

Opinion No. 1

**Public Offices—Vacancies in Public
Offices — County Commissioners,
Appointments by — Elections—
County Attorney's Office,
Vacancy in.**

HELD: A vacancy in the office of County Attorney must be filled through appointment by the Board of County Commissioners in office at the time the vacancy exists in fact.

January 27, 1955.

Mr. James E. Spurgeon
Board of County Commissioners
Richland County
Sidney, Montana

Dear Mr. Spurgeon:

You have submitted the following for my consideration:

On November 5th a county attorney received a certificate of election advising him he had been re-elected to that office. He then wrote his board of county commissioners advising them he would not accept his new term. On December 8th the board of county commissioners adopted two resolutions, the first declared a vacancy to exist in the office of county attorney, effective January 3rd due to the failure of the newly elected county attorney to properly qualify within 30 days after being advised of his election; the second resolution appointed a different party to fill the office, the appointment to take effect January 3rd. On January 3rd a newly elected commissioner assumed his duties on the board.

The question presented for my opinion is:

When a vacancy occurs in the office of county attorney can the board of county commissioners make a "prospective appointment" to fill such vacancy, or must the appointment be filled by the board in office at the time the vacancy exists in fact?

A brief summarization of the applicable laws reveal that the clerk

of the Board of County Commissioners must issue certificates to the successful candidates when the official canvass of the votes has been completed by that board. Article VIII, Section 19 of the Montana Constitution provides that the County Attorney shall be elected for a two year term, and shall hold office until his successor is "elected and qualified". Ordinance II, Section 9, of the same Constitution states the term of office for County Attorney shall end upon the "first Monday in January". Section 6-301, R.C.M. 1947, as applicable, requires official bonds to be filed, "... within the time prescribed for filing the oath ...", and Section 59-415, R.C.M., 1947, as pertinent, states that the oath of office "... must be taken, subscribed, and filed within thirty days after the officer has notice of his election or appointment ..." Article VIII, Section 34, provides that vacancies in the office of County Attorney shall be filled by the Board of County Commissioners.

On December 8th, over thirty days having elapsed since the successful candidate had received his certificate of election, the Board of County Commissioners by resolution declared a vacancy to exist in that office effective January 3rd. Section 59-602, R.C.M., 1947, states that an office becomes vacant when the incumbent refuses or neglects to file his official oath or bond within the time prescribed, and Section 59-415, supra, sets the time at thirty days for the office of County Attorney.

In the case entitled *State ex rel. Wallace v. Callow*, 78 Mont. 308, 254 Pac. 187, our Supreme Court upheld the action of a district judge in declaring a vacancy in the office of county commissioner, which vacancy would commence at a future date.

Conceding that a vacancy existed in the office of County Attorney on January 3rd the further question remains, "Does the old or new Board of County Commissioners make the appointment to fill this vacancy?"

Only the Board of County Commissioners in office when the vacancy exists in fact can make such appointment. In the case entitled *State ex rel. Jones v. Foster*, 39

Mont. 583, 104 Pac. 860, our Supreme Court ruled that a vacancy in office occurred when; first, there was a failure to elect, and secondly, when the term covered by the office had expired. The court in holding that a vacancy occurred at the end of the term cited such California cases as *Adams v. Doyle*, 139 Cal. 678, 73 Pac. 582, and stated:

"Since a vacancy, within the meaning of the Constitution, occurred at the expiration of Foster's term, by reason of the tie vote and the consequent failure of the people to elect, the appointment of the relator was properly made, and he became, upon his qualification pursuant thereto, entitled to the office and salary and emoluments attached to it. The Constitution (section 34, Article VIII) vests in the board of county commissioners the power to appoint in such cases . . ."

In the case entitled *State ex rel. Dunne v. Smith*, 53 Mont. 341, 163 Pac. 784, a county assessor was re-elected to that office and died before the beginning of the new term, but after having qualified for the office. The Board of County Commissioners then made an appointment to expire at the beginning of the new term and shortly after the new term had commenced a new Board of County Commissioners made a second appointment. In ruling that the new Board could properly make such new appointment, thereby depriving the previous Board's appointee from further holding the office, the court adopted the language and ruling of the case entitled *People ex rel. Sweet v. Ward*, 107 Cal. 236, 40 Pac. 538, which said:

" . . . The power of the board . . . could properly be exercised only upon an existing vacancy. The board could by its action neither create a vacancy, nor by anticipation fill one, which was to arise in future during the term of its successor . . ." (emphasis supplied).

The Supreme Court of Montana permitted a "prospective appointment" to stand in *State ex rel. Wallace v. Callow*, *supra*, but noted that the appointing officer's term (dis-

trict judge) continued into the vacant officer's (county commissioner) new term, and thus the same person would have made the appointment. The general rule as stated in the *Dunne* case above was followed in an opinion issued by this office in 1952. Opinion No. 94, Volume 24, Official Opinions of the Attorney General, stated that:

"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.**" (emphasis supplied).

It is therefore my opinion that a vacancy in the office of County Attorney must be filled through appointment by the Board of County Commissioners in office at the time the vacancy exists, in fact.

Very truly yours,
ARNOLD H. OLSEN,
Attorney General.