

**OPINION NO. 90-083****Syllabus:**

1. The positions of member of the board of education of a city school district and trustee of a township located within such district are incompatible.
2. A member of the board of education of a city school district impliedly resigns from that position when he subsequently is elected and qualified as a trustee of a township located within such school district.

**To: Alan R. Mayberry, Wood County Prosecuting Attorney, Bowling Green, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, November 14, 1990**

I have before me your request for my opinion concerning the compatibility of the positions of member of the board of education of a city school district and township trustee, and the removal of an individual from the position of township trustee if such positions are incompatible. Information provided indicates that a member of the board of education of a city school district has been elected as a trustee of a township which is part of the city school district. Additionally, the entire geographic territory of the township and the city school district is located within the territorial boundaries of Wood County. Consequently, you ask:<sup>1</sup>

1. Is the position of member of the board of education of a city school district compatible with the position of trustee of a township which is located within the school district?
2. If the positions are incompatible, may the prosecuting attorney of the county in which the township and city school district are located institute an action in quo warranto against the individual in his capacity as township trustee?

The powers and duties of trustees of townships are provided in R.C. Chapter 505 and various other sections located throughout the Revised Code. Such trustees are vested with those powers and duties associated with the government of the township. *See, e.g.*, R.C. 505.04 (shall make an inventory, each year, of all township materials, machinery, tools, and other supplies); R.C. 505.07 (may publish and distribute newsletters concerning township matters); R.C. 505.27 (may provide, maintain, and operate facilities for or contract for the collection, transfer, and disposal of solid wastes); R.C. 505.75 (may adopt and enforce a township building code); R.C. 519.02 (may regulate building and land use in unincorporated territory); R.C. 5731.48 (may disburse estate tax moneys to the board of education of the school district of which the township is a part).

The responsibilities of a member of the board of education of a city school district are delineated in R.C. Chapter 3313. The members of the board of education of a city school district are granted various powers and duties related to the administration of the public schools in that district. *See, e.g.*, R.C. 3313.20 (may establish rules which "are necessary for its government and the government of its employees, pupils of its schools, and all other persons entering upon its school grounds or premises"); R.C. 3313.201 (shall procure liability insurance); R.C.

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<sup>1</sup> With your concurrence, I have reworded your specific questions for ease of analysis.

3313.202 (may provide insurance and other fringe benefits to employees of the school district); R.C. 3313.47 (shall have management and control of the public schools in the district); R.C. 3313.72 (may contract with a health district to acquire the services of a school physician, dentist, or nurse); R.C. 3313.95 (may contract for police services in alcohol and drug programs).

I turn now to your first question which asks whether the position of member of the board of education of a city school district is compatible with the position of trustee of a township which is located within the school district. In 1979 Op. Att'y Gen. No. 79-111, my predecessor set forth seven questions for ascertaining the compatibility of two public positions. Two public positions are incompatible if, *inter alia*, an individual holding both positions would be subject to conflicting interests or divided loyalties. 1989 Op. Att'y Gen. No. 89-101 at 2-489; 1989 Op. Att'y Gen. No. 89-072 at 2-328 and 2-329; 1989 Op. Att'y Gen. No. 89-023 at 2-106. *See generally* 1970 Op. Att'y Gen. No. 70-168 at 2-336 (a public servant "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"), *overruled on other grounds*, 1981 Op. Att'y Gen. No. 81-100 (syllabus, paragraph two). Hence, "where the holding of dual public positions would preclude the unbiased discharge of public duties, both positions may not be held simultaneously." Op. No. 79-111 at 2-371. *See generally State ex rel. Taylor v. Pinney*, 13 Ohio Dec. 210, 212 (C.P. Franklin County 1902) ("public officials, who are the agents of the public, will not be permitted to put themselves in a position antagonistic to the public interests which are represented and which it is their duty to protect"); 1933 Op. Att'y Gen. No. 179, vol. I, p. 214 at 215 (it is a common law principle that, "a public officer should be absolutely free from any influence which would in any way affect the discharge of the obligations which he owes to the public").

