AGO 1965-66 No. 20. /**/ p.c2 {text-decoration: underline} span.c1 {text-decoration: underline} /* */

Washington Attorney General Opinions

1965.

AGO 1965-66 No. 20.
May 26, 1965

[Orig. Op. Page 1]

PRIVATE

OFFICES AND OFFICERS --- COUNTY --- AUDITOR --- VACANCY IN OFFICE --- APPOINTMENT BY COUNTY COMMISSIONERS --- COMMISSIONER NOT ELIGIBLE FOR APPOINTMENT --- RESIGNATION --- EFFECT.

(1) A board of county commissioners may not appoint one of its members to fill a vacancy in the office of county auditor.

(2) Same: If a county commissioner were to resign his office for the sole purpose of accepting an appointment as the county auditor under a prior agreement to that effect with the board of which he was a member, the member would still be ineligible for the appointment notwithstanding his resignation.

Honorable George A. Kain
Prosecuting Attorney
Spokane County Courthouse
Spokane, Washington 99201

Cite as: AGO 1965-66 No. 20

Dear Sir:

By letter previously acknowledged you have requested an opinion of this office upon the following questions:

(1) "May a board of county commissioners appoint one of its members to fill a vacancy existing in the office of county auditor?"

(2) "If a board member may be appointed to fill such a vacancy, may he vote for himself if

necessary to provide a majority vote for himself to fill the vacancy?"

(3) "If the answers to (1) and (2) are in the negative, would the situation be changed if a county commissioner resigned as such prior to being appointed as county auditor, where such resignation was made for the sole purpose of accepting an appointment from the board from which he resigned, by prior agreement with the other board members that such would be the result of his resignation?"

We answer your first question in the negative for the reasons set forth in our analysis. Consideration of your second question is thereby rendered unnecessary. We answer your third

[Orig. Op. Page 2]

question in the negative subject to the qualifications set forth in our analysis.

ANALYSIS

The function of a board of county commissioners in regard to filling vacancies occurring in any county office is set forth in Article XI, § 6, of the Washington Constitution as follows:

"The board of county commissioners in each county shall fill all vacancies occurring in any county, township, precinct or road district office of such county by appointment, and officers thus appointed shall hold office till the next general election, and until their successors are elected and qualified."

This constitutional provision has been procedurally implemented by legislation. RCW 36.16.110 provides:

"The board of county commissioners in each county shall, at its next regular or special meeting after being appraised of any vacancy in any county, township, precinct, or road district office of the county, fill the vacancy by the appointment of some person qualified to hold such office, and the officers thus appointed shall hold office until the next general election, and until their successors are elected and qualified."

Thus, clearly, any vacancy existing in the office of county auditor must be filled by an appointment made by the board of county commissioners of the particular county. Furthermore, the person appointed must be a person who is qualified to hold the office to which he is appointed---in this case, the office of county auditor.

It is a well-established common-law principle that a public officer may not simultaneously hold two incompatible offices. This principle has been recognized and applied by this office on innumerable occasions in the past, and by the Washington supreme court as recently as 1957. See, Kennett v. Levine, 50 Wn.2d 212, 310 P.2d 244 (1957), in which the court observed as follows at page 216:

". . . it has been long and universally recognized that no one should hold incompatible offices. Throop on Public Officers

[Orig. Op. Page 3]

(1892), 37, § 33; People ex rel. Ryan v. Green (1873), 5 Daly (N.Y.) 254, 46 How. Pr. 169.

"Offices are incompatible when the nature and duties of the offices are such as to render it improper, from consideration of public policy, for one person to retain both. State ex rel. Klick v. Wittmer (1914), 50 Mont. 22, 144 Pac. 648; State ex rel. Nebraska Republican State Central Committee v. Wait (1912), 92 Neb. 313, 138 N.W. 159; State v. Anderson (1912), 155 Iowa 271, 136 N.W. 128; Mechem on Public Officers (1890), 268, § 422. Or, as was said in Barkley v. Stockdell (1933), 252 Ky. 1, 66 S.W. (2d) 43:

"'The question [of incompatibility] is . . . whether the functions of the two are inherently inconsistent or repugnant, or whether the occupancy of both offices is detrimental to the public interest.'"

There is no one universal criterion of incompatibility; the determination rests upon the circumstances of each case. However, certain general considerations are stated by the various authorities. One significant consideration is the question of whether one of the two offices is subordinate to the other. This concept was expressed by the supreme court of Montana in State ex rel. Klick v. Wittmer, 50 Mont. 22, 144 Pac. 648 (1914), as follows:

"Public offices are 'incompatible' when the incumbent of one has power of removal over the other, or when one has power of supervision over the other, . . ."

A perusal of the statutes relating to the duties of a county auditor make it perfectly obvious that the office of county auditor is incompatible, on the basis of the above stated test, with the office of member of the board of county commissioners. Particularly to be noted is RCW 36.32.110, which provides:

"The county auditor shall be the clerk of the board of county commissioners, and shall attend its meetings and keep a record of its proceedings."

[Orig. Op. Page 4]

The specific duties of the county auditor, as clerk of the board of county commissioners are set forth in RCW 36.22.010 (9) as follows:

"(9) As clerk of the board of county commissioners he shall:

"Record all of the proceedings of the board;

"Make full entries of all of their resolutions and decisions on all questions concerning the raising of money for and the allowance of accounts against the county;

"Record the vote of each member on any question upon which there is a division or at the request of any member present;

"Sign all orders made and warrants issued by order of the board for the payment of money;

"Record the reports of the county treasurer of the receipts and disbursements of the county;

"Preserve and file all accounts acted upon by the board;

"Preserve and file all petitions and applications for franchises and record the action of the board thereon;

"Perform all other duties required by any rule or order of the board." (Emphasis supplied.)

That the offices of county auditor and member of the board of county commissioners cannot simultaneously be held by the same person is further demonstrated by RCW 36.22.110, providing in material part:

". . . The county auditor, during his term of office, and any deputy appointed by him is disqualified from performing the duties of any other county officer or acting as deputy for any other county officer. Nor shall any other county officer or his deputy act as auditor or deputy, or perform any of the duties of said office."

