

DOCKET NO. 175

NUMBER TERM YEAR

504 November 1961

In Re: Office of the District

Attorney, Clearfield County, Pa.

VERSUS

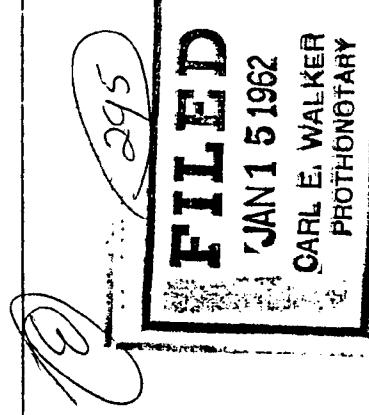
1/504 Nov 1961
IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PA.

IN RE: OFFICE OF THE DISTRICT
ATTORNEY, Clearfield County,
Pennsylvania.

PETITION FOR DECEASORATORY
JUDGMENT

and

ORDER OF COURT



BELL, SILBERBLATT & SWOOPPE
Attorneys at Law

Clearfield - Philipsburg
Pennsylvania

Now, this 15th day of Jan. 1962, service accepted
by copy.

Eugene S. Kitter

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PA.

IN RE: Office of the District Attorney:

Clearfield County, Pennsylvania:

TO: Eugene Kitko

You are required to file an answer within fifteen days from the service of this copy upon you, and to enter a written appearance in the court named, to the term and number stated hereon, specifying a person and a place within the county where service may be made upon you of all other papers, processes, and notices in the case. If you fail in either respect, a declaratory judgment or decree may be entered against you in your absence.



Attorney for Petitioner

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PA.

IN RE: Office of the District Attorney :
Clearfield County, Pennsylvania:

PETITION FOR DECLARATORY JUDGMENT

TO THE HONORABLE JOHN J. PENTZ, PRESIDENT JUDGE OF SAID
COURT:

Your Petitioner, Norma Shaw respectfully represents:

1. Norma Shaw is a resident and citizen of Osceola Mills, Clearfield County, Pennsylvania.
2. Your petitioner is the Vice Chairman of the Republican County Committee of Clearfield County, Pennsylvania.
3. That on November 7, 1962, William C. Chase was duly elected to be District Attorney of Clearfield County, as certified by the Clearfield County Commissioners, and was to have taken office on January 2, 1962.
4. That William C. Chase died on December 7, 1961.
5. That Joseph S. Ammerman was District Attorney of Clearfield County by virtue of election in November of 1957, and that Joseph S. Ammerman resigned as District Attorney of Clearfield County in March of 1961.
6. Your Honorable Court, in accordance with the law appointed Eugene Kitko to fill the unexpired term of Joseph S. Ammerman, which term expired January 1, 1962.
7. Your petitioner sets forth that by reason of the fact that William C. Chase died before qualifying for office a question arises as to the meaning of the law affecting the office of District Attorney of Clearfield County.
8. Your petitioner sets forth that this question creates a situation wherein much litigation is possible, such as a Quo Warranto proceeding, or a Tax Payer's suit, or an injunction against the County Commissioners.

9. Your petitioner sets forth that facts in the matter create a legal question for the following reasons:

A. The Constitution of Pennsylvania, Article 14, Section 2, provides:

~~County officers shall be elected at the municipal elections and shall hold their offices for the term of four years, beginning on the first Monday of January next after their election, and until their successors shall be duly qualified; all vacancies not otherwise provided for, shall be filled in such manner as may be provided by law. (Amendment of November 2, 1909.)~~

~~B. The County Code of 1955 P.L. 323 Section 401, provides for the election of a District Attorney in each County. Under (b) of said Section it provides as follows:~~

All such officers shall be elected at the municipal elections next preceding the expiration of the terms of the officers now in office and quadrennial thereafter, and shall hold their offices for the term of four years from the first Monday of January next after their election, and until their successors shall be duly qualified, but in the event that any such officer so elected, excepting a County Commissioner or Auditor, shall fail to qualify, or if no successor shall be elected, then the officer then in office shall continue in office until the first Monday of January following the next municipal election, at which time his successor shall be elected for the term of four years.

In Section 1404: If any vacancy shall occur in the office of district attorney, either by death, resignation, removal from office or from the county, or otherwise, the judges of the court of common pleas shall supply such vacancy by the appointment of a competent person to fill the office during the balance of the unexpired term.

10. Your petitioner therefore avers, that there is an actual controversy because of the ambiguity in the law with respect to the facts, and that such ambiguity indicates ~~im~~minent and inevitable litigation; that the declaratory relief herein sought will be a practical help in ending the controversy and will cause to disappear the ripening seeds of litigation and will settle the issue presented in this proceeding.

