

November 30, 2004

The Honorable Rebecca J. Ferguson
Preble County Prosecuting Attorney
103 North Barron Street
Eaton, Ohio 45320

SYLLABUS:

2004-044

A person who serves as a child abuse investigator for a county department of job and family services that is designated as the county's public children services agency may serve simultaneously as a village police chief, provided it is physically possible for the person to perform the duties of both positions, and that as a child abuse investigator he does not participate in investigations of reports of alleged child abuse within the jurisdiction of the village. (1989 Op. Att'y Gen. No. 89-072, distinguished.)



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OPINION NO. 2004-044

The Honorable Rebecca J. Ferguson
Preble County Prosecuting Attorney
103 North Barron Street
Eaton, Ohio 45320

Dear Prosecutor Ferguson:

You have requested an opinion whether the positions of child abuse investigator for a county department of job and family services that is designated as the county's public children services agency¹ and village police chief are compatible. For the reasons that follow, it is our opinion that these two positions may be held simultaneously by the same person, provided it is physically possible for the person to perform the duties of both positions, and that as a child abuse investigator he does not participate in investigations of reports of alleged child abuse within the jurisdiction of the village.

Compatibility Test

The seven questions used to determine whether two public positions are compatible are as follows:

1. Is either of the positions a classified employment within the terms of R.C. 124.57?
2. Do the empowering statutes of either position limit employment in another public position or the holding of another public office?
3. Is one position subordinate to, or in any way a check upon, the other?

¹ R.C. 5153.02 requires each county to have a public children services agency to assume the powers and duties of the children services function prescribed in R.C. Chapter 5153 for a county. *See* R.C. 5153.01(A). A board of county commissioners may designate the county department of job and family services as the county's public children services agency. R.C. 5153.02; *see also* R.C. 307.981(B) (authorizing a board of county commissioners to designate a private or government entity within this state to serve as the county's public children services agency).

4. Is it physically possible for one person to discharge the duties of both positions?
5. Is there an impermissible conflict of interest between the two positions?
6. Are there local charter provisions, resolutions, or ordinances which are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

2003 Op. Att’y Gen. No. 2003-041 at 2-335 and 2-336. *See generally* 2 Ohio Admin. Code 123:1-46-02(F) (“[s]ervice in an appointed or elected position is prohibited when such position is subordinate to or in any way a check upon a position concurrently occupied by a classified or unclassified employee, or when it is physically impossible for one person to discharge the duties of both positions, or if some specific constitutional or statutory bar exists prohibiting a person from serving [in] both positions”).

The last two questions of the compatibility test ask about the applicability of charter provisions, resolutions, or ordinances, and federal, state, and local regulations. No state or federal regulation prohibits a person from serving as both a village police chief and child abuse investigator for a county department of job and family services. Further, whether there is an applicable local charter provision, resolution, ordinance, or departmental regulation which prohibits the dual holding of these two positions is a question for local officials to answer. It is assumed, for the purpose of this opinion, that no such local charter provision, resolution, ordinance, or departmental regulation exists.²

² We note that a collective bargaining agreement between a county and its employees entered into pursuant to R.C. Chapter 4117 “governs the wages, hours, and terms and conditions of public employment covered by the agreement.” R.C. 4117.10(A). *See generally* R.C. 4117.03(A)(4) (county employees are authorized to bargain collectively with the county “to determine wages, hours, terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement, and enter into collective bargaining agreements”). A collective bargaining agreement between a county and its employees may thus have provisions that might prevent a person in a given instance from holding two public positions simultaneously. The determination whether the provisions of a collective bargaining agreement prevent a person from holding two public positions simultaneously is one that must be addressed and answered on a case-by-case basis by the interested parties. *See generally* 1991 Op. Att’y Gen. No. 91-065 at 2-311 (it is not within the authority of the Attorney General “to render an opinion as to the meaning of language in a specific collective bargaining agreement”).

