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February 26, 1985

ATTORNEY GENERAL OPINION NO. 85- 24

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Re: Elections -- City Elections -- Filing Deadlines for  
Candidates; Filling Vacancy

Cities, Second Class -- The Board of Commissioners --  
Vacancy in the Office of Commissioner

Synopsis: In a city of the second class with the commission manager form of government which is governed by K.S.A. 14-1305, a person appointed to fill a vacancy in the office of commissioner holds office only until the "next city election," at which time someone shall be elected to fill the unexpired term if any portion of the term remains. Under Kansas case law, "next city election" is the next ensuing election at which city officers are elected. This conclusion is not altered even though a vacancy occurs after the filing deadline for a candidates seeking city office. The unexpired term should appear on the ballot of the next ensuing city election regardless of the fact no one was able to file as a candidate for the office according to the regular procedures governing the conduct of city elections. Cited herein: K.S.A. 12-1006; 12-1017; 12-1020; 14-1305; K.S.A. 1984 Supp. 25-2101; K.S.A. 25-2102; 25-2103; K.S.A. 1984 Supp. 25-2108a; 25-2110; K.S.A. 25-2118; R. S. 19-203 (1923).

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Dear Mr. Retter:

As attorney for the City of Concordia, you have requested an opinion on the application of K.S.A. 14-1305 to a situation which has arisen in Concordia. You inform us that Concordia is a city of the second class with the commission-manager form of city government. The city has enacted a charter ordinance which provides for staggered three-year terms for each of three city commissioners.

Commissioner Armand Racette was elected to a three-year term which began on April 18, 1984 and will expire in April, 1987. Commissioner Racette submitted his resignation from the city commission on February 11, 1985. As noted above, Concordia has a commission-manager form of government. The statutes providing for the city manager plan state that vacancies in the governing board shall be filled in "the manner already provided by law." K.S.A. 12-1006. K.S.A. 12-1017 provides that when the city manager plan is adopted, the general laws relating to the commission form of government in cities of the same class shall govern, except insofar as the city manager statutes are inconsistent with the general statutes. See also K.S.A. 12-1020.

The general statutes pertaining to commission government in cities of the second class are found at K.S.A. 14-1101 through 14-2004. K.S.A. 14-1305 addresses vacancies in the office of commissioners and provides in relevant part:

"In case of any vacancy from any cause in the office of mayor or any commissioner, the remaining members of the said board of commissioners shall within ten (10) days after the occurrence of said vacancy elect some suitable person to fill said vacancy until the next city election, at which time a successor shall be elected to fill the unexpired term, provided there is any portion of said term unexpired, . . . ." (Emphasis added.)

You ask when the vacancy created by Commissioner Racette's resignation must be filled by an election and particularly, whether this office must be placed on the ballot at the next ensuing city election, scheduled for April 2, 1985. A potential problem is created by the fact Commissioner Racette's resignation occurred well after the statutorily prescribed filing deadline for candidates for city office. K.S.A. 1984 Supp. 25-2110 provides that the filing deadline for all city elections shall be 12:00 o'clock noon of the first Tuesday preceding by 10 weeks the

first Tuesday in April. This year that deadline was January 22, 1985. Similarly, K.S.A. 25-2118 requires the city clerk to certify to the county election officer a list of all city offices to be voted upon at the next city election "not later than January 1 of every year that such city has a city election." In addition, the number of candidates who file for a particular office determines whether it is necessary to conduct a primary election on the Tuesday 5 weeks before the first Tuesday in April. K.S.A. 1984 Supp. 25-2108a.

Under the prescribed regular procedures for city elections, it is not possible to place Commission Racette's unexpired term on the ballot at the April 2, 1985 election. K.S.A. 14-1305 clearly provides, however, that a person appointed to fill a vacancy in the office of city commissioner shall hold the office only until "the next city election." K.S.A. 25-2103 defines "city election" as "the election of such city officers as are provided by law to be elected." K.S.A. 1984 Supp. 25-2101 further defines "general election" as:

". . . the election held on the Tuesday succeeding the first Monday in November of even numbered years, the elections held for officers on the first Tuesday in April, and in the case of special elections of any officers to fill vacancies, the election at which any such officer is finally elected."

Thus, the term "general election" includes the regular election of city officers in April. It is not clear what the phrase "special elections . . . to fill vacancies" has reference to; however, in this context it has no meaning because K.S.A. 14-1305 does not provide for a "special election" to fill a vacancy in the office of commissioner. A literal interpretation of the phrase "next city election" requires the conclusion that Commissioner Racette's unexpired term should appear on the ballot at the next election of city officers on April 2, 1985.

An argument can be made that such a literal interpretation of the language is not warranted, in view of the legislative history of the statutes in question and in terms of the practical problems which are raised by a literal reading of the statute. K.S.A. 14-1305 was last amended by L. 1968, ch. 274, §40. That enactment concerned city elections and contained a number of new sections prescribing the conduct of city elections which now appear in the statute book at article 21 of chapter 25. This enactment included the deadline for filing as a candidate for city office.

Thus, it is clear that the manner of filling a vacancy pursuant to K.S.A. 14-1305 was considered by the legislature at the same time the procedures for the conduct of city elections were prescribed. It is possible to conclude, therefore, that the sections should be construed in pari materia and reconciled to reflect the intent of the legislature. This would lead to the conclusion that the reference to the "next city election" in K.S.A. 14-1305 means the next city election at which the vacancy may be filled according to the prescribed procedures for conducting such elections, and not necessarily the next ensuing city election.

While this conclusion has a great deal of practical appeal, our research into Kansas law has revealed a large body of law which clearly supports the opposite conclusion. This latter construction is consistent with the oft-cited rule announced in the case of Rice v. Stevens, 25 Kan. 302 (1881): "The theory of our law is, that officers shall be elected whenever it can be conveniently done; and that appointments to office will be tolerated only in exceptional cases." Id. at 307. K.S.A. 14-1305 clearly limits the term of a person appointed to fill a vacancy to the next "city election," that is, the next occasion when city officers are elected. In the case of Wendorff v. Dill, 83 Kan. 782 (1911), the Supreme Court interpreted the phrase "next regular election" to further the policy of filling offices by election rather than appointment, and concluded that a judge appointed to fill a vacancy held office only until a successor could be chosen at a general election, whether or not that particular office would normally be filled at that time.

Although this policy alone would not be enough to override the practical problems raised by a literal interpretation of K.S.A. 14-1305, there is a Kansas case, decided upon remarkably similar facts, which compels such a conclusion. In Hamilton v. Raub, 131 Kan. 392 (1930), the Supreme Court interpreted R. S. 19-203, which provided that in case of a vacancy in the office of a county commissioner:

". . . the remaining commissioner or commissioners and the county clerk shall appoint some one resident in the district to fill the office until the next general election, when a commissioner shall be elected to fill the unexpired term." R. S. 19-203 (1923). (Emphasis added.)

Facts presented in the Hamilton v. Raub case showed that a Shawnee county commissioner, one J. A. Cole, was elected at the general election in 1928 and commenced his four year term in

January, 1929. Mr. Cole died on August 14, 1930. Thereafter, the remaining county commissioners and the county clerk, pursuant to R. S. 19-302, appointed a Mr. Noller to fill the vacancy occasioned by the death of Commissioner Cole. The primary election in that year was held on August 5, 1930, nine days before Cole's death. Obviously, no vacancy existed at the time of the primary and therefore no name appeared on the primary ballot as a candidate for Commissioner Cole's seat. After his death, the Republican county committee met and nominated one W. G. Tandy to fill the vacancy of a candidate on the Republican ticket for the office of county commissioner in Cole's district. The county clerk, acting on the advice of the Attorney General, refused to place Mr. Tandy's name on the ballot. Tandy filed a mandamus action seeking to compel the county clerk to print his name on the ballot for the general election held in November.

On the question of when the election should be held to fill the unexpired term of Commissioner Cole, the court heard arguments favoring the general election to be held in November of 1930 and arguments favoring the general election of 1932. The court described the arguments as follows:

"Considering the first of these questions, it is argued on behalf of plaintiffs that the appointment of Noller by the other members of the board of county commissioners and the county clerk was to fill the office only until the next general election, at which time a commissioner should be elected (R. S. 19-203). Defendant contends the primary election law (R. S. 25-201 et seq.), in its provision with respect to the nomination of candidates to be voted upon at the general election, has the effect of making the primary election held on the first Tuesday in August a part of the general election, and hence that the term 'next general election' used in R. S. 19-203 necessarily means the next election held in November after the August primary election held after the vacancy in the office of county commissioner, and that since the primary election of 1930 was held August 5 and the vacancy in the office occurred thereafter, on August 14, 1930, by the death of the incumbent, there can be no election to fill the unexpired term until the November election, 1932. On this point the judgement of the court accords with the view of the plaintiffs."

