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The Hon. Colleen M. O'Toole, Esq.
Ashtabula County Prosecutor
25 W Jefferson Street
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By Regular mail and email

March 8, 2021

RE: Request for investigation and opinion - Ashtabula County Board of Elections

Dear Prosecutor O'Toole,

As you are aware, I am a member of the Ashtabula County Board of Elections, one of the two designated Republican members of the board appointed by the Secretary of State pursuant to R.C. 3501.06. I write this letter to you solely in my capacity as a member of the board of elections, and to you as the statutory legal counsel of the Ashtabula County Board of Elections. As a member of the elections board, I acknowledge that I - and the other three board members- are the Secretary's representatives in Ashtabula County.

The purpose of my letter is to request an investigation by your office and for you and your office to render an opinion as to the validity of the March 2, 2021 reorganizational meeting of the board of elections and certain actions (and lack thereof) taken in that meeting. As a corollary to the issues herein, I ask that you review and opine on the abject refusal of the other three board members to follow the very specific legal mandates of R.C. 3501.09 and the Secretary of State's directive 2020-26¹. Finally, because the meeting left the Ashtabula County Board of Elections without a director or deputy director as strictly required by statute, the Secretary's elections calendar is gravely jeopardized, including the near immediate administration of UOCAVA (42 U.S.C. §§ 1973ff-1973ff-6), I request that you evaluate whether the exigent circumstances on

¹ This directive specified the particular order and procedures to be followed and tailored specifically for the March 2021 reorganization.

the elections calendar warrant the Secretary's administrative suspension and oversight of the Ashtabula County Board of Elections pursuant to R.C. 3501.01(DD) and OAC 111:3-2-02 *et seq.*, and that your office make the appropriate consultation with the Secretary and referral if you deem warranted in your discretion after investigation.

As you know, Ohio law requires that the county boards of elections reorganize biennially or when appointments to the board are made pursuant to R.C. 3501.09. This statute mandates the precise order of the meeting and precise actions which must be taken by the board of elections to validly reorganize. The reorganizational meeting, because of its nature, is very tightly scripted. As you are further aware, the Secretary promulgates a special directive (in this case 2020-26) for each reorganization, thereby implementing R.C. 3501.09, and creating a mandatory obligation on the members of boards of elections to precisely "follow the script". I am concerned and am of the opinion that the three other board members deliberately and willfully disregarded this directive and obligation.

The Ashtabula County Board of Elections convened on March 2, 2021, at its office in Jefferson for the reorganizational meeting pursuant to the statute and the Secretary's directive. The meeting almost immediately deviated from the statute and the Secretary's plain instructions. Mr. Varckette (Democrat) was chosen as the statutory temporary chairman.² At the instance of Mr. Newcomb (Democrat), it was demanded that the board "approve" the appointment of the new member, Mr. Magyar (Republican)³. The Secretary, and not the board, approves and appoints members. This unauthorized action would simply portend the first of other deviations from the Secretary's directive. The deviation from the directive continued when Mr. Newcomb made a motion to reappoint Mr. Varckette, usurping the plenary and primary authority of the Secretary.

At this juncture, Mr. Newcomb demanded that the board go into executive session for the unspecific and amorphous justification of discussing "personnel". I immediately objected. I am of the opinion that because such an executive session is not authorized under the strict procedures in the statute and the directive, and second, the demand violated the Ohio Sunshine Law. As you know, numerous Ohio authorities have held that such a generalized motion

² Mr. Varckette would proceed to preside over this meeting without a copy or reference to directive 2020-26. He cannot argue that he was entitled to follow his own procedure, as directives are the Secretary's interpretation and implementation of election law, are entitled to deference and must be given deference by the board members. *Ohio Democratic Party v. LaRose* 2020-Ohio-4778.

³ In the course of your examination, please examine the records of the board of elections and clerk of courts, as they appear to show that no certificate of appointment and no oath of office were filed with the Ashtabula County Clerk of Courts with regard to Mr. Magyar.

involving personnel matters is clearly and obviously proscribed.⁴ Additionally, I do not believe that the appointment of a director can in any event be discussed in closed session.

