

OPINION NO. 93-020

Syllabus:

1. When the part of a township outside a municipality is erected as a new township pursuant to R.C. 503.09, all township officers are appointed by the board of county commissioners pursuant to R.C. 503.12; the officers of the original township do not continue to hold office.

2. When a municipality withdraws from a township pursuant to R.C. 503.07 and the remainder of the township is annexed to a contiguous township pursuant to R.C. 503.08 (governing reduced townships), the officers of the contiguous township govern the annexed territory; the officers of the original township do not continue to hold office.

3. When a municipality withdraws from a township pursuant to R.C. 503.07 and the remainder of the township is erected into a new township pursuant to R.C. 503.08, all township officers are appointed pursuant to R.C. 503.12; the officers of the original township do not continue to hold office.
4. When a municipality withdraws from a township pursuant to R.C. 503.07 and the remainder of the township is not a reduced township governed by R.C. 503.08, the remainder of the township outside the municipality continues to exist as the original township; therefore, any township offices held by residents of the municipality become vacant on the effective date of the withdrawal and are filled by appointment pursuant to R.C. 503.24, while elected officers who are residents of the part of the township outside the municipality continue to hold office. If only one township trustee remains in office, appointments are governed by the provisions of R.C. 503.24 that apply when there is no township board of trustees.

To: David W. Norris, Portage County Prosecuting Attorney, Ravenna, Ohio
By: Lee Fisher, Attorney General, September 16, 1993

You have requested an opinion regarding the effect of the separation of a municipality from a township on the elected township offices for the part of the township outside that municipality. Specifically, you ask:

1. Are residents of a municipality which is separated from a township still eligible to hold elected office for the township [outside the municipality]?
2. If not, do these positions become vacant, and if vacant when do such vacancies occur?
3. How are replacement officials appointed or elected?
4. If only one member of a township board of trustees remains in office after the statutory separation of a township and a municipality, how are the vacant positions of trustees and clerk filled?

Rather than discuss these questions serially, this opinion will discuss the issues you have raised in the context of each of the procedures provided in R.C. Chapter 503 for the separation of a municipality from a township and the subsequent treatment of the territory outside the municipality: 1) separation under R.C. 503.09; 2) separation under R.C. 503.07 that results in a reduced township under R.C. 503.08; and 3) separation under R.C. 503.07 that does not result in a reduced township.

Separation under R.C. 503.09

Pursuant to R.C. 503.09, if the electors¹ of the part of the township outside a municipal corporation petition the board of county commissioners to exclude the municipality from the township, the board must enter an order erecting the territory outside the municipality into a new township. R.C. 503.12 provides that "[u]pon entering an order under section 503.09 of the

¹ R.C. 503.09 refers to "freehold electors." The exclusion of renters and other "non-freehold" electors of a township, however, was held unconstitutional in the case of *Cunningham v. Crabbe*, 73 Ohio App. 3d 596, 597 N.E.2d 1210 (Jefferson County 1992).

Revised Code, creating a new township, *the board of county commissioners shall appoint all township officers to serve until the next township election.*" (Emphasis added.) Thus, when separation occurs pursuant to R.C. 503.09, R.C. 503.12 directs that none of the elected officers of the "original" township remain in office, regardless of whether they reside in or out of the excluded municipality. Rather, all the township offices of the territory outside the municipality must be filled by appointment. Only residents of the territory outside the municipality are eligible to hold office in the new township. See R.C. 3.15(A)(3); R.C. 503.241.

