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1. ELECTION, PRIMARY—PERSON HOLDING ELECTIVE OFFICE—DIED ON SIXTY-SIXTH DAY BEFORE DAY OF PRIMARY ELECTION—UNEXPIRED TERM REQUIRED BY LAW TO BE FILLED AT NEXT GENERAL ELECTION—TITLE OF OFFICE AND LENGTH OF UNEXPIRED TERM SHALL BE PRINTED ON PRIMARY ELECTION BALLOT.
2. PRIMARY ELECTION BALLOT SHALL PROVIDE BLANK SPACE FOR VOTER TO WRITE IN NAME OF PERSON TO BE NOMINATED FOR UNEXPIRED TERM.
3. IF VOTERS OF PARTY FAIL TO NOMINATE A PERSON TO FILL UNEXPIRED TERM A DULY QUALIFIED COMMITTEE OF THE PARTY MAY SELECT A CANDIDATE FOR ELECTION AT GENERAL ELECTION TO FILL UNEXPIRED TERM—SECTION 4785-94 G. C.

## SYLLABUS:

1. If a person holding an elective office dies on the sixty-sixth day before the day of a primary election and the unexpired term is required by law to be filled at the next general election, the title of said office and the length of the unexpired term shall be printed on the primary election ballot.

2. Such primary election ballot shall provide a blank space in which a voter may write the name of a person for whose nomination he desires to vote for said unexpired term.

3. If the voters of a party fail to nominate a person to fill said unexpired term at the primary election, the appropriate committee of said party, acting pursuant to the provisions of Section 4785-94, General Code, may select a candidate for election for said unexpired term at the general election.

Columbus, Ohio, March 12, 1952

Hon. Darrell R. Hottle, Prosecuting Attorney  
Highland County, Hillsboro, Ohio

Dear Sir:

I have before me your request for my opinion raising several questions arising from the following situation:

On March 1, 1952, the Treasurer of Highland County died. He had been elected in November, 1948 for the term beginning the first Monday

in September, 1949 and ending the first Monday in September, 1953. He had filed a petition and declaration of candidacy for the 1952 primary election, seeking his party's nomination as a candidate for the new term to begin in September, 1953. He was the only person who had filed a declaration of candidacy or a nominating petition for the office of Treasurer of Highland County.

Your first question concerns the person appointed to fill the vacancy in the office caused by the death of the incumbent. That appointment was made under the terms of Section 2636, General Code, which provides as follows:

"When the office of county treasurer becomes vacant by death, removal, resignation, neglect to give bond or other cause, the commissioners shall forthwith appoint a suitable person to fill such vacancy. The person so appointed shall give bond and take an oath as required by law."

You have asked whether this new appointee will receive the increased salary provided by Section 2991, General Code, as amended effective September 8, 1951. It is my opinion that he will receive the increased salary. I so ruled in my opinion No. 857, rendered October 24, 1951, the first branch of the syllabus of which provides as follows:

"A county recorder appointed on October 1, 1951, to fill a vacancy in that office, may lawfully receive the salary provided for such office under the provisions of Section 2995, General Code, as amended effective September 8, 1951."

Your next questions concern the length of the appointee's term and whether or not there must be an election in November, 1952 for the unexpired portion of the term which ends in 1953. It is my opinion that this question is answered by Section 10, General Code, which provides in part as follows:

"When an elective office becomes vacant, and is filled by appointment, such appointee shall hold the office until his successor is elected and qualified. Unless otherwise provided by law, such successor shall be elected for the unexpired term at the first general election for the office which is vacant that occurs more than thirty days after the vacancy shall have occurred. \* \* \* This section shall not be construed to postpone the time for such election beyond that at which it would have been held had no such vacancy occurred, nor to affect the official term, or the time for the commencement thereof, of any person elected to such office before the occurrence of such vacancy."

It was specifically held in Opinion No. 2201, Opinions of Attorney General for 1938, page 694, that :

“The person appointed to fill a vacancy in the office of county treasurer which occurred June 4, 1937, holds such office until his successor is elected and qualified, and such successor shall be elected at the general election to be held in November, 1938.”

In view of the above statute and opinion of my predecessor, it is my opinion that the person appointed to fill a vacancy in the office of county treasurer, which vacancy occurred March 1, 1952, holds such office until his successor is elected and qualified, and such successor shall be elected at the general election to be held in November, 1952.

Your other questions concern the election machinery and the form of the ballot at both the primary and general elections for the unexpired and full terms. Those questions can best be answered by an exposition of the problem involved with regard to each office. I will first consider the unexpired term, which I have held must be filled at the November, 1952 election.

Section 4785-67, General Code, provides in part as follows :

“On the first Tuesday after the first Monday in May of each year primary elections *shall be held* for the purpose of nominating persons as candidates of political parties for election to offices *to be voted for at the next succeeding general election ; \* \* \**”  
(Emphasis added.)

Since the office for the unexpired term is an office “to be voted for at the next succeeding general election,” it follows that a primary election “shall be held” to designate the party nominees. The time set by Sections 4785-70 and 4785-92, General Code, for filing declarations of candidacy and nominating petitions, namely, the ninetieth day before the first Tuesday after the first Monday in May, has passed ; and it follows, therefore, that no candidate for the unexpired term will have his name printed on the primary election ballot. In such a situation it appears to be the clear intention of the election law that the nominees shall be designated by a “write-in.” Section 4785-80, General Code, provides in part as follows :

“\* \* \* Immediately below the title of each office for which nominations are to be made, and the names of candidates for such nomination printed thereunder, if any, there shall be provided on

each ballot as many blank spaces as, but not more than, the number of nominations to be made for such office, in which the voter may write the name or names of persons for whose nomination he desires to vote, \* \* \*.”

