

OPINION NO. 89-072**Syllabus:**

The position of village police officer is incompatible with the position of county department of human services fraud investigator.

To: Alan W. Foster, Adams County Prosecuting Attorney, West Union, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, September 6, 1989

I have before me your request for my opinion as to whether the positions of village police officer and fraud investigator for the county department of human services (CDHS) are compatible. The information provided indicates that the village is located within the county served by such CDHS.

In 1979 Op. Att'y Gen. No. 79-111, my predecessor set forth a seven part test for determining the compatibility of two public positions. Two public positions are incompatible if, *inter alia*, an individual serving in both positions would be

subject to conflicting interests or divided loyalties. 1985 Op. Att'y Gen. No. 85-042 at 2-150 ("[n]o person may not simultaneously hold two public positions if he would be subject to divided loyalties and conflicting duties or exposed to the temptation of acting other than in the best interest of the public"); accord 1985 Op. Att'y Gen. No. 85-021; 1984 Op. Att'y Gen. No. 84-070; Op. No. 79-111. An examination of the duties of the positions is necessary to determine whether an individual occupying both positions would be subject to conflicting interests or divided loyalties.

Pursuant to R.C. 737.16, the village mayor shall appoint all village police officers as provided by the legislative authority, and subject to its confirmation. The chief of police of the village has the exclusive authority to station and transfer village police officers, under such general rules as the mayor prescribes, R.C. 737.19(A), and the exclusive right to suspend a village police officer, R.C. 737.19(B). The chief of the police shall notify the mayor of any suspension, for a determination whether to sustain the charges and the penalty if such charges are sustained. *Id.* The village police officer has, in most cases, a right of appeal to the legislative authority and where removal is involved, an appeal to the court of common pleas. *Id.*; see also R.C. 737.18.

The powers and duties of a village police officer are set forth in R.C. 737.11 and R.C. 737.18. R.C. 737.11 provides in part:

The police force of a municipal corporation shall preserve the peace, protect persons and property, and obey and enforce all ordinances of the legislative authority of the municipal corporation, all criminal laws of the state and the United States, and all court orders issued and consent agreements approved pursuant to sections 2919.26 and 3113.31 of the Revised Code.... Both the police and fire departments shall perform any other duties that are provided by ordinance.

R.C. 737.18 provides in part:

The marshal shall be the peace officer of a village and the executive head, under the mayor, of the police force. The marshal, and the deputy marshals, policemen, or night watchmen under him shall have the powers conferred by law upon police officers in all villages of the state, and such other powers, not inconsistent with the nature of their offices, as are conferred by ordinance.

Village police officers, thus, are charged with the duty to enforce the law within the village territory. *E.g.*, R.C. 2917.05 (authorized to use non-deadly force and in some instances deadly force to suppress a riot); R.C. 2935.03 (authorized to arrest without a warrant); R.C. 4513.39 (authorized to make arrests on highways located within municipal corporation).

The CDHS's primary responsibility is the administration of public assistance¹ to eligible individuals. See R.C. 329.04 (Aid to Families with Dependent Children (AFDC), various services authorized under the Social Security Act); R.C. 329.042 (food stamps); R.C. 329.05 (any state or local public welfare activity not named in R.C. 329.04); R.C. 5113.04 (general assistance); see also *St. Thomas Hospital v. Schmidt*, 62 Ohio St. 2d 439, 440, 406 N.E.2d 819, 820 (1980) (per curiam) ("R.C. Chapter 5113 is designed to place the primary responsibility for the administration of the poor relief program [now general assistance] upon the counties"). Included within the CDHS's responsibility to administer public assistance

¹ "Public assistance, whether of a financial, medical or social services nature, is a system of assisting in the provision of the basic essentials of food, clothing, shelter and medical services to those who lack resources." Ohio Department of Public Welfare, Public Assistance Manual, Introduction (Jan. 1988). Pursuant to 8 Ohio Admin. Code 5101:1-1-05, a CDHS is required to observe the policies and procedures set forth by the Ohio Department of Human Services in the Public Assistance Manual.

