

June 9, 2017

The Honorable Katherine J. Zartman
Williams County Prosecuting Attorney
1425 E. High St., Suite 115
Bryan, Ohio 43506

SYLLABUS:

2017-017

1. A person may serve simultaneously as village marshal of a non-charter village and member of a board of education of a local school district that serves the village and neighboring areas, provided that, as a member of the board of education, he shall (1) not appear before the county budget commission, (2) refrain from participating in any deliberations, discussions, and votes regarding a contract entered into with the legislative authority of a village under R.C. 3313.95, and (3) not participate in any deliberations, discussions, and votes on a tax levy or bond issue for additional funding when the village has already placed a tax levy on the ballot to fund the operations of the village police department or pay the salary of the village marshal.
2. A person may serve simultaneously as village marshal of a non-charter village and member of a board of education of a local school district that serves the village and neighboring areas, provided that, as a village marshal, he shall (1) not appear before the county budget commission, (2) refrain from participating in any investigation of a violation of the law involving employees or officials of the school district in which he serves as a member of the board of education, and (3) refrain from discussing or making determinations regarding the allocation of law enforcement trust fund moneys pursuant to R.C. 2981.13.



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OPINION NO. 2017-017

The Honorable Katherine J. Zartman
Williams County Prosecuting Attorney
1425 E. High St., Suite 115
Bryan, Ohio 43506

Dear Prosecutor Zartman:

We have received your request whether the position of village marshal of a statutory village is compatible with service as a member of a board of education of a local school district, the territory of which includes the village and neighboring areas.¹ Whether two public offices or positions are compatible depends upon the answers to the following seven questions:

1. Is either position in the classified civil service of the state, a county, a city, a city school district, or a civil service township as defined in R.C. 124.57?
2. Do any constitutional provisions or the governing statutes of either position prohibit or otherwise limit employment in another public position or the holding of another public office?
3. Is one of the positions subordinate to, or in any way a check upon, the other?
4. Is it physically possible for one person to perform the duties of both positions?
5. Is there a conflict of interest between the two positions?

¹ A village may choose to be governed by laws enacted by the General Assembly under Article XVIII, § 2 of the Ohio Constitution, *see* R.C. Chapter 705 (municipal plans of government); R.C. Chapter 731 (municipal organization); R.C. Chapter 733 (municipal officers), or may adopt a charter for its government pursuant to Article XVIII, § 7 of the Ohio Constitution. 2008 Op. Att’y Gen. No. 2008-011, at 2-122 n.1. In this instance, the village has not adopted a charter pursuant to Article XVIII, § 7 of the Ohio Constitution. Thus, this opinion addresses whether a village marshal of a statutory, or non-charter, village may serve simultaneously as a member of a board of education of a local school district that serves the village and neighboring areas.

6. Are there any controlling local charter provisions, resolutions, or ordinances?
7. Does a federal, state, or local departmental regulation prevent a person from holding both positions?

See 2014 Op. Att’y Gen. No. 2014-045, at 2-391 (“[a] seven-question compatibility test is used to determine whether a person may serve simultaneously in multiple public positions”); 2004 Op. Att’y Gen. No. 2004-019, at 2-153 to 2-154 (setting forth the seven-part compatibility test). All of these “questions must yield answers in favor of compatibility in order to conclude that two positions are compatible.” 2013 Op. Att’y Gen. No. 2013-008, at 2-78.

Question One: Classified Civil Service

The first question of the compatibility analysis asks whether either of the two positions in question is “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” within the meaning of R.C. 124.57.² R.C. 124.57(A); *see also* 2006 Op. Att’y Gen. No. 2006-041, at 2-394. R.C. 124.57(A) states that an “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 not “be an officer in any political organization or take part in politics other than to vote ... and to express freely political opinions.” R.C. 124.57(A). “R.C. 124.57 ... 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.” 2006 Op. Att’y Gen. No. 2006-041, at 2-394 to 2-395 (quoting 2003 Op. Att’y Gen. No. 2003-041, at 2-336).

The prohibition in R.C. 124.57 does not apply to a village marshal or a member of a board of education of a local school district. R.C. 124.57(A) restricts partisan political activity for only those officers or employees in the classified civil service “of the state, the several counties, cities, and *city* school districts of the state, [and] the civil service townships of the state.”³ (Emphasis added.) R.C. 124.57 does not apply to officers or employees in the classified

² The civil service in Ohio is divided into the classified and unclassified service. R.C. 124.11; *see also* Ohio Const. art. XV, § 10. An individual employed in the classified civil service possesses a statutory claim of qualified entitlement to continued employment, *see* R.C. 124.23; R.C. 124.34, whereas an individual employed in the unclassified civil service may be dismissed without cause, provided that the dismissal is not otherwise unlawful. *See* 1996 Op. Att’y Gen. No. 96-040, at 2-154.

³ “‘Civil service township’ means any township with a population of ten thousand or more persons residing within the township and outside any municipal corporation, which has a police or fire department of ten or more full-time paid employees and which has a civil service commission established under [R.C. 124.40(B)].” R.C. 124.01(G).

civil service of a village or a local school district. *See* 2011 Op. Att’y Gen. No. 2011-043, at 2-351 (“R.C. 124.57 does not expressly mention officers or employees in the service of a local school district; therefore, the statute does not apply to a member of the board of education of a local school district”); 2004 Op. Att’y Gen. No. 2004-044, at 2-377 (“R.C. 124.57 ... does not ... apply to officers or employees of villages”). Accordingly, the first question of the compatibility analysis may be answered in favor of compatibility.

