



STATE OF INDIANA  
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January 25, 2007

**OFFICIAL OPINION 2006-4**

Representative William Crawford  
State of Indiana  
House of Representatives  
Third Floor, State House, Room 4A-2  
Indianapolis, Indiana 46204

Representative Chester F. Dobis  
State of Indiana  
Third Floor, State House  
Indianapolis, Indiana 46204

Re: Indiana Code Section 3-8-1-5 Regarding Disqualification from Assuming or Being a Candidate for Elected Office.

Dear Representatives Crawford and Dobis:

This letter responds to your request for a legal opinion regarding Public Law 113-2005 (SEA 18) and its amendments to Indiana Code section 3-8-1-5. That section of the Code sets forth grounds for the disqualification of candidates for and electees of specified elected offices.<sup>1</sup> (Amended section 3-8-1-5 is included as Attachment A).

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<sup>1</sup> "Elected offices" is defined at Indiana Code section 3-5-2-17 as "a federal office, state office, legislative office, school board office, or local office. Political party offices (such as precinct committeeman and state convention delegate) are not considered to be elected offices."

## Brief Answers<sup>2</sup>

- Public Law 113-2005 became effective May 4, 2005.
- Section 3-8-1-5 applies only to newly elected officials who, upon oath, will assume the duties of office, and to candidates for an elected office.
- Current lawful office holders with disqualifying felony convictions under amended section 3-8-1-5 are not required to vacate office, but are disqualified from being a candidate for reelection.
- Section 3-8-1-5 applies to officials and candidates with *any* prior felony conviction, regardless of the actual offense.
- A person who, as a juvenile, was convicted of a felony in adult court is disqualified under section 3-8-1-5; however, a person adjudicated to be a juvenile delinquent is not thereby disqualified from running for or assuming elected office.
- Candidates and electees who have felony convictions that were pardoned, reversed, vacated, set aside or not entered are *not* disqualified under section 3-8-1-5.
- A person whose felony charge is entered into judgment as, or converted to, a conviction for a Class A misdemeanor under Indiana Code section 35-50-2-7 or 35-38-1-1.5, is disqualified by section 3-8-1-5.

## Analysis

### **I. Effective Date of the Public Law 113-2005:**

You asked what date Public Law 113-2005 became effective. Article 5, Section 14 of the Indiana Constitution states:

(a) Every bill which shall have passed the General Assembly shall be presented to the Governor. The Governor shall have seven days after the day of presentment to act upon such bill as follows:

(1) He may sign it, in which event it shall become a law.

Article 4, Section 28 of the Indiana Constitution states:

No act shall take effect, until the same shall have been published and circulated in the several counties of this State, by authority, except in case of emergency, which emergency shall be declared in the preamble, or in the body, of the law.

Indiana Code section 1-1-3-3 states that an act takes effect on July 1 following its enactment unless a different time is specified in the act. Public Law 113-2005 reads as follows:

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<sup>2</sup> Public Law 113-2005 also amended Indiana Code section 5-8-1-37. This opinion does not address that provision of the Code which concerns public officials who are convicted of felonies during their current term of office. The most significant change to section 5-8-1-37 involves office holders who are convicted of non-office related felonies. Under subsection 5-8-1-37(d)(4), if the felony does not arise out of an action taken in the officer's official capacity and the felony is reduced to a Class A misdemeanor under Indiana Code section 35-50-2-7 or 35-38-1-1.5, then the office holder may remain in office. The prior law did not allow for such an exemption.

Section 1. IC 3-8-1-5 IS AMENDED TO READ AS FOLLOWS  
[EFFECTIVE UPON PASSAGE] . . .

Section 2. IC 5-8-1-37 IS AMENDED TO READ AS FOLLOWS  
[EFFECTIVE UPON PASSAGE]: . . .

Section 3. An emergency is declared for this act.

Public Law 113-2005 declared an emergency for the act and specified that it became effective upon passage. Therefore, Public Law 113-2005 became effective on May 4, 2005, when it was signed by the Governor. *See generally Lohm v. State*, 380 N.E.2d 561 (Ind. Ct. App. 1978).

