



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

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

February 18, 1985

ATTORNEY GENERAL OPINION NO. 85- 20

Christopher Y. Meek
Cherokee County Attorney
1031 Military Avenue
Baxter Springs, Kansas 66713

Re: Elections -- City Elections -- Time of Primary
Elections; Uniformity of Statute

Synopsis: K.S.A. 1984 Supp. 25-2108a(b) prescribes the conditions under which a city utilizing non-partisan elections must hold a primary election. The statute on its face is uniformly applicable to all cities, and is contained in an act (L. 1982, ch. 157) which is also uniform. K.S.A. 25-2113, which is contained in a different act, sets forth a general rule for non-partisan city elections, but also contains a provision for partisan city elections in Johnson County. The inclusion of this provision renders K.S.A. 25-2113 non-uniform, and thereby subject to a charter ordinance under a city's home rule authority. However, in the absence of such an ordinance which would allow partisan elections, the general provisions of K.S.A. 1984 Supp. 25-2108a concerning primary elections continue to apply. To the extent it is inconsistent with this opinion, Attorney General Opinion No. 78-49 is superseded. Cited herein: K.S.A. 1984 Supp. 25-2108a, K.S.A. 25-2113, Kan. Const. Art. 12, §5.

*

*

*

Dear Mr. Meek:

As County Attorney for Cherokee County, Kansas, you request our opinion on a question involving the application of K.S.A. 1984 Supp. 25-2108a. That statute sets the time of primary elections for cities, and also provides the conditions under which a primary must be held. You inform us that the City of Galena, relying on a previous opinion of this office (No. 78-49), has utilized its home rule authority under Article 12, Section 5 of the Kansas Constitution to charter out from the provisions of the statute which set such conditions. As a result, the city had not planned to hold a primary election, even though the number of candidates would otherwise require such an election.

The statute in question, K.S.A. 1984 Supp. 25-2108a, states:

"(a) There shall be a primary election of city officers on the Tuesday preceding by five weeks the first Tuesday in April of every year that such city has a city election, except as otherwise provided in subsection (b) of this section.

"(b) No primary election of city officers shall be held unless by holding such primary one (1) or more persons will be eliminated as candidates for office. In the event there are not more than two (2) candidates for any one office, the names of the candidates for such office shall not appear on the primary election ballots, and there shall be no primary election for such office, but the names of such candidates shall be placed on the general city election ballot." (Emphasis added.)

The practical effect of this statute is to require a primary election whenever there are three or more candidates for any one office. In the case of a city with three at-large city commission positions which are to be filled, a primary would be held if there were seven or more candidates, for if six or less filed each post would be contested by less than three persons.

The provisions of K.S.A. 1984 Supp. 25-2108a(b) may be contrasted with those of K.S.A. 25-2113, which states:

"(a) Except as provided in subsection (b) of this section, city elections shall be nonpartisan. Laws applicable to elections

occurring at the same time as city elections shall apply to city elections to the extent that the same are not in conflict with the provisions of this act.

"(b) The provisions of this subsection (b) shall apply to cities of the first class in counties which have been declared urban areas as authorized by article 2, section 17, of the constitution of Kansas. Election laws of a general nature which are applicable to partisan elections and which are not in conflict with this subsection (b) or any specific law applicable to election of city officers in any city to which this subsection (b) applies, shall apply to elections held under the provisions of this subsection (b). The county election officer shall prescribe the forms, ballots and ballot labels for every election conducted under this subsection (b), and shall make such rules and regulations not inconsistent with this subsection (b) as may be necessary for the conduct of such elections." (Emphasis added.)

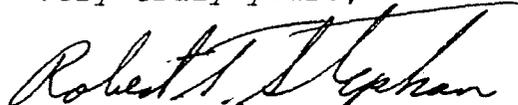
Subsection (b) on its face applies only to cities in Johnson County, which is the only "urban county" in the state. However, in that the inclusion of such special language renders the operation of the statute non-uniform, under the provisions of Article 12, Section 5 of the Kansas Constitution, a city in a non-urban county could charter out from the general rule in subsection (a) (i.e. non-partisan city elections), and hold partisan elections under section (b).

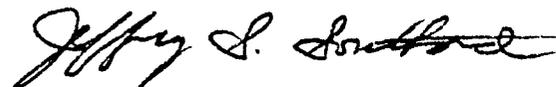
The question which has been presented concerns the ability of a city to charter out from the provisions of K.S.A. 1984 Supp. 25-2108a, rather than K.S.A. 25-2113. Under Article 12, Section 5 of the Kansas Constitution, a city may be exempt from the application of a state statute by enacting a charter ordinance which provides substitute or additional provisions on the same subject. However, in the event that the statute is contained in an enactment applicable uniformly to all cities, the city may not employ a charter ordinance to supersede the statute. The use of home rule has accordingly often hinged upon the presence of some non-uniform provision in an act, for even one such section is sufficient to "taint" an otherwise uniformly applicable act. City of Junction City v. Griffin, 227 Kan. 332 (1980). Further, in examining the question of whether a non-uniformity occurs, courts can look to other statutes, even though not

contained in the same act, which deal with the same subject matter and are therefore in pari materia. Claflin v. Walsh, 212 Kan. 1, 9 (1973).

K.S.A. 1984 Supp. 25-2108a is contained in a different act than is K.S.A. 25-2113. The first enactment, Laws of 1982, Chapter 157, consists of uniform sections applicable to all cities in the state. However, the presence of the non-uniform provision in K.S.A. 25-2113(b) could arguably render K.S.A. 1984 Supp. 25-2108a non-uniform as well, under the Claflin court's reasoning. This result was in fact reached in Attorney General Opinion No. 78-49, although the opinion did not specifically cite Claflin or conclude that the two statutes, although in different acts, were in pari materia. In our opinion, such a conclusion is unwarranted, given the difference in subject matter between the two statutes. K.S.A. 1984 Supp. 25-2108a deals with the timing of primary elections, while K.S.A. 25-2113 concerns partisan and non-partisan city elections. While, as noted above, K.S.A. 25-2113 is indeed facially non-uniform, and may be made the subject of a charter ordinance, K.S.A. 1984 Supp. 25-2108a is uniform in its application to all cities holding non-partisan elections. In our opinion, K.S.A. 1984 Supp. 25-2108a is not rendered non-uniform by application of the Claflin rationale. Accordingly, a city which now holds a primary under K.S.A. 1984 Supp. 25-2108a may utilize home rule authority to hold partisan elections under K.S.A. 25-2113, and then use the rules for a primary contained in the latter statute. A city may not, however, use home rule authority to exempt from the former statute, which is uniform in its application to all cities holding non-partisan elections.

Very truly yours,


ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS


Jeffrey S. Southard
Deputy Attorney General