

OPINION NO. 94-020**Syllabus:**

R.C. 731.12 prohibits a member of the legislative authority of a village from serving simultaneously as a member of the board of directors of a port authority created pursuant to R.C. 4582.22.

To: Lowell S. Petersen, Ottawa County Prosecuting Attorney, Port Clinton, Ohio
By: Lee Fisher, Attorney General, April 15, 1994

You have requested an opinion regarding the compatibility of the public positions of village councilman in a non-charter village and member of the board of directors of a township port authority. The port authority was formed in 1991, by the township acting alone. The village is not joined to the port authority.

Member of the Legislative Authority of a Village May Not Hold Another Public Office

Pursuant to the compatibility test set out in 1979 Op. Att'y Gen. No. 79-111, two public positions are incompatible if, *inter alia*, the empowering statutes of either position prohibit simultaneous service in the other position. *See also* 1989 Op. Att'y Gen. No. 89-069 at 2-321. The provisions of R.C. 4582.21-.59, which govern the port authority in your question,¹ do not prohibit members of the board of directors from serving in other public positions. However, R.C. 731.12, which establishes the qualifications of members of the legislative authority of a village, states in relevant part that "[n]o member of the legislative authority shall hold *any other public office*.... Any member who ceases to possess any of such qualifications or who removes from the village shall forfeit his office." (Emphasis added.) Because your question involves a member of a village legislative authority subject to R.C. 731.12, it is necessary to determine whether the position of member of the board of directors of a port authority is a public office for purposes of R.C. 731.12.

¹ R.C. Chapter 4582 provides two sets of provisions governing the creation and operation of port authorities. Port authorities formed after July 9, 1982, are governed by the provisions of R.C. 4582.21-.59. *See* R.C. 4582.202. Because the port authority you ask about was formed in 1991, the term port authority throughout this opinion refers to an authority operating under R.C. 4582.21-.59.

Meaning of Public Office for Purposes of R.C. 731.12

The Ohio Supreme Court has stated the traditional criteria used to determine whether a position is a public office as follows:

The usual criteria in determining whether a position is a public office are durability of tenure, oath, bond, emoluments, the independency of the functions exercised by the appointee, and the character of the duties imposed upon him.... The chief and most-decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law. If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office and not an employment.

....

...[I]t is manifest that the functional powers imposed must be those which constitute a part of the sovereignty of the state.

State ex rel. Landis v. Board of Comm'rs, 95 Ohio St. 157, 159-60, 115 N.E. 919, 919-20 (1917); see also *State ex rel. Milburn v. Pethel*, 153 Ohio St. 1, 90 N.E.2d 686 (1950) (citing *Landis* with approval); *Scofield v. Strain*, 142 Ohio St. 290, 51 N.E.2d 1012 (1943) (same); *State ex rel. Attorney Gen. v. Jennings*, 57 Ohio St. 415, 49 N.E. 404 (1898); 1963 Op. Att'y Gen. No. 3548, p. 58, 61 ("[t]he requisite elements of public office are: (1) the incumbent must exercise certain independent public duties, a part of the sovereignty of the state; (2) such exercise by the incumbent must be by virtue of his election or appointment to the office; (3) in the exercise of the duties so imposed, he can not be subject to the direction and control of a superior officer"). These are the criteria that have been applied in making determinations of what constitutes a public office for purposes of R.C. 731.12. See, e.g., *State ex rel. Scarl v. Small*, 103 Ohio App. 214, 145 N.E.2d 200 (Portage County 1956); 1991 Op. Att'y Gen. No. 91-036 at 2-193; 1990 Op. Att'y Gen. No. 90-059.

Member of Board of Directors of a Port Authority Holds a Public Office

When these criteria are applied to the position of member of the board of directors of a port authority, it is clear that the position is a public office. The board of directors is appointed as the governing body of the port authority pursuant to R.C. 4582.27. Although members of the board are not required to take an oath or post a bond, they serve fixed terms of four years and are entitled to compensation for their service. *Id.* Thus, the criteria of tenure and emoluments are present.

More importantly, members of the board of directors, by virtue of their appointment, perform independent statutory duties that are part of the sovereignty of the state. The operation and maintenance of the port authority facilities are designated by statute as governmental functions. R.C. 4582.22; R.C. 4582.46. The port authority also is vested with the traditional sovereign powers of appropriation of property, R.C. 4582.56, and, upon affirmative vote of the electors, taxation and the issuance of bonds and notes. R.C. 4582.31(G), (H). As the governing body of the port authority, the board of directors exercises these powers on behalf of the port authority along with other powers granted to the port authority in R.C. 4282.31. The board of directors also performs certain statutory duties with respect to the administration of the port authority. See, e.g., R.C. 4582.32-.34 (preparation, modification, and adoption of the official

plan for development, construction, and improvement); R.C. 4582.39 (preparation of the annual budget). Although R.C. 4582.27(A) provides that the members of the board of directors of a port authority created by a township are appointed by the board of township trustees and subject to removal for "misfeasance, nonfeasance, or malfeasance in office," no provision of R.C. 4582.21-.59 provides that the board of directors is subject to control or supervision by the board of township trustees in the exercise of these statutory powers and duties. Rather, the members of the board of directors exercise independent statutory powers by virtue of their appointment to the board of the port authority, which is itself a political subdivision. *See generally* 1990 Op. Att'y Gen. No. 90-060 (determining, by application of the traditional general criteria, that a port authority formed pursuant to R.C. 4582.22 is a political subdivision for purposes of sovereign immunity under R.C. Chapter 2744). Accordingly, the position of member of the board of directors of a port authority is a public office for purposes of R.C. 731.12, and a member of the legislative authority of a village may not serve simultaneously in that position.

Conclusion

It is, therefore, my opinion and you are hereby advised that R.C. 731.12 prohibits a member of the legislative authority of a village from serving simultaneously as a member of the board of directors of a port authority created pursuant to R.C. 4582.22.