



Communiqué

To: Board members, superintendents, treasurers, business officials, OCSBA members
From: Richard J. Dickinson general counsel
Re: **Board member removal decision**
Date: Oct. 7, 2004

On September 27, 2004, Madison County Court of Common Pleas Judge Robert Nichols rendered a decision ordering three members of the Madison-Plains Local (Madison) Board of Education to be removed from office. The purpose of this *Communiqué* is to briefly describe the events and the legal framework that led to this decision.

Ohio's removal-from-office law

Ohio does not have a statute that permits voters to recall elected public officials. Instead it has a series of statutes (Ohio Revised Code (RC) Sections 3.07-3.10) that permit the removal from office of a public official for misconduct in office. RC 3.07 specifically provides that a public official, including a school board member "... who willfully and flagrantly exercises authority not authorized by law, refuses or willfully neglects to enforce the law or to perform any official duty imposed upon him by law, or is guilty of gross neglect of duty, gross immorality, drunkenness, misfeasance, malfeasance or nonfeasance is guilty of misconduct in office."

Procedural steps to initiate a removal

RC 3.08 provides the procedure to initiate removal of a public official. It requires that petitions specifically setting forth the charge must be signed by qualified electors residing in the school district totaling 15% of the total vote cast for governor in the most recent election. If that number of signatures is obtained on petitions, the petitions are then filed in the court of common pleas. After notice to the public officials against whom the charges are filed, a hearing is held before the judge (or in some cases a jury) and the judge renders a decision as to whether the charges have been proved and whether they warrant removal of the individuals from public office.

What happened in Madison-Plains?

A group of citizens circulated petitions seeking removal of four members of the Madison-Plains Local Board of Education. The statutory grounds alleged for removal were gross neglect of duty, misfeasance, malfeasance and nonfeasance. The group obtained some 700 signatures on the petitions, which were then filed in the Madison County Court of Common Pleas. A hearing was held where witnesses testified and other evidence was presented, which lasted for approximately two weeks. Several weeks after the conclusion of the hearing, the judge rendered his 130-page decision ordering removal of three of the four board members petitioners sought to remove.

What did the court find?

Among the court's findings were the following:

1. That all four board members were guilty of misfeasance and nonfeasance for acts and omissions under the Ohio Open Meetings Act and Ohio Public Records Act. The judge found that the board members violated the provisions of the Ohio's Open Meetings Act (commonly known as Ohio's Sunshine Law) by repeatedly holding lengthy executive sessions, followed by brief public sessions at which votes were conducted but no discussion on matters before the board was held. The court also found that the board members had violated the Public Records Act by failing to approve minutes of board meetings for months at a time, with the purpose being to hide the record of board actions from the public.
2. The court found one of the board members violated two specific Ohio statutes that prohibit a board member from voting to employ family members, namely her husband and her daughter.
3. The court found that the board members illegally delegated the authority of the board of education to a single member of the board, thereby abdicating their corporate responsibilities in violation of Ohio law, their own board policies, their own board adopted code of ethics and their oaths of office.
4. The court found the board members violated Ohio law and illegally paid individuals who were not properly certified to teach the subjects they were teaching and who did not make progress toward obtaining appropriate certification as required under the Ohio Department of Education's certification regulations. One of these teachers was the daughter of one of the board members.
5. The court found one of the board members guilty of gross neglect of duty and malfeasance with regard to her activities attempting to obstruct the official business of the Department of Children's Services investigating an employee of the school district who was alleged to have had improper relationships with female students.

Why was the fourth board member not removed?

The court held that one board member participated in the votes used by the three other charged board members to illegally accomplish their purposes. But the court held that although she was guilty of misfeasance, malfeasance and nonfeasance, the court did not find evidence of bad faith on her part. It found that she "improperly exercised discretion, erred in judgment and disregarded the law, but such conduct does not rise to actionable misconduct." For that reason the fourth board member charged was not removed from office.

What standard did the court use to evaluate the board members' conduct?

The court stated that Ohio Supreme Court case precedents require that the law be strictly construed to disfavor removal and that evidence for removal must be clear and convincing. The grounds alleged in the petition were gross neglect of duty, misfeasance, malfeasance and nonfeasance. The court described a gross neglect of duty as either an intentional wrong or such a reckless disregard of duty and right as to imply bad faith. It defined nonfeasance as an omission of an act that one ought to do; misfeasance as improperly doing an act that one might lawfully do; and malfeasance as doing an act one ought not to do at all. Quoting another Ohio Supreme Court case, the Madison County court stated, "an elective public official should not be removed except for clearly substantiated reasons and conclusions that his further presence in office would be harmful to the public welfare." The court went on to state "from these cases it is clear that the conduct of school board members individually, and collectively as the board itself, must be given deference by the court. Mere mistake or failure to carry out minor statutory requirements attached to their office do not warrant the extraordinary remedy of removal from office. However the discretion of the school board is not unlimited, and when it is abused the courts may step in with the power of judicial review; the presumption of good faith is not irrefutable, and when it is overcome the court must determine whether the officer should be removed from his position of public trust."

Using this very high standard that gives a great deal of deference to the actions of board members, the court found that the three members of the Madison-Plains board were guilty of misconduct and ordered their immediate removal from office.

Is the case over?

No. The three board members have indicated they will appeal. They immediately asked Judge Nichols for a stay of this order of removal, to allow them to continue to serve on the board pending the outcome of the appeal. Judge Nichols denied that motion for stay. The board members have stated they will make a similar request to the court of appeals.

How will the board vacancies be filled?

Under Ohio law, a single vacancy in a board of education is to be filled by a majority vote of the remaining members of the board. If the board fails to fill such a vacancy within a period of 30 days, the probate court of the county in which the school district is located is required to do so. In addition, a recent opinion of the Ohio attorney general has held that one remaining board member cannot act to fill four vacancies on a board because the board lacks a quorum to act. The attorney general indicated that in that circumstance the probate court is to immediately have the responsibility of filling the vacant board positions. Similar reasoning is likely to be applied to a board left with two members after three vacancies have occurred.

The full text of the decision can be found at **www.co.madison.oh.us**.

If you have questions regarding this case or this subject, please contact your board counsel or OSBA's Division of Legal Services.

The information in this Communiqué is intended as general information. It should not be relied upon as legal advice. If legal advice is required, the services of an attorney should be obtained.