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SYLLABUS:

1. Section 731.43, Revised Code, provides the sole statutory methods by which a vacancy in the office of a member of the legislative authority of a municipal corporation may be filled and such section was not repealed by implication by the amendment of Section 3.02, Revised Code.

2. When the classification of a municipal corporation changes from that of a village to a city according to law, the village ceases to exist and the officers of the village continue in office only until succeeded by the proper officers of the new municipal corporation at the regular municipal election, as provided by Section 703.07, Revised Code.

3. Members of the legislative authority of the former village who were elected to serve terms of four years in accordance with Section 731.09, Revised Code, do not continue as members of the legislative authority of the city until the expiration of such four-year period.

Columbus, Ohio, July 18, 1963

Honorable Ted W. Brown
Secretary of State
State House
Columbus, Ohio

Dear Sir:

Your request for my opinion reads:

"I would appreciate your opinion, as Attorney General, on the following two questions:

"(1) In 1959 the General Assembly amended Section 731.09, Revised Code, increasing the term of office of village councilmen from two to four years. Section 731.43, Revised Code, provides that vacancies in the legislative authority of a municipal corporation shall be filled by the legislative authority. Apparently the person chosen to fill such a vacancy would serve out the entire unexpired term, which might now amount to almost a complete four years. It is being suggested that under Section 3.02, Revised Code, persons so appointed should serve only until the next election for the office, or in other words that they could serve no more than two years and thirty days. Inasmuch as Boards of Elections are now being faced with petitions from candidates who want to run for the remaining two years of some of these unexpired terms, relying on Section 3.02, we would appreciate your opinion as to which statute governs.

“(2) In 1961 four members of the council of the village of ‘S’ were elected to four-year terms, and two members were elected to two-year terms.. This is, of course, the procedure prescribed by Section 731.09, Revised Code. Subsequently, pursuant to application properly made, the Bureau of the Census made a recheck of the village and found that its population exceeded 5,000. A proclamation making the village a city was accordingly issued. The question now arises, do the councilmen elected to four-year terms continue as city councilmen, or do their terms expire at the end of 1963? Again, a Board of Elections is about to be confronted with petitions from candidates.”

The problem presented in your first question is one which will require consideration of three sections of the Revised Code, both as they presently exist and as they appeared prior to rather recent amendment.

Section 731.09, Revised Code, formerly provided that members of the legislative authority of a village should be elected for a term of two years. This section was amended as of October 22, 1959, to provide for a four-year term (128 Ohio Laws, 290). Another amendment as shown in 129 Ohio Laws, 326, became effective June 8, 1961. Section 731.09, Revised Code, now reads:

“The legislative power of each village shall be vested in, and exercised by, a legislative authority, composed of six members, who shall be elected by the electors of the village at large, for terms of four years. At the municipal election held in the year 1961 two members shall be elected for terms of two years and four members shall be elected for terms of four years. Except in villages where a primary election was held in 1961 for the nomination of candidates for member of the legislative authority, the four candidates who receive the greatest number of the votes cast shall be elected for terms of four years, and the two candidates who receive the next greatest number of the votes cast shall be elected for terms of two years.

“All candidates nominated prior to the effective date of this section, except by primary election shall have their names grouped together on the election ballot regardless of whether their nominating petition or declaration of candidacy designated that they were candidates for a two-year or a four-year term.

“At the municipal election in 1963 and quadrennially

thereafter, two members shall be elected for terms of four years.

“At the municipal election in 1965 and quadrennially thereafter, four members shall be elected for terms of four years.

“Beginning with the year 1964, all members of village council shall hold office for a term of four years.”

Section 731.43, Revised Code, has long provided the method for filling a vacancy in the office of a member of the legislative authority of a municipal corporation. Although there have been some incidental changes in the language, this section has not been amended since it was enacted in 1902 (96 Ohio Laws, 59 and 82). This was first Section 1536-613, Revised Statutes; later it became Section 4236, General Code. That section reads:

“When the office of a member of the legislative authority of a municipal corporation becomes vacant, the vacancy shall be filled by election by the legislative authority for the unexpired term. If the legislative authority fails within thirty days to fill such vacancy, the mayor shall fill it by appointment.”