[Orig. Op. Page 5]

Consequently, for this reason alone it is apparent that a board of county commissioners may not appoint one of its members to fill a vacancy existing in the office of county auditor. In regard to this point, see, also, 42 Am.Jur., Public Officers, § 97 (page 955), where it is said:

"A public office is a public trust, and should persons to be appointed thereto should be selected solely with a view to the public welfare. It goes without saying that the power of appointment to public office is to some degree limited by public policy and by statutory provisions which invalidate the appointment of relatives, or which make certain persons ineligible to office. An appointment of an ineligible person is a nullity." (Emphasis supplied.)

A further ramification of this principle is described in the very next paragraph of this same text authority as follows:

"An officer intrusted with the power of appointment should exercise it with disinterested skill and in a manner primarily for the benefit of the public, for it is the policy of the law to secure the utmost

freedom from personal interest in such appointments. So, it is contrary to public policy to permit an officer having an appointing power to use such power as a means of conferring an office upon himself, or to permit an appointing body to appoint one of its own members." (Emphasis supplied.)

Though no decisions of the Washington supreme court are cited in support of this proposition (for the reason that the precise question has apparently never been considered by the Washington court), the rule is supported by a number of well-reasoned decisions from other jurisdictions. In particular see, State ex rel. Bove v. McDaniel, 52 Del. 304, 157 A.2d 463 (1960), and Hetrich v. Co. Commissioners, 222 Md. 304, 159 A.2d 642 (1960). In the latter case the Maryland supreme court was concerned with the particular application to be given to the doctrine of incompatibility of public offices in a case where incompatibility was present by reason of the fact that one of the two offices in question held the power of appointment as to the other office. The court observed as

[Orig. Op. Page 6]

follows:

"The general rule at common law is that if an officer accepts a second office, which is incompatible with the first, he vacates the first . . . Many courts have adopted a qualification to the general rule if the one who accepted the second office was ineligible for that office. It is held in such instances that the attempted appointment was void, a nullity, and that the second acceptance was illusory, some courts deciding that the incumbent was not even a de facto officer, others that he was.

". . .

"The ineligibility which makes the appointment to a second office a nullity has not been limited to that created by constitution or statute. Even in the absence of these formalized prohibitions, at common law, on the ground of public policy a member of an appointing body is ineligible for appointment to a conflicting office by that body, even though his own vote is not essential to the appointment. McQuillin, Municipal Corporations, Sec. 12.75; 67 C.J.S., Officers, Sec. 20; 42 Am.Jur., Public Officers, Sec. 97, p. 955; Annotation: 31 L.R.A. (N.S.) 575. . . .

"The cases ground the public policy prohibition on the need for impartial official action, without suspicion of bias which may be against public interest. They say the appointing board cannot absolve itself of ulterior motives if it appoints one of its own, whether or not his vote was necessary to the appointment, since the opportunity improperly to influence the other members of the board is there. The necessity that public bodies be free from personal influence in making appointments to office cannot be secured when the appointee has the real opportunity his associations and relations afford to place his colleagues under obligations they may feel require repayment."

[Orig. Op. Page 7]

On the basis of this line of authority we answer your first question in the negative. A board of county commissioners may not appoint one of its members to fill a vacancy existing in the office of county auditor. To the extent that this conclusion conflicts with the views stated in an attorney general's opinion dated August 17, 1927, to the prosecuting attorney of Stevens county [[1927-28 OAG 155]], sanctioning the appointment by a board of county commissioners of one of its members to a vacancy in the office of county sheriff, the prior opinion is hereby overruled.

Since a member of the board of county commissioners cannot be appointed to fill a vacancy existing in the office of county auditor, it is unnecessary for us to consider your second question relative to whether the board member who is interested in being appointed to fill this vacancy can, as a county commissioner, vote upon the question of his appointment as county auditor.

Finally, you have asked whether the situation would be changed if the county commissioner in question resigned as such prior to being appointed as county auditor. Notably, however, the question stipulates that:

". . . such resignation was made for the sole purpose of accepting an appointment from the board from which he resigned, by prior agreement with the other board members that such would be the result of his resignation?"

Given this particular stipulated factual situation, we believe that the situation would in no manner be changed. In thus concluding we are guided by the approach taken by the supreme court of Delaware in State ex rel. Bove v. McDaniel, 52 Del. 304, 157 A.2d 463 (1960), supra. In that case the vacancy had been created in the office of mayor of the city of New Castle, Delaware, by reason of death of the incumbent. Thereupon a special meeting of the city council was held for the purpose of making an appointment to fill this vacancy. Faced with a charter provision expressly prohibiting the city council from appointing one of the members thereof to this office, McDaniel, the council member desiring to be appointed mayor, resigned. However, his resignation was made with the express understanding and agreement of the other members of the council that he was resigning for the sole purpose of accepting an appointment as

mayor.

Upon thereafter being appointed to the office of mayor, McDaniel's right to hold office was challenged in court. The Delaware supreme court held as follows:

". . . Both the common law and the statute demand that the power of appointment be exercised fairly and impartially. In order to attain this purpose it is important that the deliberations of the appointing body not only be free from wrongdoing but free from suspicion of wrong as well. [Citing cases] For this reason the general law has been laid down -- reinforced in many instances by

appropriate statutes -- that it is contrary to public policy to permit a Board to exercise its power of appointment by designating some one from its own body. [Citing cases and 42 Am.Jur. 97, p. 955] Such purpose cannot be attained when the appointee as a member of the appointing body has the opportunity for a closer association and influence upon the members much greater than would be the case where the persons considered for appointment were not members of the appointing body.

"In the present case the minutes of the Council demonstrate conclusively, we think, the fictitious nature of Council's action. The successive resignations and the successive filling of the vacancies thus created compel the conclusion that the whole thing was agreed upon in advance. It was one complete transaction, and was merely a subterfuge resorted to in order to nullify the charter provisions. The resignation of McDaniel as President of City Council and the resignation of Tobin as a member of the Council followed immediately by the election of Tobin as President of City Council, so that he in turn might vote for McDaniel as Mayor, were the same as if McDaniel and Tobin

[Orig. Op. Page 9]

had each voted for himself. In such case the law will look beneath the form used to comply technically with the requirements of the statute and determine the purpose to be accomplished. If that purpose should be contrary to public policy, the appointing body will not be permitted by the juggling of positions to do indirectly what it could not do directly. [Citing cases]

". . . The gyrations of the members of the Council at the meeting in producing the resignations of certain of its members and their almost immediate election to other offices for the very obvious purpose of appointing the resigning members of the appointing body to other offices placed the defendants in the same position as if they had been technically members of the Council at the time of their election. As far as they relate to the right of defendants to hold the respective offices to which they were allegedly appointed, the resignations and elections must be considered a nullity. [Citing cases]

"We are of the opinion that under both Section 8 of the Charter of the City of New Castle and under the common law, the filling of the vacancy in the office of Mayor by defendant McDaniel and the vacancy in the office of City Council by the defendant Tobin were illegal and void."

This is not to say, of course, that the same result would necessarily follow in the absence of the specific factual pattern involved, wherein the resignation was made by pre--arrangement [[prearrangement]]solely to qualify for appointment to the new office---which appointment was pre--arranged [[prearranged]]prior to the time of resignation.

[Orig. Op. Page 10]

We trust the foregoing will be of assistance to you.

Very truly yours,

JOHN J. O'CONNELL

Attorney General

PHILIP H. AUSTIN

Assistant Attorney General

AGLO 1973 No. 101. /**/ span.c2 {text-decoration: underline} p.c1 {text-decoration: underline} /**/

Washington Attorney General Opinions

1973.

AGLO 1973 No. 101.
October 24, 1973

[Orig. Op. Page 1]

PRIVATE

OFFICES AND OFFICERS -- STATE -- LEGISLATOR -- COUNTY COMMISSIONERS -- VACANCY IN OFFICE.

(1) A board of county commissioners may not appoint one of its members to fill a vacancy in the state House of Representatives.

(2) If a county commissioner were to resign for the sole purpose of accepting an appointment to the House of Representatives under a prior agreement to that effect with the board of which he was a member, the member would still be ineligible for the appointment notwithstanding his resignation.

Honorable Kenneth O. Eikenberry
State Representative, 36th District
Suite 500 Third & Lenora Building
Seattle, Washington 98121

Cite as: AGLO 1973 No. 101

Dear Sir:

By recent letter you have asked for our opinion on the following three questions:

"(1) If a vacancy occurs in one position of a house of representative district which is entirely within a single county, may a board of county commissioners appoint one of its members to fill such vacancy?

"(2) If a board member may be appointed to fill such a vacancy, may he vote for himself if necessary to provide a majority vote for himself to fill the vacancy?

"(3) If the answers to (1) and (2) are in the negative, would the situation be changed if a county commissioner resigned as such prior to being appointed as the representative of the district, where such resignation was made for the sole purpose of accepting an appointment from the board from which he resigned, by prior agreement with the other board members that such would be the result of his resignation?"

We answer your first question in the negative, thereby rendering consideration of your second question unnecessary; we also answer question (3) in the negative.

ANALYSIS

In submitting this request you have indicated an awareness of AGO 65-66 No. 20 [[to George A. Kain, Prosecuting Attorney, Spokane County on May 26, 1965]], an opinion written to the then prosecuting attorney of Spokane county on May 26, 1965, in which precisely these same questions were asked with respect to the filling of a vacancy in the office of county

[Orig. Op. Page 2]

auditor. Like the position of state representative from a legislative district located entirely within a single county, vacancies occurring in that or any other partisan county office are also filled by appointment by the applicable county commissioners. See, Wash. Const., Article II, § 15 (Amendment 52) and compare this provision with Article XI, § 6 as it then read. Accordingly, we responded to the first question there posed by concluding that a board of county commissioners may not appoint one of its own members to fill a vacancy in the office of county auditor, relying, largely, upon certain principles which were expressed in 42 Am.Jur., Public Officers, § 97 (p. 955) as follows:

"'An officer intrusted with the power of appointment should exercise it with disinterested skill and in a manner primarily for the benefit of the public, for it is the policy of the law to secure the utmost freedom from personal interest in such appointments. So, it is contrary to public policy to permit an officer having an appointing power to use such power as a means of conferring an office upon himself, or to permit an appointing body to appoint one of its own members." (Emphasis supplied.)"'(fn1)

Then, noting that this answer rendered any further consideration of question (2) unnecessary, we turned to and answered the prosecuting attorney's third and final question as follows:

"If a county commissioner were to resign his office for the sole purpose of accepting an appointment as the county auditor under a prior agreeement to that effect with the board of which he was a member, the member would still be ineligible for the appointment notwithstanding his resignation."

Accord, State ex rel. Bove v. McDaniel, 52 Del. 304, 157 A.2d 463 (1960), a case that was

factually "on all fours" from which we quoted extensively on pp. 8 and 9 of this prior opinion.

[Orig. Op. Page 3]

We can see no basis at this time for distinguishing the question which you have asked with respect to the filling of a legislative vacancy from those which were considered in this earlier, 1965 opinion and, likewise, we can see no basis for any present departure from the underlying principles enunciated therein. For this reason, we must likewise answer your first and third questions in the negative - with these answers similarly rendering consideration of your second question unnecessary.

In so concluding we should, however, note here as we did in AGO 65-66 No. 20, that insofar as question (3) is concerned, our negative answer thereto

". . . is not to say, of course, that the same result would necessarily follow in the absence of the specific factual pattern involved, wherein the resignation was made by prearrangement solely to qualify for appointment to the new office--which appointment was pre-arranged [[prearranged]]prior to the time of resignation."

We trust the foregoing will be of some assistance to you.

Very truly yours,

SLADE GORTON

Attorney General

PHILIP H. AUSTIN

Deputy Attorney General

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Footnotes:

1. Accord, 63 Am.Jur.2d Public Officers, § 96 (p. 960).

AGO 1985 No. 1. /**/ span.c2 {text-decoration: underline} p.c1 {text-decoration: underline} /**/

Washington Attorney General Opinions

1985.

