

2017
SHORT ANSWERS TO
COMMON QUESTIONS

TEXAS ASSOCIATION OF COUNTIES

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VACANCIES

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The  symbol indicates sections that have been updated since the previous publication.

Introduction

Please remember that the circumstances creating a vacancy are highly fact-specific. The information below is intended as a broad guide to vacancy issues. If there is a question as to whether a vacancy exists in a particular office, you may wish to contact for guidance either the secretary of state, the attorney general, or this office. The attorney general has compiled a useful list of holdover and resign-to-run opinions in the cumulative subject index section of its website.

CONSTITUTIONAL PROVISIONS

1. What is the definition of a “vacancy”?

A vacancy is created in an elective public office when prior to the expiration of the current term of office, the officer dies, resigns, abandons office, is judicially removed, or accepts another office that lawfully cannot be simultaneously held with the current office. For certain county and district offices, an automatic resignation occurs when the officer announces or becomes a candidate for a different office while more than a year and 30 days remains on the current term. Tex. Elec. Code, Chapter 201; Tex. Const. Art. XVI, §65.

2. What is the definition of a “holdover officer”?

To maintain the functioning of government, Article XVI, Section 17 of the Texas Constitution provides that an elected public official continues to perform the duties of office (or “hold over”) until his or her successor takes office. While a holdover, the resigned officer retains all the duties and responsibilities of office and continues to receive the same salary and benefits.

3. What is “resign to run”?

For most county offices, Article XVI, §65 of the Texas Constitution provides that it is an automatic resignation for an officeholder to announce candidacy or to file for a public office other than the one currently held if more than a year and 30 days remain in the term.

For example, during the primary filing season, a county attorney makes a last minute decision to run for district attorney. He goes to the county chair’s office and submits an application for a place on the primary ballot. If there is more than a year and 30 days to go in the county attorney’s term at the moment the application is filed, the county attorney has just automatically resigned his office. Note that the county attorney cannot cure the automatic resignation by withdrawing his application, nor would the fact that the county attorney is later found to be ineligible for the primary ballot have an impact on the resignation. Tex. Att’y Gen LO-94-059 (1994); Tex. Att’y Gen. Op. JM-132 (1984).

4. What does it mean to “announce” candidacy for purposes of “resign to run”?

According to the attorney general, a public officer may trigger an automatic resignation by making “certain and public” announcements on candidacy such that a reasonable person would conclude the officer without qualification intends to be a candidate for an office other than the one currently held. Tex. Att’y Gen. Op. No. GA-210 (2004); Tex. Att’y Gen. LO-95-071 (1995).

For example, a county commissioner with more than a year and 30 days on her term tells a friend on the phone that she is thinking about running for an unnamed different office. The friend then tells a third party about the conversation. This would not constitute an announcement. On the other hand, the same commissioner would have made a certain and public announcement if, at a commissioners court meeting, she told the audience unequivocally that she was going to be a candidate for district attorney.

5. If an elected officer enters active military duty, does he or she vacate office?

Not necessarily. In 2003, the Texas Constitution was amended to create a procedure designed for public elected or appointed officers who enter active military duty in the armed forces of the United States as a result of being called up, drafted, or activated. Tex. Const. Article XVI, Section 72.

Here “armed forces of the United States” is defined as the United States Army, Navy, Air Force, Marine Corps, Coast Guard, any reserve or auxiliary component of those services, or the National Guard.

If the officer will be on active duty for longer than 30 days, the authority that would normally appoint to fill a vacancy in that office may appoint a “temporary acting officer”.

The officer who is going on active duty may recommend the name of a person to temporarily fill his or her office. The temporary acting officer shall be appointed to begin service on the date specified in writing by the leaving officer as the date he or she will enter active military service.

