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January 21, 1981

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ATTORNEY GENERAL OPINION NO. 81- 16

Richard C. Dearth
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Re: Cities of the First Class--Commission Form of Government--
Filling Vacancies in Board of Commissioners

Synopsis: The provisions of K.S.A. 1980 Supp. 13-1806 require that a vacancy occurring in the office of city commissioner be filled by the remaining commissioners selecting a successor to serve until the next city general election. Even though said statute is silent as to the election procedure to be followed where such vacancy occurs during a term of office that otherwise would not have expired at such election, the apparent underlying legislative intent is that, at said election, the qualified electors of the city elect a successor to fill the balance of the unexpired term. The election to fill such unexpired term must be separate and distinct from the election of persons to fill the regular four-year and two-year terms of office, as provided in K.S.A. 12-1004.

Thus, persons filing for the office of city commissioner must declare their candidacy for either the position having an unexpired term of office or for a position having a full term of office, and the number of candidates for each such election will determine the necessity of holding a primary election in accordance with K.S.A. 1980 Supp. 25-2108a.

In the event that the person elected to fill the remainder of the unexpired term is someone other than the person previously selected to fill the vacancy until the city general election, the latter person holds over in office until the person so elected is qualified to commence upon the duties of the office. (Affirming Attorney General Opinion No. 79-92.) Cited herein: K.S.A. 12-1004, 12-1005k, K.S.A. 1980 Supp. 13-1806, 25-2108a, 25-2110, K.S.A. 25-2120, 54-106.

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Dear Mr. Dearth:

You have posed several questions regarding the forthcoming election of city officers in the City of Parsons. You advise that in July of 1979, the Parsons city commissioner who was elected for a four-year term of office at the city election in April of 1979 resigned and a successor to fill the vacancy was selected pursuant to the provisions of what is now K.S.A. 1980 Supp. 13-1806. The portion thereof pertinent to your inquiry reads as follows:

"In case of any vacancy from any cause in the offices of mayor or any commissioner, the board of commissioners shall, by a majority vote of all the remaining members thereof, elect some eligible person to serve in such capacity until the next city general election." (Emphasis added.)

Implicit in your request is a concern as to the meaning of the foregoing provisions. Although the statute provides that the person selected by the remaining commissioners to fill the vacancy shall serve "until the next city general election," it is silent as to the procedure to be followed at the next city election where the vacancy so filled is in a commissioner position the term of office of which does not expire at such election, as is the situation you have presented for our consideration. We addressed this precise issue in Attorney General Opinion No. 79-92, and concluded that the above-quoted provisions of 13-1806 must be construed as requiring the election of a successor to fill the remainder of the unexpired term. We affirm that conclusion.

In our judgment, it is clearly the legislature's intent that a person chosen by the remaining commissioners to fill a vacancy should serve only until the next regularly-scheduled opportunity for the city's electors to elect a successor. Such construction is consistent with the oft-cited rule announced in the early case of Rice v. Stevens, 25 Kan. 302 (1881): "The theory of our law is, that officers shall be elected whenever it can be conveniently done; and that appointments to office will be tolerated only in exceptional cases." Id. at 307. Where, as here, "the next city general election" occurs prior to the expiration of the term of a vacant office that was filled as provided in 13-1806, it also is our opinion that a successor is to be elected to fill the balance of such unexpired term, rather than be elected for a full term of office.

Of pertinence to this conclusion are the provisions of K.S.A. 12-1004, which concerns the election of commissioners in cities of the first class having the city manager-commission form of government and having a population of 18,000 or less. We are advised that this statute is applicable to the City of Parsons. It provides for the election of three commissioners with staggered terms, so that

"at each . . . regular city election there shall be elected one city commissioner for a two-year term of office and one city commissioner for a four-year term of office, or until their successors shall have been respectively elected and qualified. At each regular city election as last above provided the person receiving the largest number of votes shall thereby be elected to the four-year term of office as city commissioner." (Emphasis added.) K.S.A. 12-1004.

In Attorney General Opinion No. 79-92, we were concerned with a vacancy in a city commissioner position in a city of the first class also having the city manager-commission form of government. The only essential difference between the situation addressed in that opinion and the one you have presented is the fact that the city in question under our prior opinion elected five commissioners on a staggered basis, pursuant to K.S.A. 12-1005k, rather than three commissioners, as is provided in K.S.A. 12-1004. In our judgment, however, such difference does not alter the applicability of the legal principles relied upon in rendering our prior opinion.

In said prior opinion, we considered the specific question whether the combined provisions of K.S.A. 12-1005k and K.S.A. 1978 [now 1980] Supp. 13-1806 could be interpreted so as to permit the election of four commissioners at large, rather than having an election to fill the unexpired term of one commissioner position and the regular election of three commissioners. In rejecting such interpretation, we noted that 12-1005k provides an election scheme whereby

"at each city general election three of the five commissioners are elected--two for terms of four years and one for a two-year term. The term each commissioner serves is determined by the results of the election, with the 'candidates receiving the largest and second largest number of votes' being elected for four-year terms and the candidate receiving the third largest number of votes . . . [being] elected for the two-year term.'" Attorney General Opinion No. 79-92, at p. 2.