Question Two: Constitutional or Statutory Provisions that Prohibit or Limit Employment in another Public Position or Holding of another Public Office

The second question of the compatibility analysis asks whether there are any constitutional provisions or statutes applicable to either position that prohibit or otherwise limit employment in another public position or the holding of another public office. R.C. 3313.13 prohibits a prosecuting attorney, city law director, “or other official acting in a similar capacity” from being a member of a board of education. A village marshal is not an official that acts in a capacity similar to that of a county prosecutor or city law director. Therefore, R.C. 3313.13 does not prohibit a village marshal from serving as a member of a board of education of a local school district.

R.C. 3313.70 prohibits a member of a board of education of any district from being appointed as a school physician, dentist, or nurse. R.C. 3313.70 also does not prohibit a member of a board of education of a local school district from serving simultaneously as a village marshal. No other constitutional or statutory provisions limit the outside employment of a member of a board of education of a local school district or a village marshal. *Cf.* 2004 Op. Att’y Gen. No. 2004-044, at 2-378 (“[n]o constitutional provision or statute prohibits a person from serving simultaneously as a village [marshal] and child abuse investigator for a county department of job and family services”). Therefore, the second question of the compatibility analysis may be answered in favor of compatibility.

Question Three: Subordination and Control

The third question of the compatibility analysis asks whether one of the positions is subordinate to, or in any way a check upon, the other. A village marshal is appointed by, and accountable to, the village mayor, with the advice and consent of the village legislative authority. R.C. 737.15; R.C. 737.171; *see also* 2004 Op. Att’y Gen. No. 2004-044, at 2-378 (“[a] village police chief is appointed by the village mayor and ... is accountable to the mayor”); 1987 Op. Att’y Gen. No. 87-002, at 2-7 (“[a] village marshal, or chief of police, is appointed by the village mayor, with the advice and consent of the legislative authority of the village”). A member of a board of education of a local school district is elected by, and accountable to, the citizens of the local school district. R.C. 3313.01; *see also* 2015 Op. Att’y Gen. No. 2015-032, at 2-311 (“[a] member of a local school district board of education is an elected official ... ‘responsible to the electorate’” (quoting 2011 Op. Att’y Gen. No. 2011-043, at 2-352)). A village marshal is appointed or elected by a different authority or body than a member of a board of education of a local school district. A village marshal operates independently of a member of a board of

education of a local school district. A village marshal is not accountable or subordinate to a member of a board of education of a local school district, nor is a member of a board of education of a local school district accountable or subordinate to a village marshal. A village marshal is not responsible for assigning duties to, or supervising the activities of, a member of a board of education of a local school district. A member of a board of education of a local school district is not responsible for assigning duties to, or supervising the activities of, a village marshal. Accordingly, question three of the compatibility analysis may be answered in favor of compatibility.

Question Four: Physical Possibility

The fourth question of the compatibility analysis asks whether it is physically possible for one person to perform the duties of both positions. “Whether an individual is physically able to adequately perform the duties of both positions is a question of fact which is best answered by the parties involved.” 1993 Op. Att’y Gen. No. 93-016, at 2-89. In 2004 Op. Att’y Gen. No. 2004-019, at 2-157 to 2-158, we offered the following guidance for determining whether a person is physically able to perform the duties of both positions:

[I]n order to serve simultaneously [in both positions], a person must be certain that he will be able to carry out the duties of both positions in a competent and timely manner. This means that there should not be a direct conflict between the times when the person is needed to perform duties on behalf of [both positions]. (Footnotes omitted.)

Without any evidence to the contrary, we will presume for the purpose of this opinion that one person is physically able to perform simultaneously the duties of village marshal and member of a board of education of a local school district.

Question Five: Conflict of Interest

The fifth question of the compatibility analysis asks whether there is a conflict of interest between the two positions. A person may not hold two public positions simultaneously if a conflict of interest exists. 2012 Op. Att’y Gen. No. 2012-040, at 2-351. A conflict of interest exists if the duties and responsibilities of one position are of such a nature as to influence the duties and responsibilities of the other position, ““thereby subjecting [the person] to influences which may prevent [the person’s] decisions from being completely objective.””⁴ 2006 Op. Att’y Gen. No. 2006-041, at 2-397 (quoting 1980 Op. Att’y Gen. No. 80-035, at 2-149); *see also* 1993

⁴ As the Ohio Ethics Commission is authorized to determine the applicability of the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-43, R.C. 102.08, the Attorney General “refrain[s] from interpreting and applying [those] provisions by way of a formal opinion.” 2011 Op. Att’y Gen. No. 2011-008, at 2-60 n.1. For a determination of whether those provisions apply to the positions at issue in this opinion, we recommend that you contact the Ohio Ethics Commission. *Id.*

Op. Att’y Gen. No. 93-016, at 2-89; 1979 Op. Att’y Gen. No. 79-111, at 2-371. As explained in 1979 Op. Att’y Gen. No. 79-111, at 2-371 (quoting 1970 Op. Att’y Gen. No. 70-168, at 2-336):

[O]ne in the public service “owes an undivided duty to the public. It is contrary to public policy for a public officer to be in a position which would subject him to conflicting duties or expose him to the temptation of acting in any manner other than the best interest of the public.”

Whether a person who serves simultaneously as a village marshal and a member of a board of education of a local school district is subject to a conflict of interest requires an examination of the duties and responsibilities of each position. *See* 2004 Op. Att’y Gen. No. 2004-044, at 2-380.

A village marshal is appointed by the village mayor, with the advice and consent of the village legislative authority. R.C. 737.15; R.C. 731.171; *see also* 2004 Op. Att’y Gen. No. 2004-044, at 2-378 (“[a] village police chief is appointed by the village mayor and ... is accountable to the mayor”); 1987 Op. Att’y Gen. No. 87-002, at 2-7 (“[a] village marshal, or chief of police, is appointed by the village mayor, with the advice and consent of the legislative authority of the village”). A village marshal is “the peace officer of a village and the executive head, under the mayor, of the police force.” R.C. 737.18. The marshal possesses “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.” *Id.* A village marshal “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 over the suspension of such deputies, officers, or employees in accordance with R.C. 737.19(B). A village marshal “shall suppress all riots, disturbances, and breaches of the peace,” and arrest persons in the village who are disorderly or in the act of committing an offense under state law or village ordinance. R.C. 737.19(C); *see also* R.C. 2935.03(A)(1) (conferring upon a marshal arrest and detention powers). Pursuant to R.C. 1905.08, a village marshal or police officer designated by the marshal “shall attend the sittings of the mayor’s court to execute” the court’s orders and preserve order.

A board of education of a local school district “consist[s] of five members who shall be electors residing in the territory composing the [district] and shall be elected at large in their [district].” R.C. 3313.01. A board of education of a local school district is the governing body of the school district. *Cf.* 2004 Op. Att’y Gen. No. 2004-025, at 2-225 (recognizing that a board of education of an exempted village school district is the governing body of the school district). R.C. Chapter 3313 sets forth the general powers and duties of a board of education. *See* 2011 Op. Att’y Gen. No. 2011-043, at 2-353 (“the powers, duties, and responsibilities of a member of the board of education of a local school district ... are set forth primarily in R.C. Chapter 3313”).

A board of education of a local school district is “a body politic and corporate, and, as such, capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing, and disposing of real and personal property.” R.C. 3313.17. A board of education of a local school district may “tak[e] and hold[] in trust for the use and benefit of [the] district, any

grant or devise of land and any donation or bequest of money or other personal property.” *Id.* A board of education of a local school district is responsible for establishing rules for the government of the district, R.C. 3313.20, providing a free education to the youth of the district, R.C. 3313.48, employing superintendents, teachers, and other necessary employees, R.C. 3313.47; R.C. 3319.01; R.C. 3319.07, and managing and controlling the public schools in the district, R.C. 3313.47. As the taxing authority for the local school district, the board of education is responsible for adopting the district’s tax budget and submitting the tax budget to the county budget commission in accordance with the provisions in R.C. Chapter 5705. R.C. 5705.01(C); R.C. 5705.28(A). The board of education of a local school district also may levy taxes and assessments on the real property within the district. R.C. 5705.03; R.C. 5705.07; R.C. 5705.194; R.C. 5705.21; R.C. 5705.212; R.C. 5705.213.

A review of the duties and responsibilities of a village marshal and a member of a board of education of a local school district discloses several potential conflicts of interest. First, a conflict of interest may arise for a person serving simultaneously as a village marshal and a member of a board of education of a local school district if the board of education and village legislative authority enter into a contract under R.C. 3313.95 “under which the ... legislative authority ... assign[s]” the village marshal “to one or more of the school district’s schools” for the purpose of “assisting guidance counselors and teachers in working with students concerning the use of alcohol and drugs of abuse.”⁵ A contract entered into under R.C. 3313.95 “shall ... specify the amount to be paid to the ... municipal corporation ... by the board of education as compensation for all or part of the salary and benefits of any police officer assigned to its schools.” A person serving simultaneously as village marshal and member of the board of education of the local school district may have difficulty remaining disinterested, as a member of the board of education, in negotiating contract terms that affect his compensation as village marshal.

The mere existence of a conflict of interest, however, does not automatically render two positions incompatible. When “the possibility of conflict is remote and speculative” and can be mitigated or avoided, “the conflict of interest rule is not violated.” 1993 Op. Att’y Gen. No. 93-016, at 2-91; *see also* 2004 Op. Att’y Gen. No. 2004-019, at 2-158 (“[w]here it can be demonstrated that the conflicts may be sufficiently avoided or eliminated entirely, the person may serve in both positions”).

The factors used in making this determination include, but are not limited to, “the probability of the conflict[] arising, the ability of the person to remove himself from any conflicts that may arise, whether the person exercises decision-making

⁵ R.C. 3313.95 authorizes a board of education of a local school district to enter into a contract with a village legislative authority “under which the ... legislative authority ... assign[s] one or more police officers employed by [the village’s] police force to one or more of the school district’s schools upon such terms and conditions as are set forth in the contract.” A village marshal is a village police officer.

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. 2011-048, at 2-382 (quoting 2011 Op. Att’y Gen. No. 2011-029, at 2-235).

Upon a consideration of the foregoing factors, we conclude that the foregoing conflict of interest is remote and speculative and can be sufficiently mitigated so as to avoid incompatibility. First, it is not often that this conflict of interest will arise. *Cf.* 2015 Op. Att’y Gen. No. 2015-032, at 2-320 (that a conflict of interest may arise if a county sheriff enters into a contract with a board of education of a local school district of which a deputy sheriff is a member, is merely speculative). Second, in this instance, a village legislative authority that enters into a contract with a board of education of a local school district under R.C. 3313.95 may avoid this conflict by not assigning the village marshal to a school within the school district in which he is a member of the board of education. *Cf. id.* at 2-321 (“the deputy sheriff who is employed as a D.A.R.E. officer may not be assigned to a school that is within the school district in which he is a member of the board of education”). Third, a board of education of a local school district is capable of functioning and performing the duties conferred upon it by statute when one of its members abstains from a matter. *See* R.C. 3313.01 (a board of education of a local school district is composed of five members); *State ex rel. Saxon v. Kienzle*, 4 Ohio St. 2d 47, 48, 212 N.E.2d 604 (1965) (“[i]n the absence of a statute to the contrary, any action by a board requires that a quorum participate therein, and that a majority of the quorum concur”). Therefore, a member of a board of education of a local school district who also serves as a village marshal is able to abstain from participating in deliberations, discussions, and votes regarding a contract entered into with a village legislative authority under R.C. 3313.95.⁶

