March 9, 2001

OPINION NO. 2001-004

The Honorable D. Michael Haddox
Muskingum County Prosecuting Attorney
P.O. Box 189
27 North Fifth Street, Suite 201
Zanesville, Ohio 43702-0189

Dear Prosecutor Haddox:

You have asked whether a member of the county veterans service commission is subject to removal from office only under the process set forth in R.C. 3.07-.10, and if not, what governs the procedure for removing a commission member. You have clarified that your questions involve the removal of a commission member based on his conduct in office, and not a challenge to a member's qualifications or appointment, such as could be pursued in a quo warranto action. *See generally Mason v. State ex rel. McCoy*, 58 Ohio St. 30, 50 N.E. 6 (1898) (distinguishing between a quo warranto action challenging title to office and a removal process based upon charges of misconduct in office).

In addressing the issues of law presented by your questions, we will first examine the provisions of the Ohio Constitution and Revised Code pertaining to the removal of public officers generally, and members of a county veterans service commission in particular. We will then turn our attention to decisions of the Ohio courts and opinions of the Attorneys General that have addressed these issues of law in similar contexts. As will be made clear in the discussion that follows, these authorities provide a useful analytical framework for arriving at the appropriate answers to your questions.

Ohio Const. art. II, § 38, governs the removal of public officers from office and reads as follows:

> Laws shall be passed providing for the prompt removal from office, upon complaint and hearing, of all officers, including state officers, judges and members of the general assembly, for any misconduct involving moral turpitude or for other cause provided by law; and this method of removal shall be in addition to impeachment or other method of removal authorized by the constitution.

See State ex rel. Hoel v. Brown, 105 Ohio St. 479, 138 N.E. 230 (1922) (syllabus, paragraph 2) (by adopting Ohio Const. art. II, § 38, the people "plainly provided that such removal [of officers] should be made only 'upon complaint and hearing'").

Enacted by the General Assembly pursuant to Ohio Const. art. II, § 38, R.C. 3.07-.10 provide a specific process for the removal of public officers. R.C. 3.07 reads as follows:

> Any person holding office in this state, or in any municipal corporation, county, or subdivision thereof, coming within the official classification in Section 38 of Article II, Ohio Constitution, who willfully and flagrantly exercises authority or power not authorized by law, refuses or willfully neglects to enforce the law or to perform any official duty imposed upon him by law, or is guilty of gross neglect of duty, gross immorality, drunkenness, misfeasance, malfeasance, or nonfeasance is guilty of misconduct in office. Upon complaint and hearing in the manner provided for in sections 3.07 to 3.10, inclusive, of the Revised Code, such person shall have judgment of forfeiture of said office with all its emoluments entered thereon against him, creating thereby in said office a vacancy to be filled as prescribed by law. *The proceedings provided for in such sections are in addition to impeachment and other methods of removal authorized by law, and such sections do not divest the governor or any other authority of the jurisdiction given in removal proceedings.* (Emphasis added.)

See Hughes v. Brown, 62 Ohio App. 3d 417, 419, 575 N.E.2d 1186, 1187 (Franklin County 1989) ("R.C. 3.07 was enacted as a result of the mandate of Section 38, Article II, Ohio Constitution"). *See also State ex rel. Stokes v. Probate Court*, 17 Ohio App. 2d 247, 246 N.E.2d 607 (Cuyahoga County 1969) (setting forth the history of Ohio Const. art. II, § 38 and R.C. 3.07-.10, and an exhaustive discussion of the relationship between R.C. 3.07-.10 and other removal statutes).

Pursuant to R.C. 3.08, a removal proceeding is commenced by the filing of a written complaint with the court of common pleas setting forth the charges and signed by qualified electors of the jurisdiction which the officer serves, in a number not less than fifteen per cent of the total vote cast for governor at the most recent election. A copy of the complaint must be served upon the officer, and a hearing must be held within thirty days after the filing of the complaint. *Id.* The removal proceedings are tried before a judge of the common pleas court unless the officer demands a jury trial, in which case, at least nine of the twelve jurors must find the charges to be true before the officer may be removed. *Id. See also* R.C. 3.09 (appeals from a decision of the common pleas court in removal cases); R.C. 3.10 (subpoena of witnesses and payment of fees in removal proceedings); *In re Removal of Leach*, 32 Ohio L. Abs. 263, 265 (C.P. Jackson County 1940) (setting forth definitions of "nonfeasance," "misfeasance," and "malfeasance" for purposes of R.C. 3.07).