The temporary acting officer has all the powers and duties of the office while serving and is entitled to the same compensation “payable in the same manner and from the same source” as the replaced officer. Whether the replaced officer remains entitled to his or her compensation while the temporary acting officer is serving is an issue that has not yet been addressed by attorney general opinion. The temporary acting officer serves for the term of the active military service of the replaced officer or the term of office of the replaced officer, whichever is shorter.

HOLDOVER

- 1. An elected county official has accepted appointment to another public office. After taking the oath of office for the new position, does the officer remain in the old office as a holdover until a successor qualifies, in effect holding both offices at the same time?**

Likely not. If two offices may not lawfully be held by the same person, the holdover provision does not apply. *Pruitt v. Glen Rose Independent School District No. 1*, 84 S.W. 2d 1004, 1007 (Tex. 1935); Tex. Att’y Gen. Op. No. M-627 (1970).

If a justice of the peace were appointed to fill a vacancy on the commissioners court, for example, the justice would not holdover after joining the court. The attorney general has determined the two offices to be incompatible in part because of the commissioners court's budgetary authority over justices of the peace. Tex. Att'y Gen Op. No. V-1192 (1951). Because the two offices are incompatible, the appointed commissioner would not retain holdover status as justice of the peace after taking the oath of office to join the commissioners court.

2. If a county officer is removed from office, is the officer nevertheless a holdover until his or her successor is qualified?

It appears the answer is no. A 2003 case, *Willmann v. City of San Antonio*, 123 S.W. 3d 469 (Tex. App.-San Antonio 2003) states the constitutional right to holdover does not reside in a person who has been removed from office.

One example of this principle stems from a municipal recall election at which a majority of the city council was recalled. Citing *Willmann*, the attorney general determined the recalled council members did not holdover until their successors were elected at a following election because to allow otherwise would thwart the will of the voters. Tex. Att'y Gen. Op. No. GA-175 (2004).

Another situation would arise if a county treasurer were convicted of a misdemeanor involving official misconduct and removed from office by operation of Section 87.031, Local Government Code. The court includes an order in the judgment removing the treasurer, and the treasurer does not appeal. In this scenario, per *Willmann*, the county treasurer is not a holdover and is no longer entitled to salary and other benefits of the office.

3. Does an elected county officer who has triggered an automatic resignation under Article XVI, Section 65 of the Texas Constitution by announcing or filing for a different office with more than a year and 30 days remaining in the term remain in office as a holdover?

Yes. An elected officer who resigns under Tex. Const. art. XVI, §65 remains in office as a holdover until a successor qualifies for the office. Tex. Att'y Gen. Op. No. DM-377(1996); *Bianchi v. State*, 444 S.W. 3d 231 (Tex. App.—Corpus Christi 2014).

4. Is a holdover who declines to discharge the duties of office entitled to continue to receive his or her salary and benefits?

As noted above, vacancy situations are very fact specific. In a recent opinion, the attorney general states that a holdover's right to salary and other benefits are subject to Article III, Section 52(a) of the Texas Constitution, which prohibits political subdivisions from the gratuitous expenditure of public funds, and cites a Texas Supreme Court created three-part test¹ to determine whether an expenditure qualifies under the constitutional provision. Tex. Att'y Gen. Op. No. KP-0007(2015). The determination of whether payment of the holdover's salary and benefits achieves a public purpose under the three-part test is left to the commissioners court, subject to judicial review.

RESIGNATION

1. **Must a resignation be in writing?**

Yes. To be effective, the resignation must be signed, in writing, and delivered to the appropriate authority for acting on the resignation. Tex. Elec. Code §201.001.

2. **May a resignation of a county office be set to take effect at a future date?**

Yes. It is important to note the date a resignation is effective is not necessarily the same as the date the vacancy is effective. A resignation letter may indicate the vacancy will occur at a future date. For purposes of filling the vacancy, the authority with whom the resignation was filed may appoint upon receipt and acceptance of the resignation and the newly appointed officer may take office on or after the designated resignation date. Tex. Elec. Code §201.023.

