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1. VACANCY—OFFICE, REPRESENTATIVE, GENERAL ASSEMBLY—CERTIFICATE OF ELECTION ISSUED TO PERSON ELECTED TO FILL VACANCY—PRIMA FACIE EVIDENCE, RIGHT TO MEMBERSHIP—HOUSE OF REPRESENTATIVES SHALL BE JUDGE OF HIS ELECTION—SECTIONS 3505.38, 3521.03 RC—ARTICLE II, SECTION 11, CONSTITUTION OF OHIO.
2. PERSON CERTIFIED—ENTITLED TO SALARY PAYMENTS FROM TIME HE QUALIFIES FOR OFFICE—SALARY PAYMENTS—COMPUTED PURSUANT TO SECTION 101.27 RC—SALARY SAME AS SALARY PAID TO OTHER MEMBERS OF HOUSE OF REPRESENTATIVES DURING TIME OF MEMBERSHIP—SECTIONS 3.22, 101.23 RC.
3. STATUS, RIGHTS OF PERSONS ELECTED TO FILL VACANCY IN OFFICE, REPRESENTATIVE TO GENERAL ASSEMBLY.

SYLLABUS:

1. The certificate of election issued pursuant to the provisions of Section 3505.38, Revised Code, to a person elected to fill a vacancy in the office of Representative to the General Assembly pursuant to the provisions of Article II, Section 11 of the Ohio

Constitution and Section 3521.03, Revised Code, shall be prima facie evidence of the right to membership of the person therein certified. In the event of a contest as to such person's right to membership, the House of Representatives shall be judge of his election.

The person so certified is entitled to salary payments from the time he qualifies for office pursuant to the provisions of Sections 3.22 and 101.23, Revised Code. Such salary payments shall be computed pursuant to the provisions of Section 101.27, Revised Code, and shall be the same as the salary paid to other members of the House of Representatives during the time that such person shall be a member.

2. Other rights of persons elected to fill a vacancy in the office of Representative to the General Assembly discussed.

Columbus, Ohio, November 29, 1954

Hon. Carl Guess, Clerk, Ohio House of Representatives
Columbus, Ohio

Dear Sir:

I have your request for my opinion which reads as follows:

"Due to death and resignations of several members of the Ohio House of Representatives, 100th General Assembly of Ohio, the election on November 2nd of persons to fill these unexpired terms will create certain administrative problems, as follows:

"(1) Since Section 101.27, R.C., provides for the payment of salaries to members, upon what basis can salary payment be made, and on what date should payment commence, for the unexpired terms of these new members-elect;

"(2) In the case of Honorable Earl C. Mikesell, deceased, of Preble County, his widow has been receiving, monthly, the unpaid balance of his salary. What is the status of the balance of salary due Mrs. Mikesell, as well as the member-elect from Preble County, for the unexpired term;

"(3) Certain resolutions were adopted by the House of Representatives during the regular session, namely, H. R. No. 7, relative to mileage of members, H. R. No. 11 relative to the purchase of Codes, and H. R. No. 13 relative to stationery and supplies. Should these new members-elect for the unexpired terms receive the benefits of these resolutions.

"I should like to request an opinion from you relative to my duties with respect to the above problems."

The election to fill certain unexpired terms to which you have referred in your inquiry arose from the following circumstances:

Article II, Section 11 of the Ohio Constitution provides as follows:

“All vacancies which may happen in either house shall, for the unexpired term, be filled by election, as shall be directed by law.”

Section 3521.03, Revised Code, provides as follows:

“When a vacancy in the office of representative to congress or senator or representative to the general assembly occurs, the governor, upon satisfactory information thereof, shall issue a writ of election directing that a special election to be held to fill such vacancy in the territory entitled to fill it on a day specified in the writ. Such writ shall be directed to the board of elections within such territory which shall give notice of the time and places of holding such election as provided in section 3501.03 of the Revised Code. Such election shall be held and conducted and returns thereof made as in case of a regular state election.”

Section 3513.32, Revised Code, provides in part as follows:

“When a special election is found necessary to fill a vacancy, the date of the primary election shall be fixed at the same time and in the same manner as that of the election, by the authority calling such special election. The primary election shall be held at least fifteen days prior to the time fixed for such special election. Declaration of candidacy and certificates for such primary shall be filed and fees shall be paid at least ten days before the date for holding such primary election. * * *”

Acting pursuant to these constitutional and statutory provisions, the Governor of Ohio, on December 9, 1953 issued writs of election designating that special elections be held to fill vacancies in the offices of senator and representative to the General Assembly. These elections were set for the regular election day, Tuesday, November 2, 1954, and the primaries therefor were set on Tuesday, May 4, 1954.

Turning now to the general provisions of the election code, we note in Section 3505.33, Revised Code, the requirement that the board of elections in each county shall “determine and declare the results of the elections determined by the electors of such county” and that such board shall “promptly certify abstracts of the results of such elections within its county,” including the report of votes cast for the office of member of the General Assembly. This section also provides that the board’s declaration “shall be in writing” and shall “bear the date of the day upon which it is made.”

