June 22, 1995

OPINION NO. 95-013

The Honorable Russell V. Leffler
Huron County Prosecuting Attorney
85 Benedict Avenue
Norwalk, Ohio 44857

Dear Prosecutor Leffler:

You have requested an opinion concerning the appointment of members of a veterans service commission under R.C. 5901.02. Your specific question is whether appointments to the commission may be made only by a general division judge of the court of common pleas or whether such appointments may be made by the presiding judge when the presiding judge is a judge of the juvenile and probate division of the court of common pleas. More generally, your request raises the issue whether R.C. 5901.02 may be interpreted as conferring authority upon any judge of a court of common pleas, regardless of the division of the court to which that judge has been elected or appointed, to appoint the members of a county veterans service commission.

R.C. 5901.02

Your question relates to R.C. 5901.02, which states in part:

> In each county there shall be a commission known as "the veterans service commission" composed of five persons. Such persons shall be residents of the county and shall be appointed to five-year terms by *a judge of the court of common pleas*. (Emphasis added.)

The statute thus states simply that appointments to the commission are to be made by "a judge of the court of common pleas." The same language is used in R.C. 5901.03 in relation to the removal of a member of the commission for cause and the filling of vacancies for unexpired terms. R.C. 5901.03 ("[a] judge of the court of common pleas may remove any member of the commission for cause, and shall fill vacancies occurring on the commission for the unexpired terms, in the manner provided in [R.C. 5901.02]").

Ohio law has long provided for the appointment of members of a veterans service commission and its predecessor organization, a soldiers' relief commission, by a judge of the court of common pleas. Early versions of the statute authorized *any* judge of the court of common pleas to make the appointments. *See, e.g.*, 1888 Ohio Laws 158, 159 (H.B. 419, eff. Apr. 5, 1888) ("[a]ny judge of the court of common pleas in each of said counties" shall appoint three persons to serve as the soldiers' relief commission). The reference was changed to "a judge of the court of common pleas" with the adoption of the General Code. *See, e.g.*, G.C. 2930 (Anderson 1912); 1917 Ohio Laws 26, 27 (H.B. 55, passed March 6, 1917). At issue in this opinion is the question whether "a judge of the court of common pleas" includes a judge of any division of the court of common pleas.

History of Ohio Const. art IV, §4

The question whether "a judge of the court of common pleas" includes a judge of the common pleas court, juvenile and probate division, arose with the amendment of the Ohio Constitution in 1968 and 1973. Prior to May 7, 1968, the probate court was an entity separate from the court of common pleas. *See generally, e.g.*, *In re Estate of Miller*, 160 Ohio St. 529, 117 N.E.2d 598 (1954). Effective May 7, 1968, the Ohio Constitution was amended so that, under Ohio Const. art. IV, §4, the probate court became a division of the court of common pleas. *See* 1967-1968 Ohio Laws, Part II-III, 2878, 2881 (Am. Sub. H.J. Res. 42). *See generally, e.g.*, Milligan & Pohlman, *The 1968 Modern Courts Amendment to the Ohio Constitution*, 29 Ohio St. L.J. 811 (1968). The Schedule for implementing that amendment stated that, on the effective date of the amendment: "All judges of the probate courts shall become judges of the courts of common pleas." 1967-1968 Ohio Laws, Part II-III, 2878, 2883 (Am. Sub. H.J. Res. 42) (Schedule, paragraph (D)).

Ohio Const. art. IV, §4 was amended again in 1973 when provision was made for other divisions of a court of common pleas, as established by law. *See* 1973 Ohio Laws, Part I, 2024 (Am. S.J. Res. 30). As currently in effect, Ohio Const. art. IV, §4 states:

> (A) There shall be *a court of common pleas and such divisions thereof as may be established by law* serving each county of the state. *Any judge of a court of common pleas or a division thereof* may temporarily hold court in any county. In the interests of the fair, impartial, speedy, and sure administration of justice, each county shall have one or more resident judges, or two or more counties may be combined into districts having one or more judges resident in the district and serving the common pleas courts of all counties in the district, as may be provided by law. Judges serving a district shall sit in each county in the district as the business of the court requires. *In counties or districts having more than one judge of the court of common pleas, the judges shall select one of their number to act as presiding judge,* to serve at their pleasure. If the judges are unable because of equal division of the vote to make such selection, the judge having the longest total service on the court of common pleas shall serve as presiding judge until selection is made by vote. The presiding judge shall have such duties and exercise such powers as are prescribed by rule of the supreme court.

