

CHAPTER 351

RESIGNATIONS; VACANCIES; REMOVALS

351.02 VACANCIES.

Bond covering shortage of school treasurer during term and "until successor is elected and qualified," is as a matter of law not in force on date of qualification of himself as successor when term had expired three months previous. Surety on bond is liable, after expiration of officer's statutory term, only for reasonable time within which to choose a successor and execute a new bond. *American Surety v Ind. District*, 53 F(2d) 178.

Coroner automatically vacated his office when he pleaded guilty to a violation of the Harrison anti-narcotic law in federal court. 1942 OAG 192, Jan. 20, 1941 (490-d).

A village policeman must be a legal voter of the state. OAG June 9, 1942 (785-S).

If a county commissioner removes from the state he vacates his office. OAG May 5, 1943 (104-A-14).

A person must reside within the county where he serves as deputy sheriff, or as an officer mentioned in section 617.50. OAG Aug. 10, 1943 (122-B-6).

If supervisor removes from the town he vacates his office. OAG Dec. 4, 1944 (432-A-17).

Smuggling of dutiable goods is not an "infamous crime," but a misdemeanor, and conviction did not deprive a village trustee of his office. OAG April 1, 1946 (471-J).

A state employee who had gained permanent status prior to April 2, 1939, loses that status if he permanently removes from the state. OAG May 8, 1946 (644-B).

Where a member of the village council left Buhl, storing his furniture and now operates a garage in Iowa, the question as to whether he has ceased to be an inhabitant of the village is a question of fact to be determined in the first instance by the village council. OAG Sept. 23, 1946 (471-m).

A policeman is an officer and not an employee and whether or not he has ceased to be an inhabitant of the village so as to cause a vacancy is a question of fact. OAG March 21, 1947 (785-s).

A county officer may resign his office whereupon the office becomes vacant. There are no express statutory provisions relating to vacations for county officials. OAG June 20, 1947 (125-a-33).

Domicile, conflict of laws as to. 15 MLR 668.

Removal from public office. 20 MLR 721.

Acceptance of resignation, necessity for. 23 MLR 245.

351.03 REMOVAL BY GOVERNOR.

In order to warrant the removal of an elective public officer under section 351.03, the misconduct complained of must have some connection with or relation to the performance of the officer's official duties; and acts and conduct in opposition to the policy of the federal government in entering into war with Germany, having no relation to the official duties of a judge of probate, furnish no sufficient legal basis for an order by the governor removing an incumbent from office. *State ex rel v Burnquist*, 141 M 308, 170 NW 201, 609.

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By constitutional authority, the legislature has placed the power to remove justices of the peace in the governor. That power is exclusive as against the attempt by home rule charter to give a similar power to the city council. *State ex rel v Hutchinson*, 206 M 446, 288 NW 845.

A sheriff's official duty implies alertness and initiative to enforce laws enacted by the people for their protection and well-being. Relator, who failed to meet these requirements, was properly removed from office. *Removal of Mesenbrink*, 211 M 114, 300 NW 398.

The power to appoint a commissioner of education, vested by statute in the state board of education, carries with it the power to remove such commissioner for cause after due notice and hearing, notwithstanding his tenure of office is also fixed by statute. The board's order removing the commissioner is sustained. *State ex rel v State Board*, 213 M 184, 6 NW(2d) 251.

Within the legislative field lies the power to remove public officers, whether elective or not, or authorize their removal without notice or hearing, subject only to constitutional limitations as to the particular office. Since the manner of making such removals is wholly within legislative control, it naturally follows that where that body has granted the power of removal and provided by whom and in what manner that power shall be exercised, the only question for the courts is whether legislative direction has been complied with. *State ex rel v Oehler*, 218 M 290, 16 NW(2d) 765.

The governor's power to suspend an officer who is under charges for malfeasance or nonfeasance in office is incident to the power to remove such officer, and upon such suspension it is the duty of the governor to appoint an acting officer to perform the duties of the office during the suspension. L. 1937, c. 310, does not apply to a situation involving a suspension as distinguished from a vacancy. *State ex rel v Strunk*, 219 M 529, 18 NW(2d) 457.

Affidavits accompanying the petition for removal of county officer adds nothing to its legal sufficiency. What is required as to form or contents of the petition is fully set forth in OAG Sept. 26, 1945 (475-B).

