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January 22, 1981

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ATTORNEY GENERAL OPINION NO. 81- 18

Ray A. Neale  
Coffeyville City Attorney  
Municipal Building  
Coffeyville, Kansas 67337

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 the 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.

In the event that a successor is not elected, a vacancy exists in such office, to be filled in the manner prescribed by K.S.A. 1980 Supp. 13-1806, but until the remaining members of the city commission select someone to fill the vacancy, the incumbent holds over in office as a de facto officer until a successor has been selected and has qualified.  
Cited herein: K.S.A. 12-1005k, K.S.A. 1980 Supp. 13-1806.

\* \* \*

Dear Mr. Neale:

As city attorney for the City of Coffeyville you have submitted a request for our opinion in which you indicate that there are four city commissioner positions to be filled at the forthcoming city general election--three for regular terms of office and one for the balance of an unexpired

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term. You have expressed the concern of the Coffeyville City Commission that there might not be a candidate for the position having the unexpired term, and your questions are directed toward that eventuality.

It is our understanding that Coffeyville is a city of the first class having a city manager-commission form of government, and that, pursuant to K.S.A. 12-1005k, the city commission is composed of five members having staggered terms of office, three of whom are elected at each city general election. You advise that presently one of the commissioners holds office by virtue of an appointment to fill a vacancy in a commissioner position having a term of office which extends beyond the next city election, and although you did not so state in your letter of request, we assume that such vacancy was filled pursuant to K.S.A. 1980 Supp. 13-1806, the pertinent portion of which states:

"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.)

We recently had the occasion to construe the foregoing provisions in Attorney General Opinion No. 81-16, and we are enclosing a copy of that opinion for your consideration. Also, since that opinion quoted at length from Attorney General Opinion No. 79-92, we also are enclosing a copy of the latter opinion, as well. Please note that Opinion No. 79-92 involved a factual situation nearly identical to the one you have presented for our review.

In both of the enclosed opinions, we noted that the above-quoted portion of 13-1806 is confusing and ambiguous, to the extent that it has created a hiatus in the election procedure. However, we concluded that the manifest purpose of the legislature underlying these provisions is 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" (Att'y Gen. Op. No. 81-16), and we also concluded that the previously-quoted provisions of 13-1806 "must be construed as requiring the election of a successor to fill the remainder of the unexpired term." Id. We state these conclusions only by way of background, since we are not called upon here to reconsider them, and we note an implicit agreement with those opinions in your letter of request.

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In requesting our advice, you have suggested three possible alternatives in the event there is not someone elected to fill the remainder of the unexpired term: (1) The incumbent would hold over in office; or (2) the remaining commissioners would appoint someone to fill the balance of the term; or (3) the position would be "filled by the person getting the fourth most votes," in the election to fill the three regular positions.

As to the last alternative, we note that similar propositions were rejected in both of the enclosed opinions, and in order to avoid unduly burdening this opinion with the same type of discussion of legal principles upon which we predicated those prior opinions, suffice it to state that such alternative has no basis in any of the statutes relevant to this issue. In particular, the provisions of K.S.A. 12-1005k are plain and unambiguous in requiring that three commissioners be elected at each city general election, with "[t]he candidates receiving the largest and second largest number of votes, respectively, . . . [being] elected for a four-year term and the candidate receiving the third largest number of votes . . . [being] elected for the two-year term." To also find that the legislature intended that the candidate receiving the fourth largest number of votes be elected to fill a commissioner position having an unexpired term would require mental gymnastics of untold proportions. It would require a leap of faith and logic which we are not prepared to make, particularly since it would require the amendment of 12-1005k by implication, a result that is never favored in the law. Tague v. Hudspeth, Warden, et al., 171 Kan. 225, 229 (1951).

