

OPINION NO. 76-013

Syllabus:

R.C. 733.31 sets out the proper procedure to be followed for appointment to a vacancy resulting from death of an incumbent elected official, and R.C. 733.31 as it existed at the time the appointment was made controls over R.C. 733.31 as it was thereafter amended;

R.C. 3.02 is a general statute providing for the length of an appointee's term, and R.C. 3.02 controls over the more

specific terms of R.C. 733.31, where R.C. 733.31 contained no such specific terms at the time of appointment.

To: Roger R. Ingraham, Medina County Pros. Atty., Medina, Ohio
By: William J. Brown, Attorney General, February 27, 1976

I have before me your request for my opinion on questions which generated from the County Board of Elections relative to filling a vacancy in the office of city auditor. From the materials you have provided it is apparent that the incumbent of the office of city auditor died on November 3, 1975. The incumbent, had he survived, would have been elected for a new term beginning in January of 1976. At the time of his death the incumbent was running unopposed for re-election.

You have stated in your request that the Mayor made an appointment to fill the vacancy which occurred in the office of city auditor and the appointee took the oath and entered upon that office on November 10, 1975.

The specific question you have raised is whether the appointee is properly continuing in office as city auditor during the term which began in January of 1976.

R.C. 733.31 controls the filling of a vacancy which results from the death, resignation, removal or disability of any officer or director of a municipal corporation. R.C. 733.31 was amended by S.B. 97 during the summer of 1975, however, the effective date of the amendment was November 26, 1975. Since the death and the resultant vacancy occurred on November 3, 1975, the appointment to fill this vacancy was properly made pursuant to the provisions of R.C. 733.31 before it was amended - by the mayor of the city.

R.C. 733.31, prior to amendment, provided:

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

The issue, however, of most concern regarding this appointment is that of the term of the appointment. In the absence of specific statutory provisions to the contrary, R.C. 3.02 governs the term of an appointee to elective office. R.C. 3.02 provides, 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; 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 has occurred; provided 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."

General rules of statutory construction provide that a special statute takes precedence over general statutes when both govern the same subject matter. See, e.g. Fisher Bros. Co. v. Bowers, 166 Ohio St. 191 (1957); State, ex rel. Stellar et al., Trustees v. Zangerle, Aud., 100 Ohio St. 414 (1919); 1966 Op. Att'y Gen. No. 155. Notably, however, the unamended version of R.C. 733.31 contained no specific provisions regarding the election of a successor to an appointee of elective office and, therefore, the provisions of R.C. 3.02 were controlling as to the length of the appointee's term.

Under these provisions of R.C. 3.02, the appointee to the office of city auditor shall hold the office until his successor is elected and qualified. Such successor is to 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 occurs. It is, therefore, my opinion that the appointee to the office of city auditor in the City of Wadsworth who took office November 10, 1975 will properly hold office until the first general election of municipal officers. Since Article 17, Section 1 of the Ohio Constitution and R.C. 3501.02 indicate that elections for municipal offices shall be held in odd numbered years, a successor for the balance of the term beginning January, 1976 is to be elected in the November, 1977 election.

No separate procedure to appoint for the term commencing January, 1976 is applicable. When an incumbent office holder who is a candidate for election to succeed himself dies before entering upon a new term, a vacancy is thereby created for the term in which he was then currently serving, but not in the term for which he was a candidate and upon which he had not entered. One who is duly appointed and qualified to fill the vacancy thus created holds office for and during the unexpired term of his predecessor and until his successor is elected and qualified. State, ex rel. Sheets v. Speidel, et al., 62 Ohio St. 156 (1900).

The vacancy which arose in the office of the city auditor of the City of Wadsworth, therefore, arose as a vacancy in the term ending December 31, 1975. Since the vacancy arose November 3, 1975, the procedures for appointment to fill the vacancy under unamended R.C. 733.31 were applicable and under R.C. 3.02 and Speidel, supra, the term of the appointment made November 10, 1975, extends until the next general election of municipal officers, which will be in November, 1977.

It is worthy of note that the S.B. 97 amendments to R.C. 733.31 do make specific changes in the power of appointment to fill a vacant elective municipal office. There are also some specific provisions in regard to the term of appointments to the office of village mayor and village legislative authority, however, the term of appointment provisions of Amended R.C. 733.31(D), applicable to city solicitors, city auditors and city treasurers, even though specifically stated in this section, are the same provisions for term as in R.C. 3.02. Thus, had the S.B. 97 amendments of R.C. 733.31 been in effect at the time the vacancy arose November 3, 1975, the power to appoint would have differed, but the term of appointment would have remained the same, extending to November 7, 1977. I would further note, that, although the vacancy here arose during the term ending December

31, 1975, any vacancy which might subsequently arise in the term beginning January, 1976 would be governed by the provisions of the amended R.C. 733.31, in which case the county central committee for the party of the last occupant of the office-which in this case would be the person appointed November 10, 1975 - would have the power to appoint to fill the vacancy. In the case that the appointee is non-partisan, however, a subsequent appointment would be properly made by the mayor under R.C. 733.31.

In specific answer to your questions it is my opinion and you are so advised that:

R.C. 733.31 sets out the proper procedure to be followed for appointment to a vacancy resulting from death of an incumbent elected official, and R.C. 733.31 as it existed at the time the appointment was made controls over R.C. 733.31 as it was thereafter amended;

R.C. 3.02 is a general statute providing for the length of an appointee's term, and R.C. 3.02 controls over the more specific terms of R.C. 733.31, where R.C. 733.31 contained no such specific terms at the time of appointment.