

December 24, 2018

Tess Elshoff, President  
State Board of Education  
25 South Front Street  
Columbus, Ohio 43215

SYLLABUS:

2018-035

1. Pursuant to R.C. 3.01, an appointed member of the State Board of Education may vote at the organization meeting of the board in January 2019 when the member's term expires on December 31, 2018, and a successor has not been appointed.
2. A successor appointee may vote at the organization meeting of the State Board of Education in January 2019 when his appointment has been delivered to the Clerk of the Ohio Senate, but a vote on his confirmation has not yet occurred, provided that the appointee meets the qualifications of a member of the State Board of Education.



December 24, 2018

OPINION NO. 2018-035

Tess Elshoff, President  
State Board of Education  
25 South Front Street  
Columbus, Ohio 43215

Dear President Elshoff:

You have requested an opinion about the authority of incumbent or successor members of the State Board of Education to vote at the board's January 2019 organization meeting. You have informed us that the terms of several appointed members of the State Board of Education will expire on December 31, 2018. The Governor has not yet appointed their successors, but may do so in the coming days. In light of this, you ask the following questions:

1. May an appointed member of the State Board of Education vote at the organization meeting of the board in January 2019 when the member's term expires on December 31, 2018, and a successor has not been appointed by the Governor?
2. If the Governor makes appointments to the State Board of Education prior to the January 2019 organization meeting, may a successor appointee vote at that organization meeting when his appointment has been delivered to the Clerk of the Ohio Senate, but a vote on his confirmation has not yet occurred?

#### **Authority of Incumbent Board Member to Vote at Organization Meeting**

The State Board of Education is charged with the "general supervision of the system of public education in the state[.]" R.C. 3301.07, and consists of nineteen members, R.C. 3301.01(A). Eleven members are elected in accordance with R.C. 3301.03, and eight members are appointed by the Governor with the advice and consent of the Senate. R.C. 3301.01(A). R.C. 3301.02 provides the term of office of the members of the State Board of Education as follows:

(A) Elected voting members of the state board of education shall be elected as required by expiration of respective terms, each for a term of four years or until a successor is elected and qualified. One elected member shall be elected from each district respectively in which the term of office of a board member expires on the first day of January following the election. The term of office of each member so elected shall begin on the first day of January immediately following this election.

....

(C) Appointed voting members of the board shall serve four-year terms beginning the first day of January and ending on the thirty-first day of December. Except as provided in division (D) of this section, members may be reappointed.

(D) No person, elected or appointed, shall hold the office of member of the state board of education for a period of longer than two successive terms of four years. Terms shall be considered successive unless separated by a period of four or more years. Only terms beginning on or after January 1, 1996, shall be considered in determining an individual's eligibility to hold office.

Your first question asks whether an appointed member of the State Board of Education may vote at the organization meeting of the board in January 2019 when the member's statutory term expires on December 31, 2018, and a successor has not yet been appointed. R.C. 3301.02(A) provides that elected voting members of the State Board of Education shall serve "a term of four years *or until a successor is elected and qualified.*" (Emphasis added). R.C. 3301.02(C) does not include similar language with respect to appointed voting members of the State Board of Education.

However, R.C. 3.01 is a general law that provides that "[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 the laws of this state." R.C. 3.01 applies broadly to any "person holding an office of public trust" and permits such public officials to continue holding office beyond their statutory term, unless the Ohio Constitution or state law expressly provides otherwise. R.C. 3.01 is therefore the starting point in analyzing whether a member of the State Board of Education may continue to hold his office beyond his statutory term when his successor has not been elected or appointed.

R.C. 3.01 is intended to prevent vacancies in offices of public trust and to ensure the continuous and efficient operation of government. *See* 1982 Op. Att'y Gen. No. 82-074, at 2-207. As explained by the Ohio Supreme Court:

The purpose of [the former version of R.C. 3.01] is to insure that all lawful incumbents of public office shall hold over and thus avoid a hiatus between the end of the term and the qualification of the newly appointed or elected incumbent. It applies to all public offices or positions of public trust, except where there is a provision in the Constitution or statute to the contrary. By its provisions, the term of the person holding the office or public trust ends as soon as the term of service of a duly elected or appointed and qualified successor begins.

