

OPINION NO. 86-029

Syllabus:

The position of director of a port authority established under R.C. 4582.01-.20 or R.C. 4582.21-.59 and the position of commissioner of a county within the authority's jurisdiction are incompatible.

To: Warren J. Smith, Director, Ohio Department of Transportation, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, May 21, 1986

I have before me your request for an opinion on the question whether the position of member of the board of directors of a port authority established under R.C. Chapter 4582 and the position of commissioner of a county within the port authority's jurisdiction are incompatible, so that one person may not hold both positions at the same time. I note, first, that R.C. Chapter 4582 contains two sets of provisions governing port authorities. R.C. 4582.01-.20 apply generally to port authorities in existence on July 9, 1982. See R.C. 4582.201. R.C. 4582.21-.59 apply to port authorities created after July 9, 1982, and to port authorities in existence on that date which are, by action of the bodies creating them, permitted to operate under R.C. 4582.21-.59. See R.C. 4582.201-.202. In order to provide a complete answer to your question, I shall consider both types of port authorities, referring to those governed by R.C. 4582.21-.59 as "newly-created port authorities."

Under R.C. 4582.02, a port authority may be created by a municipal corporation, township, or county, or by a combination of such political subdivisions. Under R.C. 4582.22, a newly-created port authority may be created by the same bodies. In authorizing the creation of such an authority, a county acts by resolution of its commissioners. R.C. 4582.02; R.C. 4582.22. I assume, for purposes of this opinion, that when you speak of a county within the port authority's jurisdiction, you mean a county which has created or participated in the creation of the port authority or newly-created port authority, see R.C. 4582.05; R.C. 4582.30, or which has joined the authority under R.C. 4582.024 or R.C. 4582.26. I note that a county which has joined a port authority or newly-created port authority is considered to have participated in the creation of the authority for all purposes except the length of the initial term of any director it appoints. See R.C. 4582.024; R.C. 4582.26.

Under R.C. 4582.03 and R.C. 4582.27, a port authority or newly-created port authority is governed by a board of directors, appointed by the bodies which created the authority. Such authorities have, *inter alia*, the power¹ to purchase, construct, and operate port authority facilities, R.C. 4582.06(A); R.C. 4582.31(D), and the power to straighten, deepen, and improve watercourses to aid in the development of the facilities of a water port, R.C. 4582.06(B); R.C. 4582.31(E). They are also authorized to issue bonds or notes, R.C. 4582.06(D)-(E); R.C. 4582.31(G)-(H), and, with the approval of the voters, to levy a property tax, R.C. 4582.14; R.C. 4582.40.

Your letter references 1985 Op. Att'y Gen. No. 85-029, in which I concluded that the positions of trustee of a regional airport authority and commissioner of a county included within

¹ Under R.C. 4582.22(B), the bodies establishing a newly-created port authority may restrict its powers, so that the authority will not be able to exercise all of the powers permitted under R.C. 4582.21-.59. Such restrictions may subsequently be eliminated by action of the bodies that created the authority. R.C. 4582.22(C). I assume, for purposes of this opinion, that the port authority with which you are concerned is authorized to exercise all the powers permitted by statute.

the regional airport authority are incompatible, because a person who served in both positions would be subject to various conflicts of interest. I find that a person serving in the positions about which you have inquired would be subject to similar conflicts of interest and, thus, that the positions of director of a port authority and commissioner of a county within the port authority's jurisdiction are incompatible.

Among the criteria for determining whether two public positions are incompatible, see 1979 Op. Att'y Gen. No. 79-111, are the common law rules that positions are considered incompatible if one is subordinate to or a check upon the other, or if an individual serving in both positions would be subject to a conflict of interest. See e.g., State ex rel. Hover v. Wolven, 175 Ohio St. 114, 191 N.E.2d 723 (1963); State ex rel. Attorney General v. Gebert, 12 Ohio C.C. (n.s.) 274 (Franklin County 1909); Pistole v. Wiltshire, 90 Ohio L. Abs. 525, 189 N.E.2d 654 (C.P. Scioto County 1961). There are a number of areas in which conflicts exist between the duties of a county commissioner and the duties of the director of a port authority or newly-created port authority.

