



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

June 16, 1980

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

ATTORNEY GENERAL OPINION No. 80- 132

Ms. Elizabeth Malloy
Election Commissioner
Wyandotte County Court House
7th and Ann Avenue
Kansas City, Kansas 66101

Re: Cities of the First Class--Public Utilities--
Elections to Fill Vacancies on Board of Public
Utilities

Synopsis: Where the legislature has required in K.S.A. 1979 Supp. 13-1221 that a person appointed to fill a vacancy on the Kansas City, Kansas Board of Public Utilities (BPU) "shall serve until the next city or state general election, whichever occurs first, at which time a successor shall be elected to serve the remainder of the unexpired term," there is an apparent legislative intent that any such election be conducted in the manner city elections are conducted, including the requirement that a primary election be held in connection therewith. However, where such election is held at the time of the general election in November, there also is an apparent legislative intent that such election to fill BPU vacancies be subject to the time frames applicable to such general election. Thus, all candidates for each of the BPU positions to be filled at the general election to be held in November 1980 must declare their respective candidacies on or before twelve o'clock noon on June 20, 1980, and if there are more than two candidates for any such position, a primary election shall be held at the time of the primary election to be held on the first Tuesday in August 1980. Cited herein: K.S.A. 1979 Supp. 13-1221, 13-1223 (as amended by §3 of 1980 House Bill No. 2841), K.S.A. 25-203, 25-2101, 25-2107, K.S.A. 1979 Supp. 25-2108a.

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Dear Ms. Malloy:

You have requested our opinion with respect to several rather complicated questions regarding the filling of vacancies on the Board of Public Utilities (BPU) of Kansas City, Kansas. Before defining these questions, we think it appropriate to note that the statute which has presented the issue to which your questions relate is K.S.A. 1979 Supp. 13-1221, subsection (a) of which is pertinent to your inquiry and reads as follows:

"(a) The board of public utilities shall consist of six (6) members, three (3) of which shall be nominated and elected by the city at large and three (3) of which shall be elected by the qualified electors of the city within each of the districts established pursuant to subsection (b) of this section. Subject to the provisions of subsection (c) of this section, members elected to the board of public utilities shall hold their offices for terms of four years, and until their successors are elected and qualified. Each of the members elected from districts shall be qualified voters of the districts from which elected. The provisions of article 17 of chapter 13 of the Kansas Statutes Annotated, pertaining to the election and removal of officers, shall govern so far as applicable.

"The board shall elect from its own number a president and vice-president and shall appoint a secretary. Notwithstanding the provisions of K.S.A. 1977 Supp. 13-1222, relating to a quorum for the transaction of business and a vote for action by the board, any vacancy occurring in said board shall be filled by a majority vote of the members remaining on the board. No vacancy shall be filled until at least fifteen (15) days after notification of occurrence of such vacancy has been published in a newspaper of general circulation within the city. Where a vacancy has occurred in the membership of any board of public utilities, a member selected to fill such vacancy shall serve until the next city or state general election, whichever occurs first, at which time a successor shall be elected to serve the remainder of the unexpired term, if any." (Emphasis added.)

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Based on your letter of request, together with the enclosures therewith (including an opinion letter from the Wyandotte County counselor and a copy of a letter from you to several state senators representing portions of the metropolitan Kansas City, Kansas area), it appears that three vacancies have occurred on the BPU since the 1979 city election in Kansas City. All three vacancies have been filled by appointment of the remaining BPU members, in accordance with the provisions of 13-1221 quoted above; but this statute also requires that a BPU member so appointed to fill a vacancy "shall serve until the next city or state general election, whichever occurs first, at which time a successor shall be elected to serve the remainder of the unexpired term, if any." Because the general election to be held in November of this year precedes the next city election to be held in Kansas City, it is at this forthcoming general election that successors are to be elected to fill the remainder of each of these three unexpired terms.

Since it will be your responsibility as county election officer to conduct such election, you have raised several issues in this regard, based on your observation that the statute is "silent" as to certain of the mechanics attending the holding of this election. Most of these issues, however, would appear to be ancillary to your principal question of whether a primary election is to be held as a necessary preliminary to the general election. It is to be noted from the materials you have submitted to us that both you and the Wyandotte County counselor are of the persuasion that a primary election is not required. The silence of the statute in this regard appears to be the primary legal reason supporting your conclusion, but you have offered as additional support what appear to you to be numerous practical problems to be encountered if a primary is to be held.

We must respectfully disagree with your conclusion. We certainly share your observation as to the statute's silence; the legislature's cursory treatment of this proposition has created substantial ambiguity as to the issues you have raised. However, notwithstanding the legislature's lack of precision and clarity in drafting these particular requirements, we believe that application of well-established rules of statutory construction attributes a meaning to these provisions contrary to your suggested conclusion.