## II. Application of Indiana Code section 3-8-1-5 to Incumbent Officeholders:

You asked how the changes to section 3-8-1-5 affect incumbent office holders. Specifically, you asked:

Does an incumbent office holder have to immediately vacate their current office for a prior conviction which occurred prior to the enactment of this law or are the sanctions prospectively limited (for persons convicted of past felonies) to not being able to *assume* a new office or term in the future or stand for reelection to their current office or election to another office covered by the provisions of this law?

Prior to the changes made by Public Law 113-2005, section 3-8-1-5 provided that a “person is disqualified from *holding* or being a candidate for an elected office” under the circumstances set out in the statute. Ind. Code §3-8-1-5(b) (2004) (emphasis added). However, in 2005, the word “holding” was replaced. Section 3-8-1-5(c) now states that “a person is disqualified from *assuming* or being a candidate” under the circumstances set out in the statute.

In interpreting statutory language, the words of the statute should be examined and given their plain and ordinary meaning. Ind. Code §1-1-4-1(1); *Town of Merrillville v. Merrillville Conservancy Dist.*, 649 N.E.2d 645, 649 (Ind. Ct. App. 1995). Indiana courts note that English language dictionaries may be used when determining the plain and ordinary meaning of a statutory term. *See e.g. Doe v. Donahue*, 829 N.E.2d 99, 107 (Ind. Ct. App. 2005).

The dictionary definition of “hold” is “to have possession or ownership of” or “to possess; to occupy; to be in possession and administration of; as to hold office.” Webster’s Dictionary 575 (9<sup>th</sup> ed. 1989); Black’s Law Dictionary 731 (6<sup>th</sup> ed. 1990). “Assume” has a narrower, more finite definition, meaning “to take up” or “take over as one’s own.” Webster’s at 110.

Indiana case law also differentiates between “*holding*” and “*assuming*” an office. Cases state that “assuming office” is considered an initial one-time event. One *assumes* an office at the start of an elected term after taking the oath of office, *i.e.*, prior to actually holding the office. *See generally Steinback v. State, ex rel.* 38 Ind. 483, 488 (Ind. 1872) (observing that a person

who had been elected to office, taken the oath and provided bond “had the right to *assume* and discharge the duties of such office”); *Lake Co. Assessor’s Office v. Review Bd. of Ind. Dept. of Emp. and Training Servs.* 561 N.E.2d 754, 755 (Ind. 1990) (“On January 1, 1987, a new assessor *assumed* office . . . .”); *State v. Beckwith*, 57 N.E.2d 193, 194 (Ind. 1944) (noting that a judge *assumed* office January 1, 1943).

By contrast, cases use the term “holding office” when identifying one who is actually performing the official duties of office and when describing one who is deemed fit to perform those duties. *See generally, Stuckey v. State* 560 N.E.2d 88, 91 (Ind. Ct. App. 1990) (“[T]he office *holder* is invested with some of the functions pertinent to sovereignty, or having some of the powers and duties which inhere within the legislative, judicial, or executive departments of the government.”); *Patterson v. Dykes*, 804 N.E.2d 849, 850 (Ind. Ct. App. 2004) (discussing councilman-elect’s eligibility to “*hold* office”).

In *Taylor v. State Election Board*, 616 N.E.2d 380, 387 (Ind. Ct. App. 1993), the Court of Appeals applied the original “*holding*” language of section 3-8-1-5. The court found that the “legislature directed its actions at the regulation of a present situation, that is, a person is disqualified from holding or being a candidate for an elected office if the person has been convicted of a felony.” *Id.* The Court held that a county council member who was holding office when section 3-8-1-5(3) was originally enacted was disqualified from continuing to hold his elected office because he had committed a felony nine years earlier. *Id.*

Therefore, by changing the statutory language from “holding” to “assuming,” it follows that the legislature intended section 3-8-1-5 to now apply to only two groups: (1) newly elected officials who, upon oath, will take over the duties of an office; and (2) candidates for an elected office. Current office holders are not required to vacate their office immediately under the amended law. However, electees ready to assume office and candidates for elected office who have a felony conviction described under section 3-8-1-5 would be disqualified from assuming or being a candidate for office.