Discussion of R.C. 124.57

Question one of the compatibility test asks whether either of the positions is a classified employment within the terms of R.C. 124.57, which prohibits officers and employees in the classified service of the state, or of a county, city, city school district, or civil service township, from taking part in a variety of activities that occur as part of the regular political process and are partisan in nature.³ R.C. 124.57 thus “does the following: it prohibits an officer or employee in the classified service from seeking election or appointment to, or holding, a partisan political office, or engaging in other partisan political activities, and it prevents a partisan political officeholder from serving simultaneously as an officer or employee in the classified service.”⁴ 2003 Op. Att’y Gen. No. 2003-041 at 2-336; *accord* 2001 Op. Att’y Gen. No. 2001-034 at 2-203; *see* rule 123:1-46-02(C).

We must first determine whether a village police chief or child abuse investigator for a county department of job and family services is an officer or employee that is subject to R.C. 124.57’s prohibition. R.C. 124.57 applies only to officers and employees of “the state, the several counties, cities, and city school districts of the state, [and] the civil service townships of the state.” It does not, however, apply to officers or employees of villages. 2002 Op. Att’y Gen. No. 2002-021 at 2-133.

A child abuse investigator for a county department of job and family services is in the classified service of the county. R.C. 329.022; *see also* R.C. 124.11(A)(9); R.C. 329.02. As an employee in the classified service, a child abuse investigator is prohibited under R.C. 124.57 from running for or holding a partisan political office, or engaging in other partisan political activities. *But see* note four, *supra* (stating that a classified officer or employee may participate

³ R.C. 124.57 provides, in part:

No officer or employee in the classified service of the state, the several counties, cities, and city school districts of the state, or the civil service townships of the state shall directly or indirectly, orally or by letter, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political party or for any candidate for public office; ... nor shall any officer or employee in the classified service of the state, the several counties, cities, and city school districts of the state, or the civil service townships of the state be an officer in any political organization or take part in politics other than to vote as the officer or employee pleases and to express freely political opinions. (Emphasis added.)

⁴ A municipal charter provision or the terms of a collective bargaining agreement may permit an officer or employee in the classified service to participate in partisan politics. 2003 Op. Att’y Gen. No. 2003-041 at 2-336 n.7; 1991 Op. Att’y Gen. No. 91-065 (syllabus, paragraph one).

in partisan politics if the terms of a collective bargaining agreement authorize such participation). Accordingly, if the position of village police chief constitutes a partisan political office, a child abuse investigator for a county department of job and family services is prohibited by R.C. 124.57 from serving simultaneously as a village police chief.

Pursuant to R.C. 737.15, “[e]ach village shall have a marshal, designated chief of police, appointed by the mayor with the advice and consent of the legislative authority of the village.” A village police chief is not elected to his position by way of a partisan election, nor is he the recipient of a party-sponsored appointment to a public office that is normally filled by partisan election. R.C. 737.15. The position of village police chief thus is not a partisan political office, and a child abuse investigator for a county department of job and family services is not prohibited by R.C. 124.57 from serving in that position. Therefore, R.C. 124.57’s prohibition does not operate to prevent a person from serving simultaneously as a village police chief and child abuse investigator for a county department of job and family services.

Statutes Prohibiting the Holding of Another Public Position

Question two of the compatibility test asks whether the empowering statutes of either position limit a person from being employed in another public position or holding another public office. Additionally, a provision in the Ohio Constitution may prohibit a person from serving simultaneously in two public positions.

No constitutional provision or statute prohibits a person from serving simultaneously as a village police chief and child abuse investigator for a county department of job and family services. Accordingly, the second question of the compatibility test may be answered in the negative.

Subordination and Control

Question three of the compatibility test asks whether one position is subordinate to, or in any way a check upon, the other. A village police chief is appointed by the village mayor and, as such, is accountable to the mayor. R.C. 737.15; *see* R.C. 737.171. A child abuse investigator for the county department of job and family services is employed by, and under the direct control and supervision of, the department. R.C. 329.022; *see* R.C. 124.34; R.C. 329.02. The positions thus serve different governmental entities and are not subordinate to each other. The positions also operate independently of each other, and neither is required to assign duties to, or supervise, the other.⁵ Accordingly, neither position is subordinate to, or in any way a check upon, the other.

