

1966 Ore. AG LEXIS 13

Office of the Attorney General of the State of Oregon

32 Op. Atty Gen. Ore. 346

OR Attorney General Opinions

Reporter

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No. 6074; INFORMAL OPINION

January 28, 1966

Core Terms

elect, successor, incumbent, was, candidate, tie vote, vacancy, has, fill

Headnotes

[*1]

Since irrigation districts law requires annual election for directors, incumbent divisional director holding over as result of tie vote in divisional election for three-year term holds only until next annual election, not for a three-year term, nor pending holding of special election.

Request By: Honorable Gary W. Hermann

District Attorney, Josephine County

Opinion By: ROBERT Y. THORNTON, Attorney General; James P. Cronan, Jr., Assistant

Opinion

[**346] You state that one of the five divisional directors of the Grants Pass Irrigation District was the incumbent running in the November 1964 election for reelection to a three-year term, beginning in January 1965, which election resulted in a tie vote and that the incumbent has remained in office. You call our attention to Opinions of the Attorney General, 1948-1950, pp. 347-348, and inquire whether the tie vote requires a special election "to fill the unexpired term" or whether the incumbent may hold office until his divisional office is next regularly voted on which will, of course, be in November 1967, for a term beginning in January 1968.

Opinions of the Attorney General, 1948-1950, pp. 347-348, deals, as does your inquiry, with the irrigation districts law [*2] and holds that unless the applicable law provides for the determination of the winner (such as by lot), a tie vote represents no choice and therefore no election so that the incumbent holds over "until the next regular election when a director may be elected to serve out the unexpired term." You [**347] point out, however, that

the opinion is concerned with a district-wide (i.e., at large) election while your problem arose in a divisional election.

Opinions of the Attorney General, 1950-1952, pp. 13-15, dealt with a tie vote result in a zonal election for a director of a non-high school district. While the non-high school districts law has been repealed, the opinion is nevertheless material to your inquiry. It presents this question:

"1. At the annual school election on June 19, 1950, there were 2 candidates nominated from Zone 5 of the Non-high School District as candidates for Board member to represent that zone. A canvass of the ballots cast indicates that both nominees received the same number of votes. One of these nominees has been the incumbent of said office.

"How is this tie vote to be settled between the two candidates?"

The opinion answered the question as follows: [*3]

"* * * in 18 Am. Jur., 'Elections,' § 249, it is said:

"Where rival candidates for an office receive an equal number of votes, neither is elected. The office becomes vacant and may be filled by appointment where power exists to appoint an incumbent to the office in case of its vacancy; or, *where the incumbent of the office is entitled to hold the same until his successor is elected, he continues in office until it is determined who is entitled thereto.* * * *

* * *

"Accordingly, *in the absence of statutory provision, it is our opinion that there is no method by which the tie vote can be settled between the two candidates. The general rule is that on the expiration of an officer's term he holds over until his successor is chosen and qualifies:* 42 Am. Jur., § 139, p. 980. * * *" (Emphasis supplied)

With the above principle in mind we now turn to [ORS 545.014](#) as it applies to your problem. In so far as material this section reads:

"(1) At the election for the organization of an irrigation district *one director, who is a resident of Oregon and a bona fide owner of land situated in the division, shall be elected from each division into [*4] which the district has been divided by the county court, or the directors shall be elected from the district at large if no division has been made.* Terms of the directors so elected shall expire in one, two, and three years, respectively, from the first Tuesday in January next succeeding their election. Their respective terms shall be decided by lot.

"(2) An election shall be held *in each district on the second Tuesday in November of each year * * * at which one director shall be elected.* The person receiving the highest number of votes for any office to be filled shall be elected, and shall hold office from the first Tuesday in January next after the election *for three years and until his successor is elected and qualified.*" (Emphasis supplied)

[State ex rel. Smith v. Tazwell, \(1941\) 166 Or. 349, 111 P. \(2d\) 1021](#), involved an incumbent judge who was defeated for reelection and whose opponent died before qualifying. Supposing a vacancy thereby to have been created, the Governor appointed a successor to the deceased winner. Relying on § 1, Article XV, Oregon Constitution, reading

"All officers, except members of the Legislative Assembly, [*5] shall hold their offices until their successors are elected, and qualified"

the court held that there was no vacancy to be filled by the Governor because the winner died before he could qualify. However, the court rejected a contention of the defeated candidate that he might hold over for a full six-year term in these words:

"The contention that, if there is no vacancy in the office in question here, Judge Tazwell will hold for a new term of six years is wholly unfounded. He will hold until his successor is elected and qualified and this will continue only until after the next election." ([166 Or. at 361](#))

In holding that there was no vacancy, the court relied on and quoted from [State ex rel. Everding v. Simon, \(1891\) 20 Or. 365, 26 P. 170](#), and [Eddy v. Kincaid, \(1895\) 28 Or. 537, 41 P. 156](#). Everding involved a legislative failure to fix a term of office. The court held that under § 1, Article XV, Oregon Constitution, the incumbent might hold over. It also explained the reason for the holdover ([20 Or. at 378](#)):

"The reason [*6] of this rule is that public policy requires that the duties of the office be performed, and it is better that the incumbent should continue in the office and in the performance of its duties than that an interregnum should occur. It conserves the public interests by preserving the methods and instrumentalities by which alone public business can be transacted; while the opposite rule, when pushed to its consequences might result in the suspension of business in many of the departments of the public service."

Eddy v. Kincaid involved a legislative failure to choose a successor and said ([28 Or. at 560](#)):

"It is next contended that the failure of the legislature of eighteen hundred and ninety-five to elect plaintiff's successor operated to create a vacancy in the office, and that plaintiff was not entitled to hold over; but it seems to us this question is settled by the express declaration of the constitution of this state and of the law under which he was elected. Section 1 of article XV of the constitution provides that 'All officers, except members of the legislative assembly, shall hold their office until their successors are elected and [*7] qualified,' and the act creating the board of railroad commissioners provides [**348] that such officers 'shall hold their offices for and during the term of two years and until their successors are elected and qualified as in this act provided.' *It is thus declared, both in the constitution and the act itself, that the incumbent of the office shall hold until his successor is elected and qualified.* The legislature having failed to elect plaintiff's successor, it necessarily follows, if we are to give force and effect to the plain and express provisions of the constitution and the law, that he is entitled to hold the office and to receive the emoluments until such time as his successor shall be duly elected. * * *" (Emphasis supplied)

[ORS 545.014 \(2\)](#) above quoted like the act with which Eddy was concerned complies with § 1, Article XV, Oregon Constitution, containing as it does the "until his successor is elected and qualified" language. [ORS 545.014 \(2\)](#) also requires "An election * * * in each district * * * in November of each year * * *." Giving the same effect to this language as the court gave [*8] to § 1, Article XV, in Tazwell, in rejecting the six-year holdover contention (above quoted), you are advised that the office of the holdover divisional director about whom you inquire was required to be filled at the November 1965 election, not in 1967 nor by a special election, possibilities you suggest. There is no provision for a special election in the irrigation districts law and unless the applicable law so provides no election may be held. [State ex rel. Everding v. Simon, \(1891\) 20 Or. 365, 371, 26 P. 170](#); [Howell v. Bain, \(1945\) 176 Or. 187, 191, 156 P. \(2d\) 576](#); [School District v. Gleason, \(1946\) 178 Or. 577, 579, 168 P. \(2d\) 347](#).

You have advised that a November 1965 election for the division office in question was in fact held but that the holdover incumbent did not file and an uncontested candidate was elected. From what has already been said it follows that he is entitled to the office upon proper qualification.

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