



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 84- 120

Karen Barefield
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Minneapolis, Kansas 67467

Re: Counties and County Officers -- Sheriff --
Qualifications for Office

Synopsis: By the terms of K.S.A. 1983 Supp. 19-801b, an individual who has pleaded guilty and has been convicted of a charge of driving under the influence of intoxicating liquor under the laws of another state is ineligible to be nominated, elected or appointed to the office of sheriff in this state. K.S.A. 1983 Supp. 19-801b disqualifies persons who have been convicted or have pleaded guilty to a violation of any "federal or state laws or city ordinances relating to gambling, liquor or narcotics" from holding the office of sheriff.

The expungement of such a conviction does not alter the fact of the conviction nor remove the disability from office holding occasioned by such a conviction as provided in K.S.A. 1983 Supp. 19-801b.

The nomination or election of an ineligible person gives the person so nominated or elected no claim nor title to the office. Cited herein: K.S.A. 19-801b; K.S.A. 19-801c; K.S.A. 1983 Supp. 19-804; 21-4619, as amended by L. 1984, ch. 39, §35; K.S.A. 25-3901, 41-311, 41-2703, 41-2708, K.S.A. 1983 Supp. 77-201, Second.

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Dear Ms. Barefield:

As Ottawa County Attorney you have requested our opinion on three questions relating to the statutory qualifications for the office of sheriff. You indicate that the person who recently won election as Ottawa County sheriff pleaded guilty was convicted and placed on probation for driving under the influence of intoxicating liquor in the state of California in 1974. The conviction was recently expunged. This situation raises a number of questions in light of the requirements of K.S.A. 1983 Supp. 19-801b(a)(3), which provides:

"(a) No person shall be eligible for nomination, election or appointment to the office of sheriff unless such person:

. . . .

"(3) has never been convicted of or pleaded guilty or entered a pleas of nolo contendere to any felony charge or to any violation of any federal or state laws or city ordinances relating to gambling, liquor or narcotics."
(Emphasis added.)

Your first question concerns the scope of the terms a "violation . . . of laws . . . relating to liquor." You ask whether a DUI conviction disqualifies a person from serving as sheriff under this statute. It is our opinion that a DUI conviction is included within the terms of the statutory language and is a violation of the laws "relating to liquor."

Our conclusion is based on two prior opinions of this office and a decision of the Kansas Supreme Court, all of which addressed similar issues. In Keck v. Cheney, 196 Kan. 535 (1966), the court considered whether a DUI conviction from the state of Texas was a "violation of intoxicating liquor laws of any state" under the terms of K.S.A. 41-311. At that time, the statute prohibited the issuance of a liquor license to any person who "has been convicted of or had pleaded guilty to violation of the intoxicating liquor laws of any state" Responding to the argument that a conviction for DUI was a violation of a traffic regulation and thus not included in the "intoxicating liquor law", the court said:

"We cannot agree . . . for to do so would do violence to the clear intent and purpose of the legislature when it enacted 41-311, supra, prohibiting the granting of a license to any person who had been convicted or plead guilty

to a violation of any intoxicating liquor law. It matters not where the law is classified in in the statutes if it deals with intoxicating liquors.

"The legislature could, reasonably, have had but one thing in mind, it did not want anyone who was prone to abuse the use of intoxicating liquors to have anything to do with a retail liquor store." (Emphasis added.)

The Attorney General followed a similar line of reasoning in two previous opinions concerning related questions. In Opinion No. 82-269, the Attorney General concluded that a DUI conviction was within the phrase a "violation of the intoxicating liquor law." Thus, the opinion stated that under K.S.A. 41-2708(j) a cereal malt beverage retailer's license could be suspended or revoked if the licensee employed a person who had been convicted of driving while under the influence of intoxicating liquor.

