December 30, 2002

The Honorable Brent A. Saunders
Gallia County Prosecuting Attorney
Gallia County Courthouse
18 Locust Street, Room 1267
Gallipolis, Ohio 45631-1267

SYLLABUS: 2002-039

A person who serves as a staff attorney for a county department of job and family services that is designated as the county's child support enforcement agency may not serve simultaneously as a member of a county children services board within the same county.

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OPINION NO. 2002-039

The Honorable Brent A. Saunders
Gallia County Prosecuting Attorney
Gallia County Courthouse
18 Locust Street, Room 1267
Gallipolis, Ohio 45631-1267

Dear Prosecutor Saunders:

You have requested an opinion whether the positions of member of a county children services board and staff attorney for a child support enforcement agency (CSEA) within the same county are compatible. In Gallia County the board of county commissioners has designated the county department of job and family services as the county's CSEA.[1] The board of county commissioners also has established a county children services board and designated this board as the county's public children services agency.[2]

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[1] R.C. 3125.10 requires each county to have a child support enforcement agency (CSEA). Pursuant to R.C. 307.981 and former R.C. 2301.35, which was repealed by Am. Sub. S.B. 180, 123rd Gen. A. (2001) (eff. Mar. 22, 2001), a county department of job and family services may be designated and serve as a county's CSEA. *See* R.C. 329.04(A)(1)(c) (a county department of job and family services that is designated as a county's CSEA may exercise and perform the "services authorized by Title IV-D of the 'Social Security Act' and provided for by [R.C. Chapter 3125]"); R.C. 3125.10 ("[a] government entity designated under former [R.C. 2301.35] prior to October 1, 1997, or a private or government entity designated under [R.C. 307.981] on or after that date may serve as a county's [CSEA]"). *See generally* R.C. 3119.01(A) ("[a]s used in the Revised Code, 'child support enforcement agency' means a child support enforcement agency designated under former [R.C. 2301.35] prior to October 1, 1997, or a private or government entity designated as a child support enforcement agency under [R.C. 307.981]").

[2] Pursuant to R.C. 5153.02, each county is required 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 is

The seven questions for determining 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?

4. Is it physically possible for one person to discharge the duties of both positions?

5. Is there a 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?

2002 Op. Att'y Gen. No. 2002-022 at 2-139 and 2-140. In this instance, however, the two positions are incompatible because of the existence of impermissible conflicts of interest between the two positions. Thus, it is unnecessary for us to consider the remaining questions.

It is well settled that a person may not serve simultaneously in two public positions when he is subject to an impermissible conflict of interest. 2002 Op. Att'y Gen. No. 2002-012 at 2-66; 1999 Op. Att'y Gen. No. 99-043 at 2-262. An impermissible conflict of interest occurs when a person's "responsibilities in one position are such as to influence the performance of his duties in the other position, thereby subjecting him to influences which may prevent his decisions from being completely objective." 1980 Op. Att'y Gen. No. 80-035 at 2-149.

In order to determine whether a conflict of interest exists between two positions, we must first review the powers, duties, and responsibilities bestowed upon each position. 1999 Op. Att'y Gen. No. 99-001 at 2-2. This review will enable us to determine whether a person who holds the

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authorized to designate any of the following as the county's public children services agency: "(A) [a] county children services board; (B) [a] county department of job and family services; (C) [a] private or government entity designated under [R.C. 307.981]." R.C. 5153.02; *see also* R.C. 307.981(B) (authorizing a board of county commissioners to designate any private or government entity within this state to serve as the county's public children services agency).

two positions simultaneously will confront a conflict of interest when he exercises the powers, duties, and responsibilities in either or both positions.[3] *Id*. at 2-2 and 2-3.

Let us consider, first, the powers, duties, and responsibilities of a member of a county children services board. A county children services board is appointed and employed by a board of county commissioners to serve as the county's public children services agency. R.C. 5153.02(A); R.C. 5153.03. A county children services board is solely responsible for providing for children who are in need of public care or protective services, R.C. 5153.15, and for assuming the powers and duties of the children services function prescribed in R.C. Chapter 5153 for the county, R.C. 5153.01(A). In general, the duties of a county children services board include investigating any instances in which it is alleged that a child is an abused, neglected, or dependent child, R.C. 5153.16(A)(1), (13); *see also* R.C. 2151.421, entering into agreements with appropriate persons or public or private agencies regarding the custody, care, or placement of children, R.C. 5153.16(A)(2), accepting custody of children committed to the board by a court exercising juvenile jurisdiction, R.C. 5153.16(A)(3), providing care to any child adjudicated to be an abused, neglected, or dependent child, R.C. 5153.16(A)(4), providing social services to any unmarried girl adjudicated to be an abused, neglected, or dependent child who is pregnant with or has been delivered of a child, R.C. 5153.16(A)(5), and providing temporary emergency care to any child in need of such care, R.C. 5153.16(A)(7).

