

Stay or Go? County Commissioners on Social Services Boards

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SCENARIO 1

In June 1999 the commissioners of (fictional) Carolina County appointed Janet Greene, a county resident, to the county's social services board, effective July 1, 1999. How long is Greene's term on the board?

The answer is clear. Under Section 108A-4 of the North Carolina General Statutes (hereinafter G.S.), her appointment is for a three-year term that expires on June 30, 2002 (unless she was appointed to fill an unexpired term resulting from a vacancy on the board).

SCENARIO 2

In November 1998 the voters of Carolina County elected Janet Greene to the board of county commissioners. After Greene assumed office, the county commissioners appointed her to the social services board, effective July 1, 1999, when the term of an incumbent social services board member expired. How long is Greene's term on the board?

The answer depends on whether one thinks that Greene's appointment to the social services board is (1) governed by G.S. 108A-4 or (2) not governed by G.S. 108A-4 because it is *ex officio* and therefore concurrent with her term as a county commissioner.

This article examines the legal arguments for and against these two views: the "three-year term position" and the "*ex officio* position." (For background information on appointment and terms of social services board members, see the sidebar, page 30.)

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The Three-Year Term Position



The three-year term position is based on the literal wording of G.S. 108A-4: “each member of a county board of social services shall serve for a term of three years.” Proponents argue that G.S. 108A-4’s wording and meaning are clear and unambiguous. The three-year term established by the statute applies to *all* members, including county commissioners who are appointed to the social services board. Three years means just that—not more, not less. Nothing in the statute links a county commissioner’s appointment to the social services board to his or her term as a county commissioner.

A comparison of G.S. 108A-4 with G.S. 130A-35(c) and G.S. 122C-118(f), the statutes respectively governing appointment and terms of members of county public health boards and area mental health authorities, supports this literal interpretation, its proponents argue. All the members of a county health board are appointed by the county commissioners. One member of the county health board must be a county commissioner. The terms of all the members of the county health board, other than the county commissioner who is appointed to it, are three years.¹ G.S. 130A-35(c), however, expressly provides that, rather than serving a three-year term, the county commissioner who is appointed to serve on the county health board “shall serve only as long as the [county commissioner] member is a county commissioner.”

A multicounty area mental health authority board consists of fifteen to twenty-five members appointed by the

boards of county commissioners within the area.² These mental health authority boards must include at least one county commissioner from each county in the area. Members of a mental health authority board who are not county commissioners serve four-year terms. G.S. 122C-118(f), however, expressly provides that members of a mental health authority board who are county commissioners serve in an *ex officio* capacity and that their terms on the mental health authority board “are concurrent with their terms as county commissioners.”

Proponents of the three-year term position argue that if the General Assembly had intended to link the term of a county commissioner on the social services board to his or her term as a county commissioner, it could have done so quite easily (and may still do so) by amending G.S. 108A-4 to include language similar to that found in G.S. 130A-35(c) and G.S. 122C-118(f). The absence of similar language in G.S. 108A-4, they contend, provides additional evidence that the term of a county commissioner who serves on the social services board is three years and is not concurrent with his or her term as a county commissioner.

Finally, proponents of the three-year term position argue, the question of a county commissioner’s term on the social services board was decided by a 1963 decision of the North Carolina Supreme Court, *State ex rel. Pitts v. Williams*. In this case the court held that a county commissioner’s term as an *ex officio* social services board member

on the board of county commissioners expired on December 3, 1962, after he was defeated for reelection. On December 17, 1962, the county commissioners adopted a resolution appointing another county commissioner, Dexter F. Williams, to replace Pitts on the social services board. Pitts filed a lawsuit challenging the commissioners’ action. The North Carolina Supreme Court ruled in Pitts’s favor.

The supreme court first held that, although Pitts’s appointment to the county social services board was characterized under G.S. 108-11 as *ex officio*, the *ex officio* nature of his appointment did not affect the length of his appointment to the social services board.⁴ The court then held that the statute governing the terms of social services board members (former G.S. 108-10, now G.S. 108A-4) clearly established three-year terms for all social services board members, including county commissioners appointed to the social services board; that Pitts had been appointed to a three-year term on the social services board; that his three-year term on the social services board had not expired when the county commissioners attempted to replace him; that state law “contains no provision sufficient to support the view that the expiration of the term of office of Pitts as county commissioner disqualified him from further service as a member of the welfare board or created a vacancy in the office to which he had been appointed”; and that the county commissioners’ attempt to replace Pitts was therefore illegal, null, and void.⁵

does not expire if his or her term as a county commissioner expires before the end of his or her three-year term on the social services board.³

The *Pitts* case involved the Craven County Board of Commissioners’ appointment of one of its members, J. Ben Pitts, to the social services board on July 2, 1962, for a three-year term expiring June 30, 1965. Pitts’s term

The *Ex Officio* Position



Ex *officio* means “by virtue of one’s office.” A person who holds an office *ex officio* does so “without any other warrant or appointment than that resulting from the holding of [another] particular office” and performs the duties of the appointed office (office B) as part of his or her responsibilities of the office (office A) by virtue of which the appointment was made.⁶

Proponents of the *ex officio* position argue, first, that the county commissioners’ appointment of one of their own to the social services board is an *ex officio* appointment, and second, that as an *ex officio* appointee, the appointed commissioner serves a term that is concurrent with or linked to his or her term as a county commissioner, rather than a definite three-year term under G.S. 108A-4.

Although G.S. 108A-3 does not use the term *ex officio* with respect to the county commissioners’ appointment of one of their members to the social services board,⁷ proponents of the *ex officio* position argue that such an appointment is *ex officio* under G.S. 153A-76 and G.S. 128-1.2. The first of these two statutes, G.S. 153A-76, authorizes the board of county commissioners to create, change, abolish, or consolidate offices, departments, and agencies of the county government, to change the composition and the manner of selection of county boards, and to “impose *ex officio* the duties of more than one office on a single officer.”⁸ G.S. 128-1.2 provides that, unless the resolution of appointment provides otherwise, when the board of county commissioners ap-

points one of its own members to another public board or commission, the appointed commissioner is considered to serve on the other body as part of his or her duties as a county commissioner (that is, in an *ex officio* capacity) and is not considered to be serving in a separate office.

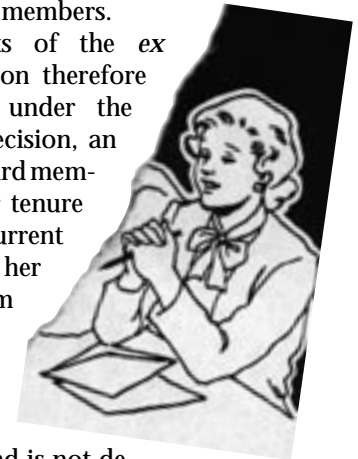
The question then becomes, Does considering a commissioner’s appointment to the county social services board *ex officio* under G.S. 153A-76 or G.S. 128-1.2 override the provisions of G.S. 108A-4 establishing a definite, three-year term for *all* people appointed to the board of social services? According to proponents of the *ex officio* position, the answer is yes. If a county commissioner is appointed *ex officio* to the social services board, he or she performs the duties of a social services board member as part of his or her responsibilities as a county commissioner. The commissioner’s *ex officio* duties on the social services board continue only as long as he or she remains a county commissioner. Thus the position of a county commissioner who is an *ex officio* social services board member is different from that of other social services board members in two respects: his or her position on the social services board is not considered a separate office for purposes of North Carolina’s laws on holding multiple offices, and his or her appointment to the social services board is not for a definite, three-year term.⁹

Neither G.S. 153A-76 nor G.S. 128-1.2, however, addresses the terms or the tenure of *ex officio* office-holders.

Therefore neither statute provides any explicit legal support for the position that the term of an *ex officio* appointment is concurrent with the term of the office by virtue of which the appointment was made.¹⁰

Proponents of the *ex officio* position therefore rely instead on language in a 1911 decision by the North Carolina Supreme Court, *McCullers v. Wake County Board of Commissioners*.¹¹ The *McCullers* case involved a state law that designated the chair of the county commissioners, the mayor of the county seat, and the county clerk of superior court as three of the five members of a county health board. The supreme court held that these three public officials were *ex officio* members of the county health board and that, as such, they did not violate North Carolina’s constitutional prohibition against holding multiple offices by serving both on the county health board and in their other public offices. The court went on to state, however, that because their *ex officio* positions on the county health board were conferred on them as the holders of particular public offices and not as particular individuals, they remained *ex officio* members of the board only as long as they held their other public offices, even though another provision of the law established definite two-year terms for health board members.

Proponents of the *ex officio* position therefore argue that, under the *McCullers* decision, an *ex officio* board member’s term or tenure *must* be concurrent with his or her tenure or term in the office that served as the basis for the appointment and is not determined by a statute establishing a different, definite term for the appointed office. If so, a county commissioner who is appointed as an *ex officio* member of the social services board remains a member only as long as he or she remains a county commissioner, rather than serving a definite, three-year term.



