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MUNICIPAL CORPORATIONS — AUDITOR — VACANCY —
SUCCESSOR ELECTED, WHEN.

SYLLABUS:

An appointee appointed to fill a vacancy occurring in the office of auditor of a municipal corporation, pursuant to the provisions of Section 4252, General Code, serves for the unexpired portion of the four year term; and the successor to the appointee is not elected until the regular municipal election in November, 1939.

COLUMBUS, OHIO, May 10, 1937.

HON. WILLIAM J. KENNEDY, *Secretary of State, Columbus, Ohio.*

DEAR SIR: I have your letter of recent date, requesting my opinion on the following question:

“A vacancy having occurred in the office of City Auditor in one of our Ohio cities, the appointment of someone to fill the unexpired term was duly made under the provisions of Section 4252, G. C.

We will ask you to please favor us with your opinion as to whether or not the appointee will serve the remainder of the unexpired term of office of City Auditor or whether such appointee shall serve until a successor is elected and qualified, such successor to be elected at the regular municipal election to be held on November 2nd of this year.”

The term of office for the auditor of a municipal corporation is provided for in Section 4275, General Code, which reads as follows:

“The auditor shall be elected for a term of four years, commencing on the first day of January next after his election, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation.”

The statute above quoted became effective August 30, 1935, and the first election pursuant to its provisions was held in November of that year. I assume, therefore, that the vacancy referred to in your inquiry occurred in a four year term of office.

The constitutional provision for filling vacancies in elective and appointive offices is found in Article II, Section 27, of the Constitution of the State of Ohio, which section is as follows:

“The election and appointment of all officers, and the filling of all vacancies, not otherwise provided for by this constitution, or the constitution of the United States, shall be made in such manner as may be directed by law; but no appointing power shall be exercised by the General Assembly, except as prescribed in this constitution, and in the election of United States Senators; and in these cases, the vote shall be taken ‘viva voce’.”

A further constitutional mandate for filling vacancies in elective offices is found in Article XVII, Section 2, of the Constitution of Ohio, the pertinent provision of which reads as follows:

“Any vacancy which may occur in any elective state office other than that of a member of the General Assembly or of Governor, shall be filled by appointment by the Governor, until the disability is removed, or a successor elected and qualified. Every such vacancy shall be filled by election at the first general election for the office which is vacant, that occurs more than thirty (30) days after the vacancy shall have occurred. The person elected shall fill the office for the unexpired term. *All vacancies in other elective offices shall be filled for the unexpired term in such manner as may be prescribed by law.*” (Italics, the writer’s).

The foregoing constitutional provisions for the filling of vacancies occurring in elective offices have been given statutory direction in Section 4252, General Code, which reads as follows:

“In case of death, resignation, removal or disability of any officer or director in any department of any municipal corporation, unless otherwise provided by law, the mayor thereof shall fill the vacancy by appointment, and such appointment shall continue *for the unexpired term* and until a successor is duly appointed, or duly elected and qualified, or until such disability is removed.” (Italics, the writer’s.)

I direct your attention particularly to the provision that all appointments made pursuant to the authority of Section 4253, supra, are “for the unexpired term.”

For an interpretation of the language, “for the unexpired term,” as contained in Section 4252, supra, I refer you to the case of *State, ex rel, Palmer vs. Darby*, 12 O. C. C., 235. In that case the court had before it

the question of the tenure of an appointee to a vacancy in a village council. The court held in the second branch of the syllabus, as follows:

“The provisions of Section 1724 must apply in determining whether the appointment shall be till the next annual municipal election or for the unexpired term, and, under that section an appointment of a councilman by the mayor, made with the consent of the council *must be for the unexpired term* of the person, who, after being elected and qualified, ceases to be a councilman before the expiration of the term for which he was elected.” (Italics, the writer’s.)

Section 1724, of the Revised Statutes, referred to in the foregoing syllabus contained the following language which is pertinent to the present question:

“* * * The mayor by and with the consent of the council shall have power to fill vacancies on the board from the electors of the corporation *to serve for the unexpired term.*” (Italics the writer’s.)

The case of *State ex rel. Palmer vs. Darby, supra*, was affirmed without opinion in 52 Ohio State, 611, and in so far as any later decisions are concerned stands as the law at the present day.

The question of the tenure of an appointee to a vacancy in an elective office has been the subject of numerous opinions rendered by this office. In Opinions of the Attorney General for 1930, page 904, the length of the term of an appointee to a vacancy in the office of county surveyor was under consideration. The filling of this vacancy was effected in accordance with Section 2785, General Code, which statute makes no provision for the tenure of office of the appointee. Consequently, it was necessary to refer to the general law on the subject, as contained in Section 10, General Code, which section reads as follows:

“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 shall have occurred. This section shall not be construed to postpone the time for such election beyond that at which it would have been held had no such vacancy occurred, nor to affect the official

term, or the time for the commencement thereof, of any person elected to such office before the occurrence of such vacancy.”

In the 1930 Opinions of the Attorney General, page 880, my predecessor had before him the question as to when the successor to an appointee in the office of county auditor and commissioner are elected. This opinion held at page 881 :

“It will be noted from the provisions of Section 2562, *supra*, that when a vacancy occurs in the office of county auditor it shall be filled by appointment thereto of a suitable person, such appointment to be made by the county commissioners. The said statute makes no provision with respect to the length of time such appointee shall serve, nor does any other statute or provision of law specifically applying to appointment made to fill vacancies in the office of county auditor, so provide. The tenure of office of such appointee is thus controlled by Section 10, *supra*, which provides that such appointee shall serve until his successor is elected and qualified. His successor, however, shall be elected for the unexpired term of the person whose resignation created the vacancy, at the first general election for county auditor which occurs more than thirty days after the vacancy shall have occurred.”

Again, the question of how long an appointee to a vacancy in the office of clerk of the common pleas court is to serve was treated in the 1930 Opinions of the Attorney General, page 630. This opinion held, in substance, that since Section 2870, General Code, which provides for the filling of a vacancy in the office of the clerk of the court of common pleas makes no provision for the tenure of office of the appointee, the general law as contained in Section 10, *supra*, is applicable, which tenure as hereinbefore indicated, extends until the first general election for the office in which the vacancy occurred.

At the risk of repetition it is noted that in the foregoing opinions the statute for filling the vacancies in question made no specific provision for the tenure of the appointee. Hence, it was necessary to refer to the general law, which, as indicated hereinbefore, required that the successor to the appointee be elected at the first general election for the office which is vacant.

In the present instance, Section 4252, *supra*, does specifically provide for the tenure of an appointee in the unequivocal language, “and such appointment shall continue for the unexpired term.” Consequently, it is unnecessary in the present case to refer to the general law in order

to determine how long the appointee in the office of city auditor will serve. The tenure of the appointee is found in the vacancy statute itself.

It is therefore my opinion that the incumbent appointee to the office of city auditor will serve for the unexpired portion of the four year term, and his successor will not be elected until the regular municipal election to be held in November, 1939.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

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DISAPPROVAL—ARTICLES OF INCORPORATION OF THE
C. M. A. BENEFIT CLUB.

COLUMBUS, OHIO, May 10, 1937.

HON. WILLIAM J. KENNEDY, *Secretary of State, Columbus, Ohio.*

DEAR SIR: You have submitted for my approval articles of incorporation of The C. M. A. Benefit Club, together with a copy of the constitution and by-laws of the organization.

There is nothing in the articles of incorporation nor in the by-laws of the above club which would exempt it from complying with the insurance laws of this state. No provision is made for the payment of a specific amount as death benefit and consequently the organization does not fall within one of the exceptions enumerated in Section 9491, General Code.

I am therefore returning the articles of incorporation without my approval.

Respectfully,

HERBERT S. DUFFY,
Attorney General.