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STATE OF KANSAS

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VERN MILLER
Attorney General

October 15, 1974

Opinion No. 74-343

Mr. Phillip M. Fromme
Coffey County Attorney
100 North 3rd
Burlington, Kansas 66839

Dear Mr. Fromme:

This will acknowledge receipt of your opinion request of October 4, 1974.

You advise us of the following facts. On August 7, 1974, immediately following the primary election, Mr. Tom Snider, the incumbent Coffey County commissioner who was defeated in the primary election, resigned his office. On August 12, 1974, Mr. Virgil Shultz, the candidate by whom Mr. Snider was defeated in the primary, was selected and appointed to fill the unexpired term of Mr. Snider. This selection was made by the County Republican Central Committee and Mr. Shultz's appointment was approved by the county commissioners on August 12, 1974, at which time he assumed the duties of office. Virgil Shultz has, since the date of August 12, served as a Coffey County commissioner, conducting business, voting on matters before the commission and has received compensation and expenses as a county commissioner. It now appears, however, that the appointment process by which Mr. Shultz took office did not comply with K.S.A. 1973 Supp. 19-203 and K.S.A. 25-3902. Mr. Snider, who resigned his office, was a registered Republican, as is Mr. Shultz who was appointed to replace him. Although the Republican county chairman and members of the central committee sanctioned the appointment of Mr. Shultz to fill the vacancy on the commission, the actual appointment was made in compliance with the old statutory procedure set forth in K.S.A. 1972 Supp. 19-203. This statute, of course, provided for the appointment to be made by the remaining county commissioners and the county clerk. Under the present statutory provisions, the appointment should have been accomplished by a convention called by the Republican Central Committee in accordance with procedures prescribed in K.S.A. 25-3902.

You have informed Mr. Shultz that he has not been legally appointed to the office of Coffey County commissioner and that you have requested that he step down from that post until such time as his appointment is confirmed in accordance with present statutory procedures.

You further advise us that you have informed the Republican Central Committee of Coffey County that they must ask to fill the vacancy which was created by Mr. Snider's resignation on August 7, 1974, and that the committee has given notice of the convention required by statute.

In connection with the situation thus described, you pose the following questions:

1. Since Mr. Shultz's "appointment" was not accomplished in the manner prescribed by K.S.A. 25-3902, is such appointment, therefore, illegal and invalid?

2. Assuming that Mr. Shultz's appointment is invalid, what effect does this have on commission decisions made and business transacted, in which he participated, since August 12, 1974?

3. Should Mr. Shultz be allowed to retain the salary and expense money paid to him on conjunction with his service as a county commissioner? In this connection, you further inquire as to whether the salary paid and the expense money should be treated differently.

In attempting to resolve these questions, we were at first hopeful that Mr. Shultz's proper appointment, should it be eventually accomplished by the required convention, could be made retroactively so as to be effective August 12, 1974. A perusal of the clear language of K.S.A. 25-3902 reveals that such a retroactive appointment is not possible. Subsection (d) consistently speaks in terms of the appointment taking place <u>after</u> certain procedural steps are completed. The final sentence of the section reads:

> "The person so appointed may qualify and enter upon the duties of his district office immediately <u>after</u> his appointment." [Emphasis supplied.]

This language precludes retroactive appointment.

With respect to your first question, we concur with your advice to Mr. Shultz that he was not a validly appointed county commissioner. K.S.A. 1973 Supp. 19-203 makes a substantial change in the prior method of filling vacancies on the county commission:

> "Appointments hereunder shall be made in the manner provided by law for filling vacancies in the office of member of the house of representatives."

Article 39 of ch. 25 of the Kansas statutes prescribes the procedure to be followed in filling vacancies in "district offices," including the House of Representatives. K.S.A. 25-3902 prescribes the procedure to be followed. It was not followed with respect to the attempted appointment of Mr. Shultz, and the appointment is, therefore, invalid.

With respect to your second question, it is our opinion that the votes and other acts of Mr. Shultz in the transactions of county business following his attempted appointment on August 12, 1974, until he was informed of the possible invalidity of his appointment are valid and binding and may not be collaterally attacked. Although we were unable to find any Kansas cases dealing directly with the question, there is ample authority in other jurisdictions supporting this conclusion. We also note that the encyclopedias follow this general rule.

> "Validity of acts. The acts of officers de facto with respect to public matters affecting the public interests are to be regarded as valid and binding; so much so as if the same acts had been performed in the same manner by an officer de jure, and the legality of such acts may not be collaterally attacked." 62 C.J.S., Municipal Corporations, § 493, p. 934.