A potentially great conflict of interest presents itself where an individual simultaneously holds the positions of member of the board of education of a city school district and trustee of a township which is located within the school district. The board of education of a city school district, as indicated above, is given broad authority over the administration of the public schools in its district, especially in regard to budgetary matters. Further, R.C. 5705.01(C) designates, for purposes of R.C. Chapter 5705, the board of education as the taxing authority for the city school district. In a similar fashion, a board of township trustees has authority over township budgetary matters and pursuant to R.C. 5705.01(C) is designated the taxing authority of the township for purposes of R.C. Chapter 5705. In addition, a board of township trustees controls expenditures from the township treasury. *See* R.C. 507.11(B) ("[n]o money belonging to the township shall be paid out, except upon an order signed personally by at least two of the township trustees, and countersigned by the township clerk").

Under R.C. 5705.28, R.C. 5705.30, and R.C. 5705.31, the taxing authorities of both a city school district and a township are required to adopt a proposed tax budget and submit it to the county auditor who presents it to the county budget commission. *See generally* R.C. 5705.01(A) (defining both a city school district and a township as "subdivisions" for purposes of R.C. Chapter 5705). The county budget commission examines the proposed tax budget submitted by the taxing authorities, and pursuant to R.C. 5705.32, modifies the estimated amounts in order to bring the tax levies required within the limits of the law. *See* R.C. 5705.31. "The determination of the budget commission directly affects the potential revenue of each subdivision." 1989 Op. Att'y Gen. No. 89-007 at 2-29; *see also* R.C. 5705.31; 1988 Op. Att'y Gen. No. 88-011 at 2-40 and 2-41.

The above mentioned budget and tax provisions, thus, situate the members of different taxing authorities within the same county in adverse positions. *See* Op. No. 88-011; 1981 Op. Att'y Gen. No. 81-010; 1966 Op. Att'y Gen. No. 66-060. An individual who serves simultaneously as a member of two taxing authorities, which compete for the same funds, "would be faced with a conflict of interest while preparing the budget of each subdivision, since in both positions he would be attempting to obtain the greatest possible share of the available funds, at the expense of the other subdivisions." Op. No. 81-010 at 2-33; *see* 1958 Op. Att'y

Gen. No. 1962, p. 215 at 217-18 (in the preparation of the tax budget it may well occur that any proposed modifications or reductions with respect to one subdivision's budget could be detrimental to another subdivision's budget, "and where the same person participates in the preparation of two such budgets there may be a conscious or unconscious bias or prejudice on his part"). Prior opinions of the Attorney General which have considered the compatibility of two positions when a potential conflict of interest exists due to the competition for tax moneys and advantageous budget decisions have concluded that the positions are incompatible, since inconsistent loyalties may result. *See* Op. No. 89-007; 1988 Op. Att'y Gen. No. 88-033; Op. No. 88-011; 1958 Op. No. 1962; 1949 Op. Att'y Gen. No. 398, p. 131; 1945 Op. Att'y Gen. No. 104, p. 56; 1928 Op. Att'y Gen. No. 2975, vol. IV, p. 2777; 1927 Op. Att'y Gen. No. 2, vol. I, p. 5. *But see* 1961 Op. Att'y Gen. No. 2480, p. 532; 1959 Op. Att'y Gen. No. 1031, p. 708. As I recently stated in Op. No. 89-007 at 2-29:

In Op. No. 88-011, I determined that a potential conflict before the budget commission lacks a sufficient "degree of remoteness" to make the positions compatible since the competition for funds and favorable budget decisions arises on an annual basis. In Op. No. 88-033, I noted that the subdivisions appearing before the budget commission are in adversarial positions and a person serving both subdivisions would be confronted with a conflict of interest. The inconsistent loyalties that result when one person represents conflicting subdivisions in seeking the same funds from the budget commission present a sufficiently serious conflict of interest to make the positions incompatible.

Hence, it is readily apparent that the possibility for conflict exists, in your situation, due to the competition for tax moneys and advantageous budget decisions.

Further, since the board of education and the board of township trustees are taxing authorities for partially coextensive subdivisions, an additional budgetary conflict might arise beyond the aforementioned conflict over inside millage. As taxing authorities, such boards 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; R.C. 5705.21. Additionally, both the board of education of a city school district and the board of township trustees are authorized to submit to the electors of their respective subdivisions the question of issuing bonds under R.C. Chapter 133. *See* R.C. 133.18.

