



STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

Curt T. Schneider
Attorney General

March 31, 1976

ATTORNEY GENERAL OPINION NO. 76- 112

The Honorable Elwill M. Shanahan
Secretary of State
2nd Floor - State Capitol Building
Topeka, Kansas 66612

Attn: Mr. Sherman A. Parks

Re: Elections--Notice of Offices to be Filled--Publication

Synopsis: Under K.S.A. 25-204, if offices to be filled by election are altered by legislation enacted and effective after April 2, 1976, the Secretary of State is authorized to prepare and mail to county election officers a supplemental notice in writing, advising such election officers of the offices to be filled by election as a result of such legislation. However, the Secretary of State must comply with K.S.A. 25-204, to the extent practicable, and to this end, must as of that date prepare and mail the notification required by that statute, prepared in accordance with the laws in force at the time of such preparation.

* * *

Dear Secretary Shanahan:

You advise that House Bill 2729 is now pending before the 1976 session of the Kansas Legislature, which may create certain offices which shall be required to be filled by election at the forthcoming primary and general elections. In addition, you advise, the bill may substitute nonelective procedures for filling certain offices which are presently elective. The bill is effective upon publication in the state paper, but all three steps necessary for its effectiveness, passage by both houses of the legislature, signature by the governor, and publication in the state paper, may not take place before April 2, 1976.

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Under these circumstances, you inquire concerning your duties and responsibilities under K.S.A. 25-204 thus:

"On or before April second in even-numbered years before the time of holding the statewide primary election, the secretary of state shall prepare and transmit to each county election officer a notice in writing, designating the offices for which candidates are to be nominated at such statewide primary election. Upon receipt of such notice each county election officer shall forthwith publish so much thereof as may be applicable to his county, once each week for three consecutive weeks, in the official county paper. Such notice so published shall state the time when such primary election will be held, together with the offices for which candidates are to be nominated."

First, you ask whether you should proceed with the certification on April 2, 1976, based on the offices to be filled by election under laws in force at that time. In my opinion, you must. The notice required to be prepared and mailed by April 2, 1976, cannot anticipate, as it were, laws which may become effective subsequently. An inchoate law, one which is passed but not effective, is in this instance no law at all, and furnishes no legal basis for preparing the notice based upon other than the laws in force and effect as of April 2, 1976, or such earlier date as the notice is prepared and mailed.

Secondly, assuming the notice is prepared and mailed by that date in accordance with laws in effect at the time of preparation and mailing, and the positions to be filled by election are changed thereafter by enactment and the effective operation of H.B. 2729, you inquire whether you may transmit a supplemental notification deleting and adding those offices affected by the bill.

In *City of Hutchinson v. Ryan*, 154 Kan. 751, 121 P.2d 179 (1942), the court stated the applicable principles thus, quoting from 59 Corpus Juris 1078:

"A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others, and prompt conduct of business is usually directory, unless the phraseology of the statute, or the nature of the act to

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be performed and the consequences of doing or failing to do it at such time, is such that the designation of time must be considered a limitation on the power of the officer. So a statute requiring a public body, merely for the orderly transaction of business, to fix the time for the performance of certain acts which may as effectually be done at any other time is usually regarded as directory"
154 Kan. at 757.

In *School District v. Clark County Commissioners*, 155 Kan. 636, 127 P.2d 418 (1942), the court stated the same principle:

"There is a rule of statutory construction familiar to all lawyers, which is that when the legislature prescribes the time when an official act is to be performed, the broad legislative purpose is to be considered by the courts whenever they are called upon to decide whether the time prescribed by statute is mandatory or directory. If mandatory, there must be strict conformity. If directory, the legislative intention is to be complied with a [sic] nearly as practicable." 155 Kan. at 638.

In my judgment, K.S.A. 25-204 is directory, and not mandatory. The publication is apparently required to apprise the electorate of the offices it will be called upon to fill by election at the primary and general elections. The date for the publication is not fixed by statute, for it is required to be made only "forthwith" after the mailing thereof to county election officers on or before April 2. Nothing in the nature of the publication, or in the consequences of failing to have it mailed by April 2, or of a delay of even two weeks or more, suggests that all legal authority of the Secretary of State regarding the publication comes to an end with the close of business April 2. Thus, while I believe that the notice should be prepared and mailed by April 2 in accordance with the laws in force on that date, if the applicable laws are changed thereafter by legislation subsequently passed during this session of the legislature, the Secretary of State remains empowered, in my judgment, to prepare and mail a subsequent notification, stating the offices to be filled by election in accordance with such subsequent legislation, in order to assure that the county election officers and

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and thereby the electorate are correctly advised regarding the offices to be filled by election.

You ask whether it is within the authority of the Secretary of State to advise county election officers to withhold publication of the notice until the fate of H.B. 2729 is determined. The statute directs only that county election officers shall publish "forthwith." This, in my judgment, requires a prompt publication within a reasonable time, and reasonableness, of course, is to be determined in light of all the surrounding facts and circumstances. When it appears, on or about April 2, that the enactment of additional legislation is imminent which will alter the offices to be filed by election, I believe that it is within the authority of the Secretary of State to advise the county election officers that the notification prepared and mailed by April 2 may be followed by a subsequent notification, which will necessarily be within a relatively short period of time, and that the county election officer may, at the option of that officer, defer publication of the notice required by K.S.A. 25-204 until such supplemental notification is prepared and mailed by the Secretary of State. Thus, in my judgment, no additional legislation is necessary to resolve any potential problems presently apparent resulting from the delay in enactment of H.B. 2729, or any other bills with similar effect.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj