

Note from the Attorney General's Office:

2015 Op. Att'y Gen. No. 2015-038 was overruled due to statutory amendment by 2021 Op. Att'y Gen. No. 2021-012.

December 23, 2015

The Honorable John D. Ferrero
Stark County Prosecuting Attorney
Stark County Office Building
110 Central Plaza South, Suite 510
Canton, Ohio 44702

SYLLABUS:

2015-038

R.C. 305.02(D) controls the appointment of a person to a vacancy in the office of county commissioner resulting from the resignation of a county commissioner elected to that office as a candidate of the Democratic party who thereafter becomes unaffiliated with a political party and is elected as an independent candidate to the office of mayor.



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OPINION NO. 2015-038

The Honorable John D. Ferrero
Stark County Prosecuting Attorney
Stark County Office Building
110 Central Plaza South, Suite 510
Canton, Ohio 44702

Dear Prosecutor Ferrero:

You have requested an opinion about the appointment of a person to fill a vacancy in the office of county commissioner. Specifically, you ask which division of R.C. 305.02 controls the appointment of a person to a vacancy that is created by the resignation of a county commissioner who was elected to that office as a candidate of the Democratic party and thereafter declared himself unaffiliated with a political party for the purpose of seeking election as an independent candidate to the office of mayor.

R.C. 305.02 addresses the appointment of a person to fill a vacancy in, *inter alia*, the office of county commissioner. R.C. 305.02(A) (“the vacancy shall be filled as provided in this section and the appointee shall hold office until a successor is elected and qualified”). Division (B) of R.C. 305.02 declares that “[i]f a vacancy occurs from any cause [in the office of county commissioner], 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[.]” Division (D) of R.C. 305.02 provides that when a vacancy occurs in the office of county commissioner, and “the last occupant of the office ... was elected as an independent candidate ... the prosecuting attorney and the remaining commissioners or a majority of them shall make the appointment.” Finally, division (F) of R.C. 305.02 provides that “[t]he board of county commissioners may appoint a person to hold [the office of county commissioner] 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.” We will address your inquiry by applying each of those provisions to the facts as you have described them in order to determine which provision controls the appointment of a person to fill a vacancy in the office of county commissioner in Stark County.

Appointment Pursuant to R.C. 305.02(B)

We begin by determining whether an appointment to fill the vacancy in the office of county commissioner may be made pursuant to R.C. 305.02(B), which provides:

If a vacancy occurs from any cause [in the office of county commissioner], 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, except that if such vacancy occurs because of the death, resignation, or inability to take the office of an officer-elect whose term has not yet begun, an appointment to take such office at the beginning of the term shall be made by the central committee of the political party with which such officer-elect was affiliated. (Emphasis added.)

Thus, pursuant to R.C. 305.02(B) if the last occupant of the office of county commissioner was affiliated with a political party, the county central committee of that party shall appoint a person to fill the vacancy in that office created by that person's resignation.

The foregoing language of R.C. 305.02(B) is ambiguous. In particular, it is unclear whether the political party affiliation of the last occupant of the office is his affiliation at the time he was elected to the office of county commissioner or his affiliation at the time the vacancy in the office of county commissioner occurs. When a statute is ambiguous, it is appropriate to consider other laws on similar subjects to assist in determining the intent of the General Assembly in enacting the statute. R.C. 1.49(D); *D.A.B.E., Inc. v. Toledo-Lucas Cnty. Bd. of Health*, 96 Ohio St. 3d 250, 2002-Ohio-4172, 773 N.E.2d 536, at ¶ 20.