The executive session commenced. I began to develop the opinion that an open and aggressive disregard of the law was taking place at this meeting. Mr. Varckette is Geneva city manager, Mr. Magyar has been a township trustee and serves on the port authority board, and Mr. Newcomb is an attorney, all of whom have or should have a strong working knowledge of the Ohio Sunshine Law and its executive session exceptions, and certainly know better.

I am of the opinion that the ensuing executive session commencing at 11:20 a.m. was illegal. While I believe that it is better discretion to discuss the specific contents and particulars directly with you as part of the investigation by the board's legal counsel, the topic of Mr. Frye's reappointment to the Ashtabula County Board of Elections ensued. I was blindsided by this discussion. It was inappropriate for the topic to be raised in this executive session. It was not contemplated by the directive or the statute. Mr. Magyar, my fellow Republican, did not previously inform me of his intention not to reappoint Mr. Frye. The Elections Officials Manual, and permanent directive 2021-02, specifically set forth factors to be considered in the appointment or reappointment of a director of the board of elections. These factors and instructions from the Secretary were not even considered in what was to be a decision not to reappoint Mr. Frye. While I will avoid going into particulars - which I will discuss with you in your investigation- there appeared to be a cynical consensus among the three⁵ - with an air of mendacity- that Mr. Frye was doing a very good job as director. The factors in the mandatory permanent directive would not even be discussed; instead some amorphous and apparently personal matters having nothing to do with board governance; Mr. Frye would not be reappointed; the board would be left in the hands of a recently appointed deputy director who had not yet presided over a full election cycle; the voters and the upcoming elections calendar be damned.

⁴ R.C. 121.22(G)(1), (7) (requiring roll call vote and specificity in motion); *State ex rel. Long v. Cardington Village Council*, 92 Ohio St.3d 54, 59 (2001) (finding respondents violated R.C. 121.22(G)(1) by using general terms like "personnel" and "personnel and finances" instead of one or more of the specified statutory purposes listed in division (G)(1)); *Maddox v. Greene Cty. Children Servs. Bd. of Dirs.*, 2d Dist. No. 2013-CA-38, 2014-Ohio-2312, ¶¶ 18-21 (finding that non-specific reference to "personnel matters" or "personnel issues" does not satisfy R.C. 121.22(G)); *Jones v. Brookfield Twp. Trustees*, 11th Dist. No. 92-T-4692, 1995 WL 411842 (Jun. 30, 1995) (stating that "[p]olice personnel matters" does not constitute substantial compliance because it does not refer to any of the specific purposes listed in R.C. 149.43(G)(1)); 1988 Ohio Op. Att'y Gen. No. 88-029, 2-120 to 2-121, n.1; *State ex rel. Dunlap v. Violet Twp. Bd. of Trustees*, 5th Dist. No. 12-CA-8, 2013-Ohio-2295, ¶ 25 (minutes stating that executive session was convened for "personnel issues" do not comply with R.C. 121.22(G)(1)); see also *State ex rel. Young v. Lebanon City School Dist. Bd. of Edn.*, 12th Dist. No. CA2012-02-013, 2013-Ohio-1111, ¶¶ 63-65.

⁵ Mr. Magyar, in a telephone conversation with me on the morning of March 3, 2021, (after avoiding communication with me) freely acknowledged and reaffirmed without my prompting that Mr. Frye was "a great director" as he had said the previous day. It was now very clear that the situation reeked with malice and extreme cynicism. Mr. Magyar has refused to explain himself, abjectly refusing to answer your questions, as I personally witnessed.

At the conclusion of the executive session, I asked that the meeting be recessed but it was insisted upon by the other three that I could have only 30 minutes recess. It was becoming clear to me during the interregnum that the meeting was a set up. The board went back into session at 12:30 PM and Mr. Newcomb nominated Mr. Mead (the previous Democratic deputy director) as an acting director. A deputy director was not appointed. The meeting concluded with the undersigned being appointed as chairman of the board of elections.

