February 12, 2013

Beverly L. Cain, State Librarian
State Library of Ohio
274 East First Avenue
Columbus, Ohio 43201

SYLLABUS: 2013-004

1. A member of a board of library trustees of a municipal free public library is a public officer and must be a resident of the state of Ohio pursuant to Article XV, § 4 of the Ohio Constitution.

2. R.C. 3375.12 and R.C. 3375.121 do not require a member of a board of library trustees of a municipal free public library to reside within the municipal corporation. (1938 Op. Att'y Gen. No. 1972, vol. I, p. 390 (syllabus, paragraph 2), overruled, on the basis of statutory change.)

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OPINION NO. 2013-004

Beverly L. Cain, State Librarian
State Library of Ohio
274 East First Avenue
Columbus, Ohio 43201

Dear Ms. Cain:

You have requested an opinion regarding the residency requirements for trustees of municipal free public libraries. For the reasons that follow, it is our opinion that a member of a board of library trustees of a municipal free public library must be a resident of the state of Ohio, but need not reside within the municipal corporation.

We begin with a general overview of R.C. Chapter 3375, the statutory framework for libraries in Ohio. This chapter creates a state library board and a state librarian position. R.C. 3375.01; R.C. 3375.02. The chapter further guides the creation and operation of several types of libraries in the state. These include county free public libraries, R.C. 3375.06, township free public libraries, R.C. 3375.10, municipal free public libraries, R.C. 3375.12-.121, and school district public libraries, R.C. 3375.15. R.C. Chapter 3375 also addresses the formation of county and regional library districts, the powers and responsibilities of the various boards of library trustees, and the operation of law libraries.

Your question concerns municipal free public libraries. R.C. 3375.12 provides that the control and administration of free public libraries established by municipal corporations shall be vested in a board of library trustees appointed by the legislative authority of the municipal corporation. The board of library trustees of a municipal free public library is organized in accordance with R.C. 3375.32 and exercises its control and management authority pursuant to R.C. 3375.33-.41. R.C. 3375.12.

A Member of a Board of Library Trustees is a Public Officer

Before turning to your question, we first must determine whether a member of a board of library trustees of a municipal free public library is a public officer. The usual criteria considered in

determining whether a position is a public office are durability of tenure, oath, bond, emoluments, independence of the functions exercised by the appointee, and character of the duties imposed upon the appointee. *State ex rel. Landis v. Bd. of Comm'rs*, 95 Ohio St. 157, 159, 115 N.E. 919 (1917). While library trustees are not required by statute to post a bond and they serve without compensation, these factors are not exclusively determinative of whether a position is a public office. *State ex rel. Landis v. Bd. of Comm'rs*, 95 Ohio St. at 159 ("while an oath, bond and compensation are usually elements in determining whether a position is a public office they are not always necessary…. The chief and most-decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law. If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office and not an employment").

It is well established that the most important elements to consider in determining whether a position is a public office are: (1) the position exercises certain independent public duties, a part of the sovereignty of the state; (2) such exercise by the position must be by virtue of election or appointment to the office; and (3) in the exercise of the duties so imposed, the position cannot be subject to the direction and control of a superior officer. 1963 Op. Att'y Gen. No. 3548, p. 58, 61; *accord State ex rel. Milburn v. Pethtel*, 153 Ohio St. 1, 90 N.E.2d 686 (1950); *State ex rel. Landis v. Bd. of Comm'rs*, 95 Ohio St. at 159-60; *State ex rel. Attorney General v. Jennings*, 57 Ohio St. 415, 424-26, 49 N.E. 404 (1898); 2011 Op. Att'y Gen. No. 2011-021, at 2-173 to 2-175. Applying these criteria to the present situation, we conclude that the position of member of a board of library trustees established under R.C. Chapter 3375 is a public office.