AGO 1985 No. 1.
January 7, 1985

[Orig. Op. Page 1]

PRIVATE

OFFICES AND OFFICERS -- STATE -- LEGISLATOR -- APPOINTMENT OF COUNTY COMMISSIONER TO VACANCY IN MULTI-COUNTY LEGISLATIVE POSITION

If a vacancy occurs in one position of a House of Representatives district which encompasses two counties and part of a third county, the boards of county commissioners of the three counties, acting jointly pursuant to Wash. Const. Art. II, § 15 (Amendment 52), may not appoint one of their own members to fill such vacancy.

Honorable Robert K. Leick
Prosecuting Attorney
Skamania County
Courthouse Building
Stevenson, Washington 98648

Cite as: AGO 1985 No. 1

Dear Sir:

By recent letter you requested our opinion on the following question:

If a vacancy occurs in one position of a House of Representatives district which encompasses two counties and part of a third county, may the boards of county commissioners of the three counties, acting jointly pursuant to Wash. Const. Art. II, § 15 (Amendment 52), appoint one of their own members to fill such vacancy?

We answer your question in the negative for the reasons set forth in our analysis.
ANALYSIS

In submitting this request you have indicated your awareness of AGLO 1973 No. 101, copy

enclosed, in which the same question was asked in the context of a vacancy in the House of Representatives from a legislative district located entirely within a single county. In that opinion, relying on another prior opinion (AGO 65-66 No. 20) relating to the ability of a board of county commissioners to appoint one of its own members to a vacant county elective office, we answered in the negative. The basis for our

[Orig. Op. Page 2]

answer, in both instances, was the common law principle of public policy set forth in 42 Am.Jur., Public Officers, § 97 (page 955) as follows:

"An officer intrusted with the power of appointment should exercise it with disinterested skill and in a manner primarily for the benefit of the public, for it is the policy of the law to secure the utmost freedom from personal interest in such appointments. So, it is contrary to public policy to permit an officer having an appointing power to use such power as a means of conferring an office upon himself, or to permit an appointing body to appoint one of its own members." (Emphasis supplied)

The text material upon which we thus relied has since been updated by its publisher. The current version now appears in 63A Am.Jur.2d, Public Officers and Employees, § 100 (page 743). The rule, however, remains essentially the same. We quote, for ease of comparison:

"An officer entrusted with the power of appointment should exercise it with disinterested skill and in a manner primarily for the benefit of the public, for it is the policy of the law to secure the utmost freedom from personal interest in such appointments. Thus, it is contrary to public policy to permit an officer having an appointing power to use such power to confer an office on himself in the absence of specific legislative authorization, or to permit an appointing body to appoint one of its own members. . . ."

In addition the same rule is stated, with supporting case authority, in 67 CJS, Officers and Employees, § 23(a) and in 3 McQuillin, Municipal Corporations (3rd ed.), § 12.75. In turn, while no Washington cases appear to have considered the question, we have no reason to think that our court would rule otherwise if presented with the issue.

We further note that all three situations(fn1) fall within the purview of the same provision of our State Constitution, Article II, § 15 (Amendment 52). Under that provision the board of county commissioners (or other county legislative authority) is to fill

[Orig. Op. Page 3]

vacancies both in the legislature and in partisan county elective offices--with the qualification that in the case (as here) of a multi-county legislative district,

". . . the vacancy shall be filled from a list of three nominees selected by the state central committee, by appointment by the joint action of the boards of county commissioners of the counties composing the joint senatorial or joint representative district, . . ."

Conversely, in the case of a single-county legislative district such as was before us in AGLO 1973 No. 108, supra, the nominating process involves the county central committee rather than the

state central committee and the appointment is made by the single board of county commissioners or other legislative authority.

Your request calls upon us to consider (a) whether AGLO 1973 No. 101 is still a correct statement of the law; and (b) whether there is any basis for not applying that rule in the case of a multi-county (rather than single-county) legislative district.

In response to the first of those questions we have already seen that the principle, i.e., that it is contrary to public policy ". . . to permit an appointing body to appoint one of its own members . . .", has not been altered by any subsequent court decisions. As for the second, the only difference between the appointment process in a single-county legislative district and in a multi-county district is purely a matter of degree. The appointing body in the latter situation is larger and thus the prospective appointee may be only one of six, or nine, members of the body rather than one of three in a typical single-county district governed by a three-member board of county commissioners. But nowhere in the cases do we find any indication that the size of the appointing body effects the applicability of the public policy principle.

Of course, consistent with the foregoing there may well be instances where, by reason of some specific statute, county or city charter, or local ordinance it is permissible for a multi-member appointing authority to select one of its own members for a particular appointment. All that means, however, is that the applicable common-law principle has been overridden in the particular instance by specific legislation. Accord RCW 4.04.010. In addition, it should similarly be understood that even under the common-law rule it is only those public officials who are members

of the appointing authority itself who are disqualified. Thus, contrary to a further thought expressed in your letter, the rule we here apply does not also serve to disqualify a member of the state or county central committee (which merely nominates) from being appointed to a legislative vacancy. Moreover, we also note that members of a state or county central committee hold political, and not public, offices.

With those points in mind, however, we adhere to the reasoning of our prior opinions and, based thereon, answer your present question, as well, in the negative. We trust that the foregoing will be of assistance to you.

Very truly yours,

KENNETH O. EIKENBERRY

Attorney General

PHILIP H. AUSTIN

Senior Deputy Attorney General

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Footnotes:

1. I.e., the two which were covered by our prior opinions and the situation involved in your present request.

AGO 1985 No. 15. /**/ span.c2 {text-decoration: underline} p.c1 {text-decoration: underline} /**/

Washington Attorney General Opinions

1985.

AGO 1985 No. 15.
September 13, 1985

[Orig. Op. Page 1]

PRIVATE

OFFICES AND OFFICERS -- STATE -- LEGISLATOR -- APPOINTMENT OF FORMER COUNTY COMMISSIONER TO VACANCY IN MULTI-COUNTY LEGISLATIVE POSITION

A former member of a board of county commissioners is eligible for appointment to a vacant Senate seat if the former commissioner has resigned prior to the appointment, the resignation is made without qualification and there is no pre-arranged agreement that the former member will be appointed.