We turn now to an examination of the appointment and removal of members of a county veterans service commission. R.C. 5901.02 requires each county to have a veterans service

commission. The commission is composed of five persons who are appointed to five-year terms by a judge of the court of common pleas. *Id.* *See generally* 1995 Op. Att'y Gen. No. 95-013 at 2-69 ("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"). R.C. 5901.02 further provides that each member must be a resident of the county and an honorably discharged or honorably separated veteran. Appointments to the commission must be made from lists of recommended persons submitted by specified veterans organizations. *Id.* Members are allowed their reasonable expenses and "a fair compensation for their services," which is fixed by the board of county commissioners. R.C. 5901.04. R.C. 5901.03 states that, "[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]." R.C. Chapter 5901 is otherwise silent as to the process for removing a commission member.

Let us now consider your questions. We are guided by 1963 Op. Att'y Gen. No. 561, p. 573, which considered the very issues you have raised with regard to the removal of members of a county child welfare board (now county children services board).

The opinion first considered whether members of the county child welfare board were "public officers" for purposes of Ohio Const. art. II, § 38. In identifying the requisite attributes of a "public office," as developed by the courts and other authorities, the opinion summarized that an official is a "public officer" where he: (1) has been appointed or elected in a manner prescribed by law; (2) has a designation or title prescribed by law; (3) exercises functions concerning the public assigned by law; and (4) holds a position that has some tenure, duration, and continuance. 1963 Op. Att'y Gen. No. 561, p. 573, at 574-75. In concluding that members of a county child welfare board were "public officers" for purposes of Ohio Const. art. II, § 38, the opinion noted that they served a four-year term and otherwise met the attributes of public office. *See* R.C. Chapter 5153.

1963 Op. Att'y Gen. No. 561, p. 573 next considered the manner in which members of the board could be removed from office. The opinion discussed first whether board members could be summarily removed under R.C. 5153.08 (now R.C. 5153.03), which provided that the board of county commissioners could remove any member of the board "for good cause," and addressed whether the statute violated Ohio Const. art. II, § 38. The opinion states:

> Inasmuch as Section 5153.08, Revised Code, provides for the removal of members of the County Child Welfare Board which we have defined as being "public officers" but does not provide for "complaint and hearing" [as] required in Section 38 of Article II, Ohio Constitution, it might be argued that Section 5153.08 … is unconstitutional. On the other hand, it is difficult to visualize the Legislature enacting a statute that is clearly in violation of a constitutional provision. It is not necessary for the Legislature to write into a statute that which the constitution reads into it….

> …[I]t is my opinion that the constitutional requirements of "complaint and hearing" as set forth in Section 38, Article II of the Ohio Constitution must by implication be read into the provisions of Section 5153.08…. It is clear, under this interpretation, that Section 5153.08 … does *not* provide for summary removal of members of the County Child Welfare Board and is therefore constitutional.
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> …[I]t is my opinion that in order for a member of the County Child Welfare Board to be removed by the Board of County Commissioners in accordance with Section 5153.08 … formal "complaint" and "hearing" are mandatory. (Emphasis in original.)

1963 Op. Att'y Gen. No. 561, p. 573, at 576-77. *Cf. State ex rel. Hoel v. Brown* 105 Ohio St. at 483, 138 N.E. at 232 (concluding that a statute providing for the removal of a county treasurer by the county commissioners, without including requirements for notice and hearing, was unconstitutional, stating, "where Section 38 applies, any statute failing to measure up to the [complaint and hearing] requirements for removal is plainly faulty and must fail as a constitutional enactment").

Concluding that members of a child welfare board could be removed by the board of county commissioners only upon complaint and hearing, the opinion went on to discuss the procedure to be used, focusing specifically on R.C. 3.07-.10. Stating at 577 that, "[i]t might be argued that the proceedings called for in Sections 3.07 and 3.10, inclusive, of the Revised Code, should be followed," 1963 Op. Att'y Gen. No. 561 p. 573 examined the language in R.C. 3.07, that the proceedings provided therein do not divest the appropriate authority of the power otherwise granted in removal proceedings, and concluded that the statutorily prescribed procedures of R.C. 3.07-.10 need not necessarily be followed. The opinion states at 577:

> Clearly then, in light of the foregoing, Sections 3.07 to 3.10, inclusive, Revised Code, do not necessarily become operative when removal is initiated under Section 5153.08…. Inasmuch as the Board of County Commissioners has jurisdiction of the removal proceedings under Section 5153.08 … it is my opinion that, so long as they comply with the constitutional requirement of "complaint and hearing" and the statutory definitions of "good cause," they are vested with discretion as to the type of proceedings which they may institute.