> (B) The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.
> (C) *Unless otherwise provided by law, there shall be a probate division and such other divisions of the courts of common pleas as may be provided by law. Judges shall be elected specifically* to such probate division and to such other divisions. The *judges of the probate division shall be empowered* to employ and control the clerks, employees, deputies, and referees of such probate division of the common pleas courts. (Emphasis added.)

Meaning of "A Judge of the Court of Common Pleas"

In order to determine whether a judge of the juvenile and probate division is a judge of the court of common pleas for purposes of R.C. 5901.02, it is necessary to examine relevant provisions of the Ohio Constitution, the Revised Code, and the Rules of Superintendence for Courts of Common Pleas. Ohio Const. art. IV, §4 provides for the court of common pleas and such divisions as may be established by law. Unless otherwise provided by law, "there shall be a probate division." Ohio Const. art. IV, §4(C). Judges must be elected specifically to the probate division and to the other divisions, and judges of the probate division must have authority to employ and control the clerks, employees, deputies, and referees of the probate division. *Id.* Any judge of a court of common pleas or a division of that court may temporarily hold court in any county. Ohio Const. art. IV, §4(A). Where there is more than one judge of the court of common pleas, one of the judges is designated as presiding judge and has the powers and duties prescribed by rule of the Ohio Supreme Court. *Id.*

Ohio Const. art. IV, §5 empowers the Chief Justice or Acting Chief Justice of the Ohio Supreme Court, as necessity arises, to "assign any judge of a court of common pleas or a division thereof temporarily to sit or hold court on any other court of common pleas or division thereof or any court of appeals." Ohio Const. art. IV, §5(A)(3). Ohio Const. art. IV, §6 provides for the election of "judges of the courts of common pleas and the divisions thereof" to terms of not less than six years and requires that each such judge reside in the county, district, or subdivision in which his court is located. Ohio Const. art. IV, §6(A)(3). It also provides that judges of "courts of common pleas, and divisions thereof" shall receive "such compensation as may be provided by law, which shall not be diminished during their term of office." Ohio Const. art. IV, §6(B).

Provisions of the Ohio Constitution thus contain various references to judges of the court of common pleas or a division thereof. It is clear that, under the Ohio Constitution, the common pleas court and its divisions constitute a single entity and judges of any division of the court are judges of the court. As one of my predecessors stated in 1970, upon examining the provisions of Ohio Const. art. IV, §4:

> The distinction between the probate court and the common pleas court which existed prior to May 7, 1968 is now abolished. There is now but one court in each county which is the common pleas court. Although a judge of the probate division is elected

> separately, this judge is also a judge of the common pleas court and should be entitled to vote in determining who the presiding judge shall be.

1970 Op. Att'y Gen. No. 70-171 at 2-340 to 2-341. *See also* 1968 Op. Att'y Gen. No. 68-123 at 2-173 ("it is clear that where the Juvenile Court had been established within the Probate Court, it became a division of the Common Pleas Court along with the Probate Court" under Ohio Const. art. IV, §4, as amended); note 2, *infra*.

A review of relevant provisions of the Revised Code supports the conclusion that the term "a judge of the court of common pleas" applies to any judge of the court of common pleas, including a judge who is elected or appointed to a particular division of that court. With respect to judges of the probate division, R.C. 2301.02 states expressly: "*Judges of the probate division* of the court of common pleas *are judges of the court of common pleas* ...." R.C. 2301.02 (emphasis added). Similarly, R.C. 2101.01 states: "As used in the Revised Code, ... *_probate judge_ means the judge of the court of common pleas* who is judge of the probate division." R.C. 2101.01 (emphasis added). The same analysis applies to judges of the division of domestic relations or juvenile division of the court of common pleas. *See, e.g.*, R.C. 2151.07 ("[t]he juvenile court is a court of record and within the division of domestic relations or probate of the court of common pleas, except that the juvenile courts of Cuyahoga county and Hamilton county shall be separate divisions of the court of common pleas"); R.C. 2153.02 ("[judges of the Cuyahoga County Court of Common Pleas, Juvenile Court Division] shall exercise the same powers and jurisdiction and receive the same compensation as other judges of the court of common pleas"); R.C. 2301.03 (judges of the court of common pleas, division of domestic relations or juvenile division, of various counties have the same qualifications, exercise the same powers and jurisdiction, and receive the same compensation as other judges of the court of common pleas). Thus, as used in the Revised Code, the term "judge of the court of common pleas" includes a judge of a division of the court of common pleas.