Where both a township and a city school district contemplate going to the electorate for a levy or bond issue for additional funds, a person serving as a member on the taxing authority of both subdivisions might find himself subject to divided loyalties. *See* Op. No. 88-011 at 2-43. For example, where the school board has authorized a levy for additional funds, *see* R.C. 5705.21, a person who is also a member of the board of township trustees might be apprehensive about placing a township levy on the ballot for fear that the electors in the city school district would turn down the school levy in favor of the township 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." Op. No. 88-011 at 2-43. Consequently, a conceivable conflict exists over the competition for moneys generated by taxes in excess of the ten mill limitation, as well as by competition for moneys generated by inside millage. *See* Op. No. 88-011 at 2-43.

Your letter of request indicates another area in which a conflict of interest occurs. R.C. 5731.48, which authorizes the disbursement of estate tax moneys, provides, in pertinent part:

If a decedent dies prior to July 1, 1991, and on or after the effective date of the amendments made to this section by Amended Substitute House Bill No. 111 of the 118th general assembly, sixty-four per cent of the gross amount of taxes levied and paid under this chapter, or if a decedent dies on or after July 1, 1991, sixty-seven per cent of the gross amount of taxes levied and paid under this chapter, shall be for the use of the municipal corporation or township in which the tax originates, and shall be credited as follows:

....  
(C) To the general revenue fund or to the board of education of the school district of which the township is a part, for school purposes, as the board of township trustees by resolution may approve, in the case of a township.

R.C. 5731.48, thus, gives a township trustee the authority to vote to determine whether the township or the board of education of a school district of which the township is a part is to receive estate tax moneys levied and paid to the township.

"Past opinions of the Attorney General which have considered the compatibility of two public positions when a statute imposes upon one of the positions the responsibility of allocating moneys to the two positions, have consistently concluded that 'where one public position has the power to appropriate funds to a second position, one person may not serve in both positions.'" Op. No. 89-101 at 2-489 (quoting 1985 Op. Att'y Gen. No. 85-029 at 2-107); accord Op. No. 88-033; 1986 Op. Att'y Gen. No. 86-029; 1985 Op. Att'y Gen. No. 85-006. Moreover, in an analogous situation, in Op. No. 85-006, I concluded that the positions of member of the board of education of a local school district and trustee of a township located within the school district are incompatible since R.C. 5731.48 authorizes the board of township trustees to make available to the local board of education moneys that would otherwise belong to the township.<sup>2</sup> The opinion provides, in relevant part:

Where, as in the case of R.C. 5731.48, a statute gives a member of a particular public body the authority to participate directly in a determination as to whether that public body or a different public body is to obtain the benefit of certain funds, I believe that it must be concluded, as a matter of law, that an individual may not serve in positions of trust and authority with respect to both bodies. A township trustee who also served as a member of a local board of education would suffer from conflicting loyalties if he were placed in the position, as trustee, of participating in a decision as to whether the township or the board of education should receive funds under R.C. 5731.48.

Op. No. 85-006 at 2-19.

It is clear that R.C. 5731.48 gives a trustee of a township the authority to vote to determine whether the township or the board of education of a city school district of which the township is a part is to receive estate tax moneys. Further, a member of the board of education of a city school district, like the member of the board of education of a local school district under consideration in Op. No. 85-006, holds a position of trust and authority with respect to the board of education of which he is a member. As such, his or her ability, as trustee, to exercise clear and independent judgment on behalf of the township in voting on whether the township or the city board of education is to receive the moneys disbursed under R.C. 5731.48 could be drawn into question.

I note that information provided indicates that the possibility for the type of conflict presented by R.C. 5731.48 may not arise in that the township in question currently does not credit the estate tax moneys disbursed under that section to the city school district. The current disbursement of estate tax moneys, however, is not determinative when considering the compatibility of these two positions. The essential element of the compatibility analysis with respect to conflicts of interest is whether the individual would be placed in situations where his ability to exercise clear and independent judgment may be jeopardized.

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<sup>2</sup> R.C. 5731.48 has been amended since the issuing of 1985 Op. Att'y Gen. No. 85-006. See Am. Sub. H.B. 111, 118th Gen. A. (1989) (eff. July 1, 1989). However, no substantive changes were made which would affect the conclusion reached therein.

