

April 11, 2014

The Honorable Timothy J. McGinty
Cuyahoga County Prosecuting Attorney
Justice Center
Courts Tower
1200 Ontario Street
Cleveland, Ohio 44113

SYLLABUS:

2014-016

1. Members of a board of trustees of a school district free public library are “officers” for purposes of Article II, Section 38 of the Ohio Constitution and may be removed from office only for cause and upon complaint and hearing.
2. A board of education does not have authority to remove a member of a board of trustees of a school district free public library from office. (2004 Op. Att’y Gen. No. 2004-001, overruled in part; 2007 Op. Att’y Gen. No. 2007-020, questioned.)



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OPINION NO. 2014-016

The Honorable Timothy J. McGinty
Cuyahoga County Prosecuting Attorney
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Courts Tower
1200 Ontario Street
Cleveland, Ohio 44113

Dear Prosecutor McGinty:

You have requested an opinion concerning the removal of a member of a board of trustees of a school district free public library. Specifically, you have asked:

1. Are members of a board of trustees of a school district free public library “officers” within the meaning of Article II, Section 38 of the Ohio Constitution such that they may be removed from office prior to the expiration of their term only for cause and upon complaint and hearing pursuant to R.C. 3.07-.10?
2. Does a board of education that has the statutory authority to appoint members of a board of trustees of a school district free public library under R.C. 3375.15 have the power to remove members of that board from office?¹

Pursuant to R.C. 3375.14, a board of education of any city, exempted village, or local school district may establish a school library to provide library services to pupils of the school district. When a board of education establishes a school district free public library, “such library shall be under the control and management of a board of library trustees consisting of seven members” appointed by the board of education. R.C. 3375.15(A). The board of trustees of a school district free public library is a body politic and corporate that is capable of suing and being sued, contracting, holding property, and exercising other powers conferred upon it by law. R.C. 3375.33. Members of the board are appointed for a term of seven years and serve without compensation. R.C. 3375.15(B).

¹ We have rephrased and reordered your questions for ease of discussion.

Article II, Section 38 of the Ohio Constitution

Your first question asks whether members of a board of trustees of a school district free public library are “officers” within the meaning of Article II, Section 38 of the Ohio Constitution. This constitutional provision governs the removal of public officers from office and reads as follows:

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.

Ohio Const. art. II, § 38. 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. By requiring a complaint and hearing prior to the removal of a public officer, Article II, Section 38 of the Ohio Constitution “recognizes Ohio’s obligation to the cardinal doctrines included within [the] phrase, ‘due process of law.’” *State ex rel. Hoel v. Brown*, 105 Ohio St. at 487; *see also In re Removal of Kuehnle*, 161 Ohio App. 3d 399, 2005-Ohio-2373, 830 N.E.2d 1173, at ¶163 (Madison County) (“[t]he removal of a public officer is a judicial proceeding, and the [officer] is entitled to due process of law”).

Prior opinions of the Attorney General have determined that an individual is an “officer” for purposes of Article II, Section 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. 2001 Op. Att’y Gen. No. 2001-004, at 2-29; *accord* 1963 Op. Att’y Gen. No. 561, p. 573, at 574-75; *see also State ex rel. Landis v. Bd. of Comm’rs of Butler Cnty.*, 95 Ohio St. 157, 159, 115 N.E. 919 (1917) (prescribing similar criteria for determining whether a position is a public office for purposes of Article X, Section 2 of the Ohio Constitution). Applying these criteria to the present situation, we conclude that a member of a board of trustees of a school district free public library is an officer for purposes of Article II, Section 38 of the Ohio Constitution. Members of a board of trustees of a school district free public library are appointed pursuant to law and have a designation given to them by law. R.C. 3375.15(A). Additionally, they exercise functions concerning the public assigned to them by law. *See, e.g.,* R.C. 3375.15(B) (board of library trustees shall have the control and management of the school district free public library); R.C. 3375.40(B) (board of library trustees may “generally do all things it considers necessary for the establishment, maintenance, and improvement of the free public library under its jurisdiction”); R.C. 3375.40(H) (board of library trustees may “[m]ake and publish rules for the proper operation and management of the free public library and facilities under its jurisdiction”); R.C. 3375.40(I) (board of library trustees may assess fines for materials not returned in accordance with the board’s rules); R.C. 3375.40(J) (board of library trustees may establish and maintain a museum in connection with the free public library). As to the final criterion, members of a board of trustees of a school district free public library serve a seven-year term of office that is established by law. R.C. 3375.15(B). Accordingly, members of a board of

