OPINION NO. 2004-049

Syllabus:

R.C. 3313.13 prohibits an assistant county prosecuting attorney from serving as a member of the board of education of a city school district. (1969 Op. Att'y Gen. No. 69-133, approved and followed.)

To: Jim Slagle, Marion County Prosecuting Attorney, Marion, Ohio
By: Jim Petro, Attorney General, December 20, 2004

You have requested an opinion whether the positions of assistant county prosecuting attorney and member of the board of education of a city school district are compatible. Pursuant to R.C. 3313.13, these two positions are incompatible.

Two public positions are incompatible, if, *inter alia*, a constitutional provision or statute prohibits a person from holding the two positions at the same time. 2004 Op. Att'y Gen. No. 2004-030 at 2-270; 2001 Op. Att'y Gen. No. 2001-009 at 2-53; 1999 Op. Att'y Gen. No. 99-036 at 2-231; 1989 Op. Att'y Gen. No. 89-069 at 2-321; *see* 2 Ohio Admin. Code 123:1-46-02(F). R.C. 3313.13, which restricts who may be a member of a board of education, provides:

> Except as otherwise provided in this section, *no prosecuting attorney, city director of law, or other official acting in a similar capacity shall be a member of a board of education*.
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> A city director of law who was appointed to his position under a city charter, village solicitor or other chief legal officer of a municipal corpora-

> tion may serve as a member of a board of education for which he is not the legal adviser and attorney under [R.C. 3313.35].[1] A city director of law who was appointed to his position under a city charter may serve as a member of a board of education for which he is the legal adviser and attorney under [R.C. 3313.35], but only if the board uses no legal services of his office or if the legal services of his office that it does use are performed under contract by persons not employed by his office. (Emphasis and footnote added.)

R.C. 3313.13 thus prohibits a person from serving simultaneously as a member of a board of education of a city school district and as a prosecuting attorney, city director of law, or other official acting in a similar capacity.

As stated in your letter, the prohibition in R.C. 3313.13 was read in *Bennett v. Celebrezze*, 34 Ohio App. 3d 260, 518 N.E.2d 25 (Lorain County 1986) and 1969 Op. Att'y Gen. No. 69-133 to prohibit a person from serving simultaneously as a member of a board of education of a city school district and assistant county prosecuting attorney. In reaching this conclusion, the court of appeals and Attorney General explained that the obvious purpose of R.C. 3313.13 is to bar prosecuting attorneys, city directors of law, and other officials acting in a similar capacity from serving on boards of education. *See* 1979 Op. Att'y Gen. No. 79-100 at 2-311 ("[t]he obvious import of [R.C. 3313.13's] language is that [the] officials [listed therein] may not serve on any board of education whether or not they are required by statute or charter to represent the board"). Because assistant county prosecuting attorneys carry out many of the same duties and responsibilities as county prosecuting attorneys, the court of appeals and Attorney General determined that an assistant county prosecuting attorney is barred by R.C. 3313.13 from serving on any board of education. *Cf.* 1979 Op. Att'y Gen. No. 79-100 (R.C. 3313.13 prohibits a person from holding at the same time the positions of assistant city solicitor of a charter city and member of a board of education of a city school district).

Current law continues to support the analyses and conclusions set forth in *Bennett v. Celebrezze* and 1969 Op. Att'y Gen. No. 69-133. Although R.C. 3313.13 has been amended twice in the last fifty years, *see* 1987-1988 Ohio Laws, Part II, 2025, 2027 (Am. H.B. 110, eff. Sept. 9, 1988); 1977-1978 Ohio Laws, Part II, 2091, 2117 (Am. Sub. H.B. 219, eff. Nov. 1, 1977), the General Assembly has made no change to the plain language of the statute that prohibits a "prosecuting attorney" or "other official acting in a similar capacity" from serving as a member of a board of education.

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[1] R.C. 3313.35 sets forth the instances in which a city director of law, village solicitor or other chief legal officer of a municipal corporation is required to serve as the legal adviser and attorney to a board of education:

> In city school districts, the city director of law shall be the legal adviser and attorney for the board thereof, and shall perform the same services for such board as required of the prosecuting attorney for other boards of the county. Such duties shall devolve upon any official serving in a capacity similar to that of prosecuting attorney or city director of law for the territory wherein a school district is situated regardless of his official designation. In a district which becomes a city school district pursuant to [R.C. 3311.10], the legal adviser shall be the solicitor or director of law of the largest of the municipal corporations all or a part of which is included within the school district boundaries.

