



## DEPARTMENT OF JUSTICE

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**No. 8288**

The Secretary of State asks if the current State Treasurer, Ted Wheeler, would be eligible to run for reelection in 2016, or whether limitations imposed by the Oregon Constitution would prohibit him from running. Below we set out the secretary's specific question and our short answer followed by a discussion of the applicable law.

### QUESTION

Is Treasurer Wheeler eligible to run for reelection in 2016 in light of Article VI, section 1, of the Oregon Constitution, which provides that the term of office for State Treasurer is four years, and that a person is not eligible to hold the office for more than eight years in a twelve-year period?

### SHORT ANSWER

No. Assuming Treasurer Wheeler completes the four-year term of office that he is currently serving, he would not qualify to run for State Treasurer in 2016, because he could not hold the office for the full four-year term without violating the eight-year limitation of Article VI, section 1.

### DISCUSSION

#### 1. Background

Wheeler has served as State Treasurer since March of 2010, when he was first appointed by Governor Kulongoski to fill the vacancy created by former Treasurer Westlund's death. Westlund had been elected for a four-year term in November 2008, but died on March 7, 2010. Wheeler was then elected to the office of treasurer in the November 2010 general election to fill the remaining two years of Westlund's four-year term. Then, in November 2012, Wheeler was reelected to a four-year term. He qualified for and assumed his present term of office in January 2013.



Article VI, section 1, of the Oregon Constitution creates the offices of State Treasurer and Secretary of State. It also establishes the terms of office and limits the number of years a person may serve in those offices:

There shall be elected by the qualified electors of the State, at the times and places of choosing Members of the Legislative Assembly, a Secretary and Treasurer of State, who shall severally hold their offices for the term of four years; but no person shall be eligible to either of said offices more than Eight in any period of Twelve years.

Article V, section 16, of the Oregon Constitution governs the filling of vacancies in state office:

when at any time a vacancy occurs in any \* \* \* state office \* \* \* the governor shall fill such vacancy by appointment, which shall expire when a successor has been elected and qualified. \* \* \* \* [T]he vacancy shall be filled at the next general election, provided such vacancy occurs more than sixty-one (61) days prior to such general election.

A statute pertaining to vacancies in elected offices likewise provides that an appointment to fill a vacancy “shall expire when a successor to the office is elected and qualified.” ORS 249.215(2). Under the terms of this statute, when Treasurer Wheeler was elected in 2010, he was elected to fill “the remaining two years of [Treasurer Westlund’s] term.”<sup>1/</sup> ORS 249.215(1).

## **2. Time Included in Limit Calculation**

The question presented by the Secretary of State requires us to first assess whether the two years Treasurer Wheeler served in office following his election in November 2010 count toward the eight-year limit established by Article VI, section 1. We conclude that those two years from January 2011 through January 2013 must be included in the calculation.

Under Article II, section 12, of the Oregon Constitution, the time that Wheeler served as the appointee from March 2010, through January 2011, is not included when applying the eight-year limitation. (“In all cases, in which it is provided that an office shall not be filled by the same person, more than a certain number of years continuously, an appointment pro tempore shall not be reckoned a part of that term.”) *See also* 17 Op Atty Gen 639 (1936) (concluding that the time that a person served as appointed State Treasurer was not included in calculations).

As noted above, both Article V, section 16, and ORS 249.215(2), provide that a temporary appointment expires when a successor is elected and qualified. Therefore, Wheeler’s appointment expired when he was elected and qualified in January, 2011.<sup>2/</sup> Because the two years that followed were not served pursuant to an appointment, and only appointments are excluded from the calculation under Article II, section 12, those two years of service as treasurer count toward the eight-year limit in Article VI, section 1.

### 3. Qualification to Run for Reelection in 2016

Wheeler currently holds the treasurer's office for a four-year term, which began in January 2013 and ends in January 2017. In January 2017, Wheeler will have held office for six consecutive years. If he were elected in the November 2016 general election, his four-year term of office would begin in January 2017 and end in January 2021. In January 2019, however, he would have served eight consecutive years as elected treasurer, and he would no longer be eligible to hold the office under Article VI, section 1.

We next consider whether his ineligibility to serve as treasurer beyond January of 2019 would prohibit Wheeler from running for office in 2016 and leaving the office when he reaches the eight-year limit. We conclude that, because he would be legally incapable of completing the four-year term of office provided in the constitution, Wheeler would not qualify to run in 2016. He could not run that year with the understanding that he would only serve two years of the four-year term.

Article VI, section 1, states that the elected State Treasurer "*shall hold \* \* \* office[] for the term of four years*" but is not "eligible" to hold office for more than eight in twelve years. (Emphasis added). This provision was part of the original constitution adopted in 1857 and effective in 1859. A dictionary in use around that time defined "eligible" to mean "fit to be chosen \* \* \* legally qualified to be chosen." Webster, AN AMERICAN DICTIONARY OF ENGLISH LANGUAGE (1828). Thus, under Article VI, section 1, Wheeler would be required to run for a four-year term of office, but he would be unqualified to be elected for that term, because he could not serve the full four-year term without exceeding the eight-year limit.

