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1. COUNTY COMMISSIONER NOT A CANDIDATE FOR RE-ELECTION—DECEASED AFTER JULY 20, 1944—SUCCESSOR FOR REMAINDER OF TERM SHALL BE ELECTED AT NOVEMBER ELECTION—SECTION 2397 G. C.
2. NO PROVISION OF LAW TO AUTHORIZE NOMINATION OF PERSON FOR ELECTION TO OFFICE OF COUNTY COMMISSIONER TO SERVE UNEXPIRED TERM OF COMMISSIONER WHO DECEASED AFTER JULY 20, 1944.
3. BOARD OF ELECTIONS—DUTY TO PROVIDE BALLOT TO VOTERS TO WRITE IN NAME OF CHOICE FOR ELECTION TO OFFICE OF COUNTY COMMISSIONER—VACANCY—UNEXPIRED TERM OF DECEASED COUNTY COMMISSIONER—BOARD NOT AUTHORIZED TO PLACE ANY NAMES OF PERSONS TO BE VOTED FOR UPON BALLOT.

## SYLLABUS:

1. During the year 1944 where a county commissioner, who is not a candidate for re-election, dies after the 20th day of July, Section 2397, General Code, requires that his successor for the balance of his term shall be elected at the November election.

2. During the year 1944, after the 20th day of July there is no provision of law authorizing the nomination of a person for election to the office of county commissioner to serve the unexpired term of one who becomes deceased.

3. It is the duty of the board of elections to provide a ballot upon which voters may write in their choice for election to the office of county commissioner for the unexpired term of a deceased county commissioner who became deceased after July 20, 1944, even though the board of elections is not authorized to place any names of persons to be voted for upon such ballot.

Columbus, Ohio, September 12, 1944

Hon. Edward J. Hummel, Secretary of State

Columbus, Ohio

Dear Sir:

I am in receipt of your request for my opinion. I am also in receipt of a similar one from the prosecuting attorney of Montgomery County concerning the same question. I, therefore, take the liberty of answering both requests by a single opinion. Your request reads:

“In case of the death of an incumbent county commissioner, whose term expires the first Monday in January, 1947, is it necessary for the county board of elections to provide facilities at the coming general election to be held November 7, 1944, for the electors of that county to vote for the successor of the deceased commissioner for the unexpired term.”

Inclosed with the request of the prosecuting attorney is a letter from the clerk of the board of elections which suggests additional considerations. Such letter reads in part as follows:

“There has recently been an appointment of a County Commissioner, which was necessary by the death of the late Elmer Tinnerman, for the unexpired term.

Now we have been requested to include on our official ballot a space for a write-in for this unexpired term, or to have printed a separate ballot for the same purpose.”

Section 2 of Article XVII of the Constitution of Ohio contains the following provisions with reference to the filling of vacancies in elective offices:

“Any vacancy which may occur in any elective state office other than that of a member of the general assembly or of governor, shall be filled by appointment by the governor until the disability is removed, or a successor elected and qualified. Every such vacancy shall be filled by election at the first general election for the office which is vacant, that occurs more than thirty (30) days after the vacancy shall have occurred. The person elected shall fill the office for the unexpired term. All vacancies in other elective offices shall be filled for the unexpired term in such manner as may be prescribed by law.”

Section 2397 of the General Code, makes provision with reference to the filling of vacancies in the office of county commissioner. Such section reads:

“If a vacancy in the office of commissioner occurs more than thirty days before the next election for state and county officers, a successor shall be elected thereat. If a vacancy occurs more than thirty days before such election, or within that time, and the interest of the county requires that the vacancy be filled before the election, the probate judge, auditor, and recorder of the county, or a majority of them, shall appoint a commissioner, who shall hold his office until his successor is elected and qualified.”

Section 2396, General Code, provides the term during which the successor so elected shall hold office. Such section reads:

“When a commissioner is elected to fill a vacancy occasioned by death, resignation, or removal, he shall hold his office for the unexpired time for which his predecessor was elected.”