*State ex rel. Bolsinger v. Oridge*, 134 Ohio St. 206, 214, 16 N.E.2d 334 (1938); *see also generally State ex rel. Wheatley v. Kirk*, 134 Ohio St. 178, 185, 16 N.E.2d 261 (1938) (the predecessor to R.C. 3.01 is intended to provide "security and continuity in government"); *State v. Howe*, 25 Ohio St. 588, 599 (1874) (General Code Sections 8 and 10 (now R.C. 3.01-.02) guard against "all the evils contemplated as likely to result from vacancies ... by confining the exercise of the power to fill vacancies in office to those cases where no one is authorized by law to

discharge the public duties”). R.C. 3.01 reflects “the settled policy of the state to avoid if practicable, a vacancy in a public office.” 1946 Op. Att’y Gen. No. 749, p. 80, at 89.

When a public officer holds over beyond his statutory term of office pursuant to R.C. 3.01, the additional time served by the official is considered a continuation of his old term of office, rather than a new term. *State ex rel. Glander v. Ferguson*, 148 Ohio St. 581, 587, 76 N.E.2d 373 (1947) (“unless otherwise expressly provided, the time of holding over by an elected or appointed officer is a continuation of the old term and not a part of a new term”); 1921 Op. Att’y Gen. No. 2157, vol. I, p. 502 (“[i]t is well settled in Ohio that when an officer holds over beyond the term for which he is elected, in pursuance to the provisions of law or the constitution, the additional tenure becomes a part of the original term”). Pursuant to R.C. 3.01, the official’s service in office ends as soon as his successor is elected or appointed and qualified. *State ex rel. Bolsinger*, 134 Ohio St. at 214.

R.C. 3.01 applies to any “person holding an office of public trust[.]” A member of the State Board of Education serves a fixed term of office, R.C. 3301.02, subscribes to an official oath of office, R.C. 3301.03, and exercises independent public duties, a part of the sovereignty of the state, *see, e.g.*, R.C. 3301.07. *See* 1977 Op. Att’y Gen. No. 77-095, at 2-319 (“[i]n view of the provisions of R.C. Chapter 3301, it is apparent that the members of the State Board of Education are to be considered public officers”); *see also generally* 2016 Op. Att’y Gen. No. 2016-029, at 2-332 (setting forth the criteria typically used to determine whether a position is a public office). It is, therefore, our opinion that a member of the State Board of Education holds an office of public trust. Accordingly, R.C. 3.01 will permit a member of the State Board of Education to continue in office “until his successor is elected or appointed and qualified, *unless otherwise provided in the constitution or the laws of this state.*” (Emphasis added). We must next consider whether there is a provision of the Ohio Constitution or the Ohio Revised Code that precludes application of R.C. 3.01 to a member of the State Board of Education.

We are not aware of a constitutional provision that would negate R.C. 3.01’s application to a member of the State Board of Education. With respect to the State Board of Education, Article VI, § 4 of the Ohio Constitution simply states:

There shall be a state board of education which shall be selected in such manner and for such terms as shall be provided by law. There shall be a superintendent of public instruction, who shall be appointed by the state board of education. The respective powers and duties of the board and of the superintendent shall be prescribed by law.

Thus, Article VI, § 4 of the Ohio Constitution does not prevent R.C. 3.01 from applying to a member of the State Board of Education and authorizing such member to continue in office beyond his statutory term “until his successor is elected or appointed and qualified.”

