STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

February 1, 1978

ATTORNEY GENERAL OPINION NO. 78- 47

Mr. Dennis W. Moore
Johnson County District Attorney
Johnson County Courthouse
Olathe, Kansas 66061

Re: Public Officers--Removal--Ouster

Synopsis: Where a public officer is convicted of perjury during a prior term, arising out of a matter unrelated to the performance of his official duties or to the affairs of the municipality which he serves, the offense was widely disclosed to and known to the electorate prior to and at the time of his reelection, and there is no basis for deeming any actionable conduct to have extended into his present term, his return to office by the electorate for a succeeding term prohibits an ouster proceeding based upon the conviction occurring during the preceding term.

* * *

Dear Mr. Moore:

You advise that on April 14, 1975, Forrest R. Edgington, then a member of the city council of the City of Overland Park, Kansas, was convicted of the offense of perjury in the Johnson County, Kansas, District Court. On July 2, 1975, the court placed him on probation for a period of one year. The conviction was then duly appealed. In April, 1977, he was reelected to his council seat for a further term. In recent weeks, the Kansas Court of Appeals has affirmed the conviction. The question is raised whether Mr. Edgington is not subject to ouster from office.

K.S.A. 60-1205 states in pertinent part thus:

> "Every person holding any office of trust or profit, under and by virtue of any of the laws of the state of Kansas, either state, district, county, township or city office, except those subject to removal from office only by impeachment, who shall (1) willfully misconduct himself or herself in office, (2) willfully neglect to perform any duty enjoined upon him or her by law, or (3) who shall commit any act constituting a violation of any penal statute involving moral turpitude, shall forfeit his or her office and shall be ousted from such office in the manner hereinafter provided."

In 1906, the attorney general brought ouster proceedings against one Rose, mayor of Kansas City, Kansas, for tolerating violations of the prohibitory law and, indeed, issuing licenses, at the rate of $50 per month, to over one hundred persons to engage in the illegal traffic. Rose subsequently resigned and consented to a judgment of ouster, which purported to bar him from office "during the remainder of said term of two years . . . ." A special election was then held to fill the resulting vacancy, and Rose, having become a declared candidate, was relected to office. In *State ex rel. Coleman v. Rose*, 74 Kan. 262, 86 Pac. 296 (1906), the court upheld a judgment of contempt against Rose, for violation of the terms of the judgment of ouster. The court held that any condonation implicit in the reelection of Rose was ineffective to limit the effect of the ouster judgment itself

> "Counsel for the defendant were inclined to concede that an officer removed for dereliction of duty could not be reappointed to fill the vacancy, but contended that a different rule obtains where provision is made for filling the vacancy by election. No room is seen for a distinction between an appointment and an election. The protection of the public is involved in the proceeding and judgment. Nothing in the statute suggests that electors, even, can condone the misfeasance,

> revive the forfeited right, or limit the effect or enforcement of the judgment of ouster." 74 Kan. at 270.

Because of the express language of the judgment of ouster upon which this action, a proceeding for contempt, was based, the case should not be regarded as particularly instructive concerning the status of the present term rule.

However, in *State ex rel. Hill v. Henschel*, 103 Kan. 511 (1918), the court considered an ouster proceeding brought against a chief of police for alleged willful misconduct occurring April 20, 1917. His term of office expired shortly thereafter, and on May 1, 1917, he was reappointed and confirmed as chief of police for a new term. The ouster proceeding was begun on May 22, 1917. The court held that although due to the alleged misconduct "he forfeited his right to office and might have been judicially ousted therefrom," this action was begun belatedly:

> "This action was begun on May 22, 1917 --to forfeit defendant's right to the office for a term which had then expired. The defendant's dereliction in one term does not disqualify him from holding the office in a succeeding term. There is no general disqualification in the ouster law barring official delinquents from holding office in any term beginning in the future, and the court cannot write such language into the statute. There seems to be no escape from this conclusion; the alleged official misconduct had become a moot question ere ouster proceedings were begun . . . ."

In *State v. Millhaubt*, 144 Kan. 574, 61 P.2d 1356 (1936), the court considered an appeal by a county commissioner from a conviction for the unlawful allowance of claims. At sentencing, the state urged that, as a part of the judgment, the trial court should remove him from office, as provided by the applicable statute, R.S. 19-243, which directed that upon conviction, any county commissioner shall be subject to a fine "and shall, moreover, be removed from office." The trial court ordered that the defendant not be removed from office by reason of the verdict

of guilty. On appeal, the court affirmed the conviction, but reversed the trial court on the cited order, directing removal of office as a portion of the judgment imposed upon conviction. The defendant raised the present term rule in defense to removal. The court indicated that if the case had been a civil action for ouster, that rule might have been a valid defense, but in a criminal proceeding, based upon a statute which specifically directed removal from office by operation of law as a consequence of conviction, the fact that the conduct constituting the basis of the offense occurred in a prior term was no defense to the judgment in a criminal proceeding.

Thereafter, in *State ex rel. Beck v. Harvey*, 148 Kan. 166, 80 P.2d 1095 (1938), the so-called "present term" rule was invoked as a defense in an ouster proceeding brought against a clerk of the district court during her third term of office, based upon embezzlement which had occurred during her second term. The court stated thus:

> "Counsel for defendant stresses the point that the taking of the money was in a prior term of office, and he cites those cases holding one cannot be removed from office because of misconduct or defalcations in a prior term. Perhaps at some time it will be necessary to review those cases and point out that the rule stated in them is not of universal application."

The court avoided application of the rule in this case, concluding that although the defalcations had indeed occurred during a prior term, the clerk was under a continuing duty to restore the money previously taken, and particularly upon a demand therefor which was made by the board of county commissioners during her third term, and that her failure to do so did in fact extend into her third term. Citing this and certain other instances of misconduct, the court upheld the ouster.

