Question (5)

"Would not like procedure be employed in the case of death of a Mayor-elect under like conditions?"

The procedure to be followed in case of the death of a mayor-elect is the same as that for city councilmen, subject, however, to such provisions as are contained in Burns' 48-1246, supra. This difference is on account of the filling of the vacancy by the city comptroller in cities having such office and further provisions for filling a vacancy created by the death of any such comptroller while acting as mayor.

OFFICIAL OPINION NO. 66
December 15, 1959

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

Dear Mr. Steers:

This is in reply to your recent letter wherein you request an Official Opinion based on the question contained in a letter addressed to the State Election Board, from Mr. Hugh Williams, Sheriff of Knox County, Indiana. The request reads as follows:

"I was elected Sheriff of Knox County, Indiana, November 6, 1956, to fill the unexpired term of Frances Thomas, which expired 1/1/59. November 4, 1958, I was elected Sheriff of Knox County for a four year term.

"My question is, am I eligible to run in 1962 for another term of four full years. I have been advised I am eligible for four more years starting in January 1963, if elected."

The term of office, including provision for a uniform cycle for the office of County Sheriff is found in the Indiana Constitution, Art. 6, Sec. 11. This section which was added by constitutional amendment on November 2, 1948, reads as follows:
“Notwithstanding any other provision hereof, the Sheriff of each county shall be elected in the general election held in the year 1950 and each four years thereafter. The term of office of each such Sheriff shall be four years beginning upon the first day of January next following his election and no person shall be eligible to such office more than eight years in any period of twelve years: * * *” (Our emphasis)

A review of the facts relative to the incumbency of said Hugh Williams, as Sheriff of Knox County, is essential to a consideration of your question. I have been advised that this is the same Hugh Williams who was the appellee in the case of State ex rel. John L. Thomas v. Hugh Williams (1958), — Ind. —, 151 N. E. (2d) 499, which involved quo warranto proceedings in connection with the election of said Williams as Sheriff of Knox County in 1956.

A review of the facts found in State ex rel. Thomas v. Williams, supra, shows that at the general election held on November 2, 1954, Francis E. Thomas was elected Sheriff of Knox County; he qualified and served as such until August 24, 1956, on which date he died. On August 28, 1956, the Board of County Commissioners of Knox County appointed one John H. Thomas to serve as Sheriff of Knox County until his successor was elected and qualified. John H. Thomas promptly qualified and assumed office. Subsequently both major political parties nominated candidates to be voted upon in the general election of 1956. Hugh Williams was nominated and elected. Thereafter, on December 3, 1956, said Hugh Williams was commissioned by the Governor of Indiana, and on the same day qualified as Sheriff by taking the oath and filing the bond required by law. Thereafter, said John H. Thomas challenged the right of said Hugh Williams to said office by an action in quo warranto. Williams demurred to the complaint and the Court below sustained said demurrer. John H. Thomas refused to plead over and suffered judgment to go against him. An appeal was taken to the Supreme Court of Indiana wherein the judgment of the trial court was affirmed with one judge disqualifying himself and the other four judges being equally divided on the opinion.

In view of the provisions of the Indiana Constitution, Art. 6, Sec. 11, supra, the amount of time served or prospectively
to be served, in the office, goes to the essence. In the instant case the facts indicate that said Hugh Williams served an elected term of two (2) years and twenty-nine (29) days under his short-term election of 1956. In the event said Williams completes his present term, on December 31, 1962, he will then have served a total of six (6) years and twenty-nine (29) days.

Let us assume, for the purpose of argument, that said Williams would be eligible to be a candidate for Sheriff in the election of 1962, and let us further assume he would be successful in the election of 1962, and that he would serve the term commencing January 1, 1963. This would mean that on December 2, 1964, he would have completed a total of eight (8) years as Sheriff of Knox County and the completion of such term on December 31, 1966, would mean the serving of ten (10) years and twenty-nine (29) days, all of which would be within a period of twelve (12) years.

The question you have asked resolves itself into one of the eligibility of said Williams as a candidate for Sheriff in the election of 1962 in view of the constitutional prohibition against any person being eligible to such office more than eight (8) years in any period of twelve (12) years, inasmuch as the end of the eight (8) year period of service would be reached practically midway of such a prospective third term.

In a consideration of the question you have presented it is important to know that Williams served his initial term of two (2) years and twenty-nine (29) days as a result of being elected and not as the result of a pro tempore appointment. The law makes a distinction between a period of time served under a pro tempore appointment and a period of time served in an elective term.

