

2149.

APPROVAL—BONDS CITY OF TOLEDO, LUCAS COUNTY,
OHIO, \$2,000.00, PART OF ISSUE DATED MARCH 1, 1919.

COLUMBUS, Ohio, March 24, 1938.

*Retirement Board, State Public School Employes Retirement System,
Columbus, Ohio.*

GENTLEMEN:

RE: Bonds of City of Toledo,
Lucas County, Ohio, \$2,000.00.

The above purchase of bonds appears to be part of an issue of bonds of the above city dated March 1, 1919. The transcript relative to this issue was approved by this office in an opinion rendered to the State Employes Retirement Board under date of October 29, 1935, being Opinion No. 4841.

It is accordingly my opinion that these bonds constitute valid and legal obligations of said city.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

2150.

VACANCY — COUNTY COMMISSIONER — DECEASED — SUCCESSION MUST BE ELECTED AT NEXT ELECTION — FILLS VACANCY AND HOLDS OFFICE FOR UNEXPIRED TERM — SHOULD RECEIVE ANNUAL COMPENSATION PROVIDED FOR IN SECTION 3001 G. C.

SYLLABUS:

1. *When a vacancy occurs in the office of county commissioner who was elected at the November, 1936, election, a successor must be elected at the November, 1938, election to fill said vacancy, and the person so elected shall hold his office for the unexpired term.*
2. *The person elected to fill a vacancy in the office of county commissioner takes office as soon as he can qualify after his election.*
3. *A person who was appointed to fill a vacancy in the office of*

county commissioner in October, 1937, as well as the successful party at the 1938 election who will be elected to fill the unexpired term in the office of county commissioner, should receive the annual compensation provided for in Section 3001, General Code, as amended in 117 O. L. 147, effective August 5, 1937.

COLUMBUS, OHIO, March 24, 1938.

HON. PAUL A. BADEN, *Prosecuting Attorney, Hamilton, Ohio.*

DEAR SIR: This will acknowledge receipt of your letter of recent date which reads as follows:

"One R. L. was elected County Commissioner of Butler County, Ohio, at the regular election in November, 1936, and qualified and took office in January, 1937. He died in October, 1937, and W. B. was appointed to succeed him.

I would like to have your opinion in answer to the following questions:

1. Will it be necessary to have an election to fill the unexpired term of R. L. at the November, 1938, election or does W. B. hold office for the full unexpired term of R. L., that is, until January 1, 1941?

2. If it is your opinion that an election must be held to fill the unexpired term of R. L., does the winner at that election take office as quickly as he can qualify after the November election or does he take office on the first Monday in January, 1939?

3. Since R. L. was elected before the new salary law for the County Commissioners went into effect, he was, therefore, receiving the old salary; does W. B. receive the new or old salary and will the winner at the 1938 election receive the new or old salary?"

The answer to the first question set forth in your letter may be found by referring to the provisions of Sections 2396 and 2397 of the General Code relating to county commissioners. Section 2396, General Code, provides as follows:

"When a commissioner is elected to fill a vacancy occasioned by death, resignation, or removal, he shall hold his office for the unexpired time for which his predecessor was elected."

Section 2397, General Code, as amended in 117 O. L. 206, provides as follows:

"If a vacancy in the office of commissioner occurs more than thirty days before the next election for state and county officers, a successor shall be elected thereat. If a vacancy occurs more than thirty days before such election, or within that time, and the interest of the county requires that the vacancy be filled before the election, the remaining commissioners and the engineer of the county, or a majority of them, shall appoint a commissioner, who shall hold his office until his successor is elected and qualified."

The present incumbent holding the office of county commissioner was, no doubt, appointed pursuant to the provisions of Section 2397, supra, to fill the vacancy occasioned by the death of the person elected to the office of county commissioner at the November, 1936, election. Such appointee holds his office "until his successor is elected and qualified." Under the provisions of Section 2397, supra, it is further provided that if a vacancy occurs more than thirty days before the next election *for state and county officers*, a successor shall be elected thereat. The next election for state and county officers will be held in November, 1938, pursuant to the provisions of Article XVII, Section 1 of the Constitution of Ohio, which, in part, provides as follows:

"Elections for state and county officers shall be held on the first Tuesday after the first Monday in November in the even numbered years; * * *."

Similar questions have been considered by this office in former years and in Opinions of the Attorney General for 1927, Vol. I, page 53, the then Attorney General held as disclosed by the syllabus as follows:

"Under the provisions of Sections 2396 and 2397 of the General Code, where a vacancy occurs in the office of the county commissioner, who was elected in November, 1926, and said vacancy is filled by appointment, the appointee will hold his office as county commissioner until his successor is elected and qualified at the November election of 1928, and the person so elected at that time will hold his office for the unexpired term for which his predecessor was elected."

