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SYLLABUS:

Members of a county child welfare board are "public officers" within the meaning of Section 38, Article II of the Ohio Constitution and, in accordance with Section 5153.08, Revised Code, may be removed by the board of county commissioners only upon "complaint and hearing" and only "for good cause."

Columbus, Ohio, October 9, 1963

Hon. Lynn B. Griffith, Jr.
Prosecuting Attorney
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Warren, Ohio

Dear Sir:

I have received your letter requesting my opinion on the following questions:

"1. Are members of the County Child Welfare Board public officers within the meaning of Article II, Sec. 38, of the Constitution and Sections 3.07 and 3.08 of the Ohio Revised Code?

"2. Can members of the County Child Welfare Board be summarily removed by the County Commissioners under Section 5153.08 of the Ohio Revised Code?

"3. Would a removal under Section 5153.08 O.R.C. be effective if a formal complaint specifying the charges on which the removal was based was served upon the members and they were given and opportunity to appear at a hearing before the Board of County Commissioners to defend against the charges?

"4. If Ohio Revised Code Section 5153.08 is unconstitutional under any procedure which might be followed, are the members of the Child Welfare Board subject to removal under the provisions of O.R.C. Sections 3.07 and 3.08?"

The answer to each successive question depends upon the answer to the preceding question; therefore, they shall be considered in numerical order.

The Constitution of Ohio does not employ or define the term "public officer" and no authority has been found which specifically categorizes a member of a County Child Welfare Board as a "public officer." Various cases do, however, outline general prerequisites to a determination that certain officials are "public officers." The members of the County Child Welfare Board fulfill those prerequisites. In the case of *State ex rel. v. Brennan*, 49 Ohio St., 33, the Ohio Supreme Court cited with approval a definition of "public officer" found in the case of *Bradford v. Justice*, 33 Ga. 332:

"Where an individual has been *appointed* or elected, *in a*

*manner prescribed by law, has a designation or title given him by law, and exercises functions concerning the public, assigned to him by law, he must be regarded as a public officer. * * **

“In passing it may be remarked that emolument, though an ordinary incident, is not a necessary one, as has been held in diverse cases in this state. * * *”

(Emphasis added)

The foregoing statement, in respect to County Child Welfare Board members, is supported by sections of the Revised Code which provide that such members shall be *appointed in a manner prescribed by law* (Section 5153.08), that they *shall have a designation given them by law* (Sections 5153.04 and 5153.07) and that said members *exercise functions concerning the public assigned to them by law* (Section 5153.16).

44 Ohio Jurisprudence 2d, page 492, Public Officers, Section 6, further refines the definition of “public officer”:

“A public office must have some permanency and continuity, and one of the characteristics of a public office as named in the definitions is *tenure*, that is, duration and continuance. * * * In other words, the person who is to be regarded as a public officer must be clothed by virtue of law with authority not incidental or transient, but for such time as *denotes duration and continuance*. * * *”

(Emphasis added)

By Section 5153.08, Revised Code, the board members serve a four year term; this provision adequately supplies the “tenure,” “duration,” and “continuance” called for in the passage above cited.

In light of the foregoing analysis, it is my opinion that members of the County Child Welfare Board are “public officers” within the meaning of Section 38 of Article II, Ohio Constitution and Sections 3.07 and 3.08, Revised Code.

Your second inquiry may be disposed of by a close examination of the Revised Code, the Ohio Constitution, and the case cited in your letter. The word “summarily” as used in your second question is *ipso facto* in contradistinction to the most basic tenet of law, i.e. due process of law. In overruling the constitutional validity of a statute which provided for summary removal of a county treasurer, the Ohio Supreme Court discussed the concept of due process and

quoted from the Dartmouth College Case (4 Wheat 518, 4 L. Ed. 629) in which Daniel Webster spoke on the subject in these terms:

“By the law of the land is most clearly intended the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society.” (quoted in *State, ex rel. Hoel v. Brown*, 105 Ohio St., 479.)

Provision for the removal of board members under Section 5153.08, Revised Code, is as follows:

“* * *The Board of county commissioners shall appoint four members of the board and for good cause may remove any member so appointed. * * *”

Query now whether this section is contrary to the requirements of Section 38 of Article II, Ohio Constitution, which is 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 causes provided by law*; and this method of removal shall be in addition to impeachment or other method of removal authorized by the constitution.”

(Emphasis added)

Inasmuch as Section 5153.08, Revised Code, provides for the removal of members of the County Child Welfare Board which we have defined as being “public officers” but does not provide for “complaint and hearing” as required in Section 38 of Article II, Ohio Constitution, it might be argued that Section 5153.08, *supra*, is unconstitutional. On the other hand, it is difficult to visualize the Legislature enacting a statute that is clearly in violation of a constitutional provision. It is not necessary for the Legislature to write into a statute that which the constitution reads into it. In *The State ex rel. Clarke v. Cook*, 103 Ohio St., 465, on page 469, the following is stated:

“It can not be seriously doubted, however, that what constitution reads into every statute it is quite unnecessary that the legislature should expressly write into it. Upon the contrary, unless the language of the statute is clearly inconsistent therewith, the presence of

such constitutional provision is as necessarily implied in the statute as if the same were expressly written into it."

Applying the foregoing reasoning to this situation, it is my opinion that the constitutional requirements of "complaint and hearing" as set forth in Section 38, Article II of the Ohio Constitution must by implication be read into the provisions of Section 5153.08, *supra*. It is clear, under this interpretation, that Section 5153.08, *supra*, does *not* provide for summary removal of members of the County Child Welfare Board and is therefore constitutional.

In response to your third question, it is my opinion that in order for a member of the County Child Welfare Board to be removed by the Board of County Commissioners in accordance with Section 5153.08, *supra*, formal "complaint" and "hearing" are mandatory.

At this point, some consideration should be given to the procedure to be utilized in removing a member of the County Child Welfare Board, particularly since Section 5153.08, *supra*, is not too clear on this matter. It might be argued that the proceedings called for in Sections 3.07 and 3.10, inclusive, of the Revised Code, should be followed. Because of the language in the last sentence of Section 3.07, Revised Code, however, I am of the opinion that it is not necessary to follow the proceedings outlined in these statutes. The last sentence of Section 3.07, *supra*, reads as follows:

"* * * 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.*"

(Emphasis added)

Clearly then, in light of the foregoing, Sections 3.07 to 3.10, inclusive, Revised Code, do not necessarily become operative when removal is initiated under Section 5153.08, *supra*. Inasmuch as the Board of County Commissioners has jurisdiction of the removal proceedings under Section 5153.08, *supra*, it is my opinion that, so long as they comply with the constitutional requirement of "complaint and hearing" and the statutory definitions of "good cause", they are vested with discretion as to the type of proceedings which they may institute.

Because of the foregoing it is not necessary to discuss your fourth question.

It is, therefore, my opinion and you are accordingly advised that members of a county child welfare board are "public officers" within the meaning of Section 38, Article II of the Ohio Constitution and, in accordance with Section 5153.08, Revised Code, may be removed by the board of county commissioners only upon "complaint and hearing" and only "for good cause."

Respectfully,
WILLIAM B. SAXBE
Attorney General