, neither the township in which the person serves as township highway superintendent nor the township for which the person is considering seeking election as a member of the board of township trustees is

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<sup>2</sup> The civil service in Ohio is divided into the classified and unclassified service. R.C. 124.11; see also Ohio Const. art. XV, § 10. An individual employed in the classified civil service possesses a statutory claim of qualified entitlement to continued employment, see R.C. 124.23, R.C. 124.34, whereas an individual employed in the unclassified civil service may be dismissed without cause, provided that the dismissal is not otherwise unlawful. See 1996 Op. Att’y Gen. No. 96-040, at 2-154.

a civil service township. Accordingly, the first question of the compatibility analysis may be answered in favor of compatibility.

**Question Two: Constitutional or Statutory Provisions that Prohibit or Limit Employment in another Public Position or Holding of another Public Office**

The second question of the compatibility analysis asks whether there are any constitutional provisions or statutes applicable to either position that prohibit or otherwise limit employment in another public position or the holding of another public office. *See generally* 2A Ohio Admin. Code 123:1-46-02(E) (“[e]mployees in the unclassified service of the state, are not prohibited from engaging in political activity unless specifically precluded by federal or state constitutional or statutory provisions”).

R.C. 511.13 prohibits a member of a board of township trustees “or any officer or employee thereof” from being “interested in any contract entered into by such board.” An impermissible interest in a contract with a township exists within the meaning of R.C. 511.13 when a person serving as an officer or employee of the township is employed by an entity that has entered into a contract with the township. *See* 2008 Op. Att’y Gen. No. 2008-002 (syllabus, paragraph 2) (“[a] trustee, officer, or employee of a township who is employed by an entity with which the township enters into a contract has an interest in the contract for purposes of R.C. 511.13, regardless of whether it can be demonstrated that the trustee, officer, or employee has a direct pecuniary or personal interest in the contract”). *Cf.* 1973 Op. Att’y Gen. No. 73-043, at 2-167 to 2-168. The person’s abstention from any discussions, negotiations, decision-making, or votes regarding the contract prior to its execution does not affect the application of R.C. 511.13 once a contract has been reached. *See* 2008 Op. Att’y Gen. No. 2008-002, at 2-12 to 2-13. When the board of township trustees for which the person serves as an officer or employee enters into a contract with an entity in which the person also is employed, the person has an impermissible interest in the contract within the meaning of R.C. 511.13 notwithstanding whether she abstained from the discussions, negotiations, decisions, and votes pertaining to the contract prior to its execution. *Id.* Thus, a person appointed by a board of township trustees as township highway superintendent who also serves simultaneously as a member of a board of township trustees in another township within the same county has a prohibited interest in a contract with either township, as proscribed by R.C. 511.13, if the two townships enter into a contract with each other.

In this matter we are not aware of any existing contracts that implicate R.C. 511.13 and thereby prohibit a person in this instance from serving as township highway superintendent or holding the office of member of a board of township trustees. Nevertheless, if, at a later date, the board of township trustees that appointed the township highway superintendent enters into a contract with the board of township trustees of which the township highway superintendent also serves as a member, the person serving simultaneously as township highway superintendent and member of a board of township trustees will find himself in violation of R.C. 511.13. *See* 2007 Op. Att’y Gen. No. 2007-044, at 2-440 to 2-441 (“if a person enters into an ongoing multi-year contract to supply a township with garage storage facilities ... and is subsequently elected to the

office of township trustee, the person is prohibited by R.C. 511.13 from serving as township trustee and continuing to have an interest in that ... contract.... Although some statutes that prohibit interests in public contracts specify the consequences that follow if public officials have an interest in contracts of the public bodies they serve, R.C. 511.13 does not specify the consequences of having an interest in a contract in violation of R.C. 511.13. Because no consequences are prescribed by statute, the trustees, county prosecuting attorney, and courts may have some discretion in determining how to address” a situation in which a township trustee has an interest in a contract in violation of R.C. 511.13 (footnote omitted)).