In *State ex rel. Herman v. Klopffleisch*, 72 Ohio St. 3d 581, 584-85, 651 N.E.2d 995 (1995), the Ohio Supreme Court construed the meaning of "affiliated" in R.C. 733.08, a statute that is nearly identical to R.C. 305.02(B).¹ In that case, the mayor of a city was elected to that office as a candidate of the Democratic party. *State ex rel. Herman v. Klopffleisch*, 72 Ohio St. 3d at 582. After taking office as mayor, he voted in several Republican party primary elections. *Id.* Subsequently, he resigned from the office of mayor. *Id.* The county central committees of the Republican and

¹ The version of R.C. 733.08 that was in effect at the time of the court's decision in *State ex rel. Herman v. Klopffleisch*, 72 Ohio St. 3d 581, 584, 651 N.E.2d 995 (1995), provided, in pertinent part:

In case of the death, resignation, or removal of the mayor, the vacancy in the office of mayor shall be filled ... by a person chosen by the residents of that city who are members of the city central committee if there is one, or if not then of the county central committee, of the political party with which the last occupant of the office was affiliated....

....

If the last occupant of the office of mayor ... was elected as an independent candidate, the vacancy shall be filled by election by the legislative authority for the unexpired term.

Democratic parties each appointed a person to fill the vacancy in the office of mayor. *Id.* After the Secretary of State determined that the county central committee of the Republican party was authorized to appoint a person to fill the vacancy, a *quo warranto* action was filed. *Id.* at 582-83.

The court rejected the argument that “affiliated” in R.C. 733.08 was the equivalent of “elected as.” *State ex rel. Herman v. Klopfleisch*, 72 Ohio St. 3d at 586. The court reasoned that “[t]he General Assembly presumably intended different results for the two situations when it used ‘affiliated’ in one portion of R.C. 733.08 and ‘elected as’ in another.” *Id.* Instead, to determine with which political party the former mayor was affiliated, the court read R.C. 733.08 *in pari materia* with R.C. 3513.19(A)(3) and R.C. 3513.05.² *State ex rel. Herman v. Klopfleisch*, 72 Ohio St. 3d at 585. The court considered the former mayor’s voting history in the two years prior to the occurrence of the vacancy. *Id.* at 586. His voting record disclosed that he had voted in Republican primary elections and did not vote in any Democratic primary elections in the same period of time. *Id.* The court also considered that the former mayor “was publicly announced to be a Republican shortly after taking office” and was “actively engaged in Republican Party activities” after that announcement. *Id.* at 586. The court concluded that the county central committee of the Republican party had the authority to appoint a person to fill the vacancy. *Id.* at 587. Based upon the holding in *Klopfleisch*, political party affiliation of the last occupant of the office of mayor, for the purpose of R.C. 733.08, is the last occupant’s affiliation at the time the vacancy occurs, rather than his affiliation at the time he was elected to the office of mayor.

² When *State ex rel. Herman v. Klopfleisch* was decided, R.C. 3513.19(A)(3) provided:

[t]he right of a person to vote at a primary election may be challenged upon the following grounds:

....

(3) That he is not affiliated with or is not a member of the political party whose ballot he desires to vote. Such party affiliation shall be determined by examining the elector’s voting record for the current year and the next two preceding calendar years as shown on the voter’s registration card, using the standards of affiliation specified in [R.C. 3513.05(D)].

1985 -1986 Ohio Laws, Part III, 4846 (Am. H.B. 524, eff. March 17, 1987). R.C. 3513.05 provided:

For purposes of signing or circulating a petition of candidacy for party nomination or election, an elector is considered to be a member of a political party if he voted in that party’s primary election within the preceding two calendar years, or if he did not vote in any other party’s primary election within the preceding two calendar years.

1993-1994 Ohio Laws, Part I, 1414, 1415-16 (Am. Sub. S.B. 150, eff. Dec. 29, 1993).

Case law addressing a person's independent candidacy for public office also may guide a determination of a person's affiliation with a political party. R.C. 3501.01(I) defines an "independent candidate" as "any candidate who claims not to be affiliated with a political party, and whose name has been certified on the office-type ballot at a general or special election through the filing of a statement of candidacy and nominating petition, as prescribed in [R.C. 3513.257]." A candidate's "claim of independence must be made in good faith[.]" *Morrison v. Colley*, 467 F.3d 503, 509 (6th Cir. 2006). While a candidate's past actions are material to the determination of whether a claim of independence has been made in good faith, the candidate's voting history is not the sole determining factor. *State ex rel. Davis v. Summit Cnty. Bd. of Elections*, 137 Ohio St. 3d 222, 2013-Ohio-4616, 998 N.E.2d 1093, at ¶ 19. As explained by the Ohio Supreme Court, "[d]isaffiliation by definition presumes a history of support for or membership in a political party. If a candidate's prior voting record, standing alone, could trump a declaration of disaffiliation, then disaffiliation would never be possible." *Id.*

