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June 8, 1990

ATTORNEY GENERAL OPINION NO. 90- 66

The Honorable Jack Lacey
State Representative, Second District
P.O. Box 6
Oswego, Kansas 67356

Re: Cities of the Third Class--Election, Appointment
and Removal of Officers--Qualifications; How
Vacancies Filled

Synopsis: The election, appointment, and removal of officers of a third class city having a mayor/council form of government is subject to K.S.A. 15-201 et seq. unless the city charters out of these statutes under home rule powers. Under K.S.A. 15-209, an individual elected to the office of mayor of such a city must be a qualified elector of that city at the time of the election. The election of an individual who is not a qualified elector of the city is void, but the individual would have served as an officer de facto. The last individual who was elected and qualified to the office of mayor would continue to serve as mayor until a successor is elected and qualified. If the former mayor is unable to continue serving as mayor, a vacancy in that office occurs, and the president of the city council then fills the office of mayor until the next regular election for the office of mayor. Cited herein: K.S.A. 15-201; 15-209; KS.A. 1989 Supp. 15-311; Kan. Const., Art. 5, § 1.

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Dear Representative Lacey:

As representative for the second district, you request our opinion regarding the qualifications of an individual serving as mayor of a third class city, and the procedure to be followed should it be determined that the elected individual is not qualified to serve as mayor. Subsequent to receipt of your request, Gene Barrett, as Cherokee county attorney, submitted a similar request to this office. Because both opinion requests regard an individual elected on a write-in vote to the office of mayor of Roseland, Kansas, both requests have been combined into this one opinion.

Roseland is a city of the third class having a mayor/council form of government. As such, the election, appointment, and removal of officers of Roseland is subject to K.S.A. 15-201 et seq. (We are informed that Roseland has not charted out of these provisions). K.S.A. 15-209 states:

"The officers elected or appointed under this act shall be qualified electors of said city, except the city may appoint nonresidents as city attorney, municipal judge and as law enforcement officers when deemed necessary, including the appointment of non-residents who also serve as city attorney, municipal judges or law enforcement officers of another municipality or public agency."

Therefore, an individual elected to serve as mayor of a third class city must be a qualified elector of that city at the time of election to the office. See Attorney General Opinions No. 81-113; 85-25; 86-146. In order to be a qualified elector of the city, the individual must possess the constitutional qualifications of a qualified elector under article 5, section 1 of the Kansas Constitution, and be duly and properly registered to vote in that city. See The State ex rel., v. Dunn, 118 Kan. 184 (1925); Dunn v. Board of County Comm'rs of Morton County, 165 Kan. 314 (1948); Wycoff v. Board of County Commissioners, 191 Kan. 658 (1963); Attorney General Opinion No. 81-113.

We have been provided with conflicting information as to whether the individual elected to serve as mayor of Roseland is a registered voter of the city. The Cherokee county clerk has indicated that the individual is a registered voter of Ross-Roseland precinct; however, there is no distinction on

the voter registration as to which voters are eligible to vote in city elections or township elections. Such a determination has apparently been left to the discretion of the poll watchers. If it is determined that the individual is not properly registered to vote in the city, the individual would not be a qualified elector of said city. The individual therefore would be ineligible to serve as mayor of Roseland, and his election would be void. See Attorney General Opinions No. 81-113; 86-146. As such, the individual serving as mayor of Roseland would be doing so as an officer de facto.

"An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised:

"1. Without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people without inquiry to submit to or invoke his action, supposing him to be the officer he assumed to be.

"2. Under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like.

"3. Under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or, by reason of some defect or irregularity in its exercise, such ineligibility, want of power or defect being unknown to the public." Railway Co. v. Preston, 63 Kan. 819, 823 (1901). (Emphasis added).

The acts heretofore performed by the individual elected as mayor, while acting as an officer de facto, are valid and effectual where they concern the public or the rights of third

persons, to the same extent as if such person was an officer de jure. Attorney General Opinion No. 81-113.

You also ask what procedure should be followed to fill the office of mayor should it be determined that the elected individual is not qualified to serve in that position. K.S.A. 15-201 states in part:

"Every two years an election shall be held for a mayor, and five councilmembers. The mayor and councilmembers shall hold their offices for two years and until their successors are elected and qualified." (Emphasis added).

K.S.A. 15-201, therefore, requires that a mayor of a third class city serve for the term for which the mayor was elected, and continue to serve until a replacement is elected and qualified. If an individual is not a qualified elector of the city at the time of his election, he would not be a qualified elector of the city, and his election would be void. See Attorney General Opinions No. 81-113, 86-146. The individual would never possess the qualifications necessary for him to be "elected and qualified", and the former mayor would then continue to serve as mayor. See State, ex rel. v. Jones, 169 Kan. 521 (1950).

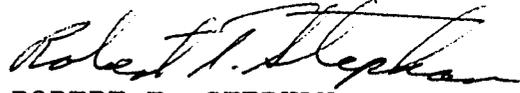
However, if the former mayor is unable to continue serving as mayor, a vacancy is created in the office of mayor.

"When any vacancy shall happen in the office of mayor, by death, resignation, removal from office, refusal to qualify, or otherwise, the president of the council for the time being shall exercise the office of mayor, with all the rights, privileges and jurisdiction of the mayor, other than the appointment of officers pursuant to K.S.A. 15-204 and amendments thereto, until such vacancy be filled, or such disability be removed, or in case of temporary absence, until the mayor shall return." K.S.A. 1989 Supp. 15-311.

The president of the city council will continue to occupy the office of mayor until the next regular election for that office. K.S.A. 15-201. The vacancy then occurring on the

city council would be filled pursuant to the terms of K.S.A.
15-201.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Richard D. Smith
Assistant Attorney General

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