The court rejected the argument that "general election" should be read to include the primary election process of nominating candidates to be voted on at the general election. Relying on the definition of "general election" found in the Kansas constitution and in numerous previous cases, the court concluded that the next general election could only be the next ensuing election held on the Tuesday following the first Monday in November.

"To hold to the contention of defendants we would have to give to the term 'general election' a meaning different from that which had been used in the constitution, statutes and judicial opinions of this state throughout the seventy years since the state was organized, and say that in some indirect way the primary election law amended R. S. 19-203 so as to postpone, in a case such as we have before us, for two years the election of a county commissioner and to permit the appointee to hold under his appointment two years longer than is contemplated by the plain language of the statute. This we are unwilling to do. The result is that the next general election, as that term is used in R. S. 19-203, after the death of J. A. Cole, August 14, 1930, is the election to be held on the Tuesday after the first Monday in November, 1930, at which time the statute requires that 'a commissioner shall be elected' to fill his unexpired term of office." 131 Kan. at 397.

Thus, despite the fact that the time for complying with the regular nomination process had passed when the vacancy in office occurred, the court concluded that a commissioner would be elected to fill the unexpired term of office at the next ensuing general election.

The matter was further complicated by the court's second conclusion that in a case where no one was nominated at the primary election whose name could appear on the ballot at the general election for the unexpired term of the deceased commissioner, the county central committee had no power or authority to nominate a candidate for that position and have his name appear on the general election ballot. This conclusion was based on the case of Koehler v. Beggs, 121 Kan. 897 (1926) which held:

"The provision of the primary election law, that vacancies occurring after the holding of a primary may be filled by the proper party committee, applies only to vacancies in nominations made at the primary." Id. Syl. ¶1.

The court then concluded:

"The result is that the writ prayed for must be denied. But since there is a county commissioner from the second commissioner district to be elected at the general election to be held November 4, 1930, to fill the unexpired term of J. A. Cole, deceased, defendant should prepare the ballot so there is a place thereon for the electors to cast their ballots, such as the following:

FOR COUNTY COMMISSIONER, SECOND DISTRICT.  
(Vote for one.)

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It is so ordered." 131 Kan. at 399-400.

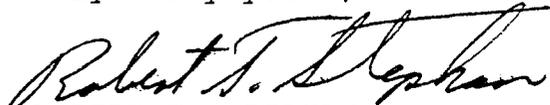
Although we find this result to be somewhat awkward, the similarities between the Hamilton case and the matter you present are too great to permit any other conclusion. The Hamilton case considered precisely the kind of arguments which may be presented in favor of interpreting "next city election" to mean the next election at which the usual procedures for nominating candidates for offices may be followed. The court rejected such arguments in favor of a literal interpretation of the phrase "next election," despite the fact that it was impossible to place the name of any candidates for the office on the general election ballot. We can find no basis for distinguishing the situation presented by your request. The statutory language in both instances provides for the same result.

Thus, under the terms of K.S.A. 14-1305, an individual appointed to fill a vacancy in the office of commissioner holds office only until the "next city election" at which time someone shall be elected to fill the unexpired term. This conclusion is not altered even though the vacancy occurs after the filing deadline for candidates for city office and after the city clerk's deadline for certifying to the county clerk the city offices to

be elected. Therefore, the commission seat of former Commissioner Racette must be placed on the city election ballot, although no names can be printed on the ballot as candidates for the position. Presumably, some individual will be elected as a write-in candidate for the position, and under Kansas law this result is to be favored over an appointee serving in office longer than the plain language of K.S.A. 14-1305 permits.

In anticipation of further questions which may be raised by this conclusion, we have enclosed copies of Attorney General Opinions No. 81-16 and 80-126. Opinion No. 81-16 noted that a person elected to succeed an appointee in filling a vacancy takes office immediately upon receiving his or her certificate of election and may commence upon the duties of such office after subscribing to the appropriate oath or affirmation as required by law. Opinion No. 80-126 concerns the right of an incumbent to hold over beyond his or her prescribed term of office until his or her successor is elected or appointed and has qualified.

Very truly yours,

  
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ATTORNEY GENERAL OF KANSAS

  
Mary F. Carson  
Assistant Attorney General

RTS:JSS:MFC:crw  
Enclosures