Prior to January 1, 1956, Section 3.02, Revised Code, read:

“When an elective office becomes vacant and is filled by appointment, such appointee shall hold the office until his successor is elected and qualified. *Unless otherwise provided by law*, such successor shall be elected for the unexpired term at the first general election for the office which is vacant that occurs more than thirty days after the vacancy has occurred. When an elected candidate fails to qualify for the office to which he has been elected, the office shall be filled as in the case of a vacancy. Until so filled, the incumbent officer shall continue to hold the office. This section does not postpone the time for such election beyond that at which it would have been held had no such vacancy occurred or affect the official term, or the time for the commencement thereof, of any person elected to such office before the occurrence of such vacancy.”

(Emphasis added)

This section was amended in 126 Ohio Laws, 205, and again in 129 Ohio Laws, 582 (586), although this latter amendment was only for the purpose of correcting style deviations. Section 3.02, Revised Code, now reads:

“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.

“When an elected candidate fails to qualify for the office to which he has been elected, the office shall be filled as in the case of a vacancy. Until so filled, the incumbent officer shall continue to hold the office. This section does not postpone the time for such election beyond that at which it would have been held had no such vacancy occurred or affect the official term, or the time for the commencement thereof, of any person elected to such office before the occurrence of such vacancy.”

It seems, then that your question has resulted from the change which removed the words “unless otherwise provided by law” from Section 3.02, Revised Code.

It is my opinion that Section 731.43, Revised Code, provides the sole method for electing or appointing a successor to serve an unexpired term as a member of the legislative authority of a municipal corporation. By the express language of that statute, the successor duly elected by the members of the legislative authority or appointed by the mayor is to serve the *unexpired term*. It seems to me that unless it could be said that the amendment of Section 3.02, Revised Code, in some way supersedes the express language of Section 731.43, Revised Code, or repealed that section by implication, there can be no doubt but that Section 731.43, Revised Code, controls. In fact, it would seem to me that there would actually be no “office which is vacant” within the meaning of Section 3.02, Revised Code, after an election or appointment made pursuant to Section 731.43, Revised Code.

The general rule concerning repeals by implication in a situation such as is presented here is stated in this way in 5 Ohio Jurisprudence 2d, beginning at page 83:

“The policy against implied repeals has peculiar and special force when the conflicting provisions, which are

thought to work a repeal, are contained in a special act and a later in general act. (sic) The special statute, in many cases, remains wholly unaffected by the later general act. Indeed, the presumption is that the special statute is intended to remain in force as an exception to the general act. The general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment. * * * Thus as a general rule, general statutory provisions do not control or interfere with specific provisions, but must yield thereto.

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My predecessor in office considered a similar question in Opinion No. 2439, Opinions of the Attorney General for 1961, page 444; the syllabus of that opinion reads:

“Vacancies occurring in a board of education are to be filled pursuant to the provisions of Section 3313.11, Revised Code, which operates as a special exception to the general provisions of Section 3.02, Revised Code, which latter section does not apply to the filling of vacancies in boards of education.”

The writer of that opinion mentioned the general rule that special statutes control over general statutes when both govern the same subject matter and then quoted as follows from *Fisher Bros. v. Bowers*, 166 Ohio St., 191, at page 196:

“‘We have held so many times that it has become axiomatic that a special statutory provision which applies to a specific subject matter constitutes an exception to a general statutory provision covering other subject matter as well as the specific subject matter.’”

This sentence appears in Opinion No. 2439, *supra*, at page 446:

“* * * Although as you point out in your request, Section 3.02, Revised Code, was amended in 1956, to delete the words ‘unless otherwise provided by law’ the present provisions of Section 3313.11, Revised Code, were not changed and, therefore, the general presumption against an implied repeal of any statute tends to support the conclusion I have reached.”

It is my conclusion that the amendment to Section 3.02, Revised Code, which deleted the words “unless otherwise provided by law,” did not in any way affect the mandatory method provided by Section 731.43, Revised Code, for filling a vacancy in the office

of a member of the legislative authority of a municipal corporation. Neither did the increase in the term of a member of the legislative authority of a village, as provided by Section 731.09, Revised Code, repeal by implication the mandatory provisions of Section 731.43, Revised Code.