"The fundamental rule of statutory construction, to which all others are subordinate, is that the purpose and intent of the legislature governs when that intent can be ascertained from the statutes." (Citations omitted.) Southeast Kansas Landowners Ass'n v. Kansas Turnpike Auth., 224 Kan. 357, 367 (1978). Ancillary to this cardinal rule is the requirement that the legislative intent underlying a statute should be gleaned from the language of the

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statute itself, and "where the language used is plain and unambiguous and also appropriate to the obvious purpose the court should follow the intent as expressed by the words used and is not warranted in looking beyond them in search of some other legislative purpose or extending the meaning beyond the plain terms of the act. (Alter v. Johnson, 127 Kan. 443, 273 Pac. 474; Hand v. Board of Education, 198 Kan. 460, 426 P.2d 124; City of Overland Park v. Nikias, 209 Kan. 643, 498 P.2d 56; Hunter v. Haun, 210 Kan. 11, 499 P.2d 1087.)" City of Kiowa v. Central Telephone & Utilities Corporation, 213 Kan. 169, 176 (1973).

However, where, as in this instance, the language of the statute is ambiguous, the court is "not bound to an examination of the language alone but may look into the existing conditions--the causes which impelled its adoption and the objective sought to be attained In City of Emporia v. Norton, 16 Kan. 236, Mr. Justice Brewer, in speaking for the court, said:

" . . . Now in determining the intent of the legislature we are not limited to a mere consideration of the language employed. We may properly look to the purposes to be accomplished, the necessity and effect of the enactment under the different constructions suggested. . . ." (p. 239)" State, ex rel., v. City of Overland Park, 215 Kan. 700, 713 (1974).

Moreover, as stated in State v. V.F.W. Post No. 3722, 215 Kan. 693, (1974):

"When a statute is susceptible to more than one construction, it must be given that construction which, when considered in its entirety, gives expression to its intent and purpose, even though such construction is not within the strict literal interpretation of the statute." (Citations omitted.) Id. at 697.

Guided by these principles, we have discerned several legislative objectives sought to be accomplished by the previously-quoted provisions of 13-1221. First, as a result of the 1977 legislative changes effected in this statute (L. 1977, ch. 66, §1), it is abundantly clear that the legislature intends that the electors of Kansas City be afforded the opportunity to vote upon those persons who are to fill vacancies in the membership of the BPU, and that such election should be held as soon as possible after the vacancy occurs. Prior to the 1977 amendments, vacancies on the BPU were filled pursuant to 13-1221 solely by appointment of the remaining members, and persons so appointed served for the balance of the

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unexpired terms of their predecessors in office. Now, however, as a result of the changes made to 13-1221 in 1977, vacancies on the BPU are initially filled by appointment of the remaining board members; but members so appointed are to serve only until the next general election or city election, whichever occurs first, which requirement evinces a clear intention that the electors of Kansas City have the right to select those persons who are to have "exclusive control of the daily operation of the water plant and the electric-light plant" of the city. (See K.S.A. 1979 Supp. 13-1223, as amended by section 3 of 1980 House Bill No. 2841, effective April 14, 1980.) It precludes the possibility that an appointed member might serve substantially all of a four-year term of office.

The other readily-discernible legislative objective is that, so far as is practicable, laws governing the election of city officers should apply to and govern BPU elections. Such objective is apparent from the requirement in 13-1221 that "[t]he provisions of article 17 of chapter 13 of the Kansas Statutes Annotated, pertaining to the election and removal of officers, shall govern so far as applicable." That provision was included in 13-1221 upon its original enactment in 1929. (See L. 1929, ch. 126, §2.) At that time, statutes relating to city elections were codified, for the most part, in chapters 13, 14 and 15 of the Revised Statutes of 1923, relating respectively to cities of the first, second and third classes. However, in 1968 the legislature revised city election laws (L. 1968, ch. 274), and all laws of general application to the election of city officers are now codified at article 21 of chapter 25 of Kansas Statutes Annotated.

Pursuant to the 1968 revision and recodification of general city elections laws, a substantial number of the sections in article 17 of chapter 13 of Kansas Statutes Annotated were amended or repealed, to the extent that these statutes no longer contain much in the way of substance as to the requirements for conducting city elections. The requirements for conducting such elections are now found in K.S.A. 25-2101 et seq. However, even though 13-1221 has been amended on two separate occasions since 1968, the legislature has not removed the reference therein to the statutes contained in article 17 of chapter 13. In order to avoid an interpretation of this provision that would render it meaningless [see Clark v. Murray, 141 Kan. 533, 536 (1935)], we believe such provision must be construed as expressing the legislature's intent that city election laws applicable to Kansas City should apply to the election of BPU members.

