

OPINION NO. 90-077**Syllabus:**

Members of the township zoning commission appointed pursuant to R.C. 519.04, members of the township board of zoning appeals appointed pursuant to R.C. 519.13, and the township zoning inspector appointed pursuant to R.C. 519.16 are not township officers for purposes of R.C. 505.60. The circumstances in which such persons are entitled to receive health insurance benefits under R.C. 505.60(A) depend upon whether the position is a full-time or part-time

employment, as determined by the facts of each case. (1955 Op. Att'y. Gen. No. 4893, p. 89, overruled.)

To: David P. Joyce, Geauga County Prosecuting Attorney, Chardon, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, November 9, 1990

I have before me your opinion request in which you ask whether members of a township zoning commission, members of a board of zoning appeals, and a township zoning inspector are public officers for purposes of R.C. 505.60, pursuant to which townships may provide certain insurance benefits for its officers and employees.

R.C. 505.60 states in pertinent part:

(A) The board of township trustees of any township may procure and pay all or any part of the cost of insurance policies that may provide benefits for hospitalization, surgical care, major medical care, disability, dental care, eye care, medical care, hearing aids, prescription drugs, or sickness and accident insurance, or a combination of any of the foregoing types of insurance for township officers and employees. If the board so procures any such insurance policies, the board *shall provide uniform coverage under these policies for township officers and full-time township employees and their immediate dependents and may provide coverage under these policies for part-time township employees and their immediate dependents...*

....
 (B) A board of township trustees may procure and pay all or any part of the cost of group life insurance to insure the lives of *officers and full-time employees* of the township. The amount of group life insurance coverage provided by the board to insure the lives of officers of the township shall not exceed fifty thousand dollars per officer.

(C) As used in this section, "part-time township employee" means a township employee who is hired with the expectation that the employee will work not more than one thousand hours in any year. (Emphasis added.)

Pursuant to R.C. 505.60(A), where a board of township trustees elects to provide health insurance benefits for township personnel, it must provide uniform coverage for all township officers and full-time township employees and their immediate dependents. At the same time, the board of township trustees is authorized, but not required, to provide insurance under such policies for part-time employees and their immediate dependents. *See generally* 1990 Op. Att'y Gen. No. 90-064 (discussing the operation of R.C. 505.60(A)).

Although R.C. 505.60(C) explains the meaning of the term "part-time township employee," as used in that section, the statute provides no definition of the term "officer." In *State ex rel. Landis v. Bd. of Commissioners*, 95 Ohio St. 157, 159-61, 115 N.E. 919, 919-20 (1917), the court set forth the following definition of the term "public officer":

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.

...It is no longer an open question in this state that "to constitute a public office,***it is essential that certain independent public duties,

a part of the sovereignty of the state, should be appointed to it by law."....

...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 in original. Citations omitted.)

Thus, it is apparent that there is no single factor that determines whether a position constitutes a public office. Rather, it is necessary to examine the statutory provisions governing the creation and powers and duties of each position in order to determine whether it constitutes a public office.

I note, however, that your question concerns the determination of what constitutes an office of a township. As explained in *State ex rel. Godfrey v. O'Brien*, 95 Ohio St. 166, 115 N.E. 25 (1917), there are additional considerations in determining what constitutes a township office, as opposed to a public office generally. The syllabus of *State ex rel. Godfrey v. O'Brien* states in part:

2. Where the state seeks to exercise its sovereign power through the agencies of county or township officers, the statute creating the office and providing for the selection and compensation of the incumbent, must conform to the constitutional provisions with reference to such officers.

3. A provision in an act of the general assembly of this state for the appointment instead of the election of a county or township officer, is in violation of Section 1 of Article X of the Constitution of Ohio and void.¹

4. The general assembly of Ohio cannot delegate the authority conferred upon it by Section 20 of Article II of the Constitution, to fix the compensation of officers.

