

**OPINION NO. 96-059****Syllabus:**

Pursuant to Ohio Const. art. IV, § 13 and R.C. 3.02(A), where a vacancy in the office of Hamilton County Municipal Court judge occurred in March 1996 for a term beginning in January 1996 and ending in January 2002, the election for the successor to such office should occur at the regular municipal election scheduled to be held on the first Tuesday after the first Monday in November 1997.

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**To: Bob Taft, Secretary of State, Columbus, Ohio**  
**By: Betty D. Montgomery, Attorney General, November 19, 1996**

I have before me your opinion request in which you ask: "If, in 1996, a vacancy occurs in the office of a municipal judge whose term ends in January 2002, must an election for the unexpired term be held at the 1997 general municipal election?" Material accompanying your request indicates that a person was elected in 1995 to a six-year term on the Hamilton County Municipal Court, commencing in January 1996. After beginning his term, the judge vacated his seat in March 1996. The vacancy was filled by appointment in the same month. Your question concerns the year in which the election of a person to serve the remainder of this particular judicial term, ending in the year 2002, is to be conducted. It is your opinion that the successor to this judgeship should be elected at the 1997 general election, the next election at which it is permissible to elect municipal court judges. A question has been raised, however, as to whether the fact that the election of one-half of the judges of the Hamilton County Municipal Court is scheduled to occur in 1993 and every six years thereafter, the remainder to be elected in 1995 and every six years thereafter, prevents the election of the successor to the vacated Hamilton County Municipal Court judgeship until 1999.

The manner of filling vacancies in public offices is governed by the Ohio Constitution and by statute. Ohio Const. art. XVII, § 2, in part, provides generally that, "[a]ny vacancy which may occur in any elective state office created by Article II or III or created by or pursuant to Article IV of this constitution shall be filled only if and as provided in such articles." The filling of a vacancy in a judicial office is expressly provided for in Ohio Const. art. IV, § 13, which states:

In case the office of any judge shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by

appointment by the governor, until a successor is elected and has qualified; and such successor shall be elected for the unexpired term, at the *first general election for the office which is vacant that occurs more than forty days after the vacancy shall have occurred*; provided, however, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term. (Emphasis added.)

R.C. 3.02(A), which specifies the terms of persons appointed to elective offices, contains similar language concerning the election of a successor. Thus, in accordance with art. IV, § 13 and R.C. 3.02(A), when the office of judge becomes vacant, the vacancy is filled by gubernatorial appointment, until a successor is elected and has qualified. Ohio Const. art. IV, § 13 and R.C. 3.02(A) dictate that the successor be elected "at the first general election for the office which is vacant" that occurs more than forty days after the vacancy occurs, except where the unexpired term ends within a year following that general election. It is, therefore, necessary to ascertain the meaning of the phrase, "the first general election for the office which is vacant," as that language is used in Ohio Const. art. IV, § 13 and R.C. 3.02, for the purpose of electing a successor to the office of municipal court judge.

The term "general election," as used in the Revised Code with respect to election matters, means "the election held on the first Tuesday after the first Monday in each November." R.C. 3501.01(A). Pursuant to Ohio Const. art. XVII, § 1, general elections for state and county officers are held in even-numbered years, and are known as "regular state elections," R.C. 3501.01(C). See R.C. 3501.02.<sup>1</sup> General elections for all other officers are held in odd-numbered years and are referred to as "regular municipal elections," R.C. 3501.01(B). *Id.* Thus, according to Ohio Const. art. XVII, § 1 and R.C. 3501.02(D), see note one, *supra*, general elections for the office of municipal court judge are conducted at "regular municipal elections," *i.e.*, general elections held in odd-numbered years.

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<sup>1</sup> In accordance with Ohio Const. art. XVII, § 1, the years in which elections for various state and local officers are to be held are set forth in R.C. 3501.02, which states in pertinent part:

General elections in the state and its political subdivisions shall be held as follows:

(A) For the election of electors of president and vice-president of the United States, in the year of 1932 and every four years thereafter;

(B) For the election of a member of the senate of the United States, in the years 1932 and 1934, and every six years after each of such years; except as otherwise provided for filling vacancies;

(C) For the election of representatives in the congress of the United States and of elective state and county officers including elected members of the state board of education, in the even-numbered years; except as otherwise provided for filling vacancies;

(D) For municipal and township officers, members of boards of education, *judges* and clerks *of municipal courts*, in the odd-numbered years.... (Emphasis added.)

