



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

April 12, 1977

ATTORNEY GENERAL OPINION NO. 77-118

Mr. James R. Fetters
Smith County Attorney
Smith County Courthouse
Smith Center, Kansas 66967

Re: Elections--Vacancies--Conventions

Synopsis: A delay of 72 hours in the transmittal to the governor and secretary of state of the certificate of election by a district convention of a person to fill a vacancy in a public office within 4 days after said convention, rather than within 24 hours, as required by K.S.A. 1976 Supp. 25-3902(f) constitutes substantial compliance with that requirement, and does not void the election conducted at said convention, or require the calling of a new convention.

* * *

Dear Mr. Fetters:

You advise that approximately one month ago, a vacancy occurred on the board of county commissioners due to the death of a member. Following the procedure outlined in K.S.A. 25-3901 *et seq.*, a convention of precinct committeemen and committeewomen was called and held on Thursday, March 17, 1977, to hold an election to fill the vacancy. On Friday, March 18, 1977, the secretary of the convention mailed notice to the county chairman advising him of the election of Mr. Dwight Peterson to fill the vacancy. Mr. Conrad, county chairman, received the notice on March 18, 1977, and forwarded notice to the governor of the election of Mr. Peterson on March 21, 1977. The notice was received in the office of the governor on March 22, 1977. K.S.A. 25-3902(f) provides for notice of the election to be forwarded to the governor after the district convention, in pertinent part as follows:

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"If transmitted by registered mail, such certificate and the copy thereof shall be mailed within twenty-four (24) hours of such election, unless the day following such election is a Sunday or legal holiday, in which case it shall be mailed by the next regular business day."

In the facts described above, the notice was not forwarded within the prescribed 24 hours. In addition, no copy was forwarded to the Secretary of State. You inquire whether this delay operates to void the election, and require that a new convention be called to hold another election.

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 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 observed thus:

"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,

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there must be strict conformity. If directory, the legislative intention is to be complied with a [sic] nearly as practicable. Instances of the latter sort frequently arise, and indeed they are particularly applicable in respect to the official mode of procedure in matters of taxation. For example, it is the duty of the board of county commissioners at its meeting on the first Monday in August to order the proper levies of every sort to be extended on the tax rolls Instance are not rare where the board has declined or failed to make a particular levy; mandamus is invoked and a decision may be reached some weeks later holding that the contested levy should be made, and it is then made, although the *directory* time at which it should have been made has passed. Again, the statute says the county clerk shall prepare and deliver the tax rolls to the county treasurer on or before November 1 If the work of preparing the tax rolls is not completed by the statutory date (and litigation over the legality of the levies or other untoward circumstances sometimes causes delay), the statutory date on which the tax rolls should be delivered to the county treasurer must of necessity be regarded as directory rather than mandatory. Although the tax rolls are not delivered to the treasurer by the time *directed by the statute*, nevertheless we all have to pay our taxes when the belated delivery is made!" [Emphasis by the court.] 155 Kan. at 638-639.

The criteria for determining whether a particular requirement is mandatory or directory was reiterated in *Shriver v. Board of County Commissioners*, 189 Kan. 548, 370 P.2d 124 (1962) thus:

"Generally speaking, statutory provisions directing the mode of proceeding by public officers and intended to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties cannot be injuriously affected, are not regarded

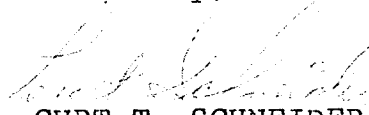
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as mandatory, unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated." 189 Kan. at 556.

In this instance, the procedure specified for the holding of the convention and prompt certification of the result to the governor and secretary of state is clearly designed to assure the prompt and orderly filling of vacancies in public office. Although the certificate is required to be forwarded to the governor within 24 hours, the statute imposes no penalty upon a belated mailing, and indeed, nothing in the statutory procedure is made contingent upon compliance with the 24-hour transmittal requirement. Transmittal within 72 hours is certainly substantial compliance with the statute and certainly serves the purpose which the statute was designed to accomplish, the prompt and timely filling of vacancies.

Thus, in my judgment, in this instance the belated transmittal of the certificate to the governor does not void the election, or require the holding of a new convention.

Sincerely,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj