June 19, 2007

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SYLLABUS: 2007-014

The language of R.C. 4755.01(B) stating that "[a] member shall not serve for more than three consecutive terms" refers to a term defined by R.C. 4755.01(B) as commencing on the 28th day of August, ending on the 27th day of August, and extending for the prescribed number of years; it does not include the remainder of an unexpired term resulting from the occurrence of a vacancy during the course of a statutory term.

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OPINION NO. 2007-014

Jeffrey M. Rosa, Executive Director
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Dear Executive Director Rosa:

We have received your letter submitting the request of the Physical Therapy Section of the Ohio Occupational Therapy, Physical Therapy, and Athletic Trainer's Board for a formal written opinion on the following question:

> In light of the new language codified in R.C. 4755.01(B), if a board member is appointed to fill a vacancy occurring prior to the expiration of the term for which the predecessor was appointed, is that considered a "term" for the purposes of determining three consecutive terms?

This question pertains to language currently appearing in R.C. 4755.01(B) that states: "A member shall not serve for more than three consecutive terms."

For the reasons discussed in this opinion, we conclude that the language of R.C. 4755.01(B) stating that "[a] member shall not serve for more than three consecutive terms" refers to a term defined by R.C. 4755.01(B) as commencing on the 28th day of August, ending on the 27th day of August, and extending for the prescribed number of years; it does not include the remainder of an unexpired term resulting from the occurrence of a vacancy during the course of a statutory term.

Background information

The Ohio Occupational Therapy, Physical Therapy, and Athletic Trainers Board consists of sixteen members appointed by the Governor with the advice and consent of the Senate. [1] It is

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[1] It is common knowledge that, when appointments are made by the Governor with the advice and consent of the Senate, there may be delays that result in an appointment for a full

composed of a Physical Therapy Section, an Occupational Therapy Section, and an Athletic Trainers Section. Five members of the Board sit on each of the sections. One member of the Board represents the public and attends at least three meetings of each of the sections each year. The Physical Therapy Section has four additional members (appointed by the Governor with the advice and consent of the Senate), who are not members of the Board and have functions pertaining only to the Physical Therapy Section. R.C. 4755.01(A). The Board meets as a whole to determine administrative, personnel, and budgetary matters, and the various sections have responsibilities pertaining to their areas of expertise. *See, e.g.,* R.C. 4755.01(H), (I); R.C. 4755.02; R.C. 4755.06-.10; R.C. 4755.41-.46; R.C. 4755.61-.63.

You have informed us that the current membership of the Board includes a member who was appointed, effective July 21, 2006, to complete an unexpired term that expired on August 27, 2006. The member was then appointed to the succeeding term, which began on August 28, 2006, and will expire on August 27, 2009. When those appointments were made, the relevant provisions appeared in R.C. 4755.03 and stated:

> Terms of office are for three years, each term commencing on the twenty-eighth day of August and ending on the twenty-seventh day of August. Each member shall serve subsequent to the expiration of the member's term until the member's successor is appointed and qualifies, or until a period of sixty days has elapsed, whichever occurs first. Each member, before entering upon official duties, shall subscribe to and file with the secretary of state the constitutional oath of office. All vacancies shall be filled in the manner prescribed for the regular appointments to the board and are limited to the unexpired terms.

At that time there were no limits on the number of terms a member could serve.

The General Assembly recently moved this language to R.C. 4755.01 and amended it in various ways. *See* Am. Sub. H.B. 403, 126th Gen. A. (2006) (eff. Apr. 6, 2007). The amended language provides, in R.C. 4755.01(A)(1), that the terms of the four additional members of the Physical Therapy Section commencing on August 28, 2007, shall be, respectively, for terms of one, two, three, and four years. In other respects, the amended language retains the substance of the language quoted above, placing it primarily in division (B), with the language pertaining to

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statutory term taking effect some time after the initial date of the term. *See* Ohio Const. art. III, § 21. Delays in the appointment process, for whatever reason, do not prevent a member from being appointed to serve for a full statutory term and do not create a vacancy for the remainder of an unexpired term as that concept is discussed in this opinion. *See generally State ex rel. O'Neill v. Fanning*, 134 Ohio St. 383, 17 N.E.2d 740 (1938) (appointment of a member of the Soldier's Relief Commission for a full term was valid though made after the statutory date of the beginning of the term); 1982 Op. Att'y Gen. No. 82-074, at 2-207; 1959 Op. Att'y Gen. No. 774, p. 477.

the oath of office moved to division (C). The amended statute also includes the provision that "[a] member shall not serve for more than three consecutive terms." R.C. 4755.01(B) now states:

> (B) Except for the terms of office specified in division (A)(1) of this section for the additional members of the physical therapy section commencing on August 28, 2007, terms for the members of the board and the additional members of the physical therapy section are for three years. Each member's term shall commence on the twenty-eighth day of August and end on the twenty-seventh day of August. Each member shall serve subsequent to the expiration of the member's term until the member's successor is appointed and qualifies, or until a period of sixty days has elapsed, whichever occurs first. *A member shall not serve for more than three consecutive terms.* All vacancies shall be filled in the manner prescribed for the regular appointments and are limited to the unexpired terms. (Emphasis added.)

With regard to periods of service predating the effective date of R.C. 4755.01, as amended, the General Assembly has stated that a member of the Board or Physical Therapy Section "who, as of the effective date of this section, has served more than a total of nine years on the Board or Physical Therapy Section may complete the member's current term but is not eligible for reappointment for the following term." Am. Sub. H.B. 403, 126th Gen. A. (2006) (eff. Apr. 6, 2007) (Sec. 4, uncodified). Thus, a member whose current period of service totaled more than nine years on April 6, 2007, is not eligible for reappointment regardless of the number of terms encompassed within that service.[2]

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[2] For purposes of this opinion, it is presumed that Am. Sub. H.B. 403, 126th Gen. A. (2006) (eff. Apr. 6, 2007) is valid and constitutional and does not provide for retroactive application in violation of Ohio Const. art. II, § 28. *See* R.C. 1.47(A); R.C. 1.48; 2005 Op. Att'y Gen. No. 2005-037, at 2-390 (it is presumed that a statute "is constitutional and entitled to the benefit of every presumption in favor of its constitutionality"); 2002 Op. Att'y Gen. No. 2002-006, at 2-32 n.10 ("[w]hile the Office of the Attorney General has no authority to determine the constitutionality of a statute, . . . it is well established that statutes are presumed to be constitutional, and courts will interpret a statute in order to preserve its constitutionality"); 1988 Op. Att'y Gen. No. 88-030, at 2-124 to 2-125; 1986 Op. Att'y Gen. No. 86-095, at 2-540 (it is not a function of the Office of the Attorney General of Ohio, as part of the executive branch of government, to opine on the constitutionality of state statutes); 1983 Op. Att'y Gen. No. 83-025; 1981 Op. Att'y Gen. No. 81-067, at 2-279; *see also State ex rel. Mirlisena v. Hamilton County Bd. of Elections*, 67 Ohio St. 3d 597, 603, 622 N.E.2d 329 (1993) (Pfeifer, J., concurring in judgment only) (arguing that city charter provision that counted prior service in determining eligibility for elective office did not impair vested rights or attach a new disability to transactions or considerations already past); *State ex rel. Matz v. Brown*, 37 Ohio St. 3d 279, 282, 525 N.E.2d 805 (1988) ("for purposes of analysis under Section 28, Article II, Ohio Constitution, we hold

You have described the situation with which you are concerned as follows:

> The Board currently has a member who was appointed to serve out the term of a member who resigned his appointment effective December 31, 2005. This new member was appointed effective July 21, 2006, filled out the remaining weeks of that term, and was subsequently reappointed for a full three-year term, which expires on August 27, 2009. If this member were reappointed to an additional three-year term in 2009, would she be eligible for a reappointment in 2012 or would she be term limited due to the fact that she served out the remaining 37 days of the term expiring in August of 2006?

Interpretation and analysis of R.C. 4755.01(B)

As amended in Am. Sub. H.B. 403, R.C. 4755.01(B) prohibits a member from serving for more than three consecutive terms. Appointments of additional members of the Physical Therapy Section of the Board for terms commencing on August 28, 2007, are for terms of one, two, three, and four years, and all other terms are three years in length. R.C. 4755.01(A), (B). By statute, "[e]ach member's term" commences on August 28th and ends on August 27th. R.C. 4755.01(B).

R.C. 4755.01(B) also provides, in the case of a vacancy, for an appointment to complete the unexpired term. In addition, provision is made for a member to continue to serve subsequent to the expiration of the member's term until the member's successor is appointed and qualifies, or until a period of sixty days has elapsed, whichever occurs first.

The pertinent language of the statute is: "A member shall not serve for more than three consecutive terms." R.C. 4755.01(B). This language is phrased not as a time limit but as a term limit. *See State ex rel. Rhodes v. Brown*, 34 Ohio St. 2d 101, 105, 296 N.E.2d 538 (1973) (Corrigan, J., concurring). Read literally, this language means that a member may not serve for more consecutive terms than three consecutive terms. *Id.* at 103. Your question is whether

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that a law that attaches a new disability to a past transaction or consideration is not a prohibited retroactive law unless the past transaction or consideration created at least a reasonable expectation of finality"); 1981 Op. Att'y Gen. No. 81-100, at 2-380 (an individual has no right to an initial appointment or reappointment to a community mental health board, but does have the expectation of serving until the end of the term for which the individual was appointed, absent some conduct that constitutes statutory grounds for removal); *cf. State ex rel. Mirlisena v. Hamilton County Bd. of Elections*, 67 Ohio St. 3d 597, 622 N.E.2d 329 (1993) (finding municipal charter provision unconstitutional on grounds of retroactivity when it counted prior service in determining eligibility for elective office under term limit provisions). *See generally* 2005 Op. Att'y Gen. No. 2005-004, at 2-38 to 2-40.

appointment to fill a vacancy for the remainder of an unexpired term is considered service for a "term" for purposes of determining three consecutive terms. Our analysis indicates that it is not.

R.C. 4755.01(B) states plainly that a member shall not serve for more than three consecutive terms and defines a term as commencing on August 28th and ending on August 27th. The statute does not limit those terms to three-year terms, and thus includes the one-, two-, and four-year terms of additional members of the Physical Therapy Section commencing on August 28, 2007.

In limiting service to three consecutive terms, R.C. 4755.01(B) does, however, appear to contemplate appointment to serve for a full term, defined by statute as extending from August 28th to August 27th. In contrast, appointment to fill a vacancy is described as appointment for an "unexpired" term, which is not the August 28th to August 27th term defined by statute and, accordingly, may be distinguished from those statutorily-defined terms. Under R.C. 4755.01(B), a member appointed to fill a vacancy serves for a portion of a term that is separate from and in addition to any subsequent full terms to which the member may be appointed. *See generally Mackin v. City of Avon Lake*, 12 Ohio App. 3d 70, 71, 465 N.E.2d 1355 (Lorain County 1983) (a term of office is "the period of time for which the incumbent has a right to that office"); 1998 Op. Att'y Gen. No. 98-024, at 2-130 ("the word 'term' can apply to the term of office established by statute" or "can be applied . . . to the portion of a statutory term for which a particular individual serves").

The conclusion that the intent of the amendment was to apply the three-term limit only to statutory terms finds support in the carryover provisions. R.C. 4755.01(B) states that "[e]ach member shall serve subsequent to the expiration of the member's term until the member's successor is appointed and qualifies, or until a period of sixty days has elapsed, whichever occurs first," and also provides that "[a] member shall not serve for more than three consecutive terms." Although in some circumstances an officer's term may extend until a successor is appointed and qualified, that situation does not exist under R.C. 4755.01(B) because R.C. 4755.01(B) states expressly that each term is for three years, ending on August 27th, with the carryover provision applicable to service "subsequent to the expiration of the member's term." *See, e.g., State ex rel. Glander v. Ferguson*, 148 Ohio St. 581, 587, 76 N.E.2d 373 (1947) ("unless otherwise expressly provided, the time of holding over by an elected or appointed officer is a continuation of the old term and not a part of a new term"); *cf.* Ohio Const. art. III, § 2 ("[t]he governor, lieutenant governor, secretary of state, treasurer of state, and attorney general shall hold their offices for four years . . . . Their terms of office shall continue until their successors are elected and qualified"); *In re Appointment of Etter*, 2 Ohio App. 165, 167 (Holmes County 1913) (statute authorizing court to appoint a stenographer "fixes the length of the term at three years from the date of the appointment and until a successor is appointed and qualified"). *See generally* R.C. 3.01 ("[a] person holding an office of public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws of this state").