Members of a board of library trustees of a municipal free public library are appointed to their positions. R.C. 3375.12. Significantly, members of a board of library trustees, by virtue of their appointment, perform numerous duties and exercise a broad range of powers, including expending money for library purposes, R.C. 3375.40(B), and holding title to and custody of real property, R.C. 3375.40(A). *See* R.C. 3375.33. These duties and powers are prescribed by statute and constitute a portion of the sovereignty of the state. R.C. 3375.40; *see* R.C. 3375.33; *State ex rel. Landis v. Bd. of Comm'rs*, 95 Ohio St. at 160-61 (if appointee is vested with independent power in the disposition of public property or the power to incur financial obligations upon the county or state, such functions are part of the sovereignty of state). Further, members of a board of library trustees act autonomously in the exercise of their powers. They are not subject to the direction or control of another office or governmental entity. For these reasons, a member of a board of library trustees of a municipal free public library is a public officer. *See generally State ex rel. Bricker v. Gessner*, 129 Ohio St. 290, 293-94, 195 N.E. 63 (1935) ("'a public office is a charge or trust conferred by public authority for a public purpose, the duties of which involve in their performance the exercise of some portion of the sovereign power, whether great or small. A public officer is an individual who has been appointed or elected in the manner prescribed by law, who has a designation or title given to him by law, and who exercises the functions concerning the public assigned to him by law'" (quoting 23 American and English Encyclopaedia of Law (2d ed.) 322)).

Constitutional Requirement for Public Officers Does Not Require Residency within the Municipal Corporation for Members of Board of Library Trustees of a Municipal Free Public Library

Article XV, § 4 of the Ohio Constitution provides that "[n]o person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector."[1] This provision does not require that such officer be an elector within any specific geographical area of Ohio. 1953 Op. Att'y Gen. No. 2318, p. 39, at 41; *accord State ex rel. Jeffers v. Sowers*, 171 Ohio St. 295, 296-99, 170 N.E.2d 428 (1960) ("the requirement that each public official within a county must be a 'citizen and inhabitant' of that county … significantly was omitted when the present Constitution was adopted in 1851…. The only geographical area or political unit [mentioned in the present, corresponding provision] is the state, and when the term 'elector' is employed it would logically seem to connote an elector of the only political territory mentioned, namely, the state" and quoting extensively from 1950 Op. Att'y Gen. No. 1870, p.339); 1957 Op. Att'y Gen. No. 1311, p. 684, at 684-85 (in response to questions whether there exists "any residence qualification" for various

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[1] Article V, § 1 of the Ohio Constitution and R.C. 3503.01 set forth qualifications for voting in Ohio. Each provision describes what it means to be an elector. Ohio Const. art. V, § 1 ("[e]very citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward … has the qualifications of an elector"); R.C. 3503.01(A) ("[e]very citizen of the United States who is of the age of eighteen years or over and who has been a resident of the state thirty days immediately preceding the election at which the citizen offers to vote, is a resident of the county and precinct in which the citizen offers to vote, and has been registered to vote for thirty days, has the qualifications of an elector and may vote at all elections in the precinct in which the citizen resides"). Thus, for purposes of Ohio Const. art. V, § 1 and R.C. 3503.01(A), to be an elector of the state one must be a resident of the state, and to be an elector of a particular ward or precinct, one must be a resident of that ward or precinct.

But Ohio Const. art. XV, § 4 only requires that a person be an elector of the state in order to be appointed to an office in this state; it does not mandate that one meet the qualifications of an elector for a *particular* county, township, ward, or precinct. *See* 1957 Op. Att'y Gen. No. 1311, p. 684, at 684-85; 1953 Op. Att'y Gen. No. 2318, p. 39, at 41. Rather, those distinctions are reserved for the meaning of elector as it pertains to a person's voting rights and to specific requirements enacted within the Ohio Revised Code. *See, e.g.*, R.C. 733.68 ("each officer of a municipal corporation, or of any department or board of a municipal corporation, whether elected or appointed as a substitute for a regular officer, shall be an elector of the municipal corporation"); R.C. 1901.06 ("[a] municipal judge during the judge's term of office shall be a qualified elector and a resident of the territory of the court to which the judge is elected or appointed"); R.C. 3375.06, -.10 (concerning county and township libraries, their trustees "shall be qualified electors of the" county or township, respectively); R.C. 3503.01; 1950 Op. Att'y Gen. No. 1870, p.339, at 342 ("we have a definition of an elector of the State of Ohio which … impl[ies] that for the purpose of voting his elector-ship must be localized to the place where he qualifies for the purpose of exercising his privilege to vote").