Honorable C. Danny Clem
Kitsap County Prosecuting Attorney
Kitsap County Courthouse
614 Division Street
Port Orchard, Washington 98366

Cite as: AGO 1985 No. 15

Dear Mr. Clem:

By a letter dated September 9, 1985, you have requested an opinion of this office upon the following question:

"Is a member of a board of county commissioners (which county is within a joint legislative district) nominated by the state central committee, eligible to fill a vacancy in the office of senate if that commissioner resigns prior to the appointment process?"

We answer your question in the affirmative.
ANALYSIS

As noted in your letter this office has previously considered somewhat similar questions albeit in

different fact situations. In AGO 65-66 No. 20, copy enclosed, we held that a county commissioner could not resign and then accept a board appointment to a subordinate county position where the resignation was made for the sole purpose of, and conditioned upon, such appointment.(fn1)

[Orig. Op. Page 2]

Similarly, in AGLO 1973 No. 101, copy enclosed, relying on AGO 65-66 No. 20, we held that a board of county commissioners could not appoint one of its own members to a vacancy in a legislative district located entirely within a single county. Most recently, in AGO 1985 No. 1, copy enclosed, we held that where a vacancy occurs in a joint legislative district, the county commissioners of the counties involved could not appoint one of their own members to fill the vacancy.

Your question, on the other hand, is addressed not to the filling of a vacancy in a subordinate county position, but rather a vacancy in a Senate seat. Further, and most significantly, your question involves an unqualified and unconditional resignation by the commissioner prior to the appointment process.

In AGO 65-66 No. 20, we noted that our answer to the question therein addressed was limited to ". . . this particular stipulated factual situation . . ." (page 7) and further that ". . . the same result would [not] necessarily follow in the absence of the specific factual pattern involved . . ." (page 9). Our analysis relied heavily on a decision of the Supreme Court of Delaware(fn2) which involved a conditional resignation from a city council made solely for the purpose of qualifying for appointment to a vacant office, which appointment had previously been agreed upon among the remaining city council members who would fill the vacancy.

The other two prior opinions of this office mentioned above, although devoid of the peculiar facts in AGO 65-66 No. 20, addressed the eligibility of sitting county commissioners. Our analysis of the questions thus posed turned on public policy considerations which would arise if a public body exercised its power of appointment in favor of one of its own members.

In the question you pose, however, we see none of the factual elements which led us to the conclusion we reached in AGO 65-66 No. 20. Likewise, none of the public policy considerations which compelled our answers in AGLO 1973 No. 101 and AGO 1985 No. 1 are present here. This is so because a person who has unconditionally and without qualification resigned from the county commission is in

[Orig. Op. Page 3]

a situation (with respect to this question) which is indistinguishable from that of any other

PRIVATE

citizen.

Thus, we conclude that there is no bar to the appointment by a board of county commissioners of a former member of that board to fill a vacancy in a Senate seat, where the former member resigns prior to the appointment process, such resignation is made without qualification, and there is no pre-arranged agreement that the former member will be appointed.

We trust the foregoing will be of some assistance to you.

Very truly yours,

KENNETH O. EIKENBERRY

Attorney General

WILLIAM L. WILLIAMS

Assistant Attorney General

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Footnotes:

1. In that same opinion, we also held that the office of county commissioner was incompatible with the office of county auditor, and that a member of the board of county commissioners, which was charged by law with the responsibility of filling a vacancy in the office of county auditor, could not be appointed to fill that vacancy so long as the commissioner remained on the board.

2. State ex rel. Bove v. McDaniel, 52 Del. 304, 157 A.2d 463 (1960).

AGO 1987 No. 21. /**/ span.c2 {text-decoration: underline} p.c1 {text-decoration: underline} /**/

Washington Attorney General Opinions

1987.

AGO 1987 No. 21.
October 21, 1987

[Orig. Op. Page 1]

PRIVATE

OFFICES AND OFFICERS -- STATE -- LEGISLATOR -- NOMINATION OF COUNTY COMMISSIONER TO VACANCY IN MULTI-COUNTY LEGISLATIVE POSITION

A member of a board of county commissioners (which county is within the joint legislative district) is not eligible to be nominated by a state central committee to fill a legislative vacancy from a joint legislative district.

Honorable Brian Ebersole
State Representative, 29th District
5716 Pacific Avenue
Tacoma, Washington 98408

Cite as: AGO 1987 No. 21

Dear Representative Ebersole:

By letter dated October 14, 1987, you have requested our opinion on the following two (2) questions:
1. Is a member of a board of county commissioners (which county is within the joint legislative district) eligible to be nominated by a state central committee to fill a legislative vacancy in the joint legislative district? 2. If your answer to Question No. 1 is in the affirmative, would your answer be the same if the member of the board of county commissioners has actively campaigned for nomination and appointment to the legislative vacancy?
For reasons which appear in the analysis below, we answer your first question in the negative. Our negative answer to your first question renders it unnecessary to answer your second question.
ANALYSIS

Your question presents yet another factual situation relating to a series of opinions we have issued over the past 20 years

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concerning the authority of county commissioners to appoint one of their own members to vacant positions over which they have power of appointment.(fn1)

When a legislative vacancy occurs in a legislative district which is wholly within a single county, the county commissioners fill that vacancy by appointing one of three nominees provided by the political party's county central committee. If the county commissioners fail to appoint within sixty days after the vacancy occurs, the Governor makes the appointment within thirty days thereafter. If the vacancy occurs in a joint legislative district, it is the state central committee which nominates three persons for appointment by joint action of the boards of county commissioners of the counties comprising the joint legislative district. Again, if the appointment is not made within the sixty days after the vacancy occurs, the Governor makes the appointment.

In the earliest of the opinions, AGO 65-66 No. 20, we found that a board of county commissioners could not appoint one of its own members to a vacant county elective office. In AGLO 1973 No. 101 (copy enclosed), we applied the same rule to an appointment to fill a vacancy in a legislative district located entirely within a single county. More recently, in AGO 1985 No. 1, we decided that the same rule applies to vacancies in a joint legislative district, and we found that none of the members of any of the county legislative authorities participating in the appointment were eligible to fill the vacancy. Finally, in AGO 1985 No. 15, we found that a county commissioner who resigns his or her commissioner position prior to the appointment process, with no conditions and with no prior commitment for appointment to a vacancy, would be eligible for appointment to a vacant legislative seat.