⁶ R.C. 3313.33(B) states that with the exception of the circumstances described in R.C. 3313.33(C), no member of a board of education of a local school district “shall have, directly or indirectly, any pecuniary interest in any contract of the board or be employed in any manner for compensation by the board of which the person is a member.” R.C. 3313.33(C) authorizes a member of a board of education of a local school district to have a pecuniary interest in a contract if “(1) [t]he member’s pecuniary interest ... is that the member is employed by a political subdivision, instrumentality, or agency of the state that is contracting with the board,” R.C. 3313.33(C)(1); “(2) [t]he member does not participate in any discussion or debate regarding the contract or vote on the contract,” R.C. 3313.33(C)(2); and “(3) [t]he member files ... an affidavit stating the member’s exact employment status with the political subdivision, instrumentality, or agency contracting with the board,” R.C. 3313.33(C)(3). Accordingly, a member of a board of education of a local school district that is employed by a village as a village marshal is required under R.C. 3313.33 to abstain from participating in deliberations, discussions, and votes regarding *any* contract between the board of education and the village, not just a contract entered into under R.C. 3313.95.

A second conflict of interest may arise with respect to competition for tax dollars derived from taxes levied within the ten-mill limitation, commonly referred to as “inside millage.”⁷ See generally 2016 Op. Att’y Gen. No. 2016-012, at 2-120 (“[r]evenue derived from taxes levied within the ten-mill limitation is commonly referred to as inside millage”). The taxing authority of each village, local school district, and other subdivision within the county, is required to “adopt a tax budget for the next succeeding fiscal year.” R.C. 5705.28(A); see also R.C. 5705.01(A) (including any municipal corporation and local school district within the meaning of “subdivision” as used in R.C. Chapter 5705). But see R.C. 5705.281 (a county budget commission, by majority vote, may waive the requirement that a subdivision adopt a tax budget). A tax budget estimates each subdivision’s anticipated expenditures and receipts, including the amount of money each subdivision will require from the general property tax. See R.C. 5705.29 (listing the information each taxing unit shall include in its tax budget); see also R.C. 5705.09 (requiring each subdivision to establish certain funds into which tax revenues may be deposited and from which expenditures may be made). The county budget commission reviews each tax budget and adjusts the amounts each tax budget estimates will be required from the general property tax so as to bring the tax levies required therefor within the ten-mill limitation and other limitations specified in R.C. 5705.01 to R.C. 5705.47. See R.C. 5705.32(A). The amount of money required by each subdivision, as shown in each subdivision’s tax budget, affects the amount of inside millage that will be allocated to each of the subdivisions in the county. See 2011 Op. Att’y Gen. No. 2011-008, at 2-64. The amount of inside millage allocated to each subdivision dictates the amount of money that will be available for use by the subdivision’s various departments, agencies, and offices. The tax budgets of all of the subdivisions in the county compete for the limited inside millage available.

As the taxing authority for a local school district, a board of education is responsible for adopting and submitting a tax budget on behalf of the school district. See R.C. 5705.01(C). A village legislative authority is the taxing authority for a village. *Id.* A village’s tax budget includes an estimate of the necessary current operating expenses of a village police department for the ensuing fiscal year, including the expenses associated with the position of village marshal. R.C. 5705.29(A)(1). The head of each village department “entitled to participate in any appropriation or revenue of” the village is required to file with the village’s chief executive officer, for inclusion in the village’s tax budget, “an estimate of contemplated revenue and expenditures for the ensuing fiscal year.” R.C. 5705.28(C)(1). Accordingly, a village marshal may be responsible for submitting the village police department’s budget estimate for inclusion

⁷ The total amount of state and local taxes levied on real property may not exceed ten mills on each dollar of the property’s true value in money, except for those taxes that have been specifically authorized to be levied in excess thereof. Ohio Const. art. XII, § 2; R.C. 5705.02; see also 2005 Op. Att’y Gen. No. 2005-043, at 2-449 (“[t]axes levied by various taxing units may include both taxes within the 10-mill limitation (unvoted taxes) and taxes outside the 10-mill limitation (taxes authorized by the voters)”). A mill is a tenth part of one cent. *Black’s Law Dictionary* 1008 (7th ed. 1999). This rule is known as the “ten-mill limitation.” See R.C. 5705.02.

in the village tax budget. Because the tax budgets of a village and local school district within the same county compete for inside millage, a member of a board of education of a local school district who also serves as a village marshal within the same county may find it difficult to maintain objectivity in completing the competing budgetary tasks of each position.⁸ *Cf.* 1998 Op. Att’y Gen. No. 98-017, at 2-88 (“[t]he budget and tax provisions of R.C. 5705.28-.32 ... situate the members of different taxing authorities within the same county in adverse positions. A person who serves simultaneously as a member of the legislative authority of a village and member of the board of education of an exempted village school district, which compete for the same funds, ‘would be faced with a conflict of interest while preparing the budget of each subdivision, since in both positions he would be attempting to obtain the greatest possible share of the available funds, at the expense of the other subdivision’” (quoting 1981 Op. Att’y Gen. No. 81-010, at 2-33)).

