determine. All bonds hereinbefore provided for shall be conditioned upon the faithful discharge of the duties of their respective positions, and such bonds * * * shall be approved as to the sufficiency of the sureties by the director, and as to legality and form by the attorney general and be deposited with the secretary of state. * * *"

Finding said bonds to have been properly executed in accordance with the foregoing sections, I have accordingly approved the same as to form, and return them herewith.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2905.

VILLAGE—VACANCY IN COUNCIL FILLED HOW.

SYLLABUS:

1. *When a vacancy in a village council is discovered to have been in existence for a period of more than thirty days, such vacancy may be filled by council or by the mayor, whichever authority acts first.*

2. *Under such circumstances, when a motion is made and seconded by council to appoint a person to fill such vacancy and a vote thereon deferred by the mayor, in refusing to entertain the motion, until after the mayor has made an appointment, the appointment made by the mayor is of no legal effect and the person thereafter appointed by council is the legally appointed incumbent to fill such vacancy.*

COLUMBUS, OHIO, July 10, 1934.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—This will acknowledge receipt of your request for my opinion, which reads as follows:

"We are submitting the following question to you for your opinion:

When a person who has been duly elected to council takes office at the first meeting of the new council in January, and later, when it is determined that he did not have the necessary qualifications to legally act as councilman, resigns, does the vacancy date from the first meeting of the year, or from the time of his resignation?

A copy of all our correspondence relative to this inquiry, including the request that same be submitted to you for an opinion, is enclosed."

The facts in the matter about which you inquire are set forth in the enclosed letter of the attorney for the village of Bainbridge, Ohio, as follows:

"As solicitor for the village of Bainbridge, Ross County, Ohio, I have been requested to secure your advice on the following question:

At the November election, 1933, Dr. C. was duly elected a member of the Village Council, and thereafter gave bond and qualified in the

usual manner and took his place in January, 1934, as a council member. Thereafter, he attended council meetings and acted and voted upon questions which came before council and was accepted as a member of council without challenge by any person until at a council meeting on March 5, 1934, the mayor of the village suggested that Dr. C. was not legally qualified to act as a member of council because he had not resided in the village one year prior to his election as required by section 4218 of the General Code.

This circumstance had apparently not been observed by any one prior to this time, and had not been brought to the attention of council or of Dr. C. Upon being informed of this circumstance, Dr. C. immediately tendered his resignation which was accepted by council at its next meeting on March 19. At this meeting a motion was duly made and seconded by members of council that one K. be elected to fill the vacancy created by the resignation of Dr. C., but the mayor refused to entertain this motion, but instead appointed one M. to the position and thereafter approved M.'s bond and recognized him as the occupant of the office.

The mayor took the position that the office of councilman which Dr. C. had occupied had actually been vacant from the first of January, because Dr. C. was not qualified under section 4218, and that, therefore, council not having acted under section 4236 for 30 days, the mayor thereby had the power of filling the vacancy.

Thereafter, on March 27, a special meeting was duly called by three members of council for the purpose, among others, of electing a person to fill the vacancy created by the resignation of Dr. C. and a motion was again duly made and seconded to elect one K. to this position which motion the mayor refused to entertain upon the ground that the vacancy had been filled by his appointment of M. At this meeting, I was asked by the mayor whether in my opinion, the mayor's appointment of M. to fill this vacancy was valid and in accordance with law.

I advised the mayor that, in my opinion, he had not been authorized to appoint M. to this vacancy for the reason that Dr. C. had occupied the office as a de facto member of council until his resignation on March 5, 1934, and that the vacancy did not occur before the resignation of Dr. C. on this date. That thereafter council had the right to elect a person to fill this vacancy within a period of 30 days and that the mayor's right of appointment would not arise until after the expiration of the 30 day period.

It appeared to me that the vacancy referred to in section 4236 means a vacancy which is known to council to exist, and not a ground of disqualification for a member which is not known to council. It appeared to me that the intent of this section of the statute is to allow council the first opportunity to fill the vacancy, which it certainly could not have until the existence of a vacancy became known to it.

