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TOWNSHIP CLERK—PERMANENT REMOVAL FROM TOWNSHIP — CREATES VACANCY — FILLED BY TOWNSHIP TRUSTEES—SECTION 3261 G. C.—ABSENCE STATUTORY AUTHORITY, TOWNSHIP CLERK MAY NOT APPOINT ASSISTANT OR DEPUTY.

SYLLABUS:

1. *The permanent removal from the township of a township clerk creates a vacancy in the office of township clerk, which office must be filled by the township trustees in accordance with the provisions of section 3261, General Code.*

2. *In the absence of statutory authority, the township clerk may not appoint an assistant or deputy clerk to perform the official duties imposed by law upon such office.*

COLUMBUS, OHIO, May 12, 1939.

HON. MARCUS SHOUP, *Prosecuting Attorney, Xenia, Green County, Ohio.*

DEAR SIR: This will acknowledge receipt of your recent letter, which reads as follows:

“The Trustees of Xenia Township, this county, have presented to me a matter on which I would appreciate your opinion.

Some weeks ago the Clerk of this Board of Trustees, elected to the Board of Xenia Township, moved to Cedarville Township. This Clerk formerly rented property in Xenia Township and since his removal from Xenia Township has been residing at the residence of his daughter in Cedarville Township. Inasmuch as his living arrangements have been continuous and from the present aspect will so continue at least indefinitely, it is the opinion of the majority of the Board that such removal creates a vacancy in the office of clerk.

Said Board of Trustees, however, are willing to have said Clerk continue as deputy for the Clerk to be newly appointed by reason of such created vacancy.

Under this arrangement it would seem, however, that the newly appointed clerk would be such in name only and that this would be an attempt to circumvent the statutory provisions applicable to the duties of this office.

It would seem to me that the removal by the present acting Clerk to Cedarville Township from the Township of Xenia effected a removal such as stipulated under Section 3261, G. C. 1931 O. A. G. No. 3601 makes it mandatory for the Trustees to appoint a qualified elector to fill any vacancy created under terms

of Section 3261 G. C. That temporary absence does not effect a vacancy, but the same must be figured as to reasonableness and time. Also that a township clerk may not appoint a deputy.

* * * The questions are:

1. Does this conduct by the clerk operate as a vacancy of his office, requiring the Board of Trustees to appoint for his unexpired term a qualified elector?
2. Is it possible for the Board of Trustees to appoint a new clerk but in reality have the present clerk perform the duties, and to be paid for such duties by the appointed clerk?"

The first question in your letter is concerned with a determination of whether a vacancy may be said to exist in the office of township clerk in the event the duly elected clerk moves outside the territorial boundaries of the township.

Section 3299, General Code, in providing for the election and term of a township clerk, makes no mention of residence qualifications. For such qualifications we must look to the Constitution of the State of Ohio and other sections of the General Code.

Article XV, section 4 of the Constitution of Ohio, provides in part as follows:

"No person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector."

The qualifications of an elector are contained in Article V, section 1 of the Constitution of Ohio, and sections 4785-29 to 4785-35a, General Code, inclusive. An examination of these provisions clearly shows that a nonresident of a township is ineligible to seek the office of clerk of said township. Your letter, however, inquires about one who after being duly elected and qualified as township clerk moves outside the limits of that township. Pertinent thereto, I direct your attention to section 3261, General Code, which provides as follows:

"If by reason of non-acceptance, death, or removal of a person chosen to an office in any township, except trustees, at the regular election, or upon the removal of the assessor from the precinct or township for which he was elected, or there is a vacancy from any other cause, the trustees shall appoint a person having the qualifications of an elector to fill such vacancy for the unexpired term."

The word "removal", as used in the above section, was construed and interpreted in Opinion No. 1867 of the Opinions of the Attorney General for 1921, at page 162, as follows:

“In view of the fact that at the time the legislature first enacted what we now call section 3261 G. C. there was no statutory method whereby the township treasurer could be removed from office for misfeasance, malfeasance or nonfeasance, it is the view of this department that the legislature could not have had in mind that meaning of the word ‘removal’. Consequently, we give the word its other possible meaning, which is, removal of the person from the territorial jurisdiction of the township.”