For example, in April the county clerk submits a signed letter to the commissioners court indicating she will leave office effective June 1 of that year. The commissioners may make an appointment once the vacancy is effective (see Question 10), but the

¹ "Article III, section 52(a) prohibits a political subdivision's gratuitous grant of public money or a thing of value in aid of, or to any individual. TEX. CONST. art. III, § 52(a); see Tex. Mun. League Intergov 'tl Risk Pool v. Tex. Workers' Comp. Comm'n, 74 S.W.3d 377, 383 (Tex. 2002) (stating that article III, section 52(a) prohibits the gratuitous expenditure of public funds). The Texas Supreme Court has enumerated a three-part test by which to determine whether a grant of money or thing of value is prohibited as gratuitous. Id. at 384 (stating that an entity making a public expenditure must: (1) ensure the expenditure's "predominant purpose is to accomplish a public purpose, not to benefit private parties; (2) retain public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment; and (3) ensure that the political subdivision receives a return benefit")." Tex. Att'y Gen. Op. No. KP-0007 (2015), pg. 2.

newly appointed officer may not take office until June 1, when the clerk actually leaves office.

3. Is it possible to withdraw a resignation?

A resignation may be withdrawn *before* it becomes effective. A resignation may not be withdrawn after it becomes effective (see Question 10). Tex. Att’y Gen. Op. No. DM-406 (1996).

An example of a timely withdrawal: a county attorney expects to move out of the county for a new job and on a Wednesday submits a signed letter of resignation with the county judge. The commissioners court is scheduled to meet the following Monday. On Thursday, the county attorney learns he actually did not get the job. Friday, the county attorney hands the county judge a letter rescinding his resignation. The commissioners court has not yet met to formally accept the resignation, nor have eight days passed since the first letter was submitted to the county judge, so the resignation is not yet effective. This would be a timely withdrawal.

On the other hand, if the county attorney only discovered he did not get the new job on Tuesday after the commissioners court met to accept his resignation, it would be too late. Once accepted by the court, the resignation is effective and may not be withdrawn.

APPOINTMENTS

1. Who/what entity has authority to appoint a person to fill a vacancy in a particular county office?

The **commissioners court** may fill vacancies in the following offices: county judge; county clerk; district and county clerk; sheriff; county attorney; county treasurer; county surveyor; county tax assessor-collector; justice of the peace; and constable. Tex. Loc. Gov’t Code §87.041. The **county judge** may fill county commissioner vacancies. Tex. Loc. Gov’t Code §87.042. A district clerk vacancy may be filled by the district judge or by agreement of the **district judges** in a county with two or more district courts. Tex. Gov’t Code §51.301. A vacancy in the office of county auditor is filled by the district judge (or judges in a county with two or more district judges). Tex. Loc. Gov’t Code §84.002.



2. When is it appropriate for the appointing entity to appoint a person to fill a vacancy?

The appointment may be made once the vacancy is effective. For a resigning officer, a vacancy is effective on the date a written and signed letter of resignation is accepted by the commissioners court (or the county judge for a commissioner resignation) or on the eighth day after the date of the letter's receipt, whichever is earlier. Tex. Elec. Code §201.023. If the officer dies, the vacancy is effective on the date of death. Tex. Elec. Code §201.022. If the officer is removed from office or declared ineligible by a court or other tribunal, the vacancy is effective on the final judgment date. Tex. Elec. Code §§201.024, 201.026. If the officer accepts another office that may not be held simultaneously, a vacancy in the first office is effective on the date the person qualifies for the second office. Tex. Elec. Code §201.025. (See Question 7). If the officer has automatically resigned under the constitutional "resign to run" provision, the vacancy is effective on the date the officer filed for office or announced his or her candidacy. Tex. Const. Art. XVI, §65.

