

AG OPINION CITED IN 93-006
I86-117

STATUTES CITED IN 93-006
ARS 38-295(B)

ARIZONA CONSTITUTION

ART. VI, SEC. 37(B)

ART. VI, SEC. 38(E)

ART. VI, SEC. 39

ART. XXII, SEC. 13



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November 23, 1993

The Honorable C. Kimball Rose
Presiding Judge
Maricopa County Superior Court
201 West Jefferson
4th Floor, CCB
Phoenix, Arizona 85003

Re: I93-006 (R93-013)

Dear Judge Rose:

You have asked whether a superior court judge in Maricopa or Pima County who fails to file a declaration of desire to be retained in office serves until the expiration of the judge's current term or until the appointment of the judge's successor. For the following reasons, we conclude that a judge who chooses not to seek reelection may not hold over in office, and therefore serves only until the expiration of his or her current term.

The Arizona Constitution provides for a system of merit selection, gubernatorial appointment, and retention by election of superior court judges in those counties having a population of two hundred fifty thousand persons or more. If a judge fails to file a declaration of desire to be retained in office by the sixtieth day before the general election preceding the expiration of his or her term of office, the Constitution provides that the judge's office "shall become vacant upon expiration of the term for which such . . . judge was serving." Ariz. Const: art. VI, § 38(E).¹ Within sixty days from the

1. In addition, the constitution specifies that the occurrence of certain events triggers vacancies in the offices of judges of courts of record. Those events include "the

(footnote continued)

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occurrence of the vacancy, the commission on trial court appointments for that county must submit to the Governor the names of at least three persons nominated to fill the vacancy. Ariz. Const. art. VI, § 37(B). The commission on trial court appointments has no power to submit names to the Governor until the office is vacant. See Ariz. Att'y Gen. Op. I86-117. As a result, when the term of a judge not standing for retention expires, his or her successor will not have been selected.

Generally, the lack of a successor results in the officer holding over or continuing to serve in the office until a replacement is selected and qualified. See A.R.S. § 38-295(B) ("Every officer shall continue to discharge the duties of the office, although the term has expired, until a successor has qualified.").^{2/} This hold over provision, however, does not apply to extend the term of a superior court judge who has failed to file a declaration of desire to be retained in office. By the specific terms of Arizona Constitution article VI, section 38, the failure to file a declaration of desire to be retained in office results in more than just the expiration of the judge's term; when the judge's term expires the office becomes vacant.

Hold over provisions have been held to apply only to cases in which the term of office of an incumbent has expired and not to cases in which a position becomes vacant. See Cragin v. Frohmiller, 43 Ariz. 251, 255-56, 30 P.2d 247 (1934). Hold over provisions are, in fact, designed to prevent vacancies in office. State v. Macias, 162 Ariz. 316, 319, 783 P.2d 255 (App. 1989). Despite the existence of a

(footnote continued)

expiration of [the] term next following a general election . . . for which general election [the judge] is required, but fails, to file a declaration of his desire to be retained in office." Ariz. Const. art. VI, § 39.

2. Article XXII, Section 13, of the Arizona Constitution similarly provides that "[t]he term of office of every officer to be elected or appointed under this Constitution or the laws of Arizona shall extend until his successor shall be elected and shall qualify." However, this provision has been interpreted to apply exclusively to elective offices that are regularly filled by election and only occasionally by appointment. Sweeney v. State, 23 Ariz. 435, 204 P. 1025 (1922).

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fixed term of office, the lack of a successor does not result in a vacancy if the laws or constitution provide for holding over until successors are elected and qualified. See State v. Osborn, 14 Ariz. 185, 201-02, 125 P. 884 (1912).

During the period of the tenure as so extended the office will not become vacant, unless for causes which would create a vacancy in the fixed and regular term, such as the death, resignation, removal, disqualification, or the like of the incumbent.

Sweeney, 23 Ariz. at 441-42.

As explained more fully by the Arizona Supreme Court:

Upon the assumption that no disqualification existed or has intervened, the right of an incumbent who has been duly admitted into an office continues during the prescribed term, and until his successor is elected and qualified. . . . Until the concurrence of these events the title of a duly qualified incumbent to the office is complete. He holds by the same tenure, after the prescribed term, until the right of a duly elected and qualified successor attaches, as before. So long as the defeasible right to hold over continues, and the incumbent exercises it, the same conditions which would create a vacancy during the prescribed term will be required to create one during the time which he is lawfully holding over. As a consequence, it must result that if no contingency has intervened to disqualify an incumbent from holding the office, or cut off his defeasible title, no vacancy has occurred merely because his prescribed term has expired, if in the meantime the right of his successor has not attached. In such a case the body with whom the power to fill vacancies is lodged, has no function to perform. The office is lawfully occupied by a qualified incumbent, whose title has not been defeated. It is not vacant.

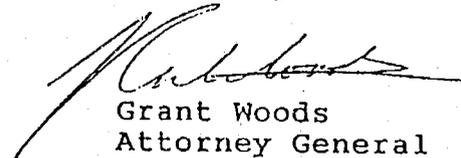
Sweeney, 23 Ariz. at 442-43 (quoting Gosman v. State, 106 Ind. 203, 6 N.E. 349 (1886)) (emphasis added); see also McCall v. Cull, 51 Ariz. 237, 243-44, 75 P.2d 696 (1938).

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If an incumbent judge who did not seek retention is available and permitted to hold over upon the expiration of his or her term, the appointing authority has no vacancy to fill. By providing that a vacancy occurs upon the expiration of the term of a judge who has failed to file a declaration of desire to be retained in office, the constitution precludes application of any hold over provision to extend the judge's term of office, thereby permitting the commission on trial court appointments and the Governor to fill the vacancy by appointment.

Therefore, a judge who chooses not to seek retention cannot serve beyond the expiration of his or her regular term.

Sincerely,



Grant Woods
Attorney General

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