

Note: KSA 75-2953 am.
after this opinion.



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 83- 27

The Honorable Marvin W. Barkis
State Representative, Fifteenth District
Room 273-W, Statehouse
Topeka, Kansas 66612

Re: State Departments; Public Officers, Employees --
Civil Service -- Resignation from Service Upon
Filing for Public Office

Synopsis: Pursuant to K.S.A. 1982 Supp. 75-2953(2), an officer or employee in the state classified service is required to resign from the service upon filing as a candidate for a partisan public office (other than the office of county commissioner). However, as used in this statute, "public office" does not include the office of precinct committeeman or committeewoman, and an officer or employee in the state classified service is not precluded by this statute from being a candidate for such office or being appointed thereto. Cited herein: K.S.A. 1968 Supp. 25-221, K.S.A. 25-3801, 25-3901, 25-3902, K.S.A. 1982 Supp. 75-2953.

* * *

Dear Representative Barkis:

You have posed two questions regarding the applicability of K.S.A. 1982 Supp. 75-2953, which states:

"(1) No officer, agent, clerk or employee of this state shall directly or indirectly use his or her authority or official influence to compel any officer or employee in the classified service to apply for membership in or become a member of any organization, or to pay or promise to pay any assessment, subscription or contribution, or to take part in any political activity. Any person who violates any

provisions of this section shall be guilty of a class C misdemeanor, and, upon conviction, shall be punished accordingly, and if any officer or employee in the classified service is found guilty of violating any provisions of this section, such officer or employee shall be automatically separated from the service.

"(2) Any officer or employee in the state classified service shall resign from the service upon filing as a candidate for public office unless the public office filed for is the office of county commissioner or is elected on a nonpartisan basis." (Emphasis added.)

First, you have asked whether this statute precludes an employee in the classified service under the state civil service system "from running as a candidate for precinct committeeman or committeewoman of a political party." In light of the foregoing statute's requirement that a classified employee "resign from the service upon filing as a candidate for public office," the issue is whether the position of precinct committeeman or committeewoman is a public office.

As you noted in your letter of request, Attorney General Kent Frizzell issued a letter opinion dated February 21, 1969, which addressed this issue. VI Op. Att'y Gen. 656. Specifically, that opinion considered whether the county chairman of a political party was a public officer. In concluding that this position was not a public office, Attorney General Frizzell considered K.S.A. 1968 Supp. 25-221 (repealed, L. 1972, ch. 129, §12, and superseded by K.S.A. 25-3801), which provided for the selection and duties of a county chairman of a political party, and the position was analyzed with reference to the necessary elements of a public office, which were identified in the opinion, as follows:

"(1) the office must be created by the constitution or legislature of the state or created by [a] municipality or other body through authority conferred by the legislature; (2) the position must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate

office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body; (5) and the position must have some permanency and continuity, and not be only temporary or occasional. See Jagger v. Green, 90 Kan. 153, 158-159 (1913); Jones v. Botkin, 92 Kan. 242, 246-247 (1914); Miller v. Ottawa Co. Commissioners, 146 Kan. 481, 484, 485 (1937)." VI Op. Att'y Gen. at 656-657.

Because the position of county chairman created by K.S.A. 1968 Supp. 25-221 was not delegated any portion of the sovereign power of government, an essential element of a public office, the opinion concluded that it was not a public office, but was only a "representative of an unincorporated organization for the purposes of providing or nominating candidates for public office." Id. at 657.

Subsequently, as you also noted, Attorney General Curt Schneider issued a formal opinion in 1975 (Attorney General Opinion No. 75-193), stating that an elected precinct committeeperson was an elected governmental official ineligible to serve on the charter commission. This opinion relied on K.S.A. 25-3901 et seq., providing inter alia for the filling of vacancies in certain public offices. This statutory series was enacted in 1972 (L. 1972, ch. 129), subsequent to the issuance of the 1969 opinion of Attorney General Frizzell.

