November 22, 2013

The Honorable Gregg Marx
Fairfield County Prosecuting Attorney
239 West Main Street
Suite 101
Lancaster, Ohio 43130

SYLLABUS: 2013-038

1. When a clerk of the court of common pleas is suspended from office more than 40 days before the next general election for state and county officers and the clerk's term does not expire within one year immediately following the date of that general election, the person appointed pursuant to R.C. 3.16 to replace the clerk is required to be elected at that general election in order to perform the suspended clerk's duties after the election.

2. A person who is elected pursuant to R.C. 3.16 as a replacement official for a suspended clerk of the court of common pleas shall not perform the duties of the clerk's office once the clerk's suspension is lifted.

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OPINION NO. 2013-038

The Honorable Gregg Marx
Fairfield County Prosecuting Attorney
239 West Main Street
Suite 101
Lancaster, Ohio 43130

Dear Prosecutor Marx:

You have requested an opinion about electing a person to perform the duties of a suspended clerk of the court of common pleas and the person's performance of the clerk's duties after the suspension is lifted.[1] Specifically, you ask:

1. If a clerk of the court of common pleas is suspended from office more than 40 days before the next general election for state and county officers, does R.C. 305.02 require the person appointed pursuant to R.C. 3.16 to replace the clerk to be elected at that general election in order to perform the suspended clerk's duties after the election?

2. If a person is elected pursuant to R.C. 3.16 as a replacement official for a suspended clerk of the court of common pleas and the suspension is lifted after the election, but before the expiration of the suspended clerk's term of office, may the person perform the duties of the clerk's office until the expiration of the clerk's term of office?

Suspension of a Clerk of the Court of Common Pleas

R.C. 3.16 provides procedures for suspending a public official when the official is charged in a state or federal court with a felony that relates to the public official's administration of his office or conduct in the performance of his duties. For purposes of R.C. 3.16, the term "public official" means "any elected officer of a political subdivision as defined in [R.C. 2744.01]." R.C. 3.16(A)(2). As R.C.

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[1] Fairfield County has not acquired home rule powers, *see* Ohio Const. art. X, § 1; R.C. 9.482; R.C. 307.15, adopted a charter, *see* Ohio Const. art. X, §§ 3 and 4, or adopted an alternative form of county government, *see* Ohio Const. art. X, § 1; R.C. Chapter 302. We will therefore consider your questions in light of the provisions of law governing the statutory form of county government.

2744.01(F) defines a county as a political subdivision and a clerk of the court of common pleas is an elected officer of the county, *see* R.C. 2303.01; *see also* R.C. 305.02, a clerk of the court of common pleas is a "public official," as defined in R.C. 3.16(A)(2), who may be suspended from his office under R.C. 3.16.

A clerk of the court of common pleas who is suspended from his office under R.C. 3.16 may not exercise any of the rights, powers, or responsibilities of the clerk's office during the period of the suspension. R.C. 3.16(E). The suspension continues until (1) the clerk is reinstated in his office; (2) all charges against the clerk "are disposed of by dismissal or by a finding or findings of not guilty;" or (3) a successor is elected and qualified to serve the next succeeding term of the clerk's office. R.C. 3.16(C)(4).

During the time that a clerk is suspended from his office, the rights, powers, and responsibilities of the clerk's office are performed or exercised by a replacement official who is appointed or elected. R.C. 3.16(E). However, the suspended clerk does (1) retain the title clerk of the court of common pleas during the period of the suspension and (2) "continue to receive the compensation that [he] is entitled to receive for holding [the clerk's] office during the period of the suspension, until [he] pleads guilty to or is found guilty of any felony with which [he] is charged." *Id.*

Election of a Replacement Official for a Suspended Clerk of the Court of Common Pleas

Your first question asks, if a clerk of the court of common pleas is suspended from office more than 40 days before the next general election for state and county officers, whether R.C. 305.02 requires the person appointed pursuant to R.C. 3.16 to replace the clerk to be elected at the next general election in order to perform the suspended clerk's duties after the election. R.C. 3.16(E) provides that, if a public official, like the clerk of the court of common pleas, is suspended, a replacement official "shall be appointed or elected to perform the public official's duties of office in the manner provided by law for filling a vacancy in that office."

R.C. 305.02 establishes procedures for filling a vacancy in the county offices enumerated therein, including the office of clerk of the court of common pleas, when the vacancy occurs more than 40 days before the next general election for state and county officers.[2] Under R.C. 305.02(B), if a vacancy occurs from any cause in the office of the clerk of the court of common pleas, "the county central committee of the political party with which the last occupant of the office was affiliated shall appoint a person to hold the office and to perform the duties thereof until a successor is elected and has qualified." *See* R.C. 305.02(C) ("[n]ot less than five nor more than forty-five days after a vacancy occurs, the county central committee shall meet for the purpose of making an appointment under [R.C. 305.02]"); *see also* R.C. 3.02(A) ("[w]hen an elective office becomes vacant and is filled by appointment, such appointee shall hold the office until the appointee's successor is elected and qualified"). Prior to a county central committee appointing a person to fill a vacancy in the office of

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[2] General elections for state and county officers are conducted "in the even-numbered years; except as otherwise provided for filling vacancies." R.C. 3501.02(C).

clerk of the court of common pleas, the board of county commissioners may appoint a person to serve as acting clerk and authorize him to perform the clerk's duties between the occurrence of the vacancy and the time when the person appointed by the county central committee qualifies and takes office. R.C. 305.02(F). Thus, when a vacancy in the office of clerk of the court of common pleas occurs more than 40 days before the next general election for state and county officers, a person may be appointed by either the county central committee or board of county commissioners to perform the clerk's duties. R.C. 305.02(B); R.C. 305.02(F).

A person appointed by a board of county commissioners to perform the clerk's duties under R.C. 305.02 may perform such duties only until the county central committee appoints a successor or a successor is elected and qualifies for the office. *See* R.C. 3.02(A); R.C. 305.02(A); R.C. 305.02(F). If a county central committee appoints a person to perform the clerk's duties, the person serves as clerk until a successor is elected and qualifies for the office. *See* R.C. 3.02(A); R.C. 305.02(A)-(B).

When a vacancy in the office of clerk of the court of common pleas occurs more than 40 days before the next general election for state and county officers and a person is appointed to the office, R.C. 305.02(A) requires the appointee's successor to be elected as follows:

> If a vacancy in the office of ... clerk of the court of common pleas ... 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.

See R.C. 3.02(A).

Pursuant to R.C. 305.02(A), when a vacancy in the office of clerk of the court of common pleas occurs more than 40 days before the next general election for state and county officers and a person is appointed to the office, the person appointed may not hold the office for the unexpired term of the office, unless the clerk's term expires within one year immediately following the date of that general election. *See id.* Except when the clerk's term expires within one year immediately following the date of the next general election for state and county officers, the appointee's successor must be elected at the next general election for state and county officers. *See id.* This means that, when a vacancy in the office of clerk of the court of common pleas occurs more than 40 days before the next general election for state and county officers and a person is appointed to the office, the person appointed must be elected at that general election in order to continue performing the clerk's duties after the election, unless the clerk's term expires within one year immediately following the date of that general election. *See id.*

In accordance with R.C. 3.16(E), the procedures for filling a vacancy in the office of clerk of the court of common pleas set out in R.C. 305.02 apply when selecting a replacement official to perform a suspended clerk's duties: "For the duration of the public official's suspension, a replacement official shall be appointed or elected to perform the public official's duties of office in the manner provided by law for filling a vacancy in that office." R.C. 3.16(E). For this reason, when a clerk is suspended more than 40 days before the next general election for state and county officers, R.C. 305.02 authorizes a person to be appointed to serve as a replacement official to perform the

suspended clerk's duties. In addition, R.C. 305.02 requires that the person be elected at the next general election for state and county officers in order to continue performing the clerk's duties after the election, unless the term of office of the suspended clerk expires within one year immediately following the date of that general election. Therefore, when a clerk of the court of common pleas is suspended from office more than 40 days before the next general election for state and county officers and the clerk's term does not expire within one year immediately following the date of that general election, the person appointed pursuant to R.C. 3.16 to replace the clerk is required to be elected at that general election in order to perform the suspended clerk's duties after the election.

