

supra; from the other quoted and referred to provisions of said statute dealing with the teacher as a State employee for the purposes of said legislation, providing for the inclusion of teachers in such Fund as a unit on a state-wide basis and from a consideration of like previous Teacher Retirement Statutes, *supra*, which dealt with such teachers on a like basis irrespective of their changing positions within the State during a school or calendar year, I am of the opinion this Act contemplates and intends that a change of public school teaching location from one community to another within the State during the period of calendar year 1955, should not deprive teachers of the employer-employee relationship during any of said calendar year 1955 and should not interfere with any such teachers, so making such change of positions, having the benefit of the retroactive benefits of the Federal-State agreement, to and including January 1, 1955.

OFFICIAL OPINION NO. 6

February 20, 1956

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

Dear Mr. Lee:

This is in reply to your letter of February 2, 1956, which reads as follows:

“The County Election Board of Monroe County, Indiana, has written us stating that the prosecuting attorney for the Tenth Judicial Circuit, Monroe County was elected in November, 1952, for the term commencing January 1, 1954; that in 1952, Article 7, Section 11 of the Indiana Constitution was amended to extend this term to December 31, 1958; that in December, 1954, this prosecutor-elect was called into active military service and resigned the office, and thereupon the Governor of Indiana issued a commission to the present prosecuting attorney, which commission states that it expires on December 31, 1958. The Monroe County

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Election Board wants to be advised as to whether or not there should be an election for the office of prosecuting attorney in Monroe County in the year 1956. There is attached hereto the letter of inquiry of the Monroe County Election Board.

"Inasmuch as this raises an important question, the State Election Board respectfully requests that you furnish an official opinion thereon."

A prosecuting attorney is a constitutional judicial officer, State *ex rel.* Stanton v. Murray, Judge (Stanton v. State of Indiana) (1952), 231 Ind. 223, 234, 108 N. E. (2d) 251. The prosecuting attorney is elected in each judicial circuit by the voters thereof, Indiana Constitution, Art. 7, Sec. 11, and is commissioned by the Governor, 1 R. S. 1852, Ch. 19, Sec. 1, Burns' Indiana Statutes (1951 Repl.), Section 49-201. A prosecuting attorney is an officer of the judicial circuit. The State *ex rel.* Howard v. Johnston (1884), 101 Ind. 223, 229.

Therefore, a vacancy in the office of prosecuting attorney would be filled by the Governor under and pursuant to the provisions of 1 R. S. 1852, Ch. 115, Sec. 2, Burns' Indiana Statutes (1951 Repl.), Section 49-404, which reads as follows:

"Whenever any vacancy occurs in any circuit or district office commissioned by the Governor, he may fill such vacancy until filled by a qualified successor."

Your inquiry raises the question as to whether an appointment made under the foregoing Section to fill a vacancy in the office of prosecuting attorney, "until filled by a qualified successor," is for the balance of the unexpired term of the former incumbent of the office or whether such appointment is merely until the next general election when the office may be filled by the voters of the judicial circuit.

Prior to the year 1952 prosecuting attorneys in this State were elected to hold office for a term of two years under the provisions of the Indiana Constitution of 1851, Art. 7, Sec. 11, which Section read as follows:

"There shall be elected, in each Judicial Circuit, by the voters thereof, a Prosecuting Attorney, who shall hold his office for two years."

During the period when this constitutional provision was in effect the time for the election of prosecuting attorneys in the various judicial circuits, and the time when such prosecuting attorneys took office was not uniform throughout the State. In order to correct this situation, the Legislature at various times prior to the year 1952, attempted to achieve uniformity by the enactment of statutes concerning the time for electing prosecuting attorneys and the time they took office. These attempts at uniformity were, however, for constitutional reasons, unsuccessful. For instance, see *Gemmer et al. v. State ex rel. Stephens* (1904), 163 Ind. 150, 71 N. E. 478, holding unconstitutional, insofar as constitutional officers were concerned, Acts of 1903, Ch. 13, which read as follows:

“AN ACT to fix the time when the terms of office of certain officers shall begin; to fix the times when successors to said officers shall be elected, to fix the tenure of office of persons appointed to fill vacancies in any of said offices, and repealing all laws in conflict herewith.

“WHEREAS, It will promote the public interests to have the terms of office of all Judges of Circuit, Superior and Criminal Courts in this State, of all Prosecuting Attorneys and of all County Sheriffs, County Recorders, County Assessors, County Coroners, and County Surveyors, begin and end at a uniform time, and to have their official and the calendar year begin at the same time; and

“WHEREAS, It will also promote the public interests to have the official terms of all of said officers begin with the beginning of the calendar year next succeeding their election, instead of having them begin at long and irregular intervals thereafter, as at present; and

“WHEREAS, In so far as the terms of office of said officers are fixed by the Constitution, they can not be shortened by the action of the Legislature;

“Therefore, For the purpose of security the desired uniformity:

“Section 1. *Be it enacted by the General Assembly of the State of Indiana, That the terms of office of all Judges*

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of Circuit, Superior and Criminal Courts in this State, of all Prosecuting Attorneys and of all County Auditors, County Treasurers, Clerks of the Circuit Court, County Sheriffs, County Recorders, County Assessors, County Coroners and County Surveyors, hereafter elected in this State, shall begin on the first day of January next succeeding their election: Provided, That in all cases where persons were elected to any of said offices at the general election in November, 1900, for a term of four years, whose term of office did not begin until after January 1, 1901, and in all cases where persons were elected to any of said offices at the general election in November, 1902, for a term of two years, whose terms of office did not begin until after January 1, 1903, no successors to such officers shall be elected until the general election in the year 1906. In all cases where persons were elected to any of said offices at the general election in November, 1900, for a term of six years, whose terms of office did not begin until after January 1, 1901, and in all cases where persons were elected to any of said offices at the general election in November, 1902, for a term of four years, whose terms of office did not begin until after January 1, 1903, no successors to such officers shall be elected until the general election in the year 1908. In all cases where persons were elected to any of said offices at the general election in November, 1902, for a term of six years, whose terms of office did not begin until after January 1, 1903, no successors to such officers shall be elected until the general election in the year 1910.

“Sec. 2. In all cases where vacancies occur in any of said offices, by reason of the death or resignation of any such officer, or by reason of the expiration of his term of office, or in any other manner, before January 1, 1904, and a successor is appointed to fill such vacancy, such appointee shall hold his office by virtue of such appointment only until January 1, 1904, and if any vacancies should occur in any of said offices after January 1, 1904, and such vacancies are filled by appointment, such appointees shall hold until the first day of January next succeeding the next general election held after such appointment.

“Sec. 3. All laws and parts of laws in conflict herewith are hereby repealed.”

See also *Robinson v. Moser* (1931), 203 Ind. 66, 179 N. E. 270, holding Acts of 1929, Ch. 27 unconstitutional, which statute read as follows:

“AN ACT fixing the time for the election of prosecuting attorneys in each judicial circuit in the State of Indiana, prescribing the time when their terms of office shall begin and repealing all laws in conflict therewith.

“PROSECUTING ATTORNEYS — TIMES OF ELECTION

“Section 1. *Be it enacted by the general assembly of the State of Indiana*, That at the general election in the year 1930, and every second year thereafter, there shall be elected in each judicial circuit of the State of Indiana, a prosecuting attorney, who shall prosecute the pleas of the state in the courts of such circuit: Provided, however, That in all judicial circuits in the State of Indiana wherein the prosecuting attorney elect has a commission which expires in December, 1931, there shall be no election held at the general election in November, 1930, for the purpose of electing prosecuting attorneys in said judicial circuits, but the election of prosecuting attorneys in said judicial circuits shall be held at the general election occurring in the year 1932 and every second year thereafter.

“TERM OF OFFICE, BEGINNING OF

“Sec. 2. The term of office of every person hereafter elected prosecuting attorney of any judicial circuit in the State of Indiana shall begin on the 1st day of January next succeeding his election.

“REPEAL.

“Sec. 3. All laws or parts of laws in conflict herewith are hereby repealed.”

Subsequently thereafter, and on November 4, 1952, a proposed amendment to the Indiana Constitution, Art. 7, Sec. 11

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was adopted and said Section, as so amended, now reads as follows:

“There shall be elected in each judicial circuit by the voters thereof a prosecuting attorney, who shall hold his office for four years, and whose term of office shall begin on the first day of January next succeeding his election. The election of prosecuting attorneys under this section shall be held at the time of holding the general election in the year 1954 and each four years thereafter: Provided, That any such officer whose term is abridged by virtue of this section shall continue to serve until January 1, 1959.”

It will be noted that this amendment to the Constitution in addition to increasing the term of office of prosecuting attorney from two to four years, also made specific provision for the time of electing prosecuting attorneys and the time of their taking office. The provisions of this amendment are plain and unambiguous and are therefore not susceptible of construction. Therefore, elections for the office of prosecuting attorney in the various judicial circuits of this State may be held only at the time of holding the general election in the year 1954 and each four years thereafter. Consequently, when an appointment is made to fill a vacancy in the office of a prosecuting attorney, such appointment is for the unexpired term of the former incumbent of the office and until said office is filled by a qualified successor elected at a general election as provided in the Indiana Constitution, Art. 7, Sec. 11, as amended November 4, 1952.