In Section 3505.38, Revised Code, it is provided that :

“Election officials who are required to declare the results of a special or general election in which persons were elected to offices shall, unless otherwise provided by law, issue to the persons declared elected by them appropriate certificates of election in such form as is prescribed by the secretary of state.”

In Section 3.22, Revised Code, it is provided that each person chosen or appointed to an office under the constitution or laws of this state, “shall take an oath of office before entering upon the discharge of his duties.” From this it would seem that the term of office of the members-elect in the instant case would not begin until such oath of office has been administered. This view is supported by the provisions of Section 3.02, Revised Code, relating to the method of filling vacancies in elective offices. This section provides that where an office is temporarily filled by appointment, such appointee shall hold office “until his successor *is elected and qualified.*” It can scarcely be doubted that this language has reference to qualification by taking the oath of office and by executing a bond in such cases as bonds are required by law of particular public officers. None is provided in the case of members of the Ohio House of Representatives and I must conclude, therefore, that the members-elect chosen in the November 2, 1954, election will have “qualified” for the office to which they have been elected immediately upon taking the oath of office to which reference is made above.

In passing, your attention is invited to the provisions in Section 101.23, Revised Code, to the effect that such oath of office may be administered by any member or any person authorized to administer an oath.

Another point of incidental interest is the provision found in Section 101.22, Revised Code, that “For the purpose of organizing the senate and house of representatives * * * a certificate of election from the board of election of the proper county shall be prima facie evidence of the right of membership * * *.” Although this language is not strictly applicable in the instant case, it would seem by analogy that the certificates of election of the members-elect for the short term consisting of the remainder of the present biennium must likewise be regarded as prima facie evidence of right to membership on the part of such members-elect. It will be observed, however, that in the event of a contest as to the results of such election, each house of the General Assembly under the provisions of

Section 6, Article II, Ohio Constitution, is the judge of such election and the returns thereof. It has been held that this provision is exclusive and that the courts have no jurisdiction to determine contests in such cases. See *Dalton v. State, ex rel. Richardson*, 43 Ohio St., 653.

Provision for the compensation of members of the General Assembly is found in Section 101.27, Revised Code, as follows :

“Each member of the senate shall receive as compensation a salary of three thousand two hundred dollars a year during his term of office and every member of the house of representatives shall receive as compensation a salary of three thousand two hundred dollars a year during his term of office. Such salaries shall be paid in the following manner: Four hundred dollars in monthly installments to every member of the senate and four hundred in monthly installments to every member of the house of representatives during the first session of such term and the balance in equal monthly installments during the remainder of such term. All monthly payments shall be made on or before the fifth day of each month. Upon the death of any member of the general assembly during his term of office, any unpaid salary due each member for the remainder of his term shall be paid to his dependent, surviving spouse, children, mother, or father, in the order in which the relationship is set forth in this section in monthly installments.

“Each member shall receive a travel allowance of ten cents a mile each way for mileage once a week during the session from and to his place of residence, by the most direct highway route of public travel to and from the seat of government, to be paid at the end of each regular or special session.

“If a member is absent without leave, or is not excused upon his return, there shall be deducted from his compensation twenty dollars for each day’s absence.”

By reference to the legislative journals of the 100th General Assembly, I note that the House adjourned sine die on August 7, 1953. Moreover, I am informed by your office that on or about August 5, 1953, the eighth \$400.00 monthly installment was paid to the several members of the House under authority of the statutory provision above noted, thus leaving a balance in salary due during the biennium of \$3200.00 to be paid in monthly installments of \$200.00 each. It would seem, therefore, in the instant case that such monthly installments in the amount of \$200.00 should begin as of the date on which the members-elect have

qualified in office by the execution of an oath in the manner provided in Section 101.23, supra.

We are next concerned with the status of the payments made to the member-elect who will serve as the successor of a deceased member. Here we are concerned with the significance of the provision in Section 101.27, supra, for the payment of "any unpaid salary due such member for the remainder of his term" to one of his dependent survivors. It would seem clear that the death of a member would terminate "his term of office," but the provision for the payment of "unpaid salary due * * * in monthly installments" to such survivors would clearly indicate the legislative intent that regardless of the fact of termination of his term by death, such survivors were to be paid such an amount as would equal in the aggregate the amount which such deceased member would have received had he lived and continued in office throughout the full term. This I understand is the actual practice which has been followed by you under an administrative interpretation of this statutory provision.

It would seem that in this view of the matter the General Assembly by this provision intended, in the case of members who died in office, to provide a salary in the aggregate amount of \$6,400.00 per biennium to such members, or to their dependents, regardless of the length of the term actually served by the member concerned. Accordingly, it would seem to follow that the election of an individual to fill the vacancy of a deceased member would have no effect on the salary payment to the dependent survivor of such deceased member; and payments to both should be made during the portion of the term served by such member-elect.

Coming now to the question of mileage allowance for newly elected members, it will be seen that in Section 101.27 provision is made for a "travel allowance of ten cents per mile each way for travel once a week during the session from and to his place of residence."