In addition, a county children services board finds certified foster homes for the care of children, R.C. 5153.16(A)(8), acquires and operates a county children's home, R.C. 5153.16(A)(10); *see also* R.C. 5153.21, administers adoption assistance funds, R.C. 5153.16(A)(14)-(15); R.C. 5153.163, and implements a system of risk assessment for determining the risk of abuse or neglect to a child, R.C. 5153.16(A)(16). A county children services board has the capacity possessed by natural persons to institute proceedings in any court, R.C. 5153.18, and may also accept gifts of funds or property for child care and services, R.C. 5153.30, and acquire such property and equipment and purchase such supplies and services as are necessary for the proper conduct of its work, R.C. 5153.34.

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[3] Pursuant to R.C. 102.08, the Ohio Ethics Commission is authorized to issue advisory opinions concerning the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43. The authority to issue advisory opinions concerning the rules and canons set forth in the Supreme Court Rules for the Government of the Bar of Ohio and the Code of Professional Responsibility is conferred upon the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court. Ohio Gov. Bar R. V § 2(C); *see* R.C. 102.08. In light of this grant of authority, we believe that it is proper to refrain from interpreting such ethical provisions, canons, and rules by way of a formal opinion, and recommend that you consult with these agencies for guidance concerning the ethical and professional responsibilities that will confront a person who serves simultaneously as a member of a county children services board and staff attorney employed by the county department of job and family services.

Let us now look to the powers, duties, and responsibilities conferred upon a staff attorney employed by a county department of job and family services that is designated as the county's CSEA. R.C. 3125.11 states that a CSEA is the county's local Title IV-D agency and is required to "operate a program for support enforcement in the county that complies with Title IV-D of the 'Social Security Act,' 88 Stat. 2351 (1975), 42 U.S.C. 651, as amended, any rules adopted pursuant to that title, and state law." Each CSEA is responsible for the enforcement of support orders and for the performance of all administrative duties related to the enforcement of any support order. R.C. 3125.11. A staff attorney employed by a county department of job and family services that is designated as the county's CSEA is responsible for advising, assisting, and representing the county in its performance of its functions pertaining to the enforcement of support orders. R.C. 3125.17. According to the position description you provided to us, this particular staff attorney is required to supervise other staff attorneys, direct and coordinate investigative operations, conduct administrative or quasi-judicial hearings, represent or provide legal advice to officials of the county department of job and family services, and prepare and review contracts, leases, or other documents involving the county department of job and family services.

Given the respective duties of the positions, we believe that a person who serves simultaneously as a member of a county children services board and staff attorney for a county department of job and family services that is designated as the county's child support enforcement agency within the same county would be subject to several impermissible conflicts of interest. Pursuant to R.C. 2151.36, when a child has been committed, as provided in R.C. Chapter 2151 or 2152, to the custody of a county children services board, the juvenile court shall issue an order "requiring that the parent, guardian, or person charged with the child's support pay for the care, support, maintenance, and education of the child." The statute further provides that, "[t]he juvenile court shall order that the parents, guardian, or person pay for the expenses involved in providing orthopedic, medical, or surgical treatment for, or for special care of, the child, enter a judgment for the amount due, and enforce the judgment by execution as in the court of common pleas." Accordingly, when a child has been committed to the custody of a county children services board, the board may receive support payments for the expenses involved in caring for the child. R.C. 2151.36; *see* R.C. 3111.15; R.C. 3113.06; Ohio R. Juv. P. 34(C); *In the Matter of Mundy*, Case No. CA97-10-027, 1998 Ohio App. LEXIS 223, at *1 (Preble County Jan. 26, 1998); *In re Hinko*, 84 Ohio App. 3d 89, 94, 616 N.E.2d 515, 518 (Cuyahoga County 1992).