Response to the *Ex Officio* Position



Proponents of the three-year term position counter that the *McCullers* decision does not constitute binding legal precedent with respect to the terms of county commissioners who are appointed *ex officio* to the social services board. First, they say, the only legal issue that was actually decided in the *McCullers* case was whether the *ex officio* service of three public officials on

the county health board violated North Carolina's constitutional prohibition against holding multiple offices. The case did not involve the tenure or the terms of these *ex officio* health board members, and the supreme court therefore did not actually decide that their tenure as *ex officio* board members was necessarily concurrent with their tenure in their other public offices.

Second, the *ex officio* offices involved in the *McCullers* case were qualitatively different from the *ex officio* appointment of a particular county commissioner to the social services board. The statute at issue in *McCullers* required the holders of three particular public offices to serve as *ex officio* members of the county health board. Under the "traditional" approach to *ex officio* office-holding, their tenure as *ex officio* board members was necessarily linked to their tenure or terms in the public offices on which their *ex officio* positions were based.¹² G.S. 108A-3, by contrast, does not require the *ex officio* appointment of a county commissioner to the social services board. More important, if the county commissioners choose to appoint one of their members as an *ex officio* member of the social services board, they generally do so by appointing a *particular individual* who is a county commissioner (as opposed to

Appointment and Terms of County Social Services Board Members

Most North Carolina counties have five-member social services boards. In these counties the board of county commissioners appoints two members of the social services board, the state Social Services Commission appoints two members, and the remaining board member is appointed by the other social services board members.¹

Although state law does not require that a county commissioner serve on the county social services board, it clearly permits the county commissioners to appoint one of their own to the social services board,² and this is a long-standing practice in many counties. The appointment of a county commissioner to the social services board may improve the communication between the county commissioners and the county's social services board and director, facilitate the commissioners' oversight of the county social services department, and allow the commissioners to exercise greater

control over the social services director and department.

Except for appointments to fill unexpired terms resulting from vacancies on the board, state law provides that "each member of a county board of social services shall serve for a term of three years" that begins on July 1 and ends on June 30. With one exception, social services board members may serve no more than two consecutive three-year terms.³ In the absence of "good cause," social services board members may not be replaced or removed before the end of their terms.⁴

Notes

1. State law requires that each North Carolina county have a social services board (or a consolidated human services board). G.S. 108A-1, -3. Wake County has a consolidated human services board. G.S. 153A-77(b). In Mecklenburg County the board of county commissioners also is the county social services board. G.S. 153A-77(a). A few counties have three-member social ser-

vices boards. G.S. 108A-2. In these counties the board of county commissioners and the state Social Services Commission appoint one member each, and the remaining member is appointed by the other two members.

2. See G.S. 108A-3(a).

3. G.S. 108A-4. An appointment to fill an unexpired term resulting from a vacancy on the social services board is not considered a term for purposes of the two-term limit. G.S. 108A-6. Also, the two-term limit does not apply to a social services board member who was a county commissioner at any time during his or her first two consecutive terms on the social services board and is a county commissioner at the time of his or her reappointment to the social services board. G.S. 108A-4.

4. The "good cause" requirement for removal of county social services board members, and the procedures for removing them, are discussed in more detail in John L. Saxon, *Removal of Members of County Social Services Boards from Office during Their Terms*, SOCIAL SERVICES LAW BULLETIN no. 17 (Institute of Government, Feb. 1993).

their appointing the holder of a *particular seat* on the board, such as the chair or the commissioner elected from district two).

This difference—between designating the holder of a particular public office as an *ex officio* board member and appointing a particular individual who is a public official as an *ex officio* board member—is more than semantic. When the board of commissioners appoints a particular individual who is a commissioner as an *ex officio* member of the social services board, it cannot be said that the commissioner's position on the social services board is *solely* by virtue of his or her office as a county commissioner—that is, “without any other warrant or appointment than that resulting from the holding of [another] particular office.” For example, in opening scenario 2, although the Carolina County commissioners undoubtedly appointed Greene to the social services board because she was a county commissioner, the legal basis for her position on the social services board is her appointment by the board of commissioners, not her office as a county commissioner. Her appointment may be characterized as *ex officio*, but it is not *ex officio* in the same sense as the *ex officio* offices involved in *McCullers*.