⁵ Investigations of alleged child abuse require interaction and cooperation between a county department of job and family services that is designated as the county’s public children

services agency and law enforcement agencies. *See* 1989 Op. Att’y Gen. No. 89-108 at 2-529; *see, e.g.*, R.C. 2151.421; R.C. 5153.28; 13 Ohio Admin. Code 5101:2-34-32(B), (J)(2), and (K); 13 Ohio Admin. Code 5101:2-34-32.1(B)(4)(a); 13 Ohio Admin. Code 5101:2-34-35(A)-(B); 13 Ohio Admin. Code 5101:2-34-36; 13 Ohio Admin. Code 5101:2-34-71; 13 Ohio Admin. Code 5101:2-39-12(C)(3) and (H); 13 Ohio Admin. Code 5101:2-39-12.1(E); *see also* 13 Ohio Admin. Code 5101:2-34-38 (authorizing a county department of job and family services to disseminate to law enforcement agencies confidential information pertaining to cases of alleged child abuse). Law enforcement officers are required to refer reports of alleged child abuse to, consult in certain instances with, and, when requested, provide assistance to, the county department of job and family services that is designated as the county’s public children services agency. R.C. 2151.421(D)(1) and (E); rule 5101:2-34-32(B), (J)(2), and (K); rule 5101:2-34-35(A)-(B); rule 5101:2-39-12(C)(3) and (H); rule 5101:2-39-12.1(E). A county department of job and family services is required to submit reports of its investigations of alleged child abuse to law enforcement agencies, R.C. 2151.421(F)(1), contact local law enforcement agencies in certain specified situations, rule 5101:2-34-32(J)(2); rule 5101:2-34-32.1(B)(4)(a); rule 5101:34-35(A)-(B); rule 5101:2-34-36(B)(1) and (H); *see* rule 5101:2-34-71(C)(5), and, when requested, conduct for a law enforcement agency a family risk assessment of all children residing in the home of an alleged perpetrator of child abuse, rule 5101:2-34-36(C).

Although the positions of village police chief and child abuse investigator for the county department of job and family services are required by law to cooperate and assist each other during an investigation of alleged child abuse, neither position is responsible for assigning specific duties or responsibilities to, or supervising or controlling the actions of, the other during an investigation. *See generally* R.C. 2151.421(J) (a county’s child abuse and neglect memorandum of understanding shall set forth the normal standards and operating procedures to be used in handling and coordinating investigations of reported cases of child abuse); *Brodie v. Summit County Children Services Bd.*, 51 Ohio St. 3d 112, 117, 554 N.E.2d 1301 (1990) (the investigatory responsibility of a county public children services agency under R.C. 2151.421 may not be delegated to another public or private agency); 13 Ohio Admin. Code 5101:2-33-07(A) (a county’s public children services agency “shall not enter into contracts with other entities or delegate its responsibility to perform its investigation duties outlined in [R.C. 2151.421]”); rule 5101:2-34-71 (a county’s child abuse and neglect memorandum of understanding sets forth the normal operating procedure to be employed by all concerned officials in the execution of their respective responsibilities for handling and coordinating investigations of reported cases of child abuse). Accordingly, the positions of village police chief and child abuse investigator operate independently when performing their respective duties during an investigation into a reported case of child abuse. *See generally* 1989 Op. Att’y Gen. No. 89-108 at 2-531 n.3 (while public children services agencies have exclusive authority to conduct investigations and make recommendations to law enforcement agencies in reported cases of child abuse, this authority in no way “restricts the responsibility of other entities to exercise authority granted to them by other statutes”).

Physical Ability to Hold and Serve in Both Positions

Question four of the compatibility test asks whether it is physically possible for one person to perform the duties of both positions. This is a factual question that is best resolved by the interested persons at the local level because they may more precisely determine the time constraints imposed upon the person as a village police chief and as a child abuse investigator. 2003 Op. Att’y Gen. No. 2003-041 at 2-339.

However, in order to serve simultaneously in these two positions the person must be certain that he will be able to carry out the duties of both positions in a competent and timely manner.⁶ *Id.* This means that there may not be a direct conflict between the times when the person is needed to perform duties on behalf of the village and the county. *Id.*

Conflicts of Interest

The final question of the compatibility test asks whether there is a conflict of interest between the two positions.⁷ It is a well-settled principle that a person may not hold two public positions simultaneously if he will be subject to divided loyalties and conflicting duties or be exposed to the temptation of acting other than in the best interest of the respective political subdivisions he serves. *Id.* at 2-339 and 2-340.

