

To: Tim Russo, Candidate for Cuyahoga County Council, 7th District

Re: Legal opinion memorandum regarding whether prior felony conviction bars client from being able to serve if elected to the Cuyahoga County Council

This legal opinion is being drafted at the request of the client who is requesting a legal opinion as to whether the recently enacted Cuyahoga County Charter, or anything in Ohio law, would prohibit the client from running for or holding public office in Ohio.

For the reasons stated below, a review of the relevant legal authorities has led the undersigned counsel to conclude that there is no reasonable legal basis to conclude that Mr. Russo cannot run for and serve in public office at the Federal, State, County, or local level.

STATEMENT OF FACTS

On July 12, 2002, Mr. Russo entered a guilty plea to a single amended count of Importuning,¹ a felony in the fifth-degree in the case: *State v. Russo*, Cuy. Cnty. C.P. Case No. CR-01-414621 (“the felony conviction.”) To the best of the undersigned counsel’s knowledge and belief, this is the only felony conviction of Client.

After submitting Mr. Russo to a pre-sentence investigation, Cuyahoga County Common Pleas Judge Christopher Boyko sentenced the client to one-year of community control, and placed him under basic probation, and other similar condictions, but imposed no period of incarceration or fine.

Approximately four months later, the Court granted the Client’s Motion to Terminate his probation, thus ending his probation as being satisfactorily completed. A review of the public record in this case shows no evidence that Mr. Russo ever violated any term of his community control.

In November 2009, the voters of Cuyahoga County passed Issue 6, a referendum issue designed to transition Cuyahoga County government to an alternative charter-form of government as described in the document known as the “Cuyahoga County Charter.”

Article XII of the County Charter deals with the effective date of the charter², the recall of the County Executive, members of the County Council, and any other elected County officials³, and the grounds for forfeiture of public office⁴.

Section 12.03(3) of the County Charter states: “A County elected official shall forfeit that office if the officer . . . [i]s convicted of any felony or of any crime involving moral turpitude.”

Client has pulled petitions from the Cuyahoga County Board of Elections to run for the newly created office of County Executive and, alternatively, for a position on the newly created County County- Seventh District.

¹ R.C. 2907.07

² See, Cuyahoga County Charter (<http://charter.cuyahogacounty.us/en-US/ArticleXII-General-Provisions.aspx>) § 12.01.

³ *Id.* at § 12.02.

⁴ *Id.* at § 12.03.

Recently, the Client was interviewed by a local television station in which the producer conducting the interview asserted that a person at the County Board of Elections had allegedly concluded that Mr. Russo would be eligible to run, but not be able to serve, if elected based on a reading of Section 12.03(3) of the County Charter.

Because the reporter did not inform the client of the identity, position, or qualifications of the Board of Elections employee the reporter was citing, this information is unknown to counsel.

Client has contacted the undersigned counsel seeking a legal opinion as to whether the reporter's claim was legally valid.

ANALYSIS

Before addressing the issue presented, counsel feels it pertinent to point out that the client's prior felony conviction would not automatically disqualify him from running for and serving in the U.S. House of Representatives, the United States Senate, or even, for President of the United States. This legal fact, alone, should give any person pause before believing that the Client's conviction would bar him to serve in a county office.

A. The client is eligible to hold public office under the Ohio Revised Code.

Under Ohio's constitution, county and township governments derive their power as granted to them by Art. X of the Ohio Constitution and defined and limited by the General Assembly.⁵ This is distinct from the right of self-governance enjoyed by municipalities under Art. XVIII--commonly known as "home rule." Furthermore, the Ohio Constitution exclusively grants "the power to exclude from the privilege of voting or being eligible to office, any person convicted of a felony" to the General Assembly.⁶ Therefore, it is important to first examine whether the Client's prior felony conviction would prohibit him from holding a public office under the Ohio Revised Code.

Under the Ohio Revised Code, a person who is convicted of a felony is "incompetent to be an elector or juror or to hold an office of honor, trust, or profit" (hereinafter "the general felony disability.")⁷ There is no doubt that either County office would constitute an office of honor or trust.⁸ However, the same statute also says that a person who is "released under a non-jail community control sanction . . . is competent to be an elector during the period of community control . . . and is competent to be an elector thereafter following final discharge."⁹ This provision has allowed the Client to legally vote in Ohio both during his probation and since it was terminated.

Ohio has a separate statute, R.C. 2961.02, which specifically designates a conviction of certain criminal offenses as a bar to holding public office. However, the Client's conviction does not constitute as a "disqualifying offense" under that statute as it defines theft, fraud, theft in office

⁵ See, Art. X, § 1 of the Ohio Constitution.

⁶ Art. V, § 4 of the Ohio Constitution.

⁷ R.C. 2961.01(A)(1).

⁸ See, "Position of honor, trust or profit" as defined in R.C. 2929.191(F)(1)(a) as: "An elected office of the state or any political subdivision of the State."

⁹ R.C. 2961.01(A)(2).

crimes, and certain offenses against justice and public administration only as disqualifying offenses barring future elected office (hereinafter “theft in office disability”).

The distinction between the two statutes is important because it’s implicated in a later statute dealing with the removal of the disenfranchisement. R.C. 2967.16(C)(1)(c) states that “A person that has completed the period of community control sanction . . . that was imposed by the sentencing court” “shall be restored to the rights and privileges forfeited by the conviction.” The statute specifically states it applies to the general felony disability, except for certain specific felony offenses.¹⁰ However, the client was not convicted of any of those listed offenses. Therefore, the client’s general felony disability preventing him from being able to run for office expired upon the successful termination of his probation back in 2002.