Nevertheless, a person's political activities, including voting history, subsequent to a statement of candidacy as an independent candidate that conflict with the statement of candidacy may be sufficient to disqualify an independent candidate from being an eligible candidate at an election. *State ex rel. Davis v. Summit Cnty. Bd. of Elections* at ¶ 26; *State ex rel. Wilkerson v. Trumbull Cnty. Bd. of Elections*, 11th Dist. No. 2007-T-0081, 2007-Ohio-4762, 2007 WL 2696769, at ¶ 30. In *State ex rel. Wilkerson v. Trumbull Cnty. Bd. of Elections* at ¶ 24, the court of appeals explained the significance of actions taken or conduct that occurs after a claim of independence:

When an independent candidate decides to vote in the primary election, he has essentially taken a completely new step which nullifies any prior declarations he previously made as to his lack of affiliation with a political party. Just as a candidate can renounce his prior affiliation with a party by declaring in his "independent" petition that he has now severed that association, the act of voting in the primary has the effect of rescinding any earlier declaration of independence. To this extent, the vote in the primary is not just another part of the candidate's voting pattern, but is a line of demarcation which renders all of his prior actions regarding his political status meaningless.

The determination of whether a person is affiliated with a political party is fact specific and shall take into account all the relevant circumstances of a person's political activities and voting history. *See Jolivette v. Husted*, 886 F.Supp. 2d 820, 830 (S.D. Ohio 2012) ("determining whether a candidate is actually unaffiliated or disaffiliated with a political party, and whether the claim of independence is made in good faith, are necessarily fact specific and intensive. This determination requires a thorough review of the candidate's conduct as it relates to party affiliation"); *State ex rel. Herman v. Klopffleisch*, 72 Ohio St. 3d at 586 ("[t]he Secretary of State's determination that the resolution of the 'affiliated' issue generally requires a consideration of all relevant circumstances is not an unreasonable interpretation of R.C. 733.08"). Therefore, the party affiliation of the last occupant of a county office for the purpose of R.C. 305.02(B) is the last occupant's affiliation at the time the vacancy occurs, taking into account all the relevant circumstances of a person's political activities. *See State ex rel. Morris v. Stark Cnty. Bd. of Elections*, 143 Ohio St. 3d 507, 2015-Ohio-

3659, 39 N.E.3d 1232, at ¶ 33 (“the right of appointment belongs to the party with which the outgoing office holder was *affiliated*, R.C. 305.02(B), which does not necessarily mean the same thing as ‘elected as,’ [State ex rel. Herman v. Klopfleisch, 72 Ohio St. 3d at 586]”).

You have explained that a vacancy in the office of county commissioner in Stark County will be created when one of the commissioners resigns his county office to begin his term as mayor. If the totality of circumstances demonstrates that, at the time the vacancy occurs, the commissioner (*i.e.*, the last occupant of the office) is not affiliated with a political party, the county central committee of a political party may not appoint a person to fill the vacancy pursuant to R.C. 305.02(B). In the situation as you have described it, the commissioner was elected to the office of mayor as an independent candidate in the November 2015 general election. The vacancy in the office of county commissioner is expected to occur no later than January 1, 2016, pursuant to the commissioner’s resignation. Provided the commissioner does not affiliate with a political party prior to his resignation, R.C. 305.02(B) will not control the appointment of a person to fill the vacancy created by the resignation.

