



STATE OF KANSAS

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CURT T. SCHNEIDER
Attorney General

January 22, 1975

Opinion No. 75-12

Honorable William W. Buntten
Kansas State Representative
District 54
State Capitol Building
Topeka, Kansas

Dear Representative Buntten:

You inquire concerning the effect of the order entered January 17, 1975, by the Shawnee County District Court in State of Kansas ex rel Olander v. Bracken, No. 126,726, a proceeding begun to oust Mrs. Bracken from the office of Treasurer of Shawnee County.

Upon application of the plaintiff, the court entered an order after hearing, which provides in pertinent part thus:

"2. The defendant, Sue Bracken, is hereby suspended from performing any of the duties of her office as county treasurer of Shawnee County, Kansas, pending a final hearing and determination of the matter for ouster from office."

This relief is authorized by K.S.A. 60-1207, which provides in pertinent part thus:

"Upon application to the court before which the petition for ouster is pending, an officer may be suspended from performing any determination of the matter; and the authority having the power of appointment to fill vacancies in such office, shall upon such suspension appoint some proper person temporarily to fill said office and to carry on its duties until such matter shall be finally determined or until the successor of the office so suspended shall be elected and shall have qualified. . . . If on the final hearing the officer is not removed from his office, he shall receive the salary allowed him by law during

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the time of his suspension. The officer so temporarily appointed shall receive the same salary as is provided by law to be paid the officer filing such position." (emphasis added).

Suspension does not constitute ouster from office. A judgment of ouster has not as of this date been rendered in the above-mentioned proceeding. The defendant in the cited case, however, is suspended from performing any of the duties of that office pending a final determination of the ouster proceeding. Thus, although the office is not vacant, technically speaking, there exists no person legally entitled to perform the duties of the office. Accordingly K.S.A. 60-1207 empowers the authority having the power of appointment to fill vacancies in the office to appoint "some proper person temporarily to fill said office and to carry on its duties."

K.S.A. 19-504 provides in pertinent part thus:

"In case the office of county treasurer shall become vacant, there shall be appointed a qualified elector of the county to perform the duties of such treasurer. . . . Appointments hereunder shall be made in the manner provided by law for filling vacancies in the office of member of the house of representatives."

While the order of suspension is outstanding, thus, although the person suspended is not removed from office, there exists a functional vacancy, which must, in our opinion, be filled in the same manner as prescribed in instances of vacancies resulting from resignation, ouster, death, and similar circumstances upon which the office becomes vacant.

It may be argued, of course, that because the office is not legally vacant, the procedure for filling vacancies may not properly be invoked. We think this view is unsound. K.S.A. 60-1207 requires that upon suspension, the authority having power to fill vacancies in the office shall appoint a proper person "temporarily to fill said office and to carry on its duties. . . ." K.S.A. 19-6504 requires that a vacancy in the office of county treasurer be filled in the manner provided by law for the house of representatives. That law is K.S.A. 25-3902. Thereunder, there is no single authority empowered to fill vacancies in the house of representatives. That provision, as applied to the office in question, requires that

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a county convention be held of the political party of the officer whose office is sought to be filled, upon the call of the chairman or vice-chairman. When the convention elects a person to fill a vacancy, the chairman or vice-chairman must certify that fact to the governor, who "shall fill such vacancy by appointing to such . . . office the person so elected." If the governor fails to make the appointment within the required time after receiving the certificate, the person elected by the convention is deemed appointed to fill the vacancy.

Thus, the "authority having the power of appointment to fill vacancies" in the office in question is twofold, the county convention and the governor. Their joint action is required, and their joint action is required under K.S.A. 60-1207 to appoint some proper person "temporarily to fill said office and to carry on its duties." Although the incumbent officeholder has not been ousted from office, and there exists no formal vacancy, K.S.A. 60-1207 recognizes that despite that fact, there exists, as stated above, no person legally entitled to perform the duties of the office. That office must be "filled," in the words of K.S.A. 60-1207, by some proper person, and this must be done by the county convention and the governor, they holding jointly the only authority for filling vacancies in office, and holding the only authority K.S.A. 60-1207 permits to be exercised to place some person in the office of county treasurer to act in the stead of the incumbent who has been suspended from discharging the duties of the office.

Accordingly, it is our opinion that any person selected to assume the duties of the office of county treasurer while the incumbent officeholder is suspended therefrom must be selected in the manner provided by law for filling vacancies in the house of representatives, and accordingly, by those authorities empowered to do so, as discussed above, acting pursuant to the procedure prescribed by K.S.A. 25-3902.

Some question may be raised concerning the time which any person so elected and appointed may serve. K.S.A. 60-1207 provides that the person appointed to fill said office temporarily shall carry on its duties "until such [ouster] matter be determined or until the successor of the officer so suspended shall be elected and shall have qualified. Until the ouster proceeding is finally determined, it is difficult to anticipate the questions which might be raised upon such determination. Should further questions arise concerning this matter at that time, or at any time in the future, please feel free to call upon us.

Very truly yours,



CURT T. SCHNEIDER
Attorney General