Similarly, Opinion No. 84-21 concluded that a person who has participated in a diversion program for driving under the influence of intoxicating liquor was ineligible for a retailer's license under K.S.A. 41-2703. That statute prohibits the issuance of a cereal malt beverage retailer's license to any person who has been "convicted" of driving an automobile under the influence of intoxicating liquor within the past two years.

Due to the substantial similarity between your question and those addressed in Keck v. Cheney, supra, as well as in our previous opinions, we conclude that a violation of the laws of any state proscribing driving under the influence of intoxicating liquor is included within the language of K.S.A. 1983 Supp. 19-801(b)(a)(3) which refers to violations of state laws and city ordinances "relating to . . . liquor." Accordingly, we believe that a person who has been convicted of, pleaded guilty or entered a plea of nolo contendere to a charge of driving under the influence of intoxicating liquor is not eligible for "nomination, election or appointment" to the office of sheriff under the terms of K.S.A. 1983 Supp. 19-801b. The reasoning of Keck v. Cheney, supra, is equally applicable here. It is apparent that the legislature did not want persons who have violated laws relating to liquor to hold the office of sheriff and thereby be responsible for enforcing the same or similar laws.

You also inquire as to the effect of the expungement of such conviction. In this case you indicate that the expungement was obtained after the person in question was nominated at the August, 1984, primary election but before the general election in November, 1984. As noted earlier, K.S.A. 1984 Supp.

19-801b states the qualifications for "nomination, election or appointment" to the office of sheriff. In Opinion No. 80-104, the Attorney General addressed the question of when the qualifications to be possessed by a person seeking the office of sheriff (as prescribed by K.S.A. 1979 Supp. 19-801b) must be satisfied. The opinion concluded that such qualifications must be possessed at the time of a person's nomination to the office. In this case the qualification prescribed by K.S.A. 1983 Supp. 19-801b should be met at the time an individual is nominated for the office of sheriff at the primary election. Thus, under the circumstances you describe, regardless of the effect of the subsequent expungement, the person in question was not qualified to be nominated to the office.

In order to fully address your concerns, however, it is necessary to consider the effect of the expungement. It is our opinion that the expungement of a conviction covered by K.S.A. 1983 Supp. 19-801b does not remove the disqualifications for office created by that statute. The documents you have submitted with your request indicate that the sheriff-elect pleaded guilty to the DUI charge, was placed on probation for one year and was required to pay a fine of \$375.00. The documents further indicate that expungement was granted in October of 1984 pursuant to the California Penal Code §1203.4 (West 1983 Supp.) That statute provides in relevant part:

"(a) In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section, the defendant shall, at any time after the termination of the period of probation, if he is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the accusations or information against the defendant and except as noted below, he shall thereafter be released from all penalties and disabilities resulting from the offense of which he has been convicted, The probationer may make such application and change of plea

in person or by attorney, or by the probation officer authorized in writing; provided, that, in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed; and provided further that the order shall state, and the probationer shall be informed, that the order does not relieve him of the obligation to disclose the conviction in response to any direct question contained in any questionnaire or application for public office or for licensure by an [sic] state or local agency." (Emphasis added.)

As is clear from the emphasized language quoted above, an order of dismissal pursuant to this section does not change the fact of the conviction or plea; nor does it relieve the person involved of the obligation to disclose a conviction in response to a question in an application for public office in California. Decisions of the California courts which construe this section make it clear that the statute does not operate to release an offender from all the consequences of a conviction which are in the nature of a penalty, e.g., disbarment, revocation of business or professional licenses, suspension by the state board of Medical Examiners, suspension by the state board of education, and deportation based upon the expunged crime. See People v. Sharman, 17 Cal.App.3d 550, 95 Cal.Rptr. 134 (1971) and cases cited therein. Thus, although expungement relieves a person of certain penalties and disabilities resulting from conviction, it does not affect the fact that his guilt has been determined. See People v. Wiedersperg, 44 Cal.App.3d 550, 118 Cal.Rptr. 755 (1975)

Accordingly, the expungement process, either in Kansas or California, does not eradicate the conviction, nor, as in this case, the effect of the guilty plea and conviction under K.S.A. 1983 Supp. 19-801b. A recent opinion of this office considered the effect of proceedings under the Kansas expungement statute (K.S.A. 1983 Supp. 21-4619, as amended by L. 1984, ch. 39, §35) and pointed out that, unlike annulment, expunction does not eliminate the conviction itself; it simply closes the records of the conviction to public scrutiny. See Attorney General Opinion No. 84-115. In addition, the Kansas expungement statute sets forth a number of exceptions to its provisions. K.S.A. 21-4619 (e)(2), as amended, provides in relevant parts:

"(e) When the court has ordered a conviction expunged, the order of expungement shall state the information required to be contained in the

petition. The clerk of the court shall send a certified copy of the order of expungement to the federal bureau of investigation, the Kansas bureau of investigation, the secretary of corrections and any other criminal justice agency which may have a record of the conviction. After the order of expungement is entered, the petitioner shall be treated as not having been convicted of the crime, except that:

"(1) Upon conviction for any subsequent crime, the conviction that was expunged may be considered as a prior conviction in determining the sentence to be imposed;

"(2) the petitioner shall disclose that the conviction occurred if asked about previous convictions (A) in any application for employment as a detective with a private detective agency, as defined by K.S.A. 1983 Supp. 75-7b01 and amendments thereto; as security personnel with a private patrol operator, as defined by K.S.A. 1983 Supp. 75-7b01 and amendments thereto; with a criminal justice agency, as defined by K.S.A. 22-4701 and amendments thereto . . . (B) in any application for admission, or for an order of reinstatement, to the practice of law in this state;

"(3) the court, in the order of expungement, may specify other circumstances under which the conviction is to be disclosed;"
(Emphasis added.)

Thus it is clear that the Kansas legislature did not intend for expunction to eliminate all the possible effects of a conviction. Relevant here is the requirement that an individual who has had a conviction expunged disclose that the conviction occurred if asked in an application for employment with a criminal justice agency. A criminal justice agency is defined in K.S.A. 1983 Supp. 22-4701(c)(1) to include sheriff's offices. Thus, any individual who applied for employment in a sheriff's office would be required to disclose a prior conviction which had been expunged pursuant to K.S.A. 1983 Supp. 21-4619, as amended. We do not believe the legislature intended to restrict the effect of expunction in the case of employees of a sheriff's office and at the same time permit expunction to restore an individual's qualification to hold the office of sheriff. As exceptions to the statute made clear, expunction does not change the fact of the conviction, it simply restricts access to the record of such a

conviction. K.S.A. 1983 Supp. 19-801b is concerned with the fact of the guilty plea or conviction and not with any subsequent procedural processes by which the record of such facts is altered, restricted or destroyed, or access thereto limited.

It is our opinion that expungement of the DUI conviction under the circumstances presented by your request does not alter the effect of the plea and conviction under K.S.A. 19-801b. Thus, a person who has pleaded guilty and has been convicted of the charge of driving under the influence of intoxicating liquor in another state and has had the conviction expunged remains disqualified from holding the office of sheriff by the terms of K.S.A. 1983 Supp. 19-801b. (See also Attorney General Opinion No. 80-225 which reaches a similar conclusion regarding an applicant to the Kansas Law Enforcement Training Center.)

You also ask whether the fact that the conviction occurred before the legislature enacted the relevant portions of K.S.A. 19-801b would affect the operation of the statute in this case. In our opinion it does not. K.S.A. 1983 Supp. 19-801b clearly provides that a person is not eligible for nomination, election or appointment to the office of sheriff unless that person has never been convicted, pleaded guilty or entered a plea of *nolo contendere* to a violation of federal or state laws or city ordinances relating to liquor. The language should be given its ordinary meaning. (K.S.A. 1983 Supp. 77-201, Second.) The legislature has imposed no time limitation nor provided, for example, that after five years a person convicted of such an offense would again be eligible. It is obvious that the legislature intended the rather harsh result obtained here, e.g., a person who, at any time, has been in the circumstances described in 19-801b(a)(3), shall be ineligible to hold the office of sheriff in any Kansas county.

