

2503

VACANCY, OFFICE OF COUNTY ENGINEER :

1. NO ONE CAN PERFORM STATUTORY OFFICIAL DUTIES IMPOSED ON COUNTY ENGINEER.
2. COUNTY COMMISSIONERS MAY CONTINUE TO PAY COUNTY EMPLOYEES RETAINED UNDER SECTION 2411 G. C. FOR WORK DONE ON COUNTY ROADS.
3. CERTIFICATION OF PLATS NOT ONE OF OFFICIAL DUTIES OF COUNTY ENGINEER—SECTION 3585 G. C.
4. COUNTY COMMISSIONERS MAY EMPLOY ENGINEER UPON WRITTEN REQUEST OF COUNTY ENGINEER—WHERE VACANCY, OFFICE COUNTY ENGINEER, COUNTY COMMISSIONERS MAY NOT EMPLOY ENGINEER.

SYLLABUS:

1. In the event of a vacancy in the office of county engineer no one can perform the official duties imposed on the county engineer by statute.
2. In the event of a vacancy in the office of county engineer, the county commissioners may continue to pay county employes retained under the provisions of Section 2411, General Code, for work done on county roads.
3. The certification of plats under the provisions of Section 3583, General Code, is not one of the official duties of the county engineer.
4. The county commissioners may employ an engineer upon the written request of the county engineer. In the event of a vacancy in the office of county engineer, the county commissioners may not employ an engineer.

Columbus, Ohio, December 15, 1947

Hon. Carl Abaecherli, Prosecuting Attorney, Warren County
Lebanon, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“* * * some time last spring this office on behalf of the

Board of County Commissioners of Warren County requested an informal opinion regarding the following situation :

The County Engineer, who had been a registered professional Engineer had just resigned, and prior to his appointment as well as during the period it was known that the incumbent intended to resign, said Commissioners had made considerable effort to fill the imminent vacancy, but were unable to find any other qualified person who was interested in accepting appointment to the office. Therefore, in order to permit the road maintenance, etc., work coming under the office of the County Engineer to continue functioning for the benefit of the public, the only practical alternative appeared to be to appoint an individual who had served as an assistant to the County Engineer, formerly known as County Surveyor, for practically 17 years, and who therefore had considerable experience, as well as knowledge of the functions and work of said county office, but who was not a registered professional engineer and surveyor, as required by Section 2783 of the General Code of Ohio.

* * * the appointment was made, and since that time the aforesaid individual, formerly assistant to the County Engineer, has continued to perform all the functions of County Engineer. What brings the matter to a head at the present time, is that a complaint against the present incumbent continuing in office has been filed with the Grievance Committee of the Ohio Society of Professional Engineers, whose Chairman, Mr. E. L. Luaces, together with two other members of the Committee has been in conference today with the present incumbent, the Board of County Commissioners and the writer. Said Grievance Committee is contemplating bringing an action in the Common Pleas Court of this County to enjoin said incumbent from continuing to perform the duties of the office of County Engineer, and also contemplates bringing a mandamus action in the Supreme Court of Ohio against the Board of County Commissioners, in order to attempt to compel said Board to vacate the office of County Engineer, and to appoint a qualified registered engineer and surveyor.

The incumbent has signified his willingness to make proper application for the examination, which, if passed by him, would entitle him to become a registered professional Engineer and Surveyor; and he has also signified his willingness, if necessary, to resign from his present office.

This statement of facts gives rise to the following series of questions which would necessarily follow either in the event of the present incumbent's resignation, or during the period of at least several months wherein he might possibly qualify to become a registered professional engineer and surveyor, especially in the event of the office of County Engineer becoming vacant, and in

the event of the continuing inability of the Board of County Commissioners to obtain a qualified person to accept appointment to said office in order that the functions of the office necessary in the public interest might be continued:

(1) In the event of such a vacancy in said office, who will certify the payroll for the work of maintaining, etc., the county roads, to the Board of County Commissioners?

(2) In the event of such vacancy, who will certify plats of subdivisions of land as being correct from an engineering and surveying standpoint, for certification of the same to the County Auditor and in turn to the County Recorder?

(3) In the event of such a vacancy in the office of County Engineer, or in the event the present incumbent fails to resign from the office and is not enjoined from continuing to function, has the Board of County Commissioners the legal authority and power to hire or appoint a properly qualified Engineer and Surveyor on a part-time basis, for the purpose of performing the technical duties of a County Engineer? * * *

There are two sets of statutes dealing with the county engineer—Section 2783, et seq., and Section 7181, et seq., General Code. In these statutes the terms “county surveyor” and “county engineer” are both used. That these terms apply to the same office is provided in Section 2782-1, General Code, which reads as follows:

“The title of county surveyor shall be changed to that of county engineer. Wherever the words ‘county surveyor’ are found in any section of the General Code, not herein amended or repealed, they shall, after the taking effect of this act, be read ‘county engineer.’”