Moreover, the General Assembly has not changed the duties or role of assistant county prosecuting attorneys. Assistant county prosecuting attorneys are appointed by county prosecuting attorneys and continue to act in their stead. 1999 Op. Att'y Gen. No. 99-027 at 2- 173 through 2-175; 1988 Op. Att'y Gen. No. 88-049 at 2-223; 1983 Op. Att'y Gen. No. 83-030 at 2-112; *see* R.C. 309.06(A). As explained in 1971 Op. Att'y Gen. No. 71-050 at 2-172, "it has long been the accepted opinion in this state that an assistant is, for all practical purposes, the alter ego of the prosecuting attorney and is authorized to act in his place in almost all matters." *Accord* 1970 Op. Att'y Gen. No. 70-053 at 2-85.

An assistant county prosecuting attorney is thus appointed to perform the duties of, and exercise the powers conferred upon, the county prosecuting attorney.[2] *See* R.C. 309.06(A); 1999 Op. Att'y Gen. No. 99-027 at 2-173 and 2-174. Accordingly, an assistant county prosecuting attorney acts in a similar capacity as the county prosecuting attorney, and, as such, is prohibited by R.C. 3313.13 from serving as a member of a board of education of a city school district. *See generally* 1979 Op. Att'y Gen. No. 79-100 at 2-311 (because "[a]n assistant city solicitor performs, under the supervision of the solicitor, all the duties of the solicitor[,]" the assistant "is an official 'acting in a similar capacity' to the solicitor himself" for purposes of R.C. 3313.13 and is prohibited by that statute from serving on the board of education of a city school district).

Additional support for concluding that the two positions in question are incompatible is also demonstrated by the General Assembly's most recent amendment to R.C. 3313.13, which was enacted following the court's decision in *Bennett v. Celebrezze* and the issuance of 1969 Op. Att'y Gen. No. 69-133. Prior to the enactment of this amendment, there were no exceptions to R.C. 3313.13's prohibition. *See* 1977-1978 Ohio Laws, Part II, 2091, 2117 (Am. Sub. H.B. 219, eff. Nov. 1, 1977); 1943-1944 Ohio Laws 475, 518 (H.B. 217, approved June 15, 1943). In 1988 the General Assembly amended R.C. 3313.13 in order to set forth certain exceptions to that prohibition. *See* 1987-1988 Ohio Laws, Part II, 2025, 2027 (Am. H.B. 110, eff. Sept. 9, 1988). None of these exceptions, however, exempts an assistant county prosecuting attorney from R.C. 3313.13's prohibition. Hence, the fact that the General Assembly did not exempt assistant county prosecuting attorneys from R.C. 3313.13's prohibition when it exempted other officials implies legislative approval of the reading of R.C. 3313.13 adopted in *Bennett v. Celebrezze* and 1969 Op. Att'y Gen. No. 69-133. *See generally Thomas v. Freeman*, 79 Ohio St. 3d 221, 224-25, 680 N.E.2d 997 (1997) (the rule of statutory construction, *expressio unius est exclusio alterius*, means that "'the expression of one thing is the exclusion of the other,'" and "[u]nder this maxim, 'if a statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded'" (citations omitted)); *State v. Cichon*, 61 Ohio St. 2d 181, 183-84, 399 N.E.2d 1259 (1980) ("legislative inaction in the face of longstanding judicial interpretations of [a] statute evidences legislative intent to retain existing law"); *Geiger v. Geiger*, 117 Ohio St. 451, 468-69, 160 N.E. 28 (1927) (in interpreting statutes, it is presumed that the General Assembly acted with full knowledge of the existing law on the subject under consideration); 2002 Op. Att'y Gen. No. 2002-007 at 2-39 ("[a]lthough an opinion of the Attorney General is not a judicial decision, the same argument may be made that the 1934 opinion has been known

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[2]The authority of an assistant county prosecuting attorney to perform the duties or exercise the powers of the county prosecuting attorney is, however, subject to the direction and control of the county prosecuting attorney. 1999 Op. Att'y Gen. No. 99-027 at 2-173 and 2-174. This means that an assistant county prosecuting attorney may only perform the duties and exercise the powers that are assigned or granted to him by the county prosecuting attorney. *Id.* at 2-175 and 2-176.

for many years, during which the General Assembly has amended R.C. Chapter 4713 without overturning the conclusion of the 1934 opinion, thus implying legislative approval of the opinion's interpretation of the law").