5. The provisions of an act of the general assembly purporting to confer authority upon the county auditor, or the board of county commissioners, to fix the salary of county or township officers within certain limits, without providing a uniform rule for determining such compensation in the several counties of the state, are in conflict with Section 26 of Article II of the Constitution of Ohio, and void. (Footnote added.)

In *O'Brien*, the court examined a statute creating public positions, one within township government and one within county government. By statute, the positions were to be filled by appointment. At the time, however, Ohio Const. art. X, §1 required that, "[t]he general assembly shall provide, by law, for the election of such county and township officers as may be necessary," which the court interpreted as requiring that township and county officers be elected. Upon examination of the duties imposed upon the positions, the court found "no possible doubt as to the official character of either. But the mere fact that they are officers does not necessarily make them township or county officers." 95 Ohio St. at 171, 115 N.E. at 26. The court then determined that since the General Assembly had created a township and a county office, but did not comply with the constitutional requirement that such offices be filled by election, the statutes were unconstitutional in violation

¹ Since the decision in *State ex rel. Godfrey v. O'Brien*, 95 Ohio St. 166, 115 N.E. 25 (1917), Ohio Const. art. X, §1 has been amended. Ohio Const. art. X, §1 now relates to the organization and government of counties, and does not require that all county officers be elected. Ohio Const. art. X, §2, however, now contains a portion of former art. X, §1, stating in part: "The general assembly shall provide by general law for the election of such township officers as may be necessary."

of former art. X, §1. The portions of the statutes authorizing the compensation of these offices to be set by county officers were also found to be unconstitutional as "an attempt to delegate to the auditor and board of county commissioners the legislative authority conferred upon the general assembly by Section 20 of Article II of the Ohio Constitution, to fix the compensation of all officers."² 95 Ohio St. at 174, 115 N.E. at 27.

The court in *O'Brien* found further constitutional infirmities to exist in the legislation in the manner in which the compensation was fixed, stating as follows:

There is no requirement that the compensation in the several counties shall be fixed by any uniform rule. On the contrary, the amount that these officers shall receive in each particular county depends upon the judgment and discretion of the county auditor and the board of county commissioners of each county, subject only to the limitation named in these sections. For this reason this provision offends against Section 26 of Article II of the Constitution, requiring that all laws of a general nature shall have a uniform operation throughout the state. (Citation omitted.)

95 Ohio St. at 175-76, 115 N.E. at 27-28. Thus, based upon the *O'Brien* case, in order to create a township office, the General Assembly must observe the provisions of Ohio Const. art. II, §§20 and 26, and Ohio Const. art. X, §2 (formerly at Ohio Const. art. X, §1).

The first position about which you ask is that of township zoning commission member. Pursuant to R.C. 519.04, where a board of township trustees wishes to proceed under R.C. Chapter 519 to implement a zoning scheme for the unincorporated territory of the township, it "shall create and establish a township zoning commission." Examination of the duties imposed upon the zoning commission reveals that the commissioners possess many characteristics of public officers. For example, R.C. 519.05 requires the zoning commission to submit to the board of township trustees its recommendation for a plan of township zoning. In the process of formulating its recommendation, the commission must hold a public hearing prior to certification of the plan to the board of trustees. R.C. 519.06. After certification of the plan to the board of trustees, the board may submit its recommended changes to the zoning commission for its approval, disapproval, or suggestions. R.C. 519.09. The zoning commission's recommendation is then subject to adoption by the board of township trustees, R.C. 519.10, and, if adopted, the zoning resolution is submitted to the electors of the unincorporated territory of the township in accordance with R.C. 519.11. The township zoning commission is further required to make recommendations to the board of township trustees concerning proposed amendments or supplements to the zoning resolution. R.C. 519.12. In the performance of its duties, the township zoning commission "may, within the limits of the moneys appropriated by the board [of township trustees] for the purpose, employ or contract with such planning consultants and executive and other assistants as it deems necessary." R.C. 519.05.