WHEREFORE, your petitioner prays that your Honorable Court under the Act of June 18, 1923 P.L. 840, 12 P.S. 831, as amended, construe the law with respect to the office of District Attorney as applicable

to the facts presented by this Petition and determine whether or not appointee, Eugene Kitko ended his services as District Attorney on January 1, 1962, thereby creating a vacancy in the office of the District Attorney of Clearfield County, since the elected person did not qualify on January 1, 1962, pursuant to his election.

And she will ever pray.

Norma Shaw
Norma Shaw

STATE OF PENNSYLVANIA:

: SS:

COUNTY OF CLEARFIELD :

Before me, the undersigned officer, personally appeared Norma Shaw, who, being duly sworn according to law, deposes and says that the facts set forth in the foregoing Petition are true and correct to the best of her knowledge, information and belief.

Sworn and subscribed to
before me this 11th day
of January, 1962.

My Commission Expires Jan. 3, 1966

Phoebe E. Butterworth
Justice of the Peace

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PA.

IN RE: Office of the District Attorney:
Clearfield County, Pennsylvania:

ORDER OF COURT

Now, this _____ day of _____, 1962, it is
ordered that the _____ day of _____, 1962, at
_____ O'clock _____.M. is fixed for hearing on this Petition,
notice thereof to be given to all interested parties.

BY THE COURT

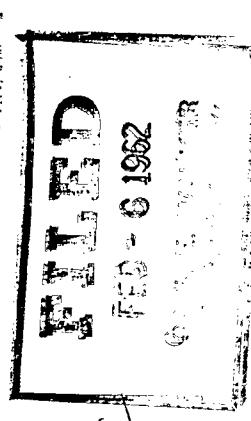
P.J.

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNA.
No. 504 November Term 1961

In re:

OFFICE OF DISTRICT ATTORNEY
OF CLEARFIELD COUNTY, PENNA.

OPINION and ORDER



JOHN J. PENTZ
PRESIDENT JUDGE
CLEARFIELD, PENNSYLVANIA

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA.

In re: : No. 504 November Term 1961.
OFFICE OF DISTRICT ATTORNEY OF :
CLEARFIELD COUNTY, PENNSYLVANIA :
:

O P I N I O N

At the Municipal Election of November 7, 1961, the office of District Attorney of Clearfield County was to be filled by the election of either William C. Chase or Eugene G. Kitko, candidates respectively, of the Republican and Democratic Parties, for that office.

Mr. Chase was elected, but died on the 7th day of December 1961; so that on January 1, 1962, the first Monday next after the preceding Municipal Election, he could not appear and qualify.

Joseph S. Ammerman was elected District Attorney, at the Municipal Election of 1957, and filled that office until March 16, 1961, when he resigned, and Eugene G. Kitko was appointed to fill the unexpired term, on that date, and has continued to act as District Attorney since January 1, 1962, asserting that no vacancy has occurred in that office.

On the 15th day of January 1962, a petition was presented by Norma Shaw, under the provisions of the Uniform Declaratory Judgment Act of June 18, 1923, P. L. 840 (12 P.S. 831) as amended, stating in her petition that there is a vacancy in the office of District Attorney of Clearfield County, which occurred January 1, 1962, because Mr. Chase, the elected District Attorney, failed to

qualify; and that Eugene G. Kitko, as the appointee on March 16, 1961, does not continue in office after the first Monday of January 1962.

Mr. Kitko answered the petition, denying any vacancy has occurred. The matter came on for argument on the pleadings, on January 26, 1962; the facts all being undisputed, and as set forth above.

The office of District Attorney is created by the County Code of August 9, 1955, P.L. 323 (16 P.S. 101 et seq.), along with all other county officials. Section 401, in addition to creating the several county offices, defines the terms of those offices, in the following words:

"All such officers shall be elected at the municipal election next preceding the expiration of the terms of the officers now in office, and quadrennially thereafter, and shall hold their offices for a term of four years from the first Monday of January next after their election and until their successors shall be duly qualified, but in the event that any such officer so elected, excepting a county commissioner or auditor, shall fail to qualify, or if no successor shall be elected, then the officer then in office shall continue in office only until the first Monday of January following the next municipal election, at which time his successor shall be elected for a term of four years. In the case of a county commissioner or auditor, there shall be a vacancy which shall be filled as provided in this act."

The term, therefore, of each county officer, except county commissioner and auditor, is for four years, beginning on the first Monday of January next after the preceding municipal election, and until a successor is qualified. However, the officer then in office continues in office, if no successor is elected or qualified;

but such continuance will not extend beyond the next municipal election.