Clearly, in the situation presented, there is the possibility that the township trustee may, at anytime, be placed in the position of having to vote on the disbursement of estate tax moneys. Particular concern must be accorded to those situations in which an individual holds a public position which has the power to appropriate moneys to a second public position held by that individual. *See* Op. No. 89-101; Op. No. 85-006.

There is one other possible conflict between the two positions in addition to the potential budgetary and taxing conflicts. Under R.C. 3313.59, a board of education of a city school district is authorized to make agreements with boards of county commissioners, boards, or other public officials having custody and management of public parks, libraries, museums, and public buildings and grounds. A board of township trustees has custody and management of township parks and public buildings. *See* R.C. 505.26; R.C. 505.261. As such, these cooperative agreements also represent a possible conflict for a person holding positions on both the city board of education and the board of township trustees.

The mere possibility of a conflict of interest, however, does not necessarily render the positions incompatible. Op. No. 79-111. Each potential conflict of interest should be decided on its own particular facts with respect to:

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 whether the potential conflict may involve budgetary controls.

Op. No. 79-111 at 2-372.

With respect to your particular inquiry, I find that the positions are incompatible. The 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, R.C. 505.01, and five members of the city board of education, *see* R.C. 3313.02,<sup>3</sup> 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. Moreover, the conflicts presented concern a primary function of both boards. Finally, both the members of a board of township trustees and board of education of a city school district have discretionary authority over the budgetary and tax matters in conflict. Having concluded that the aforementioned conflicts presented render the positions incompatible, I need not address whether the potential conflict which would arise under a cooperative agreement entered into between the city school district and the township, pursuant to R.C. 3313.59, is sufficient, in itself, to render the positions incompatible. I find, accordingly, that the positions of member of the board of education of a city school district and trustee of a township which is located within the school district are incompatible.

Your second question asks, if the two positions are incompatible, may the prosecuting attorney of the county in which the township and city school district are located institute an action in quo warranto against the individual in his capacity as township trustee. R.C. Chapter 2733 defines the scope and form of an action in quo warranto. More specifically, R.C. 2733.01 provides, in part:

A civil action in quo warranto may be brought in the name of the state:

(A) Against a person who usurps, intrudes into, or unlawfully holds or exercises a public office, civil or military...;

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<sup>3</sup> The number of members on the board of education of a city school district is determined by the population of the school district. *See* R.C. 3313.02. Information provided indicates that the board of education in question has five members.

(B) Against a public officer, civil or military, who does or suffers an act which, by law, works a forfeiture of his office....

See generally *State ex rel. Price v. Columbus, Delaware & Marion Elec. Co.*, 104 Ohio St. 120, 123-24, 135 N.E. 297, 298 (1922) (actions in quo warranto in Ohio are defined by constitutional and statutory provisions); *State ex rel. Hogan v. Hunt*, 84 Ohio St. 143, 95 N.E. 666 (1911) (syllabus, paragraph one) (the only authority for bringing an action in quo warranto in this state is given by G.C. 12303<sup>4</sup>). In Op. No. 85-006 at 2-21 n.2, I stated that "where...incompatibility of offices is based on common law principles, it appears that the appropriate action in quo warranto would be brought under division (A), rather than division (B), of R.C. 2733.01." Actions in quo warranto brought pursuant to R.C. 2733.01(B) are appropriate only where the act in question "has been made a cause of forfeiture or removal by statute." *State ex rel. Attorney General v. McLain*, 58 Ohio St. 313, 321, 50 N.E. 907, 908 (1898); see, e.g., *State ex rel. Saxbe v. Franko*, 168 Ohio St. 338, 154 N.E.2d 751 (1958) (per curiam) (where a provision of law required that a judge of a municipal court be admitted to the practice of law, revocation of the judge's status as a member of the legal profession worked a forfeiture of office and, under R.C. 2733.01(B), quo warranto was the proper remedy). Since common law principles render the positions of member of the board of education of a city school district and trustee of a township located within such district incompatible, I will assume, for purposes of this opinion, that the action in quo warranto will be brought pursuant to R.C. 2733.01(A). Accordingly, the pertinent question to be answered is whether an individual's act of holding the positions of member of the board of education of a city school district and trustee of a township located within such district, results in usurping, intruding into, or unlawfully holding or exercising a public office.<sup>5</sup>