In your second question you have described a situation in which a village has become a city and a proclamation to that effect has been duly issued according to law. Four members of the legislative authority of the village were elected in 1961 for four year terms in accordance with the provisions of Section 731.09, Revised Code. You have inquired whether these members will continue as members of the city council until the end of the four-year period.

The village in question has ceased to exist; this municipal corporation is now a city by reason of Section 1 of Article XVIII, Constitution of Ohio, and Section 703.01, Revised Code. I find nothing in the law which indicates to me that the members of the legislative authority of such a municipality continue in office until their original terms of office expire. Section 703.07, Revised Code, provides:

“Officers of a village advanced to a city, or of a city reduced to a village, shall continue in office until succeeded by the proper officers of the new municipal corporation at the regular municipal election, and the ordinances thereof not inconsistent with the laws relating to the new municipal corporation shall continue in force until changed or repealed.”

Members of the legislative authority of a city are not elected in the same manner as are the members of such authority for a village. Section 731.01, Revised Code, reads:

“The legislative power of each city shall be vested in, and exercised by a legislative authority, composed of not less than seven members, four of whom shall be elected by wards and three of whom shall be elected by electors of the city at large. For the first twenty thousand inhabitants in any city, in addition to the original five thousand, there shall be two additional members of such legislative authority, elected by wards, and for every fifteen thousand inhabitants thereafter there shall be one additional member similarly elected. The total number of members of such legislative authority shall not exceed thirty-two.

When the total number of members is fifteen or more, one of every five members shall be elected at large, and the remainder from wards."

It seems clear that the mandatory change in classification of a municipal corporation from a village to a city necessarily results in a transition period during which the form of government must be changed to that appropriate for a city. A new form of legislative authority must be elected, and the method of election is different from that which must be followed in the case of a village. The members of the legislative authority of a newly-created city can be elected only after such municipal corporation has been divided into wards. Thus, the legislative authority of the municipal corporation must promptly take the necessary steps to prepare for the lawful election of the statutory legislative authority for the government of a city.

The first paragraph of the syllabus of Opinion No. 5852, Opinions of the Attorney General for 1955, page 523, seems directly in point on this question; that paragraph reads:

"When a village becomes a city pursuant to the provisions of Section 703.06, Revised Code, it becomes the duty of the legislative body of the municipality then in office to provide for the election of a new legislative body for such city by dividing the city into wards as prescribed in Section 731.01, Revised Code."

In *State, ex rel. Heffernan vs. Serp*, 125 Ohio St., 87, the Supreme Court said this in the third paragraph of the syllabus:

"It is the true intent and meaning of Section 3499, General Code, that village officers shall continue in office, with the powers and duties only of village officers until the first regular election after the proclamation of the secretary of state has been filed with the mayor of the municipality as provided by Section 3498, General Code."

In this case the mayor of the municipal corporation had been elected as mayor of a village; after the corporation became a city, he made certain appointments which could have been made by the mayor of a city but not the mayor of a village. It was held that he did not have this power. Section 3499, General Code, mentioned by the court, is now Section 703.07, Revised Code. See also *Christensen vs. Hogedorn*, 174 Ohio St., 98.

It is my conclusion that there is nothing in Section 731.09, Revised Code, which suggests that a member of the legislative authority of a village continues in office for the entire term for which he was elected, regardless of the fact that the village has been succeeded by a city. Members of the council for the new city must be elected in accordance with Section 731.01, Revised Code, and for the term prescribed by Section 731.03, Revised Code. By reason of Section 703.07, Revised Code, such council members would be elected at the regular municipal election.

It is, therefore, my opinion and you are advised:

1. Section 731.43, Revised Code, provides the sole statutory methods by which a vacancy in the office of a member of the legislative authority of a municipal corporation may be filled and such section was not repealed by implication by the amendment of Section 3.02, Revised Code.

2. When the classification of a municipal corporation changes from that of a village to a city according to law, the village ceases to exist and the officers of the village continue in office only until succeeded by the proper officers of the new municipal corporation at the regular municipal election, as provided by Section 703.07, Revised Code.

3. Members of the legislative authority of the former village who were elected to serve terms of four years in accordance with Section 731.09, Revised Code, do not continue as members of the legislative authority of the city until the expiration of such four-year period.

Respectfully,
WILLIAM B. SAXBE
Attorney General