OPINION 3

OFFICIAL OPINION NO. 3

January 8, 1951.

Mr. Edwin Steers, Sr.,
State Election Board,
108 E. Washington St.,
Indianapolis, Indiana.

Dear Sir:

We are in receipt of the following letter:

"A peculiar question has arisen as to the Advisory Board in Fall Creek Township, Hamilton County, Indiana, and we kindly ask that you give us an opinion with reference to same. The facts are as follows:

"One man, Underwood, a member of the old Advisory Board ran for re-election. The other two old members did not ask for re-election. On the count of the ballots the returns are as follows:

Underwood 223
North 221
Madge 219
Lowery 218
Arnett 214
Cornelius 210

"Madge, the third man is not a free holder and therefore not qualified to hold the office.

"Should Lowery, the fourth man be declared elected or would one of the old Advisory Board hold over because his successor has not been duly elected and qualified? If one of the old members is to hold over, how would it be determined which one of the two would hold over?

"Also, should Madge become a freeholder before January 1st, would he become qualified?

"We will appreciate hearing from you at your very earliest convenience."

The Acts of 1949, Chapter 208, Section 1, Page 684, same being Section 65-301 Burns 1949 Pocket Supplement provides:
"At the time of electing township trustees, the voters of the several townships shall elect an advisory board, consisting of three (3) resident freeholders and qualified voters of the township. The members of such board shall subscribe and file with the trustee an oath to faithfully and honestly discharge their duties as prescribed by law. Their terms of office shall be as now provided by law and until their successors are elected and qualified. If a vacancy occurs in said board, it shall be filled by appointment by the remaining members of the board for the unexpired term; Provided, that where two (2) or more vacancies exist at any one (1) time, the board of commissioners of the county shall upon the petition of any taxpayer of such township, fill such existing vacancies for the unexpired term or terms by appointment thereto of one (1) or more resident freeholders and qualified voters of the township. * * *

The Acts of 1945, Chapter 208, Section 175, Page 680, same being 29-4501 Burns 1949 Replacement provides as follows:

"Township trustees, township assessors, justices of the peace, constables, three (3) members of the township advisory board, and such other township officers as may be provided for by law, shall be elected at the general election held on the first Tuesday after the first Monday in November, in the even-numbered year preceding the expiration of their term of office, and every four (4) years thereafter, and such election shall be conducted under the provisions of this act governing general elections. The term of office of all township officers shall be four (4) years and such term shall begin on the first day of January succeeding of their election."

You state that "Madge" is not a freeholder. By statute, Burns 65-301, Supra, requires that a member of the Advisory Board to be a resident freeholder.

It has been repeatedly held by our court that laws which prescribe the eligibility of a person to hold an office, has reference to the time when the term of the office begins and
not to the date when a person is elected to an office. Hoi v. State, *ex rel.* Buchanan, 168 Ind 506, 81 N. E. 509. State *ex rel.* Clawson v. Bell, 169 Ind. 61, 82 N. E. 69. It follows, therefore, that if "Madge" becomes a freeholder on or before the first day of January, he shall become qualified. It is to be noted that under Burns 65-301 and 29-4501, *Supra*, one is elected a member of the Advisory Board for a period of four (4) years and until their successors are elected and qualified.

You state that only one member of the old Advisory Board ran for reelection. It is the general rule that one holds office for his full term and in addition thereto until their successors are elected and qualified. This rule, in my opinion, is impossible of application in the instant case, as there is no way of ascertaining which one of the three in this case is the "hold-over".

It is now the settled law, insofar as Indiana is concerned:

"If at an election a majority of the electors vote for a candidate that they know is wholly ineligible and incapable under the law to hold the office, the person who is eligible to hold the office and who receives the next highest number of votes therefor will be elected to such office; but if the eligibility of the candidate receiving a majority of the votes is not known to the electors voting for him, then there is no election, and the person receiving the next highest number of votes is not entitled to the office."


From the foregoing, it is my opinion should "Madge" fail to qualify, "Lowery", the fourth person receiving the highest number of votes, is not entitled to the office. That as per Burns 65-301, *Supra*, the duty would devolve upon the remaining members of the board to fill the vacancy by appointment.