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December 11, 1979

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ATTORNEY GENERAL OPINION NO. 79-282

Ernestine Gilliland
State Librarian
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Topeka, Kansas 66612

Re: Cities and Municipalities--Libraries--Vacancies
on and Appointments to Library Board

Synopsis: 1) Upon the expiration of their terms, members of a public library board may continue to serve as de facto officials until such time as either their reappointment or the appointment of successors is approved. Any acts taken by them while in a de facto position are as binding on the public as if they were de jure members.

2) A continuing deadlock between a mayor and a city council may give rise to ouster proceedings only when it can be shown that willful misconduct in office and a willful and persistent failure to perform official duties exists.

* * *

Dear Ms. Gilliland:

You have requested the opinion of this office on a situation which has arisen concerning the Public Library Board in Great Bend. The Board is currently embroiled in a controversy between the mayor and the city council over two vacancies on the Board, and is concerned regarding the possible effects of, as well as any possible solutions to, this situation.

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As we understand it, the terms of two of the seven members of the Great Bend Public Library Board expired on April 30, 1979. One member had completed his second consecutive four-year term, and was accordingly ineligible for reappointment. The other member was completing his first full term, and was recommended for reappointment to the mayor by the president of the board. However, the mayor declined to do so, and appointed two other individuals, subject to the approval of the city council, as provided by K.S.A. 12-1222. The council refused to approve the new appointments, with the resulting deadlock existing to this day. We are also informed that the member who was not reappointed has continued to sit and vote with the rest of the Board.

In view of the above, the Board has requested you to seek the opinion of this office on the following points: (1) may one or both of the members whose terms expired continue to serve until they are reappointed or their successors are approved; (2) if the two members continue to participate and vote, what is the legal effect of actions so taken by the Board; and (3) what, if anything, may the Board do in the face of the continuing stalemate between the mayor and the city council on this issue?

K.S.A. 12-1222 governs the appointment of members of a public library board in a Kansas municipality, as well as the length of their terms, eligibility requirements and provisions for filling vacancies. In the first sentence of the statute, it is stated that "the official head of a municipality shall appoint, with the approval of the governing body, a library board for such library." Once established under the terms of the statute, the board is defined by K.S.A. 12-1223 as being "a body corporate and politic, possessing the usual powers of a corporation for public purposes, . . ." Additionally, we note that, unlike the statute dealing with officers of a corporation organized under Chapter 17 [K.S.A. 17-6302(a)], the statutory scheme here is silent as to whether a member continues to serve until his successor is qualified. While an earlier statute in this area did so provide (K.S.A. 12-1203), it was repealed in 1951 when the present 12-1221 was enacted. L. 1951, ch. 485, §24.

Turning to the specific inquiries made by the Board, we believe that questions (1) and (2) may be answered together. A situation analogous to this one arose in the case of Shaw v. Baker, 179 Kan. 729 (1956). There, the newly-elected mayor of Galena appointed an individual to serve as city attorney. The city council refused to confirm his choice, and the Court held that the "old" city attorney continued in office since his successor did not qualify.

It has also been recognized in other states that an appointed officer may remain in office at the expiration of his term, exercising the powers of the office until his successor qualifies, whether or not the statute creating the office so provides. Grooms v. LaVale Zoning Board, 27 Md.App. 266, 340 A.2d 385 (1975), State ex rel. Warder v. Gainer, 153 W.Va. 35, 167 S.E.2d 290 (1959). The purpose of such a rule is to prevent a hiatus in the position pending the time when a successor may be qualified for the position. 63 Am.Jur.2d, Public Officers and Employees, §160. It has also been noted that:

"The law abhors vacancies in public offices, and courts generally indulge a strong presumption against a legislative intent to create, by statute, a condition which may result in an executive or administrative office becoming, for any period of time, wholly vacant and unoccupied by one lawfully authorized to exercise its functions." 67 C.J.S. Officers, §50, p. 207.

Based on the above, we would conclude that the two individuals in question could remain in their positions until the deadlock is resolved.

In so doing, each director would be serving in the role of a de facto, rather than a de jure, official. The latter has been defined as one regularly and properly elected or appointed and qualified, and holding his office during a constituted term. 3 McQuillin, Municipal Corporations, §12.102 (3rd ed. 1973). A de facto official, on the other hand, is "one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." 63 Am.Jur.2d, Public Officers and Employees, §494. As stated in paragraph 5 in the Court's syllabus in Olathe Hospital Foundation, Inc. v. Extendicare, Inc., 217 Kan. 546 (1975):

"A person who assumes and performs the duties of a public office under color of authority and is recognized and accepted as the rightful holder of the officer by all who deal with him is a de facto officer, even though there may be defects in the manner of his appointment, or he was not eligible for the office, or he failed to conform to some condition precedent to assuming the office."
Id.

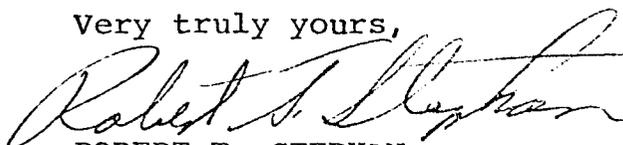
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The foregoing was quoted with approval in State v. Miller, 222 Kan. 405, 414 (1977), where the Court found that a coroner whose term had expired was a de facto officer, since he was in possession of the office and exercising the duties thereof, and the general public and public authorities believed him to be the coroner. Id. at 413, 414. As a de facto officer his acts were valid insofar as they involved the interest of the public or third persons. Id. at 414. See also Andrulis v. First Nat'l. Bank, 4 Ill.App.3d 436, 281 N.E.2d 417 (1972), Dixie Dairies v. Alabama State Milk Control Bd., 286 Ala. 198, 238 So.2d 551 (1970), and Davenport v. Teeters, 315 S.W.2d 641 (Mo.App. 1958). Accordingly, the actions of the two directors since April 30, 1979, including any votes cast by them, are valid, despite their being only de facto officials due to the expiration of their terms.

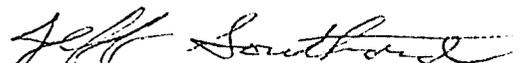
As to your third inquiry concerning what the Board may do in the face of the continuing stalemate, we agree that the current situation is certainly undesirable. It is to be hoped that some form of compromise can be arrived at in the near future, especially since, as we understand it, the terms of three more board members will expire on April 30, 1980. It is true that ouster proceedings have been successfully brought in the past against city council members who, among other things, refused to confirm appointments made by the mayor [State ex rel. v. Lander, 89 Kan. 178 (1913)], but such cases involve willful misconduct in office and a willful and persistent failure to perform official duties. Such willful conduct does not appear to exist here as of this time, leaving the board with no remedy save that of persuasion and mediation. As noted above, however, even the continuance of the deadlock will not prevent the board from continuing to operate, as its members may continue as de facto officials even after their terms expire.

In conclusion, it is our opinion that, upon the expiration of their terms, members of a public library board may continue to serve as de facto officials until such time as either their reappointment or the appointment of successors is approved. Any acts taken by them while in such a de facto position are as binding on the public as if they were de jure members. Finally, while a continuing deadlock between the mayor and the city council could give rise to ouster proceedings, such proceedings require the kind of willful misconduct in office and a willful and persistent failure to perform official duties that is not present in this situation at this time.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:gk