

OPINION NO. 2011-021**Syllabus:**

2011-021

R.C. 731.12 prohibits a member of a village legislative authority from serving simultaneously as a member of a board of county hospital trustees appointed pursuant to R.C. 339.02.

To: William D. Mason, Cuyahoga County Prosecuting Attorney, Cleveland, Ohio

By: Michael DeWine, Ohio Attorney General, June 13, 2011

You have requested an opinion whether the positions of member of the legislative authority of the Village of Bratenahl and member of the MetroHealth Hospital Board of Trustees are compatible. The MetroHealth Hospital, located in Cleveland, Ohio, is a non-profit county hospital established pursuant to R.C. Chapter 339. The trustees of a county hospital established under R.C. Chapter 339 are appointed variously by the board of county commissioners,¹ the most senior probate

¹ Cuyahoga County has adopted a charter form of government pursuant to Article X, § 3 of the Ohio Constitution that varies the system of government for that county. *See generally* 2011 Op. Att’y Gen. No. 2011-013 (discussion of Cuyahoga County’s adoption of charter form of government); 2009 Op. Att’y Gen. No. 2009-051 (same as previous parenthetical). Under the Charter of Cuyahoga County (“Charter”), the County Executive and County Council are vested with the powers and duties imposed upon a board of county commissioners by general law. *See* Charter, art. II, §§ 2.01, 2.03; art. III, §§ 3.01, 3.09; *see also* 2011 Op. Att’y Gen. No. 2011-013, slip op. at 7; 2009 Op. Att’y Gen. No. 2009-051 at 2-384 (County Executive serves as chief executive officer of the county and County Council serves as the legislative and taxing authority of the county).

judge of the county, and the most senior judge of the court of common pleas of the county. R.C. 339.02.

A seven-question compatibility test is used to determine whether a person may serve simultaneously in two public positions. *See, e.g.*, 2009 Op. Att’y Gen. No. 2009-018, at 2-127 to 2-128. Pursuant to this test, two public positions are incompatible if the empowering statutes of either position prohibit a person from holding both positions simultaneously.

R.C. 731.12, which sets forth the qualifications for members of a village legislative authority, states, in relevant part: “[n]o member of the legislative authority shall hold any other public office.” Further, “[a]ny member who ceases to possess . . . such qualification[] . . . shall forfeit the member’s office.” Your question concerns a member of a village legislative authority subject to R.C. 731.12, and thus we must determine whether the position of trustee of a county hospital is a “public office” for purposes of R.C. 731.12.²

The usual criteria considered in determining whether a position is a public office are durability of tenure, oath, bond, emoluments, independence of the functions exercised by the appointee, and character of the duties imposed upon the appointee. *State ex rel. Landis v. Bd. of Comm’rs of Butler County*, 95 Ohio St. 157, 159-60, 115 N.E. 919 (1917). Applying these criteria to the present situation, we conclude that the position of trustee of a county hospital established under R.C. Chapter 339 is a public office.

As previously explained, members of a board of county hospital trustees are appointed to their positions. R.C. 339.02. While county hospital trustees are not

Pursuant to R.C. 1.62, when a county has adopted a charter, references in the Revised Code to particular county officers, boards, or commissions should be construed to mean “the officer, board, commission, or authority of that county designated by or pursuant to the charter to exercise the same powers or perform the same acts, duties, or functions that are to be exercised or performed under the applicable section of the Revised Code by officers, boards, commissions, or authorities of counties that have not adopted a charter.” Therefore, references in R.C. Chapter 339 to a board of county commissioners as the appointing authority of a board of county hospital trustees should be construed to refer to the authority in Cuyahoga County that, pursuant to the county’s Charter, has assumed the appointment power of a board of county commissioners of a county that has not adopted a charter.

² You have indicated that the village in question has not adopted a charter pursuant to Ohio Const. art. XVIII, § 7 that alters R.C. 731.12’s qualifications for members of a village legislative authority by specifically removing that section’s prohibition against those members holding any other public office. *See State ex rel. Ziegler v. Hamilton County Bd. of Elections*, 67 Ohio St. 3d 588, 621 N.E.2d 1199 (1993) (R.C. 731.12 creates an exclusive set of qualifications for village council members, which are procedural in nature; thus, a village that wishes to alter those qualifications may do so only by the adoption of a charter provision).

required to post a bond or take an oath and they serve without compensation, this does not mean that the position of trustee of a county hospital is not a public office. *State ex rel. Landis v. Bd. of Comm'rs of Butler County*, 95 Ohio St. at 159 (“it has been held by this court that while an oath, bond and compensation are usually elements in determining whether a position is a public office, they are not always necessary”). Rather, it is well established that the most important elements in determining whether a position is a public office are as follows:

- (1) the incumbent must exercise certain independent public duties, a part of the sovereignty of the state;
- (2) such exercise by the incumbent must be by virtue of his election or appointment to the office;
- (3) in the exercise of the duties so imposed, he can not be subject to the direction and control of a superior officer.

