

November 20, 2018

The Honorable Charles E. Coulson
Lake County Prosecuting Attorney
105 Main Street
P.O. Box 490
Painesville, Ohio 44077

SYLLABUS:

2018-031

1. A person appointed to serve in place of a county treasurer, county auditor, or member of a board of county commissioners on a hearing board of a county board of revision is an employee of the county treasurer, county auditor, or board of county commissioners, respectively, for purposes of R.C. 5715.02 even when the appointee's only duty is to serve in place of the pertinent county officeholder on the hearing board.
2. R.C. 5715.02 does not limit a county treasurer, county auditor, or member of a board of county commissioners to his current pool of employees when selecting a person to appoint to serve in his place and stead on a hearing board of a county board of revision. Rather, the pertinent county officeholder may appoint a current employee of his office to serve on the hearing board in his place and stead or may hire a new employee and assign that employee the duty of serving on the hearing board in the officeholder's place and stead.



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OPINION NO. 2018-031

The Honorable Charles E. Coulson
Lake County Prosecuting Attorney
105 Main Street
P.O. Box 490
Painesville, Ohio 44077

Dear Prosecutor Coulson:

You have requested an opinion about the composition of a hearing board of a county board of revision. Pursuant to R.C. 5715.01(B), every county has a county board of revision that hears valuation complaints and revises assessments of real property for taxation. *See* R.C. 5715.02; R.C. 5715.11-.13; R.C. 5715.16; R.C. 5715.19. A county board of revision is composed of the county treasurer, county auditor, and a member of the board of county commissioners selected by the board of county commissioners. R.C. 5715.02. A county board of revision “may provide for one or more hearing boards when they deem the creation of such to be necessary to the expeditious hearing of valuation complaints.” *Id.* Each official on the county board of revision “may appoint one qualified employee from the official’s office to serve in the official’s place and stead on each such board for the purpose of hearing complaints as to the value of real property only[.]” *Id.*

You have explained that the Lake County Board of Revision has established a hearing board and that each of the officials on the Lake County Board of Revision has appointed an individual to serve in the official’s place and stead on the hearing board. However, some of the individuals appointed to the hearing board were not already employed by the office of their appointing official at the time of such appointment. The appointees are now considered to be part-time employees of the appointing official’s office, with their only duty being to serve on the hearing board of the county board of revision in the official’s place and stead.

In light of these facts, you have asked whether a person appointed to a hearing board of a county board of revision by a county treasurer, county auditor, or member of a board of county commissioners shall be considered an employee of the county treasurer, county auditor, or board of county commissioners when the appointee’s only duty is to serve in place of the pertinent county officeholder on the hearing board. You have also asked whether R.C. 5715.02 limits a county treasurer, county auditor, or member of a board of county commissioners to his current pool of employees when selecting a person to appoint to serve in his place and stead on a hearing board of a county board of revision. You explain that if the selection process is limited in this manner, the pertinent county officeholders may have difficulty in appointing qualified individuals to serve on hearing boards of the county board of revision, especially when there is a high volume of cases to be

heard. You also point out that there may be instances when the only employee deemed qualified to serve on a hearing board has a conflict of interest that would prevent the employee from serving on a particular case. In those instances, the pertinent county officeholder would be left without an appropriate choice of individual to appoint to serve in his place and stead on the hearing board.

Let us begin by examining R.C. 5715.02, which addresses the composition of a county board of revision and any hearing boards created by the county board of revision. It states, in relevant part:

The county treasurer, county auditor, and a member of the board of county commissioners selected by the board of county commissioners shall constitute the county board of revision, or they may provide for one or more hearing boards when they deem the creation of such to be necessary to the expeditious hearing of valuation complaints. *Each such official may appoint one qualified employee from the official's office to serve in the official's place and stead on each such board for the purpose of hearing complaints as to the value of real property only*, each such hearing board has the same authority to hear and decide complaints and sign the journal as the board of revision, and shall proceed in the manner provided for the board of revision by [R.C. 5715.08-.20]. Any decision by a hearing board shall be the decision of the board of revision.

