

December 19, 2011

The Honorable Paul A. Dobson
Wood County Prosecuting Attorney
One Courthouse Square
Office Building, 4th Floor
Bowling Green, Ohio 43402-2431

SYLLABUS:

2011-048

A president of a board of health of a combined general health district who serves as a member of the board of education of a local school district situated within the health district confronts a conflict of interest attributable to the competition for tax revenue within the ten-mill limitation. This conflict of interest cannot be mitigated or eliminated, and thus these two positions are incompatible. (2011 Op. Att'y Gen. No. 2011-029, approved and followed.)



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OPINION NO. 2011-048

The Honorable Paul A. Dobson
Wood County Prosecuting Attorney
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Dear Prosecutor Dobson:

You have requested an opinion whether the positions of member of the board of education of a local school district and president of the board of health of a combined general health district are compatible when the school district is situated within the health district.

A person may not hold two public positions at the same time if he will be subject to impermissible conflicts of interest. 2011 Op. Att’y Gen. No. 2011-029 at 2-235. Impermissible conflicts of interest exist when the duties of the positions subject a person who holds the positions concurrently to divided loyalties, conflicting duties, or the temptation to act other than in the public’s best interest. *Id.*

Whether impermissible conflicts of interest occur between two public positions is ascertained by reviewing the powers and duties of the respective positions. *Id.* If the review reveals possible conflicts of interest, the immediacy of the conflicts must be considered to determine whether the conflicts may be mitigated or eliminated so as to allow the person to hold both positions at the same time. *Id.* The factors used in making this determination include, but are not limited to, “the probability of the conflicts 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.” *Id.*

A person who serves simultaneously in the positions of president of the board of health of a combined general health district and member of the board of education of a local school district situated within the health district is subject to a significant conflict of interest. Pursuant to Article XII, § 2 of the Ohio Constitution and R.C. Chapter 5705, a combined general health district and local school district situated within the health district annually share in the amount of tax revenue generated

within the ten-mill limitation.¹ The amount of such tax revenue available to a local school district or combined general health district for budgeting purposes is directly contingent upon, and related to, the amount of such revenue sought by other governmental entities. Because the amount of tax revenue generated within the ten-mill limitation is finite, the process by which such revenue is allocated creates competition between the governmental entities that are entitled to share in the distribution of the revenue. The competition is extremely intense, especially when the amount of tax revenue generated within the ten-mill limitation diminishes in times of economic distress, and makes governmental entities adversaries of each other.

For this reason, Ohio's Attorneys General have, for more than 80 years, uniformly advised that a person is subject to a major, recurring conflict of interest when the person annually must directly participate in the competition for tax revenue generated within the ten-mill limitation on behalf of two governmental entities. *Compare* 2011 Op. Att'y Gen. No. 2011-029 (a member of the board of health of a combined general health district who serves as a member of a board of park commissioners formed pursuant to R.C. Chapter 1545 within the same county would be subject to a conflict of interest because he must compete in both positions for tax revenue generated within the ten-mill limitation), *with* 1930 Op. Att'y Gen. No. 2603, vol. III, p. 1718 (overruled, in part, on other grounds by 1992 Op. Att'y Gen. No. 92-013 (syllabus, paragraph 1)) (a township trustee who serves as a member of a board of health of a general health district within the same county would be subject to a conflict of interest because he must prepare competing tax budgets). Consequently, the competition for tax revenues generated within the ten-mill limitation places persons who prepare the tax budgets and appropriation measures of combined general health districts and local school districts situated within such health districts in adverse positions. *See generally* 1961 Op. Att'y Gen. No. 2480, p. 532, at 534 (“[s]ince 1927, when the Budget Law [(now R.C. Chapter 5705 (tax levy law))] went into effect, it often happens that officers of different political subdivisions of the state find themselves on opposite sides in the contest for a share of the tax dollar”).

