

May 13, 2021

The Honorable Juergen A. Waldick  
Allen County Prosecuting Attorney  
204 N. Main St., Suite 302  
Lima, Ohio 45801

SYLLABUS: 2021-012

Pursuant to R.C. 305.02, when a county treasurer-elect resigns prior to the start of the elected term, the person appointed to the vacancy will hold office until a successor is elected and qualified, and a successor shall be elected at the next general election for state and county officers. (1984 Op. Att’y Gen. No. 84-063, followed, and 2015 Op. Att’y Gen. No. 2015-038, overruled, as a result of statutory amendment.)



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OPINION NO. 2021-012

The Honorable Juergen A. Waldick  
Allen County Prosecuting Attorney  
204 N. Main St., Suite 302  
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Dear Prosecutor Waldick:

You have requested an opinion from my office regarding the appointment of an individual to a vacant county office. I have framed your question as follows:

When a county treasurer-elect resigns prior to the start of the elected term, does the person appointed to the vacancy hold office for the full four-year elected term, or only until a successor is elected and qualified at the next general election for state and county officers?

You report that the county treasurer-elect of Allen County, who was elected to a four-year term beginning September 6, 2021, has announced that she is resigning the position and will not take office in September. Pursuant to R.C. 305.02(B), the county central committee of the political party that nominated the treasurer-elect will appoint a person to the vacancy. You ask what time period the person appointed to the vacancy will hold the office.

I conclude that the person appointed to the vacancy will hold office until a successor is elected and qualified, and that a successor shall be elected at the next general election for state and county officers.

I

R.C. 305.02 sets forth the process by which vacancies in county offices are filled.

In 1984, an Attorney General opinion interpreted a previous version of R.C. 305.02 and answered a question identical to the one that you ask. 1984 Op. Att'y Gen. No. 84-063. The 1984 opinion concluded that a person appointed to a vacancy created by the resignation of an officer-elect whose term has not yet begun "shall hold office until a successor is elected and qualified, and a successor shall be elected at the next general election for state and county officers." *Id.* at syllabus.

In 1984, R.C. 305.02(A) and (B) stated:

(A) If a vacancy in the office of county commissioner, prosecuting attorney, county auditor, county treasurer, clerk of the court of common pleas, sheriff, county recorder, county engineer, or coroner occurs more than forty days before the next general election for state and county officers, a successor shall be elected at such election for the unexpired term unless such term expires within one year immediately following the date of such general election.

In either event, the vacancy shall be filled as provided in this section and the appointee shall hold office until a successor is elected and qualified.

(B) If a vacancy occurs from any cause in any of the offices named in division (A) of this section, the county central committee of the political party with which the last occupant of the office was affiliated shall appoint a person to hold

the office and to perform the duties thereof until a successor is elected and has qualified, except that if such vacancy occurs because of the death, resignation, or inability to take the office of an officer-elect whose term has not yet begun, an appointment to take such office at the beginning of the term shall be made by the central committee of the political party with which such officer-elect was affiliated. Am. S.B. No. 369, 105th Gen. A. (1963), at 190-191; *see also* 1984 Op. Att’y Gen. No. 84-063, at 2-202.

1984 Op. Att’y Gen. No. 84-063 analyzed the lack of the phrase “until a successor is elected and qualified” in the clause applying to a vacancy occurring due to the resignation of an officer-elect whose term has not yet begun. The opinion found that, “when R.C. 305.02(A) and (B) are read together, it must be concluded that the exception of R.C. 305.02(B) is qualified by the language of R.C. 305.02(A).” 1984 Op. Att’y Gen. No. 84-063, at 2-204. And that latter statute states that “a vacancy is to be filled as provided in R.C. 305.02, the appointee is to hold his office until a successor is elected and qualified, and a successor shall be elected at the next general election for the state and county officers.” *Id.* The 1984 opinion concluded that the person appointed to the vacancy holds office until a successor is elected and qualified at the next general election. *Id.* at the syllabus; *see also* 1969 Op. Att’y Gen. No. 69-052, at 2-113 (also finding that the time period in R.C. 305.02(A) applies to vacancies occurring prior to the start of a term).

R.C. 305.02(A) remains the same as it was in 1984. In 2016, however, the legislature amended R.C. 305.02(B). Sub. S.B. No. 63, 131st Gen. A. (2016), at 1. I must analyze whether this amendment changes the conclusion reached in the 1984 Opinion.

I have copied the current statute here, and underlined the new additions. I have also shown, with strikethroughs, the text deleted from the statute:

(B) If a vacancy occurs from any cause in any of the offices named in division (A) of this section, the county central committee of the political party ~~with which that~~ nominated the last occupant of the office ~~was affiliated as a candidate for that office for the current term~~ shall appoint a person to hold the office and to perform the duties thereof until a successor is elected and has qualified, except that if such vacancy occurs because of the death, resignation, or inability to take the office of an officer-elect whose term has not yet begun, an appointment to take such office at the beginning of the term shall be made by the central committee of the political party ~~with which such~~ that nominated the officer-elect ~~was affiliated as a candidate for that term~~. Sub. S.B. No. 63, 131st Gen. A (2016), at 1.

As is made clear by comparing the 1984 and current version of R.C. 305.02(B), the 2016 amendment changed the political party that chooses the vacancy from the party with which the prior officer or officer-elect was affiliated to the political party that nominated the officer or officer-elect.

You ask whether the phrase “for that term” after “that nominated the officer-elect as a candidate” means the appointed person now serves for the full four-year elected term. The answer is “no.” The best reading of the phrase “for that term” is that it specifies the political party that appoints the person, not the term of office for which the appointed person serves.

The phrase “for that term” is necessary to clarify who makes the appointment in the event that the officer-elect was nominated by different political parties for different elections. For example, if an officer-elect were nominated in the 2016 election as a Democrat, switched parties and was nominated as a Republican in 2020, and then resigned before the 2020 term began, the Republican central committee would make the appointment.

The phrase “for that term” specifies *who* makes the appointment—the central committee of the party affiliated with the officer or officer-elect *for the term* that officer or officer-elect is declining to serve. It does not specify what *term* the appointed person serves. This is plain from the text of R.C. 305.02(B). The first clause of R.C. 305.02(B) says that “the county central committee of the political party that nominated the last occupant of the office as a candidate for that office *for the current term* shall appoint a person to hold the office and to perform the duties thereof until a successor is elected and has qualified[.]” The placement of “for the current term” after “the political party that nominated the last occupant of the office as a candidate for that office” and prior to “shall appoint a person to hold the office” shows that “for the current term” modifies the political party that makes the appointment, and does not specify the term that the appointee serves. Presumably, the legislature intended the same results when it used materially identical language in identical ways twice in the same sentence—the one-word addition of “current” in the first use is needed to specify that the party that nominated the officer for the term he is *currently* holding makes the appointment.

Moreover, reading the addition of “for that term” as modifying the *term* the appointee serves ignores the fact that the 2016 amendment did not modify R.C. 305.02(A), which is the subsection that primarily addresses the period for which the appointee serves.

The amendment only modified R.C. 305.02(B), which primarily addresses *who* makes the appointment.

Because the plain language of the 2016 amendment to R.C. 305.02(B) shows that the amendment changed *who* makes an appointment to fill a vacancy, not *the term* that the appointee holds office, there is no reason to differ from the conclusion of 1984 Op. Att’y Gen. No. 84-063 that the appointee holds office until the next general election for county and state officers.

## II

The history of the 2016 amendment to R.C. 305.02(B) confirms that the amendment did not change the term that an appointee serves.

