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VACANCY — OFFICE, COUNTY AUDITOR, NOT VACANT THROUGH TEMPORARY ABSENCE OF INCUMBENT — ENGAGED IN ACTIVE DUTY — OFFICER, RESERVE CORPS, UNITED STATES ARMY.

SYLLABUS:

The office of county auditor does not become vacant by reason of the

temporary absence of the incumbent while on active duty as an officer in the reserve corps of the United States Army.

Columbus, Ohio, November 2, 1940.

Hon. Karl H. Weaner, Jr., Prosecuting Attorney,
Defiance, Ohio.

Dear Sir:

This will acknowledge your inquiry of recent date which reads as follows:

“The Auditor of Defiance County has a commission in the Reserve Army. If he is called to active duty training for a period of one year, would this affect his status as a county official.”

As viewed by me, your question resolves itself into an inquiry as to whether the one year's absence you mention creates a vacancy in the office of county auditor.

With the single exception which Section 2561, General Code, provides, that if an auditor elect fails to take the oath of office and file the requisite bond the office shall be considered vacant, there is no statutory law of this state which defines what may constitute a vacancy in the office of county auditor. Section 2562, General Code, provides that in case of a vacancy “from any cause” in the office of county auditor, the county commissioners shall, in the manner there detailed, appoint a person to fill the vacancy, but the section attempts no definition of what may be a vacancy in the office.

There being then no statutory guidance to determine when a vacancy exists in the office concerned, it is necessary to consider the question in terms of general legal principles concerning a vacancy in office.

In approaching the query here considered, it is first necessary to notice that the courts of this state have shown a reluctance to declare offices vacant when any other result might reasonably be reached. The rule is stated in 32 O. J. 1047 as follows:

The recognized policy of Ohio is to avoid, if practicable, the creation of a vacancy in an elective office.”

See also *State, ex rel. vs. McCracken*, 51 O. S. 123.

A definition, both positively and negatively stated, of what constitutes a vacancy in office is found in 32 O. J. 1044, as follows:

“An office is vacant in contemplation of law when there is no present incumbent provided by law; or, as is sometimes said, in contemplation of law there can be no vacancy in an office so long as there is a person in possession of the office who is legally qualified to perform the duty.”

I find the same rule stated in the case of *State, ex rel. vs. McCracken*, 51 O. S. 123, wherein at page 129, it is said:

“In contemplation of law there can be no vacancy in an office so long as there is a person in possession of the office legally qualified to perform the duties.”

In the case presented by you, there would at all times be a present incumbent provided by law, who, although temporarily absent, is in possession of the office and who is legally qualified to perform the duties of the office so that it would appear that the situation you present, tested by the rule provided by the Supreme Court of this state, does not result in a vacancy in office.

I find support for this conclusion in the case of *Moliter vs. The State*, 10 O. Dec. Rep. 324. In that case the court found that the temporary absence of a police judge did not create a vacancy in the office. The court, in the course of the opinion, at page 327 observed that the absent judge still held the office and might return at any time to resume its duties.

The same observation leads to the same answer in this matter. I find that the rule of the Ohio courts which, in my opinion, here precludes the existence of a vacancy is the general rule concerning vacancies in office. In 22 R. C. L. at page 437, the word “vacancy” as concerns a public office is defined as follows:

“The word ‘vacancy’ as applied to a public office has no technical meaning. Its ordinary and popular meaning is that the office is unoccupied and without an incumbent who has a lawful right to continue therein until the happening of some future event. * * * By a vacancy in an office is usually meant that the office is empty and that it is without an incumbent who has a right to exercise its functions and take its fees or emoluments.”

In 46 C. J. at page 971, it is said that an office is not vacant “so long as it is supplied with an incumbent who is legally qualified to exercise the powers and perform the duties which appertain to it.” In 22 R. C. L. at page 560, under the title “Abandonment of Office,” we find the following statements:

“In order to constitute an abandonment of office, it must be total, and under such circumstances as clearly to indicate an absolute relinquishment. * * * Temporary absence is not sufficient where no statute fixes the period beyond which the absence must not continue.”

In the same volume of the same text the following statement at page 529 indicates the same rule:

“The right of an officer to his fees, emoluments, or salary is not impaired by his occasional or protracted absence from his post,
* * *”

An indication of the propriety of the conclusion here reached is shown by the fact that in certain statutory offices of this state it is provided that an absence of more than a certain period of time shall be considered as a vacation of the office. For example, Section 2398, General Code, provides:

“The absence of a commissioner from the county for a period of six months, shall be deemed to be a resignation of the office.”

The absence of such a provision for the office considered and the presence of the one specific provision that there shall be a vacancy in that office upon failure to qualify creates the logical inference that the Legislature in so providing did not contemplate that a temporary absence would render the office vacant.

Another indication that a temporary absence does not vacate an office is shown by the fact that the statutes concerning certain offices provide that in the absence of the incumbent a deputy shall perform all and singular the duties of his principal. See Section 335, General Code. That fact again raises a strong inference that absence, in the contemplation of the Legislature, does not create a vacancy for if such situation did create a vacancy in office a deputy to the vacating incumbent would be without status, and, it follows, could not serve in the absence of his principal.

This discussion would not be complete without a consideration of whether or not the officer concerned occupies incompatible offices when also serving as a reserve officer on active federal duty and in the federal service. It has long been settled that a reserve officer of the United States Army, while on active duty, is an officer of the United States. See 1933 Opinions of the Attorney General, page 196.

It should first be noted that there is no general provision in the Consti-

tution of Ohio such as is found in the constitutions of many states prohibiting one who holds a state office from holding also a federal office. The only such inhibition in our Constitution is found in Article IV, Section 14, which prevents only judges of the Courts of Common Pleas and the Supreme Court from holding "any other office of profit or trust under the authority of this state or the United States."

The Supreme Court of Iowa in the case of Bryan vs. Cattel, 15 Ia. 538, had before it a problem similar to the one here presented. That court said as shown by the third and fourth branches of the syllabus of the opinion:

"3. The offices of district attorney and captain in the volunteer service of the United States are not in legal contemplation incompatible and an acceptance of captain in the military service would not * * * operate to vacate the office of district attorney of which the same person was the incumbent.

4. Incompatibility in offices exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one incumbent to retain both. It does not necessarily arise when the incumbent places himself for the time being in a position where it is impossible to discharge the duties of both offices."

Based upon all of the above considerations, I conclude and it is my opinion that the office of county auditor does not become vacant by reason of the temporary absence of the incumbent while on active duty as an officer in the reserve corps of the United States Army.

Respectfully,

THOMAS J. HERBERT,
Attorney General.