

December 30, 2009

The Honorable Austin B. Campbell
Vinton County Prosecuting Attorney
100 East Main Street
McArthur, Ohio 45651

SYLLABUS:

2009-055

A county prosecuting attorney who notifies a board of county commissioners prior to the commencement of his term of office that he will engage in the private practice of law may not decide during his term of office not to engage in the private practice of law in order to receive, during the remainder of his term of office, the salary prescribed for a county prosecuting attorney who does not engage in the private practice of law.



RICHARD CORDRAY
OHIO ATTORNEY GENERAL

December 30, 2009

OPINION NO. 2009-055

The Honorable Austin B. Campbell
Vinton County Prosecuting Attorney
100 East Main Street
McArthur, Ohio 45651

Dear Prosecutor Campbell:

You have requested an opinion whether a county prosecuting attorney who informs a board of county commissioners prior to the commencement of his term of office that he will engage in the private practice of law may decide during his term of office not to engage in the private practice of law in order to receive, during the remainder of his term of office, the salary prescribed for a county prosecuting attorney who does not engage in the private practice of law.

R.C. 325.11 establishes the annual salary of a county prosecuting attorney. This statute classifies each county prosecuting attorney, for salary purposes, according to the population of his county. In addition, the statute authorizes the payment of a higher salary to the county prosecuting attorney if he elects not to engage in the private practice of law. *See* 1998 Op. Att’y Gen. No. 98-024 at 2-129 (“[h]igher salary figures are established for prosecuting attorneys who do not engage in the private practice of law”).

With respect to the decision whether to engage in the private practice of law, R.C. 325.11(B) states, in part:

A prosecuting attorney shall not engage in the private practice of law unless *before taking office* the prosecuting attorney notifies the board of county commissioners of the intention to engage in the private practice of law.

A prosecuting attorney may elect to engage or not to engage in the private practice of law *before the commencement of each new term of office*, and a prosecuting attorney who engages in the private practice of law who intends not to engage in the private practice of law during the prosecuting attorney's next term of office shall so notify the board of county commissioners. (Emphasis added.)

R.C. 325.11(B) provides that a person who is elected to the office of county prosecuting attorney may elect to engage or not to engage in the private practice of law "before" the commencement of his term of office. When used as a preposition, the word "before" means, *inter alia*, "preceding in time; earlier than." *Merriam-Webster's Collegiate Dictionary* 110 (11th ed. 2005). See generally R.C. 1.42 ("[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage"). R.C. 325.11(B) thus requires a person who is elected to the office of county prosecuting attorney to decide prior to assuming office whether or not to engage in the private practice of law while in office. See 1998 Op. Att'y Gen. No. 98-024 at 2-130.

If the person decides to engage in the private practice of law while serving as county prosecuting attorney, the person must, prior to taking office, notify the board of county commissioners of that intention. R.C. 325.11(B). When such a notification is provided to the board of county commissioners, the person is entitled to receive the annual salary established in R.C. 325.11(A) for a county prosecuting attorney who engages in the private practice of law, rather than the higher annual salary established in R.C. 325.11(A) for a county prosecuting attorney who does not engage in the private practice of law.¹ R.C. 325.11(A). In other words, a person who is elected to the office of county prosecuting attorney is entitled to receive the higher annual salary established in R.C. 325.11(A) unless, prior to taking office, he notifies the board of county commissioners that he intends to engage in the private practice of law while in office.

Nothing in the language of R.C. 325.11 or elsewhere in the Revised Code, however, authorizes a county prosecuting attorney who notifies a board of county commissioners prior to the commencement of his term of office that he will engage in the private practice of law to elect during his term of office not to continue engaging in the private practice of law for purposes of receiving the higher salary prescribed in R.C. 325.11(A) for a county prosecuting attorney who does not engage in the private practice of law. Instead, R.C. 325.11(B) states that "a prosecuting

¹ This opinion does not consider the situation in which a person who is elected to the office of county prosecuting attorney notifies the board of county commissioners prior to the commencement of his term of office of his intention to engage in the private practice of law while in office and subsequently tries to rescind that notification prior to assuming office. It also does not address the issues raised by the appointment of a new county prosecuting attorney in the midst of an elected term of office, which have been addressed previously. See 1998 Op. Att'y Gen. No. 98-024.

attorney who engages in the private practice of law who intends not to engage in the private practice of law during the prosecuting attorney's *next term of office* shall so notify the board of county commissioners" for the purpose of earning the higher salary provided in R.C. 325.11(A) during his next term in office. (Emphasis added.) *See generally* 1998 Op. Att'y Gen. No. 98-024 (syllabus, paragraph 1) ("[f]or purposes of R.C. 325.11 and R.C. 325.111, the appointment of an individual to fill a vacancy in the office of prosecuting attorney constitutes 'the commencement of [a] new term of office,' so that the appointee may elect to engage or not to engage in the private practice of law").

The language of R.C. 325.11(B) therefore unequivocally provides that, once a person who is elected to the office of county prosecuting attorney notifies the board of county commissioners of his intention to engage in the private practice of law while in office, the person is entitled to receive during his entire term in office the annual salary established in R.C. 325.11(A) for a county prosecuting attorney who engages in the private practice of law, rather than the higher annual salary established in R.C. 325.11(A) for a county prosecuting attorney who does not engage in the private practice of law. In addition, R.C. 325.11(B) plainly states that, after the person notifies the board of county commissioners of his intention to engage in the private practice of law and assumes the office of county prosecuting attorney, the person may notify the board of county commissioners that he will not engage in the private practice of law during his next term in office for purposes of receiving during his next term in office the salary prescribed for a county prosecuting attorney who does not engage in the private practice of law.

Because the General Assembly has explicitly established in R.C. 325.11(B) when a county prosecuting attorney who elects to engage in the private practice of law may receive the higher annual salary established in R.C. 325.11(A) for a county prosecuting attorney who does not engage in the private practice of law, it follows that the General Assembly did not intend to permit a county prosecuting attorney who elects to engage in the private practice of law to receive the higher annual salary at any other time. *See generally Akron Transp. Co. v. Glander*, 155 Ohio St. 471, 480, 99 N.E.2d 493 (1951) (it is a well-recognized canon of statutory construction that when a statute directs a thing may be done by a specified means or in a particular manner it may not be done by other means or in a different manner); *City of Cincinnati v. Roettinger*, 105 Ohio St. 145, 152, 137 N.E. 6 (1922) (same as the previous parenthetical). Thus, pursuant to R.C. 325.11(B), a county prosecuting attorney who elects to engage in the private practice of law may not receive the higher annual salary established in R.C. 325.11(A) for a county prosecuting attorney who does not engage in the private practice of law until his next term in office. Accordingly, a county prosecuting attorney who notifies a board of county commissioners prior to the commencement of his term of office that he will engage in the private practice of law may not decide during his term of office not to engage in the private practice of law in order to receive, during the remainder of his term of office, the salary prescribed for a county prosecuting attorney who does not engage in the private practice of law.

In conclusion, it is my opinion, and you are hereby advised that a county prosecuting attorney who notifies a board of county commissioners prior to the commencement of his term of office that he will engage in the private practice of law may not decide during his term of office not to engage in the private practice of law in order to receive, during the remainder of his term of office, the salary prescribed for a county prosecuting attorney who does not engage in the private practice of law.

Respectfully,

A handwritten signature in blue ink that reads "Richard Cordray". The signature is written in a cursive, flowing style.

RICHARD CORDRAY
Ohio Attorney General