

OPINION NO. 86-083

Syllabus:

A board of county commissioners has no authority to adopt a resolution, which designates by title, emergency interim successors to carry out the functions of the board in the event that any emergency situation exists within the county or State, and two or more positions on the board of county commissioners become vacant or two or more commissioners are unavailable to perform their duties.

To: Jim Slagle, Marion County Prosecuting Attorney, Marion, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, November 13, 1986

I have before me your request for my opinion regarding the appointment of interim successors to the office of county commissioner. In your correspondence, you point out that if an emergency should arise, and either a majority of the positions on the board of county commissioners become vacant or a majority of the incumbent commissioners are unable to perform their duties, a quorum could not be convened to carry out the functions of the board.

To remedy this problem, the board of county commissioners has proposed the adoption of a resolution which would designate several county officials, by title, as interim successors should two or more positions on the board of county commissioners become vacant or two or more commissioners become unavailable to perform their duties, and an emergency situation exists with respect to Marion County or the entire state of Ohio as proclaimed by the Governor. The county officials who are named as emergency interim successors in the proposed resolution are, in order of succession, the sheriff, prosecuting attorney, engineer, auditor, treasurer and recorder. The emergency interim successors would serve until such time as those commissioners who were unavailable would be able to resume their duties or until such time as any vacancies on the board could be filled in accordance with constitutional and statutory provisions.

With reference to this proposal, you first question whether a board of county commissioners may adopt such a resolution. You also ask whether the county officers named as interim successors would encounter compatibility problems should their services ever be required under the resolution.

As a prefatory matter, it must be noted that a board of county commissioners is a creature of statute, and as such, has only those powers which are expressly conferred upon it by statute or necessarily implied therefrom. State ex rel.

Shriver v. Board of Commissioners, 148 Ohio St. 277, 74 N.E.2d 248 (1947); State ex rel. Clarke v. Cook, 103 Ohio St. 465, 134 N.E. 655 (1921); State ex rel. Locher v. Menning, 95 Ohio St. 97, 115 N.E. 571 (1916); 1986 Op. Att'y Gen. No. 86-053. Further, where the General Assembly has granted authority to the board of county commissioners, the powers must be strictly construed. Commissioners v. Andrews, 18 Ohio St. 49 (1868); State ex rel. Treadwell v. Commissioners, 11 Ohio St. 183 (1860).

The General Assembly has enacted two statutory schemes, R.C. Chapter 161 and R.C. 305.02, which relate to the appointment of persons to serve on the board of county commissioners.

R.C. Chapter 161 provides for the appointment of emergency interim successors in the event that a public officer is unavailable. See R.C. 161.01(A)(defining "unavailable" to include situations where an office is vacant or where an officer is absent or unable to discharge the duties of his office); R.C. 161.01(B)(defining "emergency interim successor"). R.C. 161.05 empowers legislative bodies or boards of counties, townships, cities, and villages "to adopt or enact resolutions or ordinances providing for emergency interim successors to offices" for which the legislative bodies or boards "may adopt or enact resolutions or ordinances relative to the manner in which vacancies will be filled or temporary appointments to office made." Such resolutions and ordinances may not be inconsistent with R.C. 161.01-.29. Id. R.C. 161.06 authorizes officers of political subdivisions to "designate by title or by named person, emergency interim successors and specify their order of succession." Emergency interim successors may exercise the officer's duties, in the event the officer or his deputy is unavailable, until such time as the vacancy is filled or until the officer or deputy becomes available to discharge the duties of the officer. Id.

While R.C. 161.05 and R.C. 161.06 grant legislative authorities and officers of political subdivisions the power to designate emergency interim successors, these sections are in effect "only in the event that an attack upon the United States, as defined in section 161.01 of the Revised Code, has occurred."¹ R.C. 161.02. The commissioners' proposed resolution provides for the appointment of emergency interim successors to act in the event that any emergency situation exists with respect to Marion County or the State of Ohio, as proclaimed by the Governor. Because the resolution provides for the designation of interim successors to act during any emergency situation, the resolution exceeds the scope of authority granted to the board of county commissioners by R.C. Chapter 161, the provisions of which are limited to the

¹ R.C. 161.01(D) defines "attack" as:

any attack or series of attacks by an enemy of the United States causing, or which may cause, substantial damage or injury to civilian property or persons in the state in any manner by sabotage or by the use of bombs, missiles, shellfire, or atomic, radiological, chemical, bacteriological, or biological means or other weapons or processes.

designation of interim successors during an attack upon the United States.²

I turn now to R.C. 305.02, which sets out the general procedure for filling vacancies in elected county offices. If a vacancy occurs, for whatever reason, in an elective county office, including that of a county commissioner, see R.C. 305.02(A), the county central committee of the political party with which the previous incumbent was affiliated must, between five and fifteen days after the office becomes vacant, meet and appoint a successor. R.C. 305.02(B) and (C). Under R.C. 305.02(F), the board of county commissioners is empowered to appoint an "acting officer" to perform the duties of the office "between the occurrence of the vacancy and the time when the officer appointed by the central committee qualifies and takes the office."³ While R.C. 305.02 does grant a board of county commissioners authority to name an interim officer until such time as a vacancy in the office of county commissioner may be filled, I find, for a number of reasons, that R.C. 305.02 does not supply the board of county commissioners authority to pass the proposed resolution.

First, the language employed in R.C. 305.02 suggests that the General Assembly did not intend to grant the board of county commissioners the authority to appoint acting officers prior to the occurrence of a vacancy. R.C. 305.02(A) provides in pertinent part:

If a vacancy in the office of county commissioner...occurs more than forty days before the next general election for state and county officers, a successor shall be elected at such election for the unexpired term unless such term expires within one year immediately following the date of such general election.

