



**THE ATTORNEY GENERAL
OF TEXAS**

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See H 220

December 7, 1970

Honorable Ted Butler
Criminal District Attorney
Bexar County Courthouse
San Antonio, Texas 78204

Opinion No. M- 742

Re: Who fills the office of Justice of the Peace between the date of certification of the winner at the general election on November 3, 1970, and January 1, 1971, where the office was held by one appointed under Article 2355, Vernon's Civil Statutes, and related questions.

Dear Mr. Butler:

In your recent letter to this office you stated that on October 1, 1969, Charles Bond was appointed by the Commissioners Court to the office of Justice of the Peace for Place Two of Precinct One of Bexar County. The appointment was to fill a vacancy in such office created by the appointment of the then Justice of the Peace, John Benavides, to the office of Judge of the 187th District Court.

At the primary election held on May 2, 1970, Mike Hernandez defeated Charles Bond for the nomination as the candidate of the Democratic Party for the office of Justice of the Peace, Place Two, Precinct One, and Mr. Hernandez was unopposed for this office at the general election on November 3, 1970.

Based upon these facts, you have requested the opinion of this office upon the following questions:

"1. Who is the Justice of the Peace for Precinct One, Place Two for Bexar County, Texas, during the 'interim' period between: 1) the certification of the official canvass of the returns of the General Elections which were held on Tuesday, November 3, 1970; and 2) the swearing and qualifying of the winner of the 4 year term on January 1, 1971?

"2. Is Mr. Mike Hernandez to take the oath

and be qualified upon receipt of his certification of election, or must he wait until January 1, 1971 to take office?

"3. If your answer to number two is in the negative, is the Commissioners Court of Bexar County entitled to appoint another to serve as Justice of the Peace Precinct One, Place Two, to hold office from the time of certification of the results of the general election until January 1, 1971?

"4. If your answer to number two above is in the negative, does the Commissioners Court of Bexar County have a duty to appoint a Justice of the Peace to hold office from receipt of certification of the general election until January 1, 1971?"

Section 18 of Article V of the Texas Constitution states that each Justice of the Peace ". . . shall hold his office for four years and until his successor shall be elected and qualified;"

Section 65 of Article XVI of the Texas Constitution establishes a system of staggered terms for various district, county, and precinct officers and pursuant to this provision the person elected to the office of Justice of the Peace, Place Two, Precinct One, Bexar County, Texas, at the 1966 election and the 1970 election were elected for a term of four years.

The beginning date of the term of office of Justices of the Peace and the date upon which a person elected to that office may qualify and assume office are fixed by Article 17, Vernon's Civil Statutes, which reads as follows:

"The regular terms of office for all elective state, district, county and precinct offices of the State of Texas, excepting the offices of Governor, Lieutenant Governor, State Senator, and State Representative, shall begin on the first day of January next following the general election at which said respective offices are regularly filled, and those who are elected to regular terms shall qualify and assume the duties of their respective offices on the first day of January following their election, or as soon thereafter as possible. Persons

elected to unexpired terms in the various state, district, county and precinct offices shall be entitled to qualify and assume the duties of their respective offices immediately upon receiving a certificate of election, which certificate shall be issued immediately following the official canvass of the results of the election at which they were elected, and they shall take office as soon thereafter as possible."

Based upon the foregoing provisions of the Constitution and statute, John Benavides was elected to and was serving a term of four years which began on January 1, 1967, and extended through December 31, 1970. At the November 3, 1970, election Mike Hernandez was elected to the same office for a term of four years beginning on January 1, 1971, and ending on December 31, 1974.

It is true that under the provisions of Article 8.36, Texas Election Code, Mr. Hernandez was entitled to a certificate of election to the office of Justice of the Peace, Place Two, Precinct One, immediately after the canvass of the election results on November 9, 1970. However, this does not entitle Mr. Hernandez to qualify and enter that office prior to January 1, 1971. He was elected to a four-year term which begins on that date; he was not elected to any portion of the term which ends on December 31, 1970. Article 17, Vernon's Civil Statutes, fixes the beginning date of his term of office and time for qualifying as January 1, 1971. He has no right to the office prior to that time. Ex parte Sanders, 147 Tex. 248, 215 S.W.2d 325 (1948); Anderson v. Parsley, 37 S.W.2d 358 (Tex.Civ.App. 1931, error ref.). This is made clear by the fact that Article 17 also provides for a person elected to an unexpired term to qualify and assume office immediately upon receiving a certificate of election.