Although this conflict of interest relates to financial and budgetary matters, we conclude that this conflict of interest also is not sufficient to render the positions incompatible. The compilation and adoption of the village’s tax budget is completed by the village legislative authority. R.C. 5705.01(A); R.C. 5705.01(C); R.C. 5705.28(A). Therefore, even if a village marshal is responsible for submitting the village police department’s budget estimate to the village, the village marshal does not exercise independent decision-making authority in the preparation and presentation of the village’s annual tax budget. *Cf.* 2004 Op. Att’y Gen. No. 2004-025, at 2-227 to 2-228 (recognizing, in analyzing the compatibility of a village clerk-treasurer and a member of a board of education of an exempted village school district, that the village legislative authority, not the village clerk-treasurer, is responsible for preparing the village’s annual tax budget). Accordingly, any undue influence a village marshal might exert in preparing the annual budget estimate for a village police department may be tempered by the actions taken by a village legislative authority in compiling and adopting the tax budget that is submitted to the county budget commission for examination.

Adopting a tax budget for a local school district is one of the primary duties of a board of education. *Cf.* 1990 Op. Att’y Gen. No. 90-083, at 2-358. Therefore, it is not practical for a member of a board of education of a local school district to abstain from discussing or making decisions about the compilation or adoption of the school district’s tax budget. *Cf. id.* (“it would, as a practical matter be laborious for [a member of a board of education] to remove himself from” such a conflict “by abstaining from taxing and budgetary matters”). Nevertheless, any undue influence that a member of a board of education of a local school district might exert in compiling and adopting a tax budget for the school district may be mitigated by the role the other members of the board play in the process. *See* R.C. 3313.01 (a local school district board of

⁸ We do not know whether, in this instance, the village marshal is responsible for compiling and submitting an annual budget estimate for the village police department to the village legislative authority. For the purpose of this opinion, we will presume that the village marshal possesses this responsibility.

education has five members). As we recognized in 2015 Op. Att’y Gen. No. 2015-032, at 2-315 to 2-316:

A member of a board of education of a ... local school district is responsible for preparing a tax budget, but he is only one of the several members of the board that votes upon the final tax budget Consequently, any undue influence he may exert will be counterbalanced by the other members of the board. (Internal citations omitted.)

See also generally State ex rel. Speeth v. Carney, 163 Ohio St. 159, 126 N.E.2d 449 (1955) (syllabus, paragraph 10) (absent evidence to the contrary, it is assumed that a public official will perform his duties in a regular and lawful manner). Moreover, a board of education of a local school district does not have the final power to determine the amount of inside millage that the school district will ultimately receive. Rather, a tax budget adopted by a local school district is subject to further review, adjustment, and approval by the county budget commission.⁹ 2015 Op. Att’y Gen. No. 2015-032, at 2-316 (“the county budget commission has the ultimate decision-making authority as to the allocation of tax moneys within the ten-mill limitation to the various subdivisions and taxing units”). Accordingly, based upon the foregoing mitigating factors, we conclude that a village marshal may serve simultaneously as a member of a board of education of a local school district notwithstanding that the job duties of those positions may require a person to discuss, compile, or adopt tax estimates or budgets that compete for tax moneys generated within the ten-mill limitation.¹⁰ *Cf. id.* (reaching the same conclusion with respect to a member of a board of a city or local school district and a deputy sheriff).

⁹ “R.C. 5705.31(D) ... requires a county budget commission to approve a minimum levy within the ten-mill limitation for the current expense and debt service of each subdivision or other taxing unit that existed during the last five years the fifteen-mill limitation was in effect (the period of 1929 through 1933).” 2016 Op. Att’y Gen. No. 2016-012, at 2-122. If any inside millage is left unallocated after the county budget commission approves the minimum levy and other levies as required by R.C. 5705.31(A)-(E), the county budget commission—not the taxing authority of any subdivision—“has broad discretion to allocate the non-mandated, or ‘free’ millage among the subdivisions.” 2016 Op. Att’y Gen. No. 2016-012, at 2-122 n.9.

¹⁰ Before the county budget commission makes final determinations with respect to the tax budgets, representatives of each subdivision may appear before the commission to explain the subdivision’s financial needs. R.C. 5705.32(E)(2). A village marshal who also serves as a member of a board of education of a local school district within the same county should not be designated by the village or by the school district to present the tax budget for the village or school district to the county budget commission. Presenting a tax budget to the county budget commission that competes with another subdivision’s tax budget is a significant conflict of interest that would render the position of village marshal and office of member of a board of education of a local school district incompatible.

A third potential conflict exists with respect to competition for tax dollars in excess of the ten-mill limitation. A village legislative authority and a board of education, as the taxing authorities of a village and a local school district, respectively, are authorized to place levies on the ballot for taxes in excess of the ten-mill limitation and to submit bond issues to electors when the amount of money generated by taxes levied within the ten-mill limitation will be insufficient to fund the purposes of the village or local school district. *See* R.C. 133.18 (authorizing the taxing authority of a subdivision to issue general obligation bonds); R.C. 5705.07 (“[t]he taxing authority of any subdivision may make tax levies authorized in excess of the ten-mill limitation by a vote of the people under the law applicable thereto, irrespective of all limitations on the tax rate”); R.C. 5705.19 (authorizing the taxing authority of any subdivision, except for school districts, to levy a tax in excess of the ten-mill limitation for particular purposes); R.C. 5705.191 (authorizing the taxing authority of any subdivision, other than a board of education of a school district or taxing authority of a county school financing district, to levy a tax in excess of the ten-mill limitation for particular purposes); R.C. 5705.21 (authorizing a board of education of any local school district, among other districts, to levy a tax in excess of the ten-mill limitation for any of the purposes specified therein).

