

OPINION NO. 92-017

Syllabus:

A board of township trustees and a village council that create a joint fire district pursuant to R.C. 505.371, but do not retain the authority to appoint or remove the persons who are to serve upon the board of fire district trustees, may not thereafter undertake joint legislative

action for the purpose of removing any of those individuals who have been appointed to serve upon that board.

To: David L. Landefeld, Fairfield County Prosecuting Attorney, Lancaster, Ohio

By: Lee Fisher, Attorney General, May 13, 1992

You have requested an opinion regarding the ability of a board of township trustees and the legislative authority of a municipal corporation to control the appointment and composition of the governing body of a joint fire district established pursuant to R.C. 505.371. You state in your letter that Liberty Township and the Village of Baltimore agreed several years ago to create a joint fire district pursuant to R.C. 505.371. R.C. 505.371 provides, in pertinent part, that the boards of township trustees of one or more townships and the legislative authorities of any one or more municipal corporations within or adjoining such townships "may, by adoption of a joint resolution by a majority of the members of each board of township trustees and by a majority of the members of the legislative authority of each municipal corporation, create a joint fire district comprising the municipal corporations and all or any portions of the townships as are mutually agreed upon." R.C. 505.371 also provides that any joint fire district that is so created shall be governed by a board of fire district trustees. Regarding the board's composition and powers, R.C. 505.371 reads, in part, as follows:

The governing body of the joint fire district shall be a board of fire district trustees, which shall include one representative from each board of township trustees and one representative from the legislative authority of each municipal corporation in the district. The board of fire district trustees may exercise the same powers as are granted to a board of township trustees in sections 505.37 to 505.45 of the Revised Code, including, but not limited to, the power to levy a tax upon all taxable property in the fire district as provided in section 505.39 of the Revised Code.

In March 1982 the board of township trustees and the village council adopted a joint resolution creating a joint fire district comprised of the entire territory of Liberty Township and the Village of Baltimore. You note that the joint resolution did not include any express provision addressed to the appointment and composition of a board of fire district trustees. Rather, those matters were addressed in a resolution subsequently adopted in June 1982 by the newly-constituted board of fire district trustees, which also described the procedures to be followed in holding board meetings and filling vacancies on the board. You have indicated that the appointment procedures set forth in that resolution were accepted by the township and village. A copy of that resolution accompanies your opinion request. Section 2 of the resolution reads as follows:

The appointment and terms of office of the members of the Board shall be as follows:

- (a) The member appointed by Baltimore Village Council shall serve during the term for which he was elected to council.
- (b) The member appointed by the Liberty Township Trustees shall serve during the term for which he was elected to the Liberty Township Board of Trustees.
- (c) All other members shall serve for a term of three years and until their successors are appointed, except for the initial term of office which shall be as follows:
 - (1) [Member A] 3 years
 - (2) [Member B] 2 years
 - (3) [Member C] 1 years
- (d) The members mentioned in paragraph (c) above shall be appointed as follows:
 - (1) The member of council shall appoint one member.
 - (2) The member of the board of trustees shall appoint one member.
 - (3) The four members thus appointed shall, by a majority

vote select and appoint the fifth member, notwithstanding the provisions of Sec. 4 below.¹ (Footnote added.)

You further state that when the village council member who serves on the board of fire district trustees recently sought to appoint a new member to the board pursuant to the foregoing provision, the three nongovernmental representatives on the board refused to recognize that appointment. They informed the village council member that they had adopted a new procedure for the appointment of nongovernmental representatives to the board of fire district trustees. The precise details of that new appointment procedure are not clearly set forth in any of the materials that accompany your opinion request. Accordingly, I shall presume that the nongovernmental representatives refused to recognize the appointment made by the village council member either because the manner of that appointment contravened the specific terms of the new appointment procedure, or because that procedure conferred no authority upon the village council member to appoint a nongovernmental representative to the board of fire district trustees. The nongovernmental representatives have further taken the position that Liberty Township and the Village of Baltimore have no power to affect the membership of the board of fire district trustees absent a complete dissolution of the joint fire district.

With regard to the foregoing, you wish to know whether the board of township trustees and the village council retain authority to control the appointment and composition of the board of fire district trustees. In particular, you have asked whether the board of township trustees and the village council may pass a joint resolution that provides for the removal of all nongovernmental representatives serving currently on the board, and the appointment of new representatives in the manner originally decided upon in 1982.

Power Conferred by R.C. 505.371 to Appoint or Remove Members of a Board of Fire District Trustees

I shall first consider whether, on the facts you have presented, R.C. 505.371 empowers the board of township trustees and the village council to remove the three nongovernmental representatives currently serving on the board of fire district trustees and appoint other individuals in their place. R.C. 505.371 requires a board of fire district trustees to include among its members one representative from each board of township trustees and one representative from the legislative authority of each municipal corporation in the district. R.C. 505.371 makes no further express statement regarding other individuals who may be included as members of a board of fire district trustees. More importantly, R.C. 505.371 does not specify or designate a particular method by which such representatives and other individuals are to be selected for, appointed to, or removed from the board of fire district trustees. It has been stated, therefore, that such matters are to be entrusted to the discretion of the executive and legislative bodies of those political subdivisions that have decided to participate in the formation of the joint fire district. 1979 Op. Att'y Gen. No. 79-082 (syllabus) (pursuant to R.C. 505.371, the members of a board of fire district trustees must include one representative from each board of township trustees and one representative from the legislative authority of each municipal corporation in the district; with respect to the total number of board members, the number of representatives from each constituent political subdivision and each constituent governing body, and their method of appointment so long as they are not popularly elected, the participating political subdivisions have substantial discretion).

