

OPINION NO. 70-131**Syllabus:**

A person appointed to the board of trustees of a university may be seated and take part in meetings pending confirmation or rejection by the Ohio Senate, and the fact that the new trustee was previously the university business manager is no bar to the exercise of powers by the new appointee, except to the extent that the new member exercise sound judgment and intelligent discretion in the performance of his duties and his personal relationship thereto.

**To: Edward J. Cox, Chairman, Board of Trustees, Central State University,
Wilberforce, Ohio**
By: Paul W. Brown, Attorney General, September 11, 1970

I have received your request for my opinion which asks

whether a person appointed to a University Board of Trustees by the Governor may be seated and take part in meetings even though not as yet confirmed by the Ohio Senate.

This precise point was considered and resolved by the Supreme Court of Ohio in State, ex rel. Brothers v. Zellar, 7 Ohio St. 2d 109 (1966). The issue is stated by Justice Matthias at page 111:

"The basic question raised by this case is created by the statutes which require that an appointment to public office by the Governor must be made with the advice and consent of the Senate. The principal issue is whether title to such office vests in the appointee after his appointment and the taking of the oath of office and any other necessary acts on the part of the appointee to qualify or whether such title vests only after the appointment is consented to by the Senate."

Justice Matthias went on to conclude at page 111:

"However, appointment to and qualification for a public office as required in Section 3.01, Revised Code, are separate and distinct acts performed by different people. Appointment relates to the acts of the authority in whom the appointing power reposes. Qualification relates to the acts which the appointee must perform before he is entitled to enter upon the duties of the office. The advice and consent of the Senate is not a part of the qualification for the office." (Emphasis added)

In the absence of legislative enactment or Supreme Court determination to the contrary, State, ex rel. Brothers v. Zellar, supra, dictates the response to the first question in your request for my opinion.

You further inquired as to the status of a member of the board of trustees who is required, as a trustee, to pass upon his acts performed as vice president for fiscal affairs and business manager, prior to being appointed to the board of trustees. Section 3343.05, Revised Code, outlining the powers and duties of the board of trustees of Central State University, states in part:

"It shall select a business manager, who shall be the fiscal officer of said university. The expenditures of all moneys appropriated for carrying out sections 3343.01 to 3343.09, inclusive, of the Revised Code, shall be made under such regulations as the board establishes, and all vouchers shall be approved in writing by the fiscal officer. No moneys or services appropriated or provided by the state shall be used for any purpose not in direct furtherance and promotion of the business of said university."

Thus the Board of Trustees selects the business manager and makes the regulations under which funds are expended. As there is nothing done by the business manager which is not

under the authority and direction of the board of trustees, there appears to be no formal restrictions which may be validly placed upon a member of the board of trustees because he was formerly the business manager of the university.

In Kahle v. Rupert, 99 Ohio St. 17 (1918), the Court stated at page 19:

"Every officer of this state or any subdivision thereof not only has the authority but is required to exercise an intelligent discretion in the performance of his official duty."
(Emphasis added)

In Maxwell v. Schneider, 103 Ohio St. 492 (1921), Justice Matthias stated at page 498:

"The action of a public officer, or of a board, within the limits of the jurisdiction conferred by law, is not only presumed to be valid but it is also presumed to be in good faith and in the exercise of sound judgment. Before a court will take cognizance of a claim that the action of such officer or board is unlawful, arbitrary, unreasonable, or of such character as to constitute an abuse of discretion, facts must be set forth which would warrant such conclusion."
(Emphasis added)

The emphasized phrases in the two preceding citations describe the nature of a self-imposed restriction which is applicable to an individual who finds himself in the position of passing upon his own acts. It is an informal restriction, a restriction impossible of definition with exactitude, yet understandable within the framework of a particular factual situation. Should a public officer find himself in a situation that requires him to pass upon his acts committed while he held a former position, he could, of course, exercise the aforementioned sound judgment and intelligent discretion and abstain from passing upon his own acts if to do so would be inconsistent with his current position.

It is therefore my opinion, and you are hereby advised, that a person appointed to the board of trustees of a university by the Governor may be seated and take part in meetings pending confirmation or rejection by the Ohio Senate, and the fact that the new trustee was previously the university business manager is no bar to the exercise of powers by the new appointee, except to the extent that the new member exercises sound judgment and intelligent discretion in the performance of his duties and his personal relationship thereto.