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May 15, 1981

ATTORNEY GENERAL OPINION NO. 81- 113

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Re: Cities of the Third Class -- Election, Appointment
and Removal of Officers -- Qualifications of Mayor

Synopsis: Because the person who was certified as being
elected mayor of the City of St. John was not a
registered voter at the time of the city election,
such person was not a qualified elector of the
city at the time of such election. Accordingly,
such person did not meet the qualifications pre-
scribed for the election to such office by K.S.A.
15-209, which requires that a candidate for elec-
tion to the office of mayor of a third class city
having a mayor-council form of government must be
a qualified elector of the city at the time of the
election. Thus, such persons' election is void.

Even though ineligible to hold such office, such
person has served in the capacity of mayor as a
de facto officer, and in that capacity, such per-
son's acts are valid and effectual where they con-
cern the public or the rights of third persons, to
the same extent as if such person were an officer
de jure. Cited herein: K.S.A. 15-209.

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Dear Mr. Coen:

As city attorney for the City of St. John, you have inquired
"whether a candidate for city office must be a qualified

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elector pursuant to K.S.A. 15-209 at the time the candidate files for office or at the time he or she is sworn into office." You note that, at the immediately preceding city election, the person elected as mayor of St. John was not a registered voter of the city "at the time of his filing nor on the day of the election," although he did register to vote as a resident of St. John the day after the election. It is based upon these facts that you have requested our opinion.

K.S.A. 15-209 requires that the "officers elected or appointed" under the statutes pertaining to a city of the third class having a mayor-council form of government "shall be qualified electors of said city." In our judgment, this statute requires that a candidate for an elective city office must possess the requisite qualifications at the time of the election, *i.e.*, the candidate must be a qualified elector of the city at the time of the election. Essentially the same conclusion was reached by Attorney General Vern Miller in Attorney General Opinion No. 73-146. In construing the requirements of K.S.A. 15-209, General Miller stated:

"It is my opinion that no person is qualified for election to the office of mayor of a city of the third class unless he is a person who possesses the qualifications of a voter under Article 5, §1, and is registered to vote as required by law." (Emphasis added.) VIII Opinions of the Attorney General 254, 255 (1974).

The foregoing prior opinion also addresses an additional issue raised by your inquiry, *i.e.*, whether a person must be registered to vote in order to be a qualified elector. We agree with General Miller's conclusion that registration is a necessary element of being a qualified elector. General Miller's conclusion was predicated on The State, ex rel., v. Dunn, 118 Kan. 184 (1925), wherein the Kansas Supreme Court construed a statute requiring a particular city election upon the filing of a petition signed by "qualified electors of such city." In considering these statutory provisions, the Court stated:

"The first question is, Who are 'qualified electors' within the meaning of the statute? It is well settled in this state that the

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legislature may require registration as a pre-requisite to the right to vote. (The State v. Butts, 31 Kan. 537, 2 Pac. 618.) In the cities where registration is required, an elector is a person having the constitutional qualifications of an elector and who is duly and properly registered. (Coney v. City of Topeka, 96 Kan. 46, 149 Pac. 689.) In Clayton v. Hill City, 111 Kan. 595, 207 Pac. 770, the term 'qualified electors' was construed to mean persons entitled to vote. Hence the words 'qualified electors' in this statute means persons who have the constitutional (Const., art. 5, §§1,4) qualifications of an elector and who are duly and properly registered. Other persons are not authorized to petition for such an election." Id. at 186, 187.

See, also, Wycoff v. Board of County Commissioners, 191 Kan. 658, 669, 670 (1963) and Dunn v. Board of County Comm'rs of Morton County, 165 Kan. 314 (1948).

Accordingly, it is our opinion that, since the person elected as mayor of St. John was not a registered voter at the time of the city election, such person was not a qualified elector of the city at the time of election and, therefore, was not eligible to election as mayor by virtue of the requirements of K.S.A. 15-209. Thus, such person's election is void.

