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1. MAYOR OF VILLAGE — RESIGNATION OR DEATH — PRESIDENT PRO TEM OF COUNCIL BECOMES MAYOR — SEAT IN COUNCIL VACATED — DUTY OF COUNCIL TO FILL VACANCY AND ELECT ANOTHER MEMBER OF COUNCIL AS PRESIDENT PRO TEM — SECTIONS 4217, 4256 G. C.
2. WHEN PRESIDENT PRO TEM OF VILLAGE COUNCIL SUCCEEDS TO OFFICE OF MAYOR AND REFUSES TO TAKE OATH OF OFFICE OR GIVE REQUISITE BOND AS MAYOR, UPON FAILURE OR REFUSAL FOR TEN DAYS, VILLAGE COUNCIL MAY DECLARE OFFICE VACANT — NEWLY ELECTED PRESIDENT PRO TEM SHALL BECOME VILLAGE MAYOR.

SYLLABUS:

1. Under the provision of Section 4256, General Code, upon the resignation or death of the mayor of a village, the president pro tem of the council becomes the mayor, and his seat in the council is thereby vacated. Thereupon it becomes the duty of the council under the provisions of Section 4217, General Code, to fill such vacancy and to elect another member of council as president pro tem.
2. When the president pro tem of a village council who has succeeded to the office of mayor by reason of the death or resignation of the mayor, with knowledge of such death or resignation fails or refuses to take the oath of office or to give the required bond as such mayor, and such failure or refusal continues for ten days, the council of said village may declare such office of mayor vacant, whereupon the newly elected president pro tem shall become the mayor.

Columbus, Ohio, October 29, 1948

Hon. Richard E. Hole, Prosecuting Attorney
Darke County, Greenville, Ohio

Dear Sir:

I have before me your request for my opinion, reading as follows:

"The Mayor of the Village of Hollandsburg, in Darke County, Ohio, has resigned his office. The president pro tem of council refuses to qualify for the office of mayor, but continues to act as a councilman.

"The village authorities have requested me to obtain your opinion as to the method that should be followed in appointing a mayor under such circumstances.

"I have examined Sections 4216, 4217, 4236, 4242, 4243, 4244, 4255 and 4256 of the General Code, but do not find in any of said sections the answer to this particular question.

"Will you please furnish me with an opinion at your earliest convenience."

Section 4216, General Code, requires the council of a village to elect a president pro tem from their own number and further provides that when the mayor is absent from the village or is unable for any cause to perform his duties, the president pro tem shall become acting mayor, and shall have the same powers and perform the same duties as the mayor.

This section does not provide for the complete succession by the president pro tem of council in case of the death or resignation of the mayor, but Section 4256, General Code, does make such provision. That section reads as follows:

"When the mayor is absent from the village, or is unable for any cause to perform his duties, the president pro tem of council shall be acting mayor. In case of the death, resignation, or removal of the mayor, the president pro tem of council *shall become the mayor* and serve for the unexpired term and until the successor is elected and qualified." (Emphasis added.)

As to the effect of the death or resignation upon the member of council who is thus elevated to the mayoralty, Section 4217, General Code, is significant. It provides:

“When the president pro tem of council becomes the mayor, *the vacancy thus created in council* shall be filled as other vacancies therein, and the council shall elect another president pro tem from their own number, who shall have the same rights, powers and duties as his predecessor.” (Emphasis added.)

In my opinion, when a member of the council accepts the office of president pro tem, he accepts it with the knowledge that in the event of the death or resignation of the mayor, he will become at once and without any action on his part the mayor of the village, and the statute last quoted plainly indicates that in the act of his becoming the mayor a vacancy is created in the council which council is required to fill as provided in Section 4236, General Code, by the election of some other person for the unexpired term.

As against the proposition that the president pro tem becomes mayor instantly upon the death or resignation of that officer, it might be argued that a person elected or appointed to an office does not become such officer until he takes the required oath of office and gives the bond that may be required. That may be true as to his right to exercise the functions of the office, but where, as in the present case, a person who has been elected to a given office becomes by the terms of the statute another officer upon the happening of a certain event, we need not be concerned as to his obligation to take the oath as a condition precedent to his right to exercise the powers incident to the office.

Section 4242, General Code, provides as follows :

“The council may declare vacant the office of any person elected or appointed to an office who fails to take the required official oath or to give any bond required of him, within ten days after he has been notified of his appointment or election, or obligation to give a new or additional bond, as the case may be.”

However, it has been held that the requirement of an oath and bond is directory only, so far as concerns the actual entry into an office. *State ex rel. Sawyer v. Poliner*, 18 O. C. C., 304. See also, *State v. Findlay*, 10 Oh., 51; 46 C. J., 961; 42 Am. Jur., 884.

While Section 4242, General Code, refers specifically to a person who has been “elected or appointed” to an office, I am of the opinion that the statute covers as well a person who by the express provision of the statute

has been advanced from one office to another, and that that section will govern the action of the council in declaring the office of mayor vacant if the person "appointed" thereto by law refuses to accept and qualify.

Applying the statutes above referred to, to the situation presented, it is my opinion that when the mayor of the village in question resigned his office, the president pro tem of council instantly became the mayor and at the same time ceased to be a member of council. It then became the duty of the council to fill that vacancy by the election of another councilman and further to proceed to the election of a new president pro tem. If within the time prescribed by Section 4242, General Code, the man who has thus succeeded to the mayoralty fails to take the oath and give bond, if one is required, the council may declare the office vacant, in which event the newly elected president pro tem of council will become the mayor.

Respectfully,

HUGH S. JENKINS,
Attorney General.