February 12, 2014

The Honorable Joseph R. Burkard
Paulding County Prosecuting Attorney
112½ Water Street
Paulding, Ohio 45879

SYLLABUS: 2014-004

A person may not serve within the same county as a county commissioner and education specialist for the soil and water conservation district.

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OPINION NO. 2014-004

The Honorable Joseph R. Burkard
Paulding County Prosecuting Attorney
112½ Water Street
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Dear Prosecutor Burkard:

You have requested an opinion whether a person may serve within the same county as a county commissioner and education specialist for the soil and water conservation district (SWCD). On the basis of the following, the positions are incompatible.

**Conflict of Interest Rule**

A person may not hold two public positions at the same time when the person will be exposed to impermissible conflicts of interest. 2011 Op. Att'y Gen. No. 2011-048 at 2-382; 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. 2011 Op. Att'y Gen. No. 2011-048 at 2-382; 2011 Op. Att'y Gen. No. 2011-029 at 2-235.

Whether impermissible conflicts of interest exist between two public positions is determined by reviewing the powers, duties, and responsibilities of the respective positions. 2011 Op. Att'y Gen. No. 2011-048 at 2-382; 2011 Op. Att'y Gen. No. 2011-029 at 2-235. If this review discloses potential conflicts of interest between the positions, the immediacy of the conflicts must be considered to determine whether the conflicts may be sufficiently avoided or eliminated to allow a person to serve simultaneously in the positions. 2011 Op. Att'y Gen. No. 2011-048 at 2-382; 2011 Op. Att'y Gen. No. 2011-029 at 2-235. The following factors are considered when making this determination: "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." 2011 Op. Att'y Gen. No. 2011-029 at 2-235; *accord* 2011 Op. Att'y Gen. No. 2011-048 at 2-382.

**Powers, Duties, and Responsibilities of the Respective Positions**

A board of county commissioners has various powers and duties related to the government of the county. *See generally* 2004 Op. Att'y Gen. No. 2004-031 at 2-275 ("[t]he board of county commissioners has been given statutory authority to act on behalf of the county and to enter into

contracts dealing with a wide variety of matters"). For example, the board has the power to acquire and dispose of the county's real and personal property, *see* R.C. 307.01-.02; R.C. 307.09; R.C. 307.12, enter into contracts on behalf of the county, *see* R.C. 307.02; R.C. 307.04; R.C. 307.15; R.C. 307.69, compound or release debts, judgments, fines, or amercements due the county and for the use thereof, *see* R.C. 305.26, and provide offices and equipment to county officers, *see* R.C. 307.01. *See generally* 1981 Op. Att'y Gen. No. 81-042 at 2-167 ("[t]he power to make contracts on behalf of the county is vested in the board of county commissioners and no other officer can bind the county by contract, unless by reason of some express provision of law").

A board of county commissioners also handles the county's finances. This includes awarding the active moneys of the county to eligible financial institutions, *see* R.C. 135.33(C), reviewing the procedures for investing the county's public moneys, *see* R.C. 135.34, demanding and receiving money and property due the county, *see* R.C. 305.12, and serving as the taxing authority for the county, *see* R.C. 133.01(NN)(1); R.C. 5705.01(C). In its capacity as a taxing authority, the board is responsible for issuing securities for the purpose of providing moneys with which to pay one or more final judgments rendered against the county, *see* R.C. 133.14, issuing securities for the purpose of paying all or any portion of the costs of any permanent improvement that the county is authorized to acquire, improve, or construct, *see* R.C. 133.15, preparing an annual tax budget, *see* R.C. 5705.28, passing an annual appropriation measure, *see* R.C. 5705.38, and levying assessments and taxes, *see* R.C. 133.56; R.C. 5705.03; R.C. 5705.19.

The duties and responsibilities of an education specialist for a SWCD are prescribed by the district's board of supervisors. *See* R.C. 1515.05 (a SWCD is administered by a board of supervisors); R.C. 1515.09 (a board of supervisors of a SWCD may hire and compensate employees). According to the job description you have provided to us, the education specialist is responsible for implementing the district's education program. The specific duties and responsibilities of the education specialist include, but are not limited to, planning and scheduling educational program activities in public schools; assisting in tours and public viewings of district projects; preparing and distributing district educational materials; organizing and maintaining a district resource library; and performing such other duties as are assigned by the district's program administrator. *See generally* R.C. 1515.08(M) (a SWCD may "conduct demonstrations and provide information to the public regarding practices and methods for natural resource conservation, development, and utilization").