Because the term of office of a municipal court judge is six years, R.C. 1901.07(A), three "regular municipal elections" occur during such term. Where a vacancy in the office of municipal court judge occurs in the first year of such term, as in the situation you describe, it is necessary to determine which of the regular municipal elections occurring within such six-year term is "the first general election for the office which is vacant," as that language is used in Ohio Const. art. IV, § 13 and R.C. 3.02(A), for purposes of electing a successor to that position.

The phrase, "the first general election for the office which is vacant," as used in former G.C. 10 (predecessor of R.C. 3.02), was interpreted by the court in *State ex rel. Harsha v. Troxel*, 125 Ohio St. 235, 181 N.E. 16 (1932), concerning the proper time to elect a successor to a vacancy in the office of county auditor. In *Troxel*, a person elected in 1930 to the position of Scioto County auditor began serving his four-year term in March 1931, and resigned from that position in July of 1931. On the day of the auditor's resignation, the county commissioners appointed someone to fill the vacancy. Another person thereafter attempted to file for election to the position of Scioto County auditor at the general election to be held in 1932. The board of elections refused to place that person's name on the ballot, arguing that because the term of office of county auditor was four years and the last election for that position had been held in 1930, a successor to that office could not be elected until the 1934 general election.

In rejecting the board of election's position, the *Troxel* court began by noting that the office of county auditor was a county office and that, pursuant to former G.C. 4785-4 (now at R.C. 3501.02), "county officers can be voted for in the even-numbered years." 125 Ohio St. at 236-37, 181 N.E. at 16. The court then set forth the following hypothetical:

A county auditor is elected, and, immediately after his qualification, dies. No one can be found to accept the appointment. Must the county do without an auditor for four years, notwithstanding there is a statute that provides that county officers shall be elected every two years? The only reason that a county auditor is not voted for every two years is because he has a four-year term. The four-year term does not affect the fact that the county auditor is a county officer.

125 Ohio St. at 237, 181 N.E. at 16.

In answering this question, the *Troxel* court looked to the language of former G.C. 10 (now at R.C. 3.02), which stated in pertinent part: "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." (Emphasis added.) Because the 1932 general election would occur more than thirty days after the vacancy arose, the *Troxel* court concluded that the 1932 election constituted the "first general election for the office which is vacant," as used in former G.C. 10. In so concluding, the *Troxel* court set forth the following rationale:

[I]t is the policy of the law that the people shall be served by the servants of their own selection, and the laws relative to filling vacancies in elective offices will be construed so as to give the people the opportunity to choose *at the earliest possible time* the successor to an official they have previously chosen.

125 Ohio St. at 238, 181 N.E. at 17 (emphasis added).

In accordance with the conclusion in *State ex rel. Harsha v. Troxel*, with respect to an office for which an election may be held, as prescribed by Ohio Const. art. XVII, § 1 and R.C. 3501.02, in even-numbered years, the "first general election for the office which is vacant" is the first "regular state election" following the occurrence of the vacancy. See *State ex rel. Ferguson v. Brown*, 2 Ohio St. 2d 235, 236, 208 N.E.2d 129, 130 (1965) (interpreting the phrase "at the first general election," as used in Ohio Const. art. III, § 18, concerning the election of a successor to the office of Auditor of State, as meaning "the general election which, under Section 1 of Article XVII, occurs in the even-numbered years"). See generally note one, *supra*. Similarly, I find with respect to the election of a successor to an office that may, pursuant to Ohio Const. art. XVII, § 1 and R.C. 3501.02, be filled in odd-numbered years, the "first general election for the office which is vacant" is the first "regular municipal election" following the occurrence of the vacancy.