township and village positions, "Section 4, Article XV, Ohio Constitution, has no application to the questions raised in your request. This section provides that no person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector. This section does not provide that such officer shall be an elector within any specific geographical area of Ohio"); 1950 Op. Att'y Gen. No. 1870, p.339, at 342 ("we have a definition of an elector of the State of Ohio which of course when applied to a political subdivision does not change its meaning but does imply that for the purpose of voting his elector-ship must be localized to the place where he qualifies for the purpose of exercising his privilege to vote and has nothing whatever to do with his qualifications for appointment to a vacancy such as we are considering").

In other words, the Ohio Supreme Court and previous Attorneys General have concluded, and we agree, that Ohio Const. art. XV, § 4 requires a public officer to be an elector of the state, but not an elector of a particular geographical area within the state. *See* note 1, *supra*. *Contra* 1975 Op. Att'y Gen. No. 75-067, at 2-272 (applying R.C. 3503.01 to conclude that a "candidate must meet the criteria of an elector in that geographical territory in which he seeks office," not considering those persons *appointed* to a public office and not taking into account R.C. 1901.06 (setting forth a residency requirement for a municipal judge)).

Thus, "[p]ursuant to [Ohio Const. art. XV, § 4], a person must be a resident of the state of Ohio in order to be elected or appointed to a public office" in Ohio. 1992 Op. Att'y Gen. No. 92-008 (syllabus, paragraph 1). Therefore, a member of a board of library trustees of a municipal free public library is a public officer and must be a resident of the state of Ohio pursuant to Article XV, § 4 of the Ohio Constitution.

R.C. 733.68 Does Not Apply to Municipal Free Public Libraries

You have asked us to address R.C. 733.68 and advise you whether it applies to municipal free public library boards of trustees. R.C. 733.68(A) requires that "each officer of a municipal corporation, or of any department or board of a municipal corporation … shall be an elector of the municipal corporation." R.C. 733.68 does not apply to municipal free public libraries because, as explained below, a municipal free public library is not a municipal corporation or a department or board of a municipal corporation.

As you explain in your request letter, before the General Assembly recodified and reorganized the statutes concerning libraries in 1947,

> each of the various types of governmental public libraries, with the exception of county district libraries, were considered part of the entity that organized them. Thus, a school district free public library, for example, was a function or board of a Board of Education, a township free public library was a board of the associated township and a municipal free public library a function or board of its municipal corporation.

In *Miller v. Akron Pub. Library*, 60 Ohio Law Abs. 364, 96 N.E.2d 795 (C.P. Summit County 1951) (syllabus, paragraph 1), the court discussed the nature of free public libraries. The court noted that

> [u]nder [G.C. 7628 (now R.C. 3375.33)] the legislature made all the various library boards bodies politic and corporate, and as such capable of suing and being sued, contracting and being contracted with, acquiring, holding, possessing and disposing of real and personal property, and of exercising such other powers and privileges as are conferred upon them by law thus making them separate and distinct entities or bodies politic and corporate, separate and apart from the municipality, the county, the school board, etc., and not agents of said bodies politic.

See also 1993 Op. Att'y Gen. No. 93-031, at 2-158; 1960 Op. Att'y Gen. No. 1552, p. 520 (finding the board of library trustees of a township free public library to be an entity separate from the township and county in which it is located). *See generally* R.C. 3375.33 ("[t]he boards of library trustees appointed pursuant to [R.C. 3375.06, R.C. 3375.10, R.C. 3375.12, R.C. 3375.15, R.C. 3375.22, and R.C. 3375.30] are bodies politic and corporate, and as such are capable of suing and being sued, contracting, acquiring, holding, possessing, and disposing of real and personal property, and of exercising such other powers and privileges as are conferred upon them by law"). "[R]ather than existing merely as an agency of the subdivision in which it is located, each board of library trustees, as the governing body of the library entity, is a distinct public agency." 1993 Op. Att'y Gen. No. 93-031, at 2-158. Thus, because a board of library trustees of a municipal free public library is not a "department or board of a municipal corporation," R.C. 733.68's residency requirement for each officer of a municipal corporation does not apply to a member of such board.[2]

