

OFFICIAL OPINION NO. 28

March 31, 1952.

Honorable Henry F. Schricker,
Governor, State of Indiana,
State House,
Indianapolis, Indiana.

Dear Governor Schricker:

I have your request for an official opinion in which you ask the following questions:

“1. Should a county auditor be elected in 1952 in any county in which an auditor was elected in 1950, who died and was succeeded by an appointee of the Board of County Commissioners in 1951?”

“2. If an auditor should be elected in 1952 should the newly elected officer take office on January 1, 1953, or immediately following his election?”

In answer to your first question, you are informed that this identical matter was before this office in 1946 and in an official opinion, being O.A.G. 1946, page 115, this office held that there should be an election to fill the vacancy at the coming general election. This is a well written opinion and cites all the authorities pertinent and we concur in the same and cite it as authority.

However, the Supreme Court of Indiana in the case of Lake County Election Board v. State *ex rel.* Eyears (1946), 224 Ind. 465, 68 N. E. (2d) 787, deals with a fact situation identical in all significant regards with the question you present and holds that the county auditor should be elected at the next general election.

So, in answer to your first question, the county auditor should be elected in the general election of 1952.

As to your second question, the General Assembly in 1929, Burns' 1951 Supplement, Section 49-207, enacted a statute dealing with the commencement of the terms of various county officials and specifically names the auditor in said statute. The county auditor is a constitutional office. (Constitution of Indiana, Article 6, Section 2.)

OPINION 28

However, the Supreme Court of Indiana, in the case of *Enmeier v. Blaize*, 203 Ind. 475, 181 N. E. 1, holds that, so far as constitutional offices are concerned, this statute is invalid and it applies only to offices created by the General Assembly. In the above case, in 181 N. E. at page 3, the court said:

“* * * To elect such successor at the November election, 1930, was a right of the people reserved by them in their Constitution. This right of the people may not be taken from them or abridged, either directly or indirectly by an agency or department of government. * * *”

Again on said page:

“* * * *The incumbent in office, the appellee, could hold his office only for the given term of four years, and, after the expiration of his term of office, he could hold the office (if he could hold it at all, see *Gosman v. State ex rel. Schumacher* (1886), 106 Ind. 203, 6 N. E. 349; and *Carson v. McPhetridge* (1860), 15 Ind. 327) only ‘until his successor shall have been elected and qualified.’* The General Assembly did not in this act abridge or take from the voters the right to vote for and elect a successor in office to the appellant at the general election in November, 1930, if we grant the power in the General Assembly to do so.

“It is plain from these sections of the Constitution cited that the Legislature is, not only barred from depriving an official, elected by the voters, from taking and assuming an office upon the termination of the term of office of his predecessor, but also that the Legislature may not forbid the voters from voting at a general election, next previous to the expiration of the term of office provided by the Constitution, and which officer shall be elected by the voters. * * * (Citing cases.)

“It is therefore held that chapter 59, Acts 1929, *supra*, in so far as it relates to the officer designated as the clerk of the circuit court, in contravention of section 2 of article 6 and of section 3 of article 15 of the Constitution of Indiana. * * *”

In the case of *Douglass v. State ex rel. Wright*, 31 Ind. 429, it was held that, under the constitutional provision, an officer takes his office immediately after the election and qualification. This decision was cited with approval by the Supreme Court in the case of *Lake County Election Board v. State ex rel. Eyears, supra*, and holds that an auditor takes his office immediately after his election and his qualification.

Hence, in answer to your second question, you are informed that a newly elected officer will assume his duties immediately after his election and qualification.

OFFICIAL OPINION NO. 29

March 27, 1952.

Honorable Otto K. Jensen,
State Examiner,
State Board of Accounts,
Room 304, State House,
Indianapolis, Indiana.

Dear Sir:

Your request for an official opinion reads as follows:

"On May 9, 1951, the judge of the Criminal Court in Marion County forfeited a cash bond in the amount of \$1,500.00. The amount of the forfeiture was paid into the county treasury by the clerk of the circuit court on June 6, 1951. Acting upon a petition filed with the Governor to have the forfeiture remitted, the Governor did on June 14, 1951, grant a remission of the forfeited bond in the amount of \$1,500.00.

"It is my understanding that the county auditor has not yet remitted the amount of the forfeiture to the Auditor of State under the provisions of Section 28-156, Burns' 1948 Replacement. The county auditor is required to issue his warrant to the treasurer of state semiannually on May 1 and November 1. The auditor of Marion County has raised the question as to his right to make refund from the fines and forfeitures account.