

Dear Mr. Hauge:

In your recent letter you advise me the county treasurer elect for Hill County has received his certificate of election, but has neglected and refused to file his official oath and bond, and you further advise that more than thirty (30) days have elapsed since his receiving said certificate of election. You inquire whether the present county treasurer holds over or whether there will be a vacancy after the first Monday in March of 1943. You have asked further if it is the duty and the right of the board of county commissioners of Hill County to fill such vacancy if a vacancy is found to exist.

Article XVI, Section 5, of the Montana Constitution, as amended by the vote of the people at the general election held November 8, 1938, provides in part:

"There shall be elected in each county the following county officers who shall possess the qualifications for suffrage prescribed by Section 2 of Article IX of this Constitution and such other qualifications as may be prescribed by law:

"One county clerk who shall be clerk of the board of county commissioners and ex-officio recorder; one sheriff; one treasurer who shall be collector of the taxes, provided, that the county treasurer shall not be eligible to his office for the succeeding term; one county superintendent of schools; one county surveyor; one assessor; one coroner; one public administrator. Persons elected to the different offices named in this section shall hold their respective offices for the term of four (4) years, and until their successors are elected and qualified. Vacancies in all county, township and precinct offices, except that of county commissioners, shall be filled by appointment by the board of county commissioners, and the appointee shall hold his office until the next general election . . ." (Emphasis mine.)

Section 511, Revised Codes of Montana, 1935, provides an office becomes vacant upon the happening of either of enumerated events before the expiration of the term of the incumbent. Subdivision 9 provides "his refusal or neglect to file his official oath or bond within the time prescribed by law."

**Opinion No. 8.**

**County Treasurer—Vacancy—Oath and Bond, Failure to file within prescribed time—County Commissioners—Appointing Power—Offices and Officers.**

Held: The failure of a county treasurer elect to qualify within the time prescribed creates a vacancy in the office which may be filled by the appointing power.

January 9, 1943.

Mr. Oscar Hauge  
County Attorney  
Hill County  
Havre, Montana

By Section 466, Revised Codes of Montana, 1935, a county treasurer is obliged to give an official bond. Section 468 provides every official bond must be filed in the proper office within the time prescribed for filing the oath, unless otherwise expressly provided by statute. As no express provision is made for filing of the official bond in the case of a county treasurer, it must be filed within thirty days after notice of election, or before the expiration of fifteen days from the commencement of the term of office, where no such notice has been given. (Section 432.) You have advised me a certificate of election was mailed to the county treasurer elect, and the county treasurer elect has failed and neglected to file an official oath and bond to date. I assume more than thirty days have elapsed since the certificate of election was mailed to the county treasurer elect.

Under the above facts, it is my opinion the failure of the treasurer elect to qualify within the time prescribed creates a vacancy in the office which may be filled by the appointing power.

In *State ex rel. Wallace v. Callow*, 78 Mont. 308, 254 Pac. 187, the Court had occasion to consider the problem now presented—whether a vacancy was created by failure of the officer elect to qualify within the time prescribed by law. The Court held it was clearly the intention of the legislature, in coupling this ground with other grounds enumerated in Section 511, to declare such refusal or neglect should have the same effect upon the right of the officer elect to hold the office as did the happening of those enumerated events which, in fact, “vacate” the office. The Court said, page 326, 327:

“As courts are required to construe statutory provisions in accordance with the legislative intent, it is held that the word ‘vacancy,’ as used in such statutes, is not to be considered in its literal sense, it is ordinarily given a more liberal figurative meaning conforming to the intention of the law-maker and the purpose to be accomplished . . . that ‘within the meaning’ of a statute identical with ours, such officer-elect is to be considered an ‘incumbent’ of the office to which he has been elected . . . and, while the statute is not self-executing, declaration of the proper authority, after the expiration of the

statutory period and before qualification by the officer-elect, creates a ‘vacancy’ in the office on the commencement of the term to which such officer is elected. . . .”

The Court said further, page 328:

“If any effect whatever is to be given to the provisions of section 511 above, in cases such as this—and it is our duty to give effect to every statute when possible to do so—it must be that thereunder the appointing power is given authority by the statute to declare the office forfeited for failure to file the oath and bond at any time after the expiration of the thirty-day period provided, which declaration is, in effect, a determination that a vacancy will occur in the office with the beginning of the term to which such officer was elected, and that such authority may make a prospective appointment to fill such vacancy when it does occur.”

It is to be noted the provisions of Section 511 are not self-executing. A declaration by the proper authority, after the expiration of the statutory period, creates a vacancy in the office on the commencement of the term to which such officer is elected.

The proper authority to declare the vacancy is the appointing power—in this case the board of county commissioners. (Article XVI, Section 5, of the Montana Constitution, as amended.)

The power of the board of county commissioners to fill the vacancy is provided for in Article XVI, Section 5 of the Constitution, as noted above.

Sincerely yours,

R. V. BOTTOMLY  
Attorney General