February 4, 2010

The Honorable Steve Knowling
Holmes County Prosecuting Attorney
164 East Jackson Street
Millersburg, Ohio 44654

SYLLABUS: 2010-003

A person who is appointed under R.C. 305.02(B) to fill a vacancy in county elective office becomes entitled to compensation upon giving bond and taking the oath of office. He is ineligible, however, to perform the duties of his office until he receives a commission from the Governor under R.C. 107.05. (1981 Op. Att'y Gen. No. 81-085, approved and followed.)

RICHARD CORDRAY
OHIO ATTORNEY GENERAL

February 4, 2010

OPINION NO. 2010-003

The Honorable Steve Knowling
Holmes County Prosecuting Attorney
164 East Jackson Street
Millersburg, Ohio 44654

Dear Prosecutor Knowling:

You have requested an opinion about when an appointment, which is made by a county central committee to fill a vacancy in a county elective office, becomes effective. Specifically, you wish to know when the appointee becomes eligible to take office and assume the powers of that office, and when he becomes entitled to receive the compensation therefor. You also ask how an office is to function in the interim between creation of a vacancy in an elective office and when the appointee becomes eligible to take office and assume the duties and powers thereof—you ask whether the business conducted and the actions taken by the office during this interim are valid.

Appointee's Eligibility to Assume Office and Receive Compensation

We begin with an examination of the statutory scheme for filling vacancies in county elective office. Under R.C. 305.02(B), if a "vacancy occurs from any cause" in a county elective office, "the county central committee of the political party with which the last occupant of the office was affiliated shall appoint a person to hold the office and to perform the duties thereof until a successor is elected and has qualified."[1] *See also* R.C. 3.02(A). The county central committee must meet "[n]ot less than five nor more than forty-five days after a vacancy occurs" to make the appointment. R.C. 305.02(C). Within seven days of making the appointment, the county central committee, or the board of county commissioners, must certify the appointment to the county board of elections and Secretary of State, and the board of elections must issue a

[1] An appointee's successor is elected for the unexpired term at the first general election for county offices that occurs more than forty days after the office became vacant, unless the unexpired term ends within one year following the election. R.C. 3.02(A); R.C. 305.02(A). In that event, the appointee serves for the remainder of the unexpired term. R.C. 3.02(A).

certificate of appointment to the appointee. R.C. 3.02(B); R.C. 305.02(E). "[T]he persons so appointed and certified shall be entitled to all remuneration provided by law for the offices to which they are appointed." R.C. 305.02(E). (*But see* note 4, *infra*.)

After being named by the county central committee, an appointee must qualify for office by taking an oath and giving bond.[2] *See* Ohio Const. art. XV, § 7 ("[e]very person chosen or appointed to any office under this state, before entering upon the discharge of its duties, shall take an oath or affirmation, to support the Constitution of the United States, and of this state, and also an oath of office"); R.C. 3.22 ("[e]ach person chosen or appointed to an office under the constitution or laws of this state, and each deputy or clerk of such officer, shall take an oath of office before entering upon the discharge of his duties"); R.C. 3.23 (the oath of office of every nonjudicial officer "shall be to support the constitution of the United States and the constitution of this state, and faithfully to discharge the duties of the office"); R.C. 3.30 (a person elected or appointed to office who refuses or neglects to give bond and "in all respects to qualify himself for the performance of such [official] duties, is deemed to have refused to accept the office to which he was elected or appointed," and "[s]uch office shall be considered vacant and shall be filled as provided by law").[3] Because of the length of time that necessarily must elapse before an appointee can be named by the central committee and take the steps necessary to qualify for office, a board of county commissioners is authorized to act immediately upon creation of a vacancy, to appoint an "acting officer" to perform the duties of office "between the occurrence of the vacancy and the time when the officer appointed by the central committee qualifies and takes the office." R.C. 305.02(F).

In 1981 Op. Att'y Gen. No. 81-085, the Attorney General advised that, once an appointee qualifies for office by taking the oath of office and giving bond, he is considered to be the officeholder and is entitled to the compensation associated with that office. The Attorney General cited *State ex rel. Wilcox v. Woldman*, 157 Ohio St. 264, 105 N.E.2d 44 (1952), for the proposition that the "right of a public officer to compensation is an incident of the title to the

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[2] As the court explained in *State ex rel. Brothers v. Zellar*, 7 Ohio St. 2d 109, 111, 218 N.E.2d 729 (1966), "appointment to and qualification for a public office … are separate and distinct acts performed by different people. Appointment relates to the acts of the authority in whom the appointing power reposes. Qualification relates to the acts which the appointee must perform before he is entitled to enter upon the duties of the office."

[3] *See also* R.C. 305.02(G) ("[a] person appointed prosecuting attorney or assistant prosecuting attorney shall give bond and take the oath of office prescribed by section 309.03 of the Revised Code for the prosecuting attorney"); R.C. 305.04 ("[b]efore entering upon the discharge of his duties each county commissioner shall give bond"); R.C. 309.03 ("[b]efore entering upon the discharge of his duties, the prosecuting attorney shall give a bond"); R.C. 311.02 (bond of county sheriff); R.C. 313.03 (bond of county coroner); R.C. 315.03 (bond of county engineer); R.C. 317.02 (bond of county recorder); R.C. 319.02 (bond of county auditor); R.C. 321.02 (bond of county treasurer); R.C. 2303.02 (bond of clerk of common pleas court).

office," and *State ex rel. Gahl v. Lutz*, 132 Ohio St. 466, 470, 9 N.E.2d 288 (1937), which held that, "[b]y the act of appointment title is vested," and "[b]y the act of qualification the investiture of title is accepted by the appointee…. Investiture and acceptance of title give appointee a complete present right to the office." 1981 Op. Att'y Gen. No. 81-085 at 2-332. Noting that "qualification for the office of county auditor consists of giving bond and taking the oath of office," *id.* at 2-332 to 2-333, the opinion concluded that "[a] newly appointed county auditor becomes entitled to compensation upon giving bond and taking the oath of office required by Ohio Const. art. XV, § 7 and R.C. 3.22 and 3.23" (syllabus).[4]

You have specifically asked about the application of R.C. 107.05, which states that a county officer "shall be ineligible to perform any duty pertaining to his office until he presents to the proper officer a legal certificate of his election or appointment, and receives from the governor a commission to fill such office." *See also* R.C. 107.06; R.C. 107.07. We turn again to 1981 Op. Att'y Gen. No. 81-085, which addressed the impact of R.C. 107.05 on an appointee's right to receive compensation, concluding that "the right to compensation is incident to the title of the office," and "[t]hus, once a person has been appointed to and qualified for office, he is entitled to compensation, even if he has not yet received a commission." *Id.* at 2-333. Again, the opinion relies on *State ex rel. Gahl v. Lutz*, wherein the court explained:

> It is an established principle of law that except in cases where the Governor is both the appointing authority and the issuer of commissions, the commission is not itself an appointment but merely formal evidence of an appointment…. The governor's commission does not vest title but merely evidences the vesting of title. Title to a public office is vested by appointment. *The investiture of title operates from the date of appointment and qualification, and not from the date of receipt of the evidence of appointment.* The receipt of a commission is no part of the act of qualification. It is not an act, the performance of which is by statute imposed upon the appointee. Nor is it by law made a part of the act of appointment. The issuance of a commission to a sheriff is an act which can be performed neither by the appointee nor by the appointing authority, nor is it an act over the performance of which either has control.

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[4] As set forth above, R.C. 305.02(E) states that persons who are appointed by the county central committee and issued a certificate of appointment by the county board of elections are "entitled to all remuneration provided by law for the offices to which they are appointed." 1981 Op. Att'y Gen. No. 81-085 explained that R.C. 305.02(E) does not entitle an appointee to compensation "immediately upon appointment and certification and possibly prior to qualification"; rather, "this section merely states that a person appointed and certified to one of the offices listed in R.C. 305.02(A) is, upon qualification for such office, entitled to the remuneration set for that office, even though he did not take office through the normal procedure of election." *Id.* at 2-334.

> *The appointment is complete before the commission is issued. The appointee's act of qualification is likewise complete before receipt of the commission.* By the act of appointment title is vested. By the act of qualification the investiture of title is accepted by the appointee. Nothing further remains to be done either by the appointing authority or by the appointee. *Investiture and acceptance of title give appointee a complete present right to the office which cannot be defeated by failure, refusal or neglect of the Governor to issue a commission. Nor is this present right converted into a future right by virtue of Section 138, General Code [R.C. 107.05]. The provisions of that section of the code merely postpone the date upon which the appointee may enter upon the performance of the duties of his office.* Where one, eligible to hold public office, is appointed to fill a vacancy in the office of sheriff for the unexpired term and until his successor is elected and qualified, and where the governor's commission is received by the appointee after the unexpired term has terminated, *such appointee will be deemed to hold the office from the date of appointment and qualification, and not from the date of the receipt of the commission*.

