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ATTORNEY GENERAL OPINION NO. 88- 38

The Honorable James B. O'Connor
District Magistrate Judge
22nd Judicial District
1006 Castle St.
Seneca, KS 66538

Re: Elections -- Nominations; Terms of Office;
Vacancies -- Vacancies in the Office of Judge of
the District Court

Synopsis: Persons elected to judge of the district court in
November 1986 due to a vacancy in office were
elected to a four year term to expire January
1991. Cited herein: K.S.A. 1987 Supp. 20-301a;
25-312a; K.S.A. 25-313; 25-314; 25-3904; 25-3906;
L. 1985, ch. 119, § 1; L. 1976, ch. 145, § 138;
Kan. Const., Art. 3, § 6.

* * *

Dear Judge O'Connor:

You have requested our opinion as to the length of the term to which you were elected in 1986 as district magistrate judge. We understand the facts of your situation to be as follows. The former judge whose position you now hold was elected in 1984 and retired from office in April 1986. The governor made an appointment on June 9, 1986 to fill the position until the next general election. Five individuals, including the appointed judge and yourself, filed for election and were placed on the August 5, 1986 primary ballot. After winning nomination as the Democratic party's candidate, you were placed on the November 3, 1986 general election ballot and

were elected district magistrate judge. You inform us that you received a certificate of election from the Office of the Secretary of State to hold the position until January 1991.

The question has been raised whether you are to stand for re-election this year. The answer to this question depends upon whether your election in 1986 was to fill the remaining two years of the unexpired term created by the vacancy, or whether you were elected to a full, four-year term. We understand that resolution of your inquiry will affect several other judges in this state who were elected in 1986 following a vacancy in office created by death or resignation.

Article 3, § 6 of the Kansas Constitution provides in pertinent part:

"(a) The state shall be divided into judicial districts as provided by law. Each judicial district shall have at least one district judge. The term of office of each judge of the district court shall be four years. District court shall be held at such times and places as may be provided by law. The district judges shall be elected by the electors of the respective judicial districts unless the electors of a judicial district have adopted and not subsequently rejected a method of nonpartisan selection. . . . Whenever a vacancy occurs in the office of district judge, it shall be filled by appointment by the governor until the next general election that occurs more than thirty days after such vacancy, or as may be provided by such nonpartisan method of selection." (Emphasis added).

The procedure to fill vacancies in the office of district court judge and district magistrate judge was further delineated by the legislature in K.S.A. 25-312a. This statute was amended in 1987 (L. 1987, ch. 124). At the time in question, 1986, K.S.A. 25-312a read as follows:

"Except as otherwise provided in K.S.A. 20-2903 through 20-2913 [nonpartisan selection of judges], and amendments thereto, whenever a vacancy occurs in the office of judge of the district court, it

shall be filled by appointment by the governor. At the next general election that occurs more than 30 days after such vacancy, the office shall be filled by election for a term commencing as provided in K.S.A. 25-313 and amendments thereto. Any appointment made by the governor as required by this section shall be made within 60 days after the vacancy occurs." L. 1985, ch. 119, § 1. (Emphasis added).

(The term "judge of the district court" includes district judges and district magistrate judges. K.S.A. 1987 Supp. 20-301a.)

In your situation, the vacancy occurred more than thirty days before the 1986 general election. Pursuant to K.S.A. 25-312a, the office was "filled by election for a term commencing as provided in K.S.A. 25-313. . . ." (Emphasis added). K.S.A. 25-313 provides that a term of office begins the second Monday in January next after the election. Article 3, § 6 of the Kansas Constitution states that the term of office of each district judge is four years. Thus, according to K.S.A. 25-312a as it existed in 1986, you were elected to a four-year term.

It has been argued, however, that K.S.A. 25-314 controls. This statute concerns the term of office of persons filling vacancies in state, district, county, and township offices:

"Any of said officers that may be elected or appointed to fill vacancies may qualify and enter upon the duties of their office immediately thereafter, and when elected they may hold the same during the unexpired term for which they were elected, and until their successors are elected and qualified; but if appointed, unless otherwise provided by law, they shall hold the same only until their successors are elected and qualified." (Emphasis added).

It is argued that, under the above statute, your election in 1986 was to fill the remaining two years of the term that was vacated. K.S.A. 25-314 was last amended in 1968. It is a rule of statutory construction that "[w]here there is a conflict between two statutes the latest legislative

expression controls." State v. Hennessee, 232 Kan. 807, Syl. ¶ 1 (1983). Furthermore, "[w]here there is a conflict between a statute dealing generally with a subject and another dealing specifically with a certain phase of it, the specific legislation controls." State v. Keeley, 236 Kan. 555, 560 (1985). K.S.A. 25-314 concerns vacancies of state, district, county, and township offices while K.S.A. 25-312a concerns vacancies in the office of district court judge. We believe it was the intent of the legislature that K.S.A. 25-312a, the specific statute concerning judges, control the present situation.

"The fundamental rule of statutory construction is that the purpose and intent of the legislature governs when the intent can be ascertained from the statute." State v. Adee, 241 Kan. 825, 829 (1987).