R.C. 5715.02 (emphasis added). Your first question asks whether a person appointed to a hearing board of a county board of revision by a county treasurer, county auditor, or member of a board of county commissioners shall be considered an “employee,” for purposes of R.C. 5715.02, of the county treasurer, county auditor, or board of county commissioners when the appointee’s only duty is to serve in place of the pertinent county officeholder on the hearing board. This question arises, in part, because of two prior Attorney General opinions — 2006 Op. Att’y Gen. No. 2006-042 and 2010 Op. Att’y Gen. No. 2010-031 — that addressed members of a hearing board of a county board of revision.

The first of these opinions, 2006 Op. Att’y Gen. No. 2006-042, considered whether a deputy county auditor or treasurer may serve in place of the county auditor or treasurer, respectively, on a hearing board of a county board of revision. In answering this question, the opinion examined the meaning of the word “employee” in R.C. 5715.02 as follows:

The word ‘employee’ is not defined for purposes of R.C. 5715.02. When a word is left undefined by the General Assembly, it is to be accorded its common, everyday meaning. R.C. 1.42; *State v. Dorso*, 4 Ohio St. 3d 60, 62, 446 N.E.2d 449 (1983). In ordinary usage, the word ‘employee’ means a person who works under the supervision and control of another person for wages or salary. *Merriam-Webster’s Collegiate Dictionary* 408 (11th ed. 2005); *Black’s Law Dictionary* 564 (8th ed. 2004); see *State ex rel. Newman v. Skinner*, 128 Ohio St. 325, 191 N.E. 127 (1934).

2006 Op. Att’y Gen. No. 2006-042, at 2-412. Applying this common meaning of the word “employee,” the 2006 opinion determined that deputy county auditors and treasurers are ‘employees’ because they work under the supervision and control of county auditors and county treasurers for compensation. *Id.* Accordingly, the 2006 opinion advised that R.C. 5715.02 authorizes a deputy

county auditor or treasurer to serve in place of the county auditor or treasurer, respectively, on a hearing board of a county board of revision for the purpose of hearing complaints as to the value of real property for taxation. *Id.* (syllabus).

The other opinion that is relevant to your inquiry, 2010 Op. Att’y Gen. No. 2010-031, considered whether the positions of member of a hearing board of a county board of revision and member of a city legislative authority are compatible. In determining whether a person may simultaneously hold these two positions, the 2010 opinion considered whether a person appointed to a hearing board of a county board of revision by a county auditor holds a “public office” for purposes of R.C. 731.02. R.C. 731.02 prohibits a member of a city legislative authority from holding “any other public office, except that of notary public or member of the state militia[.]” The opinion determined that a person who is appointed by the county auditor to serve on a hearing board of a county board of revision holds a public office for purposes of R.C. 731.02, due in large part to the independence of the position:

The Ohio Supreme Court has established the following general criteria for determining whether a public position is a public office: ‘[D]urability of tenure, oath, bond, emoluments, the independency of the functions exercised by the appointee, and the character of the duties imposed upon him.’ *State ex rel. Landis v. Bd. of Comm’rs of Butler County*, 95 Ohio St. 157, 159, 115 N.E. 919 (1917). In addition, the court has long held that ‘[i]f 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,’ even if the position is filled by appointment, rather than election. *Id.*; accord *State ex rel. Attorney General v. Jennings*, 57 Ohio St. 415, 49 N.E. 404 (1898) (syllabus, paragraph 2); *State ex rel. Attorney General v. Brennan*, 49 Ohio St. 33, 38, 29 N.E. 593 (1892).

In light of the foregoing Ohio Supreme Court pronouncements, a member of a hearing board of a county board of revision who is appointed by a county auditor holds a public office. Pursuant to R.C. 5715.02, the person is appointed to the hearing board by the county auditor. As a member of the hearing board, the person serves in place of the county auditor and has the same authority as the county auditor to hear complaints and render decisions as to the value of real property. R.C. 5715.02.