Appointed Replacement Official Continuing in that Capacity after a General Election for State and County Officers

It has been suggested that the language of R.C. 3.16(E) requiring an appointed replacement official to perform the duties of a suspended clerk of the court of common pleas "[f]or the duration" of the clerk's suspension means that the replacement official does not have to be elected at the next general election for state and county officers in order to perform the clerk's duties after the election. In other words, once a person is appointed pursuant to R.C. 3.16 as a replacement official for a suspended clerk, the person shall perform the duties of the suspended clerk until the suspension ends even though a general election for state and county officers may occur more than 40 days after the suspension begins.

We believe that this interpretation of R.C. 3.16(E) is refuted by the plain language of the statutes. As explained above, R.C. 3.16(E) explicitly requires a county to follow R.C. 305.02's procedures when selecting a replacement official to perform a suspended clerk's duties. R.C. 305.02, in turn, provides that a person appointed to perform the duties of a clerk who is suspended more than 40 days before the next general election for state and county officers may perform the duties only until that general election, unless the term of office of the suspended clerk expires within one year immediately following the date of that general election. After the general election, the duties of the suspended clerk are to be performed by the person who wins the election, provided that person is qualified to enter into the duties of the office.

We must employ the presumption that when the General Assembly enacted R.C. 3.16, it was aware that R.C. 305.02 may require the appointment of one person to perform the duties of a suspended clerk and then the election of another person to perform those duties. *See generally State v. Thompson*, 102 Ohio St. 3d 287, 2004-Ohio-2946, 809 N.E.2d 1134, at ¶18 (the General Assembly is aware of previously enacted legislation); *State v. Frost*, 57 Ohio St. 2d 121, 125, 387 N.E.2d 235 (1979) (same as the previous parenthetical). The General Assembly nevertheless stipulated in R.C. 3.16(E) that during the suspension a person who is "appointed or elected" in accordance with the procedures set forth in R.C. 305.02 may perform the duties of the suspended clerk. By using the disjunctive "or" between the words "appointed" and "elected," the General Assembly has communicated its intention that a person either appointed or elected in accordance with the procedures set forth in R.C. 305.02 may perform the duties of a suspended clerk. *See generally* R.C. 1.42 (unless the context requires otherwise, words are to be given their common, everyday meaning); *Merriam-*

Webster's Collegiate Dictionary 872 (11th ed. 2005) ("or" is "a function word to indicate an alternative").

As stated earlier, except when the term of office of a suspended clerk expires within one year immediately following the date of the next general election for state and county officers, R.C. 305.02 requires a person appointed as a replacement official for the clerk to perform the duties of the suspended clerk only until his successor is elected and qualifies for the office. The inclusion of the phrase "or elected" in R.C. 3.16(E) thus means that, after a person is elected to perform the duties of a suspended clerk, as required by R.C. 305.02, the person previously appointed to serve as the replacement official for the suspended clerk does not continue to perform the suspended clerk's duties.