Your present question concerns the possible situation which would occur if a county commissioner were to propose to resign

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after nomination by the state central committee to a vacant legislative seat, but before the county legislative bodies from the counties in the joint legislative district meet to make the actual appointment.

Although our previous opinions did not cover this precise situation, we think the clear implication of their reasoning is that, since a county commissioner in the circumstances described is ineligible for appointment to the vacant position, he or she is similarly ineligible for nomination.

Prior to the approval of Amendment 32 to the Washington State Constitution in 1956, the state

central committees of the political parties had no official role to play in the selection of an appointee to fill a vacancy in a legislative position. From statehood until 1930, the state constitution did not provide for any form of appointment to fill a legislative vacancy, but left the process to a special election. Washington State Const. art. 2, § 15 (original language). With the adoption of Amendment 13 in 1930, the county commissioners gained the power (acting alone in legislative districts entirely within a county and jointly in joint legislative districts) to fill temporary vacancies occurring in either house of the legislature to serve until the next general election. With the adoption of Amendment 33 in 1956, the people of the state for the first time imposed a requirement that the appointed legislator be of the same political party as the legislator whose office had been vacated, and provided for nomination of three persons by the county central committee (in the case of districts entirely within a county) or the state central committee (in the case of joint legislative districts) with the county commissioners to make the final appointment as before. This basic scheme is left unchanged by the most recent amendment to art. 2, § 15 (Amendment 52, adopted in 1968), which left the constitutional provision in question in the current form:

Such vacancies as may occur in either house of the legislature or in any partisan county elective office shall be filled by appointment by the board of county commissioners of the county in which the vacancy occurs: Provided, That the person appointed to fill the vacancy must be from the same legislative district, county or county commissioner district and the same political party as the legislator or partisan county elective officer whose office has been vacated, and shall be one of three persons who shall be nominated by the county central committee of that party, and in case a [Orig. Op. Page 4]majority of said county commissioners do not agree upon the appointment within sixty days after the vacancy occurs, the governor shall within thirty days thereafter, and from the list of nominees provided for herein, appoint a person who shall be from the same legislative district, county or county commissioner district and of the same political party as the legislator or partisan county elective officer whose office has been vacated, and the person so appointed shall hold office until his successor is elected at the next general election, and shall have qualified: Provided, That in case of a vacancy occurring in the office of joint senator, or joint representative, the vacancy shall be filled from a list of three nominees selected by the state central committee, by appointment by the joint action of the boards of county commissioners of the counties composing the joint senatorial or joint representative district, the person appointed to fill the vacancy must be from the same legislative district and of the same political party as the legislator whose office has been vacated, and in case a majority of said county commissioners do not agree upon the appointment within sixty days after the vacancy occurs, the governor shall within thirty days thereafter, and from the list of nominees provided for herein, appoint a person who shall be from the same legislative district and of the same political party as the legislator whose office has been vacated.

Const. art. 2, § 15 (emphasis added).

Prior to 1930, the county commissioners were free to select any qualified person to fill a legislative vacancy, and the only qualifications were the constitutional ones for the position. See Const. art. 2,

§ 7.

Since the enactment of Amendment 32 however, the authority of county commissioners to make a choice has been drastically constricted by the additional requirement that the commissioners choose from three names submitted by the appropriate party central committee, and the further requirement that the replacement legislator be of the same political party as his or her predecessor. Prior to the critical amendments, the commissioners were free to select any qualified voter resident in the district; subsequently, they were limited to selecting from a list of three names.

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It follows that the role of the state central committee (or the county central committee in a district located within a single county) is far more than that of a mere proponent of possible candidates for a vacancy. Because the commissioners must choose from a list of only three names selected by the state central committee, most of the important selection work in choosing a candidate falls to the committee, which narrows the range of choices from several thousand voters eligible for the position to merely three.

In our previous opinions, citing well-accepted common law principles, we found that a county commissioner is ineligible for consideration for appointment to a vacant position over which the board on which he or she serves has the power of appointment. Like persons who are not resident in the legislative district, or residents of the district who are not qualified voters, the county commissioner is simply not on the list of persons qualified to accept the appointment, so long as he or she holds the county legislative position.

Although art. 2, § 15 does not explicitly cover the point, a necessary implication of the process established in the constitution is that the state central committee submit the names of three qualified candidates for a vacant position. If the committee were permitted to submit one or more names of persons not qualified to fill the vacancy in question, the effect would be to shorten the list of candidates available for consideration by the county commissioners from three to two, one, or even no names. If the commissioners are to exercise the discretion left to them under the 33rd and 52nd Amendments, it necessarily follows that the state's central committee must submit the names of three persons all of whom are qualified for appointment.

However, as noted earlier, a county commissioner who by virtue of his or her office will participate in the appointment process is not, as established in our previous opinions, qualified to take the appointment. Thus, if a state central committee were to submit the name of a county commissioner, it would be submitting the name of an unqualified person, much the same as if it submitted the name of a nonresident or a person not a qualified voter in the legislative district.

At this point it might be observed that, even though ineligible for appointment while still serving as

a county commissioner, a commissioner might choose to resign after the nomination and before the appointment, thus qualifying for the

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position in their intervening period. The same of course could be said for a nominee not a resident of the district (who could offer to move to the district after nomination) or a nominee not registered to vote (who could offer to register after nomination). While any of these disqualified persons might remove their disqualifications after the nomination and before the appointment, yet again they might fail to do so. At the time the state central committee meets to make its nominations, the committee cannot with certainty predict whether a proposed candidate will be qualified for appointment when the county commissioners make the appointment.

We thus reach the opinion that the state central committee may submit as nominees for a vacant legislative position only candidates who are qualified for the position in question at the time of their nomination. County commissioners still in office at the time of nomination are not eligible, so a negative answer to your first question is dictated.

