

## OPINION NO. 72-029

**Syllabus:**

When a vacancy exists on a board of trustees of public affairs and the person who is nominated by the mayor to fill the vacancy fails to receive the confirmation by the village council, the mayor may not appoint a person to serve as an "acting trustee". The vacancy can be filled only through an appointment by the mayor, subject to confirmation by the village council.

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**To: James R. Scott, Guernsey County Pros. Atty., Cambridge, Ohio**  
**By: William J. Brown, Attorney General, April 14, 1972**

Your request for my opinion asks the following questions:

"1. When a vacancy exists on the Board of Trustees for Public Affairs established pursuant to Ohio Revised Code 735.28, and the person who is nominated by the Mayor to fill the vacancy fails to receive the confirmation by the Village Council, can the Mayor appoint a person to serve as an 'Acting Trustee' in the vacant position until such time as an appointment is made by the Mayor with the confirmation of the Village Council?

"2. In the event an 'Acting Trustee' can be appointed, and is so appointed, can this Trustee exercise the full powers of the office of a member of the 'Board of Trustees of Public Affairs?'"

I will assume that the village in question does not have a charter. Should a charter exist, pursuant to the "home-rule" amendment (Article XVIII, Sections 3 and 7, Ohio Constitution), the applicable charter provisions providing the method of filling local offices would apply. State, ex rel. Pettit v. Wagner, 170 Ohio St. 297 (1960); State, ex rel. Devine v. Hoermle, 168 Ohio St. 461 (1959). However, where no charter is involved, the municipality is bound by the state statutes even though it may have a conflicting city ordinance. Morris v. Roseman, 162 Ohio St. 447 (1954); State, ex rel. Pettit v. Wagner, supra, at page 302.

The general provision for the filling of a vacancy in a municipal office is found in Section 733.31, Revised Code, which provides as follows:

"In case of the death, resignation, removal, or disability of any officer or director in any department of any municipal corporation, the mayor thereof shall fill the vacancy by appointment, and such appointment shall continue for the unexpired term and until a successor is appointed, or elected and qualified, or until such disability is removed."

There is, however, a special statutory provision for vacancies occurring in a village board of trustees of public affairs. Section 735.28, Revised Code, provides in pertinent part as follows:

"In each village in which a water works, electric light plant, artificial or natural gas plant, or other similar public utility is situated, or when the legislative authority thereof orders a water works, electric light plant, natural or artificial gas plant, or other similar public utility, to be constructed, \* \* \* such legislative authority shall establish a board of trustees of public affairs, which shall consist of three members who are residents of the village.

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"When the legislative authority establishes such board, the mayor shall appoint the members thereof, subject to the confirmation of the legislative authority. The successors of such appointed members shall be elected at the next regular election of municipal officers held in the village which occurs more than one hundred days after the appointment.

"In case of a vacancy in such board from death, resignation, or otherwise, it shall be filled for the unexpired term by appointment by the mayor, subject to confirmation by the legislative authority.

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In construing such statutes, resort must be had to the usual rules of statutory construction. "We have held so many times that it has become axiomatic that a special statutory provision which applies to a specific subject matter constitutes an exception to a general statutory provision covering other subject matter as well as the specific subject matter". Fisher Bros. v. Bowers, 166 Ohio St. 191, 196 (1956). Section 735.28, supra, specifically refers to vacancies within a village board of trustees of public affairs. Thus, Section 735.28, supra, is an exception to the general statutory procedure for filling vacancies, i.e., Section 733.31, supra.

The only statutory provision for filling a vacancy in the village board of trustees of public affairs is through appointment by the mayor, subject to confirmation by the legislative authority. No other method is provided for or authorized by law. The powers of the mayor appear in Section 733.24, Revised Code, which provides that he shall be the chief conservator of the peace there in and shall have the powers and duties provided by law". The courts have stated that, "The mayors of villages have only such jurisdiction and authority as is given them by the legislature". Ex parte Rhein, 26 N.P. (n.s.) 325 (1926). I conclude, therefore, that Section 735.28, supra, would be meaningless if the mayor could appoint, at will, an "acting trustee", following denial of confirmation, since the mayor could presumably appoint the same person, who was denied confirmation, as "acting trustee". This is

obviously the type of situation the legislature hoped to guard against by providing for a "check and balance" system of filling vacancies.

A similar situation was presented in State, ex rel. McCray v. Burk, 20 Ohio C.C.R. 399 (1914). In that case, a mayor attempted to fill a vacancy in the office of street commissioner by appointment. Section 4363, General Code (now Section 735.31, Revised Code), provides for initial appointment of a street commissioner through appointment by the mayor, with confirmation by the council. The Section does not provide for a procedure for filling a vacancy. The Court noted at page 403 in State, ex rel. McCray v. Burk, supra:

"If a vacancy appointment to the office of street commissioner required no confirmation by the council, then an unscrupulous mayor could easily keep one of his creatures in office despite the opposition of council."

In answer to your questions it is my opinion, and you are so advised, that when a vacancy exists on a board of trustees of public affairs and the person who is nominated by the mayor to fill the vacancy fails to receive the confirmation by the village council, the mayor may not appoint a person to serve as an "acting trustee". The vacancy can be filled only through an appointment by the mayor, subject to confirmation by the village council.