

OPINION NO. 2006-012**Syllabus:**

The position of general counsel to the Summit County Engineer is not an “appointive office of the county” for purposes of R.C. 5901.02. (1964 Op. Att’y Gen. No. 1611, p. 2-458 and 1961 Op. Att’y Gen. No. 2064, p. 125, overruled due to statutory change.)

To: Sherri Bevan Walsh, Summit County Prosecuting Attorney, Akron, Ohio
By: Jim Petro, Attorney General, March 13, 2006

You have requested an opinion concerning the eligibility of a particular employee of the county engineer to serve as a member of the county’s veterans service commission.¹ It is our understanding that the person about whom you ask was appointed by the county engineer as the county engineer’s general counsel. A question has arisen whether this individual’s position in the county engineer’s office is an “appointive office,” as that term is used in R.C. 5901.02, which addresses appointments to a county’s veterans service commission. Based upon the following, we conclude that such position is not an “appointive office” for purposes of R.C. 5901.02.

¹ Pursuant to R.C. 102.08, the Ohio Ethics Commission, rather than the Attorney General, renders advisory opinions regarding the application of the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-43. In light of R.C. 102.08’s specific statutory grant of authority to the Ohio Ethics Commission, we will refrain from interpreting and applying these provisions by way of a formal opinion. 1987 Op. Att’y Gen. No. 87-033 (syllabus, paragraph three). Questions concerning the interpretation and application of these ethics law provisions in the situation in which a person serves simultaneously as a member of a county veterans service commission and general counsel within the office of the county engineer should, therefore, be directed to the Ohio Ethics Commission.

You have provided certain background information concerning Summit County's Veterans Service Commission. This information does not indicate that Summit County has enacted local legislation that addresses the authority of the county engineer to hire general counsel or that addresses the post of general counsel to the county engineer.² For purposes of discussion, therefore, we will assume that the county engineer's authority to appoint an individual to serve as the engineer's general counsel derives from the statutory scheme governing county engineers.³

With this background in mind, let us now examine the portion of R.C. 5901.02, concerning the appointment of veterans service commission members, which states, in pertinent part:

In each county there shall be a commission known as "the veterans service commission." Except as provided in [R.C. 5901.021], the commission shall be composed of five residents of the county *appointed* to five-year terms *by a judge of the court of common pleas*. At the time of appointment or reappointment to the commission, no commission member appointed under this section shall be an employee of the commission or hold an elective or other *appointive office of the county served by the commission*.

Each member of the commission appointed under this section shall be an honorably discharged or honorably separated veteran. Within sixty days after the date of appointment, each such member shall file the member's form DD214 with the governor's office of veterans affairs in accordance with guidelines established by the director of that office. Such

² Summit County has adopted a charter in accordance with Ohio Const. art. X, § 3. *See generally State ex rel. O'Connor v. Davis*, 139 Ohio App. 3d 701, 705, 745 N.E.2d 494 (Summit County 2000) ("while the powers and duties of county government are established by the general laws of the state of Ohio, the charter document provides for the 'form' as well as the 'exercise' and 'performance' of those powers and duties"); 1985 Op. Att'y Gen. No. 85-039 (syllabus, paragraph two) ("[a] county charter may provide for the transfer of the duties, which are imposed upon an elected county officer by general law, to another county officer, regardless of whether such officer is elected or appointed under the charter, so long as the charter provides for the exercise of all powers vested in, and the performance of all duties imposed upon, counties and county officers by law").

³ As stated in 1995 Op. Att'y Gen. No. 95-035 at 2-186, "the interpretation of municipal or county charter provisions is not within the opinion rendering function of the Attorney General." We cannot, therefore, express an opinion concerning the potential application of Summit County charter provisions to the question you present. The interpretation of Summit County ordinances or resolutions is similarly outside the opinion rendering function of the Attorney General. *See, e.g.*, 2004 Op. Att'y Gen. No. 2004-015 at 2-124 ("[w]hether there is an applicable resolution, ordinance, or local departmental regulation is a matter for local officials to determine").

appointments shall be made from lists of recommended persons
(Emphasis added.)

Thus, pursuant to R.C. 5901.02, anyone who is an employee of a veterans service commission or who holds an elective or appointive office of the county served by that commission is ineligible for appointment to membership on the commission.⁴

The phrase “appointive office of the county,” as used in R.C. 5901.02, is not expressly defined by statute. As stated in 1979 Op. Att’y Gen. No. 79-084 at 2-269, questioned on other grounds by 1987 Op. Att’y Gen. No. 87-102, “a long line of cases has held that the phrase ‘public officer’ is a term of art separate and distinct from a ‘public employee,’ when used in a statute or the constitution.” For example, the Ohio Supreme Court in *State ex rel. Landis v. Board of Comm’rs*, 95 Ohio St. 157, 159-61, 115 N.E. 919 (1917), set forth the following explanation of what constitutes a public office:

The usual criteria in determining whether a position is a public office are durability of tenure, oath, bond, emoluments, the independency of the functions exercised by the appointee, and the character of the duties imposed upon him. But it has been held by this court that while an oath, bond and compensation are usually elements in determining whether a position is a public office they are not always necessary The chief and most-decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such *duties are conferred upon the appointee by law*. If official duties are prescribed by statute, and their performance involves the exercise of *continuing, independent, political or governmental functions*, then the position is a public office and not an employment.

....

... [I]t is manifest that the *functional powers imposed must be those which constitute a part of the sovereignty of the state*. But as stated by Spear, C. J., in *The State, ex rel. Hogan, Atty. Gen., etc. v. Hunt*, 84 Ohio St., at page 149, without a satisfactory definition of what is the

⁴ Prior to 1993-1994 Ohio Laws, Part IV, 6089 (Am. Sub. H.B. 448, eff. July 22, 1994), which added the prohibition against a veterans service commission member’s holding a county office while serving as a commission member, a number of Attorney General opinions found the position of member of a veterans service commission (or its predecessor agencies) to be compatible with the holding of another public office. *See, e.g.*, 1964 Op. Att’y Gen. No. 1611, p. 2-458 (finding no incompatibility between service as a county treasurer and member of a county soldiers’ relief commission, so long as it is physically possible to discharge the duties of both positions); 1961 Op. Att’y Gen. No. 2064, p. 125 (finding no incompatibility between the position of member of a county soldiers’ relief commission and that of county prosecuting attorney). Based upon the amendment of R.C. 5901.02 in Am. Sub. H.B. 448, we hereby overrule 1964 Op. Att’y Gen. No. 1611, p. 2-458 and 1961 Op. Att’y Gen. No. 2064, p. 125.

“sovereignty of the country” the term “office” is not adequately defined. If specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the state, if the appointee is invested with independent power in the disposition of public property or with power to incur financial obligations upon the part of the county or state, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the state. (Emphasis added.)

Accord State ex rel. Milburn v. Pethel, 153 Ohio St. 1, 90 N.E.2d 686 (1950) (syllabus, paragraph one) (“[a] public officer, as distinguished from an employee, is one who is invested by law with a portion of the sovereignty of the state and who is authorized to exercise functions either of an executive, legislative or judicial character”).

Common indicia of public office, therefore, are durability of tenure, bond, and an oath of office. The key element in such determination, however, is whether the person is invested by law with powers that constitute a part of the sovereignty of the state, *e.g.*, the exercise of the police powers of the state, independent authority to dispose of public property or to incur financial obligations on behalf of the state or political subdivision he serves, or authority to act on behalf of the state or such political subdivision in political or business matters with persons in which the state or political subdivision must act through an official agency.

Let us now consider whether the post of general counsel to the Summit County Engineer constitutes a public office as described by the *Landis* court. In examining whether the general counsel has duties assigned by law, we note that no statute creates that post or assigns particular duties to it. *See generally, e.g., State ex rel. O'Connor v. Davis*, 139 Ohio App. 3d 701, 707-08, 745 N.E.2d 494 (Summit County 2000) (noting that the Summit County Council possessed authority to “create the office of General Counsel and that the County Executive was authorized to fill the position. The court also observed that the position of General Counsel was ‘a *personal aide* to the executive,’ but that its creation did not ‘impart power or duty * * * to represent the executive in his official capacity.’ That statutory obligation, according to the Charter, remained with the Prosecutor” (emphasis added; various citations omitted)). Rather, a county engineer, among other officers, possesses statutory authority to hire persons in accordance with R.C. 325.17, which states in pertinent part:

[The county engineer, among others] may appoint and employ the necessary deputies, assistants, clerks, bookkeepers, or *other employees* for their respective offices, fix the compensation of such employees and discharge them, and shall file certificates of such action with the county auditor.... Each of such officers may require such of his employees as he deems proper to give bond to the state, in an amount to be fixed by such officer, with sureties approved by him, conditioned for the faith-

ful performance of their official duties. Such bond, with the approval of such officer endorsed thereon, shall be deposited with the county treasurer and kept in his office. (Emphasis added.)

Thus, R.C. 325.17 authorizes a county engineer to employ and appoint individuals as “employees.”⁵ While R.C. 325.17 authorizes a county engineer to require his employees to give bond, one of the common indicia of public office, *State ex rel. Landis v. Board of Comm’rs*, the statute does not authorize the engineer to appoint anyone to a post as an officer. R.C. 325.17 authorizes a county engineer to hire only employees. Thus, if the Summit County Engineer, under the authority of R.C. 325.17, appointed an individual as general counsel, such individual would be an employee of the county engineer, not an officer of the county. At the same time, because R.C. 325.17 prescribes no particular duties to be performed by any employees hired under that statute, an employee hired under that statute lacks one of the essential characteristics of public office, *i.e.*, possessing and exercising duties assigned by law.

You further state that the individual is an unclassified employee of the county engineer. As explained in *State ex rel. Hunter v. Summit County Human Resource Comm’n*, 81 Ohio St. 3d 450, 453, 692 N.E.2d 185 (1998), “[a]n unclassified employee is appointed at the discretion of the appointing authority and serves at the pleasure of such authority.” As a general rule, “positions are placed in the unclassified service when they involve policy-making or fiduciary responsibilities, and the intent is that the appointing authority should be able to choose the individuals who hold those positions.” 1996 Op. Att’y Gen. No. 96-040 at 2-155.

As an unclassified employee of the county engineer, the individual you describe may exercise duties that may be described generally as policy-making or fiduciary responsibilities for the county engineer or may perform duties for which one’s abilities may not be adequately measured by competitive examination. The exercise of such responsibilities, however, does not necessarily constitute the exercise of the sovereignty of the state, as that term is described in the *Landis* case, *e.g.*, the exercise of the police powers of the state, independent authority to dispose of public property or to incur financial obligations on behalf of the state or political subdivision he serves, or authority to act on behalf of the state or such political subdivision in political or business matters with individuals in which the state or political subdivision must act through an official agency. Rather, as is apparent from the list of those included in the unclassified civil service, R.C. 124.11, many unclassified employees exercise policy-making or fiduciary responsibilities for their employers, but are, nonetheless, employees rather than officers. *See generally, e.g.*, R.C. 124.11(A)(9) (including within the unclassified service, among others, “those

⁵ A county engineer possesses additional statutory authority to hire individuals in certain circumstances. *See, e.g.*, R.C. 315.10 (authority to hire, with the approval of the board of county commissioners, maintenance supervisors); R.C. 5575.07 (authority to hire an inspector of road improvements); R.C. 5713.10 (authority to hire draftsmen). These statutes, however, do not appear to encompass the employment of an individual to serve as general counsel to the county engineer.

persons employed by and directly responsible to elected county officials or a county administrator and holding a fiduciary or administrative relationship to such elected county officials or county administrator, and the employees of such county officials whose fitness would be impracticable to determine by competitive examination”); *Yarosh v. Becane*, 63 Ohio St. 2d 5, 406 N.E.2d 1355 (1980) (explaining that those deputy sheriffs who perform duties of a fiduciary or administrative nature are in the unclassified service, while those who do not perform such duties are in the classified service).

Based upon the foregoing, it is my opinion, and you are hereby advised that, the position of general counsel to the Summit County Engineer is not an “appointive office of the county” for purposes of R.C. 5901.02. (1964 Op. Att’y Gen. No. 1611, p. 2-458 and 1961 Op. Att’y Gen. No. 2064, p. 125, overruled due to statutory change.)