**Conflicts of Interest between the Respective Positions**

A person who serves within the same county as a county commissioner and education specialist for the SWCD is subject to an impermissible conflict of interest because the board of county commissioners routinely makes funding decisions that may adversely affect the amount of money the county provides to the district.[1] R.C. 1515.03 states that "[e]ach county shall have a [SWCD]

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[1] A person who serves within the same county as a county commissioner and education specialist for the soil and water conservation district (SWCD) may face other situations in which he is subject to divided loyalties, conflicting duties, or the temptation to act other than in the public's best

coextensive with the geographic area of the county."[2] A county's SWCD is funded locally through revenue derived from tax levies or from moneys appropriated from the county's general fund.[3] R.C. 307.27; R.C. 1515.10; R.C. 1515.28; R.C. 5705.05(E); R.C. 5705.06(A); R.C. 5705.19(VV). In other words, a county must make local moneys available to operate the SWCD.

The exact manner in which a county funds the operations of a SWCD is determined by the board of county commissioners in accordance with various statutes. First, R.C. 5705.05(E) requires a county's general levy for current expenses to include "support of [SWCDs]." *See generally* R.C. 5705.03(A) (a board of county commissioners, as the taxing authority for the county, "may levy taxes annually, subject to the limitations of [R.C. 5705.01-.47], on the real and personal property within the [county] for the purpose of paying the current operating expenses of the [county]"); R.C. 5705.04(B) (a board of county commissioners, as the taxing authority for the county, "shall divide the taxes levied into the following separate levies: … [t]he general levy for current expense within the ten-mill limitation").[4] As the revenue derived from the county's general levy for current expenses is held in the county's general fund, *see* R.C. 5705.10(A), such revenue may be used by the board of county commissioners to fund the operations of a SWCD. *See* 2013 Op. Att'y Gen. No. 2013-035, slip op. at 2 (when moneys in the county's general fund are not required to be used for a particular purpose, "the appropriation of such moneys is largely discretionary with the board of county commissioners"); 2012 Op. Att'y Gen. No. 2012-035 at 2-310 (revenue generated by the county general tax levy for current

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interest. These situations involve competition between the county and SWCD for state grants to purchase agricultural easements, *see* R.C. 901.21-.22, and the authority of the board of county commissioners to (1) contract with the SWCD, *see* R.C. 302.21-.22; R.C. 307.15; R.C. 1515.29; R.C. 6137.15, (2) adopt and enforce rules to abate soil erosion and water pollution by soil sediment, *see* R.C. 307.79, (3) approve projects submitted by the SWCD, *see* R.C. 1515.21, and (4) levy an assessment for an improvement submitted by the SWCD, *see* R.C. 1515.24. It is unnecessary for us to determine whether these other conflicts of interest are impermissible, as an impermissible conflict of interest exists because the board of county commissioners routinely makes funding decisions that affect the amount of money the county provides to the SWCD.

[2] A SWCD is a political subdivision of the state that is separate and distinct from the county in which it operates. R.C. 1515.03; *see* 2013 Op. Att'y Gen. No. 2013-006 at 2-66 and 2-67; 1996 Op. Att'y Gen. No. 96-052.

[3] A SWCD may receive moneys to operate from sources other than tax levies and the county's general fund. *See* R.C. 901.21-.22; R.C. 1515.08(E); R.C. 1515.14-.16; R.C. 1515.24.

[4] In Ohio, real property 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. *See* Ohio Const. art. XII, § 2; R.C. 5705.02-.03; R.C. 5705.07. This is known as the ten-mill limitation. The board of county commissioners, as the taxing authority for the county, *see* R.C. 5705.01(C), may levy property taxes within the ten-mill limitation for the purpose of paying the current operating expenses of the county. *See* R.C. 5705.03-.04; 2006 Op. Att'y Gen. No. 2006-034 at 2-313 n.5.

expenses is appropriated by the board of county commissioners). *See generally* R.C. 5705.28 (a board of county commissioners adopts the annual tax budget for the county); R.C. 5705.38 (a board of county commissioners passes the county's annual appropriation measure); R.C. 5705.392(A) ("[a] board of county commissioners may adopt as a part of its annual appropriation measure a spending plan, or in the case of an amended appropriation measure, an amended spending plan, setting forth a quarterly schedule of expenses and expenditures of all appropriations for the fiscal year from the county general fund").