To the same effect was a holding in Opinions of the Attorney General for 1928, Vol. III, page 1651, wherein it was held as set forth in the syllabus:

"1. Under Section 2397, General Code, when a vacancy occurs in the office of county commissioner more than thirty days before the next election for state and county officers, a successor must be elected at said election to serve for the unexpired term of the commissioner who was elected to the office.

2. Where a county commissioner is appointed to fill a vacancy by the probate judge, auditor and recorder of the county as provided in Section 2397, General Code, such appointee may only serve until his successor is elected and qualified and the fact that the commission of the Governor states that the appointment is for the unexpired term does not effect a change in the law."

In view of the foregoing, it is my opinion that a successor must be elected at the November, 1938, election to fill the vacancy which occurred by reason of the death of the person who was elected at the November, 1936, election, and the person so elected shall hold his office for the unexpired term.

Section 2399, General Code, provides in part as follows:

"Before entering upon the discharge of his duties each commissioner shall give bond * * * conditioned for the faithful discharge of his official duties, and for the payment of any loss or damage that the county may sustain by reason of his failure therein. * * *."

When a successor is elected to fill a vacancy in the office of county commissioner, he is required to qualify as provided in the above section. As soon as this is done, he is in position to assume the office. There is no definite time fixed by statute when a successor who is elected to fill a vacancy shall assume office. The present incumbent holds office only until his successor is elected and qualified.

It is therefore my opinion that the person elected to fill a vacancy in the office of county commissioner takes office as soon as he can qualify after his election.

Your third question necessitates a consideration of Article II, Section 20 of the Constitution of Ohio, which provides as follows:

"The General Assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; *but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.*"
(Italics the writer's).

Section 3001, General Code, which fixes the annual compensation of county commissioners, was amended in 117 O. L. 147, and became effective August 5, 1937. The question presents itself whether the present incumbent who was appointed to fill a vacancy in October, 1937, and the person who will be successful at the November, 1938, election to fill the unexpired term in the office of county commissioner are to receive the compensation provided for in Section 3001, General Code, which became effective August 5, 1937. A reading of the provisions of the Constitution quoted above indicates that a change in salary shall not affect the salary of any officer *during his existing term.*

My predecessors in office and the courts of Ohio have held that the above mentioned inhibition is personal and when an appointee fills a vacancy in office, his salary is governed by the law in force at the time of his appointment and qualification rather than by the law in force at the time the person whose term he was appointed or elected to fill took office. Thus, in Opinions of the Attorney General for 1931, Vol. II, page 1050, the then Attorney General held as disclosed by the syllabus as follows:

“Where a county treasurer and probate judge were appointed to fill vacancies in such offices some time previous to August 22, 1930, and were elected to fill the remainder of the unexpired term at the general election in November, 1930, their salaries from the time of their qualification after said election should be based on the 1930 census figures.”

The Court of Appeals for Muskingum County in *State, ex rel. vs. Tanner*, 27 O. C. A. 385, considered a similar question and held as follows:

“The salary of an appointee to a vacancy in a public office is controlled by the law in effect at the time his appointment was made, and not by the law in effect at the time his predecessor was elected for the term which he is to complete.”

See also *Zangerle vs. State, ex rel.* 105 O. S. 650; Opinions of the Attorney General for 1928, Vol. I, page 256, and Opinions of the Attorney General for 1930, Vol. II, page 1075.

In view of the above, it is my opinion that the present incumbent who was appointed to fill a vacancy in the office of county commissioner, as well as the successful party in the 1938 election who will be elected to fill the unexpired term in the office of county commissioner, should

receive the annual compensation provided for in Section 3001, General Code, as amended in 117 O. L. 147.

Respectfully,

HERBERT S. DUFFY,

Attorney General.

2151.

APPROVAL—BONDS, CITY OF CLEVELAND, CUYAHOGA COUNTY, OHIO, \$5,000.00, PART OF ISSUE DATED JULY 1, 1930.

COLUMBUS, OHIO, March 25, 1938.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.
GENTLEMEN:

RE: Bonds of City of Cleveland, Cuyahoga County,
Ohio, \$5,000.00.

The above purchase of bonds appears to be part of an issue of bonds of the above city dated July 1, 1930. The transcript relative to this issue was approved by this office in an opinion rendered to the Industrial Commission under date of September 17, 1937, being Opinion No. 1172.

It is accordingly my opinion that these bonds constitute valid and legal obligations of said city.

Respectfully,

HERBERT S. DUFFY,

Attorney General.