R.C. 5705.19(J), for example, authorizes a village legislative authority to levy a tax in excess of the ten-mill limitation to provide “motor vehicles, communications, other equipment, buildings, and sites for such buildings used directly in the operation of a police department” and “for the payment of salaries of permanent or part-time police, communications, or administrative personnel to operate the same.” In this instance, the village and local school district are partially coextensive subdivisions that, at least in part, submit tax levies and bond issues to the same electors. 2004 Op. Att’y Gen. No. 2004-025, at 2-227. Thus, if a village legislative authority has placed a tax levy on the ballot to fund the operations of the village police department or pay the salary of the village marshal, and a board of education of a local school district within the same county contemplates asking the voters for additional funding, a person serving simultaneously as a member of the board of education of the local school district and village marshal may find it difficult to remain objective and disinterested in contemplating whether to submit a school district tax levy to electors, for fear that the village levy may be rejected in favor of the school district levy. *Cf.* 2015 Op. Att’y Gen. No. 2015-032, at 2-316 (“[a] deputy sheriff that is also a member of a city or local school district [board of education] may be subject to an influence that may affect his ability to act in an objective manner when the county and the school district contemplate placing levies on the ballot in excess of the ten-mill limitation”). As we recognized in 2011 Op. Att’y Gen. No. 2011-008, at 2-67 (quoting 1988 Op. Att’y Gen. No. 88-011, at 2-43), “[q]uestions of competing concerns before the electorate may be critical to determining whether or when a board might consider bringing requests for additional taxes before the voters.”

We conclude that this potential conflict of interest also does not render the positions of village marshal and member of a board of education of a local school district incompatible. The instances should be rare in which a village legislative authority places an issue on the ballot to fund the operations of a village police department or to pay the salary of a village marshal at the same time a local school district in which the village marshal also serves as a member of the

board of education places a tax levy or bond issue for additional funding on the ballot. *Cf.* 2015 Op. Att’y Gen. No. 2015-032, at 2-316 (“[t]he likelihood that the county and the city or local school district may present levies to the voters at the same time is low”); 2007 Op. Att’y Gen. No. 2007-023, at 2-241 (“[i]t is unlikely that both the village and township will have a tax levy or bond issue on the same ballot every election. Thus, deliberations, discussions, or votes by the legislative authority of the village concerning the placement of a tax levy or bond issue for additional funding on the ballot when the township has previously placed such a levy or bond issue on the ballot will be infrequent”). Moreover, a village marshal does not exercise decision-making authority with respect to levying a tax pursuant to R.C. 5705.19. *Cf.* 2004 Op. Att’y Gen. No. 2004-025, at 2-227 to 2-228 (recognizing the same principle with respect to a village clerk-treasurer). The officers responsible for determining whether to levy such a tax are the members of the village legislative authority. *See* R.C. 5705.19 (authorizing the taxing authority of any subdivision to levy a tax in accordance with that section); *see also* R.C. 5705.01(A); R.C. 5705.01(C).

A member of a board of education of a local school district is directly responsible for authorizing levies in excess of the ten-mill limitation on behalf of the school district. However, a member of a board of education of a local school district who also serves as a village marshal is able to abstain from participating in deliberations, discussions, and votes on a tax levy or bond issue for additional funding when the village has already placed a tax levy on the ballot to fund the operations of a village police department or pay the salary of the village marshal. *Cf.* 2015 Op. Att’y Gen. No. 2015-032, at 2-316 to 2-317; 2011 Op. Att’y Gen. No. 2011-008, at 2-67; 2004 Op. Att’y Gen. No. 2004-025, at 2-228. As we recognized in 2004 Op. Att’y Gen. No. 2004-025, at 2-228:

the fact that a member of the board of education of an exempted village school district holds an elected office with a village that competes with the school district for tax moneys generated within the ten-mill limitation and additional moneys in excess of the ten-mill limitation is, in and of itself, an insufficient reason to find that the board member is subject to an impermissible conflict of interest. If this reason were deemed sufficient, a board member would not be permitted to hold any office or employment with a political subdivision that competes with the school district for tax moneys generated within the ten-mill limitation and additional moneys in excess of the ten-mill limitation. (Citations omitted.)

Accordingly, a village marshal who also serves as a member of a board of education of a local school district, the territory of which includes the village, is not subject to an impermissible conflict of interest resulting from competition for tax moneys in excess of the ten-mill limitation.

A fourth conflict of interest may arise from the duty of a municipal police department under R.C. 2981.13(C)(2)(a) and (D) to establish an internal control policy that addresses the manner in which moneys deposited in the department’s law enforcement trust fund may be used. A village law enforcement trust fund is established by the village legislative authority. R.C. 2981.13(C)(1). “Amounts distributed to any [village] law enforcement trust fund shall be

allocated from the fund by the legislative authority only to the police department of the [village]” and used only in accordance with the internal control policy adopted by the village police department. R.C. 2981.13(C)(1)-(2)(a). Moneys in a law enforcement trust fund established by a village legislative authority may only be expended for certain purposes, including for providing “matching funds to obtain federal grants to aid law enforcement, in the support of DARE programs or other programs designed to educate adults or children with respect to the dangers associated with the use of drugs of abuse.” R.C. 2981.13(C)(2)(a)(iii); *see also* R.C. 2981.13(D) (a certain percentage of moneys in a law enforcement trust fund must be used to support “community preventive education programs,” which include “DARE programs and other programs designed to educate adults or children with respect to the dangers associated with using drugs of abuse”). Such programs are referred to in R.C. 2981.13 as “community preventive education programs.” R.C. 2981.13(D). The manner in which moneys from a law enforcement trust fund are used to support community preventive education programs is determined by the village police department. *Id.* A village marshal who also serves as a member of a board of education of a local school district that benefits from community preventive education programs may find it difficult to remain objective in determining the manner in which moneys from the village law enforcement trust fund shall be allocated. *Cf.* 2015 Op. Att’y Gen. No. 2015-032, at 2-321 (recognizing the same conflict between the positions of deputy sheriff and member of a board of education of a local or city school district); 2006 Op. Att’y Gen. No. 2006-023, at 2-202 to 2-204 (recognizing the same conflict may arise for a township police chief who also serves as a member of a board of education of a local school district that includes territory in the township).

