



STATE OF KANSAS

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May 16, 1980

ATTORNEY GENERAL OPINION NO. 80- 105

Ernestine Gilliland
State Librarian
Third Floor, State Capitol
Topeka, Kansas 66612

Re: Cities and Municipalities--Libraries--Election
of Library District Directors; Notice Required

Synopsis: Positions on the board of directors for a library district are filled in a general, not special, election, in that the holding of such elections at a specific time is mandated by law. As a result, notice requirements contained in K.S.A. 12-1240 are directory in nature, and do not have to be strictly complied with as long as the date established by statute is used. When neither the proper notice nor the prescribed date are complied with, however, sufficient notice cannot be found to have been given. Accordingly, any election held under such circumstances is invalid, leaving vacant those seats on the board of directors which were filled at that time. K.S.A. 12-1241 governs the filling of such vacancies. Cited herein: K.S.A. 12-1239, 12-1240, 12-1241.

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Dear Ms. Gilliland:

As State Librarian for Kansas, you have requested the opinion of this office on a matter involving an election which was held for a library district board of directors in March of

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this year. Specifically, we are informed that Library District No. 1 in Doniphan County held its annual meeting on March 11, 1980, in Troy, Kansas, at which time positions on the board of directors were to be filled. Subsequent to the meeting, it was discovered that one of two required notices had not been published. While no legal action has been instituted, questions have been raised as to the validity of the election because of this omission. You wish to have the status of the election results clarified and, if it is concluded that the election is a nullity, the procedures which must then be taken explained.

Doniphan County Library District No. 1 is an entity established pursuant to K.S.A. 12-1236 et seq., and is a public corporation empowered to establish and maintain a library for district patrons who are residents of rural areas or third-class cities. The district is governed by a board of seven directors, who are elected at the annual meeting. The time such meeting must be held is prescribed by statute (K.S.A. 12-1239) and is fixed as the first Tuesday in March. Notice concerning the meeting also is provided for by statute, and it was the failure to follow these provisions which forms the basis for the problem presented here.

K.S.A. 12-1240 is the relevant notice statute, providing:

"It shall be the duty of the board of directors to give notice of every annual meeting by causing a notice to be published once each week for two (2) consecutive weeks in a newspaper of general circulation in said library district. The last publication of such notice to be made not more than six (6) days prior to the date of holding the meeting. Such notice shall include the time and place of such meeting."

The procedures so described were admittedly not followed in this case. The only notice published appeared on February 28, 1980, which is more than six days before the meeting was held. However, there is no contention that the one notice failed to list the time and place of the meeting, which for some unexplained reason was on the second Tuesday of March, and not the first. We are also informed that additional notices in the form of news stories announcing the meeting appeared in all three Doniphan County newspapers.

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Case law in Kansas is divided as to whether the failure to give notice voids an election held pursuant to such defective notice. Under the circumstances of some cases, time and manner of notice have been regarded as mandatory, and strict compliance therewith a necessity. Baugh v. Rural High School District, 185 Kan. 123 (1959); State, ex rel. v. Kerns, 210 Kan. 579 (1972). However, other cases have held such provisions to be merely directory, leaving any irregularity as to their execution insufficient to vitiate the election. West v. Unified School Dist. No. 346, 204 Kan. 29 (1969); cf. Stanhope v. Rural High School Dist., 110 Kan. 739 (1922). In Stanhope, the Court qualified its finding that such an election was valid by noting that the "irregularities did not frustrate or tend to prevent the free expression of the electors' intentions, nor otherwise to mislead them." 110 Kan. at 744.

Whether notice provisions are determined to be directory or mandatory has often hinged on whether the election itself is "general" or "special." In the case of the former, the election involved is held at a time and concerns a topic fixed by law, and, as the voters are presumed to know the law, the failure of the person responsible to publish an additional notice will not invalidate the election. State, ex rel. v. Echols, 41 Kan. 1 (1889); Drum v. French, 138 Kan. 277 (1933); Chanute v. Davis, 85 Kan. 188 (1911). This is not true of special elections, where there exists no statute to alert the voters as to the time or subject matter of the election. Accordingly, it is essential that official notice of the date and issues to be submitted be published as required by law. It is clear from case law authority that, as the providing of notice is the foundation for holding the election, the omission to take such a mandatory step renders the election a nullity. Echols, supra at 4; State, ex rel. v. Staley, 90 Kan. 624 (1913); State, ex rel. v. Allen County Comm'rs, 143 Kan. 898 (1936). See, also, 26 Am. Jur. 2d Elections, §§195, 198; 29 C.J.S. Elections, §68.

In the present case we would conclude that the election of directors for Doniphan County Library District No. 1 is a general, not a special election, leaving the notice provisions directory only. As K.S.A. 12-1239 fixes the time such election must be held, the issuance of notice is, as in Echols and other cases in that line, only an additional action which does not have to occur before the election may be held. Even so, once it is granted that the notice was defective, it is then all

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the more necessary that the election be held on the date prescribed by statute, i.e., the first Tuesday in March. Otherwise, as was the case here, voters could neither rely on the statute nor, in view of the defective notice, be alerted otherwise as to the time of the election. While rules governing general elections are not as strict as those concerning special ones, the "substantial compliance" rule is not so elastic as to permit both the notice to be defective and the terms of the statute to be altered. Accordingly, in our opinion the election held on March 11, 1980 is void, and any seats on the board of directors which were to be filled at that time remain vacant. However, the acts of those persons who have been filling these seats since the election are valid, as they are de facto officers, i.e. an officer who performs public duties and is recognized as having the power to do so, even though there were defects in his election. Olathe Hospital Foundation, Inc. v. Extendicare, Inc., 217 Kan. 546 (1975).

Futhermore, it is also our opinion that another election to fill such vacancies is not required. K.S.A. 12-1241 deals with the filling of vacancies on a district board of directors, and provides:

"Vacancies in said board of directors accruing by death, removal, resignation or otherwise shall be filled for the unexpired term by appointment made by the chairman of said board, by and with the endorsement and approval of a majority of the remaining board members, and shall be for the unexpired term in like manner as the original elections."

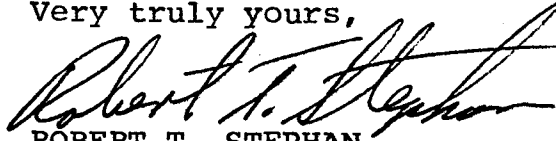
The seat or seats remaining open here may therefore be filled without the need for another, separate election to be held.

In conclusion, positions on the board of directors for a library district are filled in a general, not special, election, in that the holding of such elections at a specific time is mandated by law. As a result, notice requirements contained in K.S.A. 12-1240 are directory in nature, and do not have to be strictly complied with as long as the date established by statute is used. When neither the proper notice nor the prescribed date are complied with, however, sufficient notice

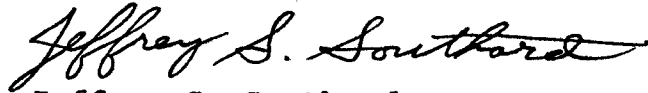
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cannot be found to have been given. Accordingly, any election held under such circumstances is invalid, leaving vacant those seats on the board of directors which were filled at that time. K.S.A. 12-1241 governs the filling of such vacancies.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:jm