Thus, pursuant to R.C. 3.02(A), if a vacancy occurs in an office the election for which may, pursuant to Ohio Const. art. XVII, § 1 and R.C. 3501.02, be held in an odd-numbered year, the election of a successor to that office is to be held at the first regular municipal election falling more than forty days after the occurrence of the vacancy, so long as that election occurs more than one year prior to the end of the unexpired term that is to be filled. See *State ex rel. McKee v. Rice*, 147 Ohio St. 505, 72 N.E.2d 102 (1947) (vacancy arising in first year of county engineer's four-year term was to be filled by successor elected at first general election in even-numbered year occurring after vacancy arose); 1976 Op. Att'y Gen. No. 76-013 (successor to office of city auditor to be elected at first general election for municipal officers that occurs more than forty days after vacancy occurs); 1945 Op. Att'y Gen. No. 610, p. 781 (syllabus) ("[w]here a vacancy in the office of county recorder occurs more than thirty days before the next general election at which county officers can be voted for, the successor of a person appointed to fill such vacancy must be elected at such general election").

Pursuant to Ohio Const. art. XVII, § 1 and R.C. 3501.02(D), municipal court judges may be elected in odd-numbered years, *i.e.*, at regular municipal elections. It is evident, therefore, that in the context of the election of a successor to the office of municipal court judge, the "first general election for the office which is vacant" is the first general election at which a municipal court judge may be elected, as determined by Ohio Const. art. XVII, § 1 and R.C. 3501.02(D), *i.e.*, the first regular municipal election following the occurrence of the vacancy, regardless of when the election for that particular judgeship was scheduled to be held under the scheme set forth in R.C. 1901.08 or otherwise. Thus, according to Ohio Const. art. IV, § 13 and R.C. 3.02(A), a successor to the office of municipal court judge shall be elected at the first regular municipal election occurring more than forty days after the occurrence of the vacancy, so long as such election occurs more than one year prior to the expiration of the term of office being filled.

Your question specifically concerns the election of a successor for the office of judge of the Hamilton County Municipal Court. According to material accompanying your opinion request, a question has arisen as to whether the successor to the six-year term that began in January 1996 and that was vacated in March of that year should be elected at the 1997 or 1999 regular municipal election. It appears that this question arises because of the timing prescribed by R.C. 1901.08 for the election of the various municipal court judges throughout the state, and the possible impact of the remedial order issued by the United States District Court in the case of *Mallory v. Eyrich*, No. C-1-86-1056 (June 3, 1993), upon the election of Hamilton County

Municipal Court judges in particular. I find it useful, therefore, briefly to review the statutory scheme governing the election of municipal court judges.

R.C. 1901.08 establishes the number of judges, the beginning of such judges' terms of office, and the time of election of such judges for each municipal court in the state. Pursuant to R.C. 1901.08, not all municipal court judges throughout the state are elected during the same year, nor are all judges of the same multi-judge municipal court required to be elected during the same year.<sup>2</sup> Specifically concerning judges of the Hamilton County Municipal Court, R.C. 1901.08 states in part:

In the Hamilton county municipal court, five full-time judges shall be elected in 1967, five full-time judges shall be elected in 1971, two full-time judges shall be elected in 1981, and two full-time judges shall be elected in 1983. All terms of judges of the Hamilton county municipal court shall commence on the first day of January next after their election, except that the terms of the additional judges to be elected in 1981 shall commence on January 2, 1982, and January 3, 1982, and that the terms of the additional judges to be elected in 1983 shall commence on January 4, 1984, and January 5, 1984.

In accordance with R.C. 1901.08, the successors to the positions on the Hamilton County Municipal Court first filled in 1967 are to be elected every six years thereafter. The same six-year election schedule applies to the positions first filled in 1971, 1981, and 1983. R.C. 1901.08, therefore, calls for no election to the Hamilton County Municipal Court in 1999.

As noted in your opinion request, however, the election of judges to the Hamilton County Municipal Court is the subject of a remedial order issued by the United States District Court in the case of *Mallory v. Eyrich*, No. C-1-86-1056 (June 3, 1993),<sup>3</sup> pursuant to which the court

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<sup>2</sup> By way of example, I note that R.C. 1901.08 states in part:

The number of, and the time for election of, judges of the following municipal courts and the beginning of their terms shall be as follows:

In the Akron municipal court, two full-time judges shall be elected in 1951, two full-time judges shall be elected in 1953, one full-time judge shall be elected in 1967, and one full-time judge shall be elected in 1975.

