

1952 O. A. G.

OFFICIAL OPINION NO. 66

October 14, 1952.

Mr. Edwin Steers, Sr.,
Member of State Election Board,
108 E. Washington Building,
Indianapolis, Indiana.

Dear Sir:

I have your request for an Official Opinion, which reads as follows:

“We have just been advised that Judge Hanna, Judge of the Circuit Court of Hendricks County, has died.

“We would like to have an opinion as to whether or not the judge to fill the vacancy shall be elected at the coming election November 4, 1952.”

Article 6, Sec. 2 of the Indiana Constitution, reads as follows:

“Designated county officers—Terms.—There shall be elected, in each county by the voters thereof, at the time of holding general elections, a Clerk of the Circuit Court, Auditor, Recorder, Treasurer, Sheriff, Coroner, and Surveyor. The Clerk, Auditor, and Recorder, shall continue in office four years; and no person shall be eligible to the office of Clerk, Recorder, or Auditor, more than eight years in any period of twelve years. The Treasurer, Sheriff, Coroner, and Surveyor, shall continue in office two years; and no person shall be eligible to the office of Treasurer or Sheriff more than four years in any period of six years.”

Although this Section is the subject of proposed amendment to be submitted to the voters in the general election this fall, that amendment will in no way affect your problem. This Section of the Constitution has been repeatedly construed to mean that as to offices created by the Constitution, there must be an election to fill a vacancy or to succeed an appointee at the first possible opportunity. See State *ex rel.* v. Schortemeier, Secretary of State (1925), 197 Ind. 507, 511, 151 N. E. 407.

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Section 187, Chap. 208 of the Acts of 1945, the same being Burns' 29-4801, provides for the holding of general elections in the following words:

“A general election shall be held on the first Tuesday after the first Monday in November in even-numbered years, at which election, *all existing vacancies in office, and all offices the terms of which shall have expired or which will expire before the next general election thereafter, shall be filled, unless otherwise provided by law.*”

Provisions of notice of such election are found in Section 22 of Chapter 120 of the Acts of 1947, the same being Burns' 29-4802, which reads as follows:

“The clerk of the circuit court of each county shall give notice of any such election and publish a statement or certificate showing what offices are to be filled at the time and in the manner provided in section ninety of this act. But no election shall be invalidated by the failure of such clerk of the circuit court in the performance of any of the duties enjoined by this section.”

Section 90 referred to in the last quoted section is found in Burns' 29-3608, which reads, in part, as follows:

“(a) At least twenty-seven (27) days before any county primary preceding a general election, the secretary of state shall transmit to the clerk of the circuit court of each county a certified list containing the names and post-office addresses of each person for whom declarations of candidacy have been filed in his office, and entitled to be voted for at such primary, together with designation of the office for which he is a candidate, and the party he represents. The clerk of the circuit court of the county shall forthwith upon receipt thereof publish under the proper party designation the title of each office, the names and addresses of all persons for whom nomination papers have been filed for all offices, giving the names and addresses of each, the date of the primary, and the hours during which the polls will be open. It shall be the duty of the clerk of the circuit court to publish such notice once each

week for two (2) consecutive weeks prior to said primary in each of two (2) principal newspapers of opposite politics, if there be such papers, and if no such papers then the chairman of each of the two (2) political parties casting the highest and next highest number of votes for secretary of state in the last preceding general election shall designate a paper in which such notice shall be printed."

Thus it appears that at the time of Judge Hanna's death, it would be possible for notice of the election not to have been given. However, Burns' 29-3805 provides that all certificates of nomination shall be filed with the Governor not later than September 1st preceding the election, and Burns' 29-3809 makes the only provision for adding candidates' names after September 1st. This section reads as follows:

"If any candidate whose nomination has been certified according to law shall wish to resign from such ticket, he shall file his resignation in writing with the officer with whom such certificate of nomination was filed not later than September 1st immediately preceding a general election: Provided, That should any vacancy on the ticket occur by reason of the death of any candidate whose name has been legally certified, such vacancy shall be filled at any time prior to any general, city or special election as provided for in this act."