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[2] 1938 Op. Att'y Gen. No. 1972, vol. I, p. 390 (syllabus, paragraph 2) concluded that a trustee of a municipal public library was required by the provisions of G.C. 4666 (now R.C. 733.68) to be an elector of the municipal corporation and thus a resident of the corporation. The analysis in that opinion focused on a determination that a municipal public library trustee meets the definition of public officer. Upon determining that a trustee is a public officer, the opinion concluded that G.C. 4666 required that a trustee of a municipal public library be a resident (*i.e.*, an elector) of the municipal corporation.

1938 Op. Att'y Gen. No. 1972, vol. I, p. 390 did not address the question of whether a municipal public library is a part of the municipal corporation; further, the opinion was issued before the General Assembly reworked the library statutes in 1947, at which time the legislature "made all the various library boards bodies politic and corporate," *Miller v. Akron Pub. Library*, 60 Ohio Law Abs. 364, 96 N.E.2d 795 (C.P. Summit County 1951) (syllabus, paragraph 1), and thus separate and autonomous from a municipal corporation. We therefore overrule 1938 Op. Att'y Gen. No. 1972, vol. I, p. 390 (syllabus, paragraph 2) on the basis of statutory change.

The Meaning of Service Area for Purposes of Municipal Free Public Libraries

You also ask whether a person who lives within the "service area" of a municipal free public library, but not in the municipal corporation itself, may be appointed to serve on the board of library trustees of the municipal free public library. The term service area is not defined by statute for purposes of municipal free public libraries. *See* 1993 Op. Att'y Gen. No. 93-031, at 2-159 ("[t]he geographic area over which each type of library entity has jurisdiction is not expressly defined in the statutes creating those entities"). *But cf.* 2010 Op. Att'y Gen. No. 2010-012, at 2-83 ("[t]he service area of a school district free public library is coextensive with that of the school district that created the library").

Nonetheless, language appearing in R.C. 3375.40(E) and (F) (delineating the powers of boards of library trustees) "suggest that the board of trustees of each library entity has jurisdiction within a limited area, presumably the area of the subdivision or the district in which it was created." 1993 Op. Att'y Gen. No. 93-031, at 2-159; *see* R.C. 3375.40(E) (a board of library trustees may "[e]stablish and maintain a main library, branches, library stations, and traveling library service *within the territorial boundaries of the political subdivision or district over which it has jurisdiction* of free public library service" (emphasis added)); R.C. 3375.40(F) (a board of library trustees may "establish and maintain branches, library stations, and traveling library service in any school district, outside *the territorial boundaries of the political subdivision or district over which it has jurisdiction* of free public library service, upon application to and approval of the state library board pursuant to [R.C. 3375.05]. The board of library trustees of any free public library maintaining branches, stations, or traveling library service, outside *the territorial boundaries of the political subdivision or district over which it has jurisdiction* of free public library service, on September 4, 1947, may continue to maintain and operate those branches, those stations, and that traveling library service without the approval of the state library board until January 1, 2015" (emphasis added)).

In addition to providing library services within the territorial boundaries of the political subdivision establishing the library, most public libraries make their services available countywide in order to be eligible to receive public funding. 1993 Op. Att'y Gen. No. 93-031, at 2-159 n.2 ("[i]t is commonly understood that, in accordance with R.C. 5705.28(D), most library boards make their services available to all county inhabitants in order to be eligible to participate in the distribution of the county library and local government support fund"); *see* R.C. 5705.28(D) ("[t]he board of trustees of any public library desiring to participate in the distribution of the county public library fund shall adopt appropriate rules extending the benefits of the library service of such library to all the inhabitants of the county on equal terms, unless such library service is by law available to all such inhabitants, and shall certify a copy of such rules to the taxing authority with its estimate of contemplated revenue and expenditures"). Even more, a board of library trustees may make "rules pertaining to the provision of library services to individuals, corporations, or institutions that are not inhabitants of the county." R.C. 3375.40(H). With these provisions and conventions in mind, the meaning of "service area" may vary from one library to another and is determined, at least in part, by the actions of each board of library trustees.