Section 1404 of the County Code provides that if a vacancy occurs in the office of District Attorney, it shall be filled, stating as follows:

"If any vacancy shall occur in the office of district attorney, either by death, resignation, removal from office or from the county, or otherwise, the judges of the court of common pleas shall supply such vacancy by the appointment of a competent person to fill the office during the balance of the unexpired term."

The appointment of Mr. Kitko on March 16, 1961, was for the balance of the unexpired term of Mr. Ammerman, and the term of Mr. Ammerman, as defined by Section 401, is for four years from the first Monday of January next following the Municipal Election of 1957, and until his successor shall be duly qualified, as stated in Section 401.

The petitioner takes the position that the prolongation of the term, in the event a successor is not elected, or fails to qualify, applies only to the officer then in office, who has been elected to that office, and not to the "officer then in office who has been appointed to fill an unexpired term".

The petitioner concedes that had Mr. Ammerman not resigned on March 16, 1961, but remained in office, and Mr. Chase, having been elected, failed to qualify on January 1, 1962, Mr. Ammerman would have continued in office until the next municipal election, which

will be the first Tuesday after the first Monday of November 1963.

Exactly the same situation has been passed upon by the Supreme Court of Pennsylvania, in COMMONWEALTH EX REL MATTHEWS V. LOMAS, 302 Pa. 97. In this case, Matthews, the plaintiff, was appointed tax collector to fill an unexpired term. Lomas was elected at the next municipal election, but died before the first Monday of January following, the date to qualify. Council appointed the wife of the deceased elected official, Mrs. Lomas, the defendant. In an action of quo warrento against Mrs. Lomas, to set aside her appointment, the Supreme Court of Pennsylvania held that the failure of an elected official to qualify, does not create a vacancy in that office, but the incumbent, who had been legally appointed to fill the vacancy, continues until the next municipal election; and stated on page 106, as follows:

"In view of the recognition by this court in Commonwealth v. Sheatz, 228 Pa. 301, 307, that a hold-over term is not a new term, but a mere prolongation of the elected incumbent's term, and the statement in Commonwealth v. Bitner, 294 Pa. 549, 554, that the appointee to fill a vacancy in such office is merely serving out the period which his predecessor would have served, it follows logically that the legislature did not, by providing for appointment for the unexpired term of office, expressly limit the term of the appointee to a shorter period than would have attached to the term of the original incumbent, but impliedly recognized his right to continue in office, if occasion should arise...."

401 The question raised by the petitioner, namely, that Section 401 does not apply to one appointed to fill the unexpired term, but a vacancy does occur when the elected official fails to qualify, has been definitely determined to the contrary, by the Lomas case, *supra*.

The rule of law in that respect was further stated in *COMMONWEALTH EX REL V. KELLY*, 322 Pa. 178, in which Mr. Justice Schaffer, stating that it is the common law of Pennsylvania that incumbents of offices remain in office until a successor has been elected and qualified, and if no successor is elected and qualified, no vacancy occurs; and states more at length, beginning on page 183, as follows:

"The unquestioned weight of modern authority holds that where an officer is appointed or elected for a specified term, he continues to hold over until his successor has qualified, unless there is an express legislative mandate to the contrary: (numerous cases cited). In *STATE EX REL ROGERS V. JOHNSON*, 135 Wash. 109, 113, 237 Pac. 12, the Supreme Court of the State of Washington in passing upon the question before us said: "The courts generally indulge in a strong presumption against a legislative intent to create by statute a condition which may result in an executive or administrative office becoming, for any period of time, wholly vacant and unoccupied by one lawfully authorized to exercise its functions..... The rule of law is that an officer shall hold office until his successor is appointed and qualified, unless by the language of the statute such holding over is expressly or by clear implication prohibited."

The question raised by the petitioner, therefore, has been definitely determined by the Supreme Court of Pennsylvania, contrary to the position taken by petitioner.

The assertion by the petitioner, that Section 4 of Article VI of the Constitution, namely, the appointing power has the power to remove, requires the Court of Common Pleas of Clearfield County to declare a vacancy, by removing the appointee, Mr. Kitko, is untenable, because the term for which he was appointed has a definite time, as stated in Section 401; and it is only those appointments which are of indefinite duration, or without fixed term, that the appointing power may remove the appointee without question, or without proper cause. This position has been discussed at length in BOWERS V. PENNSYLVANIA LABOR RELATIONS BOARD, 402 Pa. 542, in which it was pointed out that a person appointed to an office for a fixed term of years, as prescribed by the Legislature, has a right to that office which can not be taken from him by the appointing power, except for proper cause, such as misfeasance, etc.

The decisions of the Supreme Court of Pennsylvania, as above quoted, have determined what is to be done when an elected candidate is unable to qualify, even though the incumbent of the office, who has not been the choice of the electors, shall continue to hold that office for a further period of two years.