3. When is it appropriate to fill a vacancy in a newly-created office?

The general rule is that a vacancy in a new office is created on the effective date of the legislative act creating the office or on the date the order creating the office is adopted. Tex. Elec. Code §201.027. It is important to closely read the legislation as it will often contain language impacting the effective date or the first election for the office.

4. Is there a statutorily mandated process for making an appointment?

No. The commissioners court, county judge, or district judge, as appropriate, may devise the appointment process.

Some counties, for example, publish a notice of the vacancy in the newspaper with a time period for interested persons to apply. Other counties ask potential appointees to fill out an application to establish their eligibility for the office. Neither is a required practice.



For appointment of the county auditor, a procedure is set out for the meeting of the district judges in Tex. Loc. Gov't Code §84.003 .

5. Is there a requirement to appoint the candidate who came in second in the most recent election for the office to fill the vacancy?

No. The person appointed by the commissioners court, county judge, or district judge, as appropriate, must meet the qualifications for the office at the time of appointment, including being a registered voter of the territory from which the office is elected. Tex. Elec. Code §141.001.

6. May a sitting member of the commissioners court be appointed by the court to fill a vacancy?

No. Members of the commissioners court are not eligible to appoint themselves (“self-appointing”) to offices to which they (or the body) have authority to make appointments. To be eligible to be appointed by the commissioners court to fill a vacant office, a county commissioner would have to resign and his or her successor would have to have qualified for office (to cure the holdover issue). Tex. Att’y Gen. Op. No. C-452 (1965).

For example, a county judge resigns because of illness and creates a vacancy. The commissioners court has authority to appoint a county judge to serve until the next general election under §87.041 of the Texas Local Government Code. One local businessman and one of the sitting commissioners want to be considered for the appointment. The commissioners court may not appoint the current commissioner because of the self-appointment doctrine. The commissioner understands this two-step process and submits a resignation letter to the court. Even resigning office does not immediately solve the problem because the commissioner remains a holdover. She can attend and vote at meetings and continues to draw a salary. Only after the commissioners court has appointed her replacement and the new commissioner has qualified and taken office, is the now-former county commissioner eligible to be considered for appointment as county judge.

7. May an appointing entity appoint an “interim” or “temporary” officer in the event of a vacancy?

Generally not (see Question 10). However, the first assistant or chief deputy of a public office in which a physical vacancy occurs shall conduct the affairs of the office until a successor qualifies for the office. Tex. Gov’t Code §601.002.

9. What is the term of office for an appointee?

The length of time the appointee serves depends on when the vacancy occurs.

If the vacancy occurs early enough for the office to be placed on the November general election for state and county officers ballot (on or before the 74th day before the general election) held in the next to last even-numbered year of the term of office, the remainder of the unexpired term is filled at a special election held in conjunction with the general election for state and county officers. Tex. Elec. Code §202.002(a). The appointee serves until the candidate who won at the general election takes the oath of office after the election canvass.

For example, a county clerk passed away in July 2016. The clerk's office is next regularly scheduled to be on the ballot in 2018. In 2016, the 74th day before the November general election was August 26, 2016, and so the vacant office would have gone on the ballot for the unexpired term. The commissioners may make an appointment, but the appointee would have served only until the candidate elected at the November 2016 election took office shortly after the election results were canvassed.

If the vacancy had occurred after the 74th day before the date of the November 2016 general election, the appointee would have served the remainder of the unexpired term. Tex. Elec. Code §202.002(b).

So if the clerk died on September 1, 2016, the vacancy would have occurred too late to go on the November 2016 general election ballot. The appointee will serve the remainder of the term, until January 1, 2019 or when the candidate elected at the November 2018 general election for state and county officers takes the oath of office, whichever is later. Tex. Gov't Code §601.003(b).

10. How are party nominees selected for the November election if the vacancy in an office not regularly scheduled to appear on the ballot occurred too late for the primary?