It is my opinion that this provision is clear and means what it says, and that the ballot used at the forthcoming primary election should make provision for a write-in for the unexpired term of county treasurer.

As indicated in your request, such a conclusion presents a possible conflict with the provisions of Section 4785-94, General Code, which should be considered. That section provides in part as follows:

“\* \* \* If a person holding an elective office dies subsequently to the seventieth day before the day of a primary election and prior to the eightieth day before the day of the next general election, and if, under the laws of Ohio, a person may be elected at such general election to fill the unexpired term of the person who shall have died, the appropriate committee of each political party, acting as in the case of a vacancy in a party nomination, as in the first four paragraphs of this section provided for, may select a person as the candidate of its party for election for such unexpired term at such general election, and certify his name, and thereupon such name shall be printed as such candidate under proper titles and in the proper place on the proper ballots for use at such election.”

The first four paragraphs referred to all deal with the withdrawal of a candidate who has been nominated at a primary election.

It is my opinion that this section does not present an irreconcilable conflict with the provisions of Sections 4785-67 and 4785-80, *supra*, providing for a write-in, and that those sections must be held to govern the procedure in this case. In the first place, those sections provide for a primary by mandatory language, using the word “shall,” while Section 4785-94, *supra*, says only that a committee “may select a person.” But such a selection before the primary would do away with the possibility of the write-in so clearly provided for by Section 4785-80.

Furthermore, the primary purpose of Section 4785-94 seems clearly to be the protection of a party which loses its nominee by withdrawal after the primary has been held and it is too late to designate another by the ordinary procedure. That protection is not necessary in this case. Finally, the very wording of the statute says that the committee, “*acting*

*as in the case of a vacancy in a party nomination,"* may select a candidate. A committee clearly can not act to fill a vacancy until after the primary election has been held and for it to attempt to fill an anticipated vacancy and, thus, forestall a primary election is not warranted by the language of the statute. In this connection it should also be pointed out that vacancies are filled by action of the new committee elected at the primary election and organized immediately thereafter (Sections 4785-62 to 4785-65, General Code) and not by the old committee which would designate the nominee now.

I should also point out that such an interpretation of the last paragraph of Section 4785-94 does not nullify it and render it meaningless. It still may play an important part in the designation of one or both of the party nominees. Section 4785-87, General Code, provides as follows:

"If an elector voting at a primary election shall write in a blank space provided therefor on the ballot of one political party under the title of an office for which a nomination is to be made, the name of a person other than the persons, if any, whose names are printed on the ballot as candidates for such nomination, and if such elector places 'X' in the rectangular space at the left of the name so written, such ballot shall be counted as a vote for the nomination of the person whose name is so written thereon, but in no event shall a person, whose name is so written on a primary election ballot, be nominated as a candidate for election to an office if the name of no person living on the day of such primary election shall be printed on such ballots as a candidate for such nomination, unless the total number of votes cast for him shall be not less than that number which is equal to fifteen per cent of the total number of electors who vote such primary election ballot at such primary election."

It is entirely possible that either or both parties may fail to nominate a candidate for the short term under consideration by not casting for him the percentage of votes required by Section 4785-87, General Code. In such a case, the appropriate committee, acting under the provisions of Section 4785-94, "may select a person as the candidate of its party" whose name will appear on the ballot at the general election.

The above discussion of the unexpired term covers the questions with regard to the full term. It is clear that there must be a primary election for that office and that proper provision must be made for a write-in at such primary. Since Section 4785-94, by its terms provides only for the

designation of a nominee to fill the unexpired term, there is no question presented as to the rights of the party committees.

Section 4785-87, of course, applies equally to the nomination of candidates for a full term or a short term. In the event that either or both parties fail to nominate a candidate for the full term under the provisions of Section 4785-87, the party committees, as contrasted with the short term under consideration, are not authorized to select the party nominee. In the event that both parties fail to nominate a candidate, a write-in would be required at the November election under the terms of Section 4785-99, General Code, which reads in part:

“\* \* \* No blank spaces shall be provided on such ballot wherein an elector may write in the name of a person for whom he desires to vote except that if no candidate has been nominated for an office or certified to fill a vacancy in a nomination for an office for which an election is to be held, blank spaces shall be provided under the title of said office equal in number to the number of persons to be elected to such office.”

In answer to your questions, therefore, it is my opinion that:

1. If a person holding an elective office dies on the sixty-sixth day before the day of a primary election and the unexpired term is required by law to be filled at the next general election, the title of said office and the length of the unexpired term shall be printed on the primary election ballot.
2. Such primary election ballot shall provide a blank space in which a voter may write the name of a person for whose nomination he desires to vote for said unexpired term.
3. If the voters of a party fail to nominate a person to fill said unexpired term at the primary election, the appropriate committee of said party, acting pursuant to the provisions of Section 4785-94, General Code, may select a candidate for election for said unexpired term at the general election.

Respectfully,

C. WILLIAM O'NEILL  
Attorney General