In either event, the vacancy shall be filled as provided in this section and the appointee [of the county central committee] shall hold his office until a successor is elected and qualified. (Emphasis added.)

² R.C. Chapter 161 was enacted in response to Ohio Const. art. II, §42, which empowers the General Assembly to:

pass laws to provide for prompt and temporary succession to the powers and duties of public officers, of whatever nature and whether filled by election or appointment, the incumbents of which may become unavailable for carrying on the powers and duties of such offices and to pass such other laws as may be necessary and proper for insuring the continuity of governmental operations in periods of emergency resulting from disasters caused by enemy attack.

³ If the incumbent of a county office was elected as an independent candidate, R.C. 305.02(D) provides that the board of county commissioners "shall make such appointment at the time when the vacancy occurs, except where the vacancy is in the office of county commissioner, in which case the prosecuting attorney and the remaining commissioners or a majority of them shall make the appointment."

The emphasized portions of division (A) indicate that the legislature envisioned R.C. 305.02 as a provision designed to facilitate the transition of authority after a vacancy in office has occurred. R.C. 305.02(F), therefore, cannot be interpreted to authorize the appointment of acting officers in anticipation of a vacancy.

A comparison of R.C. 305.02 with R.C. 161.05 and R.C. 161.06 provides added support for this interpretation. As noted previously, R.C. 161.05 and R.C. 161.06 expressly contemplate the anticipatory appointment of interim successors to serve in the event that an office becomes vacant or an officer is otherwise unavailable to perform his duties. In conjunction with this power, R.C. 161.06 also requires that the appointing officer review and revise the list of persons designated as interim successors. Such a provision is obviously necessary in order to prevent the designation of a person who is no longer able to fulfill the duties of office. Unlike R.C. 161.06, R.C. 305.02 does not make provision for the review of designated acting officers. The absence of such a provision strongly indicates that the General Assembly did not intend that the board of county commissioners appoint acting officers prior to the occurrence of a vacancy.

In connection with this problem, it is obvious that under R.C. 305.02(F), the board of county commissioners must appoint a particular individual to serve as acting officer. Compare R.C. 305.02(F)(the board of county commissioners may appoint "a person" to serve as an acting officer) with R.C. 161.06 (an officer "shall designate by title or by named person, emergency interim successors")(emphasis added). The proposed resolution does not designate a named person or particular individual to serve as an interim appointee, but rather, designates by title, interim successors. Such a designation is not within the contemplation of R.C. 305.02(F).⁴

There are other incongruities between R.C. 305.02 and the proposed resolution which indicate that R.C. 305.02 does not allow for the appointment of interim successors in the manner you propose. Pursuant to R.C. 305.02(A) and (F), the authority to appoint an acting officer is limited to the situation where an actual "vacancy," as opposed to the unavailability of an officer, has occurred. Cf. R.C. 161.06 (providing that an interim successor may act in the incumbent's stead while the officeholder is "unavailable," as defined in R.C. 161.06(A)).

⁴ It appears that questions concerning the compatibility of offices would arise if an individual who held one of the positions specified as interim successors in the proposed resolution were appointed to the position of county commissioner. See, e.g., R.C. 305.19 ("[t]he board of county commissioners shall compare the annual reports and statements made to it by the prosecuting attorney, clerk of the court of common pleas, sheriff, and county treasurer, take all necessary measures to rectify errors in such reports and to trace and correct any discrepancies between them"); R.C. 319.07 (a county commissioner is not eligible to hold the office of county auditor); 1927 Op. Att'y Gen. No. 70, vol. I, p. 97 (offices of county surveyor (now county engineer) and county commissioner are incompatible). See generally 1979 Op. Att'y Gen. No. 79-111.

The proposed resolution is not, however, limited to the filling of vacancies. The resolution would allow an interim successor to assume office when an incumbent is "unable to perform his duties." Such a provision, again absent an attack upon the United States, is not authorized by statute.⁵

I must, therefore, conclude that R.C. 305.02(F) does not authorize a board of county commissioners to designate, by title, acting officers in anticipation of vacancies in the office of county commissioner or the unavailability of county commissioners. The practical result of this conclusion is that, where two positions on the board of county commissioners are vacant, so that a quorum may not be convened to appoint acting officers, the vacant offices would remain unfilled until the central committee of the appropriate party could convene and appoint successors. Pursuant to R.C. 305.02(C), this would occur between five and fifteen days after the offices become vacant. If the officeholders are merely "unavailable," then the county commissioners are without authority to appoint successors.

I am unaware of any other statutory provision which would enable the board of county commissioners to adopt the proposed resolution.

In conclusion, it is my opinion, and you are hereby advised that a board of county commissioners has no authority to adopt a resolution, which designates by title, emergency interim successors to carry out the functions of the board in the event that any emergency situation exists within the county or State, and two or more positions on the board of county commissioners become vacant or two or more commissioners are unavailable to perform their duties.

⁵ A vacancy on the board of county commissioners does not exist solely because an incumbent is currently unable to perform the duties of his office. See 1985 Op. Att'y Gen. 85-062 (a vacancy does not exist where a county commissioner is seriously ill and is unable to fulfill the duties of his office, but is not absent from the county). For an office to be vacant, there must no longer be an incumbent with a legal claim to the office. Id. The most common causes of a vacancy are the resignation or death of the incumbent. See generally 1984 Op. Att'y Gen. No. 84-063. A vacancy may also be declared by operation of law. See, e.g., R.C. 305.03 (office may be declared vacant if the incumbent is absent from the county for ninety consecutive days).