As explained previously, a county department of job and family services that is designated as the county's CSEA is responsible for the enforcement of support orders and for the performance of all administrative duties related to the enforcement of any support order. R.C. 3125.11; *see* 12 Ohio Admin. Code 5101:1-29-18. If a county children services board receives payments under support orders, the staff attorneys of the county department of job and family services would be required to conduct investigations related to such payments, *see, e.g.*, R.C. 3119.34; R.C. 3119.89; R.C. 3121.14; R.C. 3123.02; R.C. 3123.27, initiate enforcement actions on behalf of the county children services board, *see, e.g.*, R.C. 2151.231; R.C. 2151.43; R.C. 2705.031(B); R.C. 3123.061; R.C. 3123.14; 12 Ohio Admin. Code 5101:1-30-428, or conduct

administrative hearings that involve support payments to the county children services board, *see, e.g.*, R.C. 3123.04; R.C. 3123.33; 12 Ohio Admin. Code 5101:1-30-404. Under such circumstances, a staff attorney for a county department of job and family services that is designated as the county's CSEA who also serves as a member of a county children services board would be unable to perform his duties as a staff attorney with respect to matters concerning the county children services board in a completely objective manner because of the position he holds with the county children services board.

In addition, R.C. 5153.16(C)(2) authorizes a county children services board to enter into contracts with the county department of job and family services for the purpose of assisting the board with its duties. You have indicated in your request that there are indeed contracts between the county children services board and the county department of job and family services, and that other such contracts may be entered into in the future.

Accordingly, if a person who serves as a member of a county children services board and staff attorney for a county department of job and family services were required, in either position, to discuss, or to deliberate, negotiate, or vote upon, such a contract, it would be difficult for the person to set aside his loyalty to the county children services board or county department of job and family services, respectively. Such a predisposition of loyalty could prevent the person from making completely objective and disinterested decisions. As noted in 1981 Op. Att'y Gen. No. 81-027 at 2-101:

> It is a well-established common law principle that a public officer may not deal with himself, directly or indirectly. *See State ex rel. Taylor v. Pinney,* 13 Ohio Dec. 210 (C.P. Franklin County 1902). *By participating on both sides of a contract, a public officer would be exposed to conflicting loyalties and to the potential temptation of acting in a manner not in the best interest of the public*. *See* 1979 Op. Att'y Gen. No. 79-111. A public officer may not be in a position to control services delivered pursuant to contract, while at the same time passing upon the adequacy of the services delivered. (Emphasis added.)

Thus, in simple terms, a person may not hold positions of trust on two public entities that contract with each other.[4] *See* 2002 Op. Att'y Gen. No. 2002-022 at 2-144; 1986 Op. Att'y Gen.

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[4] Pursuant to R.C. 2921.42(A)(4), a public official may not knowingly "[h]ave an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected." If the county children services board and the county department of job and family services enter into a contract with each other, a person who holds a position with each of these entities could be determined to have an interest in the profits or benefits of a public contract. *See generally* Ohio Ethics Comm'n, Advisory Op. No. 92-002 (syllabus, paragraph two) (R.C. 2921.42(A)(4) prohibits a member of the Ohio Grape Industries Committee from having an interest in a public contract entered into between the Committee and another public agency that employs him, even

No. 86-029 at 2-153; 1985 Op. Att'y Gen. No. 85-029 at 2-108; 1984 Op. Att'y Gen. No. 84-059 at 2-195.

Having examined various potential conflicts between the positions of member of a county children services board and staff attorney for a county department of job and family services that is designated as the county's CSEA, we note that not all potential conflicts of interest render two public positions incompatible. Rather, as explained in 1979 Op. Att'y Gen. No. 79-111 at 2-372:

> [T]he better view is that no hard and fast rule should be laid down with respect to the question of whether a potential conflict will render positions incompatible, but that each compatibility question should be decided upon its particular facts. The factors to be considered with respect to questions of potential conflicts are the

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if he is required by statute to serve on the Committee by virtue of his position with the other public agency, unless the exception of R.C. 2921.42(C) applies).

In addition, the fact that this person holds two public positions for the same county could lead to a determination that the person has an interest in the profits or benefits of a public contract. R.C. 2921.42(G)(1) provides that, for purposes of R.C. 2921.42, "'[p]ublic contract' means … [t]he purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of the state, any of its political subdivisions, or any agency or instrumentality of either, including the employment of an individual by the state, any of its political subdivisions, or any agency or instrumentality of either." *See also* Ohio Ethics Comm'n, Advisory Op. No. 92-012, slip op. at 2 ("[t]he Ethics Commission has consistently held that an employment relationship between a political subdivision and an employee is a 'public contract' for purposes of R.C. 2921.42 since the political subdivision is purchasing or acquiring the services of the employee").