We also note that the requirements for eligibility at issue here have been in effect since July 1, 1972. See L. 1972, ch. 75, §2. It appears that the sheriff-elect was convicted of the offense in question in September of 1974, well after the enactment of the relevant statute. Had an individual been serving as sheriff on July 1, 1972, he or she would remain eligible to succeed himself or herself in office regardless of the requirements of 19-801b, as is provided in K.S.A. 19-801c.

Although beyond the scope of your specific inquiries, we must address briefly the effect of election of an ineligible person to office. It is a general rule of law, reflected in case law and prior Attorney General opinions, that nomination or election of an ineligible person to office gives the person so nominated or elected no claim or title to the office whatever, if that

person initially does not satisfy the eligibility requirements for holding office. In 63A Am.Jur.2d, Public Officers and Employees, §36, the writer states:

"The qualifications which relate to an office must be complied with by persons seeking that office. To hold a public office, one must be eligible and possess the qualification prescribed by law. If the conditions of eligibility are too stringent, the option to refuse the office or resign it remains. Offices created by the legislature are privileges; aspirants to such offices must strictly comply with the conditions of office holding. An election or appointment to office of a person who is ineligible or unqualified gives him no right to hold the office."
(Emphasis added.)

It is further noted in 67 C.J.S., Officers, §19, that:

"Where the legislature has fixed the qualifications for an office pursuant to its authority to do so, the electors may not select one not possessing the qualification prescribed. One who is not eligible is not regarded as elected to office, although he may have received the highest numbers of votes cast and is in possession of a certificate of election"

See also Attorney General Opinion Nos. 76-247 and 81-113.

To our knowledge no one has challenged the election or the right of the sheriff-elect to hold office on the grounds of the his lack of qualification. If no challenge is timely filed, either after nomination or election, title to the office is subject to challenge by the State of Kansas through the office of the county attorney or the Attorney General.

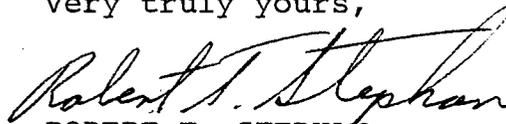
It is therefore our conclusion that the election of an individual to the office of sheriff who is ineligible to be elected to or to hold the office is void. Thus, no eligible person has been elected to hold the office of sheriff for the ensuing term. It is our opinion that this fact creates a vacancy in the new term which may be filled as provided by law. K.S.A. 1983 Supp. 19-804 provides in relevant part:

"Except in those counties operating under the provisions of consolidated law enforcement acts, whenever a vacancy occurs in the office of sheriff of any county, the undersheriff of such

county shall in all things execute the office of sheriff until a sheriff shall be appointed by the governor in the manner provided by law for filling vacancies in the office of member of the house of representatives, who shall hold office during the unexpired term for which appointed and at the expiration of such term if no sheriff is elected and qualifies for such office, the governor shall appoint a sheriff for the ensuing term in the manner provided by law for filling vacancies in the in the office of member of the house of representatives;" (Emphasis added.)

Although this statute does not address the specific circumstances raised by your request, it is our opinion that the legislative intent expressed therein is controlling. K.S.A. 19-801a provides that a sheriff shall be elected in each county, at the general election, for a term of four years. Although the statute providing for vacancies in the office of sheriff initially addresses the circumstance where a vacancy occurs in a regular four year term, it is our opinion that the legislature also intended to provide for the circumstance where no individual is elected and qualified for the office. Thus the new term should be filled by the governor through the appointment of a person selected pursuant to K.S.A. 25-3901 et seq.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Mary F. Carson
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