

sion v. Norristown Area School District, 20 Pa. Commonwealth Ct. 555, 342 A.2d 464 (1975), *aff'd*, 473 Pa. 334, 374 A.2d 671 (1977), is that a regulation is an exercise of delegated power to make law and is as binding on a reviewing court as a statute, while a statement of policy is merely interpretive, not binding on the reviewing court, but persuasive if it tracks the meaning of the statute. Applying this test to the situation at hand we reach the same conclusion. The Liquor Control Board statement is not an exercise of delegated power to make law but rather is merely a statement expressing what the Liquor Control Board deems to be an appropriate policy for that body to pursue in the conduct of its own meetings.

The wisdom of such a policy is not for us to decide. The constitutionality of the policy to the extent that it may infringe upon asserted rights of the affected individuals is pending before the U.S. District Court for the Middle District of Pennsylvania and it would be inappropriate for us to comment thereon.

You are further advised that in accordance with the provisions of § 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a)(1), you will not in any way be liable for following the advice set forth in this opinion.

Very truly yours,

LEROY S. ZIMMERMAN
Attorney General

OFFICIAL OPINION NO. 83-8

Governor's Office—Constitution—Judicial Vacancy—Appointment by the Governor—Election of Judges.

1. Pursuant to Pennsylvania Constitution, Article V, Section 13, the Governor may appoint a person to fill a judicial vacancy created on June 24, 1983, by the death of a judge running for retention. The term of any person so appointed shall end on the first Monday of January, 1984.
2. An election to fill a judicial vacancy which occurred on June 24, 1983, shall be held in November, 1983, which is the municipal election next preceding the date at which the term of office shall commence.
3. The procedure for nominations to be followed where a vacancy occurs after the time for the primary election but prior to two calendar months immediately preceding the next municipal election is set forth in the Election Law.

August 31, 1983

The Honorable Dick Thornburgh
Governor
Office of the Governor
Main Capitol Building
Harrisburg, PA 17120

Dear Governor Thornburgh:

The letter of August 16, 1983, from the General Counsel, asks that I give my opinion concerning the proper procedure for filling a vacancy on the Court of Common Pleas of Allegheny County which was created by the death of Judge Thomas Harper on June 24, 1983.

The following additional facts are set forth in the letter. Judge Harper had filed a declaration of candidacy for retention pursuant to Article V, Section 15, of the Pennsylvania Constitution. Judge Harper's name was to appear on the ballot in Allegheny County in November, 1983. We note further that Judge Harper's term expires on the first Monday in January, 1984. This series of events raises three questions concerning the vacancy on the Allegheny County Court of Common Pleas:

1. Shall the vacancy be filled by appointment and what is the term for which the appointment is made?
2. When shall an election next be held to elect a judge to this vacancy?
3. How shall the nominations of people to be elected to fill the judicial vacancy be made?

1. *Appointment*

The Pennsylvania Constitution provides that a vacancy in the office of judge shall be filled by appointment by the Governor. Article V, Section 13(b). Any person so appointed "shall serve for a term ending"—and consequently his appointment extends to—"the first Monday of January following the next municipal election more than ten months after the vacancy occurs or for the remainder of the unexpired term whichever is less . . ." Article V, Section 13(b). In the case of Judge Harper, the term expires on the first Monday in January, 1984. The unexpired term is therefore the lesser amount of time under the constitutional formula. Any person appointed by the governor to the court

vacancy created by Judge Harper's death shall serve until the first Monday of January, 1984.

2. *Time of Election*

Under Article V, Section 13(a) a judge shall be elected at the municipal election next preceding the commencement of the term of office. In the instant case, that election is November, 1983. Judge Harper was running on retention because his term was to expire in January, 1984, and, therefore, the normal election process had already been "triggered by the anticipated expiration of the incumbent's term," *Berardocco v. Colden*, 469 Pa. 452, 457, 366 A.2d 574, 576 (1976). An appointment by the governor, should he make one, does not affect the method for determining the time of election. Article IV, Section 8(b) of the Pennsylvania Constitution provides additional direction concerning the requirements for when an election shall be held to fill a vacancy. Under this provision, in the case of a vacancy to which the governor appoints, "a person shall be elected to the office on the next election day appropriate to the office unless the first day of the vacancy is within two calendar months immediately preceding the election day . . ." Further, the provisions of the Election Law which set forth the procedure to be followed for making the nominations apply where a vacancy to be filled occurs more than two calendar months immediately preceding a general or municipal election. 25 P.S. § 2953(c). Since the vacancy occurred on June 24, 1983, the time requirements of both the Constitution and the statute have been met. The commencement of the next term is January of 1984 and the next preceding election is November of 1983. Pa. Constitution, Article V, Section 13(c).