As noted earlier, a negative answer to your first question renders unnecessary any answer to your second question. However, we should note that neither our prior opinion nor this opinion precludes a commissioner from testing the waters by seeking to secure support for inclusion as a nominee prior to the final selection of the nominees. The eligibility of the commissioner is viewed from the point in time that the party central committee selects its three nominees.

We trust the foregoing will be of assistance to you.

Very truly yours,

KENNETH O. EIKENBERRY

Attorney General

JAMES K. PHARRIS

Senior Assistant

Attorney General

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Footnotes:

1. In each of the opinions we have written, including the present one, the county legislative

authority was a traditional board of commissioners. We recognize that several counties no longer have county commissioners but rather, by their county charters, have created other types of legislative bodies such as county councils. All of our opinions apply with equal force to county council members or other members of county legislative bodies as well as to those who are styled "county commissioners".

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MEMORANDUM

TO: Washington State Association of Counties

FROM: Pacifica Law Group

DATE: January 25, 2019

SUBJECT: Eligibility of a Sitting County Commissioner or Councilmember for Appointment to a Vacant State Legislative Position

I. Question Presented and Short Answer

The Washington State Association of Counties has asked Pacifica Law Group to assess whether a sitting county commissioner or councilmember is eligible to be appointed to a vacant state legislative position where the appointment is made by the county commission or council on which he or she sits. As explained below, under the Washington Constitution and state law, a sitting county commissioner or councilmember should be eligible to be appointed to a vacant state legislative position. The Constitution sets forth the exclusive eligibility requirements and process for filling a legislative vacancy and does not preclude the appointment of a sitting commissioner or councilmember. Moreover, no statutory provisions prohibit such conduct. Though the Washington Attorney General concluded decades ago that a common law rule would bar such appointments, that conclusion predated Washington Supreme Court decisions confirming that constitutional eligibility requirements for state office are exclusive. In any case, Washington never adopted that common law principle, which has since fallen out of favor, and Washington's development of a comprehensive scheme governing legislative vacancies and the conduct of public officials confirms its decision to not be governed by the corresponding common law rule.

Any sitting county commissioner or councilmember who wishes to be considered for appointment should recuse him or herself from any vote and discussion about filling that legislative vacancy.

II. Discussion

A. The Washington Constitution establishes the exclusive eligibility and process requirements for filling a legislative vacancy.

The Washington Constitution empowers county legislative authorities to appoint replacements for vacant state legislative seats, subject to several specific requirements. Const. art. II, § 15. For vacancies in legislative districts located entirely within a single county, the person appointed must be (i) from the same legislative district, (ii) from the same political party as the prior legislator, and (iii) one of the three persons nominated by the county central committee of that party. *Id.* The same requirements apply for vacancies in legislative districts encompassing part or all of more than one county, except that the state central committee provides the nominations and the county legislative authorities from the associated counties decide the appointment. *Id.* In addition, article II, section 7 of the Washington Constitution establishes the qualifications for state legislative office: such persons must a citizen of the United States and a qualified voter in the district where he or she is selected. No provision of the Constitution prohibits a sitting county commissioner or councilmember from being eligible for appointment nor precludes county commissions or councils from appointing one of their own members.

Two Washington Supreme Court cases decided after the last Attorney General opinion on the subject confirm that the constitutional eligibility requirements and processes are binding and that no law, including the common law ethics principle cited by the Attorney General, can impose limitations on those requirements and processes. In *Gerberding v. Munro*, the Supreme Court struck down an initiative attempting to impose term limits on state legislative offices and certain state executive offices, holding that the Constitution establishes the exclusive qualifications for these offices and may not be added to by statute. 134 Wn.2d 188, 191, 949 P.2d 1366 (1998) (concluding that requirements prescribed in article II, section 7 express "the exclusive qualifications for" state legislative offices). Likewise, in *Parker v. Wyman*, the Supreme Court held that a residency requirement for superior court judges could not be added by statute to the constitutional requirements for that office. 176 Wn.2d 212, 223, 289 P.3d 628 (2012). Here, the Constitution sets forth the only eligibility requirements and process for filling legislative vacancies and does not preclude eligibility or appointment of a sitting commissioner or councilmember. Accordingly, such persons should be eligible for appointment to a legislative vacancy, and their commissions or councils should be able to appoint them.

B. Washington has adopted a comprehensive ethics scheme related to public officials that would not preclude eligibility or appointment.

Washington has enacted a comprehensive statutory scheme that governs the ethical conduct of, inter alia, county commissioners and councilmembers. *See, generally*, chapter 42 RCW. For example, these provisions (i) prohibit use of official positions to secure special privileges or exemptions, (ii) prohibit giving or receiving any form of compensation related to the official's services, and (iii) prohibit certain acts that could lead to the disclosure of confidential

information acquired while an official. RCW 42.23.070. Washington law also addresses dual office-holding and prohibits it in several circumstances. *See, e.g.*, RCW 36.83.100 (prohibiting in certain cases county commissioner or councilmember that created road and bridge district from serving on district board). No provision of this comprehensive scheme prohibits a county commissioner or councilmember from eligibility for appointment to a legislative vacancy nor prohibits county commissions or councils from appointing one of their own members to a legislative vacancy. These ethical rules would require a sitting commissioner or councilmember to recuse him or herself during any discussion or vote on filling a legislative vacancy.

In addition, many counties and other municipalities have adopted their own ethics codes and policies to clarify the state statutory restrictions or to establish additional restrictions, including specifically to prohibit commissioners or councilmembers from simultaneously holding a state legislative position. *See, e.g.*, Pierce County Charter Sec. 9.45 (prohibiting councilmember from holding any other elected office except specific political party position); *see also* King County Code Sec. 3.04.030(B)(9) (prohibiting acts in conflict with official duties, including simultaneously holding two public offices that are incompatible)[1]; Clallam County Code Sec. 3.01.030(2) (clarifying prohibition on gifting); Pierce County Code Sec. 3.12.030 (clarifying prohibition on misuse of public positions); Whatcom County Code Sec. 2.104.070(C) (prohibiting in certain situations former elected county official from representing another person before the county); Bainbridge Island Ethics Program Sec. II(F) (establishing nepotism prohibition).[2] Although many counties have exercised their considerable discretion and imposed additional ethics restrictions on county officials, none have barred a sitting commissioner or councilmember from eligibility for appointment to a legislative vacancy nor prohibited legislative authorities from appointing their own members to the state legislature. If a sitting commissioner or councilmember were appointed, that member would likely have to resign from the county commission or council upon being appointed.

