May 5, 2006

The Honorable Jonathan D. Blanton
Jackson County Prosecuting Attorney
295 Broadway Street, Suite 100
Jackson, Ohio 45640

SYLLABUS: 2006-022

1. A township trustee who incurred legal fees in defending a removal action under R.C. 3.07-.10 may not participate in the board of trustees' deliberations or vote upon his request for township reimbursement for those legal fees.

2. A township trustee who signed a petition for the removal of another trustee pursuant to R.C. 3.08 is not prohibited from participating in the board of trustees' deliberations and vote upon the other trustee's request to be reimbursed by the township for the legal fees he incurred in defending the removal action.

3. If a township trustee abstains from voting on his own request that the township reimburse him for the legal fees he incurred in defending a removal action, and the two remaining trustees split their vote, the proposal to reimburse the abstaining trustee will fail.

STATE OF OHIO
OFFICE OF THE ATTORNEY GENERAL
JIM PETRO, ATTORNEY GENERAL

Opinions Section
30 E. Broad St., 15th Floor
Columbus, OH 43215-3400
Telephone: (614) 752-6417
Facsimile: (614) 466-0013

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OPINION NO. 2006-022

The Honorable Jonathan D. Blanton
Jackson County Prosecuting Attorney
295 Broadway Street, Suite 100
Jackson, Ohio 45640

Dear Prosecutor Blanton:

You have asked whether two members of a board of township trustees have a conflict of interest that would preclude them from participating in a decision by the board of township trustees to reimburse one of the trustees for the legal fees he incurred in defending an action to remove him from office. You have explained that, one of the three sitting trustees recently survived a removal action,[1] and has asked the township to reimburse him for the legal fees he incurred in defending the action. One of the other trustees, who took office after the request for reimbursement was submitted to the board, had signed the petition initiating the removal process. You have asked whether either trustee is prohibited from participating in deliberations and voting upon the first trustee's request for township reimbursement,[2] and how the board should proceed if either is required (or both are required) to abstain. For the foregoing reasons we conclude that a township trustee may not participate in the board of trustees' deliberations or vote to reimburse him for the legal fees he incurred in defending a removal action, but that a trustee who signed a petition for the

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[1] R.C. 3.07-.10 provide for the removal, upon complaint and hearing, of a public officer 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." R.C. 3.07. *See also* Ohio Const. art. II, § 38 (public officers may be removed for misconduct, but only upon complaint and hearing). 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 in that jurisdiction at the most recent election. R.C. 3.08. The removal proceedings are tried before 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).

[2] You have indicated that another trustee, whose term expired in December, 2005, was also a subject of the unsuccessful removal action. He has been reimbursed for his legal fees.

first trustee's removal is not prohibited from deliberating and voting on the first trustee's request for township reimbursement for his legal fees.

As you note in your request for an opinion, 1998 Op. Att'y Gen. No. 98-001 concluded that a board of township trustees has the discretionary authority to reimburse a township trustee for the legal fees he incurred in defending a removal action under R.C. 3.07-.10, if the board first determines that the "charges in the removal action arose from actions of the trustee that occurred or were prompted as part of a good faith, well-intended attempt to perform official duties and responsibilities" (syllabus).[3] Legal representation at public expense will be upheld even where "the officer was mistaken in his understanding of the nature of his official duties" if the officer acted in a good faith effort to perform his official duties. *Id.* at 2-4. The opinion concluded that a board of township trustees has the authority to reimburse a township trustee for his legal fees in defending against removal so long as the board determines that the trustee acted in his official capacity and in good faith, and so long as the decision to provide reimbursement is "'on the order of the board of township trustees, duly entered upon its journal, in which the compensation to be paid for such legal services shall be fixed,' as required by R.C. 309.09(B)." *Id.* at 2-6 to 2-7.

May a township trustee, who asks the township to reimburse him for legal fees he incurred in defending a removal action, vote on his own request?