The mayor, however, did not concur in my opinion and declined to permit the election of K. by the council. Thereafter at the regular meeting of council on April 2, the motion to elect K. was again made and seconded and upon the refusal of the mayor again to entertain or put

the motion to a vote, council appealed from the ruling of the chair, and put the motion to vote over the objection of the mayor.

The motion received the affirmative vote of four members of council and the negative vote of M. and another member of council and was duly declared carried. Thereafter K. qualified as a member of council and has presented a sufficient bond to the mayor for approval. The office is now claimed, of course, by M. as the mayor's appointee, and by K. as a member elected by council.

Having come to the conclusion outlined above to the effect that the mayor's appointment of M. was premature and therefore invalid, I have found no reason this far to alter my viewpoint on this question.

I have been requested to ask your advice about this question, with the hope that this might conclude the matter, and I should therefore appreciate it if you would be so good as to advise me at your early convenience as to your conclusions as to which person is properly occupying the office as successor to Dr. C."

Section 4218, General Code, relative to village councilmen, reads as follows:

"Each member of council shall have resided in the village one year next preceding his election, and shall be an elector thereof. No member of the council shall hold any other public office or employment, except that of notary public or member of the state militia, or be interested in any contract with the village. Any member who ceases to possess any of the qualifications herein required or removes from the village shall forfeit his office."

Section 4236, General Code, under the legislative heading "Cities and Villages", provides as follows:

"When the office of councilman becomes vacant, the vacancy shall be filled by election by council for the unexpired term. If council fail within thirty days to fill such vacancy, the mayor shall fill it by appointment."

Substantially the same eligibility provisions that are now incorporated in section 4218, General Code, supra, relating to village councilmen are incorporated in section 4207, General Code, relating to city councilmen. Such latter section reads as follows:

"Councilmen at large shall have resided in their respective cities, and councilmen from wards shall have resided in their respective wards, for at least one year next preceding their election. Each member of council shall be an elector of the city, shall not hold any other public office or employment, except that of notary public or member of the state militia, and shall not be interested in any contract with the city. A member who ceases to possess any of the qualifications herein required, or removes from his ward, if elected from a ward, or from the city, if elected from the city at large, shall forthwith forfeit his office."

This office has on at least two occasions concluded in formal opinions that the one year residence clause is an eligibility provision, which, if not complied with, prevents the person from holding the office of councilman and causes a vacancy at the beginning of the term for which the councilman was elected. See Annual Report of the Attorney General for 1911-1912, Vol. II, page 1616, and Annual Report of the Attorney General for 1913, Vol. II, page 1611.

In the consolidated cases of *State, ex rel. Shank* vs. *Gard,* and *Fred Shearer* vs. *Millikin, et al.,* 8 C. C. (N. S.) 599, decided by the Circuit Court of Butler County on May 1, 1906, the court had before it for consideration the provisions of sections 119 and 120 of the then municipal code, codified as sections 1536-612 and 1536-613 of Bates' Revised Statutes. The subject matter of section 1536-612 was later carried into the General Code of 1910 as section 4237, and that of section 1536-613 was carried into sections 4207 and 4236, General Code.

Section 120 of the municipal code (Bates' section 1536-613) read at the time of the rendition of the aforementioned court decision as follows:

> "Councilmen at large shall have resided in their respective cities and councilmen from wards shall have resided in their respective wards for at least one year next preceding their election. Every member of council shall be an elector of the city, shall not hold any other public office or employment, except that of notary public or member of the state militia, and shall not be interested in any contract with the city. Any member who shall cease to possess any of the qualifications herein required, or shall remove from his ward, if elected from his ward, or from the city, if elected from the city at large, shall forthwith forfeit his office.
>
> Whenever the office of councilman becomes vacant the same shall be filled by election by council for the unexpired term, and in case council fail within thirty days to fill such vacancy, the mayor shall fill the same by appointment."
>
> (Bates' Annotated Revised Statutes of Ohio, 5th Edition, 1906.)

