

764

1. VACANCY—OFFICE OF TOWNSHIP TRUSTEE—NOT CREATED WHEN INCUMBENT MOVES TO AN ADJOINING TOWNSHIP—PURPOSE TEMPORARY WITH INTENT TO RETURN TO TOWNSHIP OF LEGAL RESIDENCE WHERE HE IS AN OFFICE HOLDER.
2. VACANCY—OFFICE OF TOWNSHIP TRUSTEE—CREATED WHEN INCUMBENT REMOVES HIMSELF FROM TOWNSHIP WHERE HE IS AN OFFICE HOLDER WITH INTENTION OF REMAINING AWAY AND OF MAKING ANOTHER TOWNSHIP HIS LEGAL RESIDENCE.

SYLLABUS:

1. A vacancy in the office of township trustee is not created when the incumbent of that office moves to an adjoining township for temporary purposes only with the intention of returning to the township of which he is a legal resident and an office holder.

2. A vacancy in the office of township trustee is created when the holder of that office removes himself from the township in which he is an office holder with the intention of remaining away from said township and of making some other township his legal residence.

Columbus, Ohio, February 28, 1946

Hon. Robert M. Betz, Prosecuting Attorney
Gallipolis, Ohio

Dear Sir :

I am in receipt of your letter which reads as follows :

“Will you please give me your opinion as to whether or not the removal of a township trustee from the township of which

he is an officer creates a vacancy in that board of trustees? Also, would the character of the removal affect the result, that is, if the trustee removed to an adjoining township with the intention of returning at a later date, would the answer be the same as if he sold out his holdings and left with the intention of remaining away, having in mind in both instances, of course, that the removal would not affect his ability to carry on his duties as such officer.

I can find no requirement, statutory or constitutional, which requires a trustee to be a resident of the township, the only qualification seemingly imposed being that he be an 'elector'."

Section 3262, General Code, provides :

"When *for any cause* a township is without a board of trustees or there is a vacancy in such board, the justice of the peace of such township holding the oldest commission, or in case the commission of two or more of such justices bear even date, the justice oldest in years shall appoint a suitable person or persons, having the qualifications of electors in the township to fill such vacancy or vacancies for the unexpired term. Wherever in any township a municipal court shall replace and supersede the justices of the peace, the municipal judge or the presiding municipal judge if there be more than one, shall have power to fill vacancies on the board of trustees. In those townships wherein there are no justices of the peace or municipal judges the probate judge shall have the power to fill vacancies on the board of trustees." (Emphasis added.)

In so far as is pertinent to your inquiry, this section is substantially unchanged since its original enactment in 1877 (see 74 O. L. 16). Prior to this time vacancies in all township offices, including trustees, were filled under the provisions of Section 3261, General Code, as it then existed. Said section now reads:

"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." (Emphasis added.)

The words "except trustees" first appeared in this section in an amendment of the law passed March 26, 1890, found in 87 O. L. 118.

Tracing this section back to its original enactment in 1804 (2 O. L. 100), I find no change in this language which affects your question. Therefore, prior to 1877 a vacancy in the office of a township trustee, as in the case of a vacancy in other township offices, could occur "by reason of non-existence, death or removal" of such trustees.

In Opinion No. 1867, appearing in 1921 Opinions of Attorney General, page 159, the then attorney general stated that there were two possible meanings that could be attributed to the use of the phrase "or removal of" in this law. One would be a "removal" in the sense of removal of one's person from the territorial jurisdiction (that is, change of residence,) and the other "removal" in the sense of removal from office as for misfeasance, malfeasance or nonfeasance. He then points out that when this term was first used by the General Assembly in enacting this law in 1804, there was no provision in the statutes for the "removal" of a township officer for misfeasance, malfeasance or nonfeasance, and he argues that therefore the only possible meaning of the term "removal," as then used, was removal from the territorial jurisdiction of the township. It was therefore his opinion, as disclosed by the syllabus, that :

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

This opinion was quoted and followed in Opinion No. 581, 1939 Opinions of Attorney General, page 729, the first branch of the syllabus of which reads :

"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."

Since "removal of," as used in Section 3261, General Code, *supra*, is construed to mean removal from the territory of the township, I can arrive at no other conclusion but that the General Assembly, in using the phrase "*for any cause*" in Section 3262, General Code, intended such a removal to be one of the causes of a vacancy in the office of township trustee.

In determining whether a "removal" is such as to create a vacancy,

reference to the laws concerning electors will be helpful. Section 4, Article XV, Constitution of Ohio, provides in part:

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

Under the provisions of Section 3268, General Code, township trustees are elected officers.

Section 1 of Article V of the Ohio Constitution, and Sections 4785-29 to 4785-33a, inclusive, General Code, provide the qualifications of electors. That part of Section 4785-31 concerning the determination of the residence of an elector, reads as follows:

“All registrars and judges of elections, in determining the residence of a person offering to register or vote, shall be governed by the following rules, so far as they may be applicable:

a. That place shall be considered the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning.

b. A person shall not be considered to have lost his residence who leaves his home and goes into another state or county of this state, for temporary purposes only, with the intention of returning.”

In consideration of the foregoing, it is my opinion that a “removal” of a township trustee, of such a nature that he is no longer an elector of that township, creates a vacancy in that office.

The precise questions which you ask have twice before been the subject of opinions of the attorney general. The first of these opinions is found in 1924 Opinions of Attorney General page 525. The syllabus thereof reads:

“1. Upon a township trustee changing his residence from the township in which he was elected to another, a vacancy in such office is created, to be filled in the manner provided by section 3262.

2. 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 intent 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 body of the opinion it is said :

“Section 4 of Article XV of the Constitution provides that no person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector. It has frequently been held that if the status of an official is changed after his election or appointment so that he no longer is an elector for the district in which he was appointed or elected the office is forfeited. It will be observed that one of the qualifications of an elector is that he reside in the district for which he is elected, and a change of his residence in this respect would forfeit the office thereby creating a vacancy.”

In Opinion No. 820, 1939 Opinions Attorney General, page 1048, the questions which you ask are again discussed. The syllabus of the opinion is as follows :

“In the case of a removal from the township of a person holding the office of trustee in said township, the question of whether or not such office shall be declared vacant depends entirely upon whether such removal was temporary or permanent. Whether or not such removal constitutes a change of residence is a question of fact which may only be determined by all the circumstances surrounding the removal of such trustee, and from which circumstances the true intention of such trustee must be ascertained.”

In specific answer to your questions, it is therefore my opinion :

1. A vacancy in the office of township trustee is not created when the incumbent of that office moves to an adjoining township for temporary purposes only, with the intention of returning to the township of which he is a legal resident and an office holder.

2. A vacancy in the office of township trustee is created when the holder of that office removes himself from the township in which he is an office holder with the intention of remaining away from said township and of making some other township his legal residence.

Respectfully,

HUGH S. JENKINS,
Attorney General.