



STATE OF KANSAS

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July 19, 1990

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ATTORNEY GENERAL OPINION NO. 90- 84

Richard D. Dearth
Parsons City Attorney
P.O. Box 1037
Parsons, Kansas 67357

Re: Cities of the First Class--Board of Commissioners--
Filling Vacancies in the Office of Mayor or
Commissioner

Synopsis: Where there has been a violation of the common law
rule cited in Attorney General Opinion No. 90-59,
both resignations and reappointments should be
considered a nullity. Cited herein: K.S.A. 1989
Supp. 13-1806.

* * *

Dear Mr. Dearth:

You request reconsideration of Attorney General Opinion No. 90-59. Additionally, in the event we reaffirm that opinion, you request advice as to the status of current Parson city commissioners who were appointed in violation of the common law rule cited in Attorney General Opinion No. 90-59.

In Attorney General Opinion No. 90-59, this office concluded as follows:

"Under the common law general rule, it is against public policy for an officer to use his official appointing power to place himself in office, and all officers who have the appointing power are disqualified

for appointment to the offices to which they may appoint. In our judgment, this rule applies to filling vacancies in the office of mayor or commissioner under K.S.A. 1989 Supp. 13-1806, and remaining members of the board of commissioners are not eligible for appointment to a vacant commission seat. Additionally, a remaining member does not become eligible for appointment to a vacant commission seat by resigning the position he currently holds on the board of commissioners."

The rationale for the above-quoted rule was clearly set forth in our previous opinion. Briefly stated, the common law rule prevents city commissioners from doling out appointments to whichever fellow commissioner has the most political influence and is owed the most political favors. This office believes that the public interest will be better served if appointing bodies are required to go outside their membership in the selection of public servants. We understand that the Pittsburg city attorney and attorneys at the Kansas League of Municipalities agree with our conclusion that the common law rule (excluding the last sentence of the above-quoted synopsis) should be applied in this state.

Similarly, in our judgment the common law rule is a mere sham if it can be side-stepped by a commissioner resigning from the commission and being immediately reappointed by the remaining commissioners. Such an appointment is just as likely to be based on political influence and favoritism as if the commissioner had not resigned. We believe that the Delaware Supreme Court was correct to disregard such a charade, State v. McDaniel, 157 A.2d 463 (Del. 1960) and reaffirm our conclusion that a remaining member does not become eligible for appointment to a vacant commission seat by resigning the position he currently holds on the board of commissioners.

In regard to the status of current Parsons city commissioners who were appointed in violation of the common law rule cited in Attorney General Opinion No. 90-59, you have provided us with a chart of vacancies, resignations and appointments by the commission since April, 1989 (copy attached hereto as Exhibit 1). We concur in the conclusion of the Delaware Supreme Court that both resignations and reappointments should be considered a nullity where there has been a violation of the common law rule. State v. McDaniel, 157 A.2d 463, 467

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(Del. 1960). Accordingly, in our judgment Wheat's resignation on August 21, 1989, as well as his reappointment to fill Ward's term were void. Wheat and Ramsey's appointment of Bartelli was valid to fill the only vacancy existing at that time, i.e. the unexpired four year term of Ward. Wheat and Bartelli's appointment of Ren to fill the Ramsey vacancy did not violate the common law rule and is valid. City commissioners of the city of Parsons and their terms of office are as follows:

Wheat - serving two year term to which he was elected

Bartelli - serving the unexpired term of Ward

Ren - serving the unexpired term of Ramsey

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Terrence R. Hearshman
Assistant Attorney General

RTS:JLM:TRH:jm