

**OPINION NO. 85-062****Syllabus:**

The office of county commissioner may not be declared vacant when the incumbent is seriously ill and unable to fulfill the duties of office but is not absent from the county.

**To: Dennis Watkins, Trumbull County Prosecuting Attorney, Warren, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, September 17, 1985**

I have before me your letter requesting my opinion regarding the procedure to be followed for declaring the office of a county commissioner vacant due to the serious illness of the commissioner. I understand that the commissioner in question is presently unable to fulfill the duties of his office and that it is unlikely that the commissioner will recover for some period of time so as to again be able to fulfill his duties. Your specific questions concern when, under these circumstances, the office of county commissioner may be declared vacant, and the procedure which must be followed for filling that office once there has been a determination that a vacancy has occurred.

The central issue of your request is whether the office of county commissioner is vacant when the incumbent commissioner is unable to fulfill the duties of the office due to a serious, indeterminate illness. If the office is in fact vacant, then the procedure for filling the office is set forth clearly by statute. The Ohio Constitution provides that the filling of vacancies in public offices is a matter directed by law. See Ohio Const. art. II, §27; Ohio Const. art. XVII, §2. Vacancies in the office of county commissioner are addressed in R.C. 305.02 and R.C. 305.03.

R.C. 305.02 provides in pertinent part:

(A) If a vacancy in the office of county commissioner, prosecuting attorney, county auditor, county treasurer, clerk of court of common pleas, sheriff, county recorder, county engineer, or coroner occurs more than forty days before the next general election for state and county officers, a successor shall be elected at such election for the unexpired term unless such term expires within one year immediately following the date of such general election.

In either event, the vacancy shall be filled as provided in this section and the appointee shall hold his office until a successor is elected and qualified.

(B) If a vacancy occurs from any cause in any of the offices named in division (A) of this section, the county central committee of the political party with which the last occupant of the office was affiliated shall appoint a person to hold the office and to perform the duties thereof until a successor is elected and has qualified, except that if such vacancy occurs because of the death, resignation, or inability to take the office of an officer-elect whose term has not yet begun, an appointment to take such office at the beginning of the term shall be made by the central committee of the political party with which such officer-elect was affiliated. (Emphasis added.)

Thus, vacancies in the various county offices are filled by appointment of the county central committee of the political party with which the last occupant of the office was affiliated.<sup>1</sup>

<sup>1</sup> When, however, the last occupant of the office or the officer-elect is an independent, R.C. 305.02(D) provides that, "the board of county commissioners shall make such appointment at the time when the vacancy occurs, except where the vacancy is in the office of county commissioner, in which case the prosecuting attorney and the remaining commissioners or a majority of them shall make the appointment."

R.C. 305.03 provides that a county office may be deemed vacant when the officeholder is absent from the county for ninety consecutive days. In the event that the absence from the county is caused by sickness or injury, however, R.C. 305.03 provides that the officer

shall cause to be filed with the board of county commissioners a physician's certificate of his sickness or injury. If such certificate is not filed with the board within ten days after the expiration of the ninety consecutive days of absence from the county, his office shall be deemed vacant and the board shall declare a vacancy to exist in such office.

R.C. 305.03 is specifically limited to absences from the county rather than a general inability to perform the duties of the office. It is my understanding that the county commissioner in question is not absent from the county, but rather is unable to fulfill his duties. Thus, R.C. 305.03 is not applicable to your situation. See generally State ex rel. Trago v. Evans, 166 Ohio St. 269, 141 N.E.2d 665 (1957). Further, I am unaware of any other statute which directly addresses the situation you have described.

It remains to be determined, however, whether a "vacancy" exists in a county office for purposes of R.C. 305.02 where the incumbent is unable to fulfill his duties due to a physical disability. The Ohio Supreme Court has stated that, "[t]he term 'vacancy', in relation to public office, is not subject to any technical definition or meaning." State ex rel. Flex v. Gwin, 20 Ohio St. 2d 29, 30, 252 N.E.2d 289, 291 (1969) (citations omitted).

Absent legislative definition, words and phrases are generally accorded their common, ordinary meaning. R.C. 1.42; Baker v. Powhatan Mining Co., 146 Ohio St. 600, 67 N.E.2d 714 (1946). Black's Law Dictionary, 1388 (5th ed. 1979) defines "vacancy" as:

A place or position which is empty, unfilled, or unoccupied. An unoccupied or unfilled post, position, or office. An existing office, etc., without an incumbent. The state of being destitute of an incumbent, or a proper or legally qualified officer. The term is principally applied to an interruption in the incumbency of an office, or to cases where the office is not occupied by one who has a legal right to hold it and to exercise the rights and perform the duties pertaining thereto. The word "vacancy", when applied to official positions, means, in its ordinary and popular sense, that an office is unoccupied, and that there is no incumbent who has a lawful right to continue therein until the happening of a future event, though the word is sometimes used with reference to an office temporarily filled. (Emphasis added.)

In the situation which you have described, there is an incumbent occupying the office of a county commissioner, even though the incumbent is unable to perform the duties of the office.