We must first review the powers, duties, and responsibilities bestowed upon a village police chief and a child abuse investigator for the county department of job and family services. If this review discloses conflicts of interest, we must then determine the immediacy of the conflicts so as to determine whether the conflicts may be sufficiently avoided or eliminated entirely, thus, allowing the person to serve simultaneously in both positions. Factors used to make 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

⁶ If a person who is a child abuse investigator is required to perform his duties as a village police chief during his regular work hours as a child abuse investigator, the person must take approved vacation or personal leave or leave without pay for the time he is absent from his duties as a child abuse investigator. Similarly, the person should not perform his duties as a child abuse investigator during the hours he is required to perform his duties as village police chief unless he does so after having been granted appropriate leave time by village officials.

⁷ The authority to issue advisory opinions regarding the application of the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43 is conferred upon the Ohio Ethics Commission pursuant to R.C. 102.08. In light of the duties conferred upon the Ohio Ethics Commission, the Attorney General will refrain from interpreting and applying these provisions by way of a formal opinion. 1987 Op. Att’y Gen. No. 87-033 (syllabus, paragraph three). Accordingly, any questions about the interpretation or application of these provisions in your particular situation should be addressed by the Ohio Ethics Commission.

exercises decision-making authority in both positions, and whether the conflicts relate to the primary functions of each position, or to financial or budgetary matters. 2003 Op. Att’y Gen. No. 2003-041 at 2-340.

We will consider, first, the powers, duties, and responsibilities of a village police chief. A village police chief is the “peace officer of [the] village and the executive head, under the mayor, of the police force.” R.C. 737.18. As the executive head of the village police department, the village police chief “has exclusive authority over the stationing and transfer of all deputies, officers, and employees within the police department of the village, under the general rules that the mayor prescribes,” R.C. 737.19(A), and has the right to suspend any of the deputies, officers, or employees in the village police department who are under his management and control, R.C. 737.19(B).

A village police chief has “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.” R.C. 737.18. R.C. 737.19(C) further delineates the powers of a village police chief as follows:

The marshal of a village [who is designated chief of police under R.C. 737.15] shall suppress all riots, disturbances, and breaches of the peace, and to that end may call upon the citizens to aid the marshal. The marshal shall arrest all disorderly persons in the village and pursue and arrest any person fleeing from justice in any part of the state. The marshal shall arrest any person in the act of committing an offense against the laws of the state or the ordinances of the village and forthwith bring that person before the mayor or other competent authority for examination or trial. The marshal shall receive and execute proper authority for the arrest and detention of criminals fleeing or escaping from other places or states.

See also R.C. 2935.03 (conferring arrest powers upon village police officers).

We will now look to the duties and responsibilities performed by a child abuse investigator for a county department of job and family services that is designated as the county’s public children services agency. Public children services agencies are designated by statute as the recipients of reports of known or suspected child abuse or neglect or threats of such abuse or neglect and are mandated by statute to investigate such reports. R.C. 2151.421; *see* R.C. 2151.422; R.C. 5153.16(A)(1); R.C. 5153.28. In order to promptly investigate reports of alleged child abuse, child abuse investigators may conduct field investigations, interviews with witnesses and alleged child abuse victims, and home visits. *See* R.C. 2151.421; 13 Ohio Admin. Code 5101:2-34-32; 13 Ohio Admin. Code 5101:2-34-32.1; 13 Ohio Admin. Code 5101:2-34-36; *see also* 45 C.F.R. § 1340.14(d) (2003).

In addition, child abuse investigators may take any reasonable action necessary to assess the risk of abuse to a child. Such actions may include, but are not limited to the following:

- (1) Taking photographs of areas of trauma on the child's body;
- (2) Taking photographs of the child's environment (with the caretaker's consent);
- (3) Securing a medical, and/or psychological examination/evaluation of the child (with the consent of the child, parent, guardian, or custodian; or with a court order); or
- (4) Securing any relevant records (including but not limited to school, mental health, medical, incident reports in an out-of-home care setting).

