

OPINION NO. 94-091**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 park commissioners of a township park district.

To: David E. Bowers, Allen County Prosecuting Attorney, Lima, Ohio
By: Lee Fisher, Attorney General, December 13, 1994

You have requested an opinion regarding the compatibility of two public positions: member of an elected village council and member of a board of park commissioners of a township park district. According to your letter a village council member has applied to the court of common pleas for appointment to the board of park commissioners of a township park district.¹ See R.C. 511.18(A). The village in question is located within the township in which the township park district has been organized.

¹ A prosecuting attorney is not responsible for furnishing legal advice or representation to a member of the legislative authority of a village. Instead, R.C. 733.48 states that the legislative

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

Pursuant to the compatibility test that appears in 1979 Op. Att'y Gen. No. 79-111, two public positions are incompatible if, *inter alia*, the governing statutes of either position prohibit simultaneous service in the other position. The provisions of R.C. 511.18-.99, which govern the organization and operation of township park districts, do not prohibit members of a board of park commissioners from serving in other public positions. On the other hand, R.C. 731.12, which establishes the qualifications of members of the legislative authority of a village, states, in pertinent 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 concerns 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 park commissioners of a township park district is a public office for purposes of that statute.²

authority of a village, when it deems it necessary, "may provide legal counsel for the village, or for any department or official thereof, for a period not to exceed two years, and provide compensation for such counsel." In addition, a prosecuting attorney has no duty pursuant to R.C. 309.09 to provide legal counsel to the board of park commissioners of a township park district, or to the individual members of the board. See 1964 Op. Att'y Gen. No. 1297, p. 2-322 (the members of a board of park commissioners of a township park district appointed and acting pursuant to R.C. 511.18 are not township officers within the meaning of R.C. 309.09, and the prosecuting attorney does not have a statutory duty to provide legal counsel for that board); 1927 Op. Att'y Gen. No. 279, vol. I, p. 489 (a board of park commissioners is not a county board within the purview of G.C. 2917, now R.C. 309.09).

Your inquiry does relate, however, to the ability of a judge of the court of common pleas to appoint the individual in question to the board of park commissioners, and thus you properly may advise the judge in that regard, if so requested. See R.C. 309.09(A) (providing, in part, that the prosecuting attorney shall be the legal adviser of "all ... county officers"); 1988 Op. Att'y Gen. No. 88-055 (syllabus, paragraph one) (a common pleas court judge is a county officer for purposes of R.C. 305.14 and R.C. 309.09); 1985 Op. Att'y Gen. No. 85-014 at 2-54 ("a common pleas judge is a county officer for purposes of obtaining legal representation under R.C. 309.09"). In addition, your question relates to your obligation under R.C. 2733.01 to bring a civil action in quo warranto against any individual who unlawfully holds or exercises a public office. See R.C. 2733.04; R.C. 2733.05. For those reasons, therefore, it is appropriate to address your question by way of a formal opinion. See R.C. 109.14 (the Attorney General "shall advise the prosecuting attorneys of the several counties respecting their duties").

² You have indicated that the village in question has not adopted a charter provision pursuant to Ohio Const. art. XVIII, §7 that alters the qualifications for members of a village legislative authority that appear in R.C. 731.12, and that specifically removes that section's prohibition against those members holding other public office. See *State ex rel. Ziegler v. Hamilton County Board of Elections*, 67 Ohio St. 3d 588, 621 N.E.2d 1199 (1993) (R.C. 731.12 creates an exclusive set of qualifications for village council members, which are procedural in nature; thus, a village that wishes to alter those qualifications may do so only by the adoption of a charter provision).

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

The Ohio Supreme Court has described the traditional criteria used to determine whether a position is a public office in the following manner:

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 Commissioners, 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 *State ex rel. Landis* with approval); *Scofield v. Strain*, 142 Ohio St. 290, 51 N.E.2d 1012 (1943) (same); *State ex rel. Attorney General 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"). The foregoing criteria have been used to determine whether a particular position is 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); 1994 Op. Att'y Gen. No. 94-020; 1991 Op. Att'y Gen. No. 91-036; 1990 Op. Att'y Gen. No. 90-059.

A Member of the Board of Park Commissioners of a Township Park District Holds a Public Office

Applying these criteria in the present situation, it is apparent that the position of member of the board of park commissioners of a township park district is a public office. The members of a board of park commissioners are, pursuant to R.C. 511.18(A), appointed by the court of common pleas or a judge thereof, or by the board of township trustees, if the entire park district is contained within the unincorporated area of the township, as the governing body of the township park district. Although members of the board are not required by any provision in R.C. Chapter 511 to post a bond, and also serve without compensation, they do serve fixed terms in accordance with the provisions of R.C. 511.19. R.C. 511.23(A) also provides that the office of member of a board of park commissioners "is not a township office within the meaning of [R.C. 703.22 (abolishment of township offices)] but is an office of the township park district." (Emphasis added.)

In addition, members of a board of park commissioners of a township park district perform specific duties and exercise various powers, all of which are prescribed by law and constitute a portion of the sovereignty of the state. Pursuant to R.C. 511.23, for example, a board of park commissioners has the authority to locate, establish, improve, maintain, and

operate a free public park or parks within the township, and accept a conveyance of appropriate suitable lands and materials for such purposes, R.C. 511.23(B); accept donations of money or other property, or act as trustees of land, money, or other property, in furtherance of the use and enjoyment of the lands controlled by it, R.C. 511.23(C); hire and contract for professional, technical, consulting, and other special services, and purchase goods and award contracts, R.C. 511.23(D); appoint a superintendent for the park or parks and designate him as the board's clerk, and appoint all other necessary officers and employees, fix their compensation, and prescribe their duties, R.C. 511.23(E); and adopt bylaws and rules it considers advisable pertaining to alcohol use, government and control of parks, and plant and wildlife preservation, R.C. 511.23(F). Related powers and responsibilities are conferred upon a board of park commissioners by R.C. 511.231-.236, R.C. 511.241-.26, and R.C. 511.34-.37. A board of park commissioners also is vested with the traditional sovereign powers of appropriation of property, R.C. 511.24, and, upon affirmative vote of the electors, taxation and the issuance of bonds, R.C. 511.27-.29. The members of a board of park commissioners act autonomously and independently in their performance of the foregoing powers and duties by virtue of their appointment to the board. Subject to only a few exceptions, *see, e.g.*, R.C. 511.23(C); R.C. 511.24; R.C. 511.27(C), a board of park commissioners of a township park district is not subject to the direct control or supervision of either the board of township trustees or the court of common pleas in its exercise of those powers and responsibilities.

Accordingly, it follows that the position of member of the board of park commissioners of a township park district is a public office for purposes of R.C. 731.12. This means that 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 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 park commissioners of a township park district.