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VACANCY — OFFICE, VILLAGE CLERK — PERSON APPOINTED THREE DAYS PRIOR TO GENERAL ELECTION, NOVEMBER 1941 — NO CANDIDATE ELECTED — APPOINTEE MAY RETAIN OFFICE UNTIL SUCCESSOR ELECTED AND QUALIFIED — NOVEMBER ELECTION, 1943.

SYLLABUS:

The person appointed three days prior to the general election in November, 1941, to fill a vacancy in the office of village clerk, to which office no candidate was elected at said election, may retain said office until his successor is elected at the general election in November, 1943 and qualifies therefor.

Columbus, Ohio, December 13, 1941.

Hon. Raymond O. Morgan, Prosecuting Attorney,
Wooster, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion on the following:

“I would appreciate your rendering your opinion on the following questions:

In the Village of Rittman in this county the Village Clerk qualified as a candidate for re-election and another person qualified as a candidate to oppose him for the office, one being a Republican and the other a Democrat.

On Saturday, November 1, the Clerk who was a candidate for re-election moved with his family to Memphis, Tennessee where he accepted a position and apparently gave up his residence in Rittman. However, he did nothing to withdraw as a candidate for the office of Clerk but did inform Council that he was moving and would not be there any longer.

At the election held on November 4, he received the highest number of votes for the office of Village Clerk. Section 4279, Ohio General Code provides that the clerk shall be an elector of the corporation and upon his informing Council that he was moving and would not be there any longer, a person was appointed to fulfill his unexpired term.

The Questions are:

Who shall the Board of Elections certify as being elected to the office of Village Clerk?

If the person above referred to who received the highest number of votes, but who moved from the village should be certified as being elected, will there be a vacancy in the office on January 1, 1942 to be filled in accordance with the provision of 4252, Ohio General Code?”

Section 4 of Article XV of the Constitution of Ohio provides that no person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector. This constitutional mandate is incorporated in Section 4279, General Code, wherein it is specifically provided that the village clerk shall be an elector of the corporation.

Pursuant to the authorization contained in Section 1 of Article V of the Constitution of Ohio, the Legislature has fixed certain residence requirements which one must meet in order to be an elector. These residence requirements are contained in Section 4785-30, General Code, which provides in part as follows:

“No person shall be permitted to vote at any election unless he shall have been a resident of the state for one year, of the county for thirty days, and of the voting precinct twenty-eight days next preceding the election at which he offers to vote.
* * *”

It will be noted that in order to qualify as an elector and be permitted to vote a person must be a resident of his voting precinct for a period of twenty-eight days next preceding the election at which he offers to vote. Reference to your request reveals that on November 1, 1941, the former village clerk left with his family for Memphis, Tennessee to accept a position there; also that he notified the village council that he would no longer be in Rittman. Applying the provisions of Section 4785-31(e), General Code, to the facts presented, I am of the view that the person in question lost his residence in this state. Said section provides:

“If a person remove to another state with the intention of making such state his permanent residence he shall be considered to have lost his residence in this state.”

Thus on election day, November 4, 1941, it would appear that he could not comply with the statutory resident requirement above referred to and consequently did not possess the qualifications of an elector. Such being the case, he was ineligible to election at that time.

The question then arises whether, by reason of the former clerk's ineligibility, his opponent who received less votes shall be considered elected to the office in question. The answer to this question is contained in the third branch of the syllabus in the case of *State, ex rel. Haff v. Pask*, 126 O.S. 633, as follows:

“Where the candidate receiving the highest number of votes is ineligible to election, the candidate receiving the next highest number of votes for the same office is not elected. Only the eligible candidate who receives the highest number of votes for the office for which he stands is elected to such office.”

By reason of the foregoing, it follows that neither candidate for the office of village clerk was elected thereto at the recent November election.

However, under the provisions of Section 4785-158, General Code, the candidate receiving the greatest number of votes would be entitled to a certificate of election. Such certificate, of course, would in nowise be conclusive with respect to title to the office. See *State, ex rel. Cox v. Riffle*, 132 O.S. 546, 550.

Let us now consider whether there will exist, on January 1, 1942, a vacancy in the office of village clerk which may be filled in accordance with Section 4252, General Code.

Your request points out that when the former clerk relinquished his office the mayor filled the vacancy by appointment as provided in Section 4252, General Code, which reads as follows:

“In case of death, resignation, removal or disability of any officer or director in any department of any municipal corporation, unless otherwise provided by law, the mayor thereof shall fill the vacancy by appointment, and such appointment shall continue for the unexpired term and until a successor is duly appointed, or duly elected and qualified, or until such disability is removed.”

By force of this section the person appointed to fill that vacancy serves “for the unexpired term and until a successor is duly appointed, or duly elected and qualified”. At what time may a successor be duly elected? In this connection, your attention is directed to Section 10, General Code, as follows:

“When an elective office becomes vacant, and is filled by appointment, such appointee shall hold the office until his successor is elected and qualified. Unless otherwise provided by law, such successor shall be elected for the unexpired term at the first general election for the office which is vacant that occurs more than thirty days after the vacancy shall have occurred. When an elected candidate has failed to qualify for the office to which he has been elected, the office shall be filled as in the case of a vacancy. Until so filled, the incumbent officer shall continue to hold the office. This section shall not be construed to postpone the time for such election beyond that at which it would have been held had no such vacancy occurred, nor to affect the official term, or the time for the commencement thereof, of any person elected to such office before the occurrence of such vacancy.”

Had a person been elected in the recent November election, it is clear that the appointee filling the vacancy occasioned by the abandon-

ment would serve only until the successful candidate qualified and assumed office on or after January 1, 1942. Since, however, no one was elected as village clerk at that election, the earliest time that a successor to the present clerk could be chosen would be November, 1943. Such clerk now serving by appointment may hold over after January 1, 1942 under the terms of Sections 4252, supra, and 10, supra. Consequently, no vacancy will exist in the office and the provisions of Section 4252, supra, may not be invoked at that time.

At first blush, the conclusion I have reached might appear in conflict with that portion of Section 10, supra, which provides that "when an elected candidate has failed to qualify for the office to which he has been elected, the office shall be filled as in the case of a vacancy". A more careful reading of this provision, however, will readily reveal its inapplicability by reason of the fact that no candidate for the office of village clerk of Rittman was elected in November, 1941.

In view of the foregoing, it is my opinion that the person appointed three days prior to the general election in November, 1941, to fill a vacancy in the office of village clerk, to which office no candidate was elected at said election, may retain said office until his successor is elected at the general election in November, 1943 and qualifies therefor.

Respectfully,

THOMAS J. HERBERT,

Attorney General.