The person also is not subject to the direction and control of the county auditor or another person when performing his duties as a member of a hearing board. *See generally* R.C. 5715.48 (no ‘member of a county board of revision . . . shall willfully and fraudulently value any real property for taxation except at its taxable value as provided by law’). Instead, the person serves as a member of an independent county board that exercises a portion of the sovereign power of the state when hearing complaints and rendering decisions as to the value of real property. *See* R.C. 5715.02; R.C. 5715.08-.20; R.C. 5715.48.

2010 Op. Att’y Gen. No. 2010-031, at 2-229 to 2-230. Thus, the 2010 opinion reasoned, in part, that a person appointed to a hearing board of a county board of revision holds a public office for purposes of R.C. 731.02 because the person is not subject to the direction and control of the appointing official when performing duties as a member of the hearing board.

You note that reading the 2010 opinion in conjunction with the 2006 opinion appears to lead to the conclusion that a person appointed to a hearing board of a county board of revision by a county treasurer, county auditor, or member of a board of county commissioners is not an employee of the pertinent officeholder when the person’s only duty is to serve on the hearing board in place of the officeholder. This is because while the 2006 opinion defines “employee” as someone who works under the supervision and control of another person for wages or salary, the 2010 opinion explains that a person appointed to a hearing board is not subject to the direction and control of the appointing official when performing duties as a member of the hearing board. Thus, it appears that if a person’s only duty is to serve on the hearing board in place of the officeholder, the person will not be subject to the officeholder’s supervision and control and, consequently, will not be an employee of the officeholder. However, as explained below, we do not believe this to be the case.

A county treasurer, county auditor, and board of county commissioners are each authorized to hire employees to perform duties on their behalf. *See* R.C. 124.11(A)(8) (including in the unclassified civil service “four clerical and administrative support employees for each board of county commissioners and one such employee for each county commissioner”); R.C. 325.17 (county treasurers and county auditors “may appoint and employ the necessary deputies . . . or other employees for their respective offices”). These officeholders have discretion to assign the duties of their respective offices to their employees as they see fit. When the county board of revision creates one or more hearing boards, the county treasurer, county auditor, and member of the board of county commissioners has a duty to serve on the hearing board unless they “appoint one qualified employee from the official’s office to serve in the official’s place and stead on each such board[.]” R.C. 5715.02. Serving on a hearing board of a county board of revision is thus one of the many duties of the offices of the county treasurer, county auditor, and board of county commissioners that may be assigned to an employee of each such office.

When a county treasurer, county auditor, or member of a board of county commissioners delegates the responsibility of serving on a hearing board to an employee of his office, the employee is required to serve in place of the pertinent officeholder on the hearing board under the circumstances prescribed by the officeholder. *See* 2006 Op. Att’y Gen. No. 2006-034, at 2-316 (“[w]hen the county treasurer delegates [the duty of serving on a hearing board of a county board of revision] to the chief deputy treasurer or a deputy treasurer, the chief deputy treasurer or deputy treasurer is required to serve in place of the county treasurer on the . . . hearing board of the county board of revision under the conditions prescribed by the county treasurer”). For example, the county treasurer, county auditor, or member of the board of county commissioners may prescribe that the employee serve on the hearing board on a temporary or intermittent basis, or may assign the employee to serve on the hearing board on a regular basis. Additionally, the county officeholder retains authority to alter the conditions of the employee’s service on the hearing board and to assign additional duties of his office to the employee as the officeholder sees fit. While the appointee exercises independent judgment in

performing duties as a member of the hearing board, the terms and conditions of the appointee's service as a member of the hearing board are subject to the supervision and control of the appointing official. In this way, the appointee is subject to the supervision and control of the appointing authority, even if the appointee's only duty as an employee of the appointing official's office is to serve on the hearing board of the county board of revision in the appointing official's place and stead.

