COLUMBUS, OHIO, December 11, 1933.

HON. T. S. BRINDLE, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between the State of Ohio, acting by the Department of Public Works, for the Department of Education, and the L. M. Leonard Company, of Columbus, Ohio. This contract covers the construction and completion of Contract for General Work for a project known as Wings to Dormitory (Boys' and Girls' Dormitories) State School for the Blind, Columbus, Ohio, in accordance with Item 1, Item 6 (Alt G-1), Item 7 (Alt G-2), Item 11 (Alt G-5a), Item 12 (Alt G-5b), Item 14 (Alt G-7), including substitutions for Cleveland sandstone and all steel equipment metal wardrobes, of the form of proposal dated November 14, 1933. Said contract calls for an expenditure of one hundred and thirty-two thousand, four hundred and fifty-seven dollars ($132,457.00).

You have submitted the certificate of the Director of Finance, to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. You have also submitted a certificate of the Controlling Board, showing that said board has released funds for this project in accordance with Section 8 of House Bill No. 699, of the 90th General Assembly, Regular Session.

In addition, you have submitted a contract bond upon which the Maryland Casualty Company appears as surety, sufficient to cover the amount of the contract.

You have further submitted evidence indicating that plans were properly prepared and approved, notice to bidders was properly given, bids tabulated as required by law, and the contract duly awarded. Also it appears that the laws relating to the status of surety companies and the Workmen's Compensation have been complied with.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon, and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,
JOHN W. BRICKER,
Attorney General.

1991.

PUBLIC OFFICE—INCUMBENT MAY BECOME CANDIDATE FOR DIFFERENT TERM OF SAME OFFICE PRIOR TO EXPIRATION OF ELECTED TERM—ELECTION OPERATES AS RESIGNATION OF UNEXPIRED TERM.

SYLLABUS:

An incumbent of an office may, prior to the expiration of the term for which he was elected, become a candidate for a different term of that office at a subsequent election therefor without resigning prior to such election from the former office, and his election and qualification for the latter term would operate as a resignation or vacation of the former.

COLUMBUS, OHIO, December 11, 1933.

HON. GEORGE S. MYERS, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication which reads as follows:

"I will appreciate it very much if you will give us your opinion upon the question as to whether or not a person elected to a four year term of office as Justice of the Peace, while serving such term of office, would be permitted to become a candidate at the next general election for such office, for a four year term beginning January 1st following such election, even though such Justice of the Peace has two years yet to serve of the term to which he was originally elected.

The circumstances are as follows:

'A' was elected Justice of the Peace in 1931 for a term of four years beginning with January 1, 1932. At the election of this November, an additional Justice of the Peace was to be elected in 'A's' township. There were no names of candidates printed upon the ballot, but the electors wrote in the name of 'A' among others, and 'A' received the highest number of votes.

Should the Board of Elections issue a certificate of election to 'A' and would 'A' be permitted to resign from the term of office he is now filling to accept the longer term to which he seems to have been elected?

The question naturally arises with reference to certain other offices, 'Can an incumbent in office, if he sees an opportunity to be elected to a longer term of the same office as that to which he was elected, become a candidate for such long term without resigning from the term of office which he is now filling, such resignation effective prior to the election at which he seeks the longer term?"

Anyone who is an elector is eligible to hold public office in the absence of constitutional or statutory qualifications or inhibitions. As stated in the case of *State, ex rel.* vs. *Wagar,* 19 C. C. 149:

"One who is an elector is entitled to hold office to which he is elected, unless the statute forbids. There must be a provision of the statute forbidding his holding the office."

Likewise, the court said in the case of *Napier* vs. *Roberts,* 172 Ky. 227:

"The individual voter should not be deprived of the opportunity of choosing a public servant from among those who may seek the place unless the plain or manifest purpose of the law demands it."

I find no constitutional or statutory provision which would prevent an incumbent of an office from being a candidate for a different term of that office. In the case you present, the name of the person receiving the highest number of votes was not on the ballot as a candidate but his name was written in by the voters. Even if there were a statute prohibiting him from being a candidate, it is very doubtful if such statute would be construed to deny to the voters the right to write his name on the ballot and elect him. It has been held that the inhibition placed on the candidacy at the general election of one who has been defeated at a primary does not prevent the voters from voting for the candidate defeated in the primary. The following was held in the case of *LaCombe* vs. *LaBorde,* 132 La. 435:

"The law allows to the voter the right to vote for whom he chooses, and this right cannot be denied him merely because the one for whom he

votes is prohibited from being an avowed or official candidate. The intent of the law is to allow the voter the greatest freedom in the expressing of his will, and this freedom is not to be interfered with by the court, in the absence of a clear and unambiguous expression by the law-making power of an intent to limit or restrict within certain bounds, the exercise by the voters of this freedom of choice."

See also *State, ex rel.,* vs. *Moore,* 87 Minn. 308.

There being no constitutional or statutory inhibition against such a candidacy, I am of the view that it makes no difference whether the person's name appeared on the ballot as a candidate or whether his name was written in by the voters.

You ask whether such a person would not have to resign from the office of which he is an incumbent before the election at which he seeks the other term. It is clear, of course, that he would not be eligible to hold both offices at the same time. Where there are statutory or constitutional requirements relative to eligibility of public officers, whether or not such requirements refer to the time of election or the time of taking office, is generally determined by the language used in such provision. However, where the disqualification is the holding of an incompatible office or some like obstacle which may readily be removed, the requirements are generally considered as referring to the date of taking office. 9 R. C. L. 1124, 1125.

I am of the view that the law relating to the eligibility of a person to hold an incompatible office will apply to the situation which you present. The successful candidate could not hold both offices but he could elect which one he desires to hold. He could not retain the former after assuming the latter, and the acceptance of the latter would be an abandonment of the former. *Eddy* vs. *County Commissioners,* 15 Ill. 375. The acceptance of an incompatible office by the incumbent of another office operates as a resignation or vacation of the first office. 46 C. J. 947; *State, ex rel.,* vs. *Mason,* 61 O. S. 513. In the case of *People* vs. *Carrique,* 2 Hill 93, a law of 1822 provided for the appointment of three justices of the peace of the City of Hudson; and in April, 1836, Carrique was appointed one of them. A law of 1830 provided for the appointment of two additional justices of the peace of the City of Hudson. In January, 1838, Carrique was appointed a justice under this law and qualified. The tenure under both laws was four years. The court held that Carrique was properly in office under the last appointment, and that the first was ipso facto vacated by his acceptance of the new appointment.

I am of the opinion therefore that an incumbent of an office may, prior to the expiration of the term for which he was elected, become a candidate for a different term of that office at a subsequent election therefor without resigning prior to such election from the former office, and that his election and qualification for the latter term would operate as a resignation or vacation of the former.

Respectfully,
JOHN W. BRICKER,
Attorney General.