(Emphasis added.) 132 Ohio St. at 470-71. *See State ex rel. v. Brennan*, 49 Ohio St. 33, 38, 29 N.E. 593 (1892) (whether a person appointed or elected to a public office "'has been commissioned in form can make no difference; the commission is but evidence of title to the office'"); *State ex rel. Loomis v. Moffitt*, 5 Ohio 358, 365 (1832) (it is not the commission issued by the governor "which confers the right upon the officer. The right is derived from the election or appointment, of which the commission is only evidence"). *See also State ex rel. Peters v. McCollister*, 11 Ohio 46, 51 (1841) (the governor cannot withhold a commission "without a gross violation of executive duty"); *State ex rel. Loomis v. Moffitt*, 5 Ohio at 362 (upon presentation of a certificate of election or appointment, "the governor will issue a commission," and "[s]hould he refuse, he is within the reach of the same writ of mandamus"); 1937 Op. Att'y Gen. No. 115, vol. I, p. 146, 148 (an appointee's certificate of appointment "appears to be regular on its face, and, in my opinion, that is all that is necessary to entitle him to a commission…. when a person has been elected or appointed and presents to the proper officer a legal certificate of his election or appointment, such officer has no other choice than to issue the commission").

We see no basis upon which to disagree with the analysis or conclusions reached in 1981 Op. Att'y Gen. No. 81-085. Thus, an appointee named to fill a vacancy in county elective office under R.C. 305.02 is eligible to receive compensation once he qualifies for office by giving bond and taking the oath of office, even though he has not yet received a commission from the Governor. Although an appointee who has not received a commission from the Governor is entitled to receive compensation once he qualifies, R.C. 107.05 does require that he receive the commission before entering into the performance of his official duties. *State ex rel. Gahl v. Lutz*, 132 Ohio St. at 471 ("[t]he provisions of that section of the code [R.C. 107.05] merely postpone the date upon which the appointee may enter upon the performance of the duties of his office"); *State ex rel. Loomis v. Moffitt*, 5 Ohio at 365 (the commission is only evidence of an officer's

right to hold office, "[b]ut it is evidence without which the officer can not proceed to act officially").

Conduct of Business During Vacancy in Office

You also have asked how an office is to function in the interim between creation of a vacancy in an elective office and the time when the appointee becomes eligible to take office and assume the duties and powers thereof—you ask whether the business conducted and the actions taken by the office during this interim are valid. You have asked us to address these questions assuming that the board of county commissioners appointed an acting officeholder under R.C. 305.02(F), and then assuming that the board did not appoint an acting officeholder.[5]

We begin with the assumption that, upon vacation of a county office, the board of county commissioners appoints an "acting officer" under Division (F) of R.C. 305.02. As noted above, division (F) authorizes a board of county commissioners to appoint a person to hold a county elective office "as an acting officer and to perform the duties thereof between the occurrence of the vacancy and the time when the officer appointed by the central committee qualifies and takes the office." An acting officer who is appointed under R.C. 305.02(F), and serves prior to the appointment and qualification of a person to fill a vacancy in county elective office under R.C. 305.02(B), would have all of the constitutional and statutory power and authority granted to that county officer. The acting officer would be authorized to perform the duties and undertake the responsibilities of the office until the central committee names an appointee and the appointee "qualifies and takes the office."

The difficult issue raised by your question about R.C. 107.05 is who is entitled to hold office and perform the duties thereof when an "acting" officer has been named by the board of county commissioners under R.C. 305.02(F) and the county central committee has appointed a person who has qualified for office but has not yet received a commission from the Governor so as to be eligible to perform the duties of his office. In such a situation, there would be an appointee who has the right to take office and receive compensation yet cannot perform the duties of his office, and an acting officer, appointed by the board of county commissioners, who is entitled to perform the duties of office until the appointee "qualifies and takes the office." Under our scenario, the appointee has qualified, but has he "taken the office" for purposes of R.C. 305.02(F) before he receives a commission from the Governor? Can the acting officer continue to perform the duties of the office after the appointee qualifies but before he receives his gubernatorial commission?

