

1956 O. A. G.

OFFICIAL OPINION NO. 1

January 4, 1956

Mr. J. Otto Lee, Clerk
State Election Board
102 North Senate Avenue
Indianapolis 4, Indiana

Dear Mr. Lee:

This is in reply to your request for an Official Opinion on a question submitted to the State Election Board which, in substance, reads as follows:

In November, 1951, Mr. X was elected City Councilman for the fifth district of the City of Terre Haute, and his term expires at noon on January 1, 1956. He was a candidate for re-election, but was defeated. Following the election, the successful candidate took the oath of office and subsequently departed this earth without filing any statement of his campaign expenses and the Clerk had not issued to him a certificate of election.

I, therefore, request a ruling as to whether or not a vacancy exists in the office of City Councilman, or whether Mr. X is entitled to hold over by reason of the fact that his successor has not been elected and qualified.

In order for a public officer to "qualify" it is necessary that he perform *all* of the acts which are, under the law, conditions precedent to his entering upon the discharge of the duties of his office. See State *ex rel.* Kiefer v. Wheatley (1902), 160 Ind. 183, 190, 66 N. E. 684; Kimberlin v. State *ex rel.* Tow (1891), 130 Ind. 120, 125, 29 N. E. 773.

The following statutes enumerate various acts which must be performed by City Councilmen prerequisite to their right to demand possession of their office and to discharge the duties thereof. Acts of 1905, Ch. 129, Sec. 44, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-1244 provides as follows:

"After the execution of the certificate of election of any city officer by the board of canvassers, the city clerk shall forthwith give notice to every person elected of

OPINION 1

his election and of the time when he must qualify, either by personal service or by leaving a copy at his usual place of residence; and such clerk shall make return of such service and file the same in his office. *Every officer of any such city, before entering upon the duties of his office shall take and subscribe an oath, to be indorsed on his certificate of election, and every appointive officer shall likewise take such oath, to be indorsed on his certificate of appointment, before the city clerk or some officer authorized to administer oaths, that he will support the Constitution of the United States and the Constitution of the state of Indiana, and that he will faithfully discharge all his official duties; which oath shall also be filed with the city clerk.* Every city officer of any city, except the mayor and the members of the common council, shall likewise execute a bond, to the approval of the mayor, payable to such city, in such penal sum as the common council of such city may enact by ordinance covering such cases, conditioned for the faithful performance of the duties of his office and for the payment to the proper person of moneys received by him as such officer: Provided, That in no case shall the bond of the treasurer, or county treasurer performing the duties of treasurer, be fixed in a less sum than one-half of the estimated amount of all taxes, including delinquent, to be levied for municipal purposes and collected in such city for the current year. Such bond shall be filed with the city controller, except in cities of the fifth class, in which it shall be filed with the city clerk. Any person who shall not file his oath, or oath and bond, as the case may be, with the proper officer within ten [10] days after the beginning of the term for which he shall have been elected or appointed, shall be deemed to have refused to serve, and the office shall be deemed to be vacant.” (Our emphasis)

Acts of 1945, Ch. 208, Sec. 373, as found in Burns' Indiana Statutes (1949 Repl.), Section 29-5708 provides as follows:

“Every candidate for public office, including candidates for the office of senator of the United States, within thirty [30] days after the election or primary

election held to nominate for or fill such office or place, shall make out and file with the clerk of the circuit court for the county in which such candidate resides, a full, true and itemized statement in writing, which statement shall be subscribed and sworn to by such candidate before an officer authorized to administer oaths, setting forth in detail all moneys or other valuable things contributed, expended or promised by him to aid or promote his candidacy, or in any way in connection with his nomination or election, or both, as the case may be, or for other political purposes in connection with the election of any other person at said election, and all existing unfulfilled promises or liabilities in that connection remaining uncanceled and in force at the time such statement is made, whether such expenditures, promises or liabilities were made or incurred before, during or after such election, and showing the dates when, the person to whom, and the purpose for which, each and all of said sums or valuable things were paid, expended or promised or said liabilities incurred. Such statement shall also set forth that the same is full, true and correct. *No person shall be deemed elected to any elective office, under the laws of this state, or enter upon the duties thereof, or receive any salary or emoluments therefrom, until he shall have filed the statement provided for in this section of this article; and no officer authorized by the laws of this state to issue commissions or certificates of election shall issue a commission or certificate of election to any person claiming to be elected to any office until such statement as aforesaid shall have been so made, verified and filed by such person with such clerk.* Upon the filing of such statement, the clerk shall issue to the candidate a certificate showing the filing of such statement, and the date of such filing, which certificate shall be presented by the candidate to the officer authorized by law to issue his commission, and such certificate shall be the only evidence of the filing of such statement which may be required by the officer authorized to issue such commission. Any person violating or failing to comply with any of the provisions of this section shall be guilty of a misdemeanor. Ten [10] days after the period above fixed

OPINION 1

for the filing of said original statement shall have expired, the officer with whom the same is, by this section, required to be filed, shall notify the proper prosecuting officer of any failure to file such statement on the part of any candidate, and, within fifteen [15] days thereafter, such prosecuting officer shall proceed to prosecute for such offense: Provided, That the provisions and requirements of this section shall not apply to candidates for county council, township advisory board, road supervisor, constable, or candidates for any other office the emoluments of which are less than one hundred dollars [\$100] per year." (Our emphasis)

The last above cited statute is applicable to City Councilmen in the City of Terre Haute since they receive emoluments which are more than \$100 per year; see Acts of 1933, Ch. 233, Sec. 12, as amended, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-1224.