The facts of the foregoing case were briefly as follows: At the November election of 1904, one Fred Shearer, an elector of the city of Hamilton, Ohio, was elected for two years as a member at large of the city council of Hamilton. Prior to and at the time of election the said Fred Shearer held the public office of member of the county board of school examiners and the public employment of school teacher and principal of one of the city schools. He continued to hold this office and position after taking office as councilman, until the council on December 27, 1905, passed a resolution declaring his office vacant, and appointed one Millikin as councilman. The court held in the second paragraph of the syllabus:

> "Where one is elected to council who is already serving in the office of school examiner and is further employed as superintendent of a public school, *the election is a nullity. by reason of his ineligibility, and council* has the right to so determine without notice to the one so affected or the taking of any proceedings against him, and *may proceed to fill the vacancy forthwith.*" (Italics mine.)

The opinion of the court states in part:

"* * * We are of the opinion that at no time between his election and the hearing of this case did Fred Shearer have the qualifications of a member of council provided and required by section 120 of the municipal code. He held the public office of school examiner and the public employment of superintendent of one of the Hamilton public schools before the election and continuously during the entire time of his pretended incumbency as member of council, in contravention of the provision: 'Every member of council shall be an elector of the city, shall not hold any other public office or employment, except that of notary public or member of the state militia, and shall not be interested in any contract with the city.'

* * * * * * * * *

Fred Shearer's election and pretended incumbency of the office of councilman were a nullity, and on December 27, 1905, council had the right under Sections 119 and 120 of the municipal code to determine this matter without notice to Fred Shearer or taking any proceedings against him, and to fill the *vacancy* forthwith by the election of Brandon R. Millikin."

This case was affirmed by the Supreme Court, without opinion, on December 4, 1906. See 75 O. S. 606. While the court was not here considering the specific eligibility requirement as to one year residence preceding election as in the question which you present, the case is nevertheless directly in point as authority for the position that council is not precluded from filling a vacancy at the end of the thirty day period when under the statute the vacancy shall be filled by the mayor. It appears that in this Circuit Court case the mayor had not attempted to fill the vacancy before council had so acted. It must be concluded, as established, therefore, that in the absence of any evidence to the effect that the mayor has filled a vacancy in council existing for a greater period than thirty days council still has power so to do.

There is no question but that any time after the statutory period of thirty days has expired and so long as council has not acted in filling the vacancy, even though a period of several months have elapsed, the mayor has the power to appoint. This principle is supported by the recent case of *State, ex rel. Vandenbark* vs. *Whartenby,* 126 O. S. 209.

It follows, therefore, in view of the foregoing, that the appointment to fill the vacancy here under consideration which existed from the date of the first meeting of the village council in January, 1934, until March, 1934, could have been made by either council or by the mayor, whichever authority acted first. It becomes necessary, therefore, to apply this principle to the specific facts which you have presented.

It appears that upon learning of the lack of residence qualifications of Dr. C. as councilman, the first step to fill the vacancy was taken not by the mayor but by council. In the letter of the village solicitor, it is stated that at the meeting of March 19, a motion was duly made and seconded by council to elect one K to fill this vacancy. After this motion was made and seconded, action thereon was deferred until on April 2, when K was elected by a vote of four to one, the delay having been occasioned by the mayor's refusal to entertain the motion to elect K to fill the vacancy, presumably for the purpose of precluding council from having the prior right to fill the vacancy in order that he might make the appointment which he, in fact, thereafter purports to have done.

It might well be urged that the mayor had no duty whatever to perform when council sought to fill the vacancy in question and his attempt to thwart the action of council in electing a councilman to fill this vacancy was wholly unauthorized and of no legal effect. The case of *State* vs. *Miller,* 62 O. S. 436, with respect to the election of officers by council, supports this position. The syllabus is as follows:

> "1. Where all of the members of a city council, in a city of the second class, vote to elect a city clerk, and one of the candidates voted for receives a plurality of the votes cast, such candidate is duly elected, and a formal declaration of the result is not necessary to fix his right to the office; and thereafter it is not within the power of any member of the council to change the result by changing his vote.
>
> 2. When a choice has been made on such vote, it is not essential that the mayor as the presiding officer of the council shall declare the result. *In such case the mayor has no duty whatever to perform as to the election.* He can take part only in case of a tie vote." (Italics the writer's.)