That opinion dealt with the office of township treasurer. However, whatever was said therein is equally applicable to a township clerk, in view of the fact that section 3316-1, General Code (110 O. L. 30), abolished the office of township treasurer and transferred the duties and services of that office to the township clerk. The syllabus of that opinion reads as follows :

“The permanent removal from the township of the township treasurer creates a vacancy in the office of township treasurer, which vacancy it is the duty of the township trustees, pursuant to the provisions of section 3261, G. C., to fill.”

It will be noted that in order to create a vacancy, the removal must be permanent as distinguished from temporary. From the facts set forth in your communication, it is impossible for this office to determine whether the removal in question is permanent or temporary. That determination resolves itself into a question of fact to be decided by the township trustees. In deciding this question, the intent of the clerk is of utmost importance. This view is in accord with Opinion No. 1792, Opinions of the Attorney General for 1924, page 525, wherein was discussed the question of change of residence with regard to a township trustee. The second branch of the syllabus of that opinion reads as follows :

“Whether or not there has been such a change of residence is a question of fact to be determined by ascertaining the intent of such person. If he removes with the purpose of establishing a fixed habitation elsewhere, and does not intend to return to his former home, a change of residence is effected; or, in the event that after a temporary removal he should decide to permanently remain away from his original habitation, this would likewise constitute a change of residence. Circumstances, surrounding the acts of such a party may be considered for the purpose of determining what his real intentions are.”

In the event the trustees determine that the removal is permanent, it then becomes their duty to appoint a person having the qualifications of an elector to fill the office of township clerk for the unexpired term.

In your second question you inquire whether in the event the township trustees declare the office of township clerk to be vacant because of the permanent removal of the clerk and in conformity with section 3261, supra, appoint a new clerk, may such newly appointed clerk permit any person, in this instance, the former clerk, to perform the official duties of the office and compensate such person for services rendered. From the contents of your letter, I assume you desire to know whether the township clerk may appoint a deputy as defined in section 9, General Code, to perform the official duties of the office. In connection therewith, I might say that no statutory authority exists which would permit a township clerk to appoint a deputy or assistant clerk. This office so held in Opinion No. 3601, Opinions of the Attorney General for 1931, page 1199, as evidenced in the third branch of the syllabus as follows:

“A township clerk may not appoint a deputy.”

Inasmuch as a township clerk may not employ a deputy or assistant clerk and pay such deputy from funds in the township treasury, it is obvious that all official duties of the clerk's office must be fulfilled by the clerk himself. It may be said, without fear of contradiction, that the law contemplates a duly elected or appointed officer to perform the official duties and obligations which attach to his office. If it were possible for a public officer to maintain his position in name only, and turn over his full salary as such officer to a person not legally qualified to occupy such office in return for performing the official duties of such office, the law would then be permitting by indirection something not permitted to be done directly. Obviously, such an arrangement is not within the spirit of the law. However, there appears to be no legal objection to the appointment by the township clerk of an assistant to perform clerical duties and to compensate such employe from personal funds belonging to the duly elected clerk. In the event there is some attempt to circumvent the statutory provisions applicable to the office of township clerk, the nominal clerk would be guilty of gross neglect of duty and might be compelled to forfeit his office in accordance with the provisions of section 10-1, General Code.

Specifically answering your inquiries, I am of the opinion that:

1. The permanent removal from the township of a township clerk creates a vacancy in the office of township clerk, which office must be filled by the township trustees in accordance with the provisions of section 3261, General Code.

2. In the absence of statutory authority, the township clerk may not appoint an assistant or deputy clerk to perform the official duties imposed by law upon such office.

Respectfully,

THOMAS J. HERBERT,
Attorney General.