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VACANCY—RESIGNATION COUNTY COMMISSIONER—TERM EXPIRES JANUARY 4, 1943 — VACANCY FILLED BY APPOINTMENT THROUGH PROBATE JUDGE, COUNTY AUDITOR, COUNTY RECORDER OR MAJORITY OF THEM — APPOINTEE HOLDS OFFICE UNTIL SUCCESSOR ELECTED AND QUALIFIED — NOVEMBER ELECTION, 1942 — PERSON ELECTED HOLDS OFFICE UNTIL JANUARY 4, 1943 AND UNTIL SUCCESSOR TO BE ELECTED FOR FOUR YEAR TERM AT SAME ELECTION QUALIFIES, JANUARY 4, 1943

SYLLABUS:

When a vacancy occurs in the office of county commissioner by reason of the resignation of a commissioner whose term expires January 4, 1943 and the probate judge, county auditor and county recorder, or a majority of them, fill such vacancy by appointment, the appointee holds such office until a successor is elected at the November, 1942 election and qualifies therefor. The person so elected will hold the office until January 4, 1943, and until a successor to be elected at the same election for a four year term commencing January 4, 1943 qualifies.

Columbus, Ohio, February 14, 1942.

Hon. Harold K. Bostwick, Prosecuting Attorney,
Chardon, Ohio.

Dear Sir:

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

“In our county, county commissioner A's term expires January 4, 1943. Said commissiosner resigned, effective January 2, 1942, which said resignation was accepted.

County commissioner B was appointed to fill the vacancy under Section 2397 on January 3, 1942 and qualified on January 5, 1942, and is, under Section 2397 to hold his office until his successor is elected and qualified. His successor will be elected in November, 1942.

Now, my question for your opinion is, how long is his successor's term and when does his successor take office.”

Sections 2396 and 2397, General Code are dispositive of your questions. Said Sections provide as follows:

Section 2396, General Code:

"When a commissioner is elected to fill a vacancy occasioned by death, resignation, or removal, he shall hold his office for the unexpired time for which his predecessor was elected."

Section 2397, General Code:

"If a vacancy in the office of commissioner occurs more than thirty days before the next election for state and county officers, a successor shall be elected thereat. If a vacancy occurs more than thirty days before such election, or within that time, and the interest of the county requires that the vacancy be filled before the election, the probate judge, auditor, and recorder of the county, or a majority of them, shall appoint a commissioner, who shall hold his office until his successor is elected and qualified."

It will be noted that under the terms of the first sentence of Section 2397, *supra*, if a vacancy occurs in the office of county commissioner more than thirty days before the next election for state and county officers a successor shall be elected thereat. In my opinion this portion of the statute must be complied with even though the vacancy in question is filled by appointment in the manner set forth in the latter part of said statute.

When county commissioner A resigned, effective January 2, 1942, a vacancy occurred in said office. The next general election for said office will be held in November, 1942. See Sections 4785-3a and 4785-4c, General Code. Obviously, therefore, the vacancy occurred more than thirty days before November, 1942 and Section 2397, *supra*, would apply. By the specific terms of that section one appointed by the probate judge, county auditor and county recorder, or a majority of such officers, holds office until his successor is elected and qualified. According to the terms of Section 2397, *supra*, the successor shall be elected at the election to be held in November, 1942 and as provided in Section 2397, *supra*, the person so elected shall hold the office for the unexpired time for which A was elected.

Assuming there are candidates for the unexpired term of A and one of them is declared elected by the county board of elections in the manner prescribed in Section 4785-158, General Code, such person is then eligible to qualify for the office of county commissioner by giving the

bond and taking the oath of office as required in Section 2399, General Code. When such successor candidate for A's unexpired term qualifies he may then assume the office now occupied by B and remain therein until the expiration of the term for which A was elected, to-wit, January 4, 1943 and until his successor is elected and qualified.

The conclusions herein reached are supported by two opinions of a former Attorney General. In Opinion No. 40, Opinions of the Attorney General for 1927, Volume I, page 53, it was held:

"Under the provisions of Sections 2396 and 2397 of the General Code, where a Vacancy occurs in the office of the county commissioner, who was elected in November, 1926, and said vacancy is filled by appointment, the appointee will hold his office as county commissioner until his successor is elected and qualified at the November election of 1928, and the person so elected at that time will hold his office for the unexpired term for which his predecessor was elected."

See also Opinion No. 946, Opinions of the Attorney General for 1927, Volume III, page 1651, the syllabus of which reads as follows:

"1. Under Section 2397, General Code, when a vacancy occurs in the office of county commissioner more than thirty days before the next election for state and county officers, a successor must be elected at said election to serve for the unexpired term of the commissioner who was elected to the office.

2. Where a county commissioner is appointed to fill a vacancy by the probate judge, auditor and recorder of the county as provided in Section 2397, General Code, such appointee may only serve until his successor is elected and qualified and the fact that the commission of Governor states that the appointment is for the unexpired term does not effect a change in the law."

Before concluding, it might be well to point out that the election in 1942, at which a successor to A for the unexpired term may be chosen, will in nowise interfere with the regular election for county commissioner for the four year term beginning January 4, 1943. In other words, the ballot at the November, 1942 election should afford an opportunity to the electors of your county to vote for a successor to A who will serve until January 4, 1943 and also for a full-term commissioner who will assume office January 4, 1943.

In view of the foregoing, it is my opinion that when a vacancy occurs in the office of county commissioner by reason of the resignation of a commissioner whose term expires January 4, 1943 and the probate judge, county auditor and county recorder, or a majority of them, fill such vacancy by appointment, the appointee holds such office until a successor is elected at the November, 1942 election and qualifies therefor. The person so elected will hold the office until January 4, 1943, and until a successor to be elected at the same election for a four year term commencing January 4, 1943 qualifies.

Respectfully,

THOMAS J. HERBERT
Attorney General.