Applying the analysis of 1963 Op. Att'y Gen. No. 561, p. 573 to members of a county veterans service commission, we must first determine whether a member is an "officer" who falls within the protections of Ohio Const. art. II, § 38. Like members of a county children services board, members of a county veterans service commission are appointed pursuant to law and have a designation given to them by law, R.C. 5901.02, exercise functions concerning the public assigned to them by law, *see, e.g.,* R.C. 5901.03, and serve a term of office, R.C. 5901.02.

Thus, under the analysis set forth in 1963 Op. Att'y Gen. No. 561, p. 573, members of a county veterans service commission are "officers" for purposes of Ohio Const. art. II, § 38.[1]

Because members of a county veterans service commission are officers who fall within the scope of Ohio Const. art. II, § 38, R.C. 3.07-.10 may be used by electors of the county to cause the removal of a commission member. However, as explained in 1963 Op. Att'y Gen. No. 561, p. 573, the process set forth in R.C. 3.07-.10 does not constitute the sole or exclusive method for removal of a commission member. The 1963 opinion is supported by *State ex rel. Stokes v. Probate Court*, in which the court of appeals examined the last sentence of R.C. 3.07, emphasized above, as well as the history of Ohio Const. art. II, § 38 and R.C. 3.07-.10, and concluded that the enactment of R.C. 3.07-.10 in no way supplanted or superseded other removal laws.

In this instance, a judge of the court of common pleas is the appointing authority of the members of the county veterans service commission with the corresponding power to remove such members for cause. Reading Ohio Const. art. II, § 38 in conjunction with R.C. 5901.03, we

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[1] This conclusion is supported by 1962 Op. Att'y Gen. No. 3067, p. 441 (partially overruled on other grounds by 1991 Op. Att'y Gen. No. 91-008), which analyzed whether members of a veterans service commission (then called a soldiers' relief commission) were "public officers" under the "general rule," and concluded that they were, stating at 444:

> Section 5901.02, Revised Code, provides for a five-member "soldiers' relief commission" in each county of the state. Members are *appointed* by a judge of the court of common pleas. The main duty of the commission is to administer the laws by which relief is given to needy soldiers, sailors, marines, and airmen, and certain of their needy relatives. Under Section 5901.12, Revised Code, the commission has the authority to determine what persons will receive such relief.
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> A member of a soldiers' relief commission is appointed to that position pursuant to law, has definite duties in that position, and exercises a portion of the sovereignty of the state in that position…. [T]herefore, such a member is a public officer within the general rule as to public officers…. (Emphasis in original.)

See also State ex rel. Huron County Prosecutor v. Westerhold, 72 Ohio St. 3d 392, 650 N.E.2d 463 (1995) (individual appointed to veterans service commission was subject to a writ of quo warranto under R.C. 2733.01(A), which provides that a quo warranto action may be brought "[a]gainst a person who usurps, intrudes into, or unlawfully holds or exercises a public office"); *State ex rel. O'Neill v. Fanning*, 134 Ohio St. 383, 17 N.E.2d 740 (1938) (a member of a soldiers' relief commission is entitled to continue in office until his successor is appointed pursuant to what is now R.C. 3.01, which applies to any "person holding an office of public trust").

conclude that a judge of the common pleas court, acting pursuant to R.C. 5901.03, may remove a member of a county veterans service commission only upon complaint and hearing. While a common pleas court judge, in proceeding to remove a commission member pursuant to R.C. 5901.03, may act only upon complaint and hearing, as required by Ohio Const. art. II, § 38, the judge is not bound to follow the particular process set forth in R.C. 3.07-.10.[2] For example, a judge's authority to proceed under R.C. 5901.03 is not dependent upon the filing of a complaint signed by the requisite number of qualified electors, and no jury trial is required upon demand of the commission member.

If a judge of the court of common pleas proceeds under R.C. 5901.03 to remove a commission member, he may use his discretion to fashion the appropriate removal process, so long as he complies with the complaint and hearing requirements of Ohio Const. art. II, § 38, and so long as the removal is for "cause," as required by R.C. 5901.03. 1963 Op. Att'y Gen. No. 561, p. 573. *See generally State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 112 N.E. 138 (1915) (syllabus, paragraph 4) ("[w]here an officer is directed by the constitution or a statute of the state

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[2] It is true that, in the case of a county veterans service commission, a judge of the common pleas court is named as the appointing authority with the power of removal under R.C. 5901.03, and as the presiding officer in a R.C. 3.08 hearing. However, the actions of a common pleas court judge under R.C. 5901.03, should be distinguished from the authority exercised by a judge of the common pleas court upon the filing of a complaint by electors under R.C. 3.07-.10. *See In re Bostwick*, 125 Ohio St. 182, 180 N.E. 713 (1932) (comparing judicial power exercised by a court of common pleas pursuant to R.C. 3.07-.10 with the "political power" of removal exercised by an appointing authority). *See also Stebbins v. Rhodes*, 56 Ohio St. 2d 239, 243, 383 N.E.2d 605, 607 (1978) (noting that while the power to remove a public officer may be conferred upon the courts (citing *In re Bostwick*), it is "'not *per se* the exercise of a judicial power….[r]ather, the power to remove is ordinarily a concomitant of the power of appointment'" (quoting the court of appeals)).

If a complaint is filed under R.C. 3.07-.10 against a member of the county veterans service commission, it would be prudent for the trial judge to be someone other than the judge who would act to remove the commission member under R.C. 5901.03 and may have factual knowledge about matters that are in dispute. *See* Code of Judicial Conduct, Canon 3(E) (a judge shall disqualify himself in a proceeding where he has personal knowledge of disputed evidentiary facts or is likely to be a material witness in the proceeding). *See also* 1995 Op. Att'y Gen. No. 95-013 at 2-69 ("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"). The chief justice of the Ohio Supreme Court is empowered to assign a judge from another court or a retired judge to sit and hear a case in counties where there is only one common pleas court judge who must disqualify himself or where otherwise appropriate. Ohio Const. art. IV, §§ 5(A)(3), 6(C). *See generally State ex rel. Board of Education v. Coffman*, 2 Ohio App. 2d 41, 206 N.E.2d 231 (Fayette County 1965).

to do a particular thing, in the absence of specific directions covering in detail the manner and method of doing it, the command carries with it the implied power and authority necessary to the performance of the duty imposed"); *Jewett v. Valley Railway Co.*, 34 Ohio St. 601, 608 (1878) ("[w]here authority is given to do a specified thing, but the precise mode of performing it is not prescribed, the presumption is that the legislature intended the party might perform it in a reasonable manner"). Although a judge is not required to follow R.C. 3.07-.10, he may find it useful to examine the mandates and standards thereof, as well as the elements of other removal statutes, in developing an appropriate process for determining the propriety of removing a member of the county veterans service commission. *See, e.g., Woodman v. Tubbs Jones*, 103 Ohio App. 3d 577, 582, 660 N.E.2d 520, 524 (Cuyahoga County 1995) (a complaint filed under R.C. 309.05 for the removal of a county prosecutor "must contain distinct charges and specifications" of misconduct and "must aver facts, not just legal conclusions, so that the public official is reasonably informed of his alleged act of misconduct, and the official can prepare a defense"); *2,867 Signers v. Mack*, 66 Ohio App. 2d 79, 82, 419 N.E.2d 1108, 1110 (Medina County 1979) (while the charges in a complaint for removal "need not conform to the technical niceties of a criminal indictment, the charges must be stated with specificity and set out with substantial certainty"). *See also Dunlap v. Crebs*, C.A. No. 1380, 1975 Ohio App. LEXIS 7760 (Wayne County Feb. 12, 1975); *In re Tunstall*, 28 Ohio L. Abs. 635 (C.P. Cuyahoga County 1939).

As a final matter, we note that in instances where an officer has vacated or abandoned his office, no removal proceeding is required by Ohio Const. art. II, § 38. An officer who fails to maintain the qualifications statutorily required for office will be deemed to have resigned. *See State ex rel. Wilson v. Gulvas*, 63 Ohio St. 3d 600, 604, 589 N.E.2d 1327, 1330 (1992) ("noncompliance with a statutory prerequisite for holding office is a disqualification by operation of law and automatically creates a vacancy"); *State ex rel. Boda v. Brown*, 157 Ohio St. 368, 373, 105 N.E.2d 643, 646 (1952) ("a clear cut distinction exists between a case involving the removal of a public officer as contemplated by the Constitution [art. II, § 38] and a case in which an official becomes disqualified by a provision of law from continuing in the office he holds"); *State of Ohio ex rel. v. Orr*, 61 Ohio St. 384, 56 N.E. 14 (1899) (an officer must be qualified to hold office not only when he is elected, but throughout his term of office). For example, a member of a veterans service commission is required to be a resident of the county, and if he moves his residence to outside the county, he may be deemed to have vacated his office.[3] *See*

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[3] R.C. 5902.02(D) authorizes the director of the Governor's Office of Veterans Affairs to adopt rules providing "for the education, training, certification, and duties of veterans service commissioners." The director has accordingly adopted 16 Ohio Admin. Code 5902-1-01 and 5902-1-02 (2000-2001 Supp.) providing for the certification of newly appointed and re-appointed commissioners. In order to be certified, a commissioner must attend the required course of instruction and sign a code of conduct. *Id.* A common pleas court judge, acting within his discretion pursuant to R.C. 5901.03, may take into account a commissioner's failure to obtain and maintain certification under rule 5902-1-01 or 5902-1-02 as cause for removal. However,

Zeigler v. Village of Sycamore, 52 Ohio App. 2d 247, 369 N.E.2d 1058 (Wyandot County 1977) (a village marshal who failed to continue to meet the village residency requirement disqualified himself from continuing in office, forfeited and abandoned his appointment, and his employment could be terminated by the village without complying with the applicable removal statute, R.C. 737.171); 1989 Op. Att'y Gen. No. 89-060.

There are other instances in which an officer may be deemed to have vacated his office. In *Hughes v. Brown*, the court found that Ohio Const. art. V, § 4, which authorizes the General Assembly to exclude persons convicted of a felony from the privilege of voting or being eligible to hold office, was not limited by Ohio Const. art. II, § 38, and concluded that a person holding public office, who was convicted of a felony need not be removed pursuant to hearing "for the reason that the felony conviction is an accomplished fact and pursuant to R.C. 2961.01 the [appointing authority] has no discretion to disregard the felony conviction but must declare the office vacated."[4] 62 Ohio App. 3d at 423, 575 N.E.2d at 1190. And, in *State ex rel. Hover v. Wolven*, 175 Ohio St. 114, 191 N.E.2d 723 (1963), the court held that where a public officer accepts a second office that is incompatible with the first, the first office is vacated, and it is unnecessary to utilize R.C. 3.07 to remove the officer therefrom. *Accord State ex rel. Witten v. Ferguson*, 148 Ohio St. 702, 707-708, 76 N.E.2d 886, 890 (1947) ("the acceptance by an officer of a second office which is incompatible with the one already held is a vacation of the original office and amounts to an implied resignation or abandonment of the same").

Thus, in cases where a member may be deemed to have resigned, abandoned, or otherwise vacated his office, no removal proceeding is required prior to filling his vacancy on the commission.

It is, therefore, my opinion, and you are hereby advised that:

1. Members of a county veterans service commission are "officers" for purposes of Ohio Const. art. II, § 38, and may be removed from office only upon complaint and hearing.

2. Although members of a county veterans service commission are subject to removal from office pursuant to R.C. 3.07-.10, a judge of the court of

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certification is not a statutory requirement for being appointed to, or holding, the office of commissioner, and the failure of a commissioner to be certified does not automatically render his position vacant.

[4] R.C. 2961.01, the enabling legislation authorized by Ohio Const. art. V, § 4, reads in part as follows: "A person convicted of a felony under the laws of this or any other state or the United States, unless the conviction is reversed or annulled, is incompetent to be an elector or juror or to hold an office of honor, trust, or profit."

common pleas, in the exercise of his authority under R.C. 5901.03 to remove a commission member from office, is not bound by the mandates of R.C. 3.07-.10, and may use his discretion in developing and applying an appropriate removal process, so long as he complies with the complaint and hearing requirements of Ohio Const. art. II, § 38 and the removal is for cause as required by R.C. 5901.03.

3. In cases where a member of a county veterans service commission may be deemed to have resigned, abandoned, or otherwise vacated his office, a judge of the court of common pleas is not required to conduct a removal proceeding prior to filling the member's vacancy on the commission.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

March 9, 2001

The Honorable D. Michael Haddox
Muskingum County Prosecuting Attorney
P.O. Box 189
27 North Fifth Street, Suite 201
Jackson, Ohio 45640

SYLLABUS: 2001-004

1. Members of a county veterans service commission are "officers" for purposes of Ohio Const. art. II, § 38, and may be removed from office only upon complaint and hearing.

2. Although members of a county veterans service commission are subject to removal from office pursuant to R.C. 3.07-.10, a judge of the court of common pleas, in the exercise of his authority under R.C. 5901.03 to remove a commission member from office, is not bound by the mandates of R.C. 3.07-.10, and may use his discretion in developing and applying an appropriate removal process, so long as he complies with the complaint and hearing requirements of Ohio Const. art. II, § 38 and the removal is for cause as required by R.C. 5901.03.

3. In cases where a member of a county veterans service commission may be deemed to have resigned, abandoned, or otherwise vacated his office, a judge of the court of common pleas is not required to conduct a removal proceeding prior to filling the member's vacancy on the commission.