It is well settled that the exercise of zoning powers is an exercise of the police power of the state, carried out by the political subdivisions to the extent authorized by statute. *Cole v. Bd. of Zoning Appeals*, 39 Ohio App. 2d 177, 317 N.E.2d 65 (Hancock County 1973); 1956 Op. Att'y Gen. No. 7111, p. 667. Since the township zoning commission appears to operate independently in carrying out its duties which are related to the exercise of the police power, part of the sovereignty of the state, the nature of such duties would suggest that the commissioners are public officers.

² Ohio Const. art. II, §20 states in part: "The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers...."

Bearing in mind, however, the additional requirements for the creation of a township office, as discussed in *State ex rel. Godfrey v. O'Brien*, I turn to R.C. 519.04 which states in part:

The commission shall be composed of five members who reside in the unincorporated area of the township, *to be appointed by the board [of township trustees]*, and the terms of the members shall be of such length and so arranged that the term of one member will expire each year. Where there is a county or regional planning commission the board may appoint qualified members of such commission to serve on the township zoning commission. Each member shall serve until his successor is appointed and qualified. Members of the zoning commission shall be removable for non performance of duty, misconduct in office, or other cause by the board, upon written charges being filed with the board, after a public hearing has been held regarding such charges, and after a copy of the charges has been served upon the member so charged at least ten days prior to the hearing, either personally, by registered mail or by leaving such copy at his usual place of residence. The member shall be given an opportunity to be heard and answer such charges. Vacancies shall be filled by the board and shall be for the unexpired term. (Emphasis added.)

Thus, the members of the zoning commission are appointed for a term. Although each member serves a term, one of the indicia of public office, such members serve by appointment, not election. As stated in *O'Brien*, Ohio Const. art. X, §2 (formerly at Ohio Const. art X, §1) requires that township offices be filled by election, not by appointment. Further, R.C. 519.05 states in part: "Members of the zoning commission may be allowed their expenses, or such compensation, or both, *as the board may approve and provide.*" (Emphasis added.) Thus, the compensation of zoning commission members is determined solely by the board of township trustees in the exercise of its discretion. Since, as discussed in *O'Brien*, Ohio Const. art. II, §20 requires that the compensation of officers be set by the General Assembly and Ohio Const. art. II, §26 requires that laws of a general nature operate uniformly throughout the state, I must assume that the General Assembly acted in accordance with these constitutional mandates in providing for the appointment and compensation of zoning commission members, and did not intend to confer the status of officers upon the members of the zoning commission.

You also question whether members of the township board of zoning appeals and the township zoning inspector are township officers for purposes of R.C. 505.60. In 1955 Op. Att'y Gen. No. 4893, p. 89, one of my predecessors concluded that, for purposes of R.C. 309.09, pursuant to which the county prosecutor is required to advise, among others, township officers, members of a township board of zoning appeals are township officers. My predecessor examined R.C. 519.13, concerning the appointment of members of the board of zoning appeals, R.C. 519.14, setting forth the board's powers, and R.C. 519.15, concerning the board's organization and procedure, and concluded:

[I]f the incumbent of a position receives his authority from the law and is clothed with some part of the state sovereignty, or discharges some of the functions of government, he will, in almost all instances, be considered a public officer.

Clearly, the incumbents of the position in question receive their authority from law and they are clothed with a part of the state sovereignty. It would follow that the position in question is a public office and that the incumbents thereof are township officers within the meaning of [R.C. 309.09].

1955 Op. No. 4893 at p. 92.

The opinion then notes that, pursuant to R.C. 519.13, members of the zoning board of appeals are appointed, not elected. After discussing the portion of the *O'Brien* case concerning the requirement of former Ohio Const. art. X, §1 (now at art. X, §2) that township officers be elected, not appointed, the opinion states: "It must be presumed that the legislature was aware of the provisions of Section 2,

Article X, at the time it enacted Section 519.13, Revised Code, but found nothing in this statute which offended this constitutional provision." 1955 Op. No. 4893 at p. 93. Recognizing that it is outside the scope of the Attorney General's power to find a statute unconstitutional, the opinion concludes that, despite the fact that the board members are appointed, the statute must be presumed to be constitutional, and that the nature of the duties imposed upon the zoning board of appeals compels the conclusion that the members are township officers.