A board of education must prepare, adopt, and submit an annual tax budget to the county budget commission. *See* R.C. 5705.28. Similarly, pursuant to R.C. 3709.28, a board of health must prepare, adopt, and submit an annual appropriation measure to the county budget commission.² Once the tax budgets and appropriation measures are submitted, the county budget commission evaluates them, revises and adjusts the estimates of balances and receipts from all sources for funds within these

¹ Article XII, § 2 of the Ohio Constitution provides that real property in Ohio may not be taxed in excess of one percent of its true value in money for state and local purposes unless approved by the voters or as provided for by a municipal charter. R.C. 5705.02 states further that “[t]he aggregate amount of taxes that may be levied on any taxable property in any subdivision or other taxing unit shall not in any one year exceed ten mills on each dollar of tax valuation of such subdivision or other taxing unit, except for taxes specifically authorized to be levied in excess thereof.”

² The president of the board of health of a combined general health district is a member of the board. R.C. 3709.11.

measures and, if necessary, adjusts tax levies within the ten-mill limitation. *See* R.C. 3709.28; R.C. 5705.31; R.C. 5705.32.

Adjustments and revisions with respect to a combined general health district's appropriation measure or the tax budget of a local school district situated within the health district will affect the amount of tax revenue generated within the ten-mill limitation that is available to the school district or health district, respectively. As a result, a person who serves on the board of health of a combined general health district and the board of education of a local school district situated within the health district may experience conflicting duties and loyalties that prevent him from making completely unbiased decisions when preparing the school district's tax budget and the health district's appropriation measure.

In a similar situation, we recently examined the conflicting duties and loyalties that arise when a person serves on a board of health and another board that competes with the board of health for tax revenue generated within the ten-mill limitation. As explained in 2011 Op. Att'y Gen. No. 2011-029 at 2-238:

Because a park district and a combined general health district may be in competition for tax moneys within the ten-mill limitation, an individual who serves on both the board of park commissioners and the board of health of a combined general health district may have conflicting duties and loyalties that prevent him from making completely objective, disinterested decisions when preparing the competing tax budgets. Prior Attorney General opinions consistently have concluded that a conflict of interest occurs if a person is required to take a position on behalf of one entity to the potential detriment of the other, including the competition for tax moneys within the ten-mill limit and the preparation of tax budgets for two different governmental entities. As explained by prior opinions, "in the preparation of the annual 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.'" (Citations omitted.)

2011 Op. Att'y Gen. No. 2011-029 thus determined that a member of a board of health of a combined general health district is subject to a conflict of interest when he is required in another public position to prepare a tax budget or appropriation measure that competes with the appropriation measure of the health district. Accordingly, a person who serves simultaneously in the positions of president of the board of health of a combined general health district and member of the board of education of a local school district situated within the health district is subject to a conflict of interest because of his participation in the process to distribute tax revenue generated within the ten-mill limitation.

Having determined that a conflict of interest exists between the two positions in question, we must now consider the immediacy of the conflict. In this particular instance, the conflict of interest

arising from the competition for tax revenue generated within the ten-mill limitation cannot be mitigated or eliminated.

A primary statutory function of the members of both a board of education and of a board of health is the handling of fiscal and budgetary matters for the school district and health district, respectively, including the preparation of an annual tax budget or appropriation measure. Discussions, deliberations, and votes about a tax budget or appropriation measure and other fiscal matters related to the tax budget or appropriation measure are regularly undertaken by the members of a board of education and board of health since the tax budget or appropriation measure and its funding are matters that arise on an annual basis.

In addition, many other types of decisions made throughout the year by a board of health or board of education affect the tax budget or an appropriation measure. The conflict of interest arising from the competition for tax revenue generated within the ten-mill limitation thus occurs whenever a board of health or board of education considers a matter that has an impact on the tax budget or an appropriation measure. Significantly, the conflict relates to financial and budgetary matters.

The preparation of a tax budget or appropriation measure is an essential, nondelegable responsibility of a board of education and a board of health, which relates to financial and budgetary matters that frequently come before the boards for their decision. Consequently, a person who serves simultaneously as the president of the board of health of a combined general health district and a member of the board of education of a local school district situated within the health district is unable to continually remove himself in either position from participating in the preparation of the tax budget or appropriation measure and discussions, deliberations, and votes pertaining to other fiscal matters related to the tax budget or appropriation measure. Finally, the preparation of a tax budget or appropriation measure and the handling of other fiscal matters related to the tax budget or appropriation measure require members of a board of education and a board of health to exercise independent decision-making authority.