Your first question dealing with certifying the payrolls for work on the county roads apparently refers to Section 7187, General Code, which provides in part as follows:

“The county surveyor shall approve all estimates which are paid from county funds for the construction, improvement, maintenance and repair of roads and bridges by the county. * * *

The word “estimate” is rather loosely used in the statutes dealing with county roads, but as used above it seems clear that it refers to payments made from county funds. It has been held in two opinions by my predecessors that Section 7187, General Code, requires that the county engineer approve all bills submitted by contractors for labor or materials

used on county roads (Opinion No. 34, Opinions of the Attorney General for 1933, page 25; Opinion No. 4767, Opinions of the Attorney General for 1935, page 1300), and I adopt that interpretation in answering your question.

Since approving the bills for labor submitted by contractors is one of the duties of the county engineer, it follows that in the event of a vacancy in that office no one will be qualified to approve such bills. There will be no engineer to approve them, and the powers of any deputy appointed by the present incumbent will cease with his vacation of the office. (See *Hubert v. Mendheim*, 64 Cal. 213, 30 P. 633; *Herd v. State*, 167 Ind. 622, 79 N. E. 916, *State, ex rel. Hawes v. Barrows*, 71 Minn. 178, 73 N. W. 704 as supporting the proposition that the term of a deputy expires with that of his principal.) Until the office is filled there will be a cessation of the duties which are to be performed by the county engineer.

If your first question refers to the pay given to employes hired under the provisions of Section 2411, General Code, a different problem is presented. Section 2411 provides as follows:

“When the services of an engineer are required with respect to roads, turnpikes, ditches or bridges, or with respect to any other matter, and when, on account of the amount of work to be performed, the board deems it necessary, upon the written request of the county surveyor, the board may employ a competent engineer and as many assistant engineers, rodmen and inspectors as may be needed, and shall furnish suitable offices, necessary books, stationery, instruments and implements for the proper performance of the duties imposed on them by such board.”

It has been held by my predecessors that employes retained under the provisions of this section are employes of the county paid from the county general fund. Opinion No. 373, Opinions of the Attorney General for 1917, page 1011; Opinion No. 1369, Opinions of the Attorney General for 1918, page 1031. It is probable that such employes customarily work under the supervision of the county engineer, and that he customarily approves their payrolls before they are presented to the county commissioners. However, I am unable to find any provision of law which specifically imposes the duty of such approval on the county engineer. Therefore, in the event of a vacancy in the office of engineer, the commissioners would be authorized to pay county employes retained under the provisions of Section 2411, General Code, for work done on county

roads. In making such payments the commissioners should determine the correctness of the payrolls by some appropriate means.

Your second question refers to the certification of plats to the county auditor and county recorder. If such a certification were one of the official duties of the county engineer, the answer to this question would be the same as the answer to your first one set out above. However, I do not believe that such a certification is one of the duties of the county engineer. The applicable statutes provide in part as follows:

Section 3580, General Code.

“When a person wishes to lay out a village, or subdivision or addition to a municipal corporation, he shall cause it to be surveyed, and a plat or map of it made by a competent surveyor.
* * *”

Section 3582, General Code.

“At the time of surveying and laying it out, the proprietor of the village shall plant and fix, at the corner of the public ground, or a public lot, if any there be, and if there be none, then at the corner of one of the inlots, and at the corner of each out-lot, a good and sufficient stone, of such size and dimensions, and in such manner, as the surveyor directs, for a corner from which to make future surveys, and the point or points where it may be found shall be designated on the plat or map.”

Section 3583, General Code.

“After the plat or map is completed, it shall be certified by the surveyor, and acknowledged by the owner * * *. Such plat or map * * * shall * * * be recorded in the office of the county recorder. * * *”

Section 5568, General Code, provides that such a plat shall be presented to the county auditor for valuation of the property described therein, and Section 2757, General Code, provides that the county recorder shall maintain a record of all such plats.

In my opinion the surveyor referred to in these sections is the surveyor employed by the owner of the land and not the county engineer; and therefore the certification of such plats would not be affected by the status of the county engineer's office.

Your third question refers to the power of the county commissioners to employ an engineer "for the purpose of performing the technical duties of a County Engineer." As I have pointed out above, no one can perform the official duties of the county engineer during a vacancy in the office, so I presume your reference to "technical duties" refers to matters requiring professional skill but not within the official duties of the engineer.

Section 2411, General Code, has been set out above. It provides that the county commissioners may employ a competent engineer "upon the written request of the county surveyor." Applying the literal language of the statute, there can be no "written request of the county surveyor" if the office is vacant. If the present incumbent retains his office and requests that an engineer be employed, the commissioners are authorized to employ one.

In answer to your questions it is therefore my opinion that :

1. In the event of a vacancy in the office of county engineer no one can perform the official duties imposed on the county engineer by statute.

2. In the event of a vacancy in the office of county engineer, the county commissioners may continue to pay county employes retained under the provisions of Section 2411, General Code, for work done on county roads.

3. The certification of plats under the provisions of Section 3583, General Code, is not one of the official duties of the county engineer.

4. The county commissioners may employ an engineer upon the written request of the county engineer. In the event of a vacancy in the office of county engineer, the county commissioners may not employ an engineer.

Respectfully,

HUGH S. JENKINS,
Attorney General.