No other constitutional or statutory provisions limit the outside employment of a member of a board of township trustees or a township highway superintendent. Therefore, the second question of the compatibility analysis may be answered in favor of compatibility.

### **Question Three: Subordination and Control**

The third question of the compatibility analysis asks whether one of the positions is subordinate to, or in any way a check upon, the other. A member of a board of township trustees is an elected public officeholder. R.C. 505.01. As an elected official, a member of a board of township trustees is responsible to the electorate, and performs the duties imposed upon him by Ohio law. *See* 2014 Op. Att’y Gen. No. 2014-032, at 2-279 (“[a] township trustee, as an elected official, is responsible to the township’s electorate”). A township highway superintendent is appointed by a board of township trustees and serves “at the pleasure of the board.” R.C. 5571.02(C). In the maintenance and repair of roads, a township highway superintendent also is “subject to the general supervision and direction of the county engineer.” R.C. 5571.05. A township highway superintendent is not subordinate to a board of township trustees of another township. A township highway superintendent is only subordinate to the board of township trustees that employs him. Therefore, in this instance, the person serving as township highway superintendent is not accountable or subordinate to the board of township trustees to which he seeks election. Nor does a board of township trustees assign duties to, or supervise the activities of, a township highway superintendent appointed by a board of township trustees of another township. Comparably, the board of township trustees to which the township highway superintendent seeks election as a member also is not accountable or subordinate to the township highway superintendent. The township highway superintendent also is not responsible for assigning duties to, or supervising the activities of, the office of member of a board of township trustees. Accordingly, question three of the compatibility analysis may be answered in favor of compatibility.

### **Question Four: Physical Possibility**

The fourth question of the compatibility analysis asks whether it is physically possible for one person to perform the duties of both positions. “Whether an individual is physically able to adequately perform the duties of both positions is a question of fact which is best answered by the parties involved.” 1993 Op. Att’y Gen. No. 93-016, at 2-89. In 2004 Op. Att’y Gen. No.

2004-019, at 2-157 to 2-158, we offered the following guidance for determining whether a person is physically able to perform the duties of both positions:

[I]n order to serve simultaneously [in both positions], a person must be certain that he will be able to carry out the duties of both positions in a competent and timely manner. This means that there should not be a direct conflict between the times when the person is needed to perform duties on behalf [of both positions].

Without any evidence to the contrary, we will presume for the purpose of this opinion that one person is physically able to perform simultaneously the duties of township highway superintendent and the duties of a member of a board of township trustees.

### **Question Five: Conflict of Interest**

The fifth question of the compatibility analysis asks whether there is a conflict of interest between the two positions. A person may not hold two public positions simultaneously if a conflict of interest exists. 2012 Op. Att’y Gen. No. 2012-040, at 2-351. A conflict of interest exists if the duties and responsibilities of one position are of such a nature as to influence the duties and responsibilities of the other position, “‘thereby subjecting [the person] to influences which may prevent [the person’s] decisions from being completely objective.’”<sup>3</sup> 2006 Op. Att’y Gen. No. 2006-041, at 2-397 (quoting 1980 Op. Att’y Gen. No. 80-035, at 2-149); *see also* 1993 Op. Att’y Gen. No. 93-016, at 2-89; 1979 Op. Att’y Gen. No. 79-111, at 2-371. As explained in 1979 Op. Att’y Gen. No. 79-111, at 2-371 (quoting 1970 Op. Att’y Gen. No. 70-168, at 2-336):

[O]ne in the public service “owes an undivided duty to the public. It is contrary to public policy for a public officer to be in a position which would subject him to conflicting duties or expose him to the temptation of acting in any manner other than the best interest of the public.”

Whether a person serving simultaneously as a township highway superintendent of one township and as a member of a board of township trustees of another township within the same county is subject to a conflict of interest requires an examination of the duties and responsibilities of each position. *See* 2004 Op. Att’y Gen. No. 2004-044, at 2-380.

A board of township trustees appoints a township highway superintendent “to have charge of maintenance and repair of roads within the township.” R.C. 5571.02(C). This means that a township highway superintendent may supervise the maintenance and repair of roads, R.C.

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<sup>3</sup> As the Ohio Ethics Commission is authorized to determine the applicability of the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43, R.C. 102.08, the Attorney General “refrain[s] from interpreting and applying [those] provisions by way of a formal opinion.” 2011 Op. Att’y Gen. No. 2011-008, at 2-60 n.1. For a determination of whether those provisions apply to the positions at issue in this opinion, we recommend that you contact the Ohio Ethics Commission. *Id.*

5575.01(D); R.C. 5571.12; R.C. 5589.06, oversee the removal of noxious weeds or other nuisances that affect the safety of roads within the township, R.C. 5571.14(A); R.C. 5579.04(B), and, upon the authorization of the board of township trustees, purchase equipment or employ labor necessary for road maintenance and repair, R.C. 5549.21.

A member of a board of township trustees is responsible for the management and governance of the township. *See generally* R.C. Title 5 (townships); 1994 Op. Att’y Gen. No. 94-013, at 2-60 (“[t]ownship trustees are statutorily vested with various powers and duties associated with the government of the township”). A board of township trustees has the authority to enter into contracts on behalf of the township, *see, e.g.*, R.C. 9.60; R.C. 307.15; R.C. 505.37; R.C. 505.50; R.C. 715.02; R.C. 5549.04, acquire and dispose of real and personal property, *see, e.g.*, R.C. 505.10; R.C. 505.26, and construct and maintain buildings for township purposes, *see, e.g.*, R.C. 505.26. A board of township trustees has the authority to pass resolutions, *see, e.g.*, R.C. 504.04; R.C. 505.371; R.C. 519.02, and to levy taxes upon the real and personal property in the township for the benefit of the township electorate, *see* R.C. 5705.01(C); R.C. 5705.03(A). As the taxing authority for the township, the board of township trustees is responsible for adopting the township’s tax budget and submitting the tax budget to the county budget commission in accordance with the provisions in R.C. Chapter 5705. R.C. 5705.01(C); R.C. 5705.28(A). A board of township trustees also possesses various powers and duties concerning the implementation and enforcement of township zoning regulations, *see* R.C. Chapter 519 (township zoning), and may construct, repair, or otherwise improve public roads within its jurisdiction. R.C. 5571.01; R.C. 5573.01; *see also* 1987 Op. Att’y Gen. No. 87-046, at 2-302 (“authority to construct, repair, maintain, and improve roads and highways within a township is conferred upon a board of township trustees by R.C. Chapters 5571 and 5573”).

A review of the duties and responsibilities of a township highway superintendent and member of a board of township trustees who serve different townships within the same county discloses two potential conflicts of interest. First, a conflict of interest may arise if the township for which the person serves as township highway superintendent seeks to enter into a contract with the township for which the person serves as a member of the board of township trustees. *See, e.g.*, R.C. 9.482(B)(1) (“[w]hen legally authorized to do so, a political subdivision may enter into an agreement with another political subdivision ... whereby the contracting political subdivision ... agrees to exercise any power, perform any function, or render any service for the contracting recipient political subdivision that the contracting recipient political subdivision is otherwise legally authorized to exercise, perform, or render”); R.C. 5549.21 (a township highway superintendent may purchase equipment or employ labor for the repair and maintenance of roads, when authorized by the board of township trustees); R.C. 5549.22 (authorizing townships to join together to purchase road materials). As member of the board of township trustees, the person may find it difficult to hold disinterested discussions, deliberations, or votes related to an agreement that may affect the township in which he also serves as township highway superintendent. Similarly, if the prospective agreement is related to the sale and purchase of materials, and the person, as township highway superintendent, has been authorized under R.C. 5549.21 to purchase the materials, the person may find it difficult, as township

highway superintendent, to negotiate and execute a contract that may affect the township in which he also serves as a member of the board of township trustees.

The mere existence of a conflict of interest, however, does not automatically render two positions incompatible. When “the possibility of conflict is remote and speculative” and can be mitigated or avoided, “the conflict of interest rule is not violated.” 1993 Op. Att’y Gen. No. 93-016, at 2-91; *see also* 2004 Op. Att’y Gen. No. 2004-019, at 2-158 (“[w]here it can be demonstrated that the conflicts may be sufficiently avoided or eliminated entirely, the person may serve in both positions”).

The factors used in making this determination include, but are not limited to, “the probability of the conflict[] arising, the ability of the person to remove himself from any conflicts that may arise, whether the person exercises decision-making authority in each position, and whether the conflicts relate to the primary functions of each position or to financial or budgetary matters.”

2011 Op. Att’y Gen. No. 2011-048, at 2-382 (quoting 2011 Op. Att’y Gen. No. 2011-029, at 2-235).

Upon a consideration of the foregoing factors, we conclude that the foregoing conflict of interest is remote and speculative and can be sufficiently mitigated so as to avoid incompatibility. No statute requires two townships to enter into a contract with each other. Thus, the possibility that the township in which the person serves as township highway superintendent will enter into an agreement with the township for which the person seeks election to the board of township trustees is merely speculative. *Cf.* 2011 Op. Att’y Gen. No. 2011-008, at 2-62 (recognizing the speculative nature of this conflict in the context of analyzing the compatibility of a director of a county department of job and family services and a city council member). Furthermore, a township highway superintendent has the authority to enter into agreements to purchase materials or employ labor only when authorized to do so by the board of township trustees. *See* R.C. 5549.21. Therefore, any action undertaken by a township highway superintendent in this regard is subject to the control and direction of the board of township trustees. R.C. 5571.02(C). Moreover, there is a presumption that public officers and employees perform their duties in a regular and lawful manner in the absence of any evidence to the contrary. *See State ex rel. Speeth v. Carney*, 163 Ohio St. 159, 126 N.E.2d 449 (1955) (syllabus, paragraph 10) (“[i]n the absence of evidence to the contrary, public officials, administrative officers, and public authorities, within the limits of the jurisdiction conferred upon them by law, will be presumed to have properly performed their duties in a regular and lawful manner and not to have acted illegally or unlawfully”).

A member of a board of township trustees has final decision-making authority with respect to agreements entered into by the township. However, a member of a board of township trustees who also serves as a township highway superintendent for another township in the county may avoid an impermissible conflict of interest between the two positions by abstaining, in his role as member of the board of township trustees, from any deliberations, discussions,



negotiations, or votes concerning an agreement between the two townships. *Cf.* 2016 Op. Att’y Gen. No. 2016-034, at 2-415 (“a member of a ... board of township trustees who also serves as a county planner is able to abstain from participating in deliberations, discussions, or votes on ... township matters when those matters conflict with her duties and responsibilities as county planner”). A board of township trustees is capable of functioning and performing the duties conferred upon it by statute when one of its members abstains from a matter. *See* R.C. 505.01 (a board of township trustees is composed of three members); *State ex rel. Saxon v. Kienzle*, 4 Ohio St. 2d 47, 48, 212 N.E.2d 604 (1965) (“[i]n the absence of a statute to the contrary, any action by a board requires that a quorum participate therein, and that a majority of the quorum concur”); 1999 Op. Att’y Gen. No. 99-004, at 2-23 (two township trustees constitute a quorum that is qualified to take action on behalf of the board). Moreover, if a member of a board of township trustees is not able to abstain from discussing or making decisions about matters that conflict with his duties as township highway superintendent for another township, any undue influence that a member of a board of township trustees might exert may be mitigated by the role that the other members of the board of township trustees play in the process. 2011 Op. Att’y Gen. No. 2011-008, at 2-65 to 2-66; *see also generally State ex rel. Speeth v. Carney*, 163 Ohio St. 159 (syllabus, paragraph 10). Therefore, this conflict of interest does not prohibit a person from serving as township highway superintendent for one township and as a member of a board of township trustees for another township within the same county.<sup>4</sup>

A second conflict of interest may arise with respect to competition for tax dollars derived from taxes levied within the ten-mill limitation, commonly referred to as “inside millage.”<sup>5</sup> *See generally* 2016 Op. Att’y Gen. No. 2016-012, at 2-120 (“[r]evenue derived from taxes levied within the ten-mill limitation is commonly referred to as inside millage”). The taxing authority of each township and other subdivision within the county is required to “adopt a tax budget for the next succeeding fiscal year.” R.C. 5705.28(A); *see also* R.C. 5705.01(A) (including a township within the meaning of “subdivision” as used in R.C. Chapter 5705). *But see* R.C.

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<sup>4</sup> We caution, however, that in the event the township for which the person serves as township highway superintendent enters into a contract with the township in which the person also serves as a member of the board of township trustees, the position of township highway superintendent is incompatible with the office of member of the board of township trustees under R.C. 511.13. *See* R.C. 511.13 (prohibiting an employee or officer of a township from being “interested in any contract entered into” by the board of township trustees).

<sup>5</sup> The total amount of state and local taxes levied on real property may not exceed ten mills on each dollar of the property’s true value in money, except for those taxes that have been specifically authorized to be levied in excess thereof. Ohio Const. art. XII, § 2; R.C. 5705.02; *see also* 2005 Op. Att’y Gen. No. 2005-043, at 2-449 (“[t]axes levied by various taxing units may include both taxes within the 10-mill limitation (unvoted taxes) and taxes outside the 10-mill limitation (taxes authorized by the voters)”). A mill is a tenth part of one cent. *Black’s Law Dictionary* 1008 (7th ed. 1999). This rule is known as the “ten-mill limitation.” *See* R.C. 5705.02.

5705.281 (a county budget commission, by majority vote, may waive the requirement that a subdivision adopt a tax budget). A tax budget estimates each subdivision's anticipated expenditures and receipts, including the amount of money each subdivision will require from the general property tax. *See* R.C. 5705.29 (listing the information each taxing unit shall include in its tax budget); *see also* R.C. 5705.09 (requiring each subdivision to establish certain funds into which tax revenues may be deposited and from which expenditures may be made). The county budget commission reviews each tax budget and adjusts the amounts each tax budget estimates will be required from the general property tax so as to bring the tax levies required therefor within the ten-mill limitation and other limitations specified in R.C. 5705.01 to R.C. 5705.47. *See* R.C. 5705.32(A). The amount of money required by each subdivision, as shown in each subdivision's tax budget, affects the amount of inside millage that will be allocated to each subdivision in the county. *See* 2011 Op. Att'y Gen. No. 2011-008, at 2-64. The amount of inside millage allocated to each subdivision dictates the amount of money that will be available for use by the subdivision's various departments, agencies, and offices.

As the taxing authority for a township, a board of township trustees is responsible for adopting and submitting a tax budget on behalf of the township. *See* R.C. 5705.01(C). The township's tax budget estimates the expenditures for all township departments and agencies, and identifies the funds from which such expenditures are to be made. R.C. 5705.29(A). The costs associated with the position of township highway superintendent also may be included in the tax budget of a township. *See* R.C. 5571.02(C) (a board of township trustees may appoint a township highway superintendent to be in charge of road maintenance and repair); R.C. 5571.04 (a board of township trustees shall pay the compensation of the township highway superintendent "from the township road fund"); R.C. 5705.29(A)(1). The tax budgets submitted by all of the townships and other subdivisions within the county compete for the limited inside millage available. Accordingly, a township highway superintendent of one township who also serves as a member of a board of township trustees of another township within the same county may find it difficult to maintain objectivity in completing the competing budgetary tasks required of him in either of those positions.<sup>6</sup>

