

VOLUME NO. 36**Opinion No. 107**

COUNTY ATTORNEY—Vacancy, duration of appointment or election to fill; ELECTIONS—1977 general election for county officials; OFFICES & OFFICERS—County Attorney, vacancy; Article VIII, section 34, 1889 Montana Constitution; Article VI, section VI, 1972 Montana Constitution; Sections 16-2406, 16-5115.13, R.C.M. 1947.

HELD:

- 1. Your appointment as county attorney is valid until the next general election pursuant to section 16-2406 R.C.M. 1947.**
- 2. The next general election for county officials will be held in April of 1977.**
- 3. The person who is elected in April of 1977 to fill the vacancy in the office of county attorney will be elected for the remainder of Mr. Olson's original unexpired term.**

November 17, 1976

Mr. Donald E. White
County Attorney
County of Gallatin
P.O. Box 1049
Bozeman, Montana 59715

Dear Mr. White:

You recently requested my opinion on the following questions:

1. For what duration of time is your appointment as County Attorney valid?
2. When will the next general election be held in Gallatin County?
3. If elected as County Attorney on April 5, 1977, what would be the duration of the elective office?

In regard to these questions, you have provided the following factual situation:

Thomas A. Olson was elected to the position of County Attorney for Gallatin County in the general election in November, 1974. Subsequent to his leaving office to accept the position of United States District Attorney for the State of Montana, in January, 1976, I (Mr. White) was appointed and have served as Gallatin County Attorney. Mr. Olson's term as County Attorney would have ended in January, 1979.

Your first question concerns the duration of your appointment as county attorney. Section 16-2406 R.C.M. 1947 designates the office of county attorney as an elected county office, and goes on to state:

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 if elective....

I concur, therefore, in your opinion that an appointed county attorney holds office until the next general election.

Your second question concerns when the next general election will be held in Gallatin County. This specific question was answered in 36 **Opinions of the Attorney General**, No. 66, which held:

The next general election for county officials will be held in 1977, and a county commissioner appointed to office until the next general election will hold office until the 1977 election.

This opinion construes both sections 16-2406 and 16-5115.13 R.C.M. 1947 and the holding is equally applicable to appointed county attorneys. I have enclosed a copy of this opinion for your information.

As the election for the vacant position of county attorney will be held in April of 1977, your third question is basically how long will the person elected

hold office. In answering this question the Montana Supreme Court has traditionally held that the person elected to fill the vacancy would hold office until the expiration of the term of the person originally elected. In this instance Mr. Olson's original term expires in January of 1979. This position is supported by the following Montana cases: **Bailey v. Knight**, 118 Mont. 594, 168 P.2d 843 (1946) **Rowe v. Kehoe**, 49 Mont. 582, 144 Pac. 162 (1914); **State ex rel. McGowan v. Sedgwick**, 46 Mont. 187, 127 Pac. 94 (1912).

The holdings in these cases were primarily based on section 34, Article VIII of the 1889 Montana Constitution which read in part:

A person elected to fill a vacancy shall hold office until the expiration of the term for which the person he succeeds was elected.

This section, which dealt with county officers, was deleted from the 1972 Montana Constitution and has not been enacted in statutory form by any subsequent legislature. It is interesting to note, however, that section 6, Article VI of the 1972 Montana Constitution, which pertains to state executive officers, contains a sentence identical in substance to the above cited sentence from section 34, Article VIII. This indicates that the framers of the 1972 Constitution approved the general policy of section 34, Article VIII, and the cases which construed it.

It is evident that at the present time Montana has no statutory or Constitutional authority specifying the length of time a person who is elected to fill a vacancy in a county office must serve. Fortunately, courts in other jurisdictions have addressed this particular problem.

In **State v. Brooks**, 14 Wyo. 393, 84 Pac. 488, 492 (1902), the Wyoming Supreme Court stated the following rule, quoting A. & E. Enc. Law:

Where the time of the commencement and termination of the term of an office as well as its duration, are definitely fixed by constitutional or statutory enactment, and provision is made for filling vacancies therein by appointment or election, but without any provision as to the duration of authority of a person so appointed or elected, such person is entitled to serve for the remainder of the unexpired term.

In **State v. Seitz**, 161 Ohio 269, 119 N.E.2d 47 (1954) the court was faced with a similar situation and relied on the above quoted rule. In Montana the term and duration of the office of county attorney is statutorily fixed by section 16-2406, *supra*. As noted earlier, there is no longer any law in Montana specifying the duration in office of a person elected to fill a vacancy in a county office. Montana, therefore, falls within the scope of the rule and the person elected will serve for the remainder of the unexpired term. Adoption of this rule is supported by the traditional view of this area in Montana, and also the adoption of this rule in the 1972 Montana Constitution as it applies to state officers.

In addition this view is supported by a logical analysis of the problem. Mr. Olson was elected in November 1974. The term for which he was elected was from January of 1975 until January of 1979. When he resigned the term of office

remained the same, although it was vacant. You were appointed to fill the vacant term until the next general election pursuant to section 16-2406, *supra*. At this election a portion of the original term remains. It is therefore only logical that the election will be for the remainder of the original term, rather than for a new four year term.

THEREFORE, IT IS MY OPINION:

1. Your appointment as county attorney is valid until the next general election pursuant to section 16-2406 R.C.M. 1947.
2. The next general election for county officials will be held in April of 1977.
3. The person who is elected in April of 1977 to fill the vacancy in the office of county attorney will be elected for the remainder of Mr. Olson's original unexpired term.

Very truly yours,

ROBERT L. WOODAHL
Attorney General