In the Alliance municipal court, one full-time judge shall be elected in 1953.

....

In the Bedford municipal court, one full-time judge shall be elected in 1975, and one full-time judge shall be elected in 1979.

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In the Cleveland municipal court, six full-time judges shall be elected in 1975, three full-time judges shall be elected in 1953, and four full-time judges shall be elected in 1955.

<sup>3</sup> *Mallory v. Eyrich*, 666 F. Supp. 1060 (1987), *rev'd* 839 F.2d 275 (1988), originated as an action in which plaintiffs sought a determination that the method of electing municipal court judges in Hamilton County violated the Voting Rights Act, 42 U.S.C. § 1973.

varied the statutory schedule for the election of judges to the Hamilton County Municipal Court. By means of this order, the court divided the territory of the Hamilton County Municipal Court into seven districts and further directed that one-half of the fourteen judges of the Hamilton County Municipal Court be elected, one from each district, at the general election held in 1993, with the remainder to be elected, one from each district, at the general election held in 1995. Because each judge serves a six-year term, assuming that the court order calls for the election of successors to those positions every six years after the initial elections, elections for judges of the Hamilton County Municipal Court will arise only in 1999 and each six years thereafter for half the judges, and in 2001 and each six years after that for the remaining seven judges.

The *Mallory* court's order, therefore, varies the schedule prescribed by R.C. 1901.08 for the election of judges in the Hamilton County Municipal Court. Specifically, pursuant to R.C. 1901.08, certain judges of the Hamilton County Municipal Court are scheduled to be elected in 1997, while the court's order in *Mallory* calls for no election of a Hamilton County Municipal Court judge in that year. At the same time, R.C. 1901.08 calls for no election to the Hamilton County Municipal Court in 1999, while the *Mallory* order would appear to require the election of seven judges in that year.

The argument has been made that because the schedule of election of Hamilton County Municipal Court judges prescribed by the *Mallory* court order calls for no election of such a judge in 1997, the next general election at which a Hamilton County Municipal Court judge may be elected is the election to be held in 1999. Under such a theory, the successor to the vacancy that occurred in 1996 may not be elected until the general election held in 1999, which is the next time the court's order calls for a judge of the Hamilton County Municipal Court to be elected. Such an interpretation, however, ignores the standard expressed in *State ex rel. Harsha v. Troxel*, requiring the election of a successor to a vacancy to occur at the first general election in either an even-numbered or odd-numbered year, as prescribed by Ohio Const. art. XVII, § 1 and R.C. 3501.02, following the occurrence of the vacancy, whether or not election for that particular judgeship would have been held had no vacancy occurred. Accordingly, the argument that a successor to the vacancy that arose in 1996 may not be elected until the 1999 regular municipal election must be rejected.<sup>4</sup>

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<sup>4</sup> Your opinion request further questions whether a portion of the *Mallory* court's remedial order, concerning the filling of vacancies, prevents the election of a successor to the judgeship you describe until the general election held until 1999. With respect to the filling of vacancies on the Hamilton County Municipal Court, the *Mallory* court's remedial order states:

3. At the general election to be held on November 2, 1993, the electors of District 1 shall elect an additional judge to serve the unexpired term created by the resignation of Judge Donnellon. Said unexpired term shall end on January 4, 1996.

4. Additional vacancies on the Hamilton County Municipal Court, shall be filled *as provided by state law*, except that in the event a vacancy occurs for which state law requires that [*sic*] an election on November 2, 1993, for an unexpired term, such election shall be held in the relevant district rather than on a county-wide basis. The first such vacancy shall be filled by an election in District 2, the next by an election in District 3, and continuing in numerical order. (Emphasis added.)

The court order thus requires vacancies on the Hamilton County Municipal Court to be filled "as

Based on the foregoing, it is my opinion, and you are hereby advised that, pursuant to Ohio Const. art. IV, § 13 and R.C. 3.02(A), where a vacancy in the office of Hamilton County Municipal Court judge occurred in March 1996 for a term beginning in January 1996 and ending in January 2002, the election for the successor to such office should occur at the regular municipal election scheduled to be held on the first Tuesday after the first Monday in November 1997.