When John Benavides qualified for the office of District Judge he vacated the office of Justice of the Peace. Biencourt v. Parker, 27 Tex. 562 (1864); State v. Brinkerhoff, 66 Tex. 45, 17 S.W. 109 (1886). The power to fill vacancies in the office of Justice of the Peace is conferred upon the commissioners court by Section 28 of Article V of the Texas Constitution in the following language:

"Sec. 28. Vacancies In Offices Of Judges Of Superior Courts To Be Filled By The Governor.

"Vacancies in the office of judges of the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals and the District Courts shall be filled by the Governor until the next succeeding General Election; and vacancies in the offices of County Judge and Justices of the Peace shall be filled by the Commissioners Court until the next succeeding General Election."
(Emphasis added.)

In furtherance of that authority the Legislature has enacted Article 2355, Vernon's Civil Statutes, which reads:

"The Court shall have power to fill vacancies in the office of: County Judge, County Clerk, Sheriff, County Attorney, County Treasurer, County Surveyor, County Hide Inspector, Assessor of Taxes, Collector of Taxes, Justices of the Peace, Constables, and County Superintendent of Public Instruction. Such vacancies shall be filled by a majority vote of the members of said Court, present and voting, and the person chosen shall hold office until the next general election."
(Emphasis added.)

Upon performing the acts necessary to qualify for Justice of the Peace and assuming the duties of that office, Charles Bond became a de jure officer. State v. Jordan, 28 S.W.2d 921 (Tex.Civ. App. 1930, error dismissed); see Hamilton v. State, 51 S.W. 217 (Tex.Crim. 1899). If the language of Section 28 of Article V, Texas Constitution, and Article 2355, Vernon's Civil Statutes, be taken literally, Judge Bond's tenure in such office would apparently end with the general election held on November 3, 1970. However, for the reasons which follow, we are of the opinion that Judge Bond is entitled to hold his office through December 31, 1970, and thereafter until such time as Mr. Hernandez has qualified for that office.

The primary purpose and intent of those provisions of Section 28 of Article V and Article 2355, which specify that persons appointed to vacancies in the offices named therein shall serve until the next general election, was not to vacate the office upon that date but rather to establish the policy that the people shall fill the office by election at the earliest opportunity. This becomes clear when we consider the recent

history of amendments to this constitutional provision. Prior to 1958, Section 28 of Article V provided that "vacancies in the office of County Judge and justices of the peace shall be filled by the Commissioners Court until the next general election for such offices." When Sections 64 and 65 of Article XVI of the Texas Constitution were added in 1954, the terms of office of certain officers, including County Judge and Justices of the Peace, were changed from two to four years effective with the 1954 general election. Thereafter it was held that where a Justice of the Peace who was elected to a four-year term at the 1954 general election resigned in 1955, the person appointed to fill the vacancy was entitled to hold the office until the 1958 general election and that the office was not subject to being filled by election in 1956. Rawlins v. Drake, 291 S.W.2d 349 (Tex.Civ.App. 1956, no writ). Subsequent to this holding, Section 28 of Article V was amended to its present form.

In facilitating the return of those offices that have been filled by appointment to the choice of the electorate, the Legislature has provided for the nomination for and election to unexpired terms of office which extend beyond the first day of January following the election. Art. 13.12a, Texas Election Code. It has further specified that persons elected to unexpired terms shall be entitled to qualify and assume the duties of office immediately upon receiving a certificate of election. Art. 17, Vernon's Civil Statutes. The Legislature has not provided for the nomination for and election to unexpired terms which do not extend beyond the first day of January following the election. There being no provision for such an election, none can be held, for there is no inherent right to hold an election, and one held without authority is void. Countz v. Mitchell, 120 Tex. 324, 38 S.W.2d 770 (1931); Trustees of Ind. School Dist. v. Elbon, 223 S.W. 1039 (Tex.Civ.App. 1920, no writ). The wisdom of this omission becomes apparent when we consider the very short period to which one would be elected and the fact that there would be two changes in the office within a two-month period. While these same reasons speak against the proposition that the appointing power should again come into play during this interim, that proposition is foreclosed by the fact that other provisions of our Constitution and statutes make provision for the status of the office and its incumbent appointee during the period in question.