It may be suggested that R.C. 3.01 does not apply to an appointed member of the State Board of Education because unlike R.C. 3301.02(A), which states that an elected member shall serve “until a successor is elected and qualified[.]” R.C. 3301.02(C) does not contain similar

language with respect to an appointed member. The absence of the “until a successor is appointed and qualified” language from R.C. 3301.02(C), however, is not sufficient to constitute a statutory provision that “otherwise provide[s]” for purposes of R.C. 3.01. Rather, what is required to negate R.C. 3.01’s application is express language limiting the authority of an incumbent to hold over. *See, e.g.*, R.C. 3353.02(D) (appointed members of the Broadcast Educational Media Commission “shall continue in office subsequent to the expiration of that member’s term until the member’s successor takes office *or until a period of sixty days has elapsed*, whichever occurs first” (emphasis added)); R.C. 4121.02(C) (each member of the Industrial Commission “shall remain in office until the member’s successor takes office, *or until a period of sixty days has elapsed*, whichever occurs first” (emphasis added)). We do not read the absence of holdover language from R.C. 3301.02(C) as negating application of R.C. 3.01 to appointed members of the State Board of Education.

It may also be suggested that R.C. 3301.02(D) precludes application of R.C. 3.01 to a member of the State Board of Education. R.C. 3301.02(D) provides, in relevant part, that “[n]o person, elected or appointed, shall hold the office of member of the state board of education for a period of longer than two successive terms of four years. Terms shall be considered successive unless separated by a period of four or more years.” While it may be suggested that this language prevents a member of the State Board of Education who has held office for two consecutive four-year terms from continuing to hold office for any time in excess of eight years, thereby precluding holdover pursuant to R.C. 3.01 until his successor is elected or appointed and qualified, we do not read R.C. 3301.02(D) in this manner. Rather, it is our opinion that the language of R.C. 3301.02(D) that no person shall serve as a member of the board “for a period of longer than two successive terms of four years” imposes a term limitation, rather than a time limitation. That is, we read R.C. 3301.02(D) as preventing a board member who has served two successive four-year terms from being elected or appointed to a third consecutive four-year term, but not from extending his second term pursuant to R.C. 3.01.

This interpretation of R.C. 3301.02(D) is supported by the legislative history of R.C. 3301.02. The language of division (D) was first added by the General Assembly in 1995. 1995-1996 Ohio Laws, Part I, 898, 1114-15, (Am. Sub. H.B. 117, eff. Sept. 29, 1995). The language was added to “limit[] the *number of successive terms* any elected or appointed member can serve to two successive four-year terms, unless the terms are separated by four or more years.” Ohio Legislative Service Comm’n, Final Bill Analysis, Am. Sub. H.B. 117, at p. 95 (1995) (emphasis added). This interpretation is further supported by reference to R.C. 3301.02(C), which illustrates that R.C. 3301.02(D) is intended as a limitation on reappointment. *See* R.C. 3301.02(C) (“*[e]xcept as provided in division (D) of this section, members may be reappointed*”) (emphasis added). When an official holds over under R.C. 3.01, he is not reappointed to a term of office, but rather continues his original term. *State ex rel. Glander v. Ferguson*, 148 Ohio St. at 587.

We find further support for our reading of R.C. 3301.02(D) in *State ex rel. Rhodes v. Brown*, 34 Ohio St. 2d 101, 296 N.E.2d 538 (1973). In that case, the Ohio Supreme Court considered the analogous language of Article III, § 2 of the Ohio Constitution, which states, in part, “no person shall hold the office of governor for a period longer than two successive terms of four years.” In construing this language, the court adopted an interpretation that limits only the number of successive four-year

terms that an individual may serve as Governor. That is, the court interpreted Article III, § 2 of the Ohio Constitution as limiting the number of successive four-year terms that an individual may serve as Governor, but not the number of years (consecutive or otherwise) that a person may serve as Governor. The court recognized that:

Such an interpretation permits one who has served part of an unexpired term as Governor to still serve his or her ‘two successive terms of four years’ thereafter, should the electorate be so inclined. It also permits persons to serve as many four-year terms as they are able to achieve, so long as not more than two of them are sought to be served successively. This interpretation permits, as the language now clearly allows, the serving of any number of successive terms, so long as not more than two of them are four years in duration.