Section 202.006 of the Texas Election Code provides that a nomination for an unexpired term may be made by a political party's county or precinct executive committee, as appropriate for the office, if the vacancy occurs after the fifth day before the date of the regular deadline for candidates to file applications for a place on the ballot for the general primary election. Tex. Elec. Code §202.006 The nomination is made by the precinct chairs elected at the primary election who take office on the 20th day after the date of the primary runoff election. Texas Elec. Code §§145.036(e); 171.022. For purposes of the nomination process, a majority of the committee membership constitutes a quorum and the nominee must receive a favorable vote of a majority of the members present. Tex. Elec. Code §145.036(d). The name of the nominee must be certified in writing to the county clerk/elections administrator no later than 5 p.m. of the 71st day before the date of the general election for state and county officers. Tex. Elec. Code §§ 202.006(b); 145.037(e).

For minor parties that nominate by convention, such as the Libertarians and the Greens, the appropriate executive committee may nominate a candidate if the vacancy occurs on or before the fourth day before the date the convention having the power to make a nomination for the office convenes. Tex. Elec. Code §202.005. The nominating process is determined by party rule.

If a justice of the peace vacancy, for example, occurred in February of an even-numbered year, which would be too late for the office to go on the primary ballot, but early enough for the November general election, all the parties could nominate candidates for the November ballot. For the two major parties, the nomination will be made by the new chairs of the justice precinct elected at that year's primary election. By the February timing of the vacancy, the minor parties would be able to nominate their candidates at their county convention.

If a current county or precinct officeholder such as a constable wanted to be considered for the justice of the peace nomination, the act of asking to be considered would not itself be an announcement of candidacy that would trigger the "resign to run" provision (see Question 4). Tex. Att'y Gen. Op. JC-249 (2000).

However, if the constable accepted a party nomination for justice of the peace at a time when he or she had more than year and 30 days left in the term, that act would trigger an automatic resignation. If the constable office was not itself on the ballot,

depending on the timing, the office would be placed on the November ballot for the unexpired term and the parties would make nominations in the above manner.

11. When does the person appointed to fill a vacancy take office?

Once appointed, the new officer must take the statement of appointed officer (anti-bribery statement) and oath of office. Tex. Const. Article XVI, §1. For county offices, the statement of appointed officer is retained with the official records of the office. Depending on the office, the new officer also may have to take an additional oath and/or complete a bond. For more information, please review TAC's Outline of Official Oath and Bond Requirements. Once the oath of office, the statement of appointed officer, and any other oath or bond requirements have been completed, the new officer has qualified and assumes office.

12. When does a person elected to fill an unexpired term take office?

Under Section 601.004 of the Government Code, a person elected to an unexpired term of an office is entitled to qualify and assume the duties of the office immediately upon receipt of the certificate of election after the canvass. Tex. Gov't Code §601.004; Tex. Att'y Gen. Op. KP-13 (2015).

13. May the commissioners court create a vacancy if it believes the officeholder is no longer eligible to remain in office; for example, if the officeholder has moved or otherwise become ineligible?

No. The commissioners court does not have authority to remove an elected officeholder. An action in quo warranto, which may be brought in state district court by the county or district attorney (the attorney general also has authority to file a quo warranto), is the proper method to remove an ineligible person from office. Tex. Civ. Prac. & Remedies Code, Chapter 66. In addition, Chapter 87 of the Texas Local Government Code has procedures to remove a county or district officer on the grounds of incompetency, official misconduct, or intoxication. Tex. Loc. Gov't Code §87.011, et seq.

14. Does the commissioners court or county judge, as appropriate, have authority to order a special election to fill a vacancy to be held on a date other than the November general election for state and county officers rather than fill the vacancy by appointment?

No. The Texas Local Government Code provides authority for the commissioners or the county judge, in commissioner vacancies, to appoint a replacement to hold office until the next general election. Tex. Loc. Gov't Code §87.041, et seq. There are no provisions in state law for a special election to fill a vacancy to be held on a date other than the general election for state and county officers.