

August 5, 2015

The Honorable Katherine J. Zartman
Williams County Prosecuting Attorney
216 South Lynn Street
Bryan, Ohio 43506

SYLLABUS:

2015-026

The appointment of an individual to serve as acting prosecuting attorney pursuant to R.C. 305.02(F) to fill a vacancy in that office constitutes “the commencement of [a] new term of office” as understood by R.C. 325.11, so that the appointee may elect to engage or not to engage in the private practice of law.



MIKE DEWINE

★ OHIO ATTORNEY GENERAL ★

Opinions Section
Office 614-752-6417
Fax 614-466-0013

30 East Broad Street, 15th Floor
Columbus, Ohio 43215
www.OhioAttorneyGeneral.gov

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OPINION NO. 2015-026

The Honorable Katherine J. Zartman
Williams County Prosecuting Attorney
216 South Lynn Street
Bryan, Ohio 43506

Dear Prosecutor Zartman:

You have requested an opinion whether an individual who is appointed to serve as acting prosecuting attorney pursuant to R.C. 305.02(F) when there is a vacancy in that office may elect to engage or not to engage in the private practice of law. Specifically, you ask whether the appointment of an acting prosecuting attorney pursuant to R.C. 305.02(F) constitutes “the commencement of [a] new term of office” as the phrase is used in R.C. 325.11(B), such that the appointee may elect to engage or not to engage in the private practice of law. Your question arises because the former Williams County Prosecuting Attorney recently resigned his office. At the start of his term of office, he elected to engage in the private practice of law pursuant to R.C. 325.11(B).

When a vacancy occurs in the office of prosecuting attorney, “the county central committee of the political party with which the last occupant of the office was affiliated shall appoint a person to hold the office ... until a successor is elected and has qualified.” R.C. 305.02(B). Upon the occurrence of the vacancy and prior to the time when the person appointed by the county central committee qualifies and takes office, the board of county commissioners may appoint a person to serve as acting prosecuting attorney. R.C. 305.02(F).

Prior to your final appointment by the county central committee pursuant to R.C. 305.02(B), you were appointed to serve as acting prosecuting attorney by the Williams County Board of Commissioners pursuant to R.C. 305.02(F). Unlike your predecessor, you do not want to engage in the private practice of law. You informed the Williams County Board of Commissioners of your intent at the time you were appointed as acting prosecuting attorney. The issue is whether an appointee is bound by her predecessor’s notification of intent to engage in the private practice of law, or whether the appointee may make an independent election on that matter.

We first consider R.C. 325.11, the statute that establishes the salaries of the prosecuting attorneys. The statute classifies prosecuting attorneys, for salary purposes, according to the population of the county that a prosecuting attorney serves. R.C. 325.11(A). The counties, as of the year 2001, are divided into eight classes. *Id.*; see also R.C. 1.59(D) (defining “population”). Salary figures are

set forth for the prosecuting attorneys of the various classes of counties.¹ R.C. 325.11(A). It is our understanding that Williams County, as calculated in the 2010 U.S. Census, is a class 3 county.

Higher salary figures are established for prosecuting attorneys who do not engage in the private practice of law. *Id.* An election by a person who holds or seeks election to the office of prosecuting attorney to engage in the private practice of law shall be made before the person takes office by notifying the board of county commissioners of the intention to so practice. R.C. 325.11(B). Specifically, the statute states that a prosecuting attorney “may elect to engage or not to engage in the private practice of law before the commencement of *each new term of office.*” *Id.* (emphasis added). A prosecuting attorney who elects not to engage in the private practice of law may engage in the private practice of law for a period of six months after taking office for the purpose of concluding the affairs of private practice without any diminution of salary. *Id.*

In 1998 Op. Att’y Gen. No. 98-024 (syllabus, paragraph 1), the Attorney General concluded that “the appointment of an individual to fill a vacancy in the office of prosecuting attorney constitutes ‘the commencement of [a] new term of office,’ so that the appointee may elect to engage or not to engage in the private practice of law” for purposes of R.C. 325.11 and R.C. 325.111. That opinion addressed the appointment of an individual to serve as prosecuting attorney by a county central committee pursuant to R.C. 305.02(B). You now ask whether the analysis and conclusions of 1998 Op. Att’y Gen. No. 98-024 also apply to the appointment of an acting prosecuting attorney by a board of county commissioners pursuant to R.C. 305.02(F).