"In determining legislative intent, courts are not limited to a mere consideration of the language employed but may properly look to the historical background of the enactment, the circumstances attending its passage, the purposes to be accomplished and the effect the statute may have under the various constructions suggested." State v. Thompson, 237 Kan. 562, 563 (1985). See Jackson v. City of Kansas City, 235 Kan. 278, 319 (1984).

The meaning of K.S.A. 25-312a can be ascertained by examining the history of the statute and the intent of the legislature's 1985 and 1987 amendments. Before amendment in 1985, K.S.A. 25-312a provided:

"Except as otherwise provided in K.S.A. 20-2903 to 20-2913 and amendments thereto, whenever a vacancy shall occur in the office of judge of the district court, it shall be filled by appointment by the governor until the next general election that shall occur more than thirty (30) days after such vacancy, when such vacancy shall be filled by election. Any appointment made by the governor as required by this section shall be made within sixty (60) days after the vacancy

within sixty (60) days after the vacancy occurs." (L. 1976, ch. 145, § 138).
(Emphasis added).

Senate Bill No. 65 (Session of 1985) amended the statute as follows:

"Except as otherwise provided in K.S.A. 20-2903 ~~to~~ through 20-2913, and amendments thereto, whenever a vacancy ~~shall occur~~ occurs in the office of judge of the district court, it shall be filled by appointment by the governor ~~until~~. At the next general election that ~~shall occur~~ occurs more than ~~thirty~~ (30) 30 days after such vacancy, ~~when such vacancy the~~ office shall be filled by election for a term commencing as provided in K.S.A. 25-313 and amendments thereto. Any appointment made by the governor as required by this section shall be made within ~~sixty~~ ~~(60)~~ 60 days after the vacancy occurs." (L. 1985, ch. 119, § 1).

Testimony presented to the House Judiciary Committee on March 18, 1985, explains the purpose of the amendments. A representative from the Office of Judicial Administration testified on behalf of the bill:

"This bill would provide that in an elected district, a judge appointed to fill a vacancy would serve until the 2nd Monday in January after the election, whereupon the duly elected person would take office.

Under current law, a district judge appointed to fill a vacancy serves only until the next general election occurring more than 30 days after the vacancy. At that election, electors vote for a candidate to fill the unexpired term, a term which may be as short as a month and a half.

At the same election at which the unexpired term is filled, the voters will also be electing a judge for the next regular term of office. The same judgeship position appears on the ballot twice: once for the unexpired term and once for the regular term.

The current situation can be extremely confusing to voters and disruptive to the administration of justice. Potentially four judges could fill the same position in as short a period as a half year: the judge whose resignation, death or removal caused a vacancy; the appointed judge; the judge elected for the unexpired term; and the judge elected for the regular term.

Such a scenario is not farfetched: last year in Wichita, a judge appointed to fill a vacancy was elected to fill the next regular judicial term while another candidate won the right to fill the unexpired term of two months.

Other problems with the current legislation include voter confusion when faced by two nearly identical provisions on a ballot, and the necessity of candidates for the judgeship positions to file twice and pay two filing fees if they seek to fill both terms.

We believe Senate Bill 65 will help ensure judicial effectiveness by encouraging smooth transitions in the offices of elected judges and will also decrease voter confusion."

The intent of the bill was to remedy a situation which occurred if a vacancy was created at least 30 days before the general election preceding the January when the four-year term expired. Under the then-existing law (L. 1976, ch. 145, § 138), if a vacancy occurred the person appointed to fill the vacancy served "until the next general election." The statute provided that the person elected served the remainder of the vacated term. Thus, if the vacancy occurred during the second half of a judicial term, the person elected served from

presumably the day after the November election to the second Monday in January, a period of about eight and a half weeks. Thus, at the November general election electors also voted for a person to serve a new four year term beginning in January. The legislative history of 1985 Senate Bill No. 65 makes it clear that K.S.A. 25-312a was amended to provide that the person appointed to fill the vacancy served until "the second Monday in January next after the election," at which time the person who was elected at the preceding general election began his or her four year term of office.

The 1985 amendments to K.S.A. 25-312a did not consider the scenario if the vacancy happened in the the first half of the term; i.e., if the "next general election that occurs more than 30 days after such vacancy" is the general election that occurs at mid-term, the situation now before us. This situation is different from that presented in committee testimony concerning dual elections for the one office.

The 1985 amendments, however, do not distinguish between vacancies occurring at least 30 days before the interim general election and vacancies occurring 30 days before the general election preceding the January in which the term expires. In either case, K.S.A. 25-312a as it existed in 1986 provided that, following the appointment to fill a vacancy, the person elected at the next general election is to serve for a term commencing the second Monday in January. Before the 1985 amendments, the statute made it clear that the person elected was to fill the vacancy. K.S.A. 25-312a as amended in 1985 states that the person elected is to serve for a term. We think it is significant that the legislature in the 1985 amendments chose the words "office" and "term," replacing the word "vacancy" as used in the statute before the amendment. To conclude that you were elected to fill the remaining time in the vacancy of two years and two months would defeat the language of the 1985 amendments. Therefore, it is our opinion that in 1986 you were elected to a four-year term to expire in January 1991, as provided by your certificate of election.