We conclude that this conflict of interest also does not render the positions of village marshal and member of a board of education of a local school district incompatible. R.C. 2981.13(D) confers the duty to allocate law enforcement trust fund moneys on the village police department. While a village marshal is the head of the police department, he is subordinate to the mayor and operates the police department “under the general rules that the mayor prescribes.” R.C. 737.19(A); *see also* R.C. 737.18 (a village marshal is “the peace officer of a village and the executive head, under the mayor, of the police force”); R.C. 733.24 (village mayor is chief conservator of the peace); *In re Sturm v. Vill. of Bradner*, App. No. WD-81-74, 1982 WL 6395, at *2 (Wood County May 7, 1982) (recognizing that the provisions in R.C. Chapters 733 and 737 “clearly make the marshal of a village a subordinate of the mayor”). Therefore, a village marshal may avoid this conflict of interest by abstaining from discussions or determinations about the allocation of law enforcement trust fund moneys. *Cf.* 2015 Op. Att’y Gen. No. 2015-032, at 2-322. The duty of a village police department to allocate law enforcement trust fund moneys under R.C. 2981.13 may be performed by the mayor, as the chief conservator of the peace.

A fifth conflict of interest may arise for a person serving simultaneously as village marshal and member of a board of education of a local school district if the village marshal has been authorized by the village legislative authority to donate unclaimed property pursuant to R.C. 737.32. R.C. 737.32 states, in part:

If authorized to do so by an ordinance adopted by the legislative authority of the [village] and if the property involved is not required to be disposed of pursuant to another section of the Revised Code, the chief of police or marshal may contribute property that is unclaimed for ninety days or more to one or more public agencies, to one or more nonprofit organizations [that meet certain criteria], or to one or more organizations satisfying section 501(c)(3) or (c)(19) of the Internal Revenue Code of 1986.

If a board of education of a local school district is among a group of public agencies, each of which expresses a desire for certain unclaimed property, a village marshal who also serves as a member of the board of education of the local school district may find it difficult to remain objective and disinterested in determining to which public agency the unclaimed property shall be contributed. *Cf.* 2006 Op. Att’y Gen. No. 2006-023, at 2-204 (discussing a similar conflict of interest for a township police chief serving simultaneously as a member of a board of education of a local school district).

We find that this conflict of interest is remote and speculative and does not prohibit a village marshal from serving simultaneously as a member of a board of education of a local school district. First, there is a presumption that public officials will perform their duties in a regular and lawful manner in the absence of evidence to the contrary. *See State ex rel. Speeth*, 163 Ohio St. 159 (syllabus, paragraph 10). Second, it is unlikely that this conflict of interest will arise. A village marshal serving simultaneously as a member of a board of education of a local school district will face this conflict only in the event that (1) the village legislative authority adopts an ordinance authorizing the village marshal to contribute unclaimed property “to one or more public agencies, to one or more nonprofit organizations . . . , or to one or more organizations satisfying section 501(c)(3) or (c)(19) of the Internal Revenue Code of 1986,” R.C. 737.32, (2) property remains unclaimed for ninety days, (3) the board of education expresses an interest in the property in addition to other public agencies, and (4) no other section of the Revised Code controls the disposition of the property. This remote conflict is not enough to render the positions of village marshal and member of a board of education of a local school district incompatible. If it were, a village marshal would be unable to serve as an officer or employee for any public agency.

A final conflict of interest exists between the positions of village marshal and member of a board of education of a local school district that includes the territory of the village, insofar as a village police department may be required to investigate alleged crimes committed by employees or officers of the local school district. A village police department is required to investigate crimes within the village. If a village police department is required to investigate the conduct of employees or officers of a local school district, a village marshal that serves simultaneously as a member of the board of education of the school district may find it difficult, as village marshal, to remain objective in overseeing and directing the investigation. *Cf.* 2015 Op. Att’y Gen. No. 2015-032, at 2-319 (“[a] deputy sheriff that is required to investigate an alleged violation of the law by an employee or board member of the school district in which he serves as a member of the board of education may experience conflicting loyalties to the school district and his law

enforcement responsibilities”); 2013 Op. Att’y Gen. No. 2013-034, at 2-351 (a conflict exists when a village marshal who serves simultaneously as the village administrator is forced to investigate the office of the village administrator); 2006 Op. Att’y Gen. No. 2006-023, at 2-204 to 2-205 (recognizing that a township police department is required to investigate teachers and other employees and officers of a local school district for failing to report threats of child abuse or child neglect in accordance with R.C. 2151.421(A)(1) or disseminating the contents of a child abuse or neglect report in violation of R.C. 2151.421(H)(2)); 1989 Op. Att’y Gen. No. 89-022, at 2-106 (“[p]rior opinions have held that when a public position requires an individual to conduct an objective investigation or review of another entity, a conflict arises when the individual holds a second position which creates a loyalty to that entity or a predisposition toward the outcome of the review or investigation”).

