

**OPINION NO. 79-028****Syllabus:**

1. R.C. 3737.21, as enacted by Am. Sub. H.B. No. 590 (1978), does not manifest an intention on the part of the General Assembly to create a vacancy in the position of State Fire Marshal and, therefore, does not create such vacancy by operation of law when it becomes effective on July 1, 1979.
2. The present Fire Marshal, appointed on December 1, 1978, pursuant to R.C. 121.06, was appointed pursuant to a valid statute authorizing his appointment, and his tenure is not affected by R.C. 3737.21, as enacted by Am. Sub. H.B. No. 590 (1978).

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**To: J. Gordon Peltier, Director, Dept. of Commerce, Columbus, Ohio**  
**By: William J. Brown, Attorney General, May 31, 1979**

I have before me your request for my opinion regarding certain ambiguities contained in Am. Sub. H.B. No. 590 (1978) as it relates to the status of the position of State Fire Marshal in the Department of Commerce. Your request presents the following questions:

1. Does R.C. 3737.21 as enacted by Am. Sub. H.B. No. 590 create by operation of law a vacancy in the position of State Fire Marshal on its effective date, July 1, 1979?
2. If question number one is answered in the negative, will the presently appointed Fire Marshal be legally serving as such subsequent to June 30, 1979?

The office of Fire Marshal in the Department of Commerce was created by R.C. 121.04. As a result, appointments to the position of State Fire Marshal have been made pursuant to R.C. 121.06, which provides:

The officers mentioned in sections 121.04 and 121.05 of the Revised Code shall be appointed by the director of the department in which their offices are respectively created, and shall hold office during the pleasure of such director.

Am. Sub. H.B. No. 590 has, however, effected a change in the manner in which the State Fire Marshal will be appointed by enacting R.C. 3737.21, effective July 1, 1979:

- (A) The director of the department of commerce shall appoint,

from names submitted to him by the state fire commission, a fire marshal, who shall serve at the pleasure of the director and shall possess the following qualifications:

(1) A degree from an accredited college or university with specialized study in either the field of fire protection or fire protection engineering, or the equivalent qualifications determined from his training, experience, and duties in a fire service;

(2) Five years of recent, progressively more responsible experience in fire inspection, fire investigation, fire protection engineering, teaching of fire safety engineering, or fire fighting.

(B) When a vacancy occurs in the position of fire marshal, the director shall notify the state fire commission. The commission shall communicate the fact of the vacancy by regular mail to all fire chiefs and fire protection engineers known to the commission, or whose identity may be ascertained by the commission by the exercise of due diligence. The commission shall, no earlier than thirty days after mailing the notification, compile a list of all applicants for the position of fire marshal who are qualified under this section. The commission shall submit the names of at least three persons on the list to the director. The director shall appoint the fire marshal from the list of at least three names or may request the commission to submit additional names.

This new section sets forth the qualifications that an appointee for Fire Marshal must possess and a mode of appointment and procedure to be followed in selecting a new State Fire Marshal. Although, under R.C. 3737.21, the Fire Marshal will still serve at the pleasure of the Director of Commerce, R.C. 3737.21 requires that the Fire Marshal be appointed from a list of names submitted to the Director by the State Fire Commission. On and after July 1, 1979, the effective date of R.C. 3737.21, any appointment to the position of State Fire Marshal must be made in accordance with that section, instead of the more general section, R.C. 121.06.

The current Fire Marshal was appointed pursuant to R.C. 121.06, and the issue you raise is whether the terms of R.C. 3737.21 require the appointment of a new Fire Marshal. Stated differently: on July 1, 1979, the effective date of R.C. 3737.21, does the office of Fire Marshal become vacant, thereby necessitating the appointment of a new State Fire Marshal?

In arriving at a conclusion, I am aware that R.C. 1.51 provides in pertinent part:

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision . . . .

I am also aware that, in the enactment of statutes, it is presumed that compliance with both the state and federal constitutions is intended, that the entire statute is intended to be effective, and that a just and reasonable result, feasible of execution, is intended. See R.C. 1.47.

Am. Sub. H.B. No. 590 expressly repeals existing provisions in R.C. Chapter 3737 and in other chapters of the Revised Code, which relate to the office of Fire Marshal. In enacting new sections to replace the old, it makes many changes relating to fire protection, fire safety and enforcement, and the appeals procedure applicable thereto. I must assume that, when the General Assembly adopted Am. Sub. H.B. No. 590, it was fully apprised of R.C. 121.04 and 121.06 and the way in which those statutes related to the appointment of the Fire Marshal. The General Assembly did not, however, abolish the office of Fire Marshal created by R.C.

121.04, nor did it repeal the existing law pursuant to which appointments have been made to fill the position of State Fire Marshal, R.C. 121.06.