*State ex rel. Rhodes*, 34 Ohio St. 2d at 103. Thus, the court read the phrase “for a period of longer than two successive terms of four years” as imposing a term limitation, but not a time limitation. *See State ex rel. Rhodes*, 34 Ohio St. 2d at 105 (Corrigan, J., concurring) (“[t]he Constitution does not say that no person shall hold the office of Governor for more than eight years.... It imposes a term limit, but not a time limit”). The court’s interpretation, which would allow a person to serve as Governor for part of an unexpired term before serving two successive four-year terms, would similarly allow a person to serve two successive four-year terms prior to holding over pursuant to R.C. 3.01.

We are of the opinion that the language of R.C. 3301.02(D) should be read in accord with the court’s interpretation of the analogous language of Ohio Const. art. III, § 2 in *State ex rel. Rhodes*. We, therefore, read R.C. 3301.02(D) as preventing a member of the State Board of Education who has served two consecutive four-year terms from being elected or appointed to a third consecutive term. We do not interpret R.C. 3301.02(D) as preventing a member of the State Board of Education who has served two successive four-year terms from holding over pursuant to R.C. 3.01 “until his successor is elected or appointed and qualified.” *See also generally* 2007 Op. Att’y Gen. No. 2007-014, at 2-142 to 2-143 (concluding that language of R.C. 4755.01(B) that members of a certain board “shall not serve more than three consecutive terms” did not prevent a member of that board from holding over into a succeeding term).

Additionally, we are not aware of any other provision of law that would preclude R.C. 3.01’s application to a member of the State Board of Education. Therefore, it is our opinion that R.C. 3.01 authorizes an elected or appointed member of the State Board of Education to continue to serve as a member of the State Board of Education until his successor is elected or appointed and qualified.<sup>1</sup>

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<sup>1</sup> Our conclusion that an elected or appointed member of the State Board of Education may continue to serve as a member of the State Board of Education until his successor is elected or appointed and qualified is further supported by R.C. 3301.06. R.C. 3301.06 addresses vacancies on the State Board of Education and provides, in relevant part:

Based on the foregoing, you are hereby advised that pursuant to R.C. 3.01, an appointed member of the State Board of Education may vote at the organization meeting of the board in January 2019 when the member's term expires on December 31, 2018, and a successor has not been appointed.

### **Authority of Unconfirmed Successor Appointee to Vote at Organization Meeting**

Your next question asks whether a successor appointee may vote at the organization meeting of the State Board of Education in January 2019 when his appointment has been delivered to the Clerk of the Ohio Senate, but a vote on his confirmation has not yet occurred. R.C. 3301.01(A) provides that eight members of the State Board of Education shall be "appointed by the governor with the advice and consent of the senate."<sup>2</sup>

Article III, Section 21 of the Ohio Constitution addresses appointments that are subject to the advice and consent of the Senate. It provides, in relevant part:

When required by law, appointments to state office shall be subject to the advice and consent of the Senate....

No appointment shall be consented to without concurrence of a majority of the total number of Senators provided for by this Constitution, except as hereinafter provided for in the case of failure of the Senate to act. If the Senate has acted upon any appointment to which its consent is required and has refused to consent, an appointment of another person shall be made to fill the vacancy.

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A vacancy in the state board of education may be caused by death, nonresidence, resignation, removal from office, failure of a person elected to qualify within ten days after the organization of the board or of the person's election, removal from the district of election or from residence in the state, or absence from any two consecutive regular meetings of the board if such absence is caused by reasons declared insufficient by a vote of twelve members of the board.

The expiration of an elected or appointed member's statutory term is not included as a potential cause of a vacancy. We are of the opinion that expiration of a member's term is not included in R.C. 3301.06 because upon the expiration of a member of the State Board of Education's statutory term, R.C. 3.01 operates, until the member's successor is elected or appointed and qualified, to prevent a vacancy.

<sup>2</sup> Presently, the 132nd General Assembly is set to adjourn sometime before the end of December 2018, with the 133rd General Assembly set to convene in January 2019. It is, therefore, conceivable that the Governor will appoint individuals to serve on the State Board of Education while the Senate is not in session. It is also possible that the Governor will make appointments to the board while the Senate is in session, but that the Senate will not vote on such appointments prior to the January 2019 organization meeting of the State Board of Education.