Third, proponents of the three-year term position argue that the *McCullers* decision is inconsistent with the supreme court's 1963 decision in *Pitts*. Again, in that case the court expressly held that, when a statute (G.S. 108A-4) clearly establishes a definite term for an appointed office (social services board member), the appointment's being characterized as *ex officio* does not necessarily mean that the tenure or the term of the *ex officio* appointment is concurrent with the appointee's term in the office that serves as the basis for the *ex officio* appointment.¹³

Conclusion

Although the issue may not be completely free from doubt, it seems that, given the supreme court's decision in *Pitts* and the literal wording of G.S. 108A-4, county commissioners who are appointed as *ex officio* members of social services boards are appointed for a definite term of three years and their

service on the social services board is not linked to or concurrent with their tenure as county commissioners.

Thus, back to opening scenario 2, unless the supreme court overrules the *Pitts* decision or the General Assembly amends G.S. 108A-4 or other statutes governing *ex officio* appointments, Greene's term on the social services board will expire on June 30, 2002. If her term as a county commissioner ends in December 2000, and she is not re-elected, she may continue serving on the social services board in a non-*ex officio* capacity until June 30, 2002, and the county commissioners may not, without good cause, replace or remove her before that date.¹⁴

Notes

1. G.S. 130A-35(b), (c), (g). The statute does not use the term *ex officio* to describe the board of county commissioners' appointment of a county commissioner to the county public health board.

2. G.S. 122C-118(e)(1), (f).

3. State *ex rel. Pitts v. Williams*, 260 N.C. 168, 132 S.E.2d 329 (1963).

4. *Pitts*, 260 N.C. at 173, 132 S.E.2d at 332. In reaching this conclusion, the court reasoned that former G.S. 108-11 “obviously” used the term *ex officio* not in “its technical sense” but for the more limited purpose of allowing county commissioners to serve as social services board members without violating North Carolina's constitutional restrictions on holding multiple offices.

5. *Pitts*, 260 N.C. at 173, 132 S.E.2d at 332. The court held that Pitts's service on the social services board was *ex officio* while he was a county commissioner (July 2, 1962–December 3, 1962); that his service after December 3, 1962, was as “an appointed member who was not a county commissioner”; and that he was required to take an oath of office as a social services board member when this change in status occurred.

6. BLACK'S LAW DICTIONARY (6th ed. 1990). Many people incorrectly assume that an *ex officio* board member is an “honorary” member who may not vote. *Ex officio* office-holding is discussed in more detail in chapter 6 of A. FLEMING BELL, II, ETHICS, CONFLICTS, AND OFFICES: A GUIDE FOR LOCAL OFFICIALS (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1997).

7. The General Assembly removed the term *ex officio* from a prior version of the statute in 1969. Former G.S. 108-11 pro-

vided that “one or both of [the persons appointed by the board of county commissioners to the county social services board] may be a member or members of the board of county commissioners to serve as *ex officio* members of the county [social services] board. . . . [O]r the commissioners may appoint one or both members to the county board from persons other than their own membership.”

8. G.S. 153A-76 also provides that, notwithstanding the county commissioners' authority to make *ex officio* appointments and organize county government, they “may not change the composition or manner of selection” of the county social services board.

9. See BELL, ETHICS, CONFLICTS, AND OFFICES at 112–13.

10. G.S. 128-1.2 applies only to the question of whether *ex officio* appointments violate North Carolina's restrictions on holding multiple offices. Under G.S. 128-1.1, a person may hold concurrently no more than one elective office (such as county commissioner) and one appointive office (such as social services board member). G.S. 128-1.2 simply makes it clear that county commissioners who are appointed *ex officio* to other public boards or commissions are not considered to be holding a separate appointive office for purposes of the restrictions in G.S. 128-1.1 on holding multiple offices.

11. *McCullers v. Wake County Bd. of Comm'rs*, 158 N.C. 75, 73 S.E. 816 (1911).

12. The “traditional” and “expanded” views of *ex officio* office-holding are discussed in BELL, ETHICS, CONFLICTS, AND OFFICES at 108–10.

13. *Pitts*, 260 N.C. at 173, 132 S.E.2d at 332. Although the supreme court's reasoning in the *Pitts* case has been criticized (see BELL, ETHICS, CONFLICTS, AND OFFICES at 113–14), the *Pitts* decision has not been overruled by subsequent court decisions or legislative enactments and still is binding legal precedent on the issues it decided.

14. Greene may, of course, resign from the social services board when her term as a county commissioner expires, thereby allowing the board of county commissioners to appoint one of its members or another county resident to fill her unexpired term on the social services board. If Greene continues to serve on the social services board after her term as a county commissioner expires, she must take an oath of office as a social services board member (if she has not already done so), and she becomes subject to North Carolina's restrictions on holding multiple offices, with respect to her continued service on the board.