Noting that K.S.A. 25-3902 authorizes precinct committeepersons to elect individuals to be appointed by the governor to fill vacancies in certain public offices, Attorney General Schneider stated:

"In filling vacancies in public offices, clearly, the precinct committee members exercise privileges and responsibilities which extend beyond internal party affairs and management. Indeed, in filling vacancies in certain public offices, the party convention directly elects persons to fill those offices. The power to fill a public office is clearly the exercise of governmental power. It may be argued, of course, that in electing a person to fill a particular vacancy, party precinct committeepersons merely act as surrogates for the electorate at large, and that in that capacity, there [sic] are no more to be regarded as public officers than members of the electorate at large. The analogy does not hold, however. An elector is qualified to vote if he or she satisfies the constitutional

qualifications for suffrage, and establishes that satisfaction by registration. A precinct committeeperson is qualified to vote for persons to fill vacancies in certain public offices precisely because of the position that person holds, i.e., as a precinct committeeperson. There is thus vested in those committeepersons, by virtue of their election as committeepersons, the exercise of a measure of governmental power, i.e., the power to select and elect persons to fill vacancies in certain public offices." Id. at p. 6.

In reviewing the conclusions reached in these opinions, we have considered the decisions of our appellate courts and have found no Kansas case precisely on point. Hence, we have turned to the decisions of other jurisdictions, which indicate that the general rule is that "the members of a political committee belonging to one party are not public officers, although the legislature may consider it expedient to regulate by statute the election and conduct of members of such committee." (Footnote omitted.) 63 Am.Jur. 2d Public Officers and Employees §22. See, also, Attorney General v. Drohan, 48 N.E. 279 (Mass. 1897); McLendon v. Everett, 55 S.E.2d 119 (Ga. 1949); State v. Bivens, 149 S.E.2d 284 (W. Va. 1966); and Capron v. Mandel, 241 A.2d 892 (Md. 1968).

However, we also note that this rule has enjoyed general acceptance under the circumstances considered in Attorney General Frizzell's opinion in 1969, i.e., where political committees or the members thereof have not been statutorily invested with powers and duties respecting the nomination or selection of persons to fill vacancies in public offices. Where the duties of such officers are confined to the party to which they belong, the statutory regulation of the election and conduct of political committees does not make the members of these committees public officers. Attorney General v. Drohan, supra at 281. "[I]n the absence of statute covering the matter, committees of any political party, in acting for the party's interests, are not acting as officers of the state." (Emphasis added.) State v. Bivens, supra at 290 (quoting 29 C.J.S. Elections §85).

On the other hand, where the legislature has not only regulated the election and conduct of political committees, but also has vested these committees with governmental powers and duties, we find a split of authority. For example, in State ex rel. Hayes v. Jennings, 182 N.E.2d 546 (Ohio 1962), it was held that "[t]he statute authorizing [a] county central committee to fill vacancies in specified offices when the last occupant was affiliated with [the] same political party made central committeemen public 'officers'." Id. at Syl. ¶1.

This decision has been followed by other Ohio courts. See, e.g., State ex rel. Moss v. Franklin Cty. Bd., etc., 432 N.E. 2d 210 (Ohio Ct. of App. 1980). In State v. De Maioribus, 224 N.E.2d 353 (Ohio Ct. of App. 1967), the Court of Appeals of Ohio recognized the general rule that political party committeemen are not public officers, even though there may be statutory regulation of the election and conduct of political committees, but it adhered to the Jennings decision that "the committeemen were made public officers by virtue of the grant to them of certain powers to be exercised by them in the office they held." Id. at 355.

In contrast, other courts have found that the mere grant of certain governmental functions to a political committee or an officer of a political party is insufficient to make such officer or a member of such political committee a public office. For example, in State v. Bivens, supra, the Supreme Court of Appeals of West Virginia adhered to the general rule in holding that members of a county executive committee of a political party were not public officers, even though such executive committee was statutorily vested with the duty of selecting persons to be appointed by the county court as election board officers. Id. at 291. In reaching this decision, the court cited and quoted in part an Illinois case, as follows:

"In People ex rel. Kell v. Kramer, 328 Ill. 612, 160 N.E. 60, the court held that 'Political party committeemen are not public officers, not being required to give bond or take oath, and do not represent the public at large or exercise any of the sovereign powers of the state but represent and are accountable only to members of political parties.'" Id.