Anticipating this conclusion, you also have inquired as to the validity of such person's acts while performing the duties of mayor. In our judgment, such person is a de facto officer of the city and, in that capacity, such person's acts are valid insofar as they involve the interest of the public and a third person. State v. Miller, 222 Kan. 405, 414 (1977).

We have concluded that the person who was declared elected as mayor of St. John is a de facto officer of the city on the basis of a substantial number of decisions of the Kansas Supreme Court that have addressed this issue. One of the more recent such cases is Olathe Hospital Foundation, Inc. v. Extendicare, Inc., 217 Kan. 546 (1975). There, the Court considered the status of two members of an appeals panel convened under provisions of the Regional Health Programs Act. These members were challenged on the grounds that their terms had expired and they had not taken oaths of office prior to

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participating in the hearing in question. In concluding that these persons were de facto officers, the Court stated:

"[T]he persons designated as members of the appeals panel assumed their duties as such under color of authority, performed those duties, and were recognized and accepted as public officers by all who dealt with them. These are the classic characteristics of a de facto officer." Id. at 558.

In support of this conclusion, the Court quoted its prior opinion in Railway Co. v. Preston, 63 Kan. 819 (1901). In that case, the Court determined a judge pro tem who continued to act in such capacity after his term of office had expired was a de facto officer. Such determination was predicated on the application of the principles announced in the "landmark" decision of State v. Carroll, 38 Conn. 449, 9 Am.Rep. 409 (1871), from which the Court quoted as follows:

"An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised:

"'1. Without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people without inquiry to submit to or invoke his action, supposing him to be the officer he assumed to be.

"'2. Under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like.

"'3. Under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or, by reason of some defect or irregularity in its exercise, such ineligibility, want of power or defect being unknown to the public.'" 63 Kan. at 823.

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Clearly, the third principle stated in the foregoing has relevance to your inquiry. The person now serving as mayor of St. John claims title to such office on the basis of a known election to the office which, in our judgment, was void because the person was not eligible to be elected to the office. Of similar import, we also note the following statement from State v. Roberts, 130 Kan. 754 (1930):

"The contention of the appellant may readily be conceded that the election of a judge pro tem in this case was not within the provisions of the statute (R.S. 20-305), but whether properly and legally elected or not, he assumed the duties of the office, was accepted and reputed as being such officer, and was in possession of the office under a fair color or title thereto, which would make him a de facto officer regardless of the legality of his election.

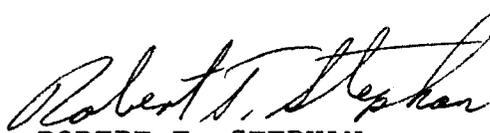
"'An officer de facto is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law. A person will be held to be a de facto officer when, and only when, he is in possession, and is exercising the duties, of an office; his incumbency is illegal in some respect; he has at least a fair color of right or title to the office, or has acted as an officer of such a length of time, and under such circumstances of reputation or acquiescence by the public and public authorities, as to afford a presumption of appointment or election, and induce people, without inquiry, and relying on the supposition that he is the officer he assumes to be, to submit to or invoke his action . . . ' (46 C.J. 1053.)

"'The acts of an officer de facto are as valid and effectual where they concern the public or the rights of third persons, until his title to the office is judged insufficient, as though he were an officer de jure, and the legality of the acts of such an officer cannot be collaterally attacked in a proceeding to which he is not a party.' (46 C.J. 1060, 1061.)" Id. at 756, 757.

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Applying the principles enunciated in the foregoing authorities to the facts as you have presented them, it is our opinion that the person now serving as mayor of St. John, even though ineligible to hold such office, is a de facto officer of such city. Consequently, we are of the further opinion that the acts heretofore performed by such person, while acting as a de facto officer, are valid and effectual where they concern the public or the rights of third persons, to the same extent as if such person were an officer de jure.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



W. Robert Alderson
First Deputy Attorney General

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