If an appointment is submitted during a session of the General Assembly, it shall be acted upon by the Senate during such session of the General Assembly, *except that if such session of the General Assembly adjourns sine die within ten days after such submission without acting upon such appointment, it may be acted upon at the next session of the General Assembly.*

*If an appointment is made after the Senate has adjourned sine die, it shall be submitted to the Senate during the next session of the General Assembly.*

In acting upon an appointment a vote shall be taken by a yea and nay vote of the members of the Senate and shall be entered upon its journal. Failure of the Senate to act by a roll call vote on an appointment by the governor within the time provided for herein shall constitute consent to such appointment.

Ohio Const. art. III, § 21 (emphasis added). Thus, Article III, § 21 of the Ohio Constitution provides that if the Governor submits an appointment and within ten days after such submission the General Assembly adjourns sine die, that is, indefinitely, the appointment may be acted upon at the next session of the General Assembly. In the present instance, this means that if the Governor makes appointments to the State Board of Education within ten days of the sine die adjournment of the 132nd General Assembly, and the 132nd General Assembly does not act on such appointments, the appointments may be acted upon by the 133rd General Assembly. Similarly, Article III, Section 21 of the Ohio Constitution contemplates recess appointments. A “recess appointment” occurs when a vacancy arises while the Senate is not in session, and no appointment has been made and confirmed in anticipation of such vacancy. *Cf. Black’s Law Dictionary* 121 (10th ed. 2014) (defining “recess appointment” as an “appointment ... made by the President when the Senate is not in session, subject to the Senate’s later ratification”). In such instances, the Governor is authorized to fill the vacancy, subject to confirmation or rejection by the Senate at its next session. Ohio Const. art. III, § 21. Applying this to the present situation leads to the conclusion that if the Governor makes appointments to the State Board of Education between sessions of the 132nd and 133rd General Assembly, the appointments shall be submitted to the Senate of the 133rd General Assembly. You wish to know whether, in these circumstances, the appointees may act as voting members of the State Board of Education before the Senate has taken action on their appointments.

The Ohio Supreme Court considered the question of whether an appointment becomes effective prior to Senate confirmation in *State ex rel. Brothers v. Zellar*, 7 Ohio St. 2d 109, 218 N.E.2d 729 (1966). In that case, the court held that an appointment by the Governor is complete after the appointee has duly qualified for such office and further held that the appointee has the right to take and hold such office until such time as the Senate acts to reject the appointment. *State ex rel. Brothers*, 7 Ohio St. 2d at 113. The court explained that appointment to and qualification for a public office are separate and distinct acts performed by different people. *Id.* at 111. Appointment refers to acts taken by the person with whom the appointing power rests, while qualification relates to actions that must be taken by the appointee before he is entitled to take office. *Id.* The court found that “[t]he advice and consent of the Senate is not a part of the qualification for office.” *Id.* The court explained:



It is apparent from an examination of Section 21 [of Article III of the Ohio Constitution] that no power to appoint was vested in the Senate, that at the time the Senate acts the appointment is complete, and that the Senate has only the negative power to reject such appointment.

....

Thus, the appointment by the Governor confers upon the appointee the right to take and hold the office until such time as the Senate acts to reject his appointment.

In other words, the appointive power is in the Governor and the appointment vests the title to the office in the appointee as soon as the appointee performs the necessary acts on his part to qualify for such office, and such title is vested subject to being divested by the action of the Senate rejecting the appointment.

....

To follow [the contrary] theory that the appointment is not completed until consented to by the Senate would completely subvert the orderly processes of government. Appointments necessarily must be made at times when the Senate is not in session, in fact at times when the Senate may not be in session for many months. Even if an appointment is made while the Senate is in session, action may be delayed thereon for many months. If the appointment is not effective when made by the Governor, the effect would be to extend the term of the incumbent far beyond his designated term or require the Governor to dismiss the officer and work without assistance.