The foregoing circumstances demonstrate that a person who serves simultaneously as the president of the board of health of a combined general health district and a member of the board of education of a local school district situated within the health district is unable to mitigate or eliminate the conflict of interest resulting from competition for tax revenue generated within the ten-mill limitation. For this reason, an impermissible conflict of interest exists between the two positions, and thus a person may not serve in both positions at the same time.

We are aware that a number of other potential conflicts of interest may prohibit a person from serving simultaneously as the president of the board of health of a combined general health district and a member of the board of education of a local school district situated within the health district. Conflicts between the two positions may arise because the board of health “has the responsibility of inspecting school premises and the power to issue orders upon school officials as necessary for the protection of health and the abatement of nuisances.” 1986 Op. Att’y Gen. No. 86-038 at 2-195; *see, e.g.*, R.C. 3701.56; R.C. 3707.01; R.C. 3707.03; R.C. 3707.26; R.C. 3709.21; R.C. 3709.22; 1986 Op. Att’y Gen. No. 86-060; 1951 Op. Att’y Gen. No. 787, p. 520; *see also* 1961 Op. Att’y Gen. No. 2206,

p. 248; 1950 Op. Att’y Gen. No. 2469, p. 721. A member of a board of health who serves on a board of education may have to participate in deliberations, discussions, or decisions about inspections or orders affecting the board of education. In such a situation, a member of a board of health could be subject to influences that may prevent him from acting impartially because of his service on the board of education.

A board of health and board of education also “have responsibilities which may overlap in other respects” and subject a person who serves on both boards to divided loyalties or the temptation to act other than in the public’s best interest. 1986 Op. Att’y Gen. No. 86-038 at 2-197. Various statutes authorize a board of health to provide services to a board of education. *See, e.g.*, R.C. 3313.67-.671; R.C. 3313.68-.69; R.C. 3313.72-.73. If a member of a board of health who serves on a board of education were to deliberate, discuss, negotiate, or make decisions to approve or reject the provision of services to the board of education, it could be difficult for the board of health member to exercise his discretion in an objective and disinterested manner because he serves on the board of education.

Finally, another conflict of interest may exist because of competition for tax revenue in excess of the ten-mill limitation. Both a health district and school district situated within the health district are permitted to place a levy on the ballot for tax revenue in excess of the ten-mill limitation. *See, e.g.*, R.C. 3709.29; R.C. 5705.194; R.C. 5705.21; R.C. 5705.212; R.C. 5705.213. When both the health district and school district contemplate asking the voters for this additional funding, a person who serves simultaneously as the president of the board of health of the health district and a member of the board of education of the school district might be subject to divided loyalties and influences that may prevent his decisions about the need for additional funding from being completely objective and disinterested. For example, if the board of health has authorized a tax levy for additional funds, the person, as a member of the board of education, may be hesitant to advocate for, or vote in favor of, placing a school district levy on the ballot for fear that the health district levy may be rejected in favor of the school district levy. Likewise, if the board of education has authorized a tax levy for additional funds, the person, as a member of the board of health, may be unwilling to support or vote in favor of placing a health district levy on the ballot out of a concern that voters will vote in favor of the health district levy rather than the school district levy. Because questions concerning the placement of competing tax levies on the ballot are critical to determining whether or when a board of health or board of education will bring a request for additional tax revenue before the voters, members of a board of education and board of health must consider such questions in a neutral and detached manner in order to best serve the interests of the school district and health district, respectively. *See* 1988 Op. Att’y Gen. No. 88-011 at 2-43.

Insofar as we have concluded that a person may not serve simultaneously as the president of the board of health of a combined general health district and a member of the board of education of a local school district situated within the health district because of competition for tax revenue generated within the ten-mill limitation, it is unnecessary for us to determine whether any other conflicts of interest also bar a person from serving in both positions.

In conclusion, it is my opinion, and you are hereby advised that a president of a board of health of a combined general health district who serves as a member of the board of education of a local school district situated within the health district confronts a conflict of interest attributable to the competition for tax revenue within the ten-mill limitation. This conflict of interest cannot be mitigated or eliminated, and thus these two positions are incompatible. (2011 Op. Att'y Gen. No. 2011-029, approved and followed.)

Respectfully,

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

MICHAEL DEWINE
Ohio Attorney General