



**FILE**

Subject

*Elections Ballots*

Copy to

*Write-ins  
Stafford County  
Attorney*

STATE OF KANSAS

*Office of the Attorney General*

State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

VERN MILLER  
Attorney General

October 11, 1974

Opinion No. 74- 337

Barry A. Bennington  
Stafford County Attorney  
Office of County Attorney  
St. John, Kansas 67576

Dear Mr. Bennington:

You advise that in Stafford County, there are no persons nominated as candidates for election to the office of County Attorney, and hence, no names appearing on the general ballot. No attorney in the county is, to your knowledge, conducting an active campaign for write-in votes. It is possible, if not probable, that a number of the attorneys in the county will receive several write-in votes each.

You inquire, first, whether there is a minimum number of votes a candidate must receive in order to be elected by write-in votes at a general election. There is not. K.S.A. 25-702 states in pertinent part thus:

"(a) In all elections for the choice of any officer, except the offices of governor and lieutenant governor, unless it is otherwise expressly provided, the person having the highest number of votes for any office shall be deemed to have been elected to that office. . . ."

Thus, the person receiving the greatest number of write-in votes will be elected.

Secondly, you ask whether the election officer should issue the certificate of election to the person receiving the most votes regardless of the number of votes received, and regardless of the individual's qualifications for election to that office. The county election officer has no authority to judge the qualifications of any person nominated or elected to public office. After having conducted the election, it is the sole duty of that officer to issue the certificate of election to that person receiving the greatest

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number of votes, whether those votes be few or many, and regardless of the qualifications for office of that person.

You inquire who is empowered to make the determination whether an individual who is elected in fact meets the statutory qualifications for office. The election may be contested on the ground that the person elected "was not eligible to the office at the time of the election." K.S.A. 25-1411. If, for example, the individual receiving the greatest number of votes is not at the time of his election a regularly qualified practicing attorney admitted to practice law within the State of Kansas, as required by K.S.A. 19-701, the election is subject to contest on that ground. We find no other procedure, tribunal or officer empowered to pass upon the qualifications of persons elected to office. Even if the disqualification is not raised in a contest proceeding, the election remains void, for the election of a person to an office who lacks the qualifications prescribed by law therefor is void and a nullity. Jansky v. Baldwin, 120 Kan. 332 (1926). In such a circumstance, the incumbent holds over. Article 2, §2, provides that "[a]ll county and township officers shall hold their offices for a term of two years and until their successors are qualified . . . ."

Ordinarily, one qualifies for office by taking the oath required by K.S.A. 19-2602 and filing the bond required by K.S.A. 19-701. One whose claim to office is based upon a void election, of course, cannot enhance his claim merely by taking these formal steps. If, in the unlikely event that a statutory disqualification or lack of qualification is not raised by a contest proceeding or by an action in the district court, it has been our view, and advice in past instances, that should the person elected assume to take the office, the board of county commissioners might justifiably withhold payment of his salary, this action being based upon the settled law that the election of a person who lacks statutory qualifications is void. In no instance in our knowledge has the matter proceeded so far, that such action has ever been taken. Based only upon hypothetical facts, of course, it is impossible to predict in what respect an asserted lack of qualifications may be raised. If the person elected lacks statutory qualifications, this issue is ordinarily raised in a contest proceeding, or in a district court proceeding, such as a quo warranto action, testing the claimant's title to the office.

You further question whether, if an individual is elected who does not wish to serve as county attorney, whether there is any particular procedure that person should follow to avoid serving in the office. K.S.A. 19-2608 states in pertinent part thus:

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"Every county office shall become vacant on the happening of either of the following events, before the expiration of the term of such office: First, the death of the incumbent; second, his resignation; third, his removal; . . . sixth, his refusal or neglect to take his oath of office, or to give or renew his official bond or to deposit such oath and bond within the time prescribed by law . . . ." [Emphasis supplied]

Upon the failure of the newly elected person to take the oath and file the bond required by law, you, the incumbent, would then hold over, by virtue of Article 4, §2. A vacancy would result thereafter only upon your resignation from office.

The person appointed as provided by law to fill this vacancy would receive the salary provided by law for the office.

Lastly, you ask whether the county attorney may also receive a salary as county counselor. The duties of the two offices are not incompatible, and should the board of county commissioners wish to appoint, under K.S.A. 19-246, as county counselor the person holding the office of county attorney, it is free to do so, and the person so appointed would be then entitled to receive the compensation due him for both positions. "Unless prohibited by constitutional provision or statutory law, one person may hold two offices if their duties are not incompatible with each other." Cogdon v. Knapp, 106 Kan. 206 at 207 (1920).

Yours truly,



VERN MILLER  
Attorney General

VM:JRM/pl