

OPINION NO. 92-008**Syllabus:**

1. Pursuant to Article XV, §4 of the Ohio Constitution, a person must be a resident of the state of Ohio in order to be elected or appointed to a public office.
2. If the Governor appoints a non-resident of the state to an office, as that term is used in Ohio Const. art. XV, §4, as a board or commission member, the appointment is a nullity.

To: George V. Voinovich, Governor, Columbus, Ohio
By: Lee Fisher, Attorney General, March 20, 1992

You have asked whether, pursuant to Ohio Const. art. XV, §4, members of boards or commissions appointed by the Governor must be residents of the State of Ohio. If an out-of-state resident may not serve on the board or commission to which such person has been appointed, you also ask whether such appointee is "immediately divested of [the] office, thus creating a vacancy on the board or commission in which [he or she serves]?"

Only Electors May Hold Public Office

Article XV, §4 of the Ohio Constitution states: "No person shall be elected or appointed to any *office* in this state unless possessed of the qualifications of an elector." (Emphasis added.) *State ex rel. Attorney General v. Wilson*, 29 Ohio St. 347, 351 (1876), concluded that a person who is not an elector is "constitutionally ineligible" to hold an office that is subject to the provisions of Ohio Const. art. XV, §4. Therefore, to hold public office in Ohio, one must meet the qualifications of an elector.

Electors Must Be Ohio Residents

Ohio Const. art. V, §1 sets forth certain constitutional qualifications for an elector:

Every citizen of the United States, of the age of eighteen years, who has been a *resident of the state*, county, township, or ward, such time as may be provided by law, and has been registered to vote for thirty days, has the qualifications of an elector, and is entitled to vote at all elections. Any elector who fails to vote in at least one election during any period of four consecutive years shall cease to be an elector unless he again registers to vote. (Emphasis added.)

R.C. 3503.01 establishes statutory residence requirements for voting, as follows:

Every citizen of the United States who is of the age of eighteen years or over and who has been a *resident of the state* thirty days next preceding the election at which he offers to vote, is a resident of the county and precinct in which he offers to vote, and has been registered to vote for thirty days, has the qualifications of an elector and may vote at all elections in the precinct in which he resides. (Emphasis added.)

These provisions clearly establish residency within the state as a qualification of an elector. See *State ex rel. Jeffers v. Sowers*, 171 Ohio St. 295, 170 N.E.2d 428 (1960); 1950 Op. Att'y Gen. No. 1870, p. 339. Residency for such purposes is

statutorily defined in R.C. 3503.02.¹ A person who does not meet the residency requirements of R.C. 3503.02 does not qualify as an elector and, consequently, may not be elected or appointed to any "office" in the State of Ohio.

Whether a person who is not a resident of Ohio may serve on a board or commission depends upon whether such position constitutes an "office" subject to Ohio Const. art. XV, §4. If the Governor appoints a person to a position as a board

¹ Pursuant to R.C. 3503.02, the determination of residence is governed by the following rules:

(A) That place shall be considered the residence of a person in which his habitation is fixed and to which, whenever he is absent, he has the intention of returning.

(B) A person shall not be considered to have lost his residence who leaves his home and goes into another state or county of this state, for temporary purposes only, with the intention of returning.

(C) A person shall not be considered to have gained a residence in any county of this state into which he comes for temporary purposes only, without the intention of making such county his permanent place of abode.

(D) The place where the family of a married man or woman resides shall be considered to be his or her place of residence; except that when the husband and wife have separated and live apart, the place where he or she resides the length of time required to entitle a person to vote shall be considered to be his or her place of residence.

(E) If a person removes to another state with the intention of making such state his residence, he shall be considered to have lost his residence in this state.

(F) If a person removes to another state with the intention of remaining there an indefinite time and making such state his place of residence, he shall be considered to have lost his residence in this state, notwithstanding the fact that he may entertain an intention to return at some future period.

(G) If a person removes out of the county to engage in the services of the United States government, he shall not be considered to have lost his residence in this state during the period of such service, and likewise should he enter the employment of the state, the place where such person resided at the time of his removal shall be considered to be his place of residence.

(H) If a person goes into another state and while there exercises the right of a citizen by voting, he shall be considered to have lost his residence in this state.

As summarized by the court in *Kyser v. Board of Elections*, 36 Ohio St. 2d 17, 21, 303 N.E.2d 77, 80 (1973), "[t]he essence of that statutory definition of residence [R.C. 3503.02] is 'fixed habitation.' 'Habitation' is defined in *Webster's Third New International Dictionary*, as "****dwelling place; house, home, residence." The court further stated that "R.C. 3503.02 lists two elements which are determinative of residency — (1) fixed habitation and (2) the intention of returning to that habitation. It is the present intention which determines a person's residency status...." *Id.* at 22; 303 N.E.2d at 80. Thus, temporary absences do not necessarily negate residency. *See, e.g.*, 1946 Op. Att'y Gen. No. 764, p. 128; 1924 Op. Att'y Gen. No. 1792, p. 525, 526. The fact that an individual lives a majority of the time elsewhere may be evidence of which habitation he views as fixed and which he views as temporary. Ultimately the determination of residency is a question of fact based on present intent. *See Kyser* at 22, 303 N.E.2d at 80; *accord* 1946 Op. No. 764; 1939 Op. Att'y Gen. No. 820, vol. II, p. 1048.

or commission member and that position is an "office" within this state, Ohio Const. art. XV, §4 requires such person to be a resident of the state of Ohio. *See, e.g., Thomas v. Board of Trustees*, 195 U.S. 207 (1904) (finding members of the board of trustees of the Ohio State University to be subject to the requirements of Ohio Const. art. XV, §4 and art. V, §1).

Determination of What Constitutes a Public Office

Your request does not seek my opinion with respect to any specific position, and, as we have discussed, because of the numerous boards and commissions served by members appointed by the Governor, it is not feasible within the scope of an Attorney General opinion to determine whether each such position is an "office" for purposes of Ohio Const. art. XV, §4. However, you have requested a brief summary of the appropriate analysis which must be undertaken in making such a determination.

The courts of this state have established the following *general* test for determining whether a particular position is 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.* (Emphasis added.)

State ex rel. Landis v. Board of Commissioners, 95 Ohio St. 157, 159, 115 N.E. 919, 919 (1917). In applying this test, the court has emphasized that "[a] 'public officer' as distinguished from an 'employee' must possess some sovereign functions of government, to be exercised by him for the benefit of the public, either of an executive, legislative or judicial character." *State ex rel. Newman v. Skinner*, 128 Ohio St. 325, 327, 191 N.E. 127, 128 (1934). Whether a position is a public office must be determined in each case by examining the particular statute and peculiar facts relating to the position. *State ex rel. Hogan v. Hunt*, 84 Ohio St. 143, 95 N.E. 666 (1911).

Thus, it is necessary to examine the nature of the duties performed by each board or commission member and the independence with which those duties are to be executed to determine whether that position constitutes an office for purposes of Ohio Const. art. XV, §4. Based on such an analysis, the following positions have been determined to constitute "offices" subject to the provisions of Ohio Const. art. XV, §4: trustee of Ohio State University (195 U.S. 207 (1904)); notary public (*State ex rel. Robinson v. McKinley*, 57 Ohio St. 627, 50 N.E. 1134 (1896)); municipal court judge (1975 Op. Att'y Gen. No. 75-067); county engineer (*State ex rel. Jeffers v. Sowers*, 171 Ohio St. 2975, 170 N.E.2d 428 (1960)). Similarly, the following positions have been determined not to constitute "offices" subject to the provisions of Ohio Const. art. XV, §4: deputy clerks of probate court and court of common pleas (*Warwick v. State*, 25 Ohio St. 21 (1874); 1954 Op. Att'y Gen. No. 3999); state librarian (*State ex rel. Newman v. Skinner*, 128 Ohio St. 325, 191 N.E. 127 (1934)); firemen (*State ex rel. Monnett v. Jennings*, 57 Ohio St. 415, 49 N.E. 404 (1898)); clerk of board of county commissioners (*State ex rel. Landis v. Board of Commissioners of Butler County*, 95 Ohio St. 157, 115 N.E. 919 (1917)).

Effect of Appointment of Nonresident to a Public Office

In the event that any board and commission members appointed by the Governor are required to be state residents, you ask whether "these members [are] immediately divested of their office[s], thus creating a vacancy on the board or commission in which they serve," if they are not Ohio residents. In addressing the

issue of statutory ineligibility to hold office, the court in *State ex rel. Attorney General v. Craig*, 69 Ohio St. 236, 69 N.E. 228 (1903), concluded in syllabus, paragraph one: "Where the appointment to an office is a nullity, for the reason that the appointee is by statute ineligible to such office, a legal appointment to such office may be made, without first ousting such first appointee by proceedings in *quo warranto*." Similarly, if a person is constitutionally ineligible to serve as an officer, the appointment of such person to that office also is a nullity; the appointee never assumes title to the office. The effect of the appointment is the same as if no appointment had been made. See *State ex rel. Vian v. Bryan*, 30 Ohio L. Abs. 61 (Ct. App. Lorain County 1938) (election to city council of a person who did not possess the statutory residential qualifications to serve as councilman was a nullity; the office he sought was not filled by his election).

The fact that an appointment by the Governor is a nullity is not, in itself, determinative of whether the office to which the appointment was made stands "vacant." If an appointee to a vacant office is ineligible to hold such office, the office remains vacant; however, if at the time of the appointment of the ineligible candidate the office was held by a legally qualified individual, such person may, depending on the circumstances, continue to serve in such office. As stated in *State ex rel. v. McCracken*, 51 Ohio St. 123, 129, 36 N.E. 941, 943 (1894): "In contemplation of law there can be no vacancy in an office so long as there is a person in possession of the office legally qualified to perform the duties." Thus, there may be situations where the office to which an ineligible person has been appointed is still in possession of another person who is legally qualified to perform the duties of the office as, for example, where an officer continues to hold over his term. See, e.g., R.C. 3.01 ("[a] person holding an office of public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws of this state"); R.C. 105.21 (member of the state board of uniform state laws "shall continue in office subsequent to the expiration date of his term until his successor *takes office*, or until a period of sixty days has elapsed, whichever occurs first" (emphasis added)). Where there is no person in possession of an office and legally qualified to perform the duties of the office, however, the office to which an ineligible person has been appointed stands vacant.

Based on the foregoing, it is my opinion, and you are hereby advised that:

1. Pursuant to Article XV, §4 of the Ohio Constitution, a person must be a resident of the state of Ohio in order to be elected or appointed to a public office.
2. If the Governor appoints a non-resident of the state to an office, as that term is used in Ohio Const. art. XV, §4, as a board or commission member, the appointment is a nullity.