

Note from the Attorney General's Office:

1988 Op. Att'y Gen. No. 88-057 was overruled in part by
1990 Op. Att'y Gen. No. 90-070.

OPINION NO. 88-057

Syllabus:

A county commissioner who was elected while he was a resident of the county may continue to serve as county commissioner after moving to an adjoining county within the state.

To: John W. Allen, Richland County Prosecuting Attorney, Mansfield, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, September 9, 1988

I have before me your request for an opinion on the following question: "Must an elected County Commissioner retain residency in the county for which he was

elected in order to retain his office?" The situation with which you are concerned involves an elected commissioner of Richland County who is moving his residence to an adjoining county within Ohio. He will not retain a residence, business operation, or mailing address within Richland County, but he does plan to return to Richland County regularly to carry out his duties as commissioner.

Ohio Const. art. X deals with the organization of counties and townships but contains no provisions relating to the residence of county commissioners. Ohio Const. art. X, §1 states that "[t]he general assembly shall provide by general law for the organization and government of counties, and may provide by general law alternative forms of county government." Ohio Const. art. X, §§3 and 4 authorize a county to adopt a charter. I have been informed that Richland County operates under the general provisions of R.C. Chapters 305 and 307, and has not adopted an alternative form of county government under R.C. Chapter 302 or a county charter. Accordingly, this opinion does not address alternative or charter forms of county government.

R.C. Chapter 305 provides for the election of county commissioners, *see* R.C. 305.01, and requires that each county commissioner give bond before entering upon the discharge of his duties, *see* R.C. 305.04. A county commissioner must take an oath of office. *See* R.C. 3.23 ("[t]he oath of office of every...officer [other than a judge of a court of record]...shall be to support the constitution of the United States and the constitution of this state, and faithfully to discharge the duties of his office"). That oath does not, however, require that the commissioner reside in the county or precinct that he serves. *Compare* R.C. 3.23 with *State ex rel. Hartshorn v. Walker*, 17 Ohio 135, 140 (1848) (under statutes then in effect, each county commissioner was required "to take an oath or affirmation faithfully and impartially to discharge the duties of a commissioner of the county in which he resides"). There is, accordingly, no express constitutional or statutory requirement that a person serving as county commissioner must reside within the county that he serves.

Ohio Const. art. XV, §4 states: "No person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector." Ohio Const. art. V, §1 defines an "elector" as follows:

Every citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, such time as may be provided by law, and has been registered to vote for thirty days, has the qualifications of an elector, and is entitled to vote at all elections. Any elector who fails to vote in at least one election during any period of four consecutive years shall cease to be an elector unless he again registers to vote. (Emphasis added.)

R.C. 3503.01 sets forth residence requirements for voting, as follows:

Every citizen of the United States who is of the age of eighteen years or over and who has been a resident of the state thirty days next preceding the election at which he offers to vote, is a resident of the county and precinct in which he offers to vote, and has been registered to vote for thirty days, has the qualifications of an elector and may vote at all elections in the precinct in which he resides.

It might, accordingly, be argued that, in order to be elected or appointed to a county office, a person must be qualified as an elector in the county and must, therefore, be a resident of the county. *See, e.g., State ex rel. Jeffers v. Sowers*, 171 Ohio St. 295, 299, 170 N.E.2d 428, 431 (1960) (Bell, J., dissenting); 1975 Op. Att'y Gen. No. 75-067; *see also State ex rel. Hartshorn v. Walker* (considering earlier constitutional and statutory provisions). *See generally* 1946 Op. Att'y Gen. No. 764, p. 128; 1939 Op. Att'y Gen. No. 820, vol. II, p. 1048; 1924 Op. Att'y Gen. No. 1792, p. 525 at 526 ("[i]t has frequently been held that if the status of an official is changed after his election or appointment so that he no longer is an elector for the district in which he was appointed or elected the office is forfeited. It will be observed that one of the qualifications of an elector is that he reside in the district

for which he is elected, and a change of his residence in this respect would forfeit the office, thereby creating a vacancy"); 1921 Op. Att'y Gen. No. 1867, vol. I, p. 159.

