March 4, 1998

OPINION NO. 98-013

The Honorable Paul J. Gains
Mahoning County Prosecuting Attorney
120 Market Street
Youngstown, Ohio 44503-1726

Dear Prosecutor Gains:

We are in receipt of your request for an opinion on the following question: Is an individual who has been convicted of a federal felony prohibited from holding the office of member of the legislative authority of a municipality in Ohio?

It is our understanding, based on your letter and conversations with a member of your staff, that the facts surrounding your question are as follows. Two individuals with federal felony convictions have been elected to the legislative authorities of two different municipalities in your county.[1] One of these individuals was convicted of a felony drug offense under 21 U.S.C. § 843(b) in August 1987. The other was convicted of a felony tax offense in 1988. Both completed their sentences in federal correctional facilities, and neither is subject to ongoing probation, parole, or any other type of supervised release. Neither, however, has been pardoned by or holds a restoration of rights certificate from the federal government or has had the record of his conviction sealed by an Ohio court of common pleas, pursuant to R.C. 2953.32 and R.C. 2953.33.

It has long been recognized that the ability to hold public office is a privilege, which "is not a natural right, but may be taken away by the power that gave it." *Mason v. State ex rel. McCoy*, 58 Ohio St. 30, 49, 50 N.E. 6, 8 (1898); *accord State ex rel. Platz v. Mucci*, 10 Ohio St. 2d 60, 61, 225 N.E.2d 238, 240 (1967). The Ohio Constitution, art. V, §4, specifically provides that the General Assembly has the power "to exclude from the privilege...of being eligible to office, any person convicted of a felony." In addition, state statutes imposing civil disabilities on convicted felons have withstood challenges made on equal protection grounds under the United States Constitution. *See generally Richardson*

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[1] A city and a village are involved. This distinction is not relevant to the analysis of your question, however.

v. Ramirez, 418 U.S. 24 (1974) (upholding the constitutionality of analogous state statutes disenfranchising felons); *Shepherd v. Trevino*, 575 F.2d 1110 (5th Cir. 1978) (upholding the constitutionality of state disenfranchisement statutes as applied specifically to federal felons), *cert. denied*, 439 U.S. 1129 (1979).

Consistent with this constitutional power, the General Assembly has enacted R.C. 2961.01,[2] which states:

[2] The provisions of R.C. Title 29 (crimes; procedure) cited and quoted in this opinion are those that apply to criminal offenses committed prior to July 1, 1996. We note that recently the General Assembly enacted amendments to R.C. 2961.01 that will take effect in March 1998. *See* Am. Sub. S.B. 111, 122nd Gen. A. (1997) (eff. March 17, 1998). These amendments, however, will have no effect on the analysis or conclusions of this opinion.

> *A person convicted of a felony under the laws of* this or any other state or *the United States*, unless his conviction is reversed or annulled, *is incompetent* to be an elector or juror, or *to hold an office of honor, trust, or profit*.[3] When any such person is granted probation, parole, or a conditional pardon, he is competent to be an elector during the period of probation or parole or until the conditions of his pardon have been performed or have transpired, and thereafter following his final discharge. The full pardon of a convict restores the rights and privileges so forfeited under this section, but a pardon shall not release a convict from the costs of his conviction in this state, unless so specified. (Emphasis and footnote added.)

R.C. 2961.01 thus expressly provides that the prohibition against holding "an office of honor, trust, or profit" extends to a person convicted of a felony under the laws of the United States. A member of the legislative authority of a municipality is an elected officer who, in concert with the other members of that authority, exercises the legislative power of that municipality. *See* R.C. 731.01-.03 (governing the legislative authority of a city); R.C. 731.09 (governing the legislative authority of a village). There is no question that this is an office of honor or trust, for purposes of R.C. 2961.01.[4] Further, a municipality's powers of local self-government, *see* Ohio Const. art XVIII, §§ 3, 7, do not include the power to remove the prohibition with respect to municipal offices, because R.C. 2961.01 pertains to

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[3] Ohio follows the general rule that specified disqualifications for *holding* a public office do not prevent an individual from being a candidate for the office unless the law expressly extends the disqualifications to candidacy. *State ex rel. Fisher v. Brown*, 32 Ohio St. 2d 23, 289 N.E.2d 349 (1972). If a candidate who is not qualified to hold an office is elected, however, that candidate is then obligated to remove any disqualifications to holding the office; the mere fact of election does not bestow title to the office. *See State ex rel. Vana v. Maple Heights City Council*, 54 Ohio St. 3d 91, 94, 561 N.E.2d 909, 912 (1990) ("a candidate for public office need not be qualified in order to run for that office, but must remove any disqualifications immediately upon assuming the office"); *State ex rel. Cox v. Riffle*, 132 Ohio St. 546, 550, 9 N.E.2d 497, 499 (1937) (holding that certification of election results does not bestow title to an office where no right to hold the office exists). In the situation presented by your request, neither of the individuals who were elected has subsequently taken any action to remove his disqualification from holding office. This opinion, therefore, is limited in its scope to whether such individuals are currently eligible to hold public office. The opinion neither addresses nor resolves the question of whether a person who is disqualified from holding public office by reason of having been convicted of a federal felony may cure or remove that disqualification subsequent to taking office, and, by so doing, continue to hold office.

[4] If a member of a municipal legislative authority receives compensation or other remuneration for his services thereon, the office is also one of profit.

a matter of statewide concern. *State ex rel. Corrigan v. Barnes*, 3 Ohio App. 3d 40, 44-45, 443 N.E.2d 1034, 1039 (Cuyahoga County 1982). *See generally State ex rel. Evans v. Moore*, 69 Ohio St. 2d 88, 89-90, 431 N.E.2d 311, 312 (1982) ("[i]t is a fundamental principle of Ohio law that, pursuant to the _statewide concern_ doctrine, a municipality may not, in the regulation of local matters, infringe on matters of general and statewide concern"). Accordingly, absent a restoration of the rights and privileges forfeited under R.C. 2961.01, a convicted federal felon may not hold the office of member of the legislative authority of a municipality in Ohio.

Ohio statutes provide several means by which forfeited rights and privileges may be restored to a convicted felon. You have specifically inquired about R.C. 2967.16(B). This statute provides that forfeited rights and privileges are restored to "[a] *prisoner* who has served the maximum term of his sentence or who has been granted his final release by the adult parole authority." (Emphasis added.) Examination of the statutory scheme of R.C. Chapter 2967 (pardon; parole; probation) and the definitions pertinent thereto, however, indicate that R.C. 2967.16(B) applies only to individuals who have served their sentences in Ohio correctional facilities. Pursuant to R.C. 2967.01(H), a "[p]risoner" is "a person who is in actual confinement in a *state* correctional institution." (Emphasis added.) A "[s]tate correctional institution" is, in turn, defined as "any institution or facility that is operated by the department of rehabilitation and correction." R.C. 2967.01(A). Accordingly, the restoration provisions of R.C. 2967.16(B) are not applicable to convicted federal felons who have served their sentences in federal correctional facilities.[5]

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[5] State law provisions for restoring civil rights and privileges to federal felons that differ from those applicable to state felons have been held not to violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Shepherd v. Trevino*, 575 F.2d
1110 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979).

Although R.C. 2967.16(B) is inapplicable, there are other statutory restoration provisions which do expressly apply to persons convicted of federal felonies. The forfeiture statute itself, R.C. 2961.01, provides for automatic restoration of the right to vote upon final discharge.[6] Other forfeited rights and privileges, including the privilege of holding office, however, are not restored upon discharge. In order to regain these rights and privileges, an individual must obtain a reversal or annulment of the conviction, or obtain a full pardon. One Ohio court of appeals has held that an individual who has been convicted of a federal felony must obtain a federal pardon for purposes of restoration under R.C. 2961.01. *Hughes v. State*, Nos. 91AP-1167, 91AP-1168, 1992 Ohio App. LEXIS 1604 (Ct. App. Cuyahoga County 1992), *rev'd on other grounds sub. nom., State ex rel. Hughes v. Celeste*, 67 Ohio St. 3d 429, 619 N.E.2d 412 (1993).

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[6] Although not pertinent to your inquiry, an individual is also restored to the right to vote during the term of probation, parole, or conditional pardon.

An additional restoration mechanism is available to federal felons who qualify as first offenders.[7] Pursuant to R.C. 2953.32(A)(1), a first offender who has been convicted of a felony in federal court may, at the expiration of three years after final discharge, apply to a court of common pleas for the sealing of the record of his conviction. If the court issues an order sealing the record of conviction, "[t]he proceedings in the case [in which the applicant was convicted] shall be considered not to have occurred." R.C. 2953.32(C)(2). R.C. 2953.33(A) further provides that, "an order to seal the record of a person's conviction restores the person who is the subject of the order to all rights and privileges not otherwise restored by termination of sentence or probation or by final release on parole."[8] Thus, a convicted federal felon whose record has been sealed by a court of common pleas pursuant to R.C. 2953.32 is eligible to hold public office in Ohio.

It is, therefore, my opinion, and you are hereby advised that, pursuant to R.C. 2961.01, an individual who has been convicted of a federal felony is prohibited from holding the office of member of the legislative authority of a municipality, unless that individual's civil rights and privileges have been restored (1) as provided in R.C. 2961.01, by reversal or annulment of the conviction, or by grant of a federal pardon, or (2) as provided in R.C. 2953.32 and R.C. 2953.33, by an order of a court of common pleas sealing the record of conviction, if the individual is a "[f]irst offender," as defined in R.C. 2953.31(A).

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[7] For this purpose, the term "[f]irst offender" is defined in R.C. 2953.31(A), as follows:

> anyone who has been convicted of an offense in this state or any other jurisdiction, and who previously or subsequently has not been convicted of the same or a different offense in this state or any other jurisdiction. When two or more convictions result from or are connected with the same act, or result from offenses committed at the same time, they shall be counted as one conviction.

[8] There are statutory exceptions to this rule, but none are applicable to your inquiry. *See, e.g.*, R.C. 2921.02(F) (public servant or party official convicted of bribery "is forever disqualified" from public office or employment); R.C. 2923.13-.14 (providing the exclusive means of relief from firearms disabilities); R.C. 2953.32(G) (certain rights and privileges pertaining to students excluded from attendance at public schools cannot be restored by having the records of their convictions sealed); *see also United States v. Cassidy*, 899 F.2d 543, 549-50 (6th Cir. 1990) (applying firearms disability provisions of R.C. 2923.13-.14); *State v. Bissantz*, 40 Ohio St. 3d 112, 532 N.E.2d 126 (1988) (syllabus, paragraph two) ("[a] person convicted of bribery in office under R.C. 2921.02(B) is forever barred from holding public office in this state, even where such conviction is subsequently expunged pursuant to R.C. 2953.31 *et seq.*").

Respectfully,

BETTY D. MONTGOMERY
Attorney General

March 4, 1998

The Honorable Paul J. Gains
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120 Market Street
Youngstown, Ohio 44503-1726

SYLLABUS: 98-013

Pursuant to R.C. 2961.01, an individual who has been convicted of a federal felony is prohibited from holding the office of member of the legislative authority of a municipality, unless that individual's civil rights and privileges have been restored (1) as provided in R.C. 2961.01, by reversal or annulment of the conviction, or by grant of a federal pardon, or (2) as provided in R.C. 2953.32 and R.C. 2953.33, by an order of a court of common pleas sealing the record of conviction, if the individual is a "[f]irst offender," as defined in R.C. 2953.31(A).