The new Democratic “appointee”, Mr. Mead, appeared concerned and surprised about what had just transpired. As a deputy director, he was and is a relatively new hire, not having had the benefit of overseeing a full election cycle. While I trust that Mr. Mead is well intentioned, he has been deserted in the face of an impending election without experienced help.

I have reviewed the meeting minutes and do not believe that they reflect what transpired or evidence my intent as a board member. The events in the closed session were the true substance and outcomes of what happened in this meeting.

I believe that the actions taken in the meeting were very clearly contrary to law. Notwithstanding what I believe to be the sunshine law violations, the illegal motions, and the illegal executive session, there is no provision or authority for a board of elections to appoint an "acting director" in a reorganizational meeting. The board must unequivocally appoint a director. Likewise, the statute clearly directs that a deputy director must be appointed at the reorganizational meeting. Of course, a valid reorganizational meeting must have taken place before March 6.

The consequences of this mendacity are obvious and this flagrant, open, and aggressive disregard of the law has no place in public governance. The highly qualified board of elections staff, upon learning of this farce of a reorganizational meeting, walked out of the office on a **bipartisan** basis. The three other board members, who purport to be community leaders, abandoned their leadership stations, refused to quell the revolt and stand before our staff on a bipartisan basis and answer for their actions.

This is unbecoming conduct on the part of the Secretary’s representatives in Ashtabula County.

This is a disgrace.

I urgently put these issues to you as the board’s legal counsel and respectfully request the following:

1. That you investigate and render an opinion as to whether or not the Ashtabula County Board of Elections validly reorganized on March 2, 2021, and within the statutory timeframe expiring March 6, 2021. In doing so, please advise:

- a. Whether the board has statutory authority under the reorganizational statute to appoint an “acting director”;
- b. Whether the failure to unequivocally appoint a director as required by the reorganizational statute results in a failure to reorganize;
- c. Whether the failure to unequivocally appoint a deputy director as required by the reorganizational statute results in a failure to reorganize;
- d. Whether the Secretary should be advised so that he may appoint a director and deputy director. Art. II, Sec. 38, Ohio Const.; R.C. 3501.16; *State ex rel Hughes v. Brown* (1972) 31 Ohio St.3d 376;
- e. Whether Mr. Magyar’s failure to file his certificate of appointment and an oath of office with the Ashtabula County Clerk of Courts renders his participation in the meeting null and void, thereby nullifying the meeting that required four members;
- f. Whether violations of R.C. 121.22 have taken place and if so the consequences for the actions purportedly taken;
- g. Whether the failure to consult and follow the Secretary’s mandatory directive during the course of the reorganizational meeting - specifically tailored for this particular meeting - invalidates the meeting;

2. If the meeting is determined to be invalid, and the actions taken invalid, and after consultation with the Secretary in your capacity as board counsel, please advise as to how the board should proceed;

3. Given the elections administration exigency, whether the current circumstances warrant the Secretary’s administrative suspension and oversight of the Ashtabula County Board of Elections pursuant to R.C. 3501.01(DD) and OAC 111:3-2-02 *et seq.*, and that your office make the appropriate consultation with the Secretary and referral if you deem warranted in your discretion after investigation.

4. Whether the board has any remedy against Varckette, Magyar, and Newcomb for what I believe to be their intentional disregard of Chapter 121, R.C. 3501.09, directive 2021-02, directive 2020-26, and their flagrant disregard for the Secretary’s explicit and mandatory instructions to the board.

5. That you take such other actions as may be just and appropriate.

Thank you for your attention to these important matters and thank you for your service to the citizens of Ashtabula County.

Respectfully,



Isaac Arthur
Member, Ashtabula County Board of Elections

Cc: The Hon. Frank LaRose, Secretary of State of Ohio
Amanda Grandjean, Director of Elections, Ohio Secretary of State
Joseph Varckette
Christopher Newcomb
Jeff Magyar
Ashtabula County Board of Elections
The Hon. Casey Kozlowski
The Hon. Kathryn L. Whittington
The Hon. J.P. Ducro IV