Between the issuance of 1984 Op. Att’y Gen. No. 84-063 and the 2016 amendment to R.C. 305.02(B), an Ohio Supreme Court decision and an Attorney General opinion interpreted R.C. 305.02 and related statutes. The amendments would appear to be a response to these decisions.

First, in 1995 the Ohio Supreme Court issued a decision interpreting then-R.C. 733.08, which controlled how vacancies in city or village mayors’ offices were filled, and was similar to the provisions for county offices in R.C. 305.02. The court considered the meaning of the phrase “the political party with which the last occupant of the office was affiliated.” *State ex rel. Herman v. Klopfleisch*, 72 Ohio St.3d 581, 584-585, 651 N.E.2d 995 (1995). The Supreme Court found that the word “affiliated,” as used in R.C. 733.08, does not solely mean the last political party from which the mayor was elected. The determination of “affiliated” can also take into account what primaries the mayor had voted in, what party the mayor publicly identified as, and similar characteristics. *Herman* at 585-587.

Second, in 2015, the Attorney General issued an opinion interpreting the meaning of the word

“affiliated” as used in then-R.C. 305.02(B). 2015 Op. Att’y Gen. No. 2015-038, Slip Op. at 2; 2-355 to 2-356. Citing *Herman*, the opinion found that “affiliated” is not equivalent to “elected as,” and found that “the party affiliation of the last occupant of a county office for the purpose of R.C. 305.02(B) is the last occupant’s affiliation at the time the vacancy occurs, taking into account all the relevant circumstances of a person’s political activities.” 2015 Op. Att’y Gen. No. 2015-038, Slip Op. at 3-4; 2-358.

In May 2016, five months after the issuance of 2015 Op. Att’y Gen. No. 2015-038, the legislature amended a pending bill to change R.C. 305.02(B) to its current version, and passed the bill shortly thereafter. Sub. S.B. No. 63, 131st Gen. A. (2016), at 1. The legislature’s action to amend R.C. 305.02(B) so quickly after the issuance of 2015 Op. Att’y Gen. No. 2015-038 indicates that the amendment to the section was intended to modify *who* appoints people to a vacancy—the party that nominated the officer or officer-elect at his most recent election—not the *term* the appointee holds. In other words, the General Assembly wanted to change course from the just-discussed interpretations, leaving no doubt that the officer or officer-elect is replaced by the party that nominated him, *not* the party with which he was affiliated.

For what it is worth, the Legislative Service Commission’s (“LSC”) report on Sub. S.B. No. 63, 131st Gen. A. (2016) supports this interpretation. The LSC report states that “the act clarifies the procedure for filling a vacancy if the former officer or officer-elect has changed the person’s political party affiliation between the time of the election and time of the vacancy.” *Legislative Service Commission Final Analysis* of Sub. S.B. No. 63, 131st Gen. A. (2016) at 7-8. The report explicitly mentions *Herman*, 72 Ohio St.3d 581, 651 N.E.2d 995, and 2015 Op. Att’y Gen. No. 2015-063 when discussing the need for the amendment. *Id.* at 8. The report includes a chart noting the changes in *who* makes the appointment, but makes no mention in any



change in the *term* the appointee serves. *Id.* The LSC report thus confirms that the purpose of the amendment was to change the political party that makes the appointment, not the term the appointee serves.

As such, 2015 Op. Att’y Gen. No. 2015-038 has been overruled as a result of statutory amendment.

### Conclusion

Accordingly, it is my opinion, and you are hereby advised that:

Pursuant to R.C. 305.02, when a county treasurer-elect resigns prior to the start of the elected term, the person appointed to the vacancy will hold office until a successor is elected and qualified, and a successor shall be elected at the next general election for state and county officers. (1984 Op. Att’y Gen. No. 84-063, followed, and 2015 Op. Att’y Gen. No. 2015-038, overruled, as a result of statutory amendment.)

Respectfully,



DAVE YOST  
Ohio Attorney General