As indicated above, the individual in question was a member of the board of education of the city school district when he was elected to the position of township trustee. It is a settled rule in Ohio that "[w]here an individual accepts a second office whose duties are incompatible with those of another office already held by such individual, the first held office is thereby vacated." *State ex rel. Hover v. Wolven*, 175 Ohio St. 114, 191 N.E.2d 723 (1963) (syllabus, paragraph three); accord *State ex rel. Witten v. Ferguson*, 148 Ohio St. 702, 707-08, 76 N.E.2d 886, 890 (1947); *State ex rel. Baden v. Gibbons*, 17 Ohio Law Abs. 341, 346, 40 Ohio Law Rep. 285, 291 (Ct. App. Butler County 1934); 1960 Op. Att'y Gen. No. 1086, p. 5 at 7-9. There is, however, one well recognized exception to this general rule. Where an individual holding an office is statutorily prohibited from holding another named office, the election or appointment to the second office is a nullity and the individual retains title to the first office. See *State ex rel. Gettles v. Gillen*, 112 Ohio St. 534, 148 N.E. 86 (1925) (syllabus); *State ex rel. Attorney General v. Craig*, 69 Ohio St. 236, 69 N.E. 228 (1903) (syllabus, paragraph one); *State ex rel. v. Kearns*, 47 Ohio St. 566, 25 N.E. 1027 (1890) (syllabus, paragraph five); 1960 Op. No. 1086 at 7-9.

I note that no statute expressly prohibits a member of the board of education of a city school district from holding the position of township trustee. See, e.g., R.C. 3313.13 ("[e]xcept as otherwise provided in this section, no prosecuting attorney, city director of law, or other official acting in a similar capacity shall be a member of a board of education"); R.C. 3313.70 ("[n]o member of the board of education in any district shall be eligible to the appointment of school physician,

<sup>4</sup> In 1953 the provisions of the entire General Code were reconsolidated and formally reenacted as the Revised Code. See 1953-1954 Ohio Laws 7 (Am. H.B. 1, eff. Oct 1, 1953). As a result, G.C. 12303 was recodified at R.C. 2733.01.

<sup>5</sup> I note that you have specifically inquired as to the initiation of an action in quo warranto against the individual in his capacity as township trustee. Hence, I will confine my analysis to the commencement of that action and will not address the commencement of an action in quo warranto against the individual in his capacity as member of the board of education of the city school district.

school dentist, or school nurse during the period for which he is elected"); *see also* R.C. 519.05 ("[n]o township trustee shall be employed by the zoning commission of his township"). The subsequent election of a member of the board of education of a city school district to the position of township trustee, thus, is not rendered invalid. As a consequence, the election and qualification of a member of the board of education of a city school district to the incompatible position of trustee of a township located within the school district,<sup>6</sup> is a vacation of the position of member of the board of education and "amounts to an implied resignation or abandonment of the same." *State ex rel. Witten v. Ferguson*, 148 Ohio St. at 707-08, 76 N.E.2d at 890; *see State ex rel. Hover v. Wolven*; *State ex rel. Baden v. Gibbons*; 1960 Op. No. 1086. *See generally State ex rel. Orr v. Board of Educ. of the City of Cleveland Dist.*, 23 Ohio C.C. (n.s.) 98, 101, 34 Ohio C.C. Dec. 140, 143 (Cir. Ct. Cuyahoga County 1912) ("[t]he authorities are uniform to the effect that, in the absence of statutory requirement, no particular form of resignation is necessary"), *aff'd mem.*, 87 Ohio St. 528, 102 N.E. 1133 (1913).

It is, thus, readily apparent from the foregoing that the individual in question is deemed to have impliedly resigned from the position of member of the board of education of the city school district and is, therefore, legally authorized to hold the position of township trustee. I find, accordingly, that the individual is not usurping, intruding into, or unlawfully holding or exercising the position of township trustee, and, therefore, no grounds exist for instituting a quo warranto action against the individual in his capacity as township trustee.

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

1. The positions of member of the board of education of a city school district and trustee of a township located within such district are incompatible.
2. A member of the board of education of a city school district impliedly resigns from that position when he subsequently is elected and qualified as a trustee of a township located within such school district.

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<sup>6</sup> For purposes of this opinion, I assume that the individual was duly elected and qualified to serve as a township trustee.