1963 Op. Att’y Gen. No. 3548, p. 58, 61; accord *State ex rel. Milburn v. Pethtel*, 153 Ohio St. 1, 90 N.E.2d 686 (1950); *State ex rel. Landis v. Bd. of Comm'rs of Butler County*, 95 Ohio St. at 159-60; *State ex rel. Attorney General v. Jennings*, 57 Ohio St. 415, 49 N.E. 404 (1898).

Significantly, members of a board of county hospital trustees, by virtue of their appointment, perform numerous duties and exercise a broad range of powers, all of which are prescribed by statute and constitute a portion of the sovereignty of the state. R.C. 339.03-.08; R.C. 339.15-.16; see also *State ex rel. Landis v. Bd. of Comm'rs of Butler County*, 95 Ohio St. at 160 (“[t]he chief and most-decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law”). The powers of a board of county hospital trustees include “the entire management and control of the county hospital” and primary responsibility for the financial administration of the county hospital. R.C. 339.06; see also R.C. 339.03-.04; R.C. 339.08. With respect to a county hospital’s financial administration, a board of county hospital trustees has the power, for example, to invest funds, R.C. 339.06(D); prepare an annual budget, R.C. 339.06(D); enter into a contract for a secured line of credit, R.C. 339.06(F); and accept donations of money or other real or personal property, R.C. 339.08. A board of county hospital trustees also has the authority to select, build, maintain, or improve a county hospital and all furniture, fixtures, and equipment of the hospital, R.C. 339.03; establish rules for the hospital’s government and for the admission of patients, R.C. 339.06(B); establish schedules of charges for the hospital’s patients, R.C. 339.06(G); employ a hospital administrator, R.C. 339.07; and retain legal counsel and institute legal action in its own name for the collection of delinquent accounts, R.C. 339.06(L). A board of county hospital trustees also is vested with the traditional sovereign powers of purchasing or leasing real or personal property in the name of the county and the issuance of revenue obligations or revenue bonds. R.C. 339.03; R.C. 339.06; R.C. 339.15; see *State ex rel. Landis v. Bd. of Comm'rs of Butler County*, 95 Ohio St. at 160-61 (if appointee is vested with independent power in the disposition of public property or the power to incur financial obligations upon the county or state, such functions are part of the sovereignty of state).

Further, the position of trustee of a county hospital is a public office because the trustees act autonomously in their exercise of the foregoing powers. Subject to only a few narrow exceptions, a board of county hospital trustees is not subject to the direction or control of any other office or governmental entity. *See, e.g.*, R.C. 339.05 (board of county commissioners to review bidding procedures and purchasing policies of board of county hospital trustees); R.C. 339.06(D) (board of county commissioners must review and approve proposed budget of county hospital); R.C. 339.091 (board of county commissioners must approve initial agreement for acquisition, operation, or lease of a county hospital operated by a board of county hospital trustees). Rather, the trustees exercise independent statutory powers by virtue of their appointment to the county hospital board.

Because members of a board of county hospital trustees exercise independent powers that are prescribed by statute, the position of trustee of a county hospital board is a public office for purposes of R.C. 731.12. *See State ex rel. Landis v. Bd. of Comm'rs of Butler County*, 95 Ohio St. at 159 (“[i]f 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”). This means that a member of a village legislative authority may not serve simultaneously as a trustee of a county hospital.

This conclusion is further supported by a prior Attorney General opinion that addressed, in a different context, whether membership on a board of trustees of a county hospital constitutes a public office. 1951 Op. Att’y Gen. No. 580, p. 342, at 346. “In view of the statutory provisions relative to the matter of appointment, tenure of office, and the responsible duties imposed on such board of trustees, I conclude that membership on such board constitutes a public office.” *Id.* Relying on many of the same factors discussed above, the 1951 opinion noted that trustees are required to operate the hospital, “exercise the entire management and government of such hospital,” control matters related to a county hospital’s employees, and set the fees paid by patients of the county hospital. *Id.*

Based on the foregoing, it is my opinion, and you are hereby advised that R.C. 731.12 prohibits a member of a village legislative authority from serving simultaneously as a member of a board of county hospital trustees appointed pursuant to R.C. 339.02.