Thus, in light of this division of authority, it is difficult to determine as a general proposition whether precinct committeemen and committeewomen in Kansas are public officers, to the extent they exercise governmental powers in the filling of vacancies in public offices under K.S.A. 25-3901 et seq. However, we think it unnecessary to determine this matter as a general proposition in order to respond to your inquiry, because we note that subsection (1) of K.S.A. 1982 Supp. 75-2953 provides that "[a]ny person who violates any provisions of this section shall be guilty of a class C misdemeanor" (emphasis added), making the statute penal in nature. A general rule of construction requires statutes which are penal in nature to be strictly construed in favor of persons sought to be subjected to their operation. State v. Howard, 221 Kan. 51 (1976). This rule means that ordinary

words are to be given their ordinary meaning and not read to add or to subtract from the language as stated. State v. Conner, 4 Kan. App. 2d 207 (1980).

Although we do not preclude the possibility that precinct committeemen and committeewomen may be regarded as public officers under appropriate circumstances, it is our opinion that, in light of the penal nature of K.S.A. 1982 Supp. 75-2953 and the rule of strict construction appropriate to such statutes, precinct committeemen and committeewomen are not public officers within the contemplation of this statute. We cannot say, as a matter of law, that the ordinary meaning of "public office," as used in K.S.A. 1982 Supp. 75-2953, includes precinct committeeman or committeewoman within its scope, or that a person sought to be subjected to this statute's sanctions would readily discern such meaning. As noted in State v. Logan, 198 Kan. 211 (1967): "A penal statute should not be read so as to add that which is not readily found therein, or to read out what, as a matter of ordinary language, is in it." Id. at 213.

Accordingly, we have no hesitation in concluding that, as a matter of ordinary language, "public office" would not include a precinct committeeman or committeewoman. Certainly, we believe the ordinary meaning to be ascribed "precinct committeeman" or "precinct committeewoman" would not, in accordance with the general rule of authority, contemplate that persons holding such positions are public officers. To the contrary, these persons are ordinarily regarded only as having duties to their particular political party. Hence, it is our opinion that for purposes of K.S.A. 1982 Supp. 75-2953(2), the term "public office" does not include a precinct committeeman or committeewoman. We reiterate, however, that our conclusion regarding the construction of this statute does not foreclose the possibility that, under other circumstances and other statutory provisions, precinct committeepersons may be considered public officers.

You also have asked whether this statute precludes a classified state employee from accepting an appointment to fill a vacancy in a precinct committee position pursuant to K.S.A. 25-3801. As previously discussed, K.S.A. 1982 Supp. 75-2953(2) requires an officer or employee in the state classified service to "resign from the service upon filing as a candidate for public office." Since we have concluded, in responding to your first question, that the term "public office" in this statute does not include a precinct committeeman or committeewoman, we believe such conclusion compels a negative response to your second question, as well.

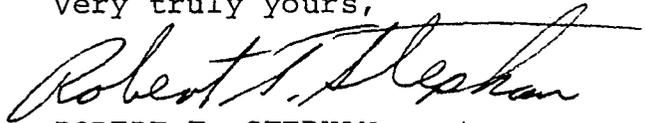
Moreover, in light of the strict construction required of this statute because of its penal nature, we also note that the provisions of subsection (2) of this statute are directed

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only toward "filing as a candidate" for an office elected on a partisan basis. The plain language of the statute is confined to this situation. It does not address the appointment of a classified employee to public office. Apparently, the only evil sought to be remedied by this statute is a classified employee's candidacy for a partisan public office (other than the office of county commissioner).

Thus, it is our opinion that K.S.A. 1982 Supp. 75-2953 does not preclude an employee in the state's classified service from being appointed to the office of precinct committeeman or committeewoman.

Very truly yours,



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