In the opinion of the court, it is said at page 445:

> "The council was engaged in the duty of electing officers, a duty *imposed on the members thereof, not on the body as a council.* They were not engaged in the deliberative business which is the ordinary work of the council; but in the election of a city officer. They were not acting under parliamentary law; but were casting their votes and making their choice as required by a specific statute." (Italics the writer's.)

Whatever may be said as to the lack of authority of the mayor to refuse to entertain a motion under all circumstances, it must be concluded that this matter was pending before council at the time the mayor attempted to fill this vacancy.

The legislative policy in this state of vesting the authority to fill vacancies, primarily in council, and secondarily, in the mayor, is clear. In view of the fact that council first attempted to fill this vacancy by motion made and duly seconded, which was delayed solely by the unauthorized act of the mayor, in order that he might make the appointment, a holding to the effect that upon this state of facts the appointment of the mayor must be upheld and the appointment of council set aside would, in my judgment, serve to effectively reverse this legislative policy.

As a general rule, any statute or rule of law restricting the power of council to appoint must be strictly construed, and it appears to me that this is especially true when the legislature has vested this power primarily in council. It is said in 43 C. J. at page 613:

> "Since the general rule is that the power of appointment may be exercised by the legislative body in the absence of provision to the contrary, the power of council to appoint officers should not be restricted by inference, but a provision, claimed to have such effect, must be construed strictly according to its express terms."

As hereinabove indicated, under the facts as set forth in the solicitor's letter,

I am unable to subscribe to a holding whereby, the authority which secondarily has the appointing power may by his own act deprive the authority which primarily has such power from exercising this power to appoint. Undoubtedly, if the facts were that council, after moving to fill the vacancy, had allowed the matter to rest and failed to act until the mayor, in good faith in order to avoid further vacancy in the office, made an appointment, then reason and justice might warrant a contrary conclusion. Such, however, are not the facts here; with apparent promptness the mayor, after refusing to entertain the motion, attempted to make the appointment himself. Even then it appears council attempted again to appoint by calling a special meeting eight days later but were again stopped by the mayor; and again five days later council appointed. These facts are clearly distinguishable from the supposititious case hereinabove mentioned of where upon failure of council to function the mayor might appoint to avoid further vacancy. As I view the situation, it is no different than if the mayor had appointed after council had moved and seconded an appointment before the members had been given as much as five minutes within which to vote.

In view of the foregoing, it is my opinion that:

1. When a vacancy in a village council is discovered to have been in existence for a period of more than thirty days, such vacancy may be filled by council or by the mayor, whichever authority acts first.

2. Under such circumstances, when a motion is made and seconded by council to appoint a person to fill such vacancy and a vote thereon deferred by the mayor, in refusing to entertain the motion, until after the mayor has made an appointment, the appointment made by the mayor is of no legal effect and the person thereafter appointed by council is the legally appointed incumbent to fill such vacancy.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2906.

HOSPITALIZATION—EMERGENCY CASE OF NON-RESIDENT IN IMMEDIATE NEED OF HOSPITALIZATION IN COUNTY OTHER THAN THAT OF HIS LEGAL SETTLEMENT DISCUSSED.

SYLLABUS:

Hospitalization in emergency cases exclusive of motor vehicle injuries and contagious cases of a non-resident of a county found in need of hospitalization in a county other than that of his legal settlement discussed.

COLUMBUS, OHIO, July 10, 1934.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication concerning the following state of facts:

> T. D. was in an accident (not of a motor vehicle type) in Norton Township, Summit County, Ohio, and was immediately rushed by ambulance to a nearby hospital, St. Thomas Hospital, in Akron for an emergency operation. No opportunity was afforded the hospital under the cir-