Moreover, while the appointee will not to be subject to the direction and control of his appointing official when performing duties as a member of the hearing board, he is subject to removal from the hearing board by his appointing official. "Generally, the power of removal is incident to the power to appoint when the term or tenure of a public position is not fixed by law and the removal is not otherwise governed by constitutional or statutory provision." 2014 Op. Att'y Gen. No. 2014-016, at 2-133; *see also Davidson v. Sheffield-Sheffield Lake Bd. of Educ.*, No. 89CA004624, 1990 Ohio App. LEXIS 2190, at *8 (Lorain County May 23, 1990) (quoting *State ex rel. Bd. of Educ. v. Miller*, 102 Ohio App. 85, 86-87, 141 N.E.2d 301 (Lawrence County 1956)). No statutory or constitutional provision governs the term of office of a person appointed to a hearing board of a county board of revision by a county treasurer, county auditor, or member of a board of county commissioners.¹ Thus, a county treasurer, county auditor, or member of the board of county

¹ We are of the opinion that a person appointed to a hearing board of a county board of revision by a county treasurer, county auditor, or member of a board of county commissioners is not an "officer" for purposes of Article II, § 38 of the Ohio Constitution. Article II, § 38 of the Ohio Constitution provides:

Laws shall be passed providing for the prompt removal from office, upon complaint and hearing, of all officers, including state officers, judges and members of the general assembly, for any misconduct involving moral turpitude or for other cause provided by law; and this method of removal shall be in addition to impeachment or other method of removal authorized by the constitution.

The Ohio Supreme Court has interpreted this constitutional provision to mean that removal of a public officer shall "be made only 'upon complaint and hearing.'" *State ex rel. Hoel v. Brown*, 105 Ohio St. 479, 138 N.E. 230 (1922) (syllabus, paragraph 2); *see also State ex rel. Zeigler v. Zumbar*, 129 Ohio St. 3d 240, 2011-Ohio-2939, 951 N.E.2d 405, at ¶ 33.

Prior Attorney General opinions have determined that an individual is an "officer" for purposes of Article II, § 38 of the Ohio Constitution when the individual: (1) has been appointed or elected in a manner prescribed by law; (2) has a designation or title prescribed by law; (3) exercises functions concerning the public assigned by law; and (4) holds a position that has some tenure, duration, and continuance. 2014 Op. Att'y Gen. No. 2014-016, at 2-129; 2001 Op. Att'y Gen. No. 2001-004, at 2-29. While 2010 Op. Att'y Gen. No. 2010-031 applied similar criteria in concluding that a person appointed by the county auditor to serve on a hearing board of a county board of revision serves in a public office for purposes of R.C. 731.02, we do not believe that application of these criteria leads to the conclusion that a person appointed to a hearing board of a county board of revision

commissioners may remove a person that he has appointed to serve on a hearing board of a county board of revision from the hearing board at any time.

In response to your first question, we are of the opinion that a person appointed to a hearing board of a county board of revision by a county treasurer, county auditor, or member of a board of county commissioners is an employee of the county treasurer, county auditor, or board of county commissioners, respectively, for purposes of R.C. 5715.02 even when the appointee's only duty is to serve in place of the pertinent county officeholder on the hearing board.²

holds a public office for purposes of Ohio Const. art. II, § 38. Article II, § 38 of the Ohio Constitution and R.C. 731.02 each serve different purposes, which affect how the above factors are weighed in determining whether someone holds a public office for purposes of each. Article II, § 38 is intended to protect a public officer's reasonable expectation of serving until the end of the term for which he was appointed, absent some conduct that constitutes statutory grounds for removal. *See* 2014 Op. Att'y Gen. No. 2014-016, at 2-133 to 2-134; *see also generally* R.C. 3.07-.10. Therefore, factor four — whether the individual holds a position that has some tenure, duration, and continuance — is a primary consideration in determining whether someone is an “officer” for purposes of Article II, § 38. In this instance, a person appointed to a hearing board of a county board of revision does not hold a position with a set tenure or duration and therefore has no reasonable expectation of serving until the end of a set period of time. Accordingly, we conclude that a person appointed to a hearing board of a county board of revision by a county treasurer, county auditor, or member of a board of county commissioners is not an “officer” for purposes of Article II, § 38 of the Ohio Constitution.