In addition, a board of county commissioners may levy other taxes or appropriate moneys from the county's general fund to pay for the operating expenses of a SWCD. R.C. 307.27 states that a board of county commissioners may contribute money from the county's general fund to a SWCD. R.C. 1515.10 declares further that "[t]he board of county commissioners of each county in which there is a [SWCD] may levy a tax within the ten-mill limitation and may appropriate money from the proceeds of the levy or from the general fund of the county" to the SWCD. R.C. 1515.28 also provides that "[a] board of county commissioners may declare by resolution that it is necessary to levy a tax [outside the ten-mill limitation] upon the property within the project area in order to pay the costs of [an] improvement" undertaken by a board of county commissioners or SWCD. *See generally* R.C. 1515.01(L) (for purposes of R.C. Chapter 1515, an "improvement" is "an improvement that is made under the authority established in [R.C. 1515.08(C)]"); R.C. 1515.08(C) (the board of supervisors of a SWCD has the power "[t]o implement, construct, repair, maintain, and operate preventive and control measures and other works of improvement for natural resource conservation and development and flood prevention, and the conservation, development, utilization, and disposal of water within the district on lands owned or controlled by this state or any of its agencies and on any other lands within the district, which works may include any facilities authorized under state or federal programs, and to acquire, by purchase or gift, to hold encumber, or dispose of, and to lease real and personal property or interests in such property for those purposes"); R.C. 1515.21 (in certain circumstances, a board of county commissioners may exercise "the powers of a [SWCD] granted by [R.C. 1515.08(C)]"). Finally, a board of county commissioners may levy a tax outside the ten-mill limitation upon the property within the county "[f]or construction and maintenance of improvements and expenses of [SWCD] programs under [R.C. Chapter 1515,]" R.C. 5705.19(VV), or levy a tax without a vote of the people "for any specific permanent improvement which the [county] is authorized by law to acquire, construct, or improve, or any class of such improvements which could be included in a single bond issue[,]" R.C. 5705.06(A).

A board of county commissioners thus makes decisions that directly affect the amount of money the county provides to operate the SWCD. In addition, many other types of budgetary and funding decisions made throughout the year by a board of county commissioners may affect the amount of money the county has to support the SWCD. When a board of county commissioners chooses to fund programs or offices other than the SWCD, such action reduces the amount of county moneys that will be available for funding the operations of the SWCD. *See generally* 2011 Op. Att'y Gen. No. 2011-048 at 2-383 (the amount of tax revenue generated within the ten-mill limitation "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"); 2005 Op. Att'y Gen. No. 2005-043 at 2-467 n.17 ("[a] change in the minimum levy for one

taxing unit may have serious consequences for other taxing units"); 1999 Op. Att'y Gen. No. 99-027 at 2-182 ("[a]n argument that the county or city is entitled to a certain level of funds means a reduced level of funds are available for the other's use. Accordingly, the competition for advantageous budget decisions could subject a person who holds [two public positions] to influences that may prevent him from making completely objective decisions").

