

3601.

TOWNSHIP CLERK—TOWNSHIP TRUSTEES APPOINT WHERE VACANCY OCCURS—TEMPORARY INCAPACITY DOES NOT CREATE VACANCY—TOWNSHIP CLERK MAY NOT APPOINT DEPUTY—MAY NOT BE A TEMPORARY APPOINTMENT TO SUCH OFFICE.

*SYLLABUS:*

1. *When a vacancy occurs in the office of township clerk, the township trustees are required to appoint a qualified elector to fill such vacancy under the terms of section 3261, General Code.*

2. *Temporary 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.*

3. *A township clerk may not appoint a deputy.*

4. *There is no provision in the statutes permitting the temporary appointment of a person to transact the duties of a township clerk, while said clerk is absent from his office, due to physical or mental incapacity.*

COLUMBUS, OHIO, September 25, 1931.

HON. HOWARD M. NAZOR, *Prosecuting Attorney, Jefferson, Ohio.*

DEAR SIR:—Your recent communication reads as follows:

“I would appreciate your advice as to the way in which a vacancy in the office of Township Clerk is filled. Also, if the clerk becomes so incapacitated that he cannot perform his duties how could an appointment of another be made to take his place.”

With respect to your first question, your attention is invited to section 3261, General Code, which provides as follows:

“If by reason of non-acceptance, death, or removal of a person chosen to an office in any township, except trustees, at the regular election, or upon the removal of the assessor from the precinct or township for which he was elected, or there is a vacancy from any other cause, the trustees shall appoint a person having the qualifications of an elector to fill such vacancy for the unexpired term.”

From the provisions of the above statute, you will note that when a vacancy occurs in a township office except the office of township trustee, the township trustees shall appoint an elector to fill such vacancy for the unexpired term. Therefore, in specific answer to your first question, I am of the opinion that the township trustees are required to appoint a qualified elector to fill a vacancy in the office of township clerk.

Coming now to your second question, I presume that you desire to know what arrangement can be made to have the clerk's duties performed by another person if the clerk becomes so physically or mentally disabled that he cannot personally transact the duties of his office.

First of all, the question arises as to whether or not physical or mental disability of a township clerk would create a vacancy in the office, by coming within the meaning of the phrase "from any other cause", as used in section 3261, supra. If it does, the township trustees could appoint a person to fill the vacancy under the terms of said statute. Difficulty is encountered in determining just what causes the legislature meant to cover by the use of such phrase. It is believed that temporary physical or mental disability of an officer was not meant to be included as a cause for vacancy. In other words, an absence from an office for a reasonable time, due to physical or mental disability, would not create a vacancy. A reference to at least two other statutes of the General Code infers this conclusion. For instance, section 2912 provides that when there is a vacancy in the office of prosecuting attorney, the common pleas court shall appoint a successor. It also provides that in case of sickness or other disability preventing the prosecuting attorney from discharging his duties, the court shall appoint an assistant prosecuting attorney to perform the duties until the disability is removed. Hence, the legislature specifically recognized that temporary illness or other disability does not vacate an office. Likewise, section 2828, General Code, provides in the first sentence that when the office of sheriff becomes vacant the county commissioners shall appoint a successor. The said statute then states that when the sheriff by reason of absence, sickness or other disability, is incapable of serving any process, a suitable person may be appointed to perform the sheriff's duties during the continuance of such disability. Furthermore, it is a general rule of law that the temporary physical or mental disability of the incumbent of an office does not create a vacancy in the office. See 46 Corpus Juris, 973, citing *State v. Pidgeon*, 8 Blackf. (Ind.) 132; *Hutch's case*, 4 Pa. Dist., 233; *Swanck's case*, 16 Pa. C. O. 318.

In an opinion, reported in Opinions of the Attorney General for 1929, volume I, page 269, it was held in the syllabus as follows:

"1. Where a county treasurer is physically absent from his office for a period of seven months on account of illness, such situation does not create a vacancy which the county commissioners are authorized to fill under the provisions of Section 2636 of the General Code if the duties of the office are being properly performed under his supervision.

2. Such a state of facts does not afford grounds for removal under the provisions of Section 10-1 of the General Code."

As is disclosed by the syllabus, I held that an absence of a county treasurer for seven months from his office, due to illness, did not create a vacancy. Of course, the county treasurer had statutory authority to appoint deputies who could transact the duties of the office in his absence. In the present case, however, there is no statutory authority for a township clerk to appoint a deputy. This office has twice so held. See Opinions of the Attorney General for 1883 to 1888, page 779; Annual Report of the Attorney General for 1912, volume II, page 1108. Nor is there any provision in the statutes for temporary appointment till the disability is removed as is the case in sections 2828 and 2912, supra. Thus, it would appear that a township clerk's absence for seven months, due to illness, would create a vacancy, as the duties of his office would be neglected for more than a reasonable time.

Of course, it is a question of fact as to what constitutes a reasonable time in any given case. The township trustees must judge whether the disability is of a temporary or permanent nature, from the facts in each case.

Inasmuch as there are no facts in your communication disclosing the nature of the incapacity in the present case, or how long it has existed, or is likely to exist, it is impossible to give you a more specific answer.

Respectfully,

GILBERT BETTMAN,

*Attorney General*

3602.

CANDIDATE—SHERIFF—CONSTITUTIONAL PROVISION, NO ONE SHALL HOLD SUCH OFFICE MORE THAN FOUR YEARS IN A SIX YEAR PERIOD, APPLICABLE.

*SYLLABUS:*

*Eligibility of candidate for county sheriff discussed.*

COLUMBUS, OHIO, September 25, 1931.

HON. ORVILLE WEAR, *Prosecuting Attorney, Springfield, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion which reads:

"In this County we have a man, who was a former Sheriff, and who went out of office on January 5th, 1931.

He was originally appointed to the office of Sheriff by the Clark County Commissioners, on December 12th, 1927, and served through until 1929, and was then re-elected for another term, finishing said term as above stated on January 5th, 1931.

He is desirous of running again in 1932 and if elected would assume office in January of 1933. In view of Section 3 of Article 10 of the Constitution, I am desirous of knowing whether or not he would qualify to run and, if elected, to hold office."

Article 10, Section 3, Ohio Constitution reads as follows:

"No person shall be eligible to the office of sheriff, or county treasurer, for more than four years, in any period of six years."

In an opinion found in the Opinions of the Attorney General for 1928, page 947, the then Attorney General in reviewing a question similar to yours, held as disclosed by the syllabus:

1. By the provisions of Article X, Section 3, of the Constitution of Ohio no person is eligible to the office of sheriff for more than four years in any period of six years.

2. When a person is elected to an office he is elected for the lawful term of that office and the question of his eligibility must be whether he is qualified to hold that office for the whole of that term, the law not contemplating an election to a part of a term.

3. By the provisions of Article X, Section 3 of the Constitution of Ohio, a person who has served as sheriff for three years and three