

## OPINION NO. 71-071

**Syllabus:**

1. Members of the Ohio Housing Development Board are public officers.

2. A public officer acting within the scope of his authority, without bad faith or corrupt motive, is not personally liable for failure to properly perform a duty involving judgment and discretion.

3. A public officer is not personally liable for official actions performed within the scope of his authority in good faith, solely because that authority is later declared unconstitutional.

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**To: W. A. Losoncy, Exec. Director, Ohio Housing Development Board, Columbus, Ohio**

**By: William J. Brown, Attorney General, November 3, 1971**

I have before me your request for my opinion, which reads as follows:

"The Ohio Housing Development Board was created by Section 124.21 of the Revised Code in legislation that became effective September 16, 1970. Board members are appointed by the Governor with the advice and consent of the Senate.

"The Board has requested that I forward the following questions to you for an official opinion:

"(1) Are members of the Ohio Housing Development Board public officers?

"(2) Is a public officer acting within the scope of his authority, without bad faith or corrupt motive, personally liable for failure to properly perform a duty involving judgment and discretion?

"(3) Is a public officer personally liable for official actions performed within the scope of his authority, if that authority is later declared unconstitutional?"

1. The definition of "public officer", as opposed to other types of public employment, is widely discussed in Ohio case law. In Opin-

ion No. 3171, Opinions of the Attorney General for 1938, my predecessor advises that membership on the Unemployment Relief Study Commission is a public office, under the general rule which he states as follows:

"There is no hard, fast rule by which it may be determined whether or not a given public employment may be a public office. The meaning of the term 'office' as used in the Constitution has been considered by the Supreme Court on numerous occasions. One of the clearest statements of what constitutes a public office is contained in the opinion of such court in the case of State, ex rel. vs. Commissioners, 95 O.S. 157, wherein the court said at pages 159 and 160:

"The usual criteria in determining whether a position is a public office are durability of tenure, oath, bond, emoluments, the independency of the functions exercised by the appointee, and the character of the duties imposed upon him. But it has been held by this court that 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 no longer an open question in this state that to constitute a public office, \* \* \* it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law."

The term, "sovereignty of the state", is explained in the case cited by my predecessor, State, ex rel. v. Commissioners, 95 Ohio St. 157, at pages 160-161 (1917), in the following language:

"In all of these cases it is manifest that the functional powers imposed must be those which constitute a part of the sovereignty of the state. But as stated by Spear, C. J., in The State, ex rel. Hogan, Atty. Gen., etc. v. Hunt, 84 Ohio St., at page 149, without a satisfactory definition of what is the 'sovereignty of the country' the term 'office' is not adequately defined. If specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the state, if the appointee is invested with independent power in the disposition of public property or with power to incur financial obligations upon the part of the county or state, if he is em-

powered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the state.'

The Court held in that case that a clerk was a mere employee of a board of county commissioners, who themselves had the real "sovereign power of the state", and consequently that he did not have the independent power characteristic of a public officer.

The fundamental difference between public officers and other public employees is clearly defined in Opinion No. 65-150, Opinions of the Attorney General for 1965. After quoting from State, ex rel. v. Commissioners, supra, State, ex rel. v. Jennings, 57 Ohio St. 415 (1898), and 44 O. Jur. 2d 503-506, that Opinion says:

"The basic philosophy apparent in the above quoted text is that certain positions in public employment, primarily because of the nature of the duties and the delegation of sovereign powers involved, are of such a character that they bear a direct trust relationship to the public; while other positions in public employment are nothing more than that because there is lacking sufficient authority to exercise sovereign power independent of supervision and control. In other words, public officers are responsible directly to the public, but public employees are answerable directly to their ultimate superiors, who are the public officers."

A further example of a mere public employee is provided by Scofield v. Strain, 142 Ohio St. 290, 27 Ohio Op. 236 (1943), which holds that a health commissioner appointed by a board of health of a city health district is not a public officer, because he is supervised and directed by the board of health, which appoints him and give him most of his powers. In contrast, the powers of a public officer are statutory and exercised independently.

Applying the general rule, I have no doubt that members of the Ohio Housing Development Board are public officers. Their powers are granted by statute, specifically, Section 124.23, Revised Code. The Board is invested with wide discretion to make advances of money and guarantee loans on the basis of its own determination of 'the market and economic feasibility of a proposed housing development". It has numerous incidental powers, including the power to "[d]o all things necessary to carry out the provisions of sections 124.21 to 124.27, inclusive, of the Revised Code." (Section 124.23 (N), Revised Code.) Its members serve for fixed terms, specified by Section 124.21, Revised Code, and they do not answer directly to any superior, but exercise independently a part of the state's sovereign power.