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[5] In certain instances, a specific course of action as to a particular matter is addressed in statute. *See, e.g.*, R.C. 2733.07 (" [w]hen the office of prosecuting attorney is vacant, or the prosecuting attorney is absent, interested in the action in quo warranto, or disabled, the court, or a judge thereof in vacation, may direct or permit any member of the bar to act in his place to bring and prosecute the action").

Two people cannot hold, and perform the duties of, one office. *See State ex rel. Peters v. McCollister*, 11 Ohio at 51 (it "will hardly be contended [that] there can be more incumbents of office than offices"); 1943 Op. Att'y Gen. No. 5974, p. 206, 207 ("[o]bviously, there can be, for example, only one county sheriff in each county"). Under *Gahl*, once a person is appointed and qualified he has "a complete present right to the office," which is not "converted into a future right by virtue of [R.C. 107.05]." 132 Ohio St. at 470-71. The person appointed by the county central committee is entitled to the office (and the compensation connected therewith) once he takes the steps necessary to qualify; under this analysis, it appears, therefore, that the acting officer would have no authority to perform the duties of office—even though, under R.C. 107.05, the appointee would be ineligible to perform the duties of office until he received his commission.

Having no one to perform the duties of a county elective office, however, is undesirable as a policy matter, and courts strive to avoid an interpretation of the law that would result in the creation of a vacancy. *See State ex rel. Hoyt v. Metcalfe*, 80 Ohio St. 244, 262, 267, 88 N.E. 738 (1909) ("[t]he policy to discourage the needless creation of vacancies is recognized in a number of decisions of this court," and "the manifest purpose of our constitution and statutes … is to secure continuity and steadiness of service and to discourage the creation of vacancies"); *State ex rel. Barton v. McCracken*, 51 Ohio St. 123, 129, 36 N.E. 941 (1894) ("[t]he recognized policy of the state is to avoid, if practicable, the creation of a vacancy in an elective office"); *State ex rel. v. Howe*, 25 Ohio St. 588, 599 (1874) ("the general assembly may provide against the occurrence of vacancies," and "all the evils contemplated as likely to result from vacancies in office are guarded against by confining the exercise of the power to fill vacancies in office to those cases where no one is authorized by law to discharge the public duties"). *Cf. State ex rel. Purola v. Cable*, 48 Ohio St. 2d 239, 242, 358 N.E.2d 537 (1976) ("[i]t is in the interest of the public that offices should be filled, and by incumbents not liable to be displaced by proceedings against other persons to which they are not parties"); *State ex rel. Paul v. Russell*, 162 Ohio St. 254, 257-58, 122 N.E.2d 780 (1954) (public policy requires that the acts of *de facto* officers be valid as to the public and third persons). It could be argued that, prior to receiving a commission, an appointee has not "taken the office" for purposes of R.C. 305.02(F), and thus, the acting officer may continue to perform the duties of the office until the appointee receives his commission from the Governor. In this way, we avoid the undesirable result of having no one authorized to perform the duties of office. It would mean, however, that two people, in effect, would be holding one office and entitled to receive compensation therefor; the arrangement, although practical, thus might fail to win the approval of the courts.

We turn now to your second scenario, where the board of county commissioners has not appointed an acting officer under R.C. 305.02(F) to serve in the interim between the occurrence of the vacancy and the time when the appointee "qualifies and takes the office." It is not clear why this would ever be so, since the board of county commissioners can ensure continuity and avoid any operational problems about the office's authority to act in a legitimate manner simply by making an interim appointment immediately. That is clearly the best practice in every instance. Perhaps as a result, we could find nothing on how the business of an elective office is

to operate when no one has a claim to the office, such as where the county central committee has not yet acted to name an appointee (or where an appointee has not yet qualified for office) and no acting officer has been appointed by the board of county commissioners. We considered whether a deputy of the officer who vacated the office could exercise the authority and perform the duties of the former officeholder. However, "there can be no deputy where there is no principal." *Warwick v. State*, 25 Ohio St. 21, 24 (1874). *Accord Lessee of Anderson v. Brown*, 9 Ohio 151 (1839) (syllabus) ("[a]n acknowledgment of [a] deed, made by a deputy [sheriff] after the death of his principal, is void").