It would seem that the limitation in this language to an "allowance * * * during the session," would necessarily refer to a session of the General Assembly which occurs during the term of office of the member concerned. Although the statute refers to "the session," it is my notion that this term is sufficiently broad to permit payment of a travel allowance in the case of any session of the General Assembly, whether it be the regular session or some extraordinary session invoked by proclamation of

the governor or otherwise. The point is that the General Assembly must actually be "in session" before the member concerned could properly receive a travel allowance as provided in this statute. In construing this statute the courts have held that the expression "during the session," as used in former Section 50, General Code, had reference to an *actual session* and that such an allowance could not be made to the members of the Legislature during a time when that body was not actually in session, even though the journal of each house made it appear that they were in legislative session. See *Harbage v. Tracy*, 64 Ohio App., 151, appeal dismissed, 136 Ohio St., 534; motion to certify overruled March 27, 1940.

Coming now to the question of codes, I note the report on p. 44 of the House Journal of the introduction and adoption of House Resolution No. 11, Mr. Drake, such resolution reading in pertinent part as follows:

"Be it resolved, That the Speaker be directed to appoint a committee of five members to make recommendations to the House relative to the purchase of the General Code of Ohio."

On the same page of the journal it is reported that pursuant to such resolution a committee of five members was appointed and on pages 1913 and 1914 such committee's report is set out as follows:

"The select committee on codes to which was referred H. R. No. 11—Mr. Drake, having had the same under consideration reports herewith and recommends adoption of its report.

"The select committee appointed to make recommendations to the House relative to the purchase of copies of the Revised Code for the use of the membership pursuant to House Resolution No. 11, having had the matter under consideration recommends that the Clerk of the House be authorized and instructed to purchase one Ohio Revised Code for each of the following offices: For the office of the Speaker, Speaker pro tem., Clerk, Finance Committee Room, the office of the Minority Leader and the Press Room.

"It is further recommended that the Clerk be authorized and instructed to purchase sufficient copies of the Revised Code to furnish the membership with Codes of their selection for their use and to supply each member of the House who applies at the Clerk's Office for a copy of the Code of his selection."

It will be noted that this resolution authorizes the purchase of a sufficient number of copies of the Revised Code to be furnished the mem-

bership "for their use," and that the clerk is instructed "to supply each member of the House who applies" at his office for such a code. In view of the fact that the House is not now currently in session, it would seem likely that a sufficient number of copies of the Revised Code would be in your possession for the purpose of supplying the needs, if any, of the newly elected members. It is possible, of course, that this is not the case and it is possible also that in the event an extraordinary session of the Legislature should be invoked during the term of such newly elected members, it would become necessary for you to purchase additional copies for the use of such members. However this may be, the plain language of the resolution would appear to authorize you to supply each such newly elected member with a copy of the code for such use as he may have for it during the term of his office.

In the matter of stationery and supplies, I note the adoption of House Resolution No. 13, p. 45, House Journal, reading in pertinent part as follows:

"Resolved, That the Sergeant-at-arms of the House of Representatives be, and hereby is authorized and directed to make his requisition for the following stationery:

"Five hundred individual letterheads and envelopes for each representative and five thousand for the clerk of the House, the size of said envelopes to be known as number 10. Five hundred individual letterheads and envelopes to be allotted to be known as executive size. The name and address of each representative and the clerk to be printed on the envelopes allotted to each respectively.

"Five hundred name cards for each representative and the clerk of the House, the name and address of each representative and the clerk to be printed on the cards allotted to each respectively; and be it further

"Resolved, That the clerk of the House is hereby authorized to procure such supplies as may be necessary to carry on the work of the House of Representatives; to rent a sufficient number of typewriters for the use of the House and clerks and stenographers during the present session, the same to be paid out of the proper funds of the House of Representatives."

In view of the short duration of the term of the newly elected members, it would seem that none of them would require the amount of stationery and supplies which each is authorized to receive under the

terms of this resolution, and it is improbable that any of them will request the full amount thus authorized. However, this resolution is so plainly worded as not to be interpreted otherwise than to authorize each member, regardless of the length of his term, to receive the stationery and supplies mentioned in the resolution in the event he requests it. It would seem, however, that in the circumstances you would be justified in refraining from ordering any letterheads, envelopes or name cards unless and until requested to do so by the several newly elected members concerned.

Accordingly, and in specific answer to your request, it is my opinion that:

1. The certificate of election issued pursuant to the provisions of Section 3505.38, Revised Code, to a person elected to fill a vacancy in the office of Representative to the General Assembly pursuant to the provisions of Article II, Section 11 of the Ohio Constitution and Section 3521.03, Revised Code, shall be prima facie evidence of the right to membership of the person therein certified. In the event of a contest as to such person's right to membership, the House of Representatives shall be judge of his election.

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2. Other rights of persons elected to fill a vacancy in the office of Representative to the General Assembly discussed.

Respectfully,
C. WILLIAM O'NEILL
Attorney General