This reading of R.C. 505.371 means that questions addressing both the appointment and removal of joint fire district trustees often have to be resolved on a case-by-case basis, requiring, in particular, an examination of the specific method and procedures selected by the board of township trustees and the municipal legislative authority, at the time of the joint fire district's creation, for the appointment of joint fire district trustees. Such authority as is granted to, or retained by, a board of township trustees and a municipal legislative authority to remove individuals previously appointed to serve upon a board of fire district trustees may be addressed, either explicitly or implicitly, by the specific method and

¹ Section 4 of the resolution also provides that "[t]hree members of the Board shall constitute a quorum and may conduct business by a majority vote of such quorum. All business shall be done by a majority vote."

related procedures selected for making those appointments. Further, the law generally recognizes that, absent constitutional or statutory provisions specifying otherwise, the power to remove an appointee from a public office or position is implied by the power to make such appointment. *See, e.g., State ex rel. Board of Education v. Miller*, 102 Ohio App. 85, 86, 141 N.E.2d 301, 302 (Lawrence County 1956) ("[w]hen the term or tenure of a public officer is not fixed by law, and the removal is not governed by constitutional or statutory provision, the general rule is that the power of removal is incident to the power to appoint," quoting a well-recognized legal encyclopedia); *Mahoning County Board of Commissioners v. Palkovic*, 12 Ohio Law. Abs. 280, 281 (App. Mahoning County 1932) (same); *Kelley v. City of Cincinnati*, 7 Ohio N.P. 360, 362 (C.P. Hamilton County 1900) ("it has been held in this state that the power to appoint includes and carries with it the power to remove"); *Longley v. City of Bedford*, 2 Ohio Misc. 86, 89, 201 N.E.2d 922, 925 (Mun. Ct. Bedford 1964) (same); 1945 Op. Att'y Gen. No. 130, p. 92, at 95 ("[t]he power to appoint ordinarily carries with it the power to remove an appointee, subject of course to restrictions that may be imposed by the law").

According to the information in both your opinion request and the documentary materials furnished in conjunction therewith, the board of township trustees and the village council, at the time this joint fire district was created in 1982, mutually agreed upon and established a procedure for the appointment of joint fire district trustees that conferred partial appointment authority upon the board and council. Specifically, under that procedure the board of township trustees and the village council each retain the power to appoint one of their members to the board of fire district trustees. That procedure further specifies that those two individuals are each authorized to appoint one nongovernmental representative to serve upon the board of fire district trustees, and that those four appointees shall, by a majority vote, select and appoint a third nongovernmental representative to serve as the fifth member of the board of fire district trustees. It is apparent, therefore, that the board of township trustees and the village council have not retained the authority to appoint directly the three nongovernmental representatives who are to serve upon the board of fire district trustees. Insofar as they are not, in the first instance, empowered to appoint the nongovernmental representatives who are to serve upon the board of fire district trustees, it follows that the authority to remove those nongovernmental representatives cannot be deemed to reside in the board of township trustees and the village council by inferring such power from the power to appoint such representatives.

Authority to Remove Members of a Board of Fire District Trustees by Joint Legislative Action

The question remains, however, whether the board of township trustees and the village council may overcome this lack of appointment authority, and the concomitant inability to remove the nongovernmental representatives from service upon the board of fire district trustees, by the enactment of a new joint resolution that will, instead, permit the board and council to remove the nongovernmental representatives, and thus enable the two governmental members of the board of fire district trustees to appoint three new nongovernmental representatives to the board. On the facts presented here, I conclude that the board of township trustees and the village council may not enact such a joint resolution. That the board of township trustees and village council each decided to establish the joint fire district and had a role in both its creation and that of the board of fire district trustees is the only basis I can discern for inferring such authority on the part of the township trustees and village council. I do not believe, however, that the mutual action of the board and council in that particular regard in any way empowers those two bodies to remove at will those individuals currently serving upon the board of fire district trustees as nongovernmental representatives.

In addition, inferring such authority on the part of the board of township trustees and the village council would fail to accord appropriate deference to the autonomy and independence that the General Assembly intends a board of fire district trustees to possess and exercise once the board has been duly constituted. Prior Attorney General opinions have stated that a joint fire district formed pursuant to R.C. 505.371 is a legal entity separate and distinct from the various political subdivisions that participate in its creation. 1989 Op. Att'y Gen. No. 89-021 at 2-97; 1988 Op. Att'y Gen. No. 88-074 at 2-365; 1985 Op. Att'y Gen. No.