R.C. 3737.21 is quite explicit in what it seeks to accomplish and provides mandatory procedures to be followed in appointing a State Fire Marshal. See State ex rel. Jones v. Farrar, 146 Ohio St. 467, 472 (1946). After July 1, 1979, appointments must be made in accordance with R.C. 3737.21. The statute does not, however, mandate that a new appointment be made immediately upon its going into effect, nor does it create a vacancy in the position of State Fire Marshal.

Division (A) of R.C. 3737.21 provides in no uncertain terms that the Director "shall appoint, from names submitted to him by the state fire commission, a fire marshal." This must, however, be read in conjunction with division (B) which provides: "When a vacancy occurs in the position of fire marshal, the director shall notify the state fire commission." R.C. 3737.21 requires the Commission to submit names, but requires it to do so only when it is notified by the Director that there is a vacancy. I see nothing in the language in either division evidencing an intent on the part of the General Assembly to abolish the existing position of State Fire Marshal, or to declare a vacancy to exist on the effective date of the statute.

Therefore, I conclude that a vacancy in the position of State Fire Marshal will not be created by operation of law on the effective date of R.C. 3737.21, July 1, 1979. Although you have not specified the method used to select the individual who currently serves as Fire Marshal, I find nothing prohibiting him from serving in that position subsequent to June 30, 1979, assuming that he legally possesses that office at the present time, and assuming that he was not ineligible at the time of his appointment. See State ex rel. Lowe v. Roseberry, 11 Ohio L. Abs. 288 (Ct. App. Lawrence County 1932). The individual who currently holds the position of Fire Marshal is not required to possess the qualifications set forth in R.C. 3737.21(A) in order to retain his position, for, by the terms of R.C. 3737.21(A), those qualifications are applicable only to a Fire Marshal appointed by the Director of the Department of Commerce pursuant to R.C. 3737.21. Cf. State ex rel. Boda v. Brown, 157 Ohio St. 368 (1952).

"To abolish an office the intention of the competent authority to abolish such office must be clear." State ex rel. Taylor v. Cowen, 96 Ohio St. 277, 282 (1917) (quoting 29 Cyc., 1368). No such intention has been expressed here. The effect of a construction declaring that a vacancy exists in the position of State Fire Marshal upon the effective date of R.C. 3737.21 "would be tantamount to the abolishment of the officer, leaving the office intact." State ex rel. Taylor v. Cowen, *supra*. When an office is filled by one legally entitled to the office, it cannot be regarded as vacant. See State ex rel. Attorney General v. Bryson, 44 Ohio St. 457 (1886). This is especially true here, since the Fire Marshal was appointed pursuant to valid statutory authority.

Am. Sub. H.B. No. 590 expressly repeals most of the statutes that govern the office of Fire Marshal. It reenacts many of the repealed statutes and makes changes in others, while it enacts certain other statutes that are entirely new. It is important to note that, when the General Assembly repeals a section of the Revised Code by the express terms of a bill and in the same bill reenacts the original portion of that section with certain additions, the original portions are not regarded as having been repealed and reenacted, but as having been continuous and undisturbed by the amending act. State ex rel. Taylor v. Cowen, *supra*; 1975 Op. Att'y Gen. No. 75-059. Thus, in the instant case the repealer clause cannot be said to evidence an intention to vacate or abolish the office of Fire Marshal.

Finally, Section 4 of Am. Sub. H.B. No. 590 states:

The person serving as state fire marshal on the effective date of this act shall be permitted to continue in that position until at least January 1, 1979.

This section became obsolete only 30 days after its effective date (November 1,

1978) because of the resignation of the person who had been serving as the State Fire Marshal. By its express terms, this section was made applicable to just one person, and whatever effect the section may have had was negated by that person's resignation. The subsequent appointment of the present Fire Marshal on December 1, 1978 was made pursuant to R.C. 121.06; the new law, R.C. 3737.21, was not in effect at that time, although some sections of Am. Sub. H.B. No. 590 were effective. So long as the appointing authority was empowered by law to make the appointment and so long as the appointee was qualified under the law to receive the appointment and was not ineligible at the time of appointment, the validity of the appointment is not open to question.

Thus, it is my opinion, and you are advised, that:

1. R.C. 3737.21, as enacted by Am. Sub. H.B. No. 590 (1978), does not manifest an intention on the part of the General Assembly to create a vacancy in the position of State Fire Marshal, and therefore, does not create such vacancy by operation of law when it becomes effective on July 1, 1979.
2. The present Fire Marshal, appointed on December 1, 1978 pursuant to R.C. 121.06, was appointed pursuant to a valid statute authorizing his appointment, and his tenure is not affected by R.C. 3737.21, as enacted by Am. Sub. H.B. No. 590 (1978).