

OPINION 65

OFFICIAL OPINION NO. 65

December 1, 1961

Mr. Edwin Steers, Sr.  
Member, State Election Board  
108 East Washington Street  
Indianapolis, Indiana

Dear Mr. Steers:

This is in response to your request of November 3, 1961, for an Official Opinion. Your query concerns the filling of a vacancy in the office of a County Commissioner.

The factual situation serving as the basis for the question is set forth in a letter, to you, dated November 2, 1961, from Mr. Harl M. Scales, Auditor of Warrick County, Indiana. The facts are stated therein as follows:

“While serving a three-year term as county commissioner from Third District (Warrick County) running from 1 January, 1959 to 31 December 1961, to which he had previously been elected, Henry E. Barclay, in the 1960 election ran for and was elected to the same office for the three-year term running from 1 January 1962 to 31 December 1964.

“On 1 January 1961 Mr. Barclay, at the swearing in ceremonies at the court house for all of the persons elected to office in the 1960 election, presented himself and with the others verbally took his oath of office and subscribed and swore to this oath on the back of his certificate of election as county commissioner for the term running from 1 January 1962 to 31 December 1964.

“On 12 April, 1961 Mr. Barclay died in office.

“On 26 April, 1961, the two remaining county commissioners elected or appointed William Farmer to fill and serve out the unexpired term of Mr. Barclay ending 31 December 1961 and to fill and serve out the unexpired term to which Mr. Barclay had been elected running from 1 January 1962 to 31 December 1964, and Mr. Farmer qualified by taking his oath.”

Statement of the question :

“Does this appointment hold good for the remaining term to which Mr. Barclay was elected, or should the Commissioners reappoint Mr. William Farmer, for the remaining term of 1 January 1962 to 31 December 1964, to which term Mr. Barclay was elected?”

The statement of facts, in the instant case, except for names and dates, is practically identical with that presented in connection with a vacancy in the office of a county commissioner, which was the subject of my 1958 O. A. G., page 48, No. 12. The reasoning and conclusions stated in that Opinion are hereby re-affirmed and are directly in point in the answering of your question herein.

The controlling statute for the filling of vacancies in the office of county commissioner is 1 R. S. 1852, Ch. 20, Sec. 1, as amended and found in Burns' (1960 Repl.), Section 26-601, which reads in part as follows:

“\* \* \* *Whenever a vacancy shall occur in the office of commissioner; or whenever a commissioner who has qualified shall die or resign before the commencement of the term for which he was elected and no general election will occur between the time of such death or resignation and the beginning of such term, the commissioners in office at any time after the occurrence of such death or resignation so producing such vacancy or prospective vacancy, wherein such vacancy or prospective vacancy in the office of commissioner shall occur for any reason, shall elect some qualified elector to fill such vacancy or prospective vacancy, from and after the time of commencement of such term, who shall serve for the remainder of the term, or for the entire term as the case may be, for which the person so dying or resigning was originally elected or appointed; \* \* \**” (Our emphasis)

It will be noted no general election will occur between the time of Mr. Barclay's death and the commencement of the new term beginning 1 January 1962.

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Inasmuch as Mr. Barclay died during his first term of office, there was a vacancy created which necessitated the election by the commissioners of a qualified person to *fill the remainder of the term* as authorized by Burns' 26-601, *supra*. This was done by the commissioners in electing Mr. Farmer to serve out the remainder of *the unexpired term*, of Mr. Barclay, *ending 31 December 1961*. The contingent right to hold over on the present term was effectually ended when Mr. Barclay was *elected and qualified* for the new term beginning 1 January 1962. Thus, Mr. Farmer has no right to hold over on the term ending 31 December 1961.

See: 1958 O. A. G., No. 12, *supra*;

1959 O. A. G., pages 338, 346, No. 65.

Let us now look to the new term commencing 1 January 1962. The controlling fact here is that Mr. Barclay was both *elected and qualified* for this new term. In the case of *State ex rel. Kares v. Karger* (1948), 226 Ind. 48, 54, 77 N. E. (2d) 746, the Supreme Court clearly recognized the right of an individual elected to office to qualify for his office a considerable time in advance of the actual commencement of his term of office. Therefore, on Mr. Barclay's death, there were two (2) vacancies to be filled; one for the remainder of the term he was serving and one for the next term for which he had been elected and qualified.

*The State ex rel. Elliott v. Bemenderfer* (1884), 96 Ind. 374;

*Gosman v. The State ex rel. Schumacher* (1885), 106 Ind. 203;

1958 O. A. G., No. 12, *supra*;

1959 O. A. G., No. 65, *supra*.

The letter dated November 2, 1961, from Mr. Harl M. Scales, Auditor of Warrick County, which serves as the basis for your request, indicates that the county commissioners in their election or appointment of 26 April 1961, attempted to fill both the unexpired present term and the coming new term by one appointment and that Mr. Farmer took but one oath.

1961 O. A. G.

Although this situation does not constitute the circumstance of two vacancies existing simultaneously, nevertheless, it does amount to two successive vacancies in the same office. Thus, there was the vacancy in the office the term of which expires on December 31, 1961, and a "prospective vacancy" for the same office in the following term which commences on January 1, 1962. Therefore, because there is a separate and independent vacancy in the office for each of two successive terms, it is my opinion that these vacancies must each be filled by specific election or appointment to such vacancy and that the appointee must specifically qualify for the office each time he receives such appointment. Therefore, if it be the desire of the commissioners that Mr. Farmer also serve the term commencing January 1, 1962, he must be specifically elected or appointed for that term and duly qualify for the same. The procedure required is the same as that which would apply if one person were elected to fill the vacancy for the term which expires December 31, 1961, and a different person were elected to fill the vacancy for the term commencing January 1, 1962.

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December 1, 1961

Mr. Albert Kelly, Administrator  
State Department of Public Welfare  
100 North Senate Avenue, Room 701  
Indianapolis 4, Indiana

Dear Mr. Kelly:

This is in response to your recent letter requesting my Official Opinion upon the following question:

"May a county department of public welfare lawfully supplement an aid to dependent children's award with wardship funds if an order of court is first obtained authorizing such expenditure?"

Since your question does not concern the conditions prerequisite to the acceptance of federal funds in conjunction with