NOTE: Cases cited to COMMONWEALTH V. KELLY, supra, as basis to conclusion quoted on page 5 of this Opinion - STATE EX REL. GUERNSEY V. MEILIKE, 81 Wis. 574, 51 N.W. 875; PEOPLE EX REL. MATEER V. MORRELL, 234 Ill. 47, 84 N.E. 644; JONES V. ROBERTS CO., 27 S.D. 519, 131 N.W. 861; STATE EX REL. EBERLE V. CLARK, 87 Conn. 537, 89 Atl. 172; WALKER V. HOPPING, 226 S.W. 146 (Tex.); STATE EX REL. PLUNTZ V. JOHNSON, 176 Wis. 107, 186 N.W. 729; STATE EX REL. ROGERS V. JOHNSON, 135 Wash. 109, 237 Pac. 12; STATE EX REL. SANDQUIST V. ROGERS, 93 Mont. 355, 18 Pac. (2d) 617; STATE EX REL. STAIN V. CHRISTENSEN, 84 Utah 185, 35 Pac. (2d) 775.

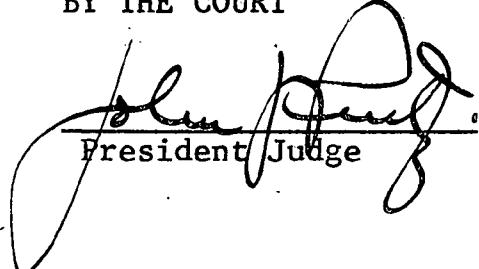
Therefore, this Court has no authority to declare a vacancy in the office of District Attorney, and thus appoint anyone to that office. The incumbent, Mr. Kitko, has the right to continue therein until the first Monday of January following the next Municipal Election, which will be the first Tuesday following the first Monday of November of the year 1963.

O R D E R

NOW, February 6, 1962, petition dismissed, and Rule prayed for refused.

Exception noted.

BY THE COURT



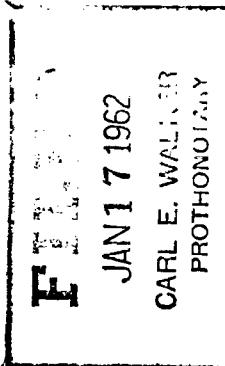
John J. Conroy
President Judge

Walter J. Lauer

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNA.
No. 504 Nov 1961

IN RE: Office of the District
Attorney:
Clearfield County,
Pennsylvania:

ANSWER TO PETITION FOR
DECLARATORY JUDGMENT



EUGENE G. KITKO
ATTORNEY AT LAW
CLEARFIELD, PA.

Non Jan 17-1962 - unanswered
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IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

IN RE: Office of the District Attorney:
Clearfield County, Pennsylvania:

504 Nov-1961

ANSWER TO PETITION FOR DECLARATORY JUDGMENT

TO THE HONORABLE JOHN J. FENTZ, PRESIDENT JUDGE OF SAID COURT:

NOW comes the respondent Eugene G. Kitko, District Attorney of Clearfield County and respectfully answers the Petition for Declaratory Judgment as follows:

1. Paragraph one of the petition is admitted.
2. Paragraph two of the petition is admitted.
3. Paragraph three of the petition is admitted.
4. Paragraph four of the petition is admitted.
5. Paragraph five of the petition is admitted.
6. Paragraph six of the petition is admitted.
7. Paragraph seven of the petition is admitted.
8. Paragraph eight of the petition is admitted.
9. Paragraph nine of the petition is denied as stated in that the citation of the County Code of 1955 P.L. 323 Section 401 Subsection B is incomplete and on the contrary it is averred that said Subsection B of Section 401 reads as follows:

All such officers shall be elected at the municipal elections next preceeding the expiration of the terms of the officers now in office and quadrennial thereafter, and shall hold their offices for the term of four years from the first Monday of January next after their election, and until their successors shall be duly qualified, but in the event that any such officer so elected, excepting a County Commissioner or Auditor, shall fail to qualify, or if no successor shall be elected, then the officer then in office shall continue in office until the first Monday of January following the next municipal election, at which time his successor shall be elected for the term of four years. In the case of a County Commissioner or Auditor there shall be a vacancy which shall be filled as provided in this Act.

10. Paragraph ten of the petition is admitted.

Eugene G. Rutherford

STATE OF PENNSYLVANIA) (SS:
COUNTY OF CLEARFIELD)

EUGENE G. KITKO, being duly sworn according to law, deposes and says that the facts set forth in the foregoing Answer are true and correct to the best of his knowledge, information and belief.

Eugene G. Kitter

Sworn to and subscribed to
before me this 17th day of
January, 1962.

Carrie E. Walker).

Deer) ROTARY
1960 NY Convention Expires
1st Monday Jan 1968