Nor could we find guidance on how an office is to operate where an appointee has qualified for office but not yet received his commission so as to be eligible to perform the duties of the office (again assuming that no acting officer was appointed by the board of county commissioners). We considered whether an appointee, who has qualified for office but not yet received his commission from the Governor, could be classified as a *de facto* officer. "'An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons.'" *State ex rel. Witten v. Ferguson*, 148 Ohio St. 702, 708, 76 N.E.2d 886 (1947). A person who exercises the duties of office "under color of a known and valid appointment or election," but who has "failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like," is a *de facto* officer. *Id.*, 148 Ohio St. at 708-709. Although the actions of a *de facto* officer are valid as to the public and third persons, he is subject to ouster in a *quo warranto* proceeding. *See State ex rel. Purola v. Cable*, 48 Ohio St. 2d at 242.

Under the analysis in *Gahl*, however, an officer who has been appointed and qualifies for office is, in fact, a *de jure* officer. That is, he is "one who occupies his office through a proper and legal election or appointment and during a constituted term." *State ex rel. Witten v. Ferguson*, 148 Ohio St. at 707. Again, he has "a complete present right to the office," and is not vulnerable to ouster, even though he lacks a commission from the Governor. Thus, a county officer awaiting his commission could not be considered a *de facto* officer and perform the duties of his office in that capacity. Not only would he lack the characteristics of a *de facto* officer, but to conclude otherwise would arguably circumvent the dictate of R.C. 107.05 that the officer "shall be ineligible" to undertake the duties of his office before receiving a commission.

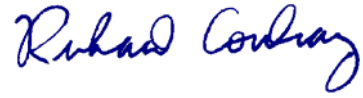
It is arguable that, after receiving his commission, the appointee may ratify the acts that were performed by office employees after he qualified for office but before he received his commission. *See Garrison v. Daytonian Hotel*, 105 Ohio App. 3d 322, 326, 663 N.E.2d 1316 (Montgomery County 1995) ("[a] ratification is a confirmation of a previous, voidable act that operates to give the act the effect it was originally intended to have"). The acts of an official's employee, undertaken without proper authority, are voidable and may be subsequently ratified by the officer if he is authorized to perform such acts. *See State v. Executor of Buttles*, 3 Ohio St. 309, 323 (1854) ("any contract that an individual, or body corporate or politic, may lawfully make, they may lawfully ratify and adopt, when made in their name without authority"); *Monarch Construction Co. v. Ohio School Facilities Commission*, 150 Ohio App. 3d 134, 2002-

Ohio-6281, 779 N.E.2d 844 (Franklin County). When an act is ratified and adopted, "it has its effect from the time it was made, and the same effect as though no agent had intervened." *State v. Executor of Buttles*, 3 Ohio St. at 323. *See also Garrison v. Daytonian Hotel*, 105 Ohio App. 3d at 326 (ratification "is equivalent to a previous authorization and relates back in time to when the act ratified was done"). Again, however, it could be argued *contra* that ratification would be inconsistent with the ineligibility language of R.C. 107.05.

In sum, we have found no statutory or judicial guidance on the issues you have raised about the operation of a county elective office when no one is eligible to perform the duties of that office. It is a matter about which the General Assembly may wish to provide direction.[6] Until such time as the General Assembly does act, however, a board of county commissioners should strive to act promptly, upon the creation of a vacancy, to appoint an acting officer under R.C. 305.02(F) and avoid the issues associated with having no incumbent officeholder.

In conclusion, it is my opinion and you are advised, that a person who is appointed under R.C. 305.02(B) to fill a vacancy in county elective office becomes entitled to compensation upon giving bond and taking the oath of office. He is ineligible, however, to perform the duties of his office until he receives a commission from the Governor under R.C. 107.05. (1981 Op. Att'y Gen. No. 81-085, approved and followed.)

Respectfully,



RICHARD CORDRAY
Ohio Attorney General

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[6] We have been speaking in terms of single officeholders. A county commissioner, however, would also fall within this statutory scheme. A board of commissioners may act with only two members. If, however, there are two vacancies on the board, the same concerns expressed with regard to single officeholders would pertain. A single member of a board of county commissioners is unable to exercise the authority of the board. *See State ex rel. Saxon v. Kienzle*, 4 Ohio St. 2d 47, 48, 212 N.E.2d 604 (1965) ("[a] single member does not constitute a board and, unless authorized by statute, cannot act as the board. The fact that all the offices but one on a board are vacant does not authorize the sole remaining member to act as the board"). *Cf. State ex rel. Purola v. Cable*, 48 Ohio St. 2d 239, 358 N.E.2d 537 (1976) (in order to fill a vacancy on the board of township trustees, a de jure township trustee and de facto trustee may appoint a person to be the third trustee, and the appointee is a de jure township trustee).