Although this conflict of interest relates to financial and budgetary matters, we conclude that this conflict of interest also is not sufficient, in this instance, to render the position of township highway superintendent incompatible with the office of member of a board of township trustees. An annual budget estimate for road maintenance and repair, including the costs associated with the appointment of a township highway superintendent, if applicable, is included in the overall tax budget for a township. R.C. 5705.29(A)(1). The compilation and adoption of the township's tax budget is completed by the board of township trustees. R.C. 5705.01(A) (defining "subdivision" to include a township); R.C. 5705.01(C) (defining "taxing authority" to

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<sup>6</sup> We do not know whether, in this instance, the township highway superintendent is responsible for compiling and submitting an annual budget estimate for the maintenance and repair of roads within the township. For the purpose of this opinion, we will presume that the township highway superintendent possesses this responsibility.

mean, in the case of a township, the board of township trustees); R.C. 5705.28(A) (requiring the taxing authority of each subdivision to “adopt a tax budget for the next succeeding fiscal year”). Therefore, even if a township highway superintendent is responsible for submitting the budget estimate for road maintenance and repair to the board of township trustees, the township highway superintendent “does not exercise independent decision-making authority in the preparation and presentation of” the township’s annual tax budget. 2011 Op. Att’y Gen. No. 2011-008, at 2-65. Accordingly, any undue influence a township highway superintendent might exert in preparing the annual budget estimate for road maintenance and repair may be tempered by the actions taken by a board of township trustees in compiling and adopting the tax budget that is submitted to the county budget commission for examination. *Cf. id.* (a “board of county commissioners ... has the opportunity to counter any undue influence that [a director of a county department of job and family services] may have exerted in preparing the county department of job and family services’ tax budget estimate”).

Adopting a township tax budget is one of the primary duties of a board of township trustees. *See* 1990 Op. Att’y Gen. No. 90-083, at 2-358. It is not practical for a member of a board of township trustees to abstain from discussing or making decisions about the compilation or adoption of a township tax budget. In the course of addressing the compatibility of a member of a board of township trustees and a member of a city board of education, a prior opinion of the Attorney General recognized:

[t]he potential conflicts of interest over competition for tax moneys and possible budget decisions would arise each year, since budget and funding matters come before both the board of education and the board of township trustees on an annual basis. Since there are only three members of the board of township trustees ... and five members of the city board of education, ... it would, as a practical matter be laborious for the person in question, to remove himself from the conflicts by abstaining from taxing and budgetary matters.

1990 Op. Att’y Gen. No. 90-083, at 2-358; *see also generally* R.C. 505.01 (a board of township trustees is composed of three members).

Nevertheless, any undue influence that a member of a board of township trustees might exert in compiling and adopting a township tax budget may be mitigated by the role the other members of the board of township trustees play in the process. *Cf.* 2011 Op. Att’y Gen. No. 2011-008, at 2-65 to 2-66 (the city’s “annual tax budget must be approved by the entire council, of which the person who also serves as director of the [county department of job and family services] is only one voting member”); *see also generally State ex rel. Speeth*, 163 Ohio St. 159 (syllabus, paragraph 10). Further, a tax budget adopted by a township is subject to further review, adjustment, and approval by the county budget commission. 2011 Op. Att’y Gen. No. 2011-008, at 2-66. A board of township trustees does not have the final power to determine the

amount of inside millage that the township will ultimately receive.<sup>7</sup> Accordingly, based upon the foregoing mitigating factors, we conclude that a township highway superintendent of one township may serve simultaneously as a member of a board of township trustees of another township within the same county notwithstanding that the job duties of those positions may require a person to discuss, compile, or adopt tax estimates or budgets that compete for tax moneys generated within the ten-mill limitation.<sup>8</sup> *Cf.* 2011 Op. Att’y Gen. No. 2011-008, at 2-66.

A person serving simultaneously as a township highway superintendent and member of a board of township trustees for different townships within the same county may be subject to conflicts of interest. The conflicts of interest, as discussed above, are remote and speculative. In the event conflicts of interest do arise, the conflicts can be sufficiently mitigated or avoided. Accordingly, question five of the compatibility analysis may be answered in favor of compatibility.