trustees of a school district free public library are “officers” for purposes of Article II, Section 38 of the Ohio Constitution and, therefore, may be removed from office only for cause and upon complaint and hearing.² See 2013 Op. Att’y Gen. No. 2013-004, at 2-36 (“the position of member of a board of library trustees established under R.C. Chapter 3375 is a public office”); 1969 Op. Att’y Gen. No. 69-102, at 2-211 (“the position of a member of the board of trustees of a school district public library is a ‘public office’ as that term is used in [R.C. 731.02,]” which prohibits members of the legislative authority of a city from holding any other public office).

You have asked whether members of a board of trustees of a school district free public library are officers that may be removed from office prior to the expiration of their term only for cause and upon complaint and hearing pursuant to R.C. 3.07-.10. R.C. 3.07-.10 were enacted by the General Assembly pursuant to Article II, Section 38 of the Ohio Constitution and provide a specific process for the removal of public officers. *Hughes v. Brown*, 62 Ohio App. 3d 417, 419, 575 N.E.2d 1186 (Franklin County 1989); 2001 Op. Att’y Gen. No. 2001-004, at 2-28. R.C. 3.07 states:

Any person holding office in this state, or in any municipal corporation, county, or subdivision thereof, coming within the official classification in Section 38 of Article II, Ohio Constitution, who willfully and flagrantly exercises authority or power not authorized by law, refuses or willfully neglects to enforce the law or to perform any official duty imposed upon him by law, or is guilty of gross neglect of duty, gross immorality, drunkenness, misfeasance, malfeasance, or nonfeasance is guilty of misconduct in office. Upon complaint and hearing in the manner provided

² We note that in instances when a member of a board of trustees of a school district free public library has vacated or abandoned his office, no removal proceeding is required by Article II, Section 38 of the Ohio Constitution. See, e.g., *State ex rel. Wilson v. Gulvas*, 63 Ohio St. 3d 600, 604, 589 N.E.2d 1327 (1992) (“noncompliance with a statutory prerequisite for holding office is a disqualification by operation of law and automatically creates a vacancy”); *State ex rel. Hover v. Wolven*, 175 Ohio St. 114, 191 N.E.2d 723 (1963) (when a public officer accepts a second office that is incompatible with the first, the first office is vacated, and it is not necessary to utilize R.C. 3.07 to remove the officer from that position); *State ex rel. Boda v. Brown*, 157 Ohio St. 368, 373, 105 N.E.2d 643 (1952) (“a clear cut distinction exists between a case involving the removal of a public officer as contemplated by the Constitution [art. II, § 38] and a case in which an official becomes disqualified by a provision of law from continuing in the office he holds”); *Hughes v. Brown*, 62 Ohio App. 3d 417, 423, 575 N.E.2d 1186 (Franklin County 1989) (a public officer who has been convicted of a felony need not be removed from office pursuant to a hearing because “the felony conviction is an accomplished fact” and pursuant to R.C. 2961.01, which prohibits a convicted felon from holding public office, the appointing authority must declare the office vacated); 1998 Op. Att’y Gen. No. 98-010 (syllabus, paragraph 2) (“[a] member of the board of library trustees of a school district free public library vacates and impliedly resigns from that position when she is subsequently elected and qualified as a member of the board of education that is responsible for making appointments to the board of library trustees”).

for in [R.C. 3.07-.10], such person shall have judgment of forfeiture of said office with all its emoluments entered thereon against him, creating thereby in said office a vacancy to be filled as prescribed by law. The proceedings provided for in such sections are in addition to impeachment and other methods of removal authorized by law, and such sections do not divest the governor or any other authority of the jurisdiction given in removal proceedings.

A removal proceeding based on any of the grounds enumerated in R.C. 3.07 is commenced by filing a written complaint with the court of common pleas specifically setting forth the charges against the officer. R.C. 3.08. The complaint must be signed by qualified electors of the jurisdiction that the officer serves, in a number not less than fifteen percent of the total vote cast for Governor at the most recent election. *Id.* A copy of the complaint must be served upon the officer, and a hearing must be held within thirty days after the filing of the complaint. *Id.* The removal proceedings are tried before a judge of the court of common pleas, unless the officer demands a trial by jury. *Id.*; *see also* R.C. 3.09 (appeal in removal cases); R.C. 3.10 (subpoena of witnesses and payment of fees in removal proceedings). Because we have determined that members of a board of trustees of a school district free public library are officers who fall within the scope of Article II, Section 38 of the Ohio Constitution, R.C. 3.07-.10 may be used by the electors to initiate removal proceedings against a board member. *See* 2001 Op. Att’y Gen. No. 2001-004, at 2-31.

In *State ex rel. Stokes v. Probate Court of Cuyahoga Cnty.*, 17 Ohio App. 2d 247, 246 N.E.2d 607 (Cuyahoga County 1969), the court considered whether enactment of R.C. 3.07-.10, which “provide a general, all-inclusive method for removal of any public official in the state[,]” repealed by implication other statutes setting forth a removal procedure for a particular public office. The court noted that R.C. 3.07 “explicitly preserves intact ‘other methods of removal authorized by law’” and, therefore, concluded that the enactment of R.C. 3.07-.10 in no way supplanted or superseded other removal laws. *State ex rel. Stokes v. Probate Court of Cuyahoga Cnty.*, 17 Ohio App. 2d at 258; *see also* 2001 Op. Att’y Gen. No. 2001-004, at 2-31. Applying similar reasoning, prior Attorney General opinions have concluded that removal proceedings may be initiated against a public officer under any applicable removal law, provided that the constitutional requirements of a complaint and hearing are satisfied. *See* 2001 Op. Att’y Gen. No. 2001-004 (syllabus, paragraph 2) (“[a]lthough members of a county veterans service commission are subject to removal from office pursuant to R.C. 3.07-.10, a judge of the court of common pleas, in the exercise of his authority under R.C. 5901.03 to remove a commission member from office, is not bound by the mandates of R.C. 3.07-.10, and may use his discretion in developing and applying an appropriate removal process, so long as he complies with the complaint and hearing requirements of Ohio Const. art. II, § 38”); 1963 Op. Att’y Gen. No. 561, p. 573, at 577 (the constitutional requirements of “complaint and hearing” must be read into the provisions of former R.C. 5153.08 (now R.C. 5153.03), which permitted a board of county commissioners to remove for cause a member of the county child welfare board (now renamed the county children services board)). While enactment of R.C. 3.07-.10 has not supplanted or superseded other removal laws, we are not aware of any statutory provisions specifically governing the removal

of a member of a board of trustees of a school district free public library from office.³ Absent a statute specifically governing the removal of a member of a board of library trustees, the general removal process set forth in R.C. 3.07-.10 may be used to initiate removal proceedings against a member of a board of trustees of a school district free public library.⁴

³ There may be, however, other provisions of the Revised Code that authorize the removal of a public officer, including a member of a board of trustees of a school district free public library, under specific circumstances. *See, e.g.*, R.C. 117.40 (the Attorney General, at the request of the Auditor of State, may bring a removal action against a public official of a public office, other than a state agency, who knowingly refuses to keep the office's accounts as required by R.C. Chapter 117 and rules adopted thereunder). For purposes of this opinion, we have limited our inquiry to the general removal provisions you have asked about, R.C. 3.07-.10, and statutes specifically authorizing the removal of a member of a board of trustees of a school district free public library.