Our conclusion is supported by the amendments to K.S.A. 25-312a made by the legislature in 1987. Indeed, these amendments distinguish vacancies occurring in the first and second half of a district judge's term:

"Except as otherwise provided in K.S.A. 20-2903 through 20-2913, and amendments thereto, whenever a vacancy occurs in the

office of judge of the district court, it shall be filled by appointment by the governor. If the vacancy occurs on or after May 1 of the second year of the term, the person so appointed shall serve for the remainder of the unexpired term and until a successor is elected and qualified. If the vacancy occurs before May 1 of the second year of the term, the person appointed to fill the vacancy shall serve until a successor is elected and qualified at the next general election to serve the remainder of the unexpired term. At the next general election that occurs more than 30 days after such vacancy, the office shall be filled by election for a term commencing as provided in K.S.A. 25-313, and amendments thereto. Any appointment made by the governor as required by this section shall be made within 60 days after the vacancy occurs." 1987 Senate Bill No. 107; L. 1987, ch. 124, § 1.

In Attorney General Opinion No. 86-100 the following situation was presented to us. A district judge whose term was to expire January 1989 retired from office on June 18, 1986, eight days after the deadline for filing for office. Given the language of K.S.A. 1985 Supp. 25-312a, a candidacy was statutorily created. We concluded that, since there were no political party candidates, the vacancies in the party candidacies for the office of district court judge were to be filled by the district convention procedure provided in K.S.A. 25-3904. We also concluded that the term of office of the judge elected in that situation was controlled by K.S.A. 25-3906. This statute, which governs elections for vacancies in candidacies occurring after the filing deadline and prior to the primary, provides that the person is elected to serve the remainder of the unexpired term.

The present situation is distinguished from Attorney General Opinion No. 86-100 in that the vacancy in the office occurred prior to the filing deadline. In the facts upon which the opinion was based, there was not only a vacancy in office but also vacancies in party candidacies. During the 1987 legislative session, Senate Bill No. 107 was introduced at the request of the Secretary of State's office. Testimony before the Senate Elections Committee was as follows:

"Nancy Ryan, Secretary of State's Office, . . . said that K.S.A. 25-312a is a statute that caused their office problems last summer. The statute presently provided [sic] that when a vacancy occurs in the office of district judge, the vacancy should be filled at the next general election if the election occurs more than 30 days after a vacancy. In July last summer a vacancy did occur and this occurred after the June 10th filing deadline. An Attorney General's opinion was requested and provided that each party name a candidate to be placed on the ballot. This decision prevented independent candidates from filing for the office. Mrs. Ryan stated their office would like the legislature to amend K.S.A. 25-312a to allow the vacancy to be filled in the same manner as county officer vacancies." (Minutes, February 4, 1987).

Senate Bill No. 107 was heard before the House Elections Committee on March 17, 1987:

"[Senate Bill No. 107] was a request of the office of the Secretary of State. . . . Ms. Ryan [said] their office has requested this legislation due to a problem which came up last July, and that this bill would clarify the procedure for filling the vacancy of a district court judge. SB 107 provides that if a vacancy occurs, in the office of the district court on or after May 1 of the second year of the term, the person so appointed shall serve for the remainder of the unexpired term, and until a successor is elected and is qualified. If the vacancy occurs before May 1st of the second year of that term, the person appointed to fill the vacancy shall serve until a successor is elected and qualified at the next general election to serve the remainder of the expired term."

Thus, the 1987 amendments to K.S.A. 25-312a do what the 1985 amendments did not do: distinguish between vacancies

occurring in the first half of the term, before the interim general elections, and vacancies occurring in the second half of the term, before the general election preceding the January in which the term expires. Clearly, if a vacancy occurs in the office of district court judge before May 1, 1990, the person elected in November 1990 will serve until January 1993.

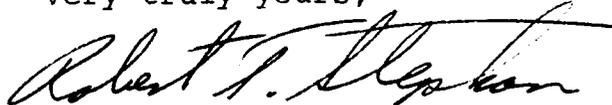
We note that the 1985 and 1987 amendments to K.S.A. 25-312a do not appear to be in harmony with language in the constitution:

"Whenever a vacancy occurs in the office of district judge, it shall be filled by appointment by the governor until the next general election that occurs more than thirty days after such vacancy. . . ."
Kan. Const., Art. 2, § 6.

However, since our opinion was not requested on this issue, we will not address the constitutionality of K.S.A. 1987 Supp. 25-312a at this time.

The vacancy in the present situation was filled pursuant to K.S.A. 25-312a, as amended in 1985. Given the language of the statute and the legislative history of K.S.A. 25-312a, it is our opinion that persons elected to judge of the district court in November 1986 due to a vacancy in office were elected to a four year term to expire January 1991.

Very truly yours,



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