This potential conflict of interest also does not render these two positions incompatible. A village marshal who serves simultaneously as a member of a board of education of a local school district that serves the village and neighboring territories may remove himself from any investigation that concerns the local school district. *See* 2013 Op. Att’y Gen. No. 2013-034, at 2-352 (recognizing that a village marshal that serves simultaneously as a village administrator may remove himself from any investigation involving the office of the village administrator). In 2006 Op. Att’y Gen. No. 2006-023, at 2-207, the Attorney General concluded that a township police chief serving simultaneously as a member of a board of education of a local school district was not able to abstain from participating in investigations involving employees or officers of the school district. “As the head of the township’s police department,” the Attorney General reasoned, “the chief is responsible for exercising or delegating all departmental decision-making authority” and is therefore “directly or indirectly involved in all departmental matters or investigations.” *Id.* The Attorney General concluded that it was not possible for a township police chief to abstain from his role as the overseer of investigations because a township police chief “exerts his influence” in all police matters or investigations, whether or not directly involved in a matter. *Id.*

Nevertheless, the position of village marshal is different from the position of township police chief insofar as a village marshal may abstain from any investigations in which he has a conflict of interest. A village marshal is the chief of police and executive head of the police force, but assumes these positions “under the mayor.” R.C. 737.18; *see also* R.C. 737.15. The mayor, as the chief conservator of the peace and the appointing authority of the village marshal, is a law enforcement officer and able to oversee and participate in any police investigations in which the village marshal has a conflict of interest and is required to abstain. R.C. 737.16; R.C. 737.24; *see also* 2001 Op. Att’y Gen. No. 2001-026, at 2-145 (recognizing that the mayor is a law enforcement officer). A township police chief serves a board of township trustees, the members of which are not law enforcement officers. R.C. 505.49. Accordingly, in this instance, this conflict of interest may be avoided by the village marshal’s abstention from any involvement in an investigation into employees or officers of a local school district in which he serves as member of the board of education. *See* 2013 Op. Att’y Gen. No. 2013-034, at 2-352 (recognizing the ability of a village marshal to abstain from investigations in which he has a conflict of interest).

A person serving simultaneously as a village marshal and member of a board of education of a local school district may be subject to conflicts of interest. The conflicts of interest, as discussed above, are remote and speculative. In the event conflicts of interest do arise, the conflicts can be sufficiently mitigated or avoided. Accordingly, question five of the compatibility analysis may be answered in favor of compatibility.

Questions Six: Local Charters, Resolutions, and Ordinances

Question six of the seven-part compatibility test asks whether any local charter provisions, resolutions, or ordinances limit the holding of outside public employment by a village marshal or member of a board of education of a local school district. Whether any local charter provisions, resolutions, or ordinances apply is a matter of local concern. *See* 1996 Op. Att’y Gen. No. 96-062, at 2-252; 1993 Op. Att’y Gen. No. 93-016, at 2-85; 1979 Op. Att’y Gen. No. 79-111, at 2-368. We therefore presume, having received no information to the contrary, that no local charter provisions, resolutions, or ordinances prohibit one person from holding the position of village marshal and the office of member of a board of education of a local school district.

Question Seven: State, Federal, or Local Departmental Regulations

Question seven of the compatibility analysis asks whether any state, local, or federal departmental regulations limit the holding of outside public employment by a village marshal or a member of a board of education of a local school district. There are no state, local, or federal departmental regulations applicable.¹¹ Accordingly, the final question of the compatibility analysis may be answered in favor of compatibility.

¹¹ The Hatch Act, 5 U.S.C.A. §§ 1501-1508 (Thomson West 2007), prohibits a “State or local ... employee” from being “a candidate for elective office” “if the salary of the employee is paid completely, directly or indirectly, by loans or grants made by the United States or a Federal agency.” 5 U.S.C.A. § 1502(a)(3). “The prohibition of 5 U.S.C.A. § 1502(a)(3) applies only to offices that are filled by a partisan election.” 2015 Op. Att’y Gen. No. 2015-032, at 2-323; *see also* 5 C.F.R. § 151.101(i) (“[e]lective office means any office which is voted upon at an election ..., but does not include political party office”). A member of a board of education of a local school district stands for election to that office on a nonpartisan ballot. R.C. 3513.254(A) (“[t]he name of each candidate for member of a ... local ... board of education shall appear on the nonpartisan ballot”); R.C. 3513.256(A) (authorizing a board of education of a local school district to adopt a resolution detailing “procedures for a nonpartisan primary election”); *see also* R.C. 3505.04. Accordingly, the Hatch Act does not prohibit a village marshal from serving simultaneously as a member of a board of education of a local school district, even if a village marshal is a “State or local ... employee” whose salary is paid completely, directly or indirectly, by federal grants or loans.

Conclusions

It is our opinion, and you are hereby advised that:

1. A person may serve simultaneously as village marshal of a non-charter village and member of a board of education of a local school district that serves the village and neighboring areas, provided that, as a member of the board of education, he shall (1) not appear before the county budget commission, (2) refrain from participating in any deliberations, discussions, and votes regarding a contract entered into with the legislative authority of a village under R.C. 3313.95, and (3) not participate in any deliberations, discussions, and votes on a tax levy or bond issue for additional funding when the village has already placed a tax levy on the ballot to fund the operations of the village police department or pay the salary of the village marshal.

2. A person may serve simultaneously as village marshal of a non-charter village and member of a board of education of a local school district that serves the village and neighboring areas, provided that, as a village marshal, he shall (1) not appear before the county budget commission, (2) refrain from participating in any investigation of a violation of the law involving employees or officials of the school district in which he serves as a member of the board of education, and (3) refrain from discussing or making determinations regarding the allocation of law enforcement trust fund moneys pursuant to R.C. 2981.13.

Very respectfully yours,



MICHAEL DEWINE
Ohio Attorney General