In the case of State ex rel. Fares v. Karger (1947), 226 Ind. 48, 77 N. E. (2d) 746, it is stated that:

"It has been held that one who is appointed to fill the unexpired term of an officer, and is then elected to the office for the next term, is then qualified to continue to serve at the end of his elective term, under the provisions of this section of the Constitution, until his successor is elected and qualified although the total period
of consecutive service exceeds the period allowed by the Constitution. This is upon the theory that the period of the pro tempore appointment, though for a full term, shall not be reckoned as a part of the elective term served as provided by Art. 2, § 11 of the Constitution; *State ex rel. Culbert v. Linkhauer*, *supra*. For a like reason, the holdover term provided for by Art. 15, § 3, should not be reckoned as a part of the elective term of the appellee."

The Indiana Constitution, Art. 2, Sec. 11, provides as follows:

"In all cases in which it is provided, that an office shall not be filled by the same person more than a certain number of years continuously, an appointment pro tempore shall not be reckoned a part of that term."

However, inasmuch as the entire period of Williams' service, or possible prospective service as Sheriff, is or will be elective service, the provisions of the Indiana Constitution, Art. 2, Sec. 11, *supra*, are inapplicable.

In view of the fact that all the service of said Williams, either past, present, or prospective, will have been elective service, the question then is: Can a Sheriff be eligible as a candidate for re-election whether or not he be qualified to hold that particular office for the whole of the term.

In 22 Indiana Law Encyclopedia, Sec. 25, p. 210, it is stated that:

"'Eligibility' for office refers to the qualifications to hold an office, or competency to hold the office if chosen, and is synonymous with qualifications. The eligibility of a person to hold public office is to be determined as of the time the term of office begins unless otherwise provided by statute or by the Constitution."

See also: *State of Indiana ex rel. Handley v. Superior Court of Marion County* (1958), — Ind. —, 151 N. E. (2d) 508.

An interpretation of the word "eligible" is given in the case of Carson v. McPhetridge (1860), 15 Ind. 327, wherein it is said:
"The term eligible, as used in our Constitution, relates to capacity of holding, as well as capacity of being elected to, an office."

The case of State ex rel. Haff v. Pask et al. (1933), 126 Ohio St. 633, 186 N. E. 809, is a case directly in point with an identical problem presented relative to the eligibility of a Sheriff as a candidate for re-election under a constitutional limitation of service similar to that found in the Indiana Constitution, Art. 6, Sec. 11, supra.

The Ohio Supreme Court in the above case gave the following definitions of "eligibility" which are equally in point relative to your question:

"The following are standard definitions of the word 'eligibility':

"Black: 'Capable of being chosen'; 'competency to hold the office if chosen.'

"Bouvier and Anderson: 'This term relates to the capacity of holding as well as that of being elected to an office.'

"Abbott: 'The term eligible to office relates to the capacity of holding, as well as the capacity of being elected.'

"10 Am. & Eng. Enc. Law (2d Ed.) 970: 'Capable of being chosen,' 'implying competency to hold the office if chosen.'

"Webster: 'That may be selected'; 'legally qualified to be elected and to hold office.'

"As stated by Judge Shauck, in State ex rel. Attorney General v. Heffner, 59 Ohio St. 368, at page 400, 52 N. E. 785, 788: 'By its terms, the test of eligibility relates to continuance in or occupancy of office.'

"The Century Dictionary defines 'ineligible' as 'legally, or otherwise disqualified;' 'not eligible to a specified office.'

"The adjudicated definition of the word 'ineligible,' when applied to holding public office, is stated in State
ex rel. Schuet v. Murray, 28 Wis. 96, 99, 9 Am. Rep. 489, where the court holds: "The term "ineligible" means as well disqualification to hold an office, as disqualification to be elected to an office."

The Ohio Supreme Court thereupon further stated, as follows:

"Since the law does not contemplate an election to a part of a term, the eligibility of the person for the specific office is determined by the question whether or not he is qualified to hold that particular office for the whole of the term.

"When Pask announced his candidacy to be voted for at the election of 1932, he knew that he could not lawfully serve out the term that he was seeking. He was neither eligible for the term nor eligible to be elected to the office." (Our emphasis)

In the case of Kirkpatrick v. King et al. (1949), 228 Ind. 236, 243, 91 N. E. (2d) 785, relative to the eligibility of a Sheriff for an additional term of office and involving an interpretation of the Indiana Constitution, Art. 6, Sec. 11, supra, it is stated:

"* * * The amendment is not to be considered as an isolated bit of design and color, but it must be seen as an integral part of the entire harmonious picture of the Constitution. It is true that it is superimposed upon that which is in direct conflict, but when the amendment is viewed in the light of these principles, there is no ambiguity. * * *" (Our emphasis)

Therefore, it is my opinion that since the initial term of office of said Williams was an "elective" term, the provisions of the Indiana Constitution, Art. 2, Sec. 11, supra, are inapplicable as authority for a cancellation of time served as Sheriff in order to avoid the prohibition of the Indiana Constitution, Art. 6, Sec. 11, supra. Inasmuch as Williams would exceed the time limitation during any such contemplated third term, it is my further opinion he would be neither eligible for the term nor eligible to be elected to the office.