See also Burns' 29-5002, which reads as follows:

"In case of the death or removal of any candidate after the printing of such ballots and before such election, it shall be lawful for the chairman of the state, district or county political organization of which such candidate was a member to make a nomination to fill such vacancy, after having obtained the written consent of the person so nominated and having filed the same with the proper officials with whom nominations are filed, and to provide the election board of each precinct and the county election board of each county in which such candidate is to be voted for with a number of pasters containing only the name of such candidate

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at least equal to the number of ballots provided each precinct for voting in the precinct and to the county election board pasters at least equal to the number of ballots provided for absentee voting, but no pasters shall be given to or received by any one except such election boards and such chairman, and it shall be the duty of the precinct election clerks to put one of such pasters, in a careful and proper manner and in the proper place, on each ticket to be voted in the precinct before they shall sign their initials thereon, and it shall be the duty of the clerk of the circuit court to put one of such pasters, in the same manner and place on each ticket to be voted by an absent voter before he signs his signature thereon."

Thus it is clear that there is no provision in our election law for the placing of an officer on the ballot after September 1st.

A substantially similar question was presented in 1948 to the then Attorney General, who answered it in Opinion No. 63 of that year, the same being 1948 O. A. G. 388. That opinion concluded:

"In the case of *Beal v. Ray et al.* (1861), 17 Ind. 554, the office of Judge of the Circuit Court became vacant on September 28, 1861; the Governor filled the vacancy by appointment of Ray. Votes were cast at the general election for the respective parties to the action at the general election held October 8, 1861. Beal received more votes than Ray, but Ray who was also the incumbent by appointment, brought the action contending the election was void.

"There was a statute then in existence relative to the time of holding general elections similar to Section 29-4801, above quoted, fixing the date as the first Tuesday in October. Another section provided that the sheriff should post the election notices (now the clerk publishes them). The court said at page 557:

"The first section authorized, generally, vacancies to be filled; but the second, and a later section, required that before "such elections," as authorized in first section, shall take place, the

clerk should certify, etc., twenty days, and the sheriff should notify fifteen days, etc. Now, this section is just as obligatory, just as much law, as the first section; and so limits the first *as to preclude elections under it to fill vacancies where the vacancies do not occur long enough before the day of election to enable the steps required by the statute to be taken.* This must have been the intention of the Legislature, and is the legal interpretation and construction, the meaning, in short, of the law, as a whole. (Our emphasis.)

“Public policy may require that officers shall not have it in their power, by neglect of duty, to defeat elections.

“We do not therefore intimate that where the vacancy had occurred such length of time before the election, the failure of the officers to certify and notify would vitiate an election held. Such then, as above interpreted, we deem to be the statute itself on this subject. And that this construction is in accordance with public policy, and the rights and interests of the people, there can be no doubt.

“It secures to them time to examine the qualifications of volunteer candidates, to bring out others of their own volition, if desirable, and to ascertain precisely what the voters have to do, and to secure some concert of movement, some concentration of public opinion and action, so as to prevent a few persons near the public offices from imposing officers, for long periods, upon the people.

“This, in popular governments, is a matter of the utmost importance. See *Biddle v. Willard*, 10 Ind. 62; *Carson v. McPhetridge*, 15 id. 327.’

“In *Lake County Election Board v. State ex rel. Eyears* (1946), 224 Ind. 465, at page 468, the court said:

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“The general election proper to elect an officer to fill a vacancy in the office of auditor of a county is the general election provided for by law—Section 29-701. Burns’ 1933—and occurring next after such vacancy, if the vacancy occurred before the time required to give notice of such election. *Beal v. Ray* (1861), 17 Ind. 554; *Beal v. Morton* (1862), 18 Ind. 346. * * *

“In the present situation, the vacancy occurred October 11th, almost six weeks after the time for filing certificates and petitions for nomination. The ballots have been printed. Absent voters’ ballots have been mailed, some have been voted. Notices of election have been or could have been published. There are no candidates on the ballot for that office. It is not a situation where there were the names of candidates legally filed by September 1 and a vacancy by one of such candidates where a paster can be used.

“Based upon the foregoing statutes and decisions, it is my opinion that the election laws do not make provision for filling a vacancy in an office which occurs as late as October 11th before the general election on November 2nd; that the vacancy did not occur ‘long enough before the day of election to enable the steps required by the statute to be taken.’”

In accordance with the authorities heretofore cited and in reaffirming the position adopted by the Attorney General of 1948, it is my opinion that there can be no election in 1952 for the office about which you inquire.