⁴ It may also be suggested that a civil action in quo warranto may be brought in the name of the state pursuant to R.C. 2733.01(A) or R.C. 2733.01(B) to remove a member of a board of trustees of a school district free public library from office. R.C. 2733.01(A) authorizes a civil action in quo warranto “[a]gainst a person who usurps, intrudes into, or unlawfully holds or exercises a public office” and may be used to challenge an individual’s title to office. Based on the information provided to us by your office, it appears that your questions concern the removal of a member of a board of library trustees based on his conduct in office, and not a challenge to a member’s qualifications or appointment as could be pursued under R.C. 2733.01(A). *See generally Mason v. State ex rel. McCoy*, 58 Ohio St. 30, 50 N.E. 6 (1898) (distinguishing between a quo warranto action challenging title to office and a removal process based upon charges of misconduct in office).

R.C. 2733.01(B) authorizes a quo warranto action “[a]gainst a public officer, civil or military, who does or suffers an act which, by law, works a forfeiture of his office[.]” With respect to removal for misconduct in office, the Ohio Supreme Court has held that “[w]here the causes of removal from office are prescribed by statute which also provides a special mode of procedure for such removal, the statutory remedy is the exclusive one, and quo warranto will not lie.” *State ex rel. Attorney General v. McClain*, 58 Ohio St. 313, 50 N.E. 907 (1898) (syllabus, paragraph 2); *see also State ex rel. Johnson v. Talikka*, 71 Ohio St. 3d 109, 110, 642 N.E.2d 353 (1994) (“[e]xtraordinary writs like quo warranto provide extraordinary, not alternative remedies, and they will not lie where there exists an adequate remedy in the ordinary course of the law”). Accordingly, it appears that any action to remove a member of a board of trustees of a school district free public library for misconduct in office should be brought under the statutory scheme set forth in R.C. 3.07-.10, rather than under the general provisions of R.C. 2733.01(B). *See* 1985 Op. Att’y Gen. No. 85-006, at 2-21 n.2. *But see State ex rel. Watkins v. Fiorenzo*, 71 Ohio St. 3d 259, 260, 643 N.E.2d 521 (1994) (“[a] public official who is convicted of theft in office is statutorily disqualified from holding public office, and a writ of quo warranto will issue to remove the official from public office”).

A Board of Education Lacks Authority to Remove a Member of a Board of Trustees of a School District Free Public Library from Office

You ask also whether the board of education that has the statutory authority to appoint members of the board of trustees of a school district free public library has authority to remove a member of that board from office. As a creature of statute, a board of education has only those powers that are expressly granted to it by statute or necessarily implied therefrom. *Wolf v. Cuyahoga Falls City Sch. Dist. Bd. of Educ.*, 52 Ohio St. 3d 222, 223, 556 N.E.2d 511 (1990); 2011 Op. Att’y Gen. No. 2011-025, at 2-206. R.C. 3375.15 grants a board of education that has established a school district free public library the authority to appoint members of the library’s board of trustees. Neither R.C. 3375.15, nor any other statute of which we are aware, grants a board of education the authority to remove a member of the library’s board of trustees from office. Had the General Assembly intended a board of education to have authority to remove members of a board of trustees of a school district free public library from office, it could have used language similar to that used in other statutes governing the appointment of public officers. *See Lake Shore Elec. Ry. Co. v. Pub. Utils. Comm’n of Ohio*, 115 Ohio St. 311, 319, 154 N.E. 239 (1926) (had the legislature intended a particular meaning, “it would not have been difficult to find language which would express that purpose,” having used that language in other matters); *cf.* R.C. 306.02 (granting a board of county commissioners authority to appoint and remove for cause members of a county transit board); R.C. 339.02(H) (granting the appointing authority of a member of a board of county hospital trustees the authority to remove that member from the board for certain specified causes); R.C. 519.04 (granting a board of township trustees authority to appoint, and remove for certain specified causes, members of a township zoning commission).