The conclusion that an office must be unoccupied before it may be declared vacant is generally supported by Ohio case law and the opinions of prior Attorneys General. In State ex rel. Attorney General v. Bryson, 44 Ohio St. 457, 465, 8 N.E. 470, 473 (1886), the Ohio Supreme Court held that, "[t]he office [of municipal fire engineer] could not be regarded as vacant while filled by one lawfully entitled to it, nor could an appointment made ostensibly to fill a vacancy, create one." In 1965 Op. Att'y Gen. No. 65-70, one of my predecessors, in construing R.C. 503.241, which is analogous to R.C. 305.03 with regard to township officers, concluded that the "failure of a member of a board of township trustees to regularly attend the meetings of such board and to properly discharge his duties does not result in a vacancy in such office, but it may be ground for removal of such township officer under Section 3.07, Revised Code." (syllabus, paragraph two). Accord 1963 Op. Att'y Gen. No. 3519, p. 6. Similarly, 1928 Op. Att'y Gen. No. 2167, vol. II, p. 1285 concluded that the disappearance of a county recorder did not result in a vacancy of that office. It was determined in 1928 Op. No. 2167 that the county

commissioners could not declare the office to be vacant, but that the recorder could be removed from office as provided by statute. Further, the court in State ex rel. Clinger v. White, 143 Ohio St. 175, 179, 54 N.E.2d 308, 310 (1944) stated:

The text in 43 American Jurisprudence, 161, Section 379, recites that the incumbent of an office does not "lose his title to the office or his right to the emoluments or salary connected with it because he may be absent or away from the office for a short, occasional, or even a protracted, period of time and does not during such period of time personally give his time and attention to the duties of the office. This is true whether he is absent from office through illness or upon purely personal business. . . ."

See 1957 Op. Att'y Gen. No. 243, p. 68 (absence of a township clerk does not result in a vacancy of such office, except as provided in R.C. 503.241). Cf. 1963 Op. Att'y Gen. No. 572, p. 588, 589 (resignation of office requires "an intention on the part of an office holder to relinquish a portion of the term of office and an actual relinquishment thereof"). It is clear therefore, that a general inability of an incumbent to fulfill the duties of his office does not constitute a vacancy of the office.

I note that in the context of various other public offices, the law has specifically dealt with temporary vacancies of office due to illness or disability, resulting in the inability of officeholders to discharge the duties of office. The law has provided a means to fill that temporary vacancy until the disability of the elected officeholder is removed. See e.g., Ohio Const. art. III, §15(B) "[w]hen the Governor is unable to discharge the duties of office by reason of disability, the Lieutenant Governor shall serve as governor until the Governor's disability terminates"; R.C. 311.03 ("[w]hen the sheriff, by reason of absence, sickness, or other disability, is incapable of serving any process required to be served. . . the court of common pleas. . . may appoint a suitable person to serve such process or to

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<sup>2</sup> But see 1931 Op. Att'y Gen. No. 3601, vol. II, p. 1199, which addressed the incapacity of a township clerk. Under the statutory scheme then in effect, there was no provision for the appointment of a deputy clerk and there was no provision whereby the office would temporarily be filled until the disability of the clerk could be removed. Given the foregoing statutory scheme, my predecessor concluded that, "[t]emporary physical or mental incapacity of a township clerk, preventing him from performing his duties, does not vacate his office. However, absence from the office for more than a reasonable time, due to physical or mental incapacity, creates a vacancy, to be filled by the township trustees." Id. (syllabus, paragraph two). It was determined that what constituted a reasonable period of time was a question of fact, and that the township trustees had the duty of judging whether the disability was temporary or permanent. Cf. 1957 Op. Att'y Gen. No. 243, p. 68 (concluding that pursuant to R.C. 507.02 (enacted as G.C. 3299-1 in 1941 Ohio Laws 226 (Am. S.B. 338, eff. May 14, 1941)), the township trustees may appoint a deputy clerk to fill the office of a township clerk in specific situations; however, mere absence of the clerk was not one of the reasons specified for which a deputy could be appointed, and the office could not be declared vacant during the absence of the clerk except as provided in R.C. 503.241). The test utilized in 1931 Op. No. 3601 is uncertain of application and vests power in the body charged with declaring the vacancy which does not appear to be contemplated by statute. Therefore, I decline to adopt this test for the situation at hand.

I note that 1929 Op. Att'y Gen. No. 190, vol. I, p. 269 concluded that if the duties of the office of county treasurer were properly performed under the supervision of a county treasurer who was absent from the office due to illness, there was no vacancy of office, and that so long as the duties of the office were being performed, there were no grounds for removal of the treasurer. The opinion did not, however, conclude that the office would be vacant if the duties of the office were not being performed.

perform the duties of sheriff during the continuance of such disability"); R.C. 507.02 (when a township clerk is unable to fulfill the duties of his office because of illness or other incapacity, a deputy clerk shall be appointed, with full power to discharge the duties of the office, until the clerk is again able to serve or until a successor is elected and qualified). There is, however, no similar provision in the Revised Code whereby the office of county commissioner may be temporarily filled during the disability of a county commissioner.

To summarize, you have presented a situation where an incumbent county commissioner is unable to perform the duties of the office due to a serious, indeterminate illness. R.C. 305.02, which establishes a procedure whereby vacant county offices may be filled, does not define the term "vacancy." R.C. 305.03 provides that a county office may be deemed vacant due to the absence of the officeholder, but R.C. 305.03 is inapplicable to the instant situation because it is limited to absences from the county. There are no other applicable provisions of law providing that an absence from public office results in a vacancy of that office. Generally, an office may be declared vacant only when the office is unoccupied by any incumbent. Therefore, I conclude that the office of county commissioner may not be declared vacant where the incumbent is unable to attend to the duties of the office and where he is not absent from the county.

It is, therefore, my opinion, and you are advised, that the office of county commissioner may not be declared vacant when the incumbent is seriously ill and unable to fulfill the duties of office but is not absent from the county.