Therefore, it would appear that the following steps must be taken by a City Councilman in order to qualify to take possession of his office and enter upon the discharge of the duties thereof:

1. He must file his statement of campaign expenses.
2. He must take and subscribe an oath which must be indorsed on his certificate of election and filed according to law.

It is true that a certificate of election is only evidence of title to office, however, under Burns' 48-1244, *supra*, it appears that this certificate of election must be indorsed with the oath of office and filed before a City Councilman may enter upon the duties of his office. Likewise, under Burns' 29-5708, *supra*, a person is not entitled to receive evidence of his right or title to office or to enter upon the duties thereof until he has filed a sworn statement of campaign expenses. This statute has been considered only once by the Supreme Court of Indiana but in that case it was indicated that the filing of expense accounts as required by law was a condition precedent to the right to receive a certificate of election and to hold office; see *Heathco v. State ex rel. Addison* (1935), 209 Ind. 667, 673, 199 N. E.

260. I would also think that the provisions of this section are mandatory, rather than merely directory, since any person failing to comply therewith shall be guilty of a criminal offense.

In view of the foregoing, and assuming that no sworn statement of campaign expenses was executed by the City Councilman elect, I am of the opinion that he was not, at the time of his death, or at any time prior thereto, qualified to demand possession of his office and enter upon the discharge of the duties thereof. Therefore, no vacancy will exist in this office so as to give a right to fill said office by appointment; see *Kimberlin v. State ex rel. Tow, supra*; *State ex rel. Denton v. Kinkle* (1949), 227 Ind. 564, 86 N. E. (2d) 677, which hold that when a person is elected to office and dies before he qualifies, no vacancy exists.

Article 15, Sec. 3 of the Indiana Constitution provides as follows:

“Whenever it is provided in this Constitution, or in any law which may be hereafter passed, that any officer, other than a member of the General Assembly, shall hold his office for any given term, the same shall be construed to mean, that such officer shall hold his office for such term, and until his successor shall have been elected and qualified.”

This section of the Constitution applies to municipal officers, *State ex rel. Jett v. Ives* (1906), 167 Ind. 13, 78 N. E. 225. In addition thereto, Acts of 1945, Ch. 229, Sec. 4, as found in *Burns' Indiana Statutes* (1948 Repl.), Section 29-4315, which fixes the term of office of city officers, provides as follows:

“The several city officials to be elected under the provisions of this act shall take office at twelve o'clock noon on the first day of January, 1948, and thereafter such city officers shall take office at twelve o'clock noon on the first day of January next following their election. Such officers shall serve for four [4] years and until their successors are elected and qualified.”

Statutory provisions of this character are declaratory of Art. 15, Sec. 3 of the Indiana Constitution; see *Swank v. Tyn-*

OPINION 2

dall (1948), 226 Ind. 204, 78 N. E. (2d) 535, and the superior force of the Constitution would also override the last paragraph of Burns' 48-1244, *supra*, insofar as it provides for a vacancy in city offices if a person fails to file his oath within ten days after the beginning of the term for which he has been elected.

I am, therefore, of the opinion that, based upon the facts which you have submitted to me, the present City Councilman will hold over, under Art. 15, Sec. 3 of the Indiana Constitution, until his successor is elected and qualified.

OFFICIAL OPINION NO. 2

January 9, 1956

Hon. Charles T. Rachels
State Representative
115 East Fourth Street
Mt. Vernon, Indiana

Dear Sir:

This is in reply to your letter of December 27, 1955, in which you request an Official Opinion as to the following:

May a Mayor of a fifth class city decline to serve as City Judge?

The Acts of 1933, Ch. 233, Sec. 8, as amended in 1955, as found in Burns' Indiana Statutes (1950 Repl., 1955 Supp.), Section 48-1219 provides as follows:

"The elective officers of cities of the fifth class shall consist of a mayor, a clerk-treasurer and members of the common council as hereinafter provided. Such officers shall be elected in accordance with provisions of laws now in effect except as herein provided.

"In such cities the mayor shall act as city judge and the duties now provided by law for city judge shall devolve wholly upon the mayor. The salary herein provided for mayor shall be in full for all services performed by him as mayor and for acting as city judge."