In *State ex rel. Londerholm v. Schroeder*, 199 Kan. 403, 430 P.2d 315 (1967), the court retreated from the present term rule, for it ordered the ouster of a county commissioner from his second term for misconduct occurring during the first. Although its holding is obviously clear, the continuing status of the present term rule is less so. In *Henschel, supra*, the court regarded the present term rule as mandated by the language of the ouster

statute itself. It did not identify the terms of the statute from which it drew that conclusion, and nothing in the statute raises any compelling inference that the present term rule has any statutory basis.

In *Schroeder*, referring to other jurisdictions, the court observed that

> "the principal rationale of the rule is that reelection or reappointment of the officer amounts to condonation of his prior misconduct. Condonation of an office implies knowledge of the offense, and, if the officer's misconduct in the prior term was concealed or not known to the electorate or the appointing official at the time of reelection or reappointment, several courts have refused to apply the rule (see annotations, supra)." 199 Kan. at 414.

Yet, the following paragraph suggests that, at least in some part, facts constituting the basis of the ouster were not withheld from the public at the time of the defendant's reelection to a second term, because, the court noted, "in his reelection campaign he is shown to have categorically denied the factual basis upon which any wrong must rest." Public denials suggest, at least, some public accusations. Nonetheless, the court stated it need not decide whether to apply the present term rule in that case:

> "We would have difficulty supposing any electorate would knowingly reelect as guardian of the public funds one guilty of the deceitful dealings revealed here. Be that as it may, we are not confronted with deciding whether the present term rule should be applied here because of condonation by the electorate. The defendant throughout his stoutly denied any acts of wrongdoing, more specifically, in his reelection campaign he is shown to have categorically denied the factual basis upon which any wrong must rest (finding 27). The wrongdoing has been concealed from public view and there is nothing before us which may fairly be interpreted as condonation by the electorate." 199 Kan. at 414.

In addition to avoiding the question of condonation, the court further concluded that the misconduct had in fact extended into the second term;

> "Insofar as nondelivery of merchandise and excessive prices are concerned, we think, under the reasoning applied in *Harvey*, there remains a continuing duty on the part of the defendant to make restitution to the county for the wrongful depletion of its funds, this duty extends into the present term, and neglect to discharge it constitutes misconduct.
>
> The same reasoning might be applied respecting the conflict of interest sales, particularly where there was concealment of the true facts, on the basis the sales in subversion of the law gave rise to continuing obligations on the part of the officer. Beyond that, however, we think there is a public interest in the fitness for public office of one engaging in such calculated trafficking, even though the transactions occurred in a term immediately prior to the present term of the officer." 199 Kan. at 415.

In *Schroeder*, while the court ordered the ouster of the defendant from a second term of office for misconduct generally regarded as occurring during the first term, it was at some pains not to abandon the present term rule altogether. It found no condonation by the electorate to be implied in the circumstances from the defendant's reelection, a basis upon which the rule is invoked in several jurisdictions. It also found a basis for concluding that the misconduct itself had extended into the second term, as pointed out in the language quoted *supra*. Moreover, one cannot disregard the court's reminder that "the object of removal of a public officer for official misconduct is not to punish the offending, but to protect and preserve the office, and to free the public of an unfit officer," and its emphasis upon the grave seriousness of the conduct shown by the record:

> "[N]o acts [conflict of interest] are more universally deemed inimical to the public welfare.

> "Vested as county commissioners are with the general control and supervision of the business affairs of the county, we can scarcely imagine a more serious disqualification for the particular office than conflict of interest transactions especially where, as here, the transactions are not of an illusive gray nature but are clearcut and direct. Nothing could be more intimately related to the duties of the office or affect those duties more directly. Such acts are moral delinquencies striking at the very heart of faithful performance required of the office and, whenever committed, they stamp the actor unworthy of the office." 199 Kan. at 415.

Clearly, as pointed out above, the court has not jettisoned the present term rule entirely. In *Schroeder*, the court discussed with great care all of the considerations which might bear upon its application in that case, and found all of them wanting: there was no condonation to be implied from reelection, and the misconduct could be deemed to continue into the second term. Had either of these considerations been more equivocal as providing some arguable basis for applying the rule, the court's emphasis upon the nature and seriousness of the offense and its direct relation to the officer's performance of his duties indicates that this might have been an express consideration for refusing to apply the rule.

In the matter at hand, the perjury conviction was rendered long prior to the reelection of Mr. Edgington. Clearly, the fact of the conviction, and the facts on which it was based, were matters of public record and perhaps notoriety at the time Mr. Edgington became a candidate for reelection and was returned to office by a majority of the electorate. This is an instance in which the voters clearly were fully apprised of the facts which are now available as a ground for ouster, and in the face thereof, returned him to office. Secondly, given the nature of the offense, there can be no argument that any portion thereof extended in any fashion into the second term. Lastly, the conduct involved here, the "act constituting a violation of any penal statute involving moral turpitude," was not committed by the officer in the conduct of his official duties. The offense was entirely unrelated to the affairs of the city, and his reelection cannot be construed as any poular sanction of blatant official corruption, as in *Rose, supra*.

The opinion in *Schroeder* makes clear, in my judgment, that the present term rule has not been abandoned in this jurisdiction and that, although it will no longer be applied categorically and indiscriminately as in *Henschel*, *supra*, nonetheless operates as a bar to any ouster action under K.S.A. 60-1205 in appropriate instances.

In my judgment, on the basis of the foregoing, this is such an instance, in which the present term rule bars any ouster proceeding based on the 1975 conviction for perjury obtained during Edgington's previous term in office.

Yours truly,

Curt T. Schneider

CURT T. SCHNEIDER
Attorney General

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