Section 5 of Amended Senate Bill No. 284, enacted by the current General Assembly, was enacted for the purpose of facilitating the voting of persons in the armed forces and others by means of absentee ballots and makes certain alterations in the permanent law concerning elections during the year 1944. It contains the following provision:

“If a person holding an elective office shall have died subsequent to the tenth day of March, 1944, and prior to the twentieth day of July, 1944, and if, under the laws of Ohio, a person may be elected at the general election to be held on the seventh day of November, 1944, to fill the unexpired term of the person who shall have died, the appropriate committee of each political party, acting as in the case of a vacancy in a party nomination as in the first three paragraphs of this section provided for, may select a person as the candidate of its party for election for such unexpired term at the general election to be held on the seventh day of November, 1944, and certify his name, and thereupon such name shall be printed as such candidate under proper titles and in the proper place on the party column ballots used at such general election.”

Section 6 of such act contains the following provisions:

“The secretary of state shall, on the twenty-fifth day of July, 1944, certify to the board of elections of each county in the state the forms of the official ballots to be used at the general election to be held on the seventh day of November, 1944, together with the names of the candidates to be printed thereon whose election is to be determined by the votes of the electors of the state at-large. . . .

If, after the twenty-fifth day of July, 1944, and before the twenty-ninth day of October, 1944, a certificate should be filed with the secretary of state to fill a vacancy caused by the death

of a candidate, as in section 5 of this act provided for, the secretary of state shall forthwith make a supplemental certification to the board of elections of each county in the state amending and correcting his original certification provided for in the first paragraph of this section. If within such time such a certificate should be filed with the board of elections of the most populous county in an election district comprised of more than one county, such board shall forthwith make a supplemental certification to the board of elections of each county in such district amending and correcting its original certification provided for in the second paragraph of this section. If, at the time such supplemental certification is received by a county board of elections, ballots carrying the name of the deceased candidate shall have been printed, such board shall cause strips of paper bearing the name of the candidate certified to fill such vacancy to be printed and pasted on such ballots so as to cover the name of the deceased candidate, before such ballots are delivered to electors."

Section 7 of such act contains the following language:

"Official printed ballots shall be provided by the board of elections for each polling place for the elections to be held on the seventh day of November, 1944, and for any special elections to be held at any prior time in the period of time during which this act is in effect. In addition to the names of the candidates, all ballots shall contain spaces, as required by law, for writing in other names. The number of ballots to be provided for each precinct, for use at any election, shall be determined by the board of elections having jurisdiction. \* \* \*"

You will observe that the temporary act (Amended Senate Bill No. 284) makes many provisions concerning the method of altering the ballot and voting in the event a candidate nominated at the primary dies before the election. However, it makes the following change in the permanent law in the case of a deceased office holder who is not a candidate for office during the year 1944, namely, if such officer becomes deceased subsequent to the tenth day of March and prior to July 20, 1944 and under the regular statutes his successor is authorized to be elected in the November election, the appropriate committee of each party may select candidates for such office so to be voted. It makes no provision, however, with reference to the selection of a candidate or to authorize the selection of a candidate after that date.

From a reading of the temporary act as an entirety, it is apparent that the official ballot is to be prepared from the lists certified to the boards of election under authority of Section 6 thereof and that thereafter no change may be made in such printed ballot, except in the case of names of deceased nominees whose names are to be replaced by other names

chosen as provided in Section 5 of such act, in which case the board of elections is required to cause strips of paper bearing the name so selected to be pasted over the name of the deceased candidate.

In view of the specific provision contained in Section 2397, General Code, to the effect that the office of county commissioner must be filled for the unexpired term by election at the November election and the fact that the regular ballots are now required to have been prepared without containing thereon any space for the voting of a candidate for such unexpired term, it would seem that it is the mandatory duty of the board of elections to provide a ballot upon which the qualified electors may vote their choice for such office, even if it must be done by the preparation of an additional ballot. Since no candidates can now be nominated for such office, it is apparent that such ballot would necessarily be one upon which the name of the choice of the voter may be written in but which shall contain no names of persons to be voted for such office.

Specifically answering your inquiry, it is my opinion that:

1. During the year 1944 where a county commissioner, who is not a candidate for re-election, dies after the 20th day of July, Section 2397, General Code, requires that his successor for the balance of his term shall be elected at the November election.

2. During the year 1944, after the 20th day of July there is no provision of law authorizing the nomination of a person for election to the office of county commissioner to serve the unexpired term of one who becomes deceased.

3. It is the duty of the board of elections to provide a ballot upon which voters may write in their choice for election to the office of county commissioner for the unexpired term of a deceased county commissioner who became deceased after July 20, 1944, even though the board of elections is not authorized to place any names of persons to be voted for upon such ballot.

Respectfully,

THOMAS J. HERBERT

Attorney General