

Note from the Attorney General's Office:

1984 Op. Att'y Gen. No. 84-063 was followed by
2021 Op. Att'y Gen. No. 2021-011.

OPINION NO. 84-063

Syllabus:

When a vacancy in any of the offices named in R.C. 305.02(A) occurs because of the death, resignation, or inability to take the office of an officer-elect whose term has not yet begun, the person appointed to take such office by the central committee of the political party with which such officer-elect was affiliated shall hold office until a successor is elected and qualified, and a successor shall be elected at the next general election for state and county officers.

To: Peter R. Seibel, Defiance County Prosecuting Attorney, Defiance, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, October 18, 1984

I have before me your letter requesting a formal legal opinion concerning the application of R.C. 305.02 to a particular set of facts. R.C. 305.02 states, in relevant part:

(A) If a vacancy in the office of county commissioner, prosecuting attorney, county auditor, county treasurer, clerk of the court of common pleas, sheriff, county recorder, county engineer, or coroner occurs more than forty days before the next general election for state and county officers, a successor shall be elected at such election for the unexpired term unless such term expires within one year immediately following the date of such general election.

In either event, the vacancy shall be filled as provided in this section and the appointee shall hold his office until a successor is elected and qualified.

(B) If a vacancy occurs from any cause in any of the offices named in division (A) of this section, the county central committee of the political party with which the last occupant of the office was affiliated shall appoint a person to hold the office and to perform the duties thereof until a successor is elected and has qualified, except that if such vacancy occurs because of the death, resignation, or inability to take the office of an officer-elect whose term has not yet begun, an appointment to take such office at the beginning of the term shall be made by the central committee of the political party with which such officer-elect was affiliated. (Emphasis added.)

In the situation which you have outlined, a county officer-elect, prior to taking office, resigned the office to which she had been elected, and subsequently died before the term began. Upon the resignation of the officer-elect, the county central committee of the political party with which the officer-elect was

affiliated, acting pursuant to R.C. 305.02(B), appointed an individual to take the office at the beginning of the term. Your question is whether the appointee holds the office for the entire term, or whether an election for the office should be held at the next general election for county officers, which will be some two years prior to the end of the term. See, e.g., Ohio Const. art. XVII, §1 ("[e]lections for state and county officers shall be held on the first Tuesday after the first Monday in November in even numbered years. . ."); R.C. 319.01 (county auditor is chosen quadrennially); R.C. 3501.01(A) (defining "general election"); R.C. 3501.02(C) (elective county officers are elected at general elections in the even-numbered years); State ex rel. Harsha v. Troxel, 125 Ohio St. 235, 181 N.E. 16 (1932) (holding that, where a county auditor elected in 1930 resigned during the first year of his four-year term and an appointment was made to fill the vacancy, the successor to the appointee must be elected at the next general election for county officers—that is, the election held in 1932).

Your question focuses on the exception set forth in R.C. 305.02—that in the case of a vacancy occurring because of the death, resignation, or inability to take office of an officer-elect, an appointment to take the office at the beginning of the term shall be made by the central committee—and in particular upon the fact that this exception does not include the language "and to perform the duties thereof until a successor is elected and has qualified." You have stated your concern as follows:

It would appear as though the legislature has indicated that if a vacancy occurs once an elected official has taken office then an appointment shall be made until the next general election. (Unless the vacancy occurs less than 40 days before the next general election.) However, if the officer-elect has not yet taken office, it would appear the legislature has intended that the central committee shall appoint a person to take office at the beginning of the term and serve the full term, since the legislature has not indicated the need for the subsequent election of a successor at the next general election.

It does not seem logical to make the apparent differentiation between an officer-elect not taking office and an officer-elect actually taking office. The legislative intent would seem to be that the voters should have an option at the next general election to rechoose and that the appointment by the county central committee would be only temporary pending the [voters'] ability to rechoose. However, this is not what the statute says and despite the apparent inconsistency it would appear as though our legislature (who are our elected representatives) has indicated that a new election is required only when the officer dies having once taken office.

I appreciate your concern that the language of R.C. 305.02 is susceptible to more than one possible interpretation. I believe, however, that when R.C. 305.02(B) is read together with R.C. 305.02(A), and in the context of other related provisions, the meaning of its language becomes clear. See generally State ex rel. Pratt v. Weygandt, 164 Ohio St. 463, 132 N.E.2d 191 (1956) (syllabus, paragraph 2) ("[s]tatutes relating to the same matter or subject, although passed at different times and making no reference to each other, are in pari materia and should be read together to ascertain and effectuate if possible the legislative intent").