The 1998 opinion considered the meaning of the phrase “new term of office” as used in R.C. 325.11(B). The opinion considered whether the phrase referred to the four-year period of time established in R.C. 309.01 for the office of prosecuting attorney, or the period for which a particular individual serves in that office. 1998 Op. Att’y Gen. No. 98-024, at 2-130. The opinion rejected an interpretation that would limit the phrase to refer only to the four-year period established by R.C. 309.01 rather than to each portion of a statutory term for which a particular individual serves. *Id.* The opinion reasoned that the phrase “new term of office”

appears to refer to the period for which an individual is appointed or elected, and not to the statutory term of the office. The sense of the statutes in question is that a decision whether to engage in the private practice of law accrues to each individual who holds the office of prosecuting attorney. The determination whether to engage in private practice is a personal one, and it is appropriate for the rights and obligations that follow from such a determination to attach to the individual, rather than to the office. Because the decision whether to engage in the private practice of law is made for each ‘new term of office,’ the word ‘term’ is most reasonably construed as referring to the ‘term’ served by a particular individual.

¹ R.C. 325.18 sets forth additional salary increases for prosecuting attorneys for the years 2002 through 2008.

Id. Therefore, the opinion concluded that when an individual is appointed by the county central committee to fill a vacancy in the office of prosecuting attorney, this constitutes “the commencement of [a] new term of office” and the appointee may elect to engage or not to engage in the private practice of law for purposes of R.C. 325.11 and R.C. 325.111. *Id.*

We believe that this analysis and conclusion also apply to the question you have presented. Since the issuance of 1998 Op. Att’y Gen. No. 98-024, there have been no amendments to the relevant language in R.C. 325.11(B) that warrant a different conclusion.² Nor are we aware of any Ohio court decision requiring us to alter or reconsider the advice rendered in the 1998 opinion.

Additionally, the analysis of 1998 Op. Att’y Gen. No. 98-024 applies with equal force to an individual appointed by a board of county commissioners to serve as an acting prosecuting attorney pursuant to R.C. 305.02(F). While the facts underlying the 1998 opinion were that of an individual appointed by a county central committee pursuant to R.C. 305.02(B) to serve as prosecuting attorney, the analysis in the opinion makes no distinction regarding how a person was appointed. That is, the analysis applies regardless of whether a person is appointed by a county central committee pursuant to R.C. 305.02(B) or by a board of county commissioners pursuant to R.C. 305.02(F). The decision whether to engage in the private practice of law accrues to the individual who holds the office for that portion of the statutory term for which the person serves even when the person is appointed to serve as acting prosecuting attorney pursuant to R.C. 305.02(F). *See* 1998 Op. Att’y Gen. No. 98-024, at 2-130. The determination is still “a personal one, and it is appropriate for the rights and obligations that follow from such a determination to attach to the individual rather than to the office.” *Id.* Finally, we discern no basis in the language of R.C. 325.11(B) to reach a different conclusion when a person is appointed pursuant to R.C. 305.02(F) than when a person is appointed pursuant to R.C. 305.02(B). *See generally State v. Taniguchi*, 74 Ohio St. 3d 154, 156, 656 N.E.2d 1286 (1995) (effect should be given to the words actually employed in a statute and words should not be deleted or inserted “in the guise of interpreting the statute”).

² The General Assembly amended R.C. 325.11 and R.C. 325.111 in 2000. 1999-2000 Ohio Laws, Part IV, 7756, 7784-90 (Sub. H.B. 712, eff. Dec. 8, 2000, with certain sections effective on other dates). The amendments did not alter the relevant language regarding “each new term of office” contained in R.C. 325.11(B) and discussed in this opinion and in 1998 Op. Att’y Gen. No. 98-024. For the purpose of this opinion, the 2000 amendments moved to R.C. 325.11 all the salary classifications and salary figures for prosecuting attorneys that previously appeared in R.C. 325.111. R.C. 325.111 no longer contains any salary classifications or salary figures as it did at the time 1998 Op. Att’y Gen. No. 98-024 was issued. Therefore, this opinion does not refer to R.C. 325.111 as did the 1998 opinion.

For the reasons discussed above, it is my opinion, and you are hereby advised that, the appointment of an individual to serve as acting prosecuting attorney pursuant to R.C. 305.02(F) to fill a vacancy in that office constitutes “the commencement of [a] new term of office” as understood by R.C. 325.11, so that the appointee may elect to engage or not to engage in the private practice of law.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive style with a large initial 'M' and a long, sweeping tail.

MICHAEL DEWINE
Ohio Attorney General