

Opinion No. 94**County Commissioners—Election of—
Vacancy of Office—Occurrence of
Vacancy—Resignation.**

Held: A notice of resignation from the office of County Commissioner to take effect as of January 1, 1953, does not create a vacancy in such office until that date. Further, no successor can be appointed until such vacancy occurs.

The successor to the present incumbent's office must therefore in conformity with Article XVI, Sec. 4 of the Montana Constitution and Section 16-903, Revised Codes of Montana, 1947, be appointed as of January 1,

1953, or thereafter by the judge or judges of the judicial district in which the vacancy occurs to fill the office until the next general election.

June 13, 1952.

Mr. Cecil N. Brown
County Attorney
Prairie County
Terry, Montana

Dear Mr. Brown:

You have requested my opinion as to the following statement of facts which I set out verbatim from your communication.

"One of our county commissioners, whose term will expire in 1954, has filed his resignation with the Clerk of the Board to take effect the 1st of January, 1953. The Board of County Commissioners has accepted his resignation.

The question has arisen as to whether there is a vacancy in the office of County Commissioner which may be filled at the election this fall. I question whether, since the vacancy does not occur until after the 1st of the year whether there is a vacancy until that time and of course if there is no vacancy, no one could file for the office."

Article XVI, Section 4, provides in part for the filling of a vacancy occurring on the board of county commissioners. The applicable portion reads:

"When a vacancy occurs in the board of county commissioners the judge or judges of the judicial district in which the vacancy occurs, shall appoint someone residing in such commissioner district where the vacancy occurs, to fill the office until the next general election when a commissioner shall be elected to fill the unexpired term."

It is apparent in the question presented that a vacancy does not exist at the present time on the board of county commissioners. The filing of the present incumbent's resignation to take effect as of January 1, 1953, serves as notice that a vacancy will occur but in fact the vacancy has not occurred and will not occur until January 1, 1953.

In the case of *LaBorde v. McGrath*, 116 Mont. 283, 292, 149 Pac. (2d) 913, 917, the Court in interpreting the word vacancy said:

"The word "vacancy" as applied to a public office, has no technical meaning, and it is not to be taken in a strict technical sense in every case. It may be said that an office is vacant when it is empty and without an incumbent who has a right to exercise its functions and take its fees or emoluments, even though the vacancy is not a corporal one. Accordingly, an office is not vacant so long as it is supplied in the manner provided by the Constitution or law with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it; and conversely, it is vacant in the eye of the law whenever it is unoccupied by a legally qualified incumbent who has a lawful right to continue therein until the happening of some future event." (Emphasis added) (42 Am. Jur., Sec. 131, p. 976).

"An office without an incumbent is vacant." (State ex rel. Patterson v. Lentz, 50 Mont. 322, 336, 146 Pac. 932, 935. See also State ex rel. Chenoweth v. Acton, 31 Mont. 37, 40, 77 Pac. 299, 300).

The above cited language of the *LaBorde* case was cited with approved in *State ex rel. Jardine, et al., v. Ford, Governor*, 120 Mont. 507, 513, 188 Pac. (2d) 422. In the *Jardine* case an original mandamus proceeding was brought directing the governor to appoint a district judge to fill a "vacancy" which was represented to exist in the office of the judge of the district court of the eighth judicial district by reason of the retirement of the incumbent. It appears that the judge notified the Governor of his intention to retire on a certain date. The Supreme Court of Montana in issuing the writ sought, said in 120 Mont. at page 514:

"As before stated Judge Ewing has voluntarily withdrawn and permanently removed himself from the office of district judge. He officially advised the governor to that effect stating that he was retiring from his office "as of midnight December 31st, 1947 * * * and that from and after my retirement a vacancy will

exist in the office of District Judge for said District." This was a considerate judgment of a learned judge in his own case. He declared that a vacancy would exist from and after midnight on the last day of the year 1947. We find that such a vacancy does now exist and that it is wholly immaterial whether the writing handed the governor announcing the judge's voluntary permanent withdrawal is termed "resignation" under subdivision 3 of section 511, Revised Codes, or a "retirement" under subdivision (ad) of section 2 of section 1, Chapter 297, Laws of 1947."

It is therefore my opinion that there is presently no vacancy existing on the board of county commissioners of Prairie County, by reason of the notice of resignation tendered by one of the members to take effect on January 1, 1953. Since the resignation will not take effect until January 1, 1953, a vacancy will not occur until such date, ergo the successor to the present incumbent's office must, in conformity with Article XVI, sec. 4 of the Montana Constitution and Section 16-903, Revised Codes of Montana, 1947, be appointed at such time by the judge or judges of the judicial district in which the vacancy occurs to fill the office until the next general election.

Very truly yours,
ARNOLD H. OLSEN
Attorney General