The Rules of Superintendence for Courts of Common Pleas, adopted by the Ohio Supreme Court in accordance with Ohio Const. art. IV, §5(A)(1), also indicate that a judge of any division of a court of common pleas is a judge of the court of common pleas. C.P. Sup. R. 2 contains the following language relating to the selection of a presiding judge:

> In counties having more than one common pleas judge, the judges thereof shall, pursuant to the Constitution, select one of their number to act as presiding judge to serve at their pleasure. The selection of the presiding judge shall be by majority vote of *all the judges of all the divisions of the court, i.e., general, domestic relations, probate and juvenile.*
> If the judges are unable for any reason to make such selection, *the judge having the longest total service on the court of common pleas in any division thereof shall serve as presiding judge* until selection is made by vote.

C.P. Sup. R. 2 (emphasis added). Under this provision, the court of common pleas consists of its various divisions, including the general, domestic relations, probate, and juvenile divisions. A judge of any division of the court of common pleas is a common pleas judge. Further, C.P. Sup. R. 2

permits the presiding judge of the court of common pleas to "assign judges on a temporary basis from one division of the court to serve another division as the business of the court may require." *Accord, e.g.*, R.C. 2301.03. It is thus evident that the probate division of a court of common pleas is not a separate entity but part of a single court, and a judge of that division, or any other division, is a judge not merely of a division but of the court.

R.C. 5901.02 states that appointments to the veterans service commission are to be made by "a judge of the court of common pleas." Because a judge of any division of a court of common pleas is a judge of the court of common pleas, it must be concluded from the plain language of R.C. 5901.02 that any judge of any division of the court of common pleas has the authority to make an appointment to the veterans service commission under R.C. 5901.02. *See, e.g., Wachendorf v. Shaver*, 149 Ohio St. 231, 232, 78 N.E.2d 370, 372 (1948) (syllabus, paragraph 5) ("[t]he court must look to the statute itself to determine legislative intent, and if such intent is clearly expressed therein, the statute may not be restricted, constricted, qualified, narrowed, enlarged or abridged ..."). The same conclusion was reached by the Court of Appeals of Huron County in *State ex rel. Huron County Prosecutor v. Westerhold*, No. H-94-4, slip op. at 9 (Ct. App. Huron County Aug. 8, 1994), as follows: "R.C. 5901.02 makes no distinction as to the appointing authority. The statute merely requires that the appointment be made by _a judge of the court of common pleas._" The court concluded in the *Westerhold* case that a judge of the general division of the court of common pleas, who was not the presiding judge, satisfied the statutory definition. The *Westerhold* case, however, suggests that any other judge of the court of common pleas would also satisfy the statutory definition and could also be an appropriate appointing authority.

In light of the *Westerhold* case and the discussion set forth above, it must be concluded that any judge of a court of common pleas may make appointments pursuant to R.C. 5901.02. You have asked about a judge of the juvenile and probate division who is presiding judge. Such a judge is clearly a judge of the court of common pleas and, as such, is authorized to make appointments pursuant to R.C. 5901.02.