> "The law validates the acts of de facto officers as to the public and third persons on the ground that, although not officers de jure, they are, in virtue of the particular circumstances, officers in fact whose acts public policy requires should be considered valid." 63 Am.Jur.2d, Public Officers and Employees, § 493, p. 930.

With respect to your third question, it is our opinion that Mr. Shultz may retain the compensation and expense money paid to him in conjunction with his service to the county.

The general rule appears to be that a de facto county officer may not recover the fees or salary attached to the office notwithstanding the fact that he has performed the duties of his office.

> "The rule seems well established that a de facto municipal or county officer cannot maintain an action to recover the salary, fees, or other emoluments attached to the office even though he has performed the duties thereof." 56 Am.Jur.2d, Municipal Corporations, § 269, p. 320.

This general rule stated differently is:

> "Since the right to a salary, fees, or other compensation attached to a municipal office followed the true title, . . . a de facto officer is, in general, not entitled thereto and can maintain no action therefor." 62 C.J.S., Municipal Corporations, § 523.

The Kansas Supreme Court appears to have followed this general rule in Garfield Township v. Crocker, 63 Kan. 272, 65 Pac. 273 (1901). There the Court was presented with the question whether there can be a recovery for a de facto officer's salary. The Court recognized the rule that a de facto officer cannot recover where an officer de jure is claiming. The Court, however, refused to restrict the rule denying recovery to cases where a de jure officer was claiming the office and compensation and held that no action would lie by an officer de facto to recover compensation attached to the office.

We note considerable authority in other jurisdictions to the contrary, holding that where there is no de jure officer, a de facto municipal or county officer, who in good faith, has performed the duties pertaining to his office, is legally entitled to the compensation attached to the office. 56 Am.Jur.2d, Municipal Corporations, § 270; 62 C.J.S., Municipal Corporations, § 523; 93 A.L.R. 258, 266, s. 151 A.L.R. 952, 956. As noted, however, Kansas does not follow this rule. The Court in Garfield Township v. Crocker, supra, chose to apply the stricter rule that a de facto officer is not entitled to compensation even though there is no other claimant. Garfield, which was handed down in 1901, has been more recently cited with approval in Will v. City of Herington, 201 Kan. 627, 630, 443 P.2d 667 (1968).

In Bailey v. Turner, 108 Kan. 856, 197 Pac. 214, the Court intimated that a different rule might apply under circumstances wherein the de facto officer is not disqualified from holding the office. At page 859, the Court states:

> "If all that the occupant of an office lacked of a de jure title grew out of the fact (for illustration) that the official oath had not been administered to him, there might be good ground for holding him entitled to the salary. But where he is disqualified to hold the office a very different situation is presented and we feel constrained to the view that the general rule applies."

We note from the factual circumstances which you relate that Mr. Shultz is not making claim for compensation during the period from August 12, 1974, until he was advised by you that his appointment was invalid. Rather, it appears he has been paid such compensation, and the question posed relates to his right to retain such compensation. As such, the general rules and authority discussed above are not directly in point. We note a considerable body of authority standing for the proposition that, just as the de facto officer may not maintain an action for payment of compensation for his services as a de facto officer, neither can a county maintain an action against such a de facto officer for the return of compensation paid to him for services which he actually rendered.

> "In the absence of statutory permission, salary which has been paid to a de facto public officer cannot be recovered back by the municipal or county authorities, at least where, acting in good faith, he has actually rendered the services for which he was paid." 56 Am.Jur.2d, Municipal Corporations, § 271.

Possession of the office by a de facto officer, acting in good faith and under color of authority, may be used as a shield of defense by the officer against a recovery action by the public body, but cannot be used as a sword against the public to secure the compensation attached to the office. 93 A.L.R. 258, 273 s. 151 A.L.R. 952, 960; 56 Am.Jur.2d, Municipal Corporations, § 271; 62 C.J.S., Municipal Corporations, § 523. It is further provided:

> "However, where one, not duly qualified, has been appointed to an office, and has performed valuable services for a municipality, a moral obligation is created in his favor which will sustain an ordinance of the council of the municipality appropriating a proper sum for the payment of the services tendered."
> 62 C.J.S., Municipal Corporations, § 523.

In view of these general rules, supported by the weight of authority from other jurisdictions, we conclude that Mr. Shultz could successfully defend any action brought by the county to recover the compensation paid to him. We note your information that Mr. Shultz has served Coffey County since August 12, 1974, diligently and in good faith, believing himself to be a duly qualified and appointed county commissioner. It is our opinion that he is entitled to retain compensation paid to him in consideration of his services so rendered.

Very truly yours,

VERN MILLER
Attorney General

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