2. The immunity from personal liability of a public officer who, acting within the scope of his authority and in good faith, fails to perform properly a duty involving judgment and discretion, was settled by Gregory v. Small, 39 Ohio St. 346 (1883), and Thomas v. Wilton, 40 Ohio St. 516 (1884). In Gregory v. Small, supra, an ex-teacher sued the local directors of a school district for firing him in breach of contract. The Court held that he had no right of action, even if there had been a valid employment contract and the firing was not for suf-

ficient cause, unless the directors acted with "corrupt intent". In Thomas v. Wilton, supra, the plaintiff contended that the county commissioners had damaged his business by delay in reconstructing a bridge to which plaintiff's mill-dam was attached. The Court held:

"County commissioners, who act in their official capacity in good faith and in the honest discharge of official duty, cannot be held to personally respond in damages."

The principle established by these cases has remained in effect. For recent confirmations, see Opinion No. 2838, Opinions of the Attorney General for 1958; Wierzbicki v. Carmichael, 118 Ohio App. 239 (1963).

3. Public officers who perform official actions within the scope of their authority, which authority is later declared unconstitutional are de facto officers. Their actions are valid with respect to third persons and, consequently, they are not personally liable because of the defect in their authority. Kirker v. Cincinnati, 48 Ohio St. 507 (1891), holds as follows:

"Members of a board of city affairs, before law declared unconstitutional, were de facto members of the administrative board of Cincinnati, and their acts valid."

The statute in question purported to establish a new board, but the Court held that since the functions of the new board and the one it replaced were identical, the statute was actually an attempt to change the membership of the old board. To similar effect, see State v. Gardner, 54 Ohio St. 24 (1896). The reason for the rule is that a statute is presumed to be constitutional until it is declared otherwise by a court of competent jurisdiction.

The rule protecting de facto officers is, of course, subject to the same "good faith" limitation which applies to de jure officers. See Paramount Film Distributing Co. v. Tracy, 86 Ohio L. Abs. 225, 176 N.E. 2d 610 (1960), affirmed 118 Ohio App. 29, 24 Ohio Op. 2d 362, 193 N.E. 2d 283 (1962), affirmed 175 Ohio St. 55, 23 Ohio Op. 2d 352, 191 N.E. 2d 839 (1963). In that case, the trial court held that state officials who collected censorship fees from motion picture companies and turned them over to the state, under a statute later held unconstitutional, were not personally liable. The Court discusses the general rule at 86 Ohio L. Abs. 235, as follows:

"Much discussion has also been had, and many cases cited, relative to the potentially conflicting principles (1) that a ministerial officer may not declare a statute unconstitutional but instead has a legal obligation to carry out the provisions of the same until such has been declared unconstitutional by a judicial body, and (2) that an unconstitutional statute is completely void and accords no protection to public officers who purport to act by virtue of such a void enactment.

"From an analysis of the many cases cited to this Court, and others, it would appear that such cases could only be rationalized on the basis of a conclusion that, even though a public officer be not fully protected by actions

taken under an unconstitutional statute, his actions in this regard do not create personal liability except in those situations where his action per se, and with no protective cloak of immunity by virtue of the unconstitutional statute, would constitute such a common law 'wrong' as to give rise to such liability, or where liability would be imposed by a consideration of basic equitable principles."

In conjunction with Kirker v. Cincinnati, supra, and State v. Gardner, supra, the case clearly implies that a public officer who acts prudently and in good faith will not be personally liable merely because the statute, under which he acted, is later declared unconstitutional.

A concrete indication of good faith is suggested by Paramount Film Distributing Co. v. Tracy, supra, and State v. Gardner, supra. In both cases, there was general acquiescence in the actions of the officials, or, at least, a lack of protest to put the officials on notice that the statutes would later be tested in court (54 Ohio St. 32; 86 Ohio L. Abs. 242). There is an implication that if the plaintiffs had vigorously protested the officials' actions and immediately taken steps to have the statutes declared unconstitutional, the officers might have been expected to use their powers cautiously until a decision was rendered. Conversely, the lack of protest gives public officers reason to believe their authority is valid.

In specific answer to your questions it is my opinion, and you are so advised that:

1. Members of the Ohio Housing Development Board are public officers.
2. A public officer acting within the scope of his authority, without bad faith or corrupt motive, is not personally liable for failure to properly perform a duty involving judgment and discretion.
3. A public officer is not personally liable for official actions performed within the scope of his authority in good faith, solely because that authority is later declared unconstitutional.