In order to faithfully perform the duties of his office, a public officer must refrain from acting in situations where he has a conflict of interest. *See In re Removal of Kuehnle*, 161 Ohio App. 3d 399, 2005-Ohio-2373, 830 N.E.2d 1173 (Madison County) ¶ 179 (elected school board members took an oath to perform faithfully the duties of their office, and were to avoid conflicts of interest or the appearance thereof and to refrain from using their office for the benefit of themselves, family members and business associates); 1998 Op. Att'y Gen. No. 98-007 at 2-39 (members of the State Teachers Retirement Board "are required by ethical principles to refrain from voting on questions in which they have direct personal or pecuniary interests not common to other members of the organization"); 1997 Op. Att'y Gen. No. 97-061. A common law conflict of interest was described in 1970 Op. Att'y Gen. No. 70-168 (overruled on other grounds by 1981 Op. Att'y Gen. No. 81-100) at 2-336: "Any public officer owes an undivided duty to the public. It is contrary to public policy for a public officer to be in a position which would subject him to conflicting duties or expose him to the temptation of acting in any manner other than the best interest of the public" (citation omitted). And, as far back as 1861, the Ohio Supreme Court agreed that, "[t]o permit a man thus to be 'judge in his own cause,' would be to convert the very checks and safeguards which the law has provided against fraud and peculation, into potent instruments of corruption and iniquity." *State ex rel. Louthan v. Taylor*, 12 Ohio St. 130, 135 (1861).

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[3] 1998 Op. Att'y Gen. No. 98-001 found that the discretionary authority of a board of township trustees to reimburse a township trustee for his legal fees is "reasonably incidental to the general authority to employ counsel" granted to the board by R.C. 309.09(B). *Id.* at 2-6. *See also* 1993 Op. Att'y Gen. No. 93-001.

In *Louthan*, the board of directors of a county infirmary voted to appoint one of its members as infirmary superintendent, with that member voting in his own favor. One of the court's several objections to the director being appointed as superintendent was that, "[s]uch a union of offices gives the defendant a vote, and it may be the *deciding* one, in fixing the amount of his own salary" (emphasis in original). *Id.*, 12 Ohio St. at 135. *See also* 1989 Op. Att'y Gen. No. 89-022 at 2-106 (finding incompatible the positions of assistant auditor of state and member of a citizens advisory committee to a school board if the individual's position as assistant auditor included auditing the school district, because, among other reasons, the "assistant auditor would be required to review the school board's payment of his or her own reimbursement requests as a committee member…. the conflict of interest is abundantly clear").

In this instance, the township trustee who is requesting reimbursement has an unmistakable conflict between acting in the best interest of the township or benefiting his own pecuniary interests. The decision of a board of trustees to reimburse another trustee for legal expenses is highly discretionary, and involves, as discussed above, a factual determination whether the trustee acted in good faith. A trustee voting on his own request for reimbursement thus would be required to judge his own motivations for acting. It is difficult to imagine a scenario more fraught with the potential for a conflict of interest. Because the trustee would be subject to an inherent conflict of interest that could impair his objectivity and independence of judgment in carrying out his official responsibilities to the township, he is prohibited from deliberating or voting upon his own request for township reimbursement.

May a township trustee who signed a petition to remove another trustee vote on whether the township should reimburse the other trustee for the legal fees he incurred in defending the removal action?

You have also asked whether the trustee who signed the petition to remove the first trustee may vote on the question whether the township should reimburse the first trustee for the legal fees he incurred in defending against the removal action. A removal action is commenced by the filing with the court of common pleas a complaint signed by no fewer than fifteen per cent of the electors of the political subdivision who voted for governor at the most recent election. R.C. 3.08. *See* note 1, *supra*.

Unlike the trustee who is requesting reimbursement, the second trustee has no personal financial interest at stake in the board's determination. His is more of a conflict between policy or political positions—conflicts that are inherent in many decisions made by public officials. Since the first trustee survived the removal action, we must assume that the second trustee will properly apply the good faith standard to determine whether the first trustee should be reimbursed by the township, regardless of his personal feelings about whether the trustee should have been removed. As the court said in *State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 12, 112 N.E. 138 (1915): "The presumption naturally obtains that [a public official] will fairly and honestly discharge his duties in this behalf and determine all questions he is called upon to decide according to the justice of the case, regardless of his own personal preferences or political affiliations." *See also State ex rel.*

Maxwell v. Schneider, 103 Ohio St. 492, 498, 134 N.E. 443 (1921) ("[t]he action of a public officer, or of a board, within the limits of the jurisdiction conferred by law, is not only presumed to be valid but it is also presumed to be in good faith and in the exercise of sound judgment"). Thus a township trustee who signed a petition for the removal of another trustee is not prohibited from deliberating and voting on the request of the other trustee to be reimbursed by the township for his legal fees in defending the removal action.