We further noted that

"K.S.A. 1978 Supp. 13-1806 is confusing, and it is ambiguous to the extent that it has created a hiatus in the election procedure. Undoubtedly, such ambiguity, resulting from the multiplicity of possible constructions of this statute, necessitates the ascertainment of legislative intent to determine the meaning of K.S.A. 1978 Supp. 13-1806. United Parcel Service, Inc. v. Arnold, 218 Kan. 102, 107 (1975); State v. V.F.W. Post No. 3722, 215 Kan. 693, 697 (1974). However, we cannot discern a legislative intent underlying

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that statute which could require a corresponding interpretative modification of K.S.A. 12-1005k. That is, if K.S.A. 1978 Supp. 13-1806 is construed as requiring an additional 'at large' position to be filled at the general election, there also is required a corresponding amendment of K.S.A. 12-1005k by implication, to accommodate the election of four instead of three commissioners.

"We believe such construction to be unwarranted, since it involves a tenuous application of rules of statutory construction. To interpret K.S.A. 1978 Supp. 13-1806 in a way which amends K.S.A. 12-1005k by implication achieves a result that is never favored in the law. Tague v. Hudspeth, Warden, et al., 171 Kan. 225, 229 (1951). See, also, In Re Murray, 88 Kan. 855, 857 (1913); Wolff v. Rife, 140 Kan. 584, 587 (1934). The terms of K.S.A. 12-1005k are plain and unambiguous, and in our judgment the implied modification thereof resulting from the suggested interpretation of K.S.A. 1978 Supp. 13-1806 is inappropriate. We cannot glean any legislative intent requiring such effect.

"Instead, we find that the most plausible interpretation of K.S.A. 1978 Supp. 13-1806 is that, when a vacancy occurs in the office of city commissioner and the term of such office would not otherwise expire at the next city general election, the remaining commissioners are to appoint a successor to fill the vacancy until said election, at which time a successor will be elected to fill the unexpired term. Such interpretation is based on our perception of the legislative intent underlying this statute, i.e., to provide an orderly means for filling vacancies in city commissions. By limiting the term of service of a successor elected by the remaining commissioners to the time of the next city election, we believe the legislature has manifested an intent that the commissioners should not have the power to fill a vacancy for an unexpired term of office extending beyond the next city election, and that the qualified electors of the city should have the power to select a successor to fill the balance of the unexpired term." Id. at pp. 2, 3.

As previously noted, we concur in the foregoing opinion. We have quoted it at length because the rationale expressed therein provides the basis for responding to your specific questions. In particular, because the provisions of K.S.A. 12-1004 are plain and unambiguous in providing for the at large election of only two commissioners at each city general election, we must conclude, for the reasons stated in the above-quoted excerpts of our opinion, that the election to fill the unexpired term must be separate and distinct from the election of persons to fill the regular four-year and two-year terms of office, as provided in K.S.A. 12-1004. Even though a single ballot

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may be used at the election, candidates for the commissioner position having the unexpired term of office must be voted on separately from the candidates for the commissioner positions having full terms of office.

Such conclusion necessitates the further determination that persons filing for the office of city commissioner in the manner prescribed by K.S.A. 1980 Supp. 25-2110 must declare their candidacy for either the position having the unexpired term or for a position to be filled in the manner provided in K.S.A. 12-1004. Thus, in answer to your further inquiry, the number of candidates for each such election will determine the necessity for holding a primary election in accordance with K.S.A. 1980 Supp. 25-2108a.

Finally, we cannot completely agree with your suggestion that there is a hiatus respecting the end of the appointee's term of office and the commencement of the elected successor's term. You have correctly noted that 13-1806 requires that a person selected by the remaining commissioners to fill a vacancy serves until the next city general election, which is April 7, 1981. However, we cannot concur with your suggestion that the person elected to succeed such appointee does not take office until April 16, 1981. We assume the latter date is the date of "the first regular meeting" of the Parsons City Commission following the expected time when the election results will be certified, as provided in K.S.A. 25-2120. However, 25-2120 can have reference only to a new term of office. It can have no application to the time of taking office for a person elected to fill the remainder of an unexpired term of office. In our opinion, since such term has already commenced, the person so elected takes office immediately upon receiving his or her certificate of election and may commence upon the duties of such office after subscribing to the oath or affirmation specified in K.S.A. 54-106. (See K.S.A. 25-2120.)

Even so, we recognize that there is a potential gap between the time of election and the time for assuming the duties of the office. However, in the event that the person elected to fill the remainder of the unexpired term is someone other than the person previously selected to fill the vacancy until such election, as provided in 13-1806, it is our opinion that the latter person holds over in such office until the person so elected is qualified to commence upon the duties of the office. Our opinion is predicated upon the extensive discussion in Attorney General Opinion No. 80-126 of the right of an incumbent to hold over beyond his or her prescribed term of office. In order to avoid unduly burdening this opinion by a reiteration of that discussion, suffice it to state that it was concluded therein that, notwithstanding the absence of specific statutory authority for holding over in office, an incumbent officer continues in office until a successor is elected or appointed and has qualified. Such conclusion was based primarily on the decision of the Kansas Supreme Court in Murray v. Payne, 137 Kan. 685 (1933),

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which affirmed said principle as being "[t]he prevailing rule in the United States." Id. at 690.

Very truly yours,

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