From the fact that the General Assembly provided for a member to hold over subsequent to the expiration of the member's term until the member's successor is appointed and qualifies, or until a period of sixty days has elapsed, it is evident that the General Assembly did not consider this holdover period into a succeeding term to constitute a term for purposes of term limits. Hence, the General Assembly did not prohibit a member from serving during the period of a fourth consecutive term, evidently finding that this period of service did not constitute a term for purposes of determining three consecutive terms. [3]

Whether service for the remainder of an unexpired term resulting upon the occurrence of a vacancy constitutes service for a term for purposes of term limits is not clear. However, the holdover provision suggests that consecutive terms are intended to be full statutory terms, rather than partial terms, and that even as holding over into a succeeding term is not considered service for a term within the term limits of the statute, neither is service for the remainder of an unexpired term resulting from the occurrence of a vacancy during the course of a statutory term.

"The polestar of statutory interpretation is legislative intent, which a court best gleans from the words the General Assembly used and the purpose it sought to accomplish." *State v. Elam*, 68 Ohio St. 3d 585, 587, 629 N.E.2d 442 (1994). It is presumed that the entire statute is intended to be effective and that a just and reasonable result is intended. R.C. 1.47(B), (C). When statutory language is ambiguous, it is appropriate to consider, *inter alia*, the object sought to be attained, related statutory provisions, and the consequences of a particular construction. R.C. 1.49(A), (D), (E); 1998 Op. Att'y Gen. No. 98-024, at 2-130.

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[3] In summarizing the amendments to R.C. 4755.01(B), the Legislative Service Commission stated: "[T]he bill establishes a three consecutive term limit for all members (therefore, a member cannot serve for more than nine consecutive years)." Ohio Legislative Service Comm'n, Bill Analysis, Am. Sub. H.B. 403, 126th Gen. A. (As Reported by S. Insurance, Commerce, & Labor). This summary appears to adopt a shorthand calculation that, because three years is the length of a standard term, a member serving for not more than three consecutive terms may serve for not more than nine consecutive years. It does not consider the fact that the term of one of the additional members of the Physical Therapy Section commencing on August 28, 2007, will be for a period of four years, or the possibility that a member might be required to hold over following service for a third consecutive term. It similarly fails to address the possibility that a member might serve for the remainder of an unexpired term. The absence in this analysis of any consideration of the various circumstances in which service might exceed nine years apparently reflects a shorthand summary, rather than a studied analysis of the various time periods that might be included in service for three consecutive terms. *See also* Am. Sub. H. B. 403, 126th Gen. A. (2006) (eff. Apr. 6, 2007) (Sec. 4, uncodified) (a member of the Board or Physical Therapy Section "who, as of the effective date of this section, has served more than a total of nine years on the Board or Physical Therapy Section may complete the member's current term but is not eligible for reappointment for the following term").

Ohio's constitutional and statutory term limit provisions are many and varied. *See, e.g.*, Ohio Const. art. III, § 2 ("[n]o person shall hold any one of the offices of lieutenant governor, secretary of state, treasurer of state, attorney general, or auditor of state for a period longer than two successive terms of four years"); R.C. 340.02 ("[n]o member shall serve more than two consecutive four-year terms. A member may serve for three consecutive terms only if one of the terms is for less than two years. A member who has served two consecutive four-year terms or three consecutive terms totaling less than ten years is eligible for reappointment one year following the end of the second or third term, respectively"); R.C. 3301.48 (Interstate Compact for Education, Art. VI. A: "No person shall serve more than two terms as a member of the steering committee; provided that service for a partial term of one year or less shall not be counted toward the two term limitation"); R.C. 3304.12; [4] R.C. 5123.092(C) ("[n]o member shall serve more than two consecutive terms, except that any former member may be appointed if one year or longer has elapsed since the member served two consecutive terms"); R.C. 5126.0213; *see also, e.g.*, *State ex rel. Haff v. Pask*, 126 Ohio St. 633, 636, 186 N.E. 809 (1933) (syllabus, paragraphs 1 and 2) (under a provision prohibiting a person from serving in the office of sheriff for more than four years in any period of six years, a sheriff who served the remainder of a term upon appointment to fill a vacancy and then was elected to a two-year term has already served more than two years in office and is ineligible to be a candidate for reelection to office for another two-year term); 1986 Op. Att'y Gen. No. 86-045 (syllabus, paragraph 1) (construing statutory language providing that members of the Ohio Governor's Council on Disabled Persons "may succeed themselves not more than one time" and concluding that "[a] person, who is initially appointed to the Governor's Council on Disabled Persons to fill the remainder of an unexpired term and who is appointed to a consecutive three-year term, may not, pursuant to R.C. 3303.41, be appointed to a second consecutive three-year term"). The language used in Ohio's provisions governing term limits varies widely, and each provision must be construed and applied on the basis of the words used and the context in which they appear, with the goal of ascertaining the legislative intent.