is the duty to investigate cases where the circumstances indicate a fraudulent receipt of such assistance by an individual. See R.C. 5107.04 and 5113.07 (each CDHS shall take action to recover payments made as a result of misrepresentation or fraud); see also 8 Ohio Admin. Code 5101:1-27-02(A) ("the county welfare² department [CWD] [now CDHS] also is responsible for preventing fraudulent [sic] actions by the recipient and for taking decisive and prompt steps to investigate and establish the facts regarding any situation in which it appears aid may have been received on a basis of incorrect, incomplete or false data"). (Footnote added.) In discharging its duty to investigate cases of fraudulent receipt of public assistance, the CDHS shall employ those individuals "necessary for the efficient performance of the human services of the county." R.C. 329.01; see also 8 Ohio Admin. Code 5101:1-27-09(B) ("the CWD shall designate certain employees to have responsibility for fraud investigation"). Although the Revised Code makes no mention of the duties of a CDHS fraud investigator, 8 Ohio Admin. Code 5101:1-27-08 provides that CDHS fraud investigators³ are responsible for handling fraud investigations, which are beyond the scope of usual eligibility determination, and any other duties needed by the CDHS to further an investigation. See generally R.C. 5107.02 and R.C. 5113.05 (department of human services to provide rules for the administration of public assistance); *Parfitt v. Correctional Facility*, 62 Ohio St. 2d 434, 436, 406 N.E.2d 528, 530 (1980) ("rules issued by administrative agencies pursuant to statutory authority have the force and effect of law"), *cert. denied*, 449 U.S. 1061 (1980).

A CDHS has a duty to safeguard all information and records concerning applicants, recipients, and former recipients of public assistance. See, e.g., 8 Ohio Admin. Code 5101:1-1-03 ("all information and records concerning an applicant, recipient, or former recipient are to be safeguarded"); 8 Ohio Admin. Code 5101:1-1-27 ("the CWD must physically protect SSA [social security administration] information from unauthorized access"); 8 Ohio Admin. Code 5101:1-1-42 ("because of the confidential nature of SSA match information, county welfare departments must ensure its safeguarding"); 8 Ohio Admin. Code 5101:4-1-13 (protection of case file information obtained from food stamp applicant households); see also [1988-1989 Monthly Record] Ohio Admin. Code 5101:1-27-05(B) at 285-86 (methods of investigation utilized by the CDHS must insure that confidential information is used only for purposes associated with the administration of public assistance). It is well recognized in the State of Ohio that an administrative rule has the effect of a statute. *Meyers v. State Lottery Comm.*, 34 Ohio App. 3d 232, 234, 517 N.E.2d 1029, 1031 (Lucas County 1986) ("an Ohio Administrative Code section is a further arm, extension, or explanation of statutory intent implementing a statute passed by the General Assembly. It has the force and effect of a statute itself"); *Adams v. Ohio Dept. of Health*, 5 Ohio Op. 3d 148, 151, 356 N.E.2d 324, 327 (C.P. Montgomery County 1976) ("valid rules promulgated by an administrative body have the force and effect of law, and constitute a part of the law of the state").

A review of the foregoing administrative rules indicates that employees of a CDHS have a duty not to disclose or wrongfully use the personal information concerning applicants, recipients, or former recipients of public assistance. More specifically, in 1983 Op. Att'y Gen. No. 83-071, I determined that a CDHS is prohibited from disclosing personal information about applicants for or recipients of AFDC, general assistance, and food stamps to law enforcement

² 1983-1984 Ohio Laws, Part II, 3692 (Am. Sub. H.B. 401, eff. July 20, 1984) ("to enact section 5101.01 of the Revised Code to change the name of the Department of Public Welfare to the Department of Human Services and to change the name of the county department of welfare to the county department of human services"). See R.C. 329.01; R.C. 5101.01.