However, even if the constitutional amendment in question were susceptible of construction the rule applicable in such a case would be “that which is expressed makes that which is silent to cease,” *State of Indiana v. Patterson* (1913), 181 Ind. 660, 665, 105 N. E. 228. Applying this rule to the language of Art. 7, Sec. 11, as amended, *supra*, the constitutional mandate that elections for the office of prosecuting attorney shall be held at the time of holding the general election in the year 1954 and each four years thereafter would preclude the holding of an election for such office at any other time than is provided in said amendment.

This is further borne out by a comparison of the language of Art. 7, Sec. 11, as amended, *supra*, with the language contained in the various statutes enacted by the Legislature, which attempted to establish uniformity in the time for electing prosecuting attorneys and the time when they should take office; for instance, compare Art. 7, Sec. 11, as amended, *supra*, with the provisions of Acts of 1903, Chapter 13 and Acts of 1929, Chapter 27, *supra*.

In view of the similarity between the Indiana Constitution, Art. 7, Sec. 11, as amended, *supra*, and the various statutory attempts at uniformity, I am of the opinion that one of the primary purposes of this amendment was to secure uniformity as to the time of electing prosecuting attorneys in the various judicial circuits of this State and the time when they should take office. This is further emphasized by the proviso to the 1952 amendment to the Constitution providing that prosecuting attorneys whose terms were abridged by said amendment should continue to serve until January 1, 1959. This proviso clearly shows that no elections were to be held for the office of prosecuting attorney except in November of 1954 and each four years thereafter and, in my opinion, could have only been intended to achieve uniformity in the time of electing prosecuting attorneys.

As heretofore noted, the office of prosecuting attorney was created by the Constitution and the term of such office and the time of taking office were also fixed therein; consequently, when a person is elected to the office of prosecuting attorney he is elected for the full four-year term thereof as fixed by the Constitution, *The Governor v. Nelson* (1855), 6 Ind. 496. Therefore, if elections for the office of prosecuting attorney were held at any time other than as prescribed in Art. 7, Sec. 11, as amended, *supra*, the uniformity as to time of election intended to be accomplished by said amendment would not be secured and the purpose of the amendment would thus be defeated.

In arriving at this opinion, I am aware of the decisions such as *State ex rel. Custer et al. v. Schortemeier* (1926), 197 Ind. 507, 151 N. E. 407, which held that when a circuit judge is appointed to fill a vacancy in the office, a successor should be elected at the next general election and the appointee's term expires when the successor has qualified. However, prosecutors are distinguished from the case of a circuit judge since the

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Constitution does not provide that elections for judges of the circuit courts shall be held at a certain time and every six years thereafter. Rather, your question appears to me to fall within the doctrine of the cases cited by the Court in the Schortemeier opinion at pages 515, 516 thereof, which cases held that there could not lawfully be an election to fill an office at a time other than prescribed by the Constitution where the Constitution provided for the first election for such office and all other elections thereafter.

I am also aware of the decisions such as *Enmeier v. Blaize* (1932), 203 Ind. 475, 481, 181 N. E. 1, which state that the spirit of the Constitution is to avoid vacancies in office and to avoid, as far as possible, the necessity of filling vacancies in office by appointment. However, in my opinion, this policy has been modified insofar as prosecuting attorneys are concerned, to the extent hereinbefore stated, by the Indiana Constitution, Art. 7, Sec. 11, as amended in 1952. The superior force of the Constitution would also override any statutes providing for the election of prosecuting attorneys, to fill a vacancy or otherwise, at any time other than is stated in said amendment.

I am, therefore, of the opinion that there can be no election for the office of prosecuting attorney in Monroe County, which is the Tenth Judicial Circuit, or in any other circuit in this State in the year 1956. I am of the further opinion that elections for the office of prosecuting attorney may be held only at the time of holding the general elections in the year 1954 and each four years thereafter and that persons appointed to fill a vacancy in the office of prosecuting attorney may hold said office for the balance of the unexpired term of their predecessor in office and until a prosecuting attorney is elected and qualified at a general election held as provided in the Indiana Constitution, Art. 7, Sec. 11, as amended, *supra*. I believe the foregoing will also answer your letter of February 9, 1956, concerning a similar factual situation with respect to the election of a prosecuting attorney in the Eighty-third Judicial Circuit.