The officers appointed under R.C. 503.12 serve until the next township election. At that election, R.C. 3.02(A) requires that successors be elected to serve any unexpired terms remaining until the next regular election for each township office.² See 1937 Op. Att'y Gen. No. 1021, vol. II, p. 1776 (syllabus, paragraph three) (holding that G.C. 3250-4 and G.C. 10, now R.C. 503.12 and R.C. 3.02, should be construed together). If the unexpired term ends within one year of the next election after the appointment, however, the appointee may serve out the unexpired term.³

Separation under R.C. 503.07 that Results in a Reduced Township under R.C. 503.08

R.C. 503.07 provides that the legislative authority of a municipality may petition the county commissioners to make the township boundaries identical to the municipal boundaries or to erect a new township out of the part of the township inside the municipal boundaries. When a municipality initiates the separation, as provided in R.C. 503.07, the effect on the remainder of the original township depends on the characteristics of that remaining territory. R.C. 503.08 provides that if the part of the township outside the separated municipality is reduced to an area of less than twenty-two square miles and there is no other municipality in the territory, the county commissioners may (1) annex the "reduced" township to any contiguous township, (2) erect a new township by annexing territory from a contiguous township to the "reduced" township, or (3) if petitioned to do so "by a majority of the householders of the reduced

² Regular elections for township offices occur in November of odd numbered years only. See Ohio Const. art. XVII, § 1; R.C. 3501.02(D). By statute, the November election in odd-numbered years is referred to as the regular municipal election. R.C. 3501.01(B). Township officers are elected to four year terms. R.C. 505.01 (trustees); R.C. 507.01 (clerk). In order to provide continuity, the legislature has staggered the beginnings of these terms of office, so that at any given regular municipal election only half the township officers are up for election to full terms. R.C. 505.01; R.C. 507.01. If, because of separation, an election for all the officers of a new township must be held in November of 1993, two trustees should be elected to full four year terms. The remaining trustee and the clerk should be elected to serve "short" terms of two years. Those offices would then be filled for full four year terms at the 1995 election. The election cycle for officers in the new township would then be in conformity with the rest of the state.

³ In applying G.C. 10 (now R.C. 3.02) to appointments to the offices of a new township, the Attorney General in 1937 held that a successor must be elected to the short term from the November election to January, even when the new full term began in January. 1937 Op. Att'y Gen. No. 1021, vol. II, p. 1776, 1780. The subsequent amendment of R.C. 3.02 regarding unexpired terms that end within a year of the election has eliminated the need for an election to the term occurring between the election and the beginning of the regular term of office. See 1955-1956 Ohio Laws 205 (Am. S.B. 220, eff. Jan. 1, 1956).

township," erect the "reduced" township into a new township without the annexation of additional territory. See 1955 Op. Att'y Gen. No. 5422, p. 304.⁴ Thus, when R.C. 503.08 applies to the territory remaining after a municipality separates from a township pursuant to R.C. 503.07, the remaining territory will be annexed to a contiguous township and be governed by the elected officers of that contiguous township, or the remaining territory will become all or part of a new township. As a result, when R.C. 503.08 applies, none of the elected officers of the original "old" township will continue in office, regardless of whether they reside in or out of the municipality that has separated.

When a new township is formed under the provisions of R.C. 503.08, the provisions of R.C. 503.12 for appointment of new township officers apply. This is not immediately apparent from the current language of R.C. 503.12, which states that it applies "[u]pon entering an order under section 503.09 of the Revised Code." As has been recognized, however, the statutes governing the formation of new townships were affected by a number of drafting errors during the recodification of the General Code to the Revised Code in 1953. See 1955 Op. Att'y Gen. No. 5422, p. 304; accord 1958 Op. Att'y Gen. No. 1743; 1958 Op. Att'y Gen. No. 2686, p. 542. Examination of the history and recodification of R.C. 503.12 indicates that the General Assembly intended the procedures therein to apply to new townships erected pursuant to R.C. 503.08 as well as pursuant to R.C. 503.09.

The provisions of what is now R.C. 503.12 were enacted in 1935 as part of House Bill 130 with the express stated purpose "*to supplement section 3250....*" 1935 Ohio Laws 197 (H.B. 130, approved May 17, 1935) (preamble) (emphasis added). G.C. 3250 contained the provisions, now codified at R.C. 503.08, that allow formation of a new township from an area less than twenty-two square miles when the reduced township results from the withdrawal of a municipality. As a supplement, H.B. 130 enacted what is now R.C. 503.09, which also allows formation of a new township from an area under twenty-two square miles, but allows the township electors to initiate the separation. 1935 Ohio Laws at 198 (G.C. 3250-1). Additionally, H.B. 130 enacted a series of statutes providing specific procedures for apportioning indebtedness, dividing funds and property, and providing township officers for the new township resulting from the separation. 1935 Ohio Laws at 198 (G.C. 3250-2 through 3252-5, now R.C. 503.10 -13). These procedural statutes, as enacted, did not contain any numerical cross references to other General Code sections, but simply directed the county commissioners to follow the procedures when "entering an order creating such new township." *Id.* Since these statutes were enacted expressly for the purpose of supplementing what is now R.C. 503.08, it seems that the phrase "an order creating such new township" was intended to refer to a new township created under R.C. 503.08, as well as to a new township created under the newly

⁴ On its face, the language of R.C. 503.08 is ambiguous with respect to whether a reduced township can be erected as a new township without adding additional territory. It has long been settled, however, that R.C. 503.08 does allow this if the householders of the reduced territory petition for it. 1955 Op. Att'y Gen. No. 5422, p. 304; accord 1958 Op. Att'y Gen. No. 1743, p. 95; 1958 Op. Att'y Gen. No. 2686, p. 542. As explained in these opinions, the ambiguity in the current statute resulted from changes in phrasing made during the recodification from the General Code to the Revised Code. G.C. 3250, the predecessor of R.C. 503.08, clearly allowed erection of a new township without annexation of additional territory and the changes made during recodification were intended to convey the same meaning. See R.C. 1.30(B)(1) (H.B. 1 of 100th General Assembly (the recodification act) intended to be a restatement of preexisting law). That the changes made resulted in less rather than more clarity must, therefore, be recognized as errors in drafting and not substantive changes in the law.

enacted provisions of what is now R.C. 503.09.⁵ The replacement of the phrase "order creating such new township" with the phrase "order under [R.C.] section 503.09" during recodification was, therefore, a drafting error that cannot be given substantive effect. See R.C. 1.30(B)(1); see also 1955 Op. No. 5422, at p. 308-09 (holding that the omission of R.C. 503.08 from the statutory cross-references in what is now R.C. 503.03 was a similar error in drafting made during recodification).

Separation under R.C. 503.07 that Does Not Result in a Reduced Township

The provisions of R.C. 503.08 requiring annexation or erection of a new township do not apply when a municipality withdraws from a township pursuant to R.C. 503.07 and the remaining part of the township is larger than twenty-two square miles or contains another municipality. In that situation, the original township continues to exist in the part of the township outside the separated municipality. R.C. 503.241, which applies to elected township officers, see *State ex rel. Wilson v. Gulvas*, 63 Ohio St. 3d 600, 602, 589 N.E.2d 1327, 1329 (1992), states: "Whenever any township officer ceases to reside in the township ... his office shall be deemed vacant and the board of township trustees shall declare a vacancy to exist in such office." Accordingly, the township officers of the original township will continue in office, unless the change in boundaries has made them ineligible. 1962 Op. Att'y Gen. No. 3310, p. 762, 767-68.

The recent enactment of R.C. 3.15, see 1989-1990 Ohio Laws, Part I, 1007 (Am. Sub. S.B. 196, eff. June 21, 1990), supports the continuing validity of the above interpretation of the residency requirement for township officers. In addition to the residency requirement of R.C. 503.241, R.C. 3.15(A)(3) provides that "at all times during his term of office ... [e]ach person holding an elective office of a political subdivision shall be a resident of that political subdivision."⁶ R.C. 3.15(B) further provides that nonresidence results in a forfeiture of office, but makes an express exception for certain public officers who become nonresidents of their districts or subdivisions because of boundary changes. No township officers are included in the exception. Accordingly, residents of a municipality that is separated from a township are not eligible to hold elected township offices in that township. Pursuant to R.C. 503.241 and R.C. 3.15, any elected township offices held by residents of a municipality that separates from the township become vacant as of the date the change in township boundaries becomes effective.