³ 8 Ohio Admin. Code 5101:1-27-08 specifically sets forth the duties of the CDHS overpayment recovery unit. 8 Ohio Admin. Code 5101:1-27-07 defines the CDHS overpayment recovery unit as "a person or section whose duties involve determination and recovery of overpayments and fraud-related activity." Thus, CDHS fraud investigators are encompassed by the definition contained in rule 5101:1-27-07.

personnel. In syllabus paragraphs one and two of Op. No. 83-071,⁴ I determined that:

1. Pursuant to 7 Ohio Admin. Code 5101:1-1-03 and related statutory provisions, a county department of welfare is prohibited from disclosing to law enforcement personnel personal information about applicants for or recipients of Aid to Families with Dependent Children or poor relief, unless such law enforcement personnel are prosecuting public fraud or seeking child support, or the applicant or recipient has expressly consented in writing to the disclosure. In addition, the release must be for a purpose directly connected with the administration of a public assistance program outlined in Ohio Admin. Code Division 5101:1, and the agency to which the information is released must be subject to standards of confidentiality substantially comparable to those established in rule 5101:1-1-03.
2. Pursuant to [1982-1983 Monthly Record] Ohio Admin. Code 5101:4-1-13 at 308, a county department of welfare is prohibited from disclosing to law enforcement personnel personal information about applicants for or recipients of food stamps unless such law enforcement personnel are directly connected with the enforcement of the Food Stamp Act or regulations, other federal assistance programs, or general relief programs that are subject to joint processing requirements, or unless the applicant or recipient has executed a written waiver consenting to the release.

It is, therefore, conceivable that a situation could arise where an individual who serves as a CDHS fraud investigator and village police officer might obtain and use personal information as a village police officer, which he would not otherwise obtain but for his employment as a CDHS fraud investigator.

It is a general rule of compatibility analysis that not all potentialities for conflict result in a finding of incompatibility. Rather, an examination of various factors is necessary. These include the remoteness of the potential conflict, the individual's ability to remove himself from the conflict, and whether the potential conflict involves the primary functions of each position. Op. No. 79-111 at 2-372; *see also Esler v. Summit County*, 39 Ohio Misc. 2d 8, 530 N.E.2d 973 (C.P. Summit County 1985).

A significant factor, in determining whether a potential conflict renders positions incompatible, is the immediacy of the conflict. Op. No. 79-111; *see also* 1979 Op. Att'y Gen. No. 79-112 at 2-375 ("[t]he degree of remoteness, for example, is a significant factor"). Information provided by your office indicates that the individual deals with many of the same citizens while serving in both capacities. Such a situation increases the likelihood of a conflict of loyalties and duties. Furthermore, the individual would constantly be exposed to the temptation of utilizing the personal information in CDHS files to discharge his duties as a village police officer. The possibility of the individual using personal information obtained from CDHS files, therefore, is not remote and speculative.

Additionally, the individual cannot remove himself from the conflict. As a CDHS fraud investigator the individual is exposed to the personal information of applicants, recipients, and former recipients of public assistance. Thus, as a village police officer, he would be privy to personal information which he otherwise would be unable to obtain. *See* Op. No. 83-071. Furthermore, the conflict involves the

⁴ Since the issuing of 1983 Op. Att'y Gen. No. 83-071, 8 Ohio Admin. Code 5101:1-1-03 and 8 Ohio Admin. Code 5101:4-1-13 have been revised. No substantive changes were made, however, which would affect the conclusion reached in Op. No. 83-071.

primary duties of each position. A CDHS fraud investigator has a duty to investigate cases where the circumstances indicate the fraudulent receipt of public assistance and to safeguard the personal information of public assistance applicants, recipients, and former recipients. Village police officers have a duty to investigate crimes and enforce the criminal laws of the state and village. Clearly, the duty to safeguard information which might enable the individual to discharge the duties as a village police officer is a conflict which subjects the individual to divided loyalties. Accordingly, I find the conflict of interest presented by the CDHS fraud investigator's duty to safeguard the CDHS's information and records renders the positions incompatible.

Therefore, it is my opinion, and you are hereby advised that, the position of village police officer is incompatible with the position of county department of human services fraud investigator.