If it were determined that this person has an interest in a public contract for purposes of R.C. 2921.42(A)(4), the person could be prohibited from holding both positions. *See generally* Ohio Ethics Comm'n, Advisory Op. No. 99-002, slip op. at 3 ("[t]he Ethics Commission has held that R.C. 2921.42(A)(4) prohibits an elected officer of a political subdivision from simultaneously holding compensated employment with his own political subdivision because an employment relationship between a political subdivision and a public employee is a 'public contract' for purposes of R.C. 2921.42"); Ohio Ethics Comm'n, Advisory Op. No. 91-002 (a city council member is prohibited from holding compensated employment with the city's fire department). The determination whether a public official has an interest in a public contract for purposes of R.C. 2921.42(A)(4) is one that must be made by the Ohio Ethics Commission. 1990 Op. Att'y Gen. No. 90-040 at 2-161 n.1; *see also* note three, *supra*. We would, therefore, strongly recommend that you contact the Ohio Ethics Commission for guidance and advice regarding the application of R.C. 2921.42(A)(4) in the situation in which a person wishes to serve simultaneously within the same county as a member of a county children services board and staff attorney employed by the county department of job and family services.

> degree of remoteness of a potential conflict, the ability or inability of an individual to remove himself from the conflict, whether the individual exercises decision-making authority in both positions, whether the potential conflict involves the primary functions of each position, and whether the potential conflict may involve budgetary controls. Thus, not all potentialities for conflict will render positions incompatible, and to the extent that the earlier opinions cited herein state categorically that any possibility thereof necessitates a finding of incompatibility, they are hereby disapprove.

Examining the factors used to evaluate potential conflicts of interest, it is apparent that the various conflicts referred to above render the positions of member of a county children services board and staff attorney for a county department of job and family services that is designated as the county's CSEA incompatible. In this regard, we note first that, the conflicts cannot be sufficiently avoided or mitigated. As indicated in your letter, the county children services board and the county department of job and family services enter into contracts whereby the county department of job and family services assists the county children services board with its duties. It is not, therefore, merely a remote possibility that a person serving as a member of a county children services board and staff attorney for a county department of job and family services that is designated as the county's CSEA would be on both sides of any contracts between the board and the department. In addition, it is likely that the legal staff of the county department of job and family services will conduct investigations, initiate enforcement actions, or conduct administrative hearings that pertain to support payments to the county children services board.

Moreover, the conflicts involve the care of children, which is a primary function of both the county children services board and county department of job and family services, and the provision of legal services, which is a primary duty of the legal staff of the county department of job and family services. The conflicts also involve situations in which the positions exercise decision-making authority. Further, the role of the county children services board to perform its statutory responsibilities presents numerous potential conflicts which could be avoided only by the member's abstention from all decisions involving the duties of the board that could be performed by the county department of job and family services. Accordingly, these conflicts of interest bar a staff attorney employed by a county department of job and family services that is designated as the county's CSEA from serving simultaneously as a member of the county children services board within the same county.

Additionally, we note that there may be an occasion in which the position of staff attorney would be subordinate to the position of member of the county children services board. In this regard, R.C. 5153.121(A), which authorizes a county children services board and county department of job and family services to share employees, provides as follows:

> The board of county commissioners and the county children services board may agree to permit *any employee of the department of job and family services also to perform duties for the county children services board*, or to permit

> any employee of the county children services board also to perform duties for the department of job and family services. (Emphasis added.)

Accordingly, if a staff attorney for a county department of job and family services were required under an agreement entered into under R.C. 5153.121 to perform duties for a county children services board on which he serves, the position of staff attorney would be subordinate to the position of member of the county children services board.

It is well settled that "[t]here can be no stronger case of subordination, and, therefore, incompatibility, than a direct employer-employee relationship." 1979 Op. Att'y Gen. No. 79-099 at 2-308; *accord* 2001 Op. Att'y Gen. No. 2001-034 at 2-204 and 2-205; 1958 Op. Att'y Gen. No. 1742, p. 93, at 94; 1936 Op. Att'y Gen. No. 5114, vol. I, p. 71 (syllabus, paragraph one). Thus, the fact that the position of staff attorney could become subordinate to the position of member of the county children services board lends additional support for our conclusion that the positions of staff attorney for a county department of job and family services that is designated as the county's CSEA and member of a county children services board within the same county are incompatible.

Based on the foregoing, it is my opinion, and you are hereby advised that a person who serves as a staff attorney for a county department of job and family services that is designated as the county's child support enforcement agency may not serve simultaneously as a member of a county children services board within the same county.

Respectfully,

BETTY D. MONTGOMERY
Attorney General