A county which creates, or participates in creating, a port authority or newly-created port authority is authorized to expend funds to assist the authority in its activities. See R.C. 4582.023 ("[a]ny...county creating or participating in the creation of a port authority in accordance with [R.C. 4582.02] may expend funds not otherwise appropriated to defray the expense of surveys and examinations incidental to the purposes of the port authority so created"); R.C. 4582.25(A) ("[a]ny...county creating or participating in the creation of a port authority in accordance with [R.C. 4582.22] may appropriate and expend public funds to finance or subsidize the operation of the port authority"); 1966 Op. Att'y Gen. No. 66-070. Further, the board of directors of a port authority or newly-created port authority is permitted, if the authority has a surplus of funds at the end of a calendar year, to "pay such surplus into the general funds of the political subdivisions creating and comprising the port authority in proportion to the taxable value of all property within the port authority which shall be listed on the general tax list for the respective subdivisions." R.C. 4582.13; R.C. 4582.39. Thus, the relationship between a port authority or newly-created port authority and a county within the authority's jurisdiction is such that either may be in a position to provide financial assistance to the other. A person who served as both a county commissioner and a member of a board of directors of a port authority or newly-created port authority would have responsibilities to both bodies and would be subject to a conflict of interest in attempting to balance the competing financial demands of the two bodies. See generally State ex rel. Baden v. Gibbons, 17 Ohio L. Abs. 341 (App. Butler County 1934); Op. No. 85-029; 1985 Op. Att'y Gen. No. 85-006; 1983 Op. Att'y Gen. No. 83-035; 1975 Op. Att'y Gen. No. 75-032. As I stated in Op. No. 85-029, at 2-107 (citations omitted): "It is well established that where one public position has the power to appropriate funds to a second position, one person may not serve in both positions." The power of one body to fund a second body causes a clear conflict of interest between the positions of director of a port authority and commissioner of a county within the authority's jurisdiction.

Conflicts concerning the financial interests of a board of county commissioners and the board of directors of a port

authority or newly-created port authority might also result from the fact that each is a taxing authority. See R.C. 4582.14; R.C. 4582.40; R.C. 5705.01(C). A person serving as director of a port authority or newly-created port authority would be responsible for helping to determine when a tax levy under R.C. 4582.14 or R.C. 4582.40 should be submitted to electors within the authority, and then for certifying such a levy to the taxing authorities of the political subdivisions within the authority. These responsibilities would be subject to conflict with the duties of a county commissioner to ensure the fiscal well-being of the county, see, e.g., R.C. 5705.19-.191, since both bodies would draw upon at least some of the same taxpayers. See generally Op. No. 85-006; 1983 Op. Att'y Gen. No. 83-016; 1981 Op. Att'y Gen. No. 81-010. See also Op. No. 83-035.

Further conflicts would result from the fact that the bodies creating the port authority or newly-created port authority may dissolve the authority and cause the properties of the authority to be transferred to the bodies which created it. See R.C. 4582.023; R.C. 4582.25. A county commissioner who served as director of a port authority or newly-created port authority would, thus, be in a position of considering whether the authority should continue to exist, or whether some or all of its property should be transferred to the county. His capacity to evaluate that question would be subject to conflict with the duties he would owe the authority as one of its directors.

In addition to the conflicts outlined above, a person serving as both county commissioner and director of a port authority or newly-created port authority would face conflicting demands regarding the authority of the two bodies to contract with one another. Under R.C. 4582.121 and R.C. 4582.38, a county and a port authority or newly-created port authority are authorized to convey, lease, or exchange, "without competitive bidding and on mutually agreeable terms, any personal property or real property, or any interest therein, which is not needed for the purposes of the grantor, or lessor, to be used by the recipient or lessee for its purposes." Under R.C. 4582.17 and R.C. 4582.43, a port authority or a newly-created port authority is authorized to enter into various types of contracts with other governmental bodies, including counties. The fact that counties and port authorities or newly-created port authorities are authorized to contract with one another means that a person serving as both county commissioner and director of a port authority or newly-created port authority would be involved on both sides of a potential contract and would, thus, be subject to a conflict of interest. See Op. No. 85-029; 1984 Op. Att'y Gen. No. 84-059. Further, statutory provisions prohibit public officials from having an interest in public contracts. See R.C. 305.27 (applying to county commissioners); R.C. 2921.42(A)(1), (4). Such provisions may come into play when a single individual occupies positions of trust on two public bodies which enter into contractual relationships. See Op. No. 85-029; 1984 Op. Att'y Gen. No. 84-097.

Other conflicts of interest between a county commissioner and the director of a port authority or newly-created port authority may result on matters concerning eminent domain or the vacation or relocation of roads. See R.C. 4582.06(G); R.C. 4582.19; R.C. 4582.31(P); R.C. 4582.56; R.C. 4582.57. See generally Op. No. 85-029; Op. No. 84-059.

It is apparent from the foregoing that a person who served both as county commissioner and as director of a port authority or newly-created port authority would be subject to conflicting interests and loyalties in attempting to serve both bodies. It is, therefore, my opinion, and you are hereby advised, that the position of director of a port authority established under R.C. 4582.01-.20 or R.C. 4582.21-.59 and the position of commissioner of a county within the authority's jurisdiction are incompatible.