



THE ATTORNEY GENERAL OF TEXAS

GERALD C. MANN
~~WOODRUFFSON~~
ATTORNEY GENERAL

AUSTIN 11, TEXAS

Honorable W. Lee O'Daniel
Governor of Texas
Austin, Texas

Dear Sir:

Opinion No. 0-1561
Re: Vacancy in House of Representa-
tives.

By your letter of October 10, 1939, you ask the opinion of this department upon the question whether, under the facts stated below, there is now a vacancy in Floterial District, Tarrant and Denton counties, District No. 102-F.

It seems that on July 5, 1939, W. N. Corry, member of the House of Representatives from Floterial District No. 102-F, tendered to you in writing his resignation, which was unconditional, and provided that it was to be effective immediately; that you did not accept same, but Mr. Corry was not advised by you that you objected to his resignation, his resignation being retained and filed in your office without objection; that shortly after filing his resignation with you, Mr. Corry accepted an appointment as Assistant Director of the Old Age Assistance Commission of this State from that body, and worked as such Assistant Director until September 1, 1939, the time at which, by legislative enactment, the administrative set-up of the Old Age Assistance Commission was changed; and that on October 11, 1939, Mr. Corry tendered to you a letter withdrawing his resignation. An independent investigation conducted by us in the Comptroller's office and the office of the State Treasurer indicates that for Mr. Corry's services as Assistant Director of the Old Age Assistance Commission for the months of July and August, 1939, the Comptroller drew a warrant for the sum of \$242.00 to Mr. Corry for his services during the month of July, 1939, which was, being Warrant No. 107719, paid according to the records in the Treasurer's office on August 2, 1939. The Comptroller likewise drew a warrant to Mr. Corry for the sum of \$300.00 for his services as Assistant Director of the Old Age Assistance Commission for the month of August, 1939, which was, being Warrant No. 115041, paid on September 5, 1939, according to the records of the State Treasurer's office.

It seems your inquiry arises from your desire to know whether you should act in pursuance to the provisions of Article III, Section 13, of our Constitution, which provides:

"When vacancies occur in either House, the Governor, or the person exercising the power of the Governor, shall issue writs of election to fill such vacancies; and should the Governor fail to issue a writ of election to fill any such vacancy within twenty days after it occurs, the returning officer of the district in which such vacancy may have happened, shall be authorized to order an election for that purpose."

It is unnecessary, for the purposes of this opinion, to determine whether in this State an unconditional resignation to take effect immediately, delivered to the proper officer, is effectual to create a vacancy without an overt acceptance thereof by such officer. It is likewise unnecessary to determine whether the place of Assistant Director of the Old Age Assistance Commission is an "office" of emolument within the meaning of Article XVI, Section 40, of our Constitution, so that the acceptance and qualification therefor automatically vacated the office of Legislator. We have reached the conclusion that there exists a vacancy in Floterial District No. 102-F upon other grounds.

It is well settled that a public office may be abandoned (34 Tex. Jur. 385; Steingruber vs. City of San Antonio, (Commission of Appeals) 220 S.W. 77). Abandonment may, according to the authorities, be inferred from the acts and conduct of the officer, and, of course, an abandonment of a legislative office creates a vacancy therein requiring compliance with Article III, Section 13, of our Constitution.

Article II, Section 1, of our Constitution, provides:

"The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to-wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."

Article XVI, Section 33, of our Constitution provides:

"The accounting officers of this State shall neither draw or pay a warrant upon the Treasury in favor of any person, for salary or

compensation as agent, officer or appointee, who holds at the same time any other office or position of honor, trust or profit, under this State or the United States, except as prescribed in this Constitution. Provided, that this restriction as to the drawing and paying of warrants upon the Treasury shall not apply to officers of the National Guard of Texas, the National Guard Reserve, the Officers Reserve Corps of the United States, nor to enlisted men of the National Guard, the National Guard Reserve, and the Organized Reserves of the United States, or to retired officers of the United States Army, Navy, and Marine Corps, and retired Warrant Officers and retired enlisted men of the United States Army, Navy, and Marine Corps. (Sec. 33, Article XVI, adopted election November 8, 1932.)"

The acts and conduct of Mr. Corry evidence conclusively an abandonment of his legislative office. He tendered to Your Excellency in writing an unconditional resignation to take effect immediately. Thereafter, although Article II, Section 1, of our Constitution, prohibits a person of the legislative branch of the government from exercising powers properly belonging to the executive branch, Mr. Corry accepted and exercised the power and authority of an Assistant Director of the Old Age Assistance Commission, in the executive branch of our government. By so doing he necessarily represented that he was no longer a member of the legislative branch of our government. His acceptance of the appointment as Assistant Director in the Old Age Assistance Commission necessarily involved a representation that he no longer held his office (Terrell vs. King, 118 Tex. 237, 14 S.W. (2d) 786) as Legislator.

Likewise, Mr. Corry's acceptance of salary or compensation as an appointee of the Old Age Assistance Commission in the capacity of Assistant Director necessarily involved the representation that he was not disqualified, under Article XVI, Section 33, from accepting such salary or compensation, for Article XVI, Section 33, of our Constitution, would prevent payment of salary or compensation for his services as either Legislator or as Assistant Director of the Old Age Assistance Commission so long as he held both places. (See opinion by the Honorable C. M. Cureton, Reports and Opinions of the Attorney General, 1912-1914, page 873.) Upon the faith of the representations necessarily involved in Mr. Corry's acts and conduct, the State was induced to compensate him for his services as Assistant Director of the Old Age Assistance Commission. Upon the plainest principles of equity and public policy, Mr. Corry is now estopped to assert that he had not vacated his office as

Legislator. It follows, of course, that Mr. Corry's attempted withdrawal, on October 5, 1939, of his resignation, is ineffective to restore to him the title to the legislative office, for an office once vacated may not be resumed at the will or pleasure of the officer. (46 C.J., p. 980; State vs. Murphy, 30 Nev. 409, 426, 97 Pac. 391, 720, 18 L.R.A. (N.S.) 1210.)

You are, therefore, advised that, in our opinion, there now exists a vacancy in Floterial District No. 102-F, Tarrant and Denton counties, and that you should therefore proceed as required by the Constitution, Article III, Section 13.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By s/R. W. Fairchild
R. W. Fairchild
Assistant

RWF:FG:wc

APPROVED OCT 24, 1939
s/Gerald C. Mann
ATTORNEY GENERAL OF TEXAS

Approved Opinion Committee By s/BWB Chairman