Further, we are of the opinion that a board of education does not have implied authority to remove a member of a board of trustees of a school district free public library from office. 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. *Davidson v. Sheffield-Sheffield Lake Bd. of Educ.*, No. 89CA004624, 1990 WL 72316, at *3 (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)); *Mahoning Cnty. Bd. of Comm’rs v. Palkovic*, 12 Ohio Law Abs. 280, 281, 1932 WL 2341 (Mahoning County June 10, 1932); 1992 Op. Att’y Gen. No. 92-017, at 2-60; *see also Longley v. City of Bedford*, 2 Ohio Misc. 86, 89, 201 N.E.2d 922 (Bedford Mun. Ct. 1964); 1945 Op. Att’y Gen. No. 130, p. 92, at 95.⁵ Here, members of a board of trustees of a school

⁵ The general rule that the power of removal is incident to the power to appoint applies when the appointee serves at the pleasure of the appointing authority, as in the case of unclassified civil service employees. *See, e.g., Davidson v. Sheffield-Sheffield Lake Bd. of Educ.*, No. 89CA004624, 1990 WL 72316, at *3 (Lorain County May 23, 1990) (stating that “the power of appointment carries with it, by implication, the power of removal” in upholding the removal of an employee in the unclassified civil service); *State ex rel. Bd. of Educ. v. Miller*, 102 Ohio App. 85, 141 N.E.2d 301 (Lawrence County 1956) (upholding the removal of a clerk of a board of education in part because no statute fixed a definite term for such position, and the clerk served at the pleasure of the board of

district free public library are appointed pursuant to R.C. 3375.15 to serve a seven-year term of office. They, therefore, have a reasonable expectation of serving until the end of the term for which they are appointed, absent some conduct that constitutes statutory grounds for removal.⁶ See 1981 Op. Att’y Gen. No. 81-100, at 2-380. Additionally, as explained above, the removal a member of a board of trustees of a school district free public library is governed by the provisions of Article II, Section 38 of the Ohio Constitution and R.C. 3.07-.10. Accordingly, we are of the opinion that a board of education does not have authority to remove a member of a board of trustees of a school district free public library from office.

As noted in your opinion request, 2004 Op. Att’y Gen. No. 2004-001 is relevant to your inquiry. In that opinion, the Attorney General addressed the compatibility of the positions of a member of a board of education and an employee of a school district free public library. In finding the two positions incompatible, the Attorney General stated that a “board of education’s authority to appoint persons to a board of library trustees includes the concomitant power to remove persons from the board.” 2004 Op. Att’y Gen. No. 2004-001, at 2-3. We overrule 2004 Op. Att’y Gen. No. 2004-001 to the extent that it advises a board of education has authority to remove a member of a board of trustees of a school district free public library from office.⁷

education); *Kelley v. City of Cincinnati*, 7 Ohio N.P. 360, 362, 9 Ohio Dec. 611 (C.P. Hamilton County 1899) (stating that “the power to appoint includes and carries with it the power to remove” in addressing the removal of a city employee); see also *State ex rel. Minor v. Eschen*, 74 Ohio St. 3d 134, 139, 656 N.E.2d 940 (1995) (stating that “the power to appoint without interference also implies the power to discharge” in addressing the discipline and removal of an employee in the classified civil service). This general rule does not apply when the appointee serves a term that is fixed by law, or removal of the appointee is governed by constitutional or statutory provision.

⁶ In limited circumstances, the term of a member of a board of trustees of a school district free public library may be altered by the consolidation of the school district free public library with a county library district, see R.C. 3375.212, or the consolidation of the school district with another school district that operates a free public library under R.C. 3375.14. See 1965 Op. Att’y Gen. No. 65-119.

⁷ We also question the statement in 2007 Op. Att’y Gen. No. 2007-020, at 2-211 (relying, in part, on 2004 Op. Att’y Gen. No. 2004-001) that a board of county commissioners “has the authority to remove the members of a board of trustees of a community college district that the board appoints” under R.C. 3354.05. Members of the board of trustees of a community college district appointed by a board of county commissioners serve terms that are fixed in the manner specified in R.C. 3354.05(A) and (B).

Conclusions

It is, therefore, my opinion, and you are hereby advised as follows:

1. Members of a board of trustees of a school district free public library are “officers” for purposes of Article II, Section 38 of the Ohio Constitution and may be removed from office only for cause and upon complaint and hearing.
2. A board of education does not have authority to remove a member of a board of trustees of a school district free public library from office. (2004 Op. Att’y Gen. No. 2004-001, overruled in part; 2007 Op. Att’y Gen. No. 2007-020, questioned.)

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General