Pursuant to R.C. 519.13, the members of the township board of zoning appeals are appointed by the board of township trustees. Each member is appointed to serve a term. R.C. 519.13. Like the members of the zoning commission, members of the township board of zoning appeals "may be allowed their expenses, or such compensation, or both, as the board of township trustees may approve and provide." *Id.* As summarized in *State ex rel. Westchester Estates v. Bacon*, 61 Ohio St. 2d 42, 44, 399 N.E.2d 81, 83 (1980): "Under R.C. 519.14, the Board of Zoning Appeals is authorized to hear and decide appeals from decisions made by an administrative official in the enforcement of R.C. Chapter 519. In deciding these appeals the board can make any order and use all the powers of the officer from whom the appeal is taken." Further, R.C. 519.15 provides for a public hearing of any such appeal. Thus, the duties performed by the members of the township board of zoning appeals appear to be those of public officers. I must assume, however, that the General Assembly was aware of the constitutional requirements for the creation of a township office when it created township boards of zoning appeals. See R.C. 1.47(A). Thus, based upon the *O'Brien* case, as discussed above, I believe that the statutory provisions governing the appointment and compensation of members of the township board of zoning appeals indicate that the General Assembly did not intend that the members of the township board of zoning appeals be township officers. I, therefore, conclude that members of a township board of zoning appeals are not township officers, and accordingly overrule 1955 Op. Att'y Gen. No. 4893, p. 89.

The final office about which you ask is that of township zoning inspector. R.C. 519.16 states:

For the purpose of enforcing the zoning regulations, *the board of township trustees* may provide for a system of zoning certificates, and for this purpose *may establish and fill the position of township zoning inspector*, together with such assistants as the board deems necessary, *fix the compensation* for such positions, and make disbursements for them. The township clerk may be appointed secretary of the township zoning commission, secretary of the township board of zoning appeals, and zoning inspector, and he may receive compensation for such services in addition to other compensation allowed by law. (Emphasis added.)

Thus, the township zoning inspector serves by appointment and receives such compensation as prescribed by the board of township trustees. I note, however, that R.C. 519.161 states in part: "The township zoning inspector, before entering upon the duties of his *office*, shall give bond..." (Emphasis added.) Such language would suggest that a township zoning inspector may be considered a township officer. In light of the *O'Brien* case, however, I must conclude that a township zoning inspector is not a township officer.

Having concluded that none of the positions about which you ask constitute township offices, I return to the portion of your question concerning the township's duty to provide the health insurance benefits set forth in R.C. 505.60(A). As discussed above, R.C. 505.60(A) requires that if a township chooses to provide health insurance benefits pursuant to that statute, it must provide uniform coverage for all township officers and full-time employees and their immediate dependents. Further, the township may, but need not, provide insurance under such policies for part-time employees and their immediate dependents. R.C. 505.60(A). Whether the persons serving in the positions about which you ask are full-time or part-time employees, as the latter term is defined in R.C. 505.60(C), is not governed by statute, but appears to be a question of fact to be resolved on a case-by-case basis.

Based on the foregoing, it is my opinion, and you are hereby advised that members of the township zoning commission appointed pursuant to R.C. 519.04,

members of the township board of zoning appeals appointed pursuant to R.C. 519.13, and the township zoning inspector appointed pursuant to R.C. 519.16 are not township officers for purposes of R.C. 505.60. The circumstances in which such persons are entitled to receive health insurance benefits under R.C. 505.60(A) depend upon whether the position is a full-time or part-time employment, as determined by the facts of each case. (1955 Op. Att'y. Gen. No. 4893, p. 89, overruled.)