The Ohio Supreme Court has, however, determined that the constitutional requirement that a person have the qualifications of an elector in order to be elected or appointed to an office in this state means only that he must have the qualifications of an elector of the state—that is, that he must be a resident of the state, but unless a constitutional or statutory provision so requires, need not be a resident of the county or precinct which he is to serve. In *State ex rel. Jeffers v. Sowers*, the Ohio Supreme Court considered whether, when a candidate for the office of county engineer died before the election, the vacancy on the ballot could be filled by a person who was not a resident of the county. The court held that the person selected to fill the vacancy was required to meet the statutory requirements for county engineer, see R.C. 315.02, and to be a resident and elector of Ohio, but that he was not required to be a resident and elector of the county to whose ballot he was named by the appropriate committee of a political party. See R.C. 3513.31.

In the *Jeffers* case, the court relied, in part, upon the fact that earlier constitutional provisions had required that a person appointed to an office within a county must be a citizen and inhabitant of that county; and that such language had been dropped:

If the Ohio Constitution of 1802 were still in effect, the answer would be found in Section 27 of Article I relating to appointive public officials, inasmuch as most public officials then were appointive instead of elective as now. The section read in part:

"No person shall be appointed to any office within any county, who shall not have been a citizen and inhabitant therein, one year next before his appointment***."

Nothing was left to inference in the requirement that each public official within a county must be a "citizen and inhabitant" of that county. However, this quoted language significantly was omitted when the present Constitution was adopted in 1851. The corresponding provision is Section 4 of Article XV. It now reads in part:

"No person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector***."

The only geographical area or political unit there mentioned is the state, and when the term "elector" is employed it would logically seem to connote an elector of the only political territory mentioned, namely, the state. In any event, the word "county" was eliminated by the substituted provision of 1851. Hence, the present Constitution provides no express requirement that a candidate for the office of county engineer be a resident and elector of that county.

State ex rel. Jeffers v. Sowers, 171 Ohio St. at 296-97, 170 N.E.2d at 429.

The court in *Jeffers* relied also upon 1950 Op. Att'y Gen. No. 1870, p. 339, which concluded, in the second paragraph of the syllabus: "Where the county commissioners make an appointment to fill a vacancy in the office of county engineer, there is no requirement in law that such appointee shall be a resident elector of the county in which such appointment is made." 1950 Op. No. 1870 states, in part:

For the purpose of history and further clarification, the Constitution of the State of Ohio, Article XV, Section 4, reads in part:

"No person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector; ***"

The Constitution, of course, is the law of the State. Its application is state-wide and when it refers to the qualifications of an elector it obviously means an elector of the State, and we can not bring it down to mean that wherever an appointment is made to fill a vacancy in a county office it means that such appointee shall be an elector of such county, in the absence of a specific requirement that he be such an elector.

Under the election laws, Section 4785-3(h), General Code, reads as follows:

"The term 'elector' or 'qualified elector' shall mean a person having the qualifications provided by law to entitle him to vote."

Here I wish to point out again that we have a definition of an elector of the State of Ohio which of course when applied to a political subdivision does not change its meaning but does imply that for the purpose of voting his elector-ship must be localized to the place where he qualifies for the purpose of exercising his privilege to vote and has nothing whatever to do with his qualifications for appointment to a vacancy such as we are considering.

1950 Op. No. 1870 at 342.

The *Jeffers* court quoted this portion of 1950 Op. No. 1870 and stated:

This ruling now has stood for ten years, during which period the General Assembly has not seen fit to exercise its unquestioned authority in this matter of legislative policy.

This ruling is consistent with the general rule stated as follows in 120 A.L.R., 672:

"The decided weight of authority supports the view that residence within the district or other political unit for which he is elected or appointed is not a necessary qualification of an officer or candidate, in the absence of an express statutory or constitutional provision requiring such residence or that he shall be an elector of the political unit."