R.C. 305.02(A) provides that, if a vacancy occurs in one of the specified county offices more than forty days before the next general election for state and county officers, a successor for the unexpired term shall be elected at that election, unless the unexpired term expires within one year of the election. It goes on to state generally, however, that, "[i]n either event [that is, regardless of whether a successor is to be elected for the unexpired term], the vacancy shall be filled as provided in this section and the appointee shall hold his office until a successor is elected and qualified." R.C. 305.02(B) sets forth the manner in which appointments are to be made to fill such vacancies. The first part of this division states that a vacancy is to be filled by the county central committee of the

political party with which the last occupant of the office was affiliated, and that the appointee shall perform the duties of the office until a successor is elected and has qualified. The exception relates to the appointment of an individual to begin the term of an officer-elect who has died, has resigned, or is unable to take office. It does not specify how long that person is to hold office and, if that exception is read by itself, it may lead to the apparently illogical result that you have pointed out. I believe, however, that when R.C. 305.02(A) and (B) are read together, it must be concluded that the exception of R.C. 305.02(B) is qualified by the language of R.C. 305.02(A) which states that a vacancy is to be filled as provided in R.C. 305.02, the appointee is to hold his office until a successor is elected and qualified, and a successor shall be elected at the next general election for state and county officers. See generally State ex rel. Pratt v. Weygandt. In 1969 Op. Att'y Gen. No. 69-052, at 2-113, one of my predecessors reached the same conclusion: "This last quotation [exception of R.C. 305.02(B)] makes no mention of the time to be served by the appointee, but Subsection (A) is in pari materia with Subsection (B) and must be considered applicable."

This conclusion is consistent with the general constitutional and statutory scheme governing vacancies in office. Ohio Const. art. II, §27 provides generally that "[t]he 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. . . ." Accord Ohio Const. art. XVII, §2 ("[a]ll vacancies in other [than state] elective offices shall be filled for the unexpired term in such manner as may be prescribed by this constitution or by law"). R.C. 3.02 states in part:

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. (Emphasis added.)

This language is, by its terms, applicable to elected county officers, and, when read in pari materia with R.C. 305.02, supports the conclusion that, when an elected candidate for some reason does not take office, the office shall be filled by appointment and a successor shall be elected at the first general election for the office which is vacant that occurs more than forty days after the vacancy has occurred, unless the unexpired term ends within a year of the election. The next general election for a county office is the next election held in November of an even-numbered year. Ohio Const. art. XVII, §1; R.C. 3501.01(A); R.C. 3501.02(C); State ex rel. Harsha v. Troxel.

Similar language providing, in general, for filling a vacancy by appointment and electing a successor at the next general election appears in Ohio Const. art. III, §18 (certain elective state offices); art. IV, §13 (judges); and art. XVII, §2 (certain elective state offices). See also R.C. 503.24 (township offices); R.C. 733.25 (mayor of a village); R.C. 3313.11 (providing for special elections to fill vacancies in boards of education); 1927 Op. Att'y Gen. No. 946, vol. III, p. 1651. But see R.C. 733.31 (certain elective offices of villages shall be filled by appointment by the mayor for the remainder of the unexpired term). The philosophy behind such language was aptly expressed by the Ohio Supreme Court in State ex rel. Harsha v. Troxel, 125 Ohio St. at 238, 181 N.E. at 17: "[i]t is the policy of the law that the people shall be served by the servants of their own selection, and the laws relative to filling vacancies in elective offices will be construed so as to give the people the opportunity to choose at the earliest possible time the successor to an official they have previously chosen." (Emphasis added.) Thus, I find that the interpretation

which you present as the more logical one is also supported by relevant statutory language and policy considerations.

In conclusion, it is my opinion, and you are hereby advised, that when a vacancy in any of the offices named in R.C. 305.02(A) occurs because of the death, resignation, or inability to take the office of an officer-elect whose term has not yet begun, the person appointed to take such office by the central committee of the political party with which such officer-elect was affiliated shall hold office until a successor is elected and qualified, and a successor shall be elected at the next general election for state and county officers.