While an incumbent lawfully in office is not required to vacate that office immediately under the amended law, the incumbent would not be qualified to seek reelection if he or she has a disqualifying felony conviction under amended section 3-8-1-5. As to an incumbent’s qualification for office, it is commonly held that:

Eligibility in public office is of a continuing nature and must exist at the commencement of the term of office. . . . The fact that the candidate may have been qualified at the time of his election is not sufficient to entitle him to hold office, if at the time of the commencement of the term or during the continuance of the incumbency he ceases to be qualified.

63C Am Jur. 2d *Public Officers and Employees* §56.

*Jeffries v. Rowe*, 63 Ind. 592 (Ind. 1878) illustrates this principle. In *Jeffries*, a township trustee incumbent won reelection for his third term, but was deemed ineligible under a new law limiting office holders to two terms. The Indiana Supreme Court stated that, “[o]ffices are

neither grants nor contracts nor obligations which can not be changed or impaired. They are subject to the legislative will at all times, except so far as the constitution may protect them from interference." *Id.* See also *Taylor*, 616 N.E.2d at 387 (holding current officeholder may not continue to hold office following passage of statute disqualifying the individual during his term). Therefore, current office holders with disqualifying felony convictions under amended section 3-8-1-5 are not required to immediately vacate office, but are disqualified from being a candidate for reelection.

### **III. Felony Convictions:**

You also asked whether newly amended Indiana Code section 3-8-1-5 pertains to *any* prior felony conviction, irrespective of when the felony occurred or in what jurisdiction the verdict was announced. Section 3-8-1-5 does not limit its application only to certain categories of felony convictions. *Taylor* holds that any prior felony conviction, in any jurisdiction, at any time, resulting in possible imprisonment for more than one year, results in disqualification irrespective of the underlying offense. *Taylor*, 616 N.E.2d at 385-86. Thus, any offense resulting in a felony conviction would disqualify a candidate or an electee. However, as discussed further in section IV below, the felony conviction is a disqualifying conviction only if it has not been pardoned, reversed, vacated, set aside, or the person's guilty plea was not accepted and entered by a court. Ind. Code § 3-8-1-5(b).

You also asked whether juvenile convictions were included in the disqualifying felony convictions under section 3-8-1-5. Adjudication in a juvenile court is considered a civil proceeding and not a criminal matter resulting in a criminal conviction. See Ind. Code §31-32-2-6; *Jordan v State*, 512 N.E.2d 407, 408 (Ind. 1987). For that reason, a person who has been adjudicated delinquent by a juvenile court would not have a disqualifying felony conviction under section 3-8-1-5.

However, by statute, juveniles meeting certain age requirements may also be automatically placed under the jurisdiction of an adult court (Ind. Code §31-30-1-4), or waived to an adult court (Ind. Code §31-30-3-4; -5). Section 3-8-1-5 does not expressly exempt a felony conviction for a juvenile in an adult court. Thus, such convictions have the same impact as the felony convictions of adult offenders in terms of disqualifying a person from assuming or being a candidate for office. See *Polk v. State*, 783 N.E.2d 1253, 1261 (Ind. Ct. App. 2003) (holding that the habitual-offender enhancement of the defendant's sentences may be based solely on underlying felony convictions that occurred in adult court when the defendant was a minor). Therefore, while a juvenile adjudication for delinquency would have no disqualifying effect, a candidate or electee who, as a juvenile, was convicted of a felony in adult court would be disqualified under section 3-8-1-5.

### **IV. Convictions Pardoned, Reversed, Vacated, Set Aside or Entered as a Class A Misdemeanor:**

Prior to the changes made by Public Law 113-2005, section 3-8-1-5(b)(3) disqualified candidates and office holders who had "entered a plea of guilty or nolo contendere to; or been


convicted of a felony (as defined by Indiana Code section 35-50-2-1)."<sup>3</sup> Ind. Code §3-8-1-5(b)(3) (2004). You asked whether section 3-8-1-5 applies to candidates or elected officials who have been pardoned or have had their convictions reversed, vacated, set aside or not entered because the trial court did not accept a plea of guilty.

Amended section 3-8-1-5 now expressly excludes from its definition of disqualifying "felony" convictions not only convictions that have been pardoned, but also felony convictions that have been reversed, vacated, set aside or not entered because the trial court did not accept a guilty plea. Candidates for office, or electees ready to assume office, who have felony convictions that were pardoned, reversed, vacated, set aside or not entered are not disqualified.

You asked whether amended section 3-8-1-5 now disqualifies a person with a felony charge that is reduced to a Class A misdemeanor conviction. Originally, section 3-8-1-5 used the definition of felony conviction set out at section 35-50-2-1. Ind. Code §3-8-1-5(b)(3)(B) (2004). Under the law as previously written, a person was not disqualified from holding or being a candidate for office if his or her felony charge had been reduced to a Class A misdemeanor under section 35-50-2-7(b) in place of a Class D felony.

The statute now disqualifies a person from assuming or being a candidate for office if the person committed a Class D felony that has been converted to a Class A misdemeanor under section 35-38-1-1.5, or entered into judgment as a Class A misdemeanor under section 35-50-2-7. In other words, a person who has a felony conviction that was reduced to a Class A misdemeanor under section 35-50-2-7 or 35-38-1-1.5 is now disqualified from assuming or being a candidate for an elected office. However, a person currently *holding* office who has a felony conviction that was reduced to a Class A misdemeanor under section 35-50-2-7 or 35-38-1-1.5 would only be disqualified in future elections.

Sincerely,



Stephen Carter  
Attorney General

Rebecca Walker  
Deputy Attorney General

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<sup>3</sup> Section 35-50-2-1 defines "felony" as a "conviction, in any jurisdiction at any time, with respect to which the convicted person might have been imprisoned for more than one (1) year. However, it does not include a conviction with respect to which the person has been pardoned, or a conviction of a Class A misdemeanor under section 7(b) of this chapter."

## Attachment A

Indiana Code section 3-8-1-5 as amended by Public Law 113-2005 (SEA 18).

- (a) This section does not apply to a candidate for federal office.
- (b) As used in this section, "felony" means a conviction in any jurisdiction for which the convicted person might have been imprisoned for at least one (1) year. However, the term does not include a conviction:**
- (1) for which the person has been pardoned; or**
  - (2) that has been:**
    - (A) reversed;**
    - (B) vacated;**
    - (C) set aside; or**
    - (D) not entered because the trial court did not accept the person's guilty plea.**
- ~~(b)~~ **(c) A person is disqualified from holding assuming or being a candidate for an elected office if: ~~the person:~~**
- (1) the person gave or offered a bribe, threat, or reward to procure the person's election, as provided in Article 2, Section 6 of the Constitution of the State of Indiana;**
  - (2) the person does not comply with IC 5-8-3 because of a conviction for a violation of the federal laws listed in that statute;**
  - (3) has: in a:**
    - (A) jury trial, a jury publicly announces a verdict against the person for a felony;**
    - (B) bench trial, the court publicly announces a verdict against the person for a felony; or**
    - (C) guilty plea hearing, the person pleads guilty or nolo contendere to a felony;**
    - ~~(A) entered a plea of guilty or nolo contendere to; or~~
    - ~~(B) been convicted of;~~
  - a felony (as defined in IC 35-50-2-1);**
  - (4) the person has been removed from the office the candidate seeks under Article 7, Section 11 or Article 7, Section 13 of the Constitution of the State of Indiana;**
  - (5) the person is a member of the United States armed forces on active duty and prohibited by the United States Department of Defense from being a candidate; or**
  - (6) the person is subject to:**
    - (A) 5 U.S.C. 1502 (the Little Hatch Act); or**
    - (B) 5 U.S.C. 7321-7326 (the Hatch Act);**
- and would violate either federal statute by becoming or remaining the candidate of a political party for nomination or election to an elected office or a political party office.
- (d) The reduction of a felony to a Class A misdemeanor under IC 35-50-2-7 or IC 35-38-1-1.5 does not affect the operation of subsection (c).**