

No. 443

**MILITARY SERVICE—ARMY—NAVY—MARINE
CORPS—NATIONAL GUARD—UNITED STATES MILI-
TARY SERVICE—OFFICERS AND OFFICES—“SUS-
PENDED” OFFICERS—ELECTED OFFICERS—AP-
POINTMENTS—VACANCIES—COUNTY COMMIS-
SIONERS**

Held: Where an elected county commissioner is inducted into the land or naval forces of the United States or is a member of any reserve component of the land or naval forces, national guard, or retired personnel ordered into the active military service of the United States, and, in order to perform such service, leaves such elected office, no permanent vacancy occurs under Chapter 47, Laws of 1941. In such event the remaining members of the Board of County Commissioners shall appoint some person to replace temporarily such officer, under the terms and conditions contained in Chapter 47, Laws of 1941, as construed by the Supreme Court of Montana in the case of *Howard M. Gullickson v. Sam W. Mitchell, Secretary of State of the State of Montana, Pac.* (2nd.)

July 13, 1942.

Mr. Thomas R. Marron
County Attorney
Valley County
Glasgow, Montana

Dear Mr. Marron:

You have submitted the following question for my opinion:

"Where a duly and regularly elected county commissioner is now inducted into the land or naval forces of the United States, will you give me your opinion as to who makes the appointment to the office of county commissioner to fill such vacancy, under Chapter 47, Laws of 1941?"

In answering your inquiry it will be noted Section 4 of Article XVI of the State Constitution and Section 4454, Revised Codes of Montana, 1935, provide, in substance, that—whenever a vacancy occurs in the board of county commissioners—the district judge or judges in whose district the vacancy occurs shall fill the vacancy.

The legislature in 1941, enacted Chapter 47, Laws of 1941, which act is entitled:

"An Act to Provide for Reemployment of Elected Officers and Employees of the State of Montana and Any Political Subdivision Thereof, Who Shall Hereafter Serve in the Military Forces of the United States, Upon the Completion of Their Period of Training and Service; to Provide for 'Acting' Officers to Serve During Such Absence of Elected Officers; and Relating to Procedure to be Followed to Secure Such Reemployment."

The part of Chapter 47, Laws of 1941, pertinent to your inquiry is:

"Section 1. Any person inducted into the land or naval forces of the United States (including the aviation unit of either force) or any member of any reserve component of the land or naval forces, national guard, or retired personnel ordered into the active military service of the United States, who, in order to perform such training, service or active duty, leaves a position, other than a temporary position in the employ of the State of Montana or any political subdivision thereof, and who

"(1) Receives a certificate of completion of training or service from the proper authorities of the United States government, and

"(2) Is still qualified to perform the duties of such position: . . .
(b) If such position was that of an elected, executive or judicial officer of the State of Montana or any political subdivision thereof, such person shall be restored to such position, status and pay at any time during the term for which he was elected as provided herein." (Emphasis mine.)

It is to be observed Section 7, Chapter 47, Laws of 1941, provides in part, "the board of county commissioners, in the case of members of either house of the legislative assembly and county, township or district officers elected from such county, shall appoint as 'acting' officer to temporarily replace any elected officer, designated in paragraph (b) of Section 1, who shall enter military service in the manner set forth in Section 1 of this Act . . ." (Emphasis mine.)

Section 8 of Chapter 47 also provides in part:

"It is specifically declared that the absence of such officer, caused by such military service, shall not create a vacancy in the office to which he was elected." (Emphasis mine.)

The Supreme Court of Montana had this act under determination in the recent case of *Howard M. Gullickson v. Sam W. Mitchell, Secretary of State of the State of Montana*, decided June 6th, 1942, as Cause No. 8330. (126 Pac. (2nd) 1106.)

In discussing the act, the Court stated:

"It makes such absence result, not in a permanent vacancy of office but in something of the nature of a suspension of the officer, or a temporary vacancy of office . . .

"The legislative intent was not to establish a new class of officers for the state, from top to bottom, under the title of 'acting officers,' but merely to provide for the naming of officers 'to temporarily replace any elected officer' (Section 7.) . . . takes the place of the elected officer and supplants him, although temporarily and indefinitely. . . .

"Chapter 47, relating, as it does, to the temporary suspension of an officer rather than to a permanently vacated office, there is no valid objection to the appointment's continuing beyond an election; for, as pointed out in the Florida case, *supra*, the two classes of situations are entirely different."

It would appear, therefore, no vacancy exists within the meaning of Section 4 of Article XVI of the Constitution and Section 4454, Revised Codes of Montana, 1935, where an elected county officer is inducted into the land or naval forces of the United States, including the aviation unit of either force.

It is therefore my opinion that—where an elected county commissioner is inducted into the land or naval forces of the United States or is a member of any reserve component of the land or naval forces, national guard, or retired personnel ordered into active military service of the United States, and, in order to perform such service, leaves such elected office—no permanent vacancy occurs. In such event, the remaining members of the board of county commissioners shall appoint some person temporarily to replace such officer, under the terms and conditions contained in Chapter 47, Laws of 1941, as construed by the Supreme Court of Montana in the case of *Howard M. Gullickson v. Sam W. Mitchell, Secretary of State of the State of Montana*, 126 Pac. (2nd) 1106.

Sincerely yours,

HOWARD M. GULLICKSON
Attorney General