#### **Questions Six: Local Charters, Resolutions, and Ordinances**

Question six of the seven-part compatibility test asks whether any local charter provisions, resolutions, or ordinances limit the holding of outside public employment by a township highway superintendent or a member of a board of township trustees. Whether any local charter provisions, resolutions, or ordinances apply is a matter of local concern. *See* 1996 Op. Att’y Gen. No. 96-062, at 2-252; 1993 Op. Att’y Gen. No. 93-016, at 2-85; 1979 Op. Att’y Gen. No. 79-111, at 2-368. We therefore presume, having received no information to the contrary, that no local charter provisions, resolutions, or ordinances prohibit one person from

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<sup>7</sup> “R.C. 5705.31(D) ... requires a county budget commission to approve a minimum levy within the ten-mill limitation for the current expense and debt service of each subdivision or other taxing unit that existed during the last five years the fifteen-mill limitation was in effect (the period of 1929 through 1933).” 2016 Op. Att’y Gen. No. 2016-012, at 2-122. If any inside millage is left unallocated after the county budget commission approves the minimum levy and other levies as required by R.C. 5705.31(A)-(E), the county budget commission—not the taxing authority of any subdivision—“has broad discretion to allocate the non-mandated, or ‘free’ millage among the subdivisions.” 2016 Op. Att’y Gen. No. 2016-012, at 2-122 n.9.

<sup>8</sup> Before the county budget commission makes final determinations with respect to the tax budgets, representatives of each subdivision may appear before the commission to explain the subdivision’s financial needs. R.C. 5705.32(E)(2). A township highway superintendent who also serves as a member of a board of township trustees for another township within the same county should not be designated by either township to present the townships’ tax budgets to the county budget commission. Presenting a tax budget to the county budget commission that competes with another subdivision’s tax budget is a significant conflict of interest that would render the positions incompatible. *Cf.* 2011 Op. Att’y Gen. No. 2011-008, at 2-66.

holding the position of township highway superintendent for one township and the office of member of a board of township trustees for another township within the same county.

### **Question Seven: State, Federal, or Local Departmental Regulations**

Question seven of the compatibility analysis asks whether any state, local, or federal departmental regulations limit the holding of outside public employment by a township highway superintendent or member of a board of township trustees. There are no state or local departmental regulations applicable. With respect to federal law, the federal Hatch Act may apply in this instance. 5 U.S.C.A. §§ 1501-1508 (Thomson Reuters 2017).

The Hatch Act prohibits a “State or local officer or employee” from being “a candidate for elective office” “if the salary of the employee is paid completely, directly or indirectly, by loans or grants made by the United States or a Federal agency.” 5 U.S.C.A. § 1502(a)(3). The Hatch Act defines “State or local officer or employee” as “an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by” federal loans or grants.<sup>9</sup> 5 U.S.C.A. § 1501(4); *see also* 5 C.F.R. § 151.101(d) (2016). A “State or local agency” includes “the executive branch of a ... political subdivision of a State, or an agency or department thereof.” 5 U.S.C.A. § 1501(2); *see also* 5 C.F.R. § 151.101(a)-(b).

A board of township trustees may be considered the executive branch of a township for purposes of 5 U.S.C.A. § 1501(2). *Cf. Reddick v. Coshocton Cnty. Reg’l Airport*, Coshocton App. No. 04CA017, 2005-Ohio-2169, at ¶14 n.1 (“[w]e are unable to definitively determine whether a county board of commissioners is the functional equivalent of the executive branch or the legislative branch of the government, or potentially a combination of both”); *see also generally* 2011 Op. Att’y Gen. No. 2011-040, at 2-320 (“[i]t is beyond the scope of the formal opinion process to render authoritative interpretations of federal law”). Therefore, a township highway superintendent may be a “State or local officer or employee” within the meaning of the Hatch Act if the board of township trustees is a “State or local agency” under 5 U.S.C.A. § 1501(2) and the principal employment of the township highway superintendent is in connection with an activity which is financed in whole or in part by federal grants or loans. If a township highway superintendent is a “State or local officer or employee” and the salary of the township highway superintendent is paid completely, directly or indirectly, by federal grants or loans, the township highway superintendent is prohibited from being a “candidate for elective office.”<sup>10</sup> 5 U.S.C.A. § 1502(a)(3).

