

1429.

OFFICES INCOMPATIBLE—MEMBER OF VILLAGE COUNCIL AND ASSISTANT IN COUNTY SURVEYOR'S OFFICE—EFFECT OF NEWLY ELECTED WARD COUNCILMAN REFUSING TO QUALIFY FOR OFFICE.

*SYLLABUS:*

1. *Under the provisions of Section 4218, General Code, a person holding the position of assistant in the county surveyor's office is ineligible to membership in a village council.*

2. *When a deputy county surveyor is elected ward councilman and does not desire to relinquish his employment as deputy county surveyor in order to qualify as a member of council, the present member of council from the ward in which such duly elected councilman resides continues in office until his successor is elected and qualified.*

COLUMBUS, OHIO, December 23, 1927.

HON. W. M. MCKENZIE, *Prosecuting Attorney, Chillicothe, Ohio.*

DEAR SIR:—Receipt is acknowledged of your communication of recent date requesting my opinion, as follows:

"We have the following situation existing in the City of Chillicothe, Ohio: The deputy county surveyor was a candidate and was elected, in November of this year, as a member of city council. Can he serve as deputy county surveyor and qualify and serve as a member of the city council? In other words, can he hold both offices at the same time? If he can not hold both offices and desired to retain his position as deputy county surveyor, which is an appointive office, would the ward councilman in the same ward in which the deputy surveyor was elected hold over until another election or would the city council have the authority to appoint a new member of council?"

I would be very glad to hear from you as soon as possible for the reason that the newly elected members of the city council must qualify within the next week."

You first inquire as to whether or not a deputy county surveyor may qualify and serve as a member of the city council.

This question was answered in the negative in an opinion addressed to Hon. F. E. Slabaugh, Prosecuting Attorney, Newark, Ohio, under date of December 17, 1927. I refer to Opinion No. 1396, a copy of which is herewith enclosed.

Assuming that the deputy county surveyor does not desire to relinquish his present position in order to qualify for the office of councilman, you inquire whether the present ward councilman of the ward in which the deputy county surveyor was elected will continue to serve until the next election, or whether or not council has authority to appoint a new member in his stead.

Section 4208, General Code, provides:

"One member of the council from each ward and such number of members thereof at large as is provided by law shall be chosen in each odd numbered year. Members of council shall serve for a term of two years commencing on the first day of January next after their election, and until their successors are elected and qualified."

It will be observed from a reading of the foregoing statute that councilmen are elected in each of the odd numbered years for a term of two years and are to serve until their successors be elected and qualified.

Section 8, General Code, provides as follows :

“A person holding an office or public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws.”

The provisions of Section 4208, *supra*, are similar to the provisions of Section 8, *supra*, in that both sections provide that the tenure in office shall continue until a successor be elected and qualified.

It was held in the case of *State vs. Anderson*, 45 O. S. 196, that the president of a city council holds an “office” within the meaning of Section 8 of the General Code; and in *State vs. Kearns*, 47 O. S. 566, that a member of a city council is the occupant of an “office” within the meaning of said Section 8 of the General Code.

Section 4242, General Code, makes provision for the manner in which the office of councilman may be declared vacant by council, as follows :

“The council may declare vacant the office of any person elected or appointed to an office who fails to take the required official oath or to give any bond required of him within ten days after he has been notified of his appointment or election, or obligation to give a new or additional bond, as the case may be.”

It will be noted that under the provisions of the statute above quoted a city council may in three cases declare vacant the office of any person elected or appointed thereto. These are :

- (1) Where the person elected or appointed fails to take the required official oath ; or
- (2) Furnish bond within ten days after such person has been notified of his election or appointment ; or
- (3) In case such person so elected or appointed refuses to give a new or additional bond, as the case may be.

The above section was originally enacted as a part of the Municipal Code of 1878, 75 O. L., p. 161, at p. 211. In that act provision was made for organization of hamlets, villages and cities of various classifications. It provided that the corporate authority of hamlets should be vested in trustees who should be elected for three years “and until their successors are elected and qualified.” Said act fixed the term of office of the legislative authorities of cities at a definite term of years and did not provide that they should serve “until their successors are elected and qualified.” Other municipal officers were provided for in said act wherein the term of office was fixed for a definite term of years, without the provision that such officers should hold office until their successors were elected and qualified.

The Supreme Court of Ohio in the case of *State, ex rel. vs. Wright*, 56 O. S., p. 540, at p. 553, said, with reference to the term of office of a mayor :

“ \* \* \* his lawful term, expressly fixed by statute, is not only for two years, but also until his successor shall be qualified. His right to serve after the expiration of the designated period, until the qualification of his successor,

being conferred by statute at the time of his election, is no less a part of his statutory term of office, than is the fixed period itself; and while he is so serving, there can be no vacancy in the office, in any proper sense of the term, for there is an actual incumbent of the office legally entitled to hold the same.

\* \* \* The rule applicable to cases like the one before us is, therefore, that where an officer elected by the people is authorized to hold the office for a fixed period and until his successor is qualified, a failure to elect a successor does not create a vacancy to be filled by appointment under a general authority to fill vacancies. If the council had made no appointment, the right of the defendant to continue in the occupancy of the office until a successor should be elected and qualified, would be indisputable; it could not plausibly be claimed that a vacancy existed; and if not, it must follow that none was produced by the expiration of the designated term, or the failure to elect a successor. And it is not apparent how any action of the council in making an appointment to the office, can operate to create a vacancy to be so filled, where none otherwise existed, unless that power be expressly conferred by statute."

The latter statement gives rise to the inquiry as to whether or not Section 4242 of the General Code amounts to a power "expressly conferred by statute." Said section was in full force and effect at the time of the decision of the Supreme Court in the above case, and if such construction could be placed upon that section it would be contrary to the decision of the court in said cause.

Provision is made for the filling of a vacancy in the office of councilman by Section 4236 of the General Code, as follows:

"When the office of councilman becomes vacant, the vacancy shall be filled by election by council for the unexpired term. If council fails within thirty days to fill such vacancy, the mayor shall fill it by appointment."

It is evident from the provisions of Section 4208, *supra*, that a member of council continues in office until his successor is elected and qualifies for such office, and that under the provisions of Section 4242, *supra*, council may not declare such office vacant except for the reasons therein specified.

I am not unmindful of the decision of the Supreme Court in the case of *State ex rel. vs. Larson*, 110 O. S. 413. In that case the Supreme Court had before it the question of the term of office of one of a group of officers, in which case no particular officer succeeds the other. As was said by the court in the opinion in that case:

"None of those elected could be designated as the successor of a particular former member. Consequently had Hutchinson lived he could not have been regarded as his own successor in the new term, and, therefore, Christiansen by reason of his selection for the unexpired term of Hutchinson could not hold over and become Hutchinson's successor in the new term."

In view of the foregoing, and answering your second question specifically, it is my opinion that where a deputy county surveyor is elected ward councilman and does not desire to relinquish his employment as deputy county surveyor in order to qualify as a member of council, the present member of council from the ward in which such duly elected councilman resides continues in office until his successor is elected and qualified.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*