We are mindful of our recent opinions that, as you state in your letter, seem to indicate that "assistant prosecutors could serve in positions which previously would have been thought to be incompatible." You refer us to 1999 Op. Att'y Gen. No. 99-027, 2001 Op. Att'y Gen. No. 2001-027, 2001 Op. Att'y Gen. No. 2001-040, and 1997 Op. Att'y Gen. No. 97-034. These opinions determined, respectively, that the position of assistant county prosecuting attorney is compatible under certain conditions with the position of member of the legislative authority of a statutory city, township trustee, member of the board of health of a combined general health district, and village solicitor.

In the compatibility situations addressed in these opinions, however, no statute explicitly or by necessary implication barred an assistant county prosecuting attorney from holding the other position.[3] Instead, these several opinions reconsidered the long-held com-

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[3]In your letter you note that 1999 Op. Att'y Gen. No. 99-027 advised that the positions of assistant county prosecuting attorney and member of the legislative authority of a statutory city are compatible under certain conditions "even though R.C. 731.02 prohibits a member of city council from holding any other public office." You further state that, "[w]hile this prohibition clearly prevents the prosecuting attorney from serving as a member of city council, your Office held that it does not prohibit an assistant prosecutor from serving as a member of city council." It thus appears that you believe that 1999 Op. Att'y Gen. No. 99-027 may be construed as advocating the proposition that an assistant county prosecuting attorney may hold any position that the county prosecuting attorney is statutorily barred from holding.

1999 Op. Att'y Gen. No. 99-027 does not aver this general proposition. Instead, the opinion interpreted the specific language of R.C. 731.02 and determined that the prohibition set forth therein does not apply to assistant county prosecuting attorneys. R.C. 731.02 provides, in relevant part, that a member of the legislative authority of a city "shall not hold any other *public office*, except that of notary public or member of the state militia." (Emphasis added.) Applying the traditional criteria used for determining whether a position is a public office, 1999 Op. Att'y Gen. No. 99-027 at 2-172 through 2-174 determined that the position of county prosecuting attorney, but not assistant county prosecuting attorney, is a public office for purposes of R.C. 731.02. In light of this determination, the opinion concluded that R.C. 731.02 prohibits county prosecuting attorneys, but not assistant county prosecuting attorneys, from holding the position of member of the legislative authority of a statutory city. *Id.*

The opinion also stated that, if the language of a statute does not in and of itself prohibit an assistant county prosecuting attorney from serving in a position, the assistant will not be prohibited from serving in that position because the county prosecuting attorney is prohibited by the statute from serving in the position:

> Although no statute prohibits a person from serving simultaneously in the positions of member of the legislative authority of a city and assistant prosecuting attorney, prior opinions of the Attorneys General have stated that, "because an assistant prosecutor is empowered to act for, and in the place of a prosecutor in most matters, the assistant is subject to the same limitations as the prosecutor, and may not hold any office which a prosecu-

mon-law principle that an assistant county prosecuting attorney may not hold a position that the county prosecuting attorney may not hold. Finding this proposition to have no application when the duties assigned to an assistant county prosecuting attorney are properly limited, these opinions explained:

> [B]ecause an assistant prosecuting attorney does not, by virtue of his appointment to that position, assume all of the duties of a prosecuting attorney, an assistant prosecuting attorney who is assigned to perform only limited duties or functions on behalf of the prosecuting attorney may be permitted to hold a position that the prosecuting attorney would not otherwise be able to hold.
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> tor may not hold." Because the position of prosecuting attorney is a public office, R.C. 731.02 prevents a person from serving concurrently as a member of a city's legislative authority and as a prosecuting attorney. It would, thus, ordinarily follow that R.C. 731.02 similarly prevents a person from serving concurrently as an assistant prosecuting attorney and as a member of the legislative authority of a city. We have not reached that conclusion in this instance, however....
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> ... [T]he fact that an assistant prosecuting attorney may be authorized to act for and in the place of the prosecuting attorney is insufficient in and of itself to find that an assistant prosecuting attorney may not hold a position that the prosecuting attorney may not hold. Accordingly, while R.C. 731.02 prohibits a member of the legislative authority of a city from serving concurrently as a prosecuting attorney, that statute does not prohibit that member from serving as an assistant prosecuting attorney. (Citations and footnote omitted.)