Under section 351.03 the governor may remove any of the officers therein designated when it appears to him, by competent evidence, that either has been guilty of malfeasance or nonfeasance in the performance of his official duties, first giving such officer a copy of the charges against him and an opportunity to be heard in his defense. There is nothing in our statutes which relieves a sheriff of doing his duty "even though he may have a police chief under civil service in the county." If any official charged with malfeasance or nonfeasance in office wishes to have the findings of the governor reviewed by the supreme court, he may, of course, apply for a writ of certiorari for that purpose. OAG July 14, 1947 (733).

Power of courts to review governor's acts on certiorari. 6 MLR 80.

Power of governor to remove a municipal officer where a home rule charter provides for a recall. 8 MLR 70.

Effect on official status of a public officer holding under an unconstitutional statute. 13 MLR 439.

Mandamus to compel governor to remove county officer. 14 MLR 572.

Rule I governing attorneys in the practice of their profession. 16 MLR 273.

Municipal home rule. 16 MLR 659, 675.

Removal from public office. 20 MLR 721.

Tort liability of administrative officers. 21 MLR 263, 275.

Governor's constitutional powers of appointment and removal. 22 MLR 451.

Evidence before administrative tribunals. 23 MLR 68.

Resignation, when effective—necessity of acceptance. 23 MLR 245.

Determination as to whether an office is a state or county office. 23 MLR 535.

351.04 SPECIAL COMMISSIONER TO TAKE TESTIMONY.

No statutory authority is necessary for the appointment of a referee to receive and file charges and to take testimony in removal proceedings pending before an administrative board. The original specifications of charges against an official may be supplemented or amended during the progress of removal proceedings. The validity of the proceedings is not affected by the appointment of special counsel to represent the state, the appointment being made with the consent and acquiescence of the attorney general. *State ex rel v State Board*, 213 M 184, 6 NW(2d) 251.

Evidence before administrative tribunals. 23 MLR 68.

351.06 APPOINTMENT; CONTINUANCE OF TERM; IMPEACHMENT.

The phrase "next general election" means one occurring after there is sufficient time after the vacancy to give the notice required by law that the vacant office is to be filled at the election. Commissioner Wefald's death occurred on October 25 and the state canvassing board properly held that sufficient time had not intervened between the death of Wefald and the general election on November 3, and that no certificate of election should be issued to the relator who received 87 sticker votes. *State ex rel v Alwood*, 202 M 50, 277 NW 357.

When appointing a new member to fill a vacancy caused by the death of a county commissioner, the term "official year" should not be construed so as to mean for the "unexpired term" of the person who by death, resignation or otherwise caused the vacancy. OAG June 11, 1946 (126-G).

351.11 FEES OF COMMISSIONERS AND WITNESSES; HOW PAID.

In proceedings to remove a sheriff if the governor or his agent, the commissioner, orders subpoenas they must be paid from the governor's contingent fund; otherwise they must be paid by the party making the complaint. The cost of subpoenas are not chargeable to the county. OAG Dec. 26, 1944 (144b-24).

351.12 PAY TO EMPLOYEE ANNUAL LEAVE ALLOWANCE.

HISTORY. 1945 c. 492 s. 1.

Employee who applies for reinstatement solely for the purpose of utilizing accrued annual leave and without intending to continue in the employment of the state is entitled to such leave and to payment therefor on resignation. OAG March 6, 1946 (644-D).

An employee cannot receive pay for both working and being on vacation. An employee entitled to a vacation may take same only at such times as may be approved by the appointing authority. OAG June 3, 1946 (120).

A state employee may not be paid simultaneously for both working and being on vacation. OAG Sept. 16, 1946 (644-D).

An employee whose last day on the payroll was Oct. 15, 1946, was paid in advance to Dec. 15, 1946, the excess being his unused accumulated leave. For refundment and other contingencies he is deemed to have severed his connection with the state on October 15. OAG Nov. 15, 1946 (331-a-13).

Payment of annual leave and overtime on transfer of employees to a new department; limitations; distinction between classified and unclassified employees, as determined by L. 1945, c. 492, and civil service rule 13.7. OAG July 10, 1947 (644-D).

Where there is in practice a custom to permit employees to accumulate annual leave and sick leave, and where such practice existed while the claimant was in military service, such employee although not under civil service, would be entitled upon reinstatement to accumulated vacations, and the employee generally would be entitled to all the benefits allowable under section 192.261. OAG Aug. 14, 1947 (644-D).