State ex rel. Jeffers v. Sowers, 171 Ohio St. at 299, 170 N.E.2d at 430. It may, similarly, be stated at this time that the ruling of the *Jeffers* case has stood for more than twenty-five years and the General Assembly has not acted to provide generally that a person who serves as a county officer must be a resident of the county. But see R.C. 311.01(B) ("[o]n and after January 1, 1988...no person shall be elected or appointed to the office of sheriff unless that person...(2) Has been a resident of the county in which he is a candidate for or is appointed to the office of sheriff for at least one year prior to the qualification date...").

I had occasion to consider a related question in 1984 Op. Att'y Gen. No. 84-025 and concluded that, because of the statutory provisions governing elections, an individual who files a petition to run for county office must be a resident of the county. See R.C. 3513.05; R.C. 3513.261.¹ There is, however, no general requirement that a person elected to county office must retain residence in the county that he was elected to serve. See generally R.C. 311.01; *State ex rel. Ehring v. Bliss*, 155 Ohio St. 99, 97 N.E.2d 671 (1951). Further, a person may be appointed to certain county offices even though he is not a resident of the county, if he has the necessary professional qualifications. See *State ex rel. Jeffers v. Sowers* (county engineer); 1968 Op. Att'y Gen. No. 68-072 (county prosecuting attorney). It follows that a person may serve in those county offices even though he is not a resident of the county.

I am aware that the *Jeffers* case and opinions applying that case involved county officers other than county commissioners. See *State ex rel. Jeffers v. Sowers* (county engineer); Op. No. 84-025 (county prosecuting attorney, coroner, and engineer); Op. No. 68-072 (county prosecuting attorney). The conclusion that a nonresident of the county may hold the office of county prosecuting attorney,

¹ I note that in 1975 Op. Att'y Gen. No. 75-067 my predecessor stated, in reliance upon art. XV, §4, and R.C. 3503.01, that a candidate for county office must be a resident of the county and a candidate for municipal office must be a resident of one of the appropriate precincts. That general rule is accurate for a person seeking to have his name placed on the ballot, but is more appropriately based on R.C. 3513.05 and R.C. 3513.261. See 1984 Op. Att'y Gen. No. 84-025; see also R.C. 311.01(B).

coroner, or engineer is supported by the fact that the General Assembly has established professional qualifications for those offices. See R.C. 309.02 (no person may be elected to the office of prosecuting attorney "who is not an attorney at law licensed to practice law in this state"); R.C. 313.02 ("[n]o person shall be eligible to the office of coroner except a physician who has been licensed to practice as a physician in this state for a period of at least two years immediately preceding his election or appointment as a coroner, and who is in good standing in his profession, or is a person who was serving as coroner on October 12, 1945"); R.C. 315.02 (no person may be elected or appointed to the office of county engineer "unless he is a registered professional engineer and a registered surveyor, licensed to practice in this state"). There may, accordingly, be occasions on which no qualified resident of the county seeks such an office. See Op. No. 84-025; 1950 Op. No. 1870 at 340 (quoting the opinion request from the prosecuting attorney of Holmes County: "in Holmes County there are only three persons eligible to serve as County Engineer, none of whom are interested in the position").

The office of county commissioner has no professional qualifications established by statute. See R.C. Chapter 305. It might be argued that a commissioner's responsibilities are of such nature that they should be performed by a resident of the county. See, e.g., *State ex rel. Hartshorn v. Walker*, 17 Ohio at 140-41 (stating, under earlier constitutional and statutory provisions: "when we take into consideration the general duties of the board of commissioners, the fact that they are the representatives of the county in its corporate capacity, that they are the corporate body in all suits and contracts, relating to the interests and funds of the county, etc., we cannot doubt that non-residence within the county is a disqualification, which necessarily vacates the office"). There is, however, no constitutional or statutory provision imposing a residency requirement upon one who holds the office of county commissioner. The statutes governing county commissioners are analogous to those governing county engineers, prosecuting attorneys, and coroners. The analysis applied to the offices of county engineer, prosecuting attorney, and coroner is, accordingly, applicable also to the office of county commissioner. It follows that, under existing constitutional and statutory provisions, residence within the county is not a qualification required to hold the office of county commissioner. See Ohio Const. art. X; R.C. Chapter 305; cf., e.g., Ohio Const. art. IV, §6(A)(3) ("each judge of a court of common pleas or division thereof shall reside during his term of office in the county, district, or subdivision in which his court is located"). See generally, e.g., *State ex rel. Boda v. Brown*, 157 Ohio St. 368, 373, 105 N.E.2d 643, 646 (1952) ("an officer must be qualified to hold his office not only when he is elected or appointed thereto but also throughout his term"); *State ex rel. Haff v. Pask*, 126 Ohio St. 633, 186 N.E. 809 (1933); *State ex rel. Attorney General v. Orr*, 61 Ohio St. 384, 56 N.E. 14 (1899); *State ex rel. Ives v. Choate*, 11 Ohio 511 (1842).

If the General Assembly intends that a particular officer must meet a residency requirement in order to retain his office, it may so state in express terms. See, e.g., R.C. 503.241 ("[w]hensoever any township officer ceases to reside in the township, or is absent from the township for ninety consecutive days, except in case of sickness or injury as provided in this section, his office shall be deemed vacant and the board of township trustees shall declare a vacancy to exist in such office"); R.C. 731.02 ("[a] member [of the legislative authority of a city] who...removes from his ward, if elected from a ward, or from the city, if elected from the city at large, shall forthwith forfeit his office"). See generally *State ex rel. Nichols v. Vinton County Board of Elections*, 20 Ohio St. 3d 1, 484 N.E.2d 690 (1985); *State ex rel. Spangler v. Board of Elections*, 7 Ohio St. 3d 20, 455 N.E.2d 1009 (1983); *State ex rel. Attorney General v. Orr*; *State ex rel. Ives v. Choate*, 11 Ohio at 513 (quoting Ohio Const. of 1802, art. III, §3: "[t]here shall be appointed in each county, not more than three, nor less than two Associate Judges, who, during their continuance in office, shall reside therein"); *State ex rel. Weber v. Hathaway*, 22 Ohio C.C. (n.s.) 314 (Cuyahoga County 1908). Since neither the Ohio Constitution nor Ohio statutory law imposes continued residency as a qualification for the office of county commissioner, there is no prohibition against a county commissioner's moving from the county and continuing to serve.

R.C. 305.02 sets forth procedures for filling vacancies in county offices, including the office of county commissioner. R.C. 305.03 defines particular instances in which an office shall be deemed vacant, as follows:

(A) Whenever any county officer fails to perform the duties of his office for ninety consecutive days, except in case of sickness or injury as provided in divisions (B) and (C) of this section, his office shall be deemed vacant.

(B) Whenever any county officer is absent because of sickness or injury, he shall cause to be filed with the board of county commissioners a physician's certificate of his sickness or injury. If such certificate is not filed with the board within ten days after the expiration of ninety consecutive days of absence, his office shall be deemed vacant.

(C) Whenever a county officer files a physician's certificate under division (B) of this section, but continues to be absent for an additional thirty days commencing immediately after the last day on which this certificate may be filed under division (B) of this section, his office shall be deemed vacant.

Any vacancy declared under this section shall be filled in the manner provided by section 305.02 of the Revised Code.

This section shall not apply to a county officer while in the active military service of the United States.

It does not, however, appear that R.C. 305.03 will be relevant in the situation with which you are concerned, since the county commissioner is not ill and intends to continue to perform his duties. See generally, e.g., *State ex rel. Trago v. Evans*, 166 Ohio St. 269, 141 N.E.2d 665 (1957) and 1985 Op. Att'y Gen. No. 85-062 (considering earlier version of R.C. 305.03). See also 1986 Op. Att'y Gen. No. 86-083.

It is, therefore, my opinion, and you are hereby advised, that a county commissioner who was elected while he was a resident of the county may continue to serve as county commissioner after moving to an adjoining county within the state.