Rule 5101:2-34-32(I). Child abuse investigators may also determine whether a child is at immediate risk of harm and in need of removal from his home or an out-of-home care setting. Rule 5101:2-34-32(J); 13 Ohio Admin. Code 5101:2-39-12; 13 Ohio Admin. Code 5101:2-39-12.1.

A review of the duties and responsibilities of the positions of village police chief and child abuse investigator discloses one potential conflict of interest.⁸ Both the village police

⁸ We note that it is a well-established rule that a person who holds two law enforcement positions with overlapping jurisdiction is subject to impermissible conflicts of interest that render the two positions incompatible. *See, e.g.*, 1996 Op. Att'y Gen. No. 96-017; 1989 Op. Att'y Gen. No. 89-044; 1987 Op. Att'y Gen. No. 87-002; 1985 Op. Att'y Gen. No. 85-021. Because a child abuse investigator is not a law enforcement officer, *see* R.C. 2901.01(A)(11) (defining the term "[l]aw enforcement officer" for purposes of the Revised Code), the foregoing rule does not prevent a person from serving simultaneously as a village police chief and child abuse investigator for a county department of job and family services that is designated as the county's public children services agency. *See generally* 1989 Op. Att'y Gen. No. 89-016 (since a part-time investigator for a county coroner is not a law enforcement officer, a city police chief may also serve as a part-time investigator for a county coroner).

In addition, 1989 Op. Att'y Gen. No. 89-072 determined that the positions of village police officer and fraud investigator for the county department of human services are incompatible because a situation could arise where the person as a village police officer might obtain and use personal information he acquires from his position as fraud investigator. As stated in 1989 Op. Att'y Gen. No. 89-072 at 2-330, a county department of human services "has a duty to safeguard all information and records concerning applicants, recipients, and former recipients of public assistance." *See also* 1983 Op. Att'y Gen. No. 83-071. A fraud investigator's duty to safeguard the personal information of public assistance applicants, recipients, and former recipients thus presents an impermissible conflict of interest that bars him from serving as a village police officer.

Pursuant to R.C. 2151.421(H) and 13 Ohio Admin. Code 5101:2-34-38, each report and investigation of alleged child abuse is confidential. *See* R.C. 5153.17. However, a county's public children services agency is permitted to release reports and information pertaining to child

department and county's public children services agency may investigate within the village reports alleging child abuse. R.C. 2151.421; rule 5101:2-34-32; rule 5101:2-34-32.1; rule 5101:2-34-36; *see also* 13 Ohio Admin. Code 5101:2-34-35(A). During an investigation, the village police department or county's public children services agency may seek assistance from the other. For example, the village police department may consult with the county's public children services agency prior to removing a child from the person having custody of the child, R.C. 2151.421(E), or may request the agency for a family risk assessment of all children residing in the home of an alleged perpetrator of child abuse, rule 5101:2-34-36(C). Also, the county's public children services agency may request the assistance of the village police department, refer a report alleging child abuse to the village police department, or notify the county prosecuting attorney that an alleged perpetrator of child abuse has not been investigated by law enforcement. *See, e.g.*, R.C. 2151.421; rule 5101:2-34-32; rule 5101:2-34-32.1; rule 5101:2-34-35; rule 5101:2-34-36; rule 5101:2-39-12; rule 5101:2-39-12.1.

If a person who holds the positions of village police chief and child abuse investigator were required as a child abuse investigator to investigate a report alleging child abuse within the jurisdiction of the village, it would be difficult for the person as a child abuse investigator or village police chief to set aside his loyalty to the village police department or county's public children services agency, respectively, when making decisions pertaining to the extent of interaction between the police department and public children services agency during an investigation. Such a predisposition of loyalty could prevent the person from making completely objective and disinterested decisions or result in preferential treatment being accorded to the other position during an investigation. *See generally State ex rel. Baden v. Gibbons*, 17 Ohio Law Abs. 341, 344, 1934 Ohio Misc. LEXIS 1224 (Ct. App. Butler County 1934) (a conflict of interest results when the duties of one position may be administered or discharged in such a way as to result in favoritism and preference being accorded the other position); 1981 Op. Att'y Gen. No. 81-027 at 2-101 (“[i]t is a well-established common law principle that a public officer may not deal with himself, directly or indirectly”); 1980 Op. Att'y Gen. No. 80-035 at 2-149 (a conflict of interest occurs when a person's “responsibilities in one position are such as to

