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ATTORNEY GENERAL OPINION NO. 83- 92

L. O. Bengtson
Attorney at Law
114 East Iron Avenue
Salina, Kansas 67401

Re: Irrigation -- Districts -- Board of Directors;
Filling of Vacancies

Synopsis: Pursuant to K.S.A. 42-706(a), a board member of an irrigation district shall serve a term of three years, and shall continue to hold office until his or her successor has been elected and qualified. In the case of a director whose term has expired, such person continues to serve as a de facto officer, with full authority to perform the duties of the office until a successor is properly selected. Such authority includes the power to fill by appointment vacancies which are caused by the resignation of another director. In the event that two of the three seats on an irrigation district board are vacant, the remaining member may act under K.S.A. 42-706(d) to appoint new directors. Cited herein: K.S.A. 42-701, 42-706.

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Dear Mr. Bengtson:

As attorney for Kanopolis Irrigation District No. 7, you request our opinion on two inter-related matters concerning the district's board of directors. The district, organized pursuant to K.S.A. 42-701 et seq., has a three member board of directors as required by K.S.A. 42-706(a). However, due to the disqualification of two of the three directors (their land is no longer contained within the district), only one director remains. Additional factors have intervened to prevent any election of directors since 1980, so that the remaining director's term has expired. In view of these conditions, you inquire regarding the legal procedures which

should be followed to restore the board to its full complement of members.

It would initially be our opinion that the remaining board member whose term has expired is nonetheless able to continue on the board until a properly qualified successor is elected. K.S.A. 42-706(a) provides in pertinent part that:

"The officers of such district shall be a board of directors consisting of three (3) members who shall be persons entitled to vote as provided in subsection (h) and residents of a county in which the district or a portion thereof is located, or county adjoining a county in which said irrigation district or a portion thereof is located, and who shall hold their offices for a period of three (3) years, and each shall serve until his or her successor has been elected and qualified." (Emphasis added.)

The underscored language codifies a common-law principle that an officer is entitled to hold office until his successor is appointed or chosen and has qualified. 67 C.J.S. Officers, §71 (1978). The purpose of this rule is clearly to prevent a hiatus in the position pending the time when a successor is chosen. 63 Am.Jur.2d, Public Officers and Employees, §160 (1972). Kansas courts have accepted this principle, leaving no doubt that the legislature's use of it here is legally permissible. Murray v. Payne, 137 Kan. 685, 690 (1933), Shaw v. Baker, 179 Kan. 729 (1956).

It is also our opinion that the remaining director's actions will be valid and binding until a qualified successor replaces him. This, despite the expiration of his term. Although no longer a de jure officeholder who, after being properly elected and qualified, holds office during a constituted term, the director is still a de facto official who may possess the office and exercise the duties thereof. Olathe Hospital Foundation, Inc. v. Extendicare, Inc., 217 Kan. 546 (1975). As a de facto officer his acts are valid insofar as they involve the interest of the public or third persons. State v. Miller, 222 Kan. 405, 414 (1977).

It is clear that at present the most pressing need for action lies in the area of filling the two vacant seats on the board of directors. While you inquire whether an election could be called under K.S.A. 42-706(f) for this purpose, our reading of the statute indicates that this subsection, like subsection (e), contemplates elections only on the second Tuesday in March. While subsection (f) contains procedures which are more streamlined than in the preceding subsection, we do not believe it can be used for the holding of a special election of the type needed in this situation. Rather, it appears

that the legislature desired to give smaller irrigation districts the option of proceeding under either subsection (e) or subsection (f) in holding its regular annual election in March.

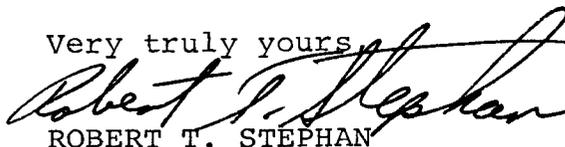
In our opinion, the statute provides for the appointment of new members in the event of vacancies, rather than the holding of a special election. This is dealt with in the latter part of subsection (d) of K.S.A. 42-706, wherein it is stated:

"In case the office of any director shall become vacant the remaining members of the board shall fill the vacancy by appointment. A director appointed to fill a vacancy shall serve the unexpired term of the director whose term he or she was appointed to fill."

Acting pursuant to this language, the remaining director can appoint two new members to complete the board. While alone he does not constitute a quorum to do business, decisions of courts in other states have held that an individual member may act to fill vacant seats if he or she is the only remaining official on the board. State v. Simpson, 198 Tenn. 695, 281 S.W.2d 697 (1955), Douglas v. Pittman, 239 Ky. 548, 39 S.W.2d 979 (1931). In that the statute speaks of action by the remaining board members rather than the board itself, we do not believe that the lack of a quorum prevents the appointment of additional directors by the hold-over member.

In conclusion, pursuant to K.S.A. 42-706(a), a board member of an irrigation district shall serve a term of three years, and shall continue to hold office until his or her successor has been elected and qualified. In the case of a director whose term has expired, such person continues to serve as a de facto officer, with full authority to perform the duties of the office until a successor is properly selected. Such authority includes the power to fill by appointment vacancies which are caused by the resignation of another director. In the event that two of the three seats on an irrigation district board are vacant, the remaining member may act under K.S.A. 42-706(d) to appoint new directors.

Very truly yours,


ROBERT T. STEPHAN

Attorney General of Kansas


Jeffrey S. Southard
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