Residency Requirements of R.C. Chapter 3375

There is no explicit residency requirement in R.C. 3375.12 in the case of a municipal free public library. Comparatively, several of the statutes for other types of libraries require that each member of the board of library trustees be an elector—and thus, a resident—of the political subdivision that has established the library. *See, e.g.*, R.C. 3375.06 (concerning county free public libraries, "trustees shall be qualified electors of the county"); R.C. 3375.10 (concerning township libraries, trustees "shall be qualified electors of the township"); R.C. 3375.15(A) (concerning school district free public libraries, "[a] majority of the trustees shall be qualified electors of the school district, but a minority may be qualified electors of the county who reside outside the school district"); R.C. 3375.22 (concerning county library districts, "trustees shall be qualified electors of the library district or county").

Had the General Assembly intended to impose a residency requirement upon members of boards of trustees of municipal free public libraries, it could have done so by inserting in R.C. 3375.12 language similar to that appearing in R.C. 3375.06, R.C. 3375.10, R.C. 3375.15(A), or R.C. 3375.22. *See Lake Shore Elec. Ry. Co. v. Pub. Utils. Comm'n of Ohio*, 115 Ohio St. 311, 319, 154 N.E. 239 (1926) (had the legislature intended a particular meaning, "it would not have been difficult to find language which would express that purpose," having used that language in other matters); *State ex rel. Enos v. Stone*, 92 Ohio St. 63, 69, 110 N.E. 627 (1915) (had the General Assembly intended a particular result, it could have employed language used elsewhere that plainly and clearly compelled that result).

As discussed above, none of the related statutory or constitutional provisions operates to compel a member of a board of library trustees of a municipal free public library to live within the municipal corporation that has established the library. Rather, notwithstanding the several public library boards for which a residency requirement is imposed by statute, the General Assembly has not imposed this requirement for a member of a board of library trustees of a municipal free public library.

Thus, no law requires that a member of a board of library trustees of a municipal free public library be a resident of either the municipal corporation that has established the library or the service area of the library. We recognize that the absence of this kind of particularized residency requirement will enable a person who resides in one part of the state to be appointed to serve as a member of a board of library trustees of a municipal free public library in an opposite corner of the state. We trust that the legislative authority will have the best interests of the municipal free public library and its board of library trustees in mind and thus act prudently when appointing trustees to a board pursuant to R.C. 3375.12.

To the extent that a different result may be desirable, the remedy lies with the General Assembly. 2012 Op. Att'y Gen. No. 2012-027, at 2-237; 2004 Op. Att'y Gen. No. 2004-035, at 2-321; 1983 Op. Att'y Gen. No. 83-034, at 2-131. *See also Bd. of Educ. v. Fulton Cnty. Budget Comm'n*, 41 Ohio St. 2d 147, 156, 324 N.E.2d 566 (1975) ("[t]he remedy desired by appellants ... must be obtained from the source of their problem—the General Assembly"); *State ex rel. Nimberger v. Bushnell*, 95 Ohio St. 203, 116 N.E. 464 (1917) (syllabus, paragraph 4) ("[w]hen the meaning of the

language employed in a statute is clear, the fact that its application works an inconvenience or accomplishes a result not anticipated or desired should be taken cognizance of by the legislative body, for such consequence can be avoided only by a change of the law itself, which must be made by legislative enactment").

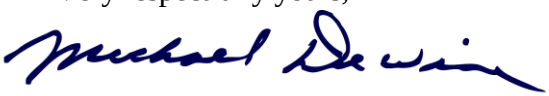
Conclusion

In sum, it is my opinion, and you are hereby advised that:

1. A member of a board of library trustees of a municipal free public library is a public officer and must be a resident of the state of Ohio pursuant to Article XV, § 4 of the Ohio Constitution.

2. R.C. 3375.12 and R.C. 3375.121 do not require a member of a board of library trustees of a municipal free public library to reside within the municipal corporation. (1938 Op. Att'y Gen. No. 1972, vol. I, p. 390 (syllabus, paragraph 2), overruled, on the basis of statutory change).

Very respectfully yours,



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