



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

February 5, 1976

ATTORNEY GENERAL OPINION NO. 76- 42

Mr. Philip C. Lorton
Attorney for the Board of
Public Utilities
454 New Brotherhood Building
Kansas City, Kansas 66101

Re: Cities--Officers--House Bill 2083 and 2848

Synopsis: House Bills 2083 and 2848, insofar as either may operate to shorten the terms of certain present members of the Board of Public Utilities of Kansas City, Kansas, and require those terms to be filled by election prior to the expiration of the terms as provided by law at the time said members were appointed, are not *ex post facto* laws, if enacted, and are within the constitutional power of the legislature.

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Dear Mr. Lorton:

You advise that the five members of the Kansas City, Kansas, Board of Public Utilities were elected at the time of the April 1, 1975, city election. Following that election, in November and December, 1975, three members left office, one by resignation and two by ouster. Pursuant to Opinion No. 75-431, in December, 1975, the two remaining members appointed a third member to fill the vacancy resulting from the resignation of Al Bukaty. Thereafter, the three members proceeded to appoint the remaining two vacancies resulting from the ouster of Mrs. Shirley Cahill and Joe Mulich.

You advise that there are presently pending two House bills in committees, H.B. 2803 and 2848, which propose to amend K.S.A. 13-1221 under which vacancies are filled on the Board of Public Utilities, and to provide that when a vacancy occurs, whether due

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to resignation or ouster, such position shall be filled by election at either the next general election in 1976, or the next city election in 1977. These bills, you advise, would, if passed, thus affect the terms for which three members have been appointed to serve, for these terms would not expire until 1979 under K.S.A. 13-1221, which provides in pertinent part thus:

"Where a vacancy has occurred in the membership of any board of public utilities, the term of such member selected to fill such vacancy shall be the remainder of the term of the member whose retirement from the board created such vacancy."

You inquire whether a law which operates to shorten the terms of duly appointed incumbents to office, and which requires an election to fill those positions prior to the expiration of those terms as provided by law at the time of their appointment, constitutes an *ex post facto* exercise of legislative power.

At 16 Am.Jur.2d, *Constitutional Law*, § 396, the writer states thus:

"The Supreme Court of the United States at different times has enunciated somewhat variant definitions of the phrase 'ex post facto laws.' The early and classic definition is as follows: '(1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; (2) every law that aggravates a crime, or makes it greater than it was when committed; (3) every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed; (4) every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender.'" [Footnote omitted.]

At § 397, the writer emphasizes that the prohibition against *ex post facto* laws applies solely and exclusively to criminal and penal statutes:

"The expression 'ex post facto laws' is a technical one which was in use long before the Revolution and had acquired an appropriate meaning as used by legislators, lawyers, and authors. The phrase is one which relates exclusively to criminal or penal statutes. The ex post facto prohibition is infringed by laws which establish punishment for acts antecedently done that were not punishable when done, or which increase the punishment for acts already criminally punishable at the time of the enactment of the legislation in question."

This rule was followed in *Re Clark*, 86 Kan. 539, 121 P. 492 (1912), in which the court stated thus:

"The term '*ex post facto*,' as used in the constitution, relates to criminal punishment and has no relation to other retrospective laws." 86 Kan. at 541.

Thus, I can but conclude that the proposed House Bills numbered 2803 and 2848 would not constitute *ex post facto* laws if enacted.

Secondly, there remains the question whether the legislature may constitutionally shorten the terms of the present incumbents, and require the positions to be filled by election prior to the expiration of the terms as provided by law at the time the incumbents were appointed. The great weight of authority is that if an office has been created by the legislature, and there is no constitutional inhibition, the legislature may abolish those offices which it has created, and may do during the term of an incumbent. In *Re Hinkle*, 31 Kan. 712, 9 Pac. 531 (1884), the court stated thus:

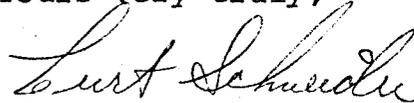
"The legislature clearly has the power, directly or through the action of the board of county commissioners of a county, to abolish or wipe out townships; and having this constitutional power, the effect thereof may be to oust the officers of a township so abolished or destroyed from office before the expiration of their term. This would also include the constitutional power to abolish the office of justice of the peace in a township so destroyed. So it is not

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true, as contended, for by the counsel resisting this application, that a justice of the peace may not be ousted from his office before the end of his term."

See Annots., 4 A.L.R. 205, 37 A.L.R. 815, 172 A.L.R. 1376. See also Aikman v. Edwards, 55 Kan. 751 (1895) and Lawson v. Board of County Commissioners of Reno County, 47 Kan. 271 (1891). I find no constitutional prohibition to a legislative enactment shortening the tenure of office of the three members of the Board whose positions would be required to be filled by election at a date prior to the expiration of the terms as provided by law at the time they were appointed.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj