

Mayor—Tie Vote—Council—Cities and Towns—Vacancies.

The council selects the mayor in case of a tie vote and in case the council deadlocks the mayor casts the deciding vote in his capacity as a holdover.

J. L. Angstman, Esq.,
Attorney at law,

April 10, 1926.

Harlem, Montana.

My dear Mr. Angstman:

Your letter regarding the contest for mayor was received.

My conclusions are as follows:

The newly elected officers do not assume the duties of their offices until the first Monday of May. (Sections 5006, 5014 R. C. M. 1921.)

Under section 5012 the mayor in case of a tie vote is chosen by the council at its first regular meeting following the Monday next after the election. If this regular meeting comes on or after the first Monday in May then I think unquestionably the new council decides who is mayor. If this regular meeting is before the first Monday of May then I think the old council has this authority. I find no statute on the subject of when the regular meetings shall be held. I assume they are regulated by ordinance.

You also desire my opinion whether in case of a tie vote by the council the present mayor may cast the deciding vote. I think clearly if the regular meeting referred to in section 5012 is held before the first Monday in May he may do so—this by virtue of section 5031 R. C. M. 1921, as interpreted in *State ex rel Young, vs. Yates*, 19 Mont. 239.

If the regular meeting is held on or after the first Monday in May the question is fraught with more difficulty. Section 5003 provides that the mayor shall hold office for two years "and until the qualification of his successor."

On the other hand, section 5013 requires the successor to qualify and "enter upon his duties at the time fixed by law." This is, by section 5014, made the first Monday of May. If he does not do so, then, under section 5013, the "office becomes vacant." However, section 5013 has reference only to a situation where one has been "either elected or appointed to office" and cannot be held applicable to a situation where a

tie vote exists. Hence, it is reasonable to conclude that the phrase in section 5003, "and until the qualification of his successor," had reference to a situation where a tie vote resulted and a mayor was chosen by the method prescribed in section 5012.

It could be given no meaning in case a mayor was elected or appointed and failed to qualify in the face of section 5013 to the effect that under those circumstances a vacancy in the office exists, for if a vacancy exists in the office it cannot at the same time be occupied by a legal incumbent. (State ex rel Bennetts vs. Duncan, 47 Mont. 447, 453.)

Hence, concluding as I do that section 5013 has no effect in providing for a vacancy in the case of a tie vote, I am of the opinion that under section 5003 the outgoing mayor holds over until the mayor chosen under the provisions of section 5012 qualifies. It necessarily follows that under section 5031 he may decide the tie vote in question.

This conclusion is fortified by the fact that under section 5012 it is contemplated that there is still a mayor after the regular meeting therein referred to for it provides, in substance, that under certain conditions therein named he must call a special meeting.

If the office were at that time vacant, and was so intended to be by the legislature, it is unbelievable that the legislature would have imposed the duty upon the mayor to call a special election after he had been relegated to private life.

Very truly yours

L. A. FOOT,

Attorney General.