Our conclusion is supported by an Oregon Supreme Court opinion holding that a candidate for State Treasurer who was incapable of serving the full term did not qualify for the office. In *McAlmond v. Myers*, 262 Or 521, 500 P2d 457 (1972), the candidate had violated a state election law in an earlier election for state senator. In consequence, she was disqualified from serving in another office during the term that she would have served as state senator. Her senatorial term would have expired on January 8, 1973, and, if elected State Treasurer, her term of office would have begun on January 1, 1973. She would have been disqualified from serving as State Treasurer for one week of the four-year term.

The court concluded that the Secretary of State had a duty to withhold certification of a candidate that he knew was "unqualified" or "ineligible" for office. The court explained that candidates for State Treasurer were nominated by filing a nominating petition or declaration of candidacy with the Secretary of State. Candidates had to state in those documents that they would qualify if elected. The Secretary of State was authorized to verify the validity of those statements.<sup>37</sup> The court opined that the Secretary of State's authority to verify the validity of the statements in declarations and petitions "would be meaningless if it was not contemplated that he would take action if facts became known to him which show that the candidate is unqualified." 262 Or at 25.

Then, as now, the Secretary of State had a duty to certify a petition of nomination to the person receiving the highest number of votes in the primary. See ORS 254.555(1)(c)(Secretary of State must certify nomination of primary winner). The court reasoned that if the secretary knew that the candidate was disqualified from being elected or serving as treasurer he had a duty to omit her name from the certification of candidates in the general election. See also, ORS254.165 (current statute providing that if filing officer determines that a candidate has become disqualified or will not qualify in time for the office if elected they may not print the name of the candidate on the ballot).

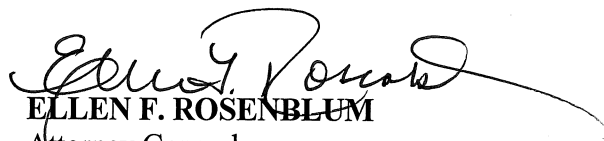
The court reasoned that “[p]lacing a party’s name on the ballot is a form of representation to the voters that, insofar as can then be known, the candidate, if elected, will be able to qualify for the Full term of the office.” 262 Or at 532 (capitalization in original). The court also agreed with a Pennsylvania decision holding that when a candidate asserted that he was qualified for office, the candidate was asserting eligibility to fill the entire term of the office:

“it may be assumed that those who voted for him did so in the mistaken belief that the candidate of their choice would be legally capable of holding the entire term for which they were balloting. \* \* \* \* \*. Its effect \* \* \* [would be] to bring about the election of one who could not, by any act of his own, or in any possible circumstances, remove the disqualification so as to completely fill the office for which he was standing, and to which he had been elected \* \* \* .”

262 Or at 532-533 (quoting *Commonwealth ex rel Kelley v. Keiser*, 340 Pa 59, 16 A2d 307 (1940)). If Wheeler were elected in 2016, he would be ineligible to hold the office for the last two years of the four-year term. For this reason, we conclude that the Secretary of State would not be able to certify Wheeler as a candidate for treasurer, knowing he would be ineligible to hold the full term of office.

### CONCLUSION

For the reasons discussed above, we conclude that the two years Treasurer Wheeler served after his election in November of 2010 must be included when applying the eight-year limit of Article VI, section 1. Assuming that Treasurer Wheeler completes his present four-year term of office, we further conclude that he would not qualify to run for State Treasurer in the 2016 election, because he would be incapable of fulfilling the full term of office without violating the eight-year limitation of Article VI, section 1, of the Oregon Constitution.

  
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1/ In providing that the State Treasurer may be elected to fill the remaining two years of a predecessor’s term under some circumstances, ORS 249.215 potentially conflicts with Article VI, section

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1, of the Oregon Constitution, which specifies a four-year term. Regardless of any conflict, if Treasurer Wheeler completes his present term, he will have served six consecutive years as treasurer since his initial election, and therefore be ineligible to run again in 2016. For that reason, it is not necessary in this opinion to analyze the constitutionality of ORS 249.215.

2/ See also, *State ex rel Whitney v. Johns*, 3 Or 533, 536, 1869 WL 638 (1869) (holding that the governor's appointment power under Article V, section 16, "extends to the filling of the vacancy and until the next election, when the people can regularly exercise their authority in electing officers. \* \* \* \*". The term of the appointed incumbent \* \* \* then expires."); *State ex rel Musa v. Minear*, 240 Or 315, 319, 401 P2d 36 (1965) (citing Article V, section 16, and declaring that "the framers meant an elected official to be elected by the people \* \* \* \*". The only appointments contemplated were to fill vacancies between elections."); 30 Op Atty Gen 101(1960) (stating that if an officer appointed by the governor to fill a vacancy pursuant to Article V, section 16 is then elected by the people at the next election, there are two terms involved – an appointive and an elective term).

3/ Although some of the numbers have changed, the current statutes contain the same requirements. See ORS 249.031(candidates must file a nominating petition or a declaration of candidacy); ORS 249.035 (nominating petitions and declarations of candidacy for state office must be filed with Secretary of State); ORS 249.031(1)(f)(nominating petition or declaration must contain "[a] statement that the candidate will qualify if elected"); ORS 249.004(filing officer may verify the validity of the contents of documents filed under chapter 249).