Confusion is generated by this conclusion, however, because a set of laws separate and distinct from city election laws govern the

conduct of a general election. Thus, it is apparent that, in addition to 13-1221, city election laws and general election laws all have relevance to your inquiry. It also is apparent that differing and potentially conflicting results might be obtained if one of these statutes or sets of laws is relied upon to the exclusion of the other laws in resolving your inquiry. While under their broadest applications, these statutes concern very distinct subjects; however, insofar as they all bear upon the issue of electing BPU members at the forthcoming general election, they must be considered to that extent as being statutes in pari materia. As such, the following statement in Claflin v. Walsh, 212 Kan. 1 (1973), provides assistance in construing these statutory provisions:

"In order to ascertain the legislative intent, courts are not permitted to consider only a certain isolated part or parts of an act but are required to consider and construe together all parts thereof in pari materia. When the interpretation of some one section of an act according to the exact and literal import of its words would contravene the manifest purpose of the legislature, the entire act should be construed according to its spirit and reason, disregarding so far as may be necessary the strict letter of the law. (Gnadt v. Durr, 208 Kan. 783, 494 P. 2d 1219.) In addition, to be in pari materia statutes need not have been enacted at the same time. Statutes relating to the same subject, although enacted at different times, are in pari materia and should be construed together. (Flowers, Administratrix v. Marshall, Administrator, 208 Kan. 900, 494 P. 2d 1184.)"
Id. at 8.

Applying the foregoing principles to the instant situation has compelled our conclusion that, in order to nominate candidates for election as BPU members at the general election in November of this year, where there are two or more such candidates for the remainder of the same unexpired term of office, there must be held a primary election at the time of the regularly-scheduled primary to be held on the first Tuesday of August of this year. (See K.S.A. 25-203.) As noted previously, there is an overriding legislative intent that BPU elections be governed by the laws applicable to city elections. Thus, if an election to fill the remainder of an unexpired term on the BPU were to be held at the next city election, rather than at the forthcoming general election, K.S.A. 1979 Supp. 25-2108a would mandate a primary election where there are more than two candidates for the office to be filled. As a result, we believe it would be highly inconsistent to attribute an intent to the legislature that merely because such

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election is being held at a time other than the first Tuesday in April of an odd-numbered year, the statutory time for holding city elections (see K.S.A. 25-2107), no primary election is required. In our judgment, such interpretation would do violence to the obvious legislative objective of conducting BPU elections as city elections are conducted.

In reaching this conclusion, we recognize that a city primary election precedes the city election by four weeks (see K.S.A. 1979 Supp. 25-2108a), and that the August primary precedes the November general election by approximately three months. However, even though there is an apparent intent that city election laws should govern BPU elections "so far as applicable," by placing the time of the election at the time of the general election in November, we discern a clear intent that the time frames applicable to such general election should be applicable in this instance, as well. To find otherwise would require some statutory indication that the legislature intended the time frames applicable to city elections should supersede and prevail over the corresponding time parameters applicable to general elections. We have found no such indication of that intent, and we note that to interpret 13-1221 in this fashion, would impose significant administrative burdens on your office, which you have recognized. As an alternative to the construction of the statute we have suggested, which would impose relatively few administrative burdens in comparison, it would not be favored in the law.

Therefore, we find there is an apparent legislative intent that elections to fill unexpired terms of members of the BPU be subject to city election laws as they relate to the manner of conducting such elections. For example, we believe it clear that, as an essentially municipal election, the election must be nonpartisan; that a primary election be held where there are two or more candidates for any unexpired term of office; that such elections must be called by the city; and that the filing of declarations of candidacy be made with the city clerk. However, there is an equally apparent legislative intent that the time frames relative to general elections should be applicable to any such BPU election held at the time of the general election. Thus, persons desiring to be candidates at such BPU election should declare their respective candidacies by June 20, 1980, and if a primary election is required, it should be held at the time of the primary to be held on the first Tuesday of August 1980.

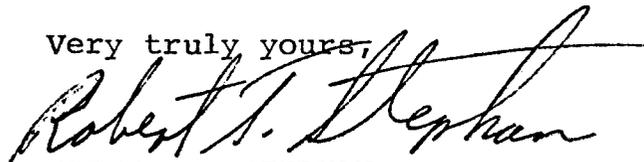
In reaching this conclusion, we are not unmindful of the fact that, in the event a primary election is required, it will necessitate the holding of a nonpartisan primary in connection with the regularly-scheduled partisan primary election, which you suggest will produce complications in programming the voting machines for both partisan and nonpartisan ballots. While we cannot comment with any degree

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of expertise on that potential problem, we do note, however, that voting on nonpartisan issues at a partisan primary election is not unprecedented. We note, for example, that at the primary election held on August 1, 1972, voters throughout the state voted on five separate propositions to amend the Kansas Constitution, and at the primary election on August 6, 1974, five additional proposed amendments were submitted to the state's electors. Obviously, all qualified electors, irrespective of their party affiliation, if any, were entitled to vote on such propositions, and voting machines were programmed accordingly. We trust that a nonpartisan primary election on BPU candidates to fill unexpired terms can be handled similarly.

In concluding, we think it appropriate to note that the problems addressed by this opinion were considered by the 1980 Legislature (see 1980 House Bill No. 2840), and it is regrettable that the legislature took no action to rectify its previous lack of clarity and precision in its amendment of 13-1221. In our judgment, it is never desirable that the legislative intent underlying a statute be discerned except from the plain and unambiguous language of the statute itself.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



W. Robert Alderson
First Deputy Attorney General