

1. A candidate elected to the office of township trustee who served as an election official in the same precinct at such election, is barred from taking such office by the provisions of Section 5092, General Code.

2. Where three members of a board of township trustees are elected on the face of the returns, it is the duty of the canvassing power, under Section 5112, General Code, to issue certificates of election to all three.

3. A vacancy on the board of township trustees caused by the inability of one of the trustees-elect to qualify, will be filled by appointment, as provided in Section 3262, General Code.

4. Where a justice of the peace is appointed to fill a vacancy, and no successor is elected and qualified at the subsequent regular election for justice of the peace, the appointee continues in office until the next regular election for that office if such term of service does not exceed the four year limitation imposed by Section 2, Article XVII of the Constitution.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1337.

ELECTION—SIX VILLAGE COUNCILMEN ELECTED BUT FOUR DISQUALIFIED FOR SERVING AS ELECTION OFFICIALS—HOW VACANCIES FILLED.

SYLLABUS:

1. *Where an entire new village council of six members is elected and four of such councilmen-elect are unable to qualify because of having served as election judges in violation of Section 5092, General Code, none of the outgoing members of council hold over because of such situation.*

2. *The two duly elected members of council not constituting a majority, have no power to fill the four vacancies, but after expiration of the thirty day period provided in Section 4236, General Code, the vacancies will be filled by appointment of the mayor.*

COLUMBUS, OHIO, December 27, 1929.

HON. MICHAEL B. UNDERWOOD, *Prosecuting Attorney, Kenton, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication, which reads:

“We submit the following for your opinion:

We note that under Section 5092, G. C., there are mentioned several opinions of the Attorney General, and perhaps a copy of one of those would be sufficient.

There were eight candidates for council, six to be elected, but out of the six that received the highest vote, four had served on the board of elections.

Section 5092 provides that no person serving on the election board is eligible to qualify for the office. There were several that received a few votes.

What we wish to know is, who is eligible to qualify under the circumstances?

Of those who did not serve on the board of elections and could therefore qualify, there seems to be only three, and they would not constitute a quorum.”

We have also received supplemental information that the four candidates to whom you refer were avowed candidates in the sense that they had filed declarations of candidacy to the office of councilman, that the election was in a non-chartered village and that an entire new council of six members was to be elected.

The four persons who appear elected to council on the face of returns and who served as election officials in the village at such election, should be barred from taking office because of the provisions of Section 5092, General Code, which reads:

"No person, being a candidate for an office to be filled at an election, other than for committeeman or delegate or alternate to any convention, shall serve as deputy state supervisor or clerk thereof, or as a judge or clerk of elections, in any precinct at such election. A person serving as deputy state supervisor or clerk thereof, judge or clerk of elections contrary to this section shall be ineligible to any office to which he may be elected at such election."

Under the provisions of Section 5144, General Code, the returns of the election in question are made to the clerk or auditor of the village whose duty it is to make an abstract and ascertain the candidates elected and make and deliver a certificate of election for each candidate so elected.

The powers of a canvassing authority are purely ministerial in this respect. The functions of the canvassing power are limited and do not comprehend the determination of qualification of candidates. The canvassing power must be governed by the returns and the returns in the present case show the six persons receiving the highest number of votes to be elected. Certificates of election, therefore, should be issued to these six persons.

This rule has been laid down in the case of *Dalton, Clerk, vs. State ex rel.* 43 O. S. 652; *State ex rel. vs. Graves*, 91 O. S. 113, and *State ex rel. vs. Tanzey*, 49 O. S. 656.

It therefore follows in the case at hand that council in the canvassing of returns can not ignore the votes cast for candidates who are ineligible. However, it is evident that the four candidates who served as election officials can not qualify. Therefore, there will be four vacancies.

Section 4236 of the General Code provides:

"When the office of councilman becomes vacant, the vacancy shall be filled by election by council for the unexpired term. If council fail within thirty days to fill such vacancy, the mayor shall fill it by appointment."

The four vacancies therefore will be filled after January 1, 1930, in accordance with Section 4236, *supra*. The two persons referred to in your letter elected councilmen, not constituting a quorum, can not fill the four vacancies and therefore can do no more than adjourn until the thirty day period expires, when the mayor may fill the four vacancies by appointment.

A somewhat similar situation arose in the 1923 November election in the village of New Middletown, where three members of a newly elected council of six members were unable to qualify. The then Attorney General held, (see Opinions of the Attorney General for 1916, Vol. I, page 89) that the three duly elected members not constituting a majority of council, could not fill the three vacancies. He did not consider that three of the outgoing members should remain in office because of this situation.

In the 1919 November election in the Buckland village school district in Auglaize County, one of two persons elected to the board of education was unable to qualify not being a resident of the school district. The then Attorney General ruled (see Opinions of the Attorney General for 1920, Vol. I, page 14), that one of the old board members would not hold over but that the vacancy should be filled by appointment as provided by law.

In the case of *City of Williamsburg vs. Weesner et al*, 176 S. W. 224, the Kentucky Court of Appeals had before it a situation where an entire new city council consisting of six members were duly elected for the term of two years and three newly elected members refused to take the oath of office or attend meetings. In holding that these three men had abandoned their offices, the court did not consider that three of the outgoing members of council held over because of failure of the three persons mentioned to qualify.

In the case at hand the people have expressed their will in favor of a decided and sweeping change in their representation in council. Under the circumstances I believe that it is your duty as prosecuting attorney of Hardin County to advise the four councilmen-elect who served as election judges that they are ineligible to assume the positions to which they have been elected.

In view of the above citations and in way of specific answer to your questions, I am of the opinion that:

1. Where an entire new village council of six members is elected and four of such councilmen-elect are unable to qualify because of having served as election judges in violation of Section 5092, General Code, none of the outgoing members of council hold over because of such situation.

2. The two duly elected members of council not constituting a majority, have no power to fill the four vacancies, but after expiration of the thirty day period provided in Section 4236, General Code, the vacancies will be filled by appointment of the mayor.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1338.

CLAIM—LIVE STOCK KILLED BY DOG—DOG WARDEN'S FAILURE TO VIEW SUCH STOCK DOES NOT PREVENT COMMISSIONERS FROM PAYING CLAIMANT.

SYLLABUS:

The failure of a dog warden to view live stock that has been injured or killed by a dog not belonging to the claimant, or harbored on his premises, does not bar the board of county commissioners from allowing the claim for such loss or injury to live stock provided such claim is duly presented by the claimant, in accordance with the provisions of Section 5840, of the General Code.

COLUMBUS, OHIO, December 28, 1929.

HON. GEO. E. SCHROTH, JR., *Prosecuting Attorney, Tiffin, Ohio.*

DEAR SIR:—I am in receipt of your letter of recent date which is as follows:

“In re: Sec. 5840, G. C.

All provisions in the above statute were complied with by claimant for the loss of certain sheep, killed by a dog; except the requirement that the dog warden did not actually view the sheep. The dog warden investigated the loss, however, and found the facts to be as represented by the claimant and the appraisers. It did not occur to the claimant that it was necessary for the dog warden to first view the sheep before they were disposed of. The above claim is a bona fide claim but the Commissioners would like to know