How should the board of township trustees proceed if one trustee abstains and the two remaining trustees split their vote?

You have asked how the matter of reimbursement is to be addressed by the board of township trustees if the first trustee is not permitted to vote on the reimbursement of his fees, and the two other trustees split their vote. (A board of township trustees has three members. R.C. 505.01.)

A public official who abstains from voting on a matter because he is disqualified due to a conflict of interest is not qualified to act and his office is treated as vacant—his abstention does not count either for or against the proposal at issue. 1999 Op. Att'y Gen. No. 99-004. Although the remaining two trustees constitute a quorum that is qualified to take action on behalf of the board, 1999 Op. Att'y Gen. No. 99-004, a single trustee does not constitute a majority of the quorum and may not act as the board of trustees. *See* 1999 Op. Att'y Gen. No. 99-004 at 2-26 ("if two members of a board of township trustees abstain from voting because of conflicts of interest, the board is unable to act"). *See also State ex rel. Saxon v. Kienzle*, 4 Ohio St. 2d 47, 48, 212 N.E.2d 604 (1965) ("[a] single member does not constitute a board and, unless authorized by statute, cannot act as the board"); 2004 Op. Att'y Gen. No. 2004-027 (syllabus) ("[w]hen four vacancies occur on a five-member board of education of a local school district, the sole remaining member of the board does not constitute the board and has no authority to fill vacancies on the board"). If only two members vote, they must concur in order for the board to act. 1999 Op. Att'y Gen. No. 99-004.[4]

Thus, if the two trustees eligible to vote in this instance split their vote, the proposal to reimburse the abstaining trustee for his legal fees would not carry. *See also Deglow v. Kruse*, 57 Ohio St. 434, 49 N.E. 477 (1898); *Bob Daniels Buick Co. v. General Motors Corp.*, 1998 Ohio App. LEXIS 4862 (Franklin County Oct. 13, 1998) (where one member of a three-member board recused himself and the remaining two members split their vote, the board failed to attain a majority vote and thus failed to act).[5]

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[4] "It is a recognized principle of parliamentary procedure that a tie vote defeats the proposal," regardless of how many members are on a board. *Kibler v. Muth*, 1985 Ohio App. LEXIS 7068, at *4 (Trumbull County Sept. 16, 1985).

[5] You also asked how the board of township trustees should proceed if both trustees are disqualified from acting. Although we concluded that only one of the trustees is required to refrain from acting, we note that, as discussed above, a single member does not constitute, and cannot act

The Ohio ethics laws

We have analyzed your questions under a common law conflict of interest standard. The Ohio ethics laws, R.C. Chapter 102, R.C. 2921.42, and R.C. 2921.43, also impose statutory standards of ethical conduct upon public officials and employees. The Ohio Ethics Commission has the authority to issue advisory opinions regarding the application of these statutes, R.C. 102.08, and thus the Attorney General refrains from issuing opinions interpreting them. 2004 Op. Att'y Gen. No. 2004-044 at 2-380 n.7; 1987 Op. Att'y Gen. No. 87-025 at 2-179. Either you or the trustees involved may wish to consult the Ethics Commission for an analysis of their situations. If the Ethics Commission renders an advisory opinion concluding that there is no violation of the statutes under its jurisdiction, the person to whom the opinion is addressed, as well as those similarly situated, may rely on that opinion, and be immune from criminal prosecutions, civil suits, and removal actions for violating any such statute. R.C. 102.08.

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

1. A township trustee who incurred legal fees in defending a removal action under R.C. 3.07-.10 may not participate in the board of trustees' deliberations or vote upon his request for township reimbursement for those legal fees.

2. A township trustee who signed a petition for the removal of another trustee pursuant to R.C. 3.08 is not prohibited from participating in the board of trustees' deliberations and vote upon the other trustee's request to be reimbursed by the township for the legal fees he incurred in defending the removal action.

3. If a township trustee abstains from voting on his own request that the township reimburse him for the legal fees he incurred in defending a removal action, and the two remaining trustees split their vote, the proposal to reimburse the abstaining trustee will fail.

Respectfully,

JIM PETRO
Attorney General

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for, the board. If two members of a board of township trustees are required to abstain from voting because of a conflict of interest, the board would be unable to act. 1999 Op. Att'y Gen. No. 99-004. *See also* 2004 Op. Att'y Gen. No. 2004-027.