When nonresidence creates a vacancy in a township office, R.C. 503.241 states that the office shall be filled as provided in R.C. 503.24. R.C. 503.24 states that "the board of township trustees shall appoint a person having the qualifications of an elector to fill such vacancy for the unexpired term or until a successor is elected." Thus, generally, vacancies created by a change of boundaries will be filled by the township board of trustees.

⁵ Prior to the enactment of House Bill 130 in 1935, the only procedure for providing officers for a new township was G.C. 3259 (now R.C. 503.22), which required the board of county commissioners, "[w]hen a new township is set off," to "forthwith give at least ten days' public notice ... of the time and place of holding an election for township officers." The effect of House Bill 130 was to establish a new procedure for providing officers when a new township results from orders pursuant to the provisions now codified at R.C. 503.08 and R.C. 503.09. When a new township is erected under other provisions of the Revised Code, R.C. 503.22 would still apply. See, e.g., 1953 Op. Att'y Gen. No. 2710, p. 231.

⁶ It has long been recognized that townships are political subdivisions of the state. See, e.g., *Dunn v. Agric. Soc'y*, 46 Ohio St. 93, 96-97, 18 N.E. 496, 497-98 (1888).

When vacancies on the township board of trustees leave only one trustee, however, there is no board of trustees. *State ex rel. Saxon v. Kienzle*, 4 Ohio St. 2d 47, 48, 212 N.E.2d 604, 605-06 (1965) ("[a] single member does not constitute a board and, unless authorized by statute, cannot act as a board. The fact that all of the offices but one on a board are vacant does not authorize the sole remaining member to act as the board"). In such a situation, the alternative appointment provisions of R.C. 503.24 come into play:

If a township is without a board or if no appointment is made within thirty days after the occurrence of a vacancy, a majority of the persons designated as the committee of five on the last-filed nominating petition of the township officer whose vacancy is to be filled who are residents of the township shall appoint a person having the qualifications of an elector to fill the vacancy for the unexpired term or until a successor is elected. If at least three of the committee members who are residents of the township cannot be found, or if that number of such members fails to make an appointment within ten days after the thirty-day period in which the board of township trustees is authorized to make an appointment, then the presiding probate judge of the county shall appoint a suitable person having the qualifications of an elector in the township to fill the vacancy for the unexpired term or until a successor is elected.⁷

R.C. 503.24 (footnote added). Thus, if only one trustee remains in office after the separation of a municipality and a township, appointments to the other vacant offices must be made by the nominating committee of the prior officeholder or the presiding county probate court judge as provided in R.C. 503.24.

Conclusion

It is, therefore, my opinion, and you are hereby advised that:

1. When the part of a township outside a municipality is erected as a new township pursuant to R.C. 503.09, all township officers are appointed by the board of county commissioners pursuant to R.C. 503.12; the officers of the original township do not continue to hold office.
2. When a municipality withdraws from a township pursuant to R.C. 503.07 and the remainder of the township is annexed to a contiguous township pursuant to R.C. 503.08 (governing reduced townships), the officers of the contiguous township govern the annexed territory; the officers of the original township do not continue to hold office.
3. When a municipality withdraws from a township pursuant to R.C. 503.07 and the remainder of the township is erected into a new township pursuant to R.C. 503.08, all township officers are appointed pursuant to R.C. 503.12; the officers of the original township do not continue to hold office.

⁷ R.C. 503.24 further provides that a successor must be elected at the next general election if the vacancy occurs more than forty days before the election and the unexpired term has less than one year remaining from the election. Otherwise the appointee serves the full remaining term.

4. **When a municipality withdraws from a township pursuant to R.C. 503.07 and the remainder of the township is not a reduced township governed by R.C. 503.08, the remainder of the township outside the municipality continues to exist as the original township; therefore, any township offices held by residents of the municipality become vacant on the effective date of the withdrawal and are filled by appointment pursuant to R.C. 503.24, while elected officers who are residents of the part of the township outside the municipality continue to hold office. If only one township trustee remains in office, appointments are governed by the provisions of R.C. 503.24 that apply when there is no township board of trustees.**