If a person appointed as a replacement official for a suspended clerk were required to perform the duties of the suspended clerk for the duration of a suspension regardless of the occurrence of general elections for state and county officers, the General Assembly would not have included the terms "or elected" in R.C. 3.16(E). By including these words in R.C. 3.16(E), the General Assembly has indicated that a county is required to follow *all* of the procedures set out in R.C. 305.02 when selecting a replacement official for a suspended clerk. *See generally* R.C. 1.47(B) (when the General Assembly enacts a statute, it is presumed that "[t]he entire statute is intended to be effective"); *State ex rel. Cleveland Elec. Illum. Co. v. City of Euclid*, 169 Ohio St. 476, 479, 159 N.E.2d 756 (1959) ("the General Assembly is not presumed to do a vain or useless thing, and ... when language is inserted in a statute it is inserted to accomplish some definite purpose"). The language of R.C. 3.16(E) requiring an appointed replacement official to perform the duties of a suspended clerk "[f]or the duration" of the clerk's suspension therefore is not intended to permit a person appointed as a replacement official for a clerk to continue serving in that capacity when R.C. 305.02 requires otherwise.

Replacement Official Performing the Duties of a Clerk of the Court of Common Pleas after the Clerk's Suspension Has Been Lifted

Your second question asks, if a person is elected pursuant to R.C. 3.16 as a replacement official for a suspended clerk of the court of common pleas and the suspension is lifted after the election, but before the expiration of the suspended clerk's term of office, whether the person may perform the duties of the clerk's office until the expiration of the clerk's term of office.

No provision of law declares that a person elected pursuant to R.C. 3.16 to perform the duties of a suspended clerk shall perform those duties until the end of the unexpired term of office of the suspended clerk. Instead, R.C. 3.16(E) expressly provides that a replacement official is appointed or elected "to perform the ... duties of the office" of a suspended clerk only "[f]or the duration" of the clerk's suspension. In other words, when a replacement official is appointed or elected, the replacement official has the authority to perform the duties of the suspended clerk only during the suspension, rather than for the entire unexpired term of office of the suspended clerk.

Moreover, pursuant to R.C. 3.16(C)(4)(c), if the suspension of a clerk of court of common pleas does not end during the suspended clerk's term of office,[3] the replacement official may perform the duties of the suspended clerk's office until "[a] successor is elected and qualified to serve *the next succeeding term* of the" clerk's office, as the replacement official has the authority to perform the duties of the suspended clerk during the entire period of the suspension, *see* R.C. 3.16(E). (Emphasis added.) R.C. 3.16(C)(4)(c) establishes the only situation in which a person elected as a replacement official for a suspended clerk may perform the duties of the clerk's office until the expiration of the clerk's term of office. The language of R.C. 3.16(C)(4)(c) thus further supports the proposition of law that, when a suspension ends during a clerk's term of office, the replacement official shall not perform the duties of the clerk's office until a successor is elected and qualified to serve the next succeeding term of the clerk's office. Accordingly, a person who is elected pursuant to R.C. 3.16 as a replacement official for a suspended clerk of the court of common pleas shall not perform the duties of the clerk's office once the clerk's suspension is lifted.

Conclusions

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

1. When a clerk of the court of common pleas is suspended from office more than 40 days before the next general election for state and county officers and the clerk's term does not expire within one year immediately following the date of that general election, the person appointed pursuant to R.C. 3.16 to replace the clerk is required to be elected at that general election in order to perform the suspended clerk's duties after the election.

2. A person who is elected pursuant to R.C. 3.16 as a replacement official for a suspended clerk of the court of common pleas shall not perform the duties of the clerk's office once the clerk's suspension is lifted.

Very respectfully yours,

MICHAEL DEWINE
Ohio Attorney General

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[3] R.C. 3.16(C)(3)(a) provides that, if a clerk of the court of common pleas is provisionally suspended, the provisional suspension terminates immediately upon the issuance of a report that finds that the clerk's administration of his office and conduct in the performance of his duties does not adversely affect the functioning of his office or adversely affect the rights and interests of the public. Under R.C. 3.16(C)(4)(a)-(b), a clerk's suspension is lifted when the clerk is reinstated in his office as provided in R.C. 3.16(D) or all charges against the clerk are disposed of by dismissal or by a finding or findings of not guilty.