



STATE OF KANSAS

*Office of the Attorney General*

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CURT T. SCHNEIDER  
Attorney General

September 8, 1975

ATTORNEY GENERAL OPINION NO. 75- 354

Mr. Daniel F. Meara  
Bourbon County Attorney  
Bourbon County Courthouse  
Fort Scott, Kansas 66701

Re: Cities--Officers--Vacancies

Synopsis: Councilmen-elect of a city of the third class, elected on April 1, 1975, who failed to take the oath of office within thirty days thereafter, are deemed to have refused said offices, and the positions are by operation of law vacant. The mayor who took the oath of office within a reasonable time after his election, in this instance May 14, 1975, is lawfully entitled to the office, and is required to fill the vacancies on the council in the manner provided by law.

\* \* \*

Dear Mr. Meara:

We have your letter of August 28, 1975, enclosing a copy of your opinion dated August 15, 1975, addressed to Mr. Robert D. Binford, of Uniontown, Kansas.

We understand that at the April 1, 1975, city election, a mayor and members of the council of the City of Uniontown were elected. They failed to take an oath or affirmation as required by K.S.A. 25-2120 until May 14, 1975. The question presented, and which you have considered, is whether this failure results in vacancies in the offices of the persons elected this spring.

As your point out, K.S.A. 25-2120 states in pertinent part thus:

"Every person elected or appointed to city office, before entering upon the duties of such

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office, shall take and subscribe an oath or affirmation as specified in K.S.A. 54-106, and every such oath or affirmation shall be filed with the city clerk."

In addition, as you note, K.S.A. 1974 Supp. 15-203 states in pertinent part thus:

"In case any person elected as a councilman neglects or refuses to qualify within thirty (30) days after his election, he shall be deemed to have refused to accept such office and a vacancy shall exist, and thereupon the mayor may, with the consent of the remaining councilmen, appoint some suitable elector to fill said vacancy."

Under this statute, by its express terms, a vacancy results upon failure of elected councilmen to qualify within the time prescribed. This particular provision applies, however, only to persons elected as councilmen, and not to persons elected as mayor. The councilmen not having qualified within the time prescribed by law, I must agree with you that there results a vacancy in each of their respective offices. K.S.A. 1974 Supp. 15-201 speaks separately of the mayor and councilmen. This sentence applying by its terms only to councilmen, I must conclude that the failure of the mayor to take the oath within 30 days from the date of election does not *ipso facto* vacate the office, and that the person elected as mayor on April 1, 1975, is entitled to retain the office if he qualified within a reasonable time thereafter. May 14, 1975, fell but two weeks after the statutory deadline, and having taken the oath as of that date constitutes qualifying for office within a reasonable time, in my opinion.

Thus, I conclude that the person newly elected as mayor on April 1, 1975, having taken the oath of office on May 14, 1975, is lawfully entitled to retain the office to which he was elected, but that those positions held by councilmen elected on April 1, 1975, who failed to take the oath of office by May 1, 1975, as required by law, are now vacant.

K.S.A. 1974 Supp. 15-201 also prescribes the terms of office thus:

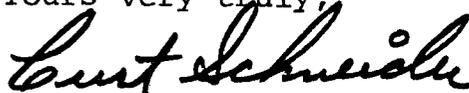
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"The mayor and councilmen shall hold their offices for two (2) years and until their successors are elected and qualified."

As applied to the councilmanic positions in question, there is some internal inconsistency in this section. On the one hand, the term of an incumbent runs until his successor is not only elected, but qualified. On the other, upon the failure of a councilmen-elect to take the oath of office within thirty days after his election, the position is declared vacant by operation of law. If the incumbent indeed continues until his successor is qualified, of course, there exists no vacancy. See 63 Am.Jur.2d, *Public Officers and Employees*, § 138. Here, however, the statute expressly provides that there shall exist a vacancy upon the failure to qualify as required, which shall be filled by appointment by the mayor, with the consent of the remaining council members. Statutory requirements respecting qualification for office have been strictly construed and enforced in this jurisdiction. See *State v. Matheny*, 7 Kan. 327 (1871). Accordingly, I must conclude that as to the members of the council who failed to take the oath of office as required by law by May 1, that those positions thereupon became vacant by operation of law, K.S.A. 1974 Supp. 15-201, and that those vacancies must be filled by appointment by the mayor now in office. There being no remaining councilmen in office at present, the mayor is solely empowered to make the first appointment to a vacant councilmanic position. Thereupon, that appointee having taken office, the mayor should proceed to appoint to fill the second vacancy, with the consent of the councilman just appointed, and so on, until all seats are filled.

To summarize, it is my opinion that the person elected as mayor on April 1, 1975, having qualified therefor by taking the oath of office on May 14, 1975, is legally qualified and entitled to that office. It is further my opinion that the positions held by those persons elected to council positions on April 1, 1975, having failed to take the oath of office by May 1, 1975, as required to do, thereupon became vacant by operation of law, and that these vacancies must be filled by appointment as set out above.

Yours very truly,



CURT T. SCHNEIDER  
Attorney General