Appointment Pursuant to R.C. 305.02(F)

R.C. 305.02(F) provides that “[t]he board of county commissioners may appoint a person to hold [the office of county commissioner] 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.*” (Emphasis added.) The emphasized language specifies that the acting officer’s performance of the duties of the office is confined to the period between the occurrence of the vacancy and the qualification of the county central committee’s appointee. This means that the General Assembly intends that an appointment of an acting officer pursuant to R.C. 305.02(F) may occur only when an appointment pursuant to R.C. 305.02(B) also will be forthcoming. When R.C. 305.02(B) applies, the county central committee shall meet for the purpose of making an appointment between five and forty-five days after the occurrence of a vacancy. R.C. 305.02(C). The appointment of an acting officer may be necessary so that the duties of the office are performed during that period.

Had the General Assembly intended that an appointment pursuant to R.C. 305.02(F) could be made when R.C. 305.02(B) does not apply, it could have chosen language to that effect. That the General Assembly included specific language relating the acting officer’s performance of the duties of the office to the assumption of the office by a county central committee’s appointee indicates that an appointment of an acting officer pursuant to R.C. 305.02(F) may be made only in those situations in which an appointment may be made by the county central committee of a political party pursuant to R.C. 305.02(B). Therefore, when a vacancy occurs in the office of county commissioner and R.C. 305.02(B) does not apply, a board of county commissioners may not appoint a person to fill the vacancy as an acting officer pursuant to R.C. 305.02(F).

Appointment Pursuant to R.C. 305.02(D)

Let us now examine the process in R.C. 305.02(D) for filling by appointment a vacancy in a county office, including the office of county commissioner. R.C. 305.02(D) reads as follows:

If the last occupant of the office ... was *elected as* an independent candidate, the board of county commissioners shall make such appointment at the time when the vacancy occurs, except where the vacancy is in the office of county commissioner, in which case the prosecuting attorney and the remaining commissioners or a majority of them shall make the appointment. (Emphasis added.)

As is the case of R.C. 305.02(B), the language of R.C. 305.02(D) is ambiguous. It is unclear whether R.C. 305.02(D) controls the appointment process only if the last occupant of the county office was elected to *that office* as an independent candidate or whether R.C. 305.02(D) also applies when, at the time a vacancy occurs in a county office, the last occupant of the county office is not affiliated with a political party under R.C. 305.02(B) and has been elected as an independent candidate to a public office other than the county office of which he was the last occupant. It is possible to read R.C. 305.02(D) as applying when, at the time the vacancy occurs, the last occupant of the county office is not affiliated with a political party and he was elected as an independent candidate either to that county office or to a public office other than the county office of which he was the last occupant.

We are not aware of any decision of an Ohio court or an opinion of the Attorney General that has applied R.C. 305.02(D) to facts that duplicate those described in your letter. However, we believe that it is reasonable to read R.C. 305.02(D) as applying when, at the time a vacancy occurs in a county office, the last occupant of that county office is not affiliated with a political party and has been elected as an independent candidate to a public office other than the county office of which he was the last occupant. This reading is supported by and consistent with the case law discussed above in relation to the construction of R.C. 305.02(B).

We first look to the language of R.C. 305.02(D). “Elected” in R.C. 305.02(D) is not followed by the phrase “to that office.” No other language appears in R.C. 305.02(D) that indicates to which public office “elected as an independent candidate” refers. Accordingly, we discern nothing in the plain language of R.C. 305.02(D) that prohibits its application when the last occupant of a county office has been elected as an independent candidate to a public office other than the county office of which he was the last occupant. In addition, R.C. 305.02(B) and (D) shall be read together as related parts of a larger statutory scheme. *Commerce & Indus. Ins. Co. v. Toledo*, 45 Ohio St. 3d 96, 102, 543 N.E.2d 1188 (1989) (“words and phrases in a statute must be read in context of the whole statute”); 1998 Op. Att’y Gen. No. 98-011, at 2-59 (“[i]t is axiomatic that statutes must be read as a whole”). For the purpose of R.C. 305.02(B), the last occupant’s political party affiliation is the occupant’s affiliation at the time the vacancy occurs. Determination of the last occupant’s affiliation for the purpose of R.C. 305.02(B) shall take into account all the relevant political activities of the last occupant of the county office. Thus, when it is determined whether the last occupant of the county office was elected as an independent candidate for the purpose of R.C. 305.02(D), the determination also shall take into account all the occupant’s relevant political activities that have preceded the occurrence of the vacancy.

