OPINION NO. 76-073

Syllabus:

1. A de facto officer is one who holds an office and performs the duties thereof with the acquiesence of the people and the public authorities and has the reputation of being the officer he assumes to be and is dealt with as such. It is not necessary that a de facto officer derives his appointment from one competent to invest him with good title to the office, but only that he derive his appointment from one having colorable authority to appoint.

2. The right of a de facto officer to hold office may not be collaterally attacked in a proceeding to which he is not a party. Until a de facto officer is successfully challenged in a quo warranto proceeding and removed from office, his actions are as valid as those of a de jure officer.

To: John D. Shimp, Sandusky County Pros. Atty., Fremont, Ohio
By: William J. Brown, Attorney General, November 8, 1976

I have before me your request for my opinion concerning the propriety of several appointments of deputy county sheriffs. It is my understanding that these appointments were made by the chief deputy, rather than by the sheriff himself and that the propriety of the appointments has recently come into question.

Your specific questions read as follows:

(1) What is the status of a de facto public officer such as a deputy sheriff, insofar as acts performed by him under color of office are concerned?

(2) Are the acts of a de facto public officer, even though he be improperly appointed, subject to a collateral attack?

(3) To constitute one appointed to legally existing office a de facto officer, is it necessary that he should derive his appointment from one competent to vest him with good title to the office?

At the outset, I would note from materials forwarded with your request that the matter of whether the appointments in question were improper has not been resolved. It is my understanding that the chief deputy has been appointed by order of the Court of Common Pleas of Sandusky County as acting sheriff during any absence of the sheriff. The factual circumstances surrounding these appointments have not been made known to me. While, in response to your questions, my opinion is directed toward the contingency that the officers in question were improperly appointed, it should be stressed that the matter of whether these deputies were duly appointed de jure officers remains open.

However, where there has been some defect in the process of appointment or election of a public officer, the question of an individual's status as a de facto officer and the validity of his acts as such have been addressed on numerous occasions by the Supreme Court of Ohio. I had occasion to consider these questions in 1975 Op. Att'y Gen. No. 75-046.

It has been an established doctrine in Ohio for over one hundred years that one who has the reputation of being the officer he assumes to be is a de facto officer, although he may not be a properly appointed officer in point of law. State v. Alling, 12 Ohio 16, (1843); Smith v. Lynch, 29 Ohio St. 261, (1876); State ex rel. Herron v. Smith, 44 Ohio St. 348, (1886); Steiss v. State, 103 Ohio St. 33, (1921); State, ex rel. Wescott v. Ring, 126 Ohio St. 203, (1933); State, ex rel. Paul v. Russell, 162 Ohio St. 254, (1954); State, ex rel. Marshall v. Keller, 10 Ohio St. 2d 85, (1967); State v. Staten, 25 Ohio St. 2d 107, (1971).

In State, ex rel. Paul v. Russell, supra, the Court discussed the purpose of this doctrine at page 257:

> "It has been said that the doctrine of de-facto officers rests on the principle of protection to the interests of the public and third parties, not to protect or to vindicate the acts or rights of the particular de facto officer or the claims or rights of rival claimants to the particular office. The law validates the acts of de facto officers as to the public and third persons on the ground that, although not officers de jure, they are, in virtue of the particular circumstances, officers in fact whose acts public policy requires should be considered valid."

The question of when an individual shall be recognized as a de facto officer has been considered on numerous occasions. In Ex Parte Strang, 21 Ohio St. 610, pp. 618-619 (1871), the Court, in discussing this matter expressly considered your third question and specifically rejected the proposition that a de facto officer could receive authority only from a person or body legally competent to invest the officer with good title to the office. Paragraph 2 of the syllabus in Strang provides:

> "To constitute an officer de facto of a legally existing office it is not necessary that he should derive his appointment from one competent to invest him with good title to the office. It is sufficient if he derives his appointment from one having colorable authority to appoint . . . ."

As discussed in State, ex rel. Marshall v. Keller, supra, at pp. 87-88, further delineation of the definition of a de facto officer has been made. As expressed in State, ex rel. Witten v. Ferguson, 148 Ohio St. 702, 710, (1947), a de facto officer may be identified by the following criteria:

> "Thus, where an officer holds the office and performs the duties thereof with the acquiescence of the public authorities and the public and has the reputation of being the officer he assumes to be and is dealt with as such, he is, in the eyes of the law, a de facto officer."

This definition of a de facto officer was subsequently approved and followed in State v. Staten, supra, in 1971 in a situation involving a criminal prosecution. The Court in State v. Staten again concluded that the actions of a de facto officer are as valid as those of a de jure officer and approved and followed this conclusion as expressed in Ex Parte Strang, supra.

Further, as discussed in both Ex Parte Strang, supra, and State ex rel. Staten, supra, the right of a de facto officer to hold office may not be questioned in a collateral proceeding. Until a de facto officer is successfully challenged in a quo warranto proceeding, his actions are as valid as those of a de jure officer. See also State, ex rel. Newman v. Jacobs, 17 Ohio St. 143, 153, (1848); State v. Gardner, 54 Ohio St. 24, (1896); Steiss v. State, supra; Greenlee, Clerk v. Cole, 113 Ohio St. 585, (1925).

In answer to your questions, therefore, it is my opinion and you are so advised that:

1. A de facto officer is one who holds an office and performs the duties thereof with the acquiesence of the people and the public authorities and has the reputation of being the officer he assumes to be and is dealt with as such. It is not necessary that a de facto officer derives his appointment from one competent to invest him with good title to the office, but only that he derive his appointment from one having colorable authority to appoint.

2. The right of a de facto officer to hold office may not be collaterally attacked in a proceeding to which he is not a party. Until a de facto officer is successfully challenged in a quo warranto proceeding and removed from office, his actions are as valid as those of a de jure officer.