When a county commissioner who serves within the same county as an education specialist for the SWCD deliberates, discusses, or votes on county budgetary matters, it may be difficult for the commissioner to exercise his discretion to allocate county moneys in an objective and disinterested manner because of the employment relationship he has with the SWCD. *See generally* 2006 Op. Att'y Gen. No. 2006-041 at 2-401 ("[w]hen a county commissioner who serves as a member of the county board of elections deliberates, discusses, or votes in matters concerning the payment of the expenses of the county board of elections, it may be difficult for the commissioner to exercise her discretion to allocate county moneys in an objective and disinterested manner because of her position as a member of the county board of elections"); 2002 Op. Att'y Gen. No. 2002-022 at 2-145 ("in the execution of his duty as county commissioner to adopt the county's annual appropriation measure, an individual who was also director of the county's children services board would be subject to divided loyalties, trying to balance the needs of the county board of which he is director against the competing financial needs of other entities entitled to participate in county funds"); 1985 Op. Att'y Gen. No. 85-029 at 2-107 (when a board of county commissioners may appropriate moneys to a regional airport authority, a trustee of the airport authority who serves as a county commissioner "would be interested in obtaining the most possible money from the county. A county commissioner, however, must balance the needs of the airport authority against other, competing financial demands faced by the county. Thus, a person who served in both positions would be subject to a conflict of interest"); 1959 Op. Att'y Gen. No. 42, p. 13, at 15 ("[b]y his position of authority and interest in the activities of the soil conservation district a member of a Board of County Commissioners might well find himself in a serious position of divided loyalties"). *See generally also* 2010 Op. Att'y Gen. No. 2010-031 at 2-228 ("[i]f a member of a hearing board of a county board of revision who serves as a city legislator hears complaints and renders decisions as to the value of real property located in taxing units that overlap the city, the member may be predisposed toward increasing the value of such real property so as to increase the availability of free millage that may be allocated to the city by the county budget commission"). The commissioner also may be influenced not to perform his duties and exercise his discretion with respect to county budgetary matters in a completely objective manner for fear of reprisals by the board of supervisors of the SWCD. *See generally* 2003 Op. Att'y Gen. No. 2003-010 at 2-72 (a member of the board of education of a local school district who serves as a principal of a school in a joint vocational school district may "be influenced not to perform his duties and exercise his discretion with respect to matters involving the joint vocational school district in a completely objective manner for fear of reprisals by the joint vocational school district board of education").

**Immediacy of the Conflicts of Interest**

A review of the immediacy of the conflicts of interest that arise because a board of county commissioners is required to fund the operations of a SWCD discloses that the conflicts cannot be sufficiently avoided or eliminated entirely. A board of county commissioners is required annually to fund the operations of the SWCD, as well as other county entities. The conflicts of interest also involve the exercise of decision-making authority by the board of county commissioners and a primary function of the board of county commissioners—preparing the county's annual budget.

Moreover, insofar as the conflicts of interest involve financial and budgetary matters, which are a primary function of a board of county commissioners, it is impractical for a county commissioner to continually abstain from such matters. *See* 2006 Op. Att'y Gen. No. 2006-041 at 2-405. *See generally* 2010 Op. Att'y Gen. No. 2010-031 at 2-228 (a member of a hearing board of a county board of revision who serves as a member of a city legislative authority within the same county "cannot continually abstain from participating in matters involving taxing units that overlap the city since all the matters the board considers will involve the county (which is a taxing unit) and, possibly, other taxing units that overlap the city. If this were permitted, the hearing board member could not perform the duties the law requires him to perform as a member of the hearing board"). Accordingly, the conflicts of interest that arise because a board of county commissioners is required to fund the operations of a SWCD prohibit a person from serving within the same county as a county commissioner and education specialist for the SWCD. *See* 2006 Op. Att'y Gen. No. 2006-041 at 2-405 ("the conflicts of interest that arise because a board of county commissioners is required to appropriate an amount of money sufficient to pay the necessary and proper expenses of the board of elections prohibit a person from serving simultaneously as a county commissioner and member of a board of elections"); 2002 Op. Att'y Gen. No. 2002-022 at 2-147 (the positions of executive director of a children services board that is a county's public children services agency and county commissioner within the same county are incompatible since, among other things, "the role of the county commissioners, as the county's taxing authority, to perform various duties under R.C. Chapter 5705, including adoption of the county's annual appropriation measure, presents numerous potential conflicts which could be avoided only by the commissioner's abstention from all decisions involving funds that may otherwise be available for use by the agency he directs"); 1985 Op. Att'y Gen. No. 85-029 (the positions of member of a board of county commissioners and trustee of a regional airport authority are incompatible because the board of county commissioners may appropriate moneys to the regional airport authority); 1975 Op. Att'y Gen. No. 75-032 (the positions of county commissioner and member of a county board of mental retardation are incompatible because the county commissioners are required to levy taxes and make appropriations sufficient to enable the county board of mental retardation to perform its functions and duties); 1959 Op. Att'y Gen. No. 42, p. 13, at 15-16 (the position of supervisor of a soil conservation district is incompatible with the position of county commissioner because the board of county commissioners is required to fund the operations of the soil conservation district). *See generally* 1985 Op. Att'y Gen. No. 85-029 at 2-107 ("[i]t 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").

**Conclusion**

For the foregoing reasons, it is my opinion, and you are hereby advised that a person may not serve within the same county as a county commissioner and education specialist for the soil and water conservation district.

Very respectfully yours,

MICHAEL DEWINE
Ohio Attorney General