For the purpose of R.C. 305.02, therefore, when a vacancy occurs in a county office, the first step is to determine whether, at that time, the last occupant of the county office is affiliated with a political party. If the last occupant of the county office is affiliated with a political party at the time

the vacancy occurs, appointment of a person to fill the vacancy is made pursuant to R.C. 305.02(B) by the county central committee of the political party that corresponds to that affiliation. If it is determined that, at the time the vacancy occurs, the last occupant of the office is not affiliated with a political party, the next step is to determine whether the last occupant of the county office was elected to that county office as an independent candidate. If the last occupant of the county office is not affiliated with a political party at the time the vacancy occurs and was elected to that county office as an independent candidate, an appointment may be made pursuant to R.C. 305.02(D). Additionally, if the last occupant of the county office was not elected to the county office as an independent candidate, but, at the time the vacancy occurs, that person is not affiliated with a political party and was elected as an independent candidate to a public office other than the county office of which he was the last occupant, an appointment may be made pursuant to R.C. 305.02(D). Therefore, a person may be appointed pursuant to R.C. 305.02(D) when, at the time the vacancy occurs, the last occupant of the county office is not affiliated with a political party and was elected as an independent candidate either to that office or to a public office other than the county office of which he was the last occupant.

This reading of R.C. 305.02(D) comports with judicial statements discouraging the interpretation of a statute in a manner that creates a vacancy in a public office or that extends a vacancy for a lengthy period of time. *See State ex rel. Hoyt v. Metcalfe*, 80 Ohio St. 244, 261, 88 N.E. 738 (1909) (“[t]he policy has been to secure continuity of service and avoid unnecessary 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”); 2010 Op. Att’y Gen. No. 2010-003, at 2-21 (“[h]aving no one to perform the duties of a county elective office ... 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”). As we have already explained, R.C. 305.02(B) and (F) do not control the appointment process when a vacancy occurs upon the resignation of a county commissioner who was elected to that office as a candidate of a political party but then is elected as an independent candidate to the office of mayor. If an appointment is not made pursuant to R.C. 305.02(D), then the office of county commissioner will remain vacant until the next general election. Although a board of county commissioners is able to fulfill its duties with only two members, *see* 2010 Op. Att’y Gen. No. 2010-003, at 2-23 n.6, there may be instances in which that result may disrupt the continuity of county government and prove impractical. For example, with only two commissioners on the board, unanimous votes will be required for the board to act. If a unanimous vote does not occur, there will be no third vote to break the impasse.

We conclude that R.C. 305.02(D) controls the appointment of a person to fill the anticipated vacancy in the office of county commissioner in Stark County. The facts as you have described them indicate that a commissioner was elected to that county office as a Democratic party candidate. During his term as county commissioner, he became unaffiliated with the Democratic party and sought election as an independent candidate to the office of mayor. He was elected to the office of mayor. Thus, at the time the vacancy is expected to occur, the commissioner will not be affiliated with a political party and will have been elected as an independent candidate to the office of mayor. Therefore, an appointment to fill the vacancy in the office of county commissioner may be made pursuant to R.C. 305.02(D). Appointing a person to fill the vacancy in the office of county

commissioner pursuant to R.C. 305.02(D) will avoid a lengthy vacancy in the county office and promotes the continuity of Stark County government.

Conclusion

Based upon the foregoing, it is our opinion, and you are hereby advised that R.C. 305.02(D) controls the appointment of a person to a vacancy in the office of county commissioner resulting from the resignation of a county commissioner elected to that office as a candidate of the Democratic party who thereafter becomes unaffiliated with a political party and is elected as an independent candidate to the office of mayor.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive style with a large initial "M" and a long, sweeping tail.

MICHAEL DEWINE
Ohio Attorney General