Although no authorities have addressed the precise provisions with which we are concerned, related issues were addressed in *State ex rel. Rhodes v. Brown*, 34 Ohio St. 2d 101,

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[4] 1986 Op. Att'y Gen. No. 86-045, at 2-240, contains the following description of the term limits set forth in R.C. 3304.12(B):

> R.C. 3304.12(B) provides that each of the seven members of the Rehabilitation Services Commission "first appointed" shall serve a term of one, two, three, four, five, six, or seven years, and, thereafter, the "terms of office shall be for seven years . . . with no person eligible to serve more than two seven-year terms." Pursuant to R.C. 3304.12(B), initial appointments may be for terms of less than seven years, the term for which all subsequent appointments are made. R.C. 3304.12(B), although providing for terms of less than seven years, expressly limits only the number of seven-year terms which a member may serve.

296 N.E.2d 538 (1973). In the *Rhodes* case, the Ohio Supreme Court construed the language of Ohio Const. art. III, § 2 stating that "[n]o person shall hold the office of Governor for a period longer than two successive terms of four years." The court distinguished this language from language of the Twenty-Second Amendment to the United State Constitution prohibiting a person from being "elected to the office of the President more than twice," concluding that the Ohio limitation was not a lifetime limitation and an individual who had served two successive four-year terms as Governor could, following a four-year term served by another individual, again seek the office of Governor.

In reaching its conclusion in the *Rhodes* case, the Ohio Supreme Court found that the language of the Constitution was ambiguous and stated:

> At the outset, we hold that in the language under consideration the word "period" refers to the entire phrase "two successive terms of four years." In order to utilize each word in the amendment consistently, as we must and including "successive," this construction becomes mandatory. Such an interpretation permits one who has served part of an unexpired term as Governor to still serve his or her "two successive terms of four years" thereafter, should the electorate be so inclined. It also permits persons to serve as many four-year terms as they are able to achieve, so long as not more than two of them are sought to be served successively. This interpretation permits, as the language now clearly allows, the serving of any number of successive terms, so long as not more than two of them are four years in duration.

State ex rel. Rhodes v. Brown, 34 Ohio St. 2d at 103. This construction applies the constitutional limitation only to four-year terms. It permits an individual to serve the remainder of an unexpired term as Governor and then to serve two successive terms of four years, without specifying that there must be a break in service.

The *Rhodes* analysis turns on the fact that the Governor's service is limited on the basis of four-year terms. The specification of "two successive terms of four years" is found to render service for any other length of time irrelevant. Similarly, if the words "three consecutive terms" in R.C. 4755.01(B) are found to apply only to full statutory terms, service for any partial term, whether the remainder of an unexpired term preceding a statutory term or a carryover period following a statutory term, is irrelevant to the term limit restriction. Had the General Assembly intended to include a partial term as one of three consecutive terms, it could have easily so stated. *See, e.g.*, R.C. 5126.0213 ("[a] member [of a county board of mental retardation and developmental disabilities] who has served during each of three consecutive terms shall not be reappointed for a subsequent term until two years after ceasing to be a member of the county board, except that a member who has served for ten years or less within three consecutive terms may be reappointed for a subsequent term before becoming ineligible for reappointment for two years").

Conclusion

For the reasons discussed above, it is my opinion, and you are advised, that the language of R.C. 4755.01(B) stating that "[a] member shall not serve for more than three consecutive terms" refers to a term defined by R.C. 4755.01(B) as commencing on the 28th day of August, ending on the 27th day of August, and extending for the prescribed number of years; it does not include the remainder of an unexpired term resulting from the occurrence of a vacancy during the course of a statutory term.

Respectfully,

MARC DANN
Attorney General