Section 17 of Article XVI of the Texas Constitution provides that "All officers within this State shall continue to perform the duties of their offices until their successors shall

be duly qualified." Acting pursuant to this provision the Legislature has provided in Article 18 of Vernon's Civil Statutes that "Each officer, whether elected or appointed under the laws of this State, . . . shall hold his office for the term provided by law and until his successor is elected or appointed and qualifies" The effect of these provisions was explained in State v. Jordan, 28 S.W.2d 921 (Tex.Civ.App. 1930, error dismissed at pages 923-924:

" . . . The practical effect of a constitutional provision directing that public officials should hold over until their successors are qualified is that a public office does not become vacant, in the sense that there is no incumbent to fill it, except in the case of death." (Emphasis added.)

We think this applies with equal force whether the incumbent be elected or appointed.

In Ex parte Sanders, 147 Tex. 248, 215 S.W.2d 325 (1948) it was contended that the tenure of office of a District Judge appointed to fill a vacancy terminated on the day of the general election and that a contempt order entered by him thereafter was void because he was no longer the judge of that court. In rejecting this contention the court held that the holdover provisions of Section 17 of Article XVI must be construed with Section 28 of Article V in order to preserve the orderly process of government and that one appointed as District Judge under Section 28 of Article V was an officer within this State who is continued in office by Section 17 of Article XVI until his successor shall be duly qualified. Our Court of Criminal Appeals reached the same result in Hamilton v. State, 51 S.W. 217 (Tex.Crim. 1899) where the authority and actions of an appointed District Judge were challenged as being void where he continued to exercise the duties of that office in the succeeding term when no one was elected to that term of office at the preceding general election. In our opinion these holdings apply to the situation presented by your request.

Accordingly, your questions are answered as follows:

First, the incumbent appointee Charles Bond is the Justice of the Peace of Precinct One, Place Two, of Bexar County for the period of time between the general election held on November 3, 1970 and January 1, 1971.

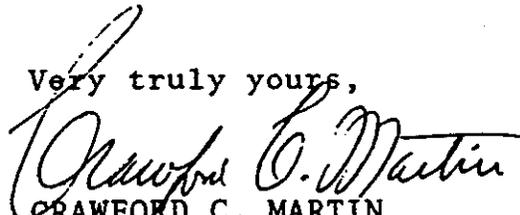
Second, having been elected to a term of office which begins upon January 1, 1971, Mike Hernandez cannot qualify for office prior to that time even though he has received a certificate of election.

Third and fourth, in the absence of the death or resignation of Judge Bond prior to January 1, 1971, the Commissioners Court of Bexar County has neither the power nor the duty to appoint anyone to the office of Justice of the Peace of Precinct One, Place Two, of Bexar County, because there will be no vacancy in that office.

S U M M A R Y

Where a vacancy in the office of Justice of the Peace occurred during the term which runs through December 31, 1970, the person appointed to that office pursuant to Section 28 of Article V, Texas Constitution, on October 1, 1969, is entitled, by virtue of Section 17 of Article XVI, Texas Constitution, to hold his office during the period between the general election held on November 3, 1970, and January 1, 1971. The Commissioners Court has no power or duty to appoint anyone to that office during such period because there is no vacancy in the office. The person elected to such office at the general election November 3, 1970, for the term beginning on January 1, 1971, cannot qualify and enter into office prior to January 1, 1971, even though he has a certificate of election. Art. 17, Vernon's Civil Statutes.

Very truly yours,


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and by W. O. Shultz
Assistant Attorney General

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