Under the Ohio Revised Code, only a felon convicted of a felony committed in relation to a public office they held or any person who commits certain offenses against justice and public administration (bribery, intimidation, theft in office) is barred after completing community control or post-release control from serving in public office absent a pardon or expungement of the disqualifying offense. Given the offense for which Mr. Russo was convicted and that he is no longer on community control, the Ohio Revised Code permits Mr. Russo to run for public office, and, if elected, serve. There is absolutely no reason to believe that the Ohio Revised Code prohibits the Client from being able to serve in any state, county, or local office that he is qualified to serve.

B. The County Charter does not prohibit the Client from serving in a public county office.

The only other possible legal theory is whether Section 12.03(3) of the County Charter prohibits a person with a prior felony from serving elected County office. It does not. However, even if such a provision could be interpreted to serve as such a bar, it would be unconstitutional as such a requirement obviously would go beyond what the General Assembly has decided when a felony should serve as a bar to public office, and therefore, constitutes as an unconstitutional infringement of an issue the General Assembly has been given exclusive powers to decide under Art. 5, Sec. 4 of the Ohio Constitution. Therefore, the legislative interpretation Canon of Constitutional Avoidance mandates that this clause be interpreted to avoid any such constitutional questions. Such a canon, and the plain meaning of the clause itself, means that Sec. 12.03(3) of the County Charter does not operate to prevent Mr. Russo, or any other qualified elector with a felony conviction, from holding elected county office in Cuyahoga County.

Section 12.03(3) of the County Charter states: “A County elected official shall forfeit that office if the officer . . . **[i]**s convicted of any felony or of any crime involving moral turpitude.” (emphasis added.) The exclusive use of the present tense in that clause makes it perfectly clear that only a conviction of a felony or any crime involving a moral turpitude during the elected official’s term would disqualify that official from continuing to serve. Under Sec. 1.03 of the Charter, “[t]he rules for statutory construction contained in the Ohio Revised Code shall govern the provisions of this Charter.” The Revised Code states that the use of the present tense in a provision implicates only the present and future tense.¹¹ Furthermore, a statute is legislatively presumed to be operative prospectively, not retroactively, unless *expressly* made retroactive.¹² Therefore,

¹⁰ See, R.C. 2967.16(C)(2)(c).

¹¹ See, R.C. 1.43(C).

¹² See, R.C. 1.48.

12.03 must be interpreted to not include any felony convictions that occurred prior to the existence of the Charter or prior to the official's election.

The provision is not ambiguous, and therefore, should be interpreted by its plain meaning. Furthermore, had the drafters intended to wholesale bar any convicted felon from serving in an elected position, they would have inserted such language in the separate provision of the Charter dealing with the qualifications for those offices, and not in a provision generally dealing with the *recall election* of such officials.

Had the drafters meant otherwise, they would not have specifically included the present tense verbage. Under the statutory interpretation doctrine, *expressio unius est exclusio alterius*, the fact that the provision does not specifically include alternative language such as "has been convicted" means that the clause cannot be interpreted to include such convictions.

The clause cited by the television producer is nothing more than a legal truism as it would be interpreted as merely acknowledging that the general felony disability and theft in office disability under the Ohio Revised Code operates against the elected officials described in the Charter.

It is also important to note that the other grounds for disqualifying a member of Council from office, Sections 12.03(1) 12.03(2), and 12.03(4) all clearly deal with acts or omissions that can only occur during the offending member's term in office. Therefore, under the statutory interpretation doctrine of *noscitur a sociis*, the term "is" in 12.03(3) would have to be construed to meaning only convictions that occurred during a county elected official's term, and not prior felonies.

Finally, under the statutory interpretation canon of *in pari materia*, the fact that Sections 12.02 and 12.03 of the Cuyahoga County charter seems to essentially mirror in organization and language (with some inconsequential departures) to Ohio's recall statutes led to a legal conclusion that 12.03(3) does not bar candidates with a felony conviction to serve in an elected office.¹³ The only real difference is that the Charter mentions the issues of removal from office and disqualifying acts in the opposite order than the Ohio Revised Code does. Regardless, the consequence is that 12.02 and 12.03 would be interpreted as being related provisions, and thus, Section 12.03(3) would also be interpreted to include only convictions occurring *during* an elected official's term as disqualifying the official from serving, but not barring a candidate with a prior felony from serving if elected.

After a thorough review of the applicable legal authorities and applying the recognized judicial doctrines of statutory construction and interpretation, the undersigned counsel simply cannot fashion any recognized manner of statutory interpretation that would support any claim that Section 12.03(3) of the Cuyahoga County Charter would bar the Client from serving in elected office.

Not only is such a claim not supported by Ohio law, but it is directly contradicted by it. Therefore, any such news report would be so reckless as to the facts as it may rise to malice. The client is advised, to the extent he can, to immediately provide a copy of this legal opinion to the television producer who interviewed him and to provide the television station, and any other reporter in the future, a copy of this legal opinion in the future if the issue arises. **However,**

¹³ See, R.C. 3.07 & 3.08.

the client is also advised that any transmission of this opinion to third parties constitutes as a waiver of the attorney-client privilege only as the privilege relates to the facts and analysis of this opinion.

If the undersigned counsel has omitted or stated any material fact incorrectly, counsel will revise this opinion to reflect what impact, if any, the corrected facts would have.

Respectfully,

Brian R. Hester, Esq. (0079752)

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