Instead, it is our judgment that a combination of the other two alternatives provides the legally justifiable resolution of your inquiry. As can be seen from the provisions of 13-1806 previously quoted herein, the person selected by the remaining commissioners to fill a vacancy on the commission serves only "until the next city general election." This statute prescribes a very precise ending to the term of office to be served by a person so selected. It does not authorize a person to continue beyond such term, as for example, by serving until such person's successor is elected and qualified. Notwithstanding the absence of such language, however, it is our opinion that the incumbent would hold over in office, but only until a successor shall have been chosen by the remaining members of the city commission in the manner prescribed by 13-1806.

Our conclusion is predicated, in part, on the fact that "the law abhors vacancies in public offices." 67 C.J.S. Officers, §74a. As was recognized in Attorney General Opinion No. 80-126, even in the absence of specific constitutional or statutory provisions establishing

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the right of an incumbent to hold over in office until his or her successor is elected or appointed and qualified, such right is well-established throughout the various jurisdictions. "Since the public interest ordinarily requires that public offices should be filled at all times without interruption . . . in the absence of an express or implied constitutional provision to the contrary, an officer is entitled to hold office until his successor is appointed or chosen and has qualified." (Footnotes omitted.) 67 C.J.S. Officers, §71. The foregoing has been affirmed in Kansas as "[t]he prevailing rule in the United States." Murray v. Payne, 137 Kan. 685, 690 (1933). In Murray, the Kansas Supreme Court construed a statute containing a holdover provision, but it noted that even if such provision had not been present, the holdover rule would apply. Id.

The Murray case was quoted and discussed at length in Attorney General Opinion No. 80-126, in which it also was noted that "[o]ther jurisdictions have recognized the holdover rule. In Grooms v. LaVale Zoning Board, 27 Md. App. 266, 340 A.2d 385 (1975), for example, the Court of Special Appeals of Maryland stated the rule thus:

"It has long been recognized in this State, as elsewhere, that the public interest requires, in the absence of any provisions to the contrary, that public offices should be filled at all times, without interruption . . . . In accord with this principle, the [Maryland] Court of Appeals has recognized that an elected or appointed officer may remain in office at the expiration of his term and is entitled to exercise the powers of his office until his successor qualifies, whether or not the statute creating the office so provides." (Citations omitted.) 340 A.2d at 391." Att'y Gen. Op. No. 80-126, at p. 4.

Thus, it is our opinion that, in the event there is no one elected to the commissioner position having an unexpired term of office, the incumbent holds over in such office, even though not specifically authorized by statute to do so. However, it is our further opinion that such failure to elect someone to fill the unexpired term creates a vacancy in that position, to be filled as prescribed by K.S.A. 1980 Supp. 13-1806, and the incumbent holds over only as a de facto officer until a successor to fill the vacancy has been so selected and has qualified. 67 C.J.S. Officers, §271; Grooms v. LaVale Zoning Board, supra. Upon such successor qualifying for office, the incumbent would no longer hold or be entitled to exercise the powers of the office.

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This proposition was discussed in State of Connecticut, ex rel. v. Watson, 132 Conn. 518, 45 A.2d 716, 164 A.L.R. 1238 (1946), as follows:

"If by constitutional provision or valid statute, a definite term is established for an office without provision that the incumbent shall continue in office after its expiration, he will, in holding over, be a de facto and not a de jure officer, and a vacancy will result which may be filled by the appointment, under proper authority, of a successor. If, however, the term of office is not only for a definite time but until a successor is appointed and qualified, an incumbent holding over is a de jure officer and unless, from the particular language of the statute or the particular circumstances of the case, a different legislative intent appears, there is no vacancy in the office within a provision authorizing an appointment in such a contingency." 45 A.2d at 720, 721.

In our opinion, the foregoing rules would have application to the eventuality you have posed. Although such rules have not been expressly considered by the Kansas Supreme Court, we believe the logic thereof is compelling, and we believe they are to be regarded as dispositive of the issue you have raised.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



W. Robert Alderson  
First Deputy Attorney General

RTS:WRA:phf  
Enclosures:

Attorney General Opinion Nos. 79-92 and 81-16