3. *Procedure for Nominations*

The Election Law provides that in all cases where a vacancy shall occur for any cause in an elective public office, including that of judge of a court of record, at a time when such vacancy is required to be filled at the ensuing election (in this case November, 1983), but at a time when nominations for such office cannot be made under any other provision of this act, nominations to fill such a vacancy shall be made by political parties in accordance with party rules relating to the filling of vacancies by means of nomination certificates in the form prescribed and by political bodies by means of nomination papers in accordance with the Election Law. Section 993 of the Election Law, Act of June 3, 1937, P.L. 1333, added by Section 1 of the Act of August 26, 1953, P.L. 1479, *as amended*, 25 P.S. § 2953. The other provision of the Election Law which might arguably apply to this case, namely that provision con-

cerned with revocation, Section 2938.3, need not be analyzed here because the procedure for nominations to fill a vacancy thereby created is the same in that provision as that set forth in Section 2953.

All of the elements set forth in Section 2953 are present in this case, and, therefore, the procedures in the statute shall be followed:

1. A vacancy has occurred.
2. The vacancy has occurred at a time (June, 1983) when the vacancy is required to be filled at the ensuing election. Pa. Constitution Article V, Section 13. See 2 above.
3. The vacancy has occurred at a time which is not within two calendar months immediately preceding the next municipal election. Pa. Constitution, Article IV, Section 8(b) and 25 P.S. § 2953(c).
4. The vacancy has occurred at a time when nominations for such office cannot be made under any other provision of the Election Law. The time for the primary election had passed as of the time of Judge Harper's death.

4. *Conclusion*

The decisions of the Pennsylvania Supreme Court make it clear that the election of judges is preferred to appointment. *Berardocco v. Colden, supra*. The Constitutional provisions for election and appointment of judges must be construed together. *Cavanaugh v. Davis*, 497 Pa. 351, 440 A.2d 1380 (1982). The Constitution provides for the filling of a vacancy by appointment, but, in the same section, provides that the term of the appointment shall be "for a term ending on the first Monday of January following the next municipal election more than ten months after the vacancy occurs or for the remainder of the unexpired term, *whichever is less*." The procedure for gubernatorial appointment is a stop-gap measure to fill seats which unexpectedly fall vacant. *Barbieri v. Shapp*, 476 Pa. 513, 383 A.2d 218 (1978). The Constitution clearly directs that a person be elected to fill the vacancy at the earliest time possible under the provisions of Article V and the statutes. In this case, the time is November 8, 1983, and the applicable procedures are set forth in the Election Law.

It is my opinion and you are hereby advised that you may appoint a person to fill the vacancy on the Allegheny County Court of Common Pleas, pursuant to the Constitution, for a term to end on the first Mon-

day of January, 1984. It is also my opinion that the Constitution requires that an election be held in November, 1983, to fill the vacancy. The Secretary of the Commonwealth and the county board of elections, as appropriate, are responsible for carrying out the procedures set forth in the Election Law for the conduct of this election.

You are further advised that in accordance with the provisions of Section 204(a)(1) of the Commonwealth Attorneys Act, Act No. 1980-164, 71 P.S. § 732-204(a), you will not in any way be liable for following the advice set forth in this opinion.

Very truly yours,

LEROY S. ZIMMERMAN
Attorney General

OFFICIAL OPINION NO. 83-9

Department of Transportation and the Historical and Museum Commission—Repair and Maintenance of Historic Bridges.

1. The Department of Transportation has the authority and the duty to keep state-owned bridges in repair.
2. The Department of Transportation has the responsibility to consult with and seek the advice of the Historical and Museum Commission concerning that method of repair which will preserve and protect the historic character of state-owned bridges, but the final decision lies with the Department of Transportation.

September 21, 1983

Honorable Thomas D. Larson, P.E.
Secretary of Transportation
1200 Transportation and Safety Building
Harrisburg, PA 17120

Larry E. Tise, Executive Director
Historical and Museum Commission
501 William Penn Memorial Building
Harrisburg, PA 17120

Dear Secretary Larson and Mr. Tise:

You have asked for my opinion concerning possible tort liability for the Commonwealth when any work needed to repair historic bridges is not performed or is performed in a limited fashion after a finding by