Id. at 2-174 through 2-177.

1999 Op. Att'y Gen. No. 99-027 thus asserted the proposition that, if the language of a statutory prohibition against the holding of another public position applies to county prosecuting attorneys, but not to assistant county prosecuting attorneys, the prohibition does not prohibit assistant county prosecuting attorneys from holding the other public position even though county prosecuting attorneys may not hold the position. Nowhere in the opinion is it stated or implied that an assistant county prosecuting attorney may serve in another position when a statute prohibits both county prosecuting attorneys and assistant county prosecuting attorneys from holding the position. To the contrary, the opinion accedes to the well-established principle that, if the language of a statute prohibits an assistant county prosecuting attorney from serving in another position, the assistant may not serve in the position.

1999 Op. Att'y Gen. No. 99-027, therefore, does not advocate the proposition that an assistant county prosecuting attorney may hold any position that the county prosecuting attorney is statutorily barred from holding. The opinion instead indicates that the particular statutory language used to bar a county prosecuting attorney from holding the position must be examined so as to determine whether it also applies to assistant county prosecuting attorneys.

> For this reason, the resolution of the compatibility issue of conflict of interest in the case of an assistant prosecuting attorney who wishes to serve simultaneously in another public position requires a factual examination of the particular duties and responsibilities assigned to and to be performed by the assistant prosecuting attorney. "And where the facts in a particular situation demonstrate that an assistant prosecuting attorney performs, on behalf of the prosecuting attorney, duties that are confined to certain categories of cases or matters, or certain clients of the prosecuting attorney, that in no way conflict with any of the duties and responsibilities the assistant undertakes in the other position, then the assistant may hold the other position even though the prosecuting attorney would otherwise be prohibited from serving in that position." (Citations omitted.)

2001 Op. Att'y Gen. No. 2001-040 at 2-241 and 2-242; *accord* 2001 Op. Att'y Gen. No. 2001-027 at 2-154 and 2-155; 1999 Op. Att'y Gen. No. 99-027 at 2-178; 1997 Op. Att'y Gen. No. 97-034 at 2-198 and 2-199. Thus, when the duties of an assistant county prosecuting attorney are appropriately circumscribed so as not to conflict with the duties of another public position, the assistant may be able to avoid conflicts of interest that would otherwise prevent him from holding the other position.

The duties of an assistant county prosecuting attorney cannot, however, be limited in such a way so as to avoid the application of R.C. 3313.13. As stated previously, this statute applies to, *inter alia,* a "prosecuting attorney" or "other official acting in a similar capacity." An assistant county prosecuting attorney acts in a similar capacity as the county prosecuting attorney even when the assistant's powers and duties are limited by the county prosecuting attorney since the assistant acts for or in the place of the county prosecuting attorney with respect to his assigned responsibilities. *See generally* 1999 Op. Att'y Gen. No. 99-027 at 2-176 ("it is only with regard to those duties assigned to him by the prosecuting attorney that an assistant prosecuting attorney acts for or in the place of the prosecuting attorney"); 1945 Op. Att'y Gen. No. 184, p. 163 (syllabus) ("[a]n assistant appointed by the prosecuting attorney may, whenever authorized or directed by him, act for and in the place of such prosecuting attorney in all civil and procedural matters"). Accordingly, R.C. 3313.13's board of education membership restriction applies to an assistant county prosecuting attorney regardless of measures taken by the prosecuting attorney to limit or narrow the scope of the assistant's duties or responsibilities.

In conclusion, it is my opinion, and you are hereby advised that R.C. 3313.13 prohibits an assistant county prosecuting attorney from serving as a member of the board of education of a city school district. (1969 Op. Att'y Gen. No. 69-133, approved and followed.)