1969 Op. Att'y Gen. No. 69-031

You have asked for a reexamination of 1969 Op. Att'y Gen. No. 69-031. That opinion concluded that, under Ohio Const. art. IV, §4(C), "the judge who is elected to the office of judge of the court of common pleas shall make appointments" pursuant to R.C. 2301.18[1] and R.C. 5901.02,

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[1] R.C. 2301.18 provides that the court of common pleas shall appoint a stenographic reporter as official shorthand reporter for the court. Since your questions do not relate to this provision, this

Op. No. 69-031 (syllabus), and the judge of the probate division could not make such appointments. Op. No. 69-031 stated that, pursuant to Ohio Const. art. IV, §4, all judges of the probate courts became judges of the courts of common pleas but concluded, nonetheless, that "the probate judge is to make appointments connected with the probate division of the court of common pleas, while the common pleas judge is to make appointments connected with that court." Op. No. 69-031 at 2-54. That conclusion was based on the following reasoning:

> [A]ny appointments heretofore made by a judge of the court of common pleas under ... Section 5901.02 ... are to be continued to be made by the judge elected to the office of judge of the court of common pleas. While it is true that judges of the probate courts will become judges of the courts of common pleas, such judges of the probate courts are to be elected specifically to the probate bench, and have the power "to employ and control the clerks, employees, deputies and referees of such probate division of the common pleas courts." Subsection (C), Section 4, Article IV, supra.

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opinion does not consider it and does not reexamine the validity of 1969 Op. Att'y Gen. No. 69-031 with respect to R.C. 2301.18.

Op. No. 69-031 at 2-54.[2]

Notwithstanding the argument presented in Op. No. 69-031, the provisions discussed above compel the conclusion that a judge of any division of the court of common pleas, including the probate division, is a judge of the court of common pleas with authority to make an appointment to the veterans service commission under R.C. 5901.02. *See, e.g., Slingluff v. Weaver*, 66 Ohio St. 621, 621, 64 N.E. 574, 574 (1902) (syllabus, paragraph 2) ("the intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation"). The fact that judges of the probate division are elected specifically to the probate bench and have authority over clerks, employees, deputies, and referees of that division does not mean that they do not have the powers of other judges of the court of common pleas. It is necessary, therefore, to overrule Op. No. 69-031 on this point.

Conclusion

For the reasons discussed above, it is my opinion and you are advised:

1. For purposes of the Ohio Constitution, the Revised Code, and the Rules of Superintendence for Courts of Common Pleas, a judge of any division of a court of common pleas is a judge of the court of common pleas.

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[2] Between May 7, 1968 and November 6, 1973, Ohio Const. art. IV, §4 stated, in part:

> (C) Unless otherwise provided by law, there shall be a probate division of the courts of common pleas, and judges shall be elected specifically to such probate division and shall be empowered to employ and control the clerks, employees, deputies and referees of such probate division of the common pleas courts.

1967-1968 Ohio Laws, Part II-III, 2878, 2881 (Am. Sub. H.J. Res. 42); *see also* 1973 Ohio Laws, Part I, 2024 (Am. S.J. Res. 30); 1970 Op. Att'y Gen. No. 70-171.

2.R.C. 5901.02 permits any judge of a court of common pleas, regardless of the division of the court to which that judge has been elected or appointed, to appoint the members of a veterans service commission. (1969 Op. Att'y Gen. No. 69-031, overruled in part.)

3.A judge of the juvenile and probate division who is the presiding judge of the court of common pleas is a judge of the court of common pleas with authority to make appointments to the veterans service commission pursuant to R.C. 5901.02. (1969 Op. Att'y Gen. No. 69-031, overruled in part.)

Respectfully,

BETTY D. MONTGOMERY
Attorney General

June 22, 1995

The Honorable Russell V. Leffler
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SYLLABUS: 95-013

1.For purposes of the Ohio Constitution, the Revised Code, and the Rules of Superintendence for Courts of Common Pleas, a judge of any division of a court of common pleas is a judge of the court of common pleas.

2.R.C. 5901.02 permits any judge of a court of common pleas, regardless of the division of the court to which that judge has been elected or appointed, to appoint the members of a veterans service commission. (1969 Op. Att'y Gen. No. 69-031, overruled in part.)

3.A judge of the juvenile and probate division who is the presiding judge of the court of common pleas is a judge of the court of common pleas with authority to make appointments to the veterans service commission pursuant to R.C. 5901.02. (1969 Op. Att'y Gen. No. 69-031, overruled in part.)