*Id.* at 113-14. Thus, pursuant to the court's holding in *State ex rel. Brothers*, an appointee who otherwise qualifies for the public office to which he is appointed legally takes and holds the office pending confirmation or rejection of his appointment by the Senate. *See also State ex rel. Marshall v. Kellar*, 10 Ohio St. 2d 85, 226 N.E.2d 743 (1967) (syllabus) (“[w]here the holder of a commission from the Governor appointing him to a public office authorized to be filled in that manner does all things formally required of him to be done in order to qualify for the office, including taking the oath, takes actual possession of the office and performs the duties thereof, ... such appointee is at least a *de facto* officer during the period of nonaction on, and before rejection of, his appointment by the Senate, and his acts during that period are not invalid by reason of such nonaction of the Senate”); 1970 Op. Att’y Gen. No. 70-131 (syllabus) (“[a] person appointed to the board of trustees of a [state] university may be seated and take part in meetings pending confirmation or rejection by the Ohio Senate”).

This conclusion is further bolstered by R.C. 3.03, which provides in relevant part:

If [a vacancy in an office filled by appointment of the governor, with the advice and consent of the senate] occurs when the senate is not in session, and no appointment has been made and confirmed in anticipation of such vacancy, the governor shall fill the vacancy and report the appointment to the next regular session of the senate, and, if the senate advises and consents thereto, such appointee shall hold the office for the full term, otherwise a new appointment shall be made. *A person appointed by the governor when the senate is not in session* or on or after the convening of the first regular session and more than ten

days before the adjournment sine die of the second regular session to fill an office for which a fixed term expires or a vacancy otherwise occurs *is considered qualified to fill such office until the senate before the adjournment sine die of its second regular session acts or fails to act upon such appointment pursuant to section 21 of Article III, Ohio Constitution.* (Emphasis added.)

Thus, pursuant to R.C. 3.03, an appointment made by the Governor when the Senate is not in session is submitted to the next regular session of the Senate. The person so appointed is considered “qualified,” for purposes of R.C. 3.03,<sup>3</sup> to fill such office until the Senate either acts or fails to act on the appointment prior to indefinitely adjourning its second regular session. *See generally* R.C. 101.01(A) (the first regular session of each General Assembly convenes on the first Monday of January in odd-numbered years (unless a holiday) and the second regular session on the same date of the following year). In this instance, a person appointed to the State Board of Education during the period after the sine die adjournment of the 132nd General Assembly but before the 133rd General Assembly convenes would be considered qualified to hold the office until the Senate of the 133rd General Assembly either rejects such appointment or adjourns indefinitely its second regular session without acting on the appointment. *See generally* Ohio Const. art. III, § 21 (“[f]ailure of the Senate to act by a roll call vote on an appointment by the governor within the time provided for herein shall constitute consent to such appointment”).

Based on our reading of Article III, Section 21 of the Ohio Constitution, R.C. 3.03, and relevant precedent, it is our opinion that an appointee to the State Board of Education is authorized to take and hold the office prior to the Senate acting on the appointment, provided that the appointee has met the qualifications of a member of the State Board of Education. *See, e.g.*, R.C. 3301.03 (each appointed member of the State Board of Education must, *inter alia*, be a qualified elector residing in the state and subscribe to the official oath of office). Therefore, in response to your second question, you are hereby advised that a successor appointee may vote at the organization meeting of the State Board of Education in January 2019 when his appointment has been delivered to the Clerk of the Ohio Senate, but a vote on his confirmation has not yet occurred, provided that the appointee meets the qualifications of a member of the State Board of Education.

### **Conclusions**

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

1. Pursuant to R.C. 3.01, an appointed member of the State Board of Education may vote at the organization meeting of the board in January 2019 when the member’s term expires on December 31, 2018, and a successor has not been appointed.

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<sup>3</sup> The appointee must, of course, meet any other qualifications of office that are set forth by the Ohio Constitution or statute. *See, e.g.*, R.C. 3301.03.

2. A successor appointee may vote at the organization meeting of the State Board of Education in January 2019 when his appointment has been delivered to the Clerk of the Ohio Senate, but a vote on his confirmation has not yet occurred, provided that the appointee meets the qualifications of a member of the State Board of Education.

Very respectfully yours,

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

MICHAEL DEWINE  
Ohio Attorney General