While factor four is a primary consideration in determining whether someone is an “officer” for purposes of Article II, § 38 of the Ohio Constitution, factor three — whether the individual exercises functions concerning the public assigned by law — is predominant in determining whether someone holds a public office for purposes of R.C. 731.02. This is because R.C. 731.02, which prohibits a member of a city legislative authority from holding any other public office, is intended to prevent the centralization of sovereign power in one individual. For this reason, 2010 Op. Att'y Gen. No. 2010-031 gave primary consideration to factor three in determining that a person appointed to a hearing board of a county board of revision holds a public office for purposes of R.C. 731.02 and, therefore, cannot also serve as a member of a city legislative authority. Our conclusion that a person appointed to a hearing board of a county board of revision is not an “officer” for purposes of Article II, § 38 of the Ohio Constitution does not alter the conclusions reached in 2010 Op. Att'y Gen. No. 2010-031.

² We have previously advised that a person appointed to a hearing board of a county board of revision by a county auditor is not an employee of *a county board of revision* for purposes of R.C. 5715.51. 2010 Op. Att'y Gen. No. 2010-031, at 2-230 to 2-232; *see also generally* R.C. 5715.51 (prohibiting assistants, experts, clerks, and other employees of a county board of revision from, *inter alia*, holding any position on or under any committee of a political party). This prior advice is

You also ask whether R.C. 5715.02 limits a county treasurer, county auditor, or member of a board of county commissioners to his current pool of employees when selecting a person to appoint to serve in his place and stead on a hearing board of a county board of revision. We do not read R.C. 5715.02 as imposing such a limitation. R.C. 5715.02 provides that each member of a county board of revision “may appoint one qualified employee from the official’s office to serve in the official’s place and stead” on a hearing board of a county board of revision. The language of R.C. 5715.02 does not limit a county treasurer, county auditor, or member of the board of county commissioners to his current employees in selecting someone to appoint to serve in his place on a hearing board of a county board of revision. Reading the statute to require the appointment of a *current* employee would require us to add to the language of R.C. 5715.02, which we cannot permissibly do. See *Hubbard v. Canton City Sch. Bd. of Educ.*, 97 Ohio St. 3d 451, 2002-Ohio-6718, 780 N.E.2d 543, at ¶ 14, *superseded by statute on other grounds as recognized in Contreras v. Vill. of Bettsville*, Seneca App. No. 13-10-48, 2011-Ohio-4178, 2011 Ohio App. LEXIS 3487 (“where the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom”); *State ex rel. Foster v. Evatt*, 144 Ohio St. 65, 56 N.E.2d 265 (1944) (syllabus, paragraph 8), *cert denied*, 324 U.S. 878 (1945) (“[t]here is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statute to meet a situation not provided for”). Rather, we are of the opinion that R.C. 5715.02 authorizes the pertinent county officeholders to appoint a current employee to serve on the hearing board or to hire a new employee and assign that employee the duty of serving on a hearing board of the county board of revision.

Based on the foregoing, it is my opinion, and you are hereby advised that:

1. A person appointed to serve in place of a county treasurer, county auditor, or member of a board of county commissioners on a hearing board of a county board of revision is an employee of the county treasurer, county auditor, or board of county commissioners, respectively, for purposes of R.C. 5715.02 even when the appointee’s only duty is to serve in place of the pertinent county officeholder on the hearing board.
2. R.C. 5715.02 does not limit a county treasurer, county auditor, or member of a board of county commissioners to his current pool of employees when selecting a person to appoint to serve in his place and stead on a hearing board of a county board of revision. Rather, the pertinent county officeholder may appoint a current employee of his office to serve on the hearing board in his

consistent with the advice in this opinion, which concludes that a person appointed to a hearing board of a county board of revision by a county auditor is an employee of *the county auditor’s office*.

place and stead or may hire a new employee and assign that employee the duty of serving on the hearing board in the officeholder's place and stead.

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