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<sup>9</sup> Title 5 U.S.C.A. § 1501(4), divisions (A) and (B)(i)-(iii) provide exceptions to the definition of “State or local officer or employee.” *See also* 5 C.F.R. § 151.101(d)(1), (2)(i)-(iii) (2016). Those exceptions are not relevant to your inquiry.

<sup>10</sup> The compensation of a township highway superintendent is paid from the township road fund. R.C. 5571.04. It is the responsibility of the person employed as township highway

“Elective office means any office which is voted upon at an election ..., but does not include political party office.” 5 C.F.R. § 151.101(i). An election, as used in the foregoing definition, “includes a primary, special, and general election.” 5 C.F.R. § 151.101(f). A member of a board of township trustees is nominated by petition and stands for election to that office on a nonpartisan ballot, “unless a majority of the electors of such township have petitioned for a primary election.” R.C. 3513.253; *see also* R.C. 3505.04; R.C. 3513.01; 2011 Op. Att’y Gen. No. 2011-034, at 2-267 n.4 (“[c]andidates for the office of township trustee are nominated by petition, rather than in a primary election.... When a township does not conduct a primary election for the office of township trustee, the candidates for such office appear on a nonpartisan ballot”); 1978 Op. Att’y Gen. No. 78-022, at 2-52. Accordingly, the Hatch Act does not prohibit a “State or local officer or employee” as defined in 5 U.S.C.A. § 1501(4) and 5 C.F.R. § 151.101(d), whose salary is paid completely, directly or indirectly, by federal grants or loans from serving simultaneously as a member of a board of township trustees when the township trustee is nominated by petition and elected after appearing on a nonpartisan ballot.

The election of a member of a board of township trustees transforms from nonpartisan to partisan when township electors petition for a primary election. R.C. 3513.253; *see also* 1978 Op. Att’y Gen. No. 78-022, at 2-52 (“R.C. 3513.253 requires that a primary election be held upon petition of a majority of the electors in the township. Where such a primary is held the ensuing general election becomes partisan, with partisan ballots in use”). In those circumstances, the Hatch Act prohibits a “State or local officer or employee” as defined in 5 U.S.C.A. § 1501(4) and 5 C.F.R. § 151.101(d), whose salary is paid completely, directly or indirectly, from federal loans or grants, from seeking election to the office of township trustee.

The final question of the compatibility analysis may be answered in favor of compatibility so long as the salary of the township highway superintendent in this instance is not paid completely, directly or indirectly, by federal loans or grants. If the salary of the township highway superintendent is paid completely, directly or indirectly, by federal loans or grants and the township highway superintendent is a “State or local officer or employee” as defined in 5 U.S.C.A. § 1501(4) and 5 C.F.R. § 151.101(d), the final question of the compatibility analysis may still be answered in favor of compatibility so long as the person that serves as township highway superintendent seeks election to the office of member of a board of township trustees in a nonpartisan election.

### **Conclusion**

It is our opinion, and you are hereby advised that a person appointed by a board of township trustees as a township highway superintendent may serve simultaneously as a member

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superintendent to determine, in this particular instance, whether his principal employment is in connection with an activity which is financed in whole or in part by federal grants or loans and whether his salary is paid completely, directly or indirectly, by federal grants or loans, within the meaning of the Hatch Act.

of a board of township trustees of another township within the same county provided that no contract exists between the townships. If the salary of the township highway superintendent is paid completely, directly or indirectly, by federal loans or grants, and the township highway superintendent is a "State or local officer or employee" as defined in 5 U.S.C.A. § 1501(4) (Thomson Reuters 2017) and 5 C.F.R. § 151.101(d) (2016), a person may serve simultaneously in these two positions only if the person seeks election to the office of member of a board of township trustees in a nonpartisan election.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE  
Ohio Attorney General