



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL OPINION NO. 82- 11

Mr. Mickey Carl Moorman  
Meade County Attorney  
124 North Fowler  
P. O. Box 908  
Meade, Kansas 67864

Re: Townships and Township Officers -- Township  
Treasurer -- Vacancy; Disability

Synopsis: The physical or mental disability of a township treasurer does not result in a vacancy which can be filled by the county commission in accordance with K.S.A. 25-1606. However, such inability to perform the duties of the office is grounds for recall in accordance with K.S.A. 1980 Supp. 25-4301 et seq. Therefore, after successful completion of a recall election there would be a vacancy which the county commission could fill. Cited herein: K.S.A. 1980 Supp. 25-4301, 25-4302, 25-4304, K.S.A. 25-1606, 80-202.

\* \* \*

Dear Mr. Moorman:

As Meade County Attorney, you have requested our opinion on what procedure should be followed to declare a vacancy in the office of township treasurer. The current treasurer is presently unable to carry out the duties of his office or even resign because he is hospitalized in a comatose condition. Furthermore, you note that as he still meets the residency requirements of K.S.A. 80-202, the office is not vacant by operation of that statute. Since that is the only statute stating when a vacancy in the office of township treasurer occurs and relates only to residency requirements, it is necessary to rely on general authority to determine if disability of this type results in a vacancy.

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This very problem was the subject of an opinion issued by Attorney General Robert C. Londerholm on February 13, 1968 (copy enclosed). In that opinion it was concluded that: "The physical incapacity of an officer in this situation would not create a vacancy whereby the provisions of K.S.A. 25-1606 could be invoked." In support of this conclusion he cited 67 C.J.S. Officers §50 p. 209, which stated:

"The physical or mental disability of the incumbent of an elective office has been held not to create a vacancy, but the rule is otherwise where a statute so provides; and absence from duty due to physical disability may amount to a separation from the public service."

Since that time 67 C.J.S. Officers has been revised and the current section found at 67 C.J.S. Officers §74 p. 388 now states:

"Where, by reason of disability after taking office, the officer becomes incompetent to hold it, the court cannot declare the office vacant if the statute does not declare that such disqualification shall vacate the office."

While the language in these two sections is somewhat different, it is clear that the disability of an officer does not create a vacancy unless it is specifically declared to do so by statute. As noted earlier, there is no statute relating to township treasurers which declares that the officer's mental or physical disability results in a vacancy in the office. Therefore, we agree with Attorney General Londerholm's opinion that the disability of the township treasurer does not result in a vacancy in the office.

This conclusion is further supported by the Kansas Supreme Court's general definition of a vacancy in Leek v. Theis, 217 Kan. 784 (1975) where they stated at 790:

"'An office is not vacant so long as it is supplied in the manner provided by the constitution or law with an incumbent who is legally qualified to exercise the power and perform the duties which pertain to it. It is vacant when it has no incumbent authorized to perform its functions. . . .' Barret v. Duff, 114 Kan. 220, 232" (Emphasis added.)

As can be seen from this definition, the issue of whether an office is vacant turns on whether it is occupied by a legally qualified incumbent, and not on whether that incumbent is

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able to perform the duties thereof. In the situation at hand, the office of township treasurer is supplied with a legally qualified incumbent. Therefore, in the absence of a statute declaring disability to result in a vacancy, the office is not vacant and the county commission may not appoint a successor in accordance with K.S.A. 25-1606.

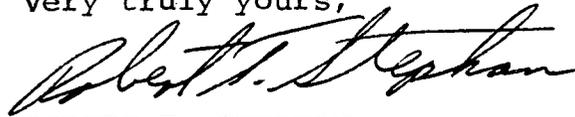
However, the office could be vacated by a recall election and then filled with a person capable of performing the duties of the office. K.S.A. 1980 Supp. 25-4301 et seq. governs the use of recall elections. K.S.A. 1980 Supp. 25-4301 states that:

"All elected public officials in the state, except judicial officers, are subject to recall by the voters of the state or the political subdivision from which elected."

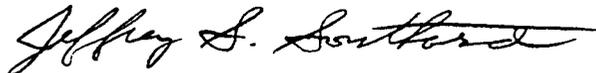
K.S.A. 1980 Supp. 25-4302 sets forth the grounds upon which an officer can be recalled, among which is included incompetence or failure to perform duties prescribed by law. Since the township treasurer in the situation at hand cannot perform the duties prescribed by law, there appear to be sufficient grounds for his recall. Further, since he is a local officer as defined in K.S.A. 1980 Supp. 25-4304(c), his recall will be governed by the procedures set forth in K.S.A. 1980 Supp. 25-4318 to 25-4331.

In conclusion, while the township treasurer is completely disabled from performing the duties of his office, the office is not vacant and a successor cannot be appointed. However, such inability to perform these duties is grounds for recall, upon the completion of which the county commissioners may then appoint a successor in accordance with K.S.A. 25-1606.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Jeffrey S. Southard  
Assistant Attorney General

RTS:BJS:JSS:hle

Enc.