C. Washington has not adopted a common law ethics principle.

The Attorney General opinions on the issue have relied on a common law ethics principle for the conclusion that a sitting commissioner or councilmember is not eligible for appointment to a legislative vacancy. Though some jurisdictions have adopted a common law rule that government entities may not appoint their own members to positions over which they have appointment power, no such common law principle has been adopted in Washington.

First, a common law rule must be recognized by a state for it to apply in that jurisdiction. *State ex rel. Clayton v. Bd. of Regents*, 635 So. 2d 937, 937-38 (Fla. 1994). Here, Washington has not adopted by statute or court case an applicable common law rule.

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[1] It is unclear whether simultaneously holding a council or commission position and a state legislative position would violate the established common law doctrine prohibiting the holding of "incompatible public offices." *Kennett v. Levine*, 50 Wn.2d 212, 216, 310 P.2d 244 (1957). Pierce County, for its part, has expressly barred such simultaneous holding.

[2] Any county commissioner or councilmember seeking appointment to a vacant legislative seat should consult the code and internal policies of the relevant counties to determine whether any additional requirements may apply.

Second, a state's development of laws governing an issue confirms a state's decision not to be governed by the corresponding common law. *Id.* *Clayton* is instructive on this point. In *Clayton*, the Florida Board of Regents appointed one of its members to the position of president of one of the universities. *Id.* The appointment was challenged as void "based on the common law rule that a government body with appointment powers may not appoint one of its own to a position." *Id.* at 938. The court denied the petition, holding that no common law rule prohibited such appointments. *Id.* The court noted that Florida's constitutional provisions governed public official conduct, including addressing dual office-holding, financial benefits from office-holding, abuse of public trust, open business, and public records. *Id.* These provisions, the court concluded, were "even more restrictive" than the common law doctrines adopted by other states. *Id.* Similarly, Washington has established a comprehensive scheme governing public official conduct, as examined above. In addition to those provisions, Washington has enacted several important open government requirements like those in *Clayton*, including that all meetings of county legislative authorities be open to the public, that public records be made available to the public, and that certain proceedings comply with the appearance of fairness doctrine. Chapter 42.30, .36, .56 RCW. Washington's decision comprehensively to address the conduct of its public officials and the appointment process confirms that the common law principle should not apply in Washington.

Third, the common law principle cited by the Attorney General in its earlier opinions has fallen out of favor in the intervening years and is now subject to limitation. As expressed in the recent edition of the primary treatise relied upon by the Attorney General: "[i]t is **sometimes** considered to be contrary to public policy to permit an officer having appointing power to use such power to confer an office on him- or herself in the absence of specific legislative authorization, or to permit an appointing body to appoint one of its own members." 63C Am. Jur. 2d Public Officers and Employees § 93 (footnotes omitted) (emphasis added).

III. Conclusion

A sitting county commissioner or councilmember should be eligible for appointment to a vacant state legislative position. The Constitution enumerates the exclusive eligibility requirements and process for filling a legislative vacancy and does not preclude the appointment of a sitting commissioner or councilmember. No statutory provision prohibits such appointment either. The Attorney General's earlier conclusion that a common law rule would bar such appointments is in retrospect mistaken. That conclusion predated Supreme Court decisions confirming that the constitutional eligibility requirements are exclusive. Moreover, Washington has not adopted that common law principle, which has since fallen out of favor, and Washington's development of robust laws governing appointments to the legislature and the conduct of public officials confirms the state's decision not to be governed by this common law ethics principle.

Skagit County Prosecuting Attorney
Richard A. Weyrich

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MEMORANDUM

TO: Skagit County Board of County Commissioners:
Lisa Janicki, Chair;
Ron Wesen, Commissioner; and
Kenneth A. Dahlstedt, Commissioner

FROM: Richard Weyrich, Skagit County Prosecuting Attorney; and
Melinda Miller, Skagit County Chief Civil Deputy Prosecutor

DATE: January 29, 2019

RE: County Commissioner or Councilmember Eligibility for Appointment to a Vacant State Legislative Position

The Skagit County Prosecuting Attorney's Office has reviewed the relevant constitutional provisions, case law and attorney general opinions. The Skagit County Prosecuting Attorney's Office concurs in the legal opinion of Pacifica Law Group that a current County Commissioner or Councilmember is eligible for appointment to a vacant state legislative position.

Washington Supreme Court cases issued after AGO 1985 No. 1 and No. 15 have held that for state constitutional offices, the constitution sets forth the sole eligibility requirements. *Parker v. Wyman*, 176 Wn.2d 212, 218, 289 P.3d 628, 631 (2012) *citing Gerberding v. Munro*, 134 Wn.2d 188, 210, 949 P.2d 1366 (1998). The cases have expressed the strong presumption favoring eligibility for office:

> Since the right to participate in the government is the common right of all, it is the unqualified right of any eligible person within the state to aspire to any of these offices, and equally the unqualified right of the people of the state to choose from among those aspiring the persons who shall hold such offices. It must follow from these considerations that eligibility to an office in the state is to be presumed rather than to be denied, and must further follow that any doubt as to the eligibility of any person to hold an office must be resolved against the doubt.

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Gerberding v. Munro, 134 Wn.2d 188, 202, 949 P.2d 1366, 1373 (1998) (*citing State v. Schragg*, 158 Wash. 74, 78, 291 P. 321 (1930). Washington Constitution Article 2, Section 7 provides:

> No person shall be eligible to the legislature who shall not be a citizen of the United States and a qualified voter in the district for which he is chosen.

To require that a candidate not be a sitting Commissioner or Councilmember runs contrary to the rule that the constitution sets the exclusive requirements for eligibility and the strong presumption favoring eligibility.

Any issues that may arise due to incompatible offices would be resolved by a candidate's withdrawal from an incompatible office after appointment.

cc: Tim Holloran, Skagit County Administrator