85-071 at 2-276. Indeed, the General Assembly has, in R.C. 5705.01(A), classified a joint fire district as a "[s]ubdivision" with regard to the levying of taxes upon real and personal property within the district. The board of fire district trustees of a joint fire district has itself been characterized as a separate legal entity, *see In re Termeer*, 52 Ohio Misc. 101, 103, 369 N.E.2d 819, 820 (C.P. Franklin County 1977), upon which is conferred various powers, duties, and responsibilities related to the management and operation of a joint fire district, and the fulfillment of the district's statutory mission of providing fire protection services to persons and property within the district. Moreover, those duties and responsibilities are exclusively those of the board of fire district trustees, and are to be exercised independently of the individual boards of township trustees and municipal legislative authorities that have acted to form the joint fire district. Thus, for example, the General Assembly defines a board of fire district trustees as both a "[t]axing authority" and "bond issuing authority" in R.C. 5705.01(C) for purposes of R.C. Chapter 5705. R.C. 505.371 states unambiguously, and without any further qualification, that a board of fire district trustees may exercise the same powers as are granted to a board of township trustees in R.C. 505.37-45. Such powers include, but are not limited to, the power to levy a tax upon all taxable property in the district as provided in R.C. 505.39. *Id.* See also R.C. 505.37 (addressing, *inter alia*, activities that may be undertaken or pursued by a board of township trustees in conjunction with township fire protection services, cooperative agreements with other townships or other political subdivisions for the joint purchase, maintenance, use, and operation of fire-fighting equipment, and the management and operation of a township fire district, R.C. 505.37(A)-(C)); R.C. 505.373 (adoption of fire code by board of township trustees); R.C. 505.38 (appointment of fire chief for township fire department or other fire district; employment of fire fighters); R.C. 505.39 (board of township trustees may levy tax for fire protection services); R.C. 505.391 (charges that may be assessed by a board of township trustees for responses to false alarms from automatic alarm systems in commercial establishments).

Thus, a board of township trustees and a village council that create a joint fire district pursuant to R.C. 505.371, but do not retain the authority to appoint or remove individuals who are to serve upon the board of fire district trustees, may not thereafter undertake joint legislative action for the purpose of removing those individuals who have been so appointed.

Finally, I wish to emphasize that the foregoing conclusion does not mean that, absent a formal dissolution of the joint fire district, there are no avenues available in this particular instance by which to effect a change in the present composition of the board of fire district trustees. Moreover, I am not expressing an opinion about the propriety of the earlier action taken by the several fire district trustees to change the procedure for making appointments to the board, or their subsequent refusal to honor the appointment of a new member to the board by the village council member. Your letter makes it clear that the board of township trustees and village council desire to remove certain members of the board of fire district trustees because those individuals have purportedly changed the procedures, as originally approved by the board of township trustees and village council, by which appointments are made to the board of fire district trustees. Nothing in the materials that accompany your opinion request suggests that members of the board of fire district trustees are lawfully authorized or empowered to alter those appointment procedures. Thus, insofar as certain of the board's nongovernmental members have attempted to change those procedures, or have acted in contravention of those procedures, they may be subject to removal from their positions on the board pursuant to the terms of R.C. 3.07 and R.C. 3.08. R.C. 3.07 provides that any person holding office in Ohio, or in any municipal corporation, county, or subdivision thereof, within the official classification in Ohio Const. art. II, §38,² "who

² Article II, §38 of the Ohio Constitution states the following:

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.

willfully and flagrantly exercises authority or power not authorized by law...or is guilty of...misfeasance, malfeasance, or nonfeasance" is guilty of misconduct in office. R.C. 3.07 further provides that upon complaint and hearing in the manner set forth 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." See generally *2,867 Signers of Petition v. Mack*, 66 Ohio App. 2d 79, 419 N.E.2d 1108 (Medina County 1979); *State ex rel. Stokes v. Probate Court*, 17 Ohio App. 2d 247, 249, 246 N.E.2d 607, 610 (Cuyahoga County 1969) (R.C. 3.07-.10 "provide a general, all-inclusive method for removal of any public official in the state of Ohio"), *appeal dismissed*, 22 Ohio St. 2d 120, 258 N.E.2d 594 (1970). R.C. 3.08 sets forth the procedure for the removal of public officers on any of the grounds described in R.C. 3.07. R.C. 3.08 specifically provides that an action for the removal of a public officer for any reason described in R.C. 3.07 may be commenced by the filing of a complaint signed by qualified electors "not less in number than fifteen per cent of the total vote cast for governor at the last preceding election for the office of governor in the state or political subdivision whose officer it is sought to remove."

Conclusion

It is, therefore, my opinion, and you are advised that a board of township trustees and a village council that create a joint fire district pursuant to R.C. 505.371, but do not retain the authority to appoint or remove the persons who are to serve upon the board of fire district trustees, may not thereafter undertake joint legislative action for the purpose of removing any of those individuals who have been appointed to serve upon that board.