abuse investigations to law enforcement agencies such as village police departments. Rule 5101:2-34-38; *see* R.C. 2151.421(F)(1); rule 5101:2-34-35(B); rule 5101:2-34-36(B)(1); rule 5101:2-34-71(C)(5); *see also* 1992 Op. Att'y Gen. No. 92-046 at 2-188 (“[t]he term ‘law enforcement agency’ is not defined for purposes of R.C. 2151.421. It appears, however, that the term refers to municipal police and county sheriffs, who have a duty pursuant to R.C. 2151.421 to accept reports of alleged child abuse and neglect and refer those reports to the [public children services agency]”). *See generally* R.C. 2901.01(A)(11)(a) (for purposes of the Revised Code, village police chiefs and village police officers are “[l]aw enforcement officers”). Accordingly, the situation addressed in 1989 Op. Att'y Gen. No. 89-072 may be distinguished from the situation involving the positions of village police chief and child abuse investigator for a county department of job and family services that is designated as the county's public children services agency.

influence the performance of his duties in the other position, thereby subjecting him to influences which may prevent his decisions from being completely objective”).

We believe, however, that this conflict of interest may be sufficiently avoided. No statute requires the person as a child abuse investigator to investigate a report alleging child abuse within the jurisdiction of the village. Instead, the case load of a child abuse investigator is established by the public children services agency that employs him as an investigator. *See* R.C. 329.02 (“[u]nder the control and direction of the board of county commissioners, the county director of job and family services shall have full charge of the county department of job and family services”). Moreover, if there is more than one child abuse investigator employed by the public children services agency, it is possible for the person to remove himself from any investigations conducted by the agency within the jurisdiction of the village.

Whether the responsibilities of the person as a child abuse investigator for a county department of job and family services that is designated as the county’s public children services agency include investigating reports of alleged child abuse within the village or whether the person is able to remove himself from such investigations are questions of fact that must be determined at the local level. *See* 1989 Op. Att’y Gen. No. 89-022 at 2-104 and 2-105 (“whether the job duties of a particular assistant auditor require any involvement with the particular township or municipality where he or she holds the additional position depends upon the organizational structure of the office of the auditor of state” and “whether the position of an assistant auditor below the rank of regional administrator operates as a check upon the public office of township clerk or city planning commissioner is a question of fact to be determined in each instance”). Accordingly, if the duties of the person as a child abuse investigator do not include investigating reports of alleged child abuse within the village or if the person is able to remove himself from such investigations, the aforementioned conflict of interest does not exist, and the person is not prohibited from serving simultaneously in the positions of village police chief and child abuse investigator for a county department of job and family services that is designated as the county’s public children services agency. *See generally* 1989 Op. Att’y Gen. No. 89-052 at 2-220 (if a person’s duties as a county auditor employee do not involve conducting or participating in an audit of a law library association that employs him as a librarian, “then no conflict [of interest] as such exists, and the two positions would not be incompatible in this regard”); 1989 Op. Att’y Gen. No. 89-016 (syllabus) (the positions of investigator for the county coroner and city police chief are compatible, provided the person as an investigator “is not called upon by the coroner to investigate a death within the jurisdiction of the police chief of the city”).

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised that a person who serves as a child abuse investigator for a county department of job and family services that is designated as the county’s public children services agency may serve simultaneously as a village police chief, provided it is physically possible for the person to perform the duties of both positions, and that as a child abuse investigator he does not participate in investigations of

The Honorable Rebecca J. Ferguson

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reports of alleged child abuse within the jurisdiction of the village. (1989 Op. Att'y Gen. No. 89-072, distinguished.)

Respectfully,

A handwritten signature in black ink, appearing to read "Jim Petro", with a stylized flourish at the end.

JIM PETRO
Attorney General