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April 12, 1984

ATTORNEY GENERAL OPINION NO. 84- 33

The Honorable Theo Cribbs
Representative, District 89
State Capitol, Room 273-W
Topeka, Kansas 66612

Re: Elections -- Filling of Vacancies -- Vacancy in
State Legislature

Synopsis: Kansas law provides that a vacancy occurring in the office of a state senator shall be filled by appointment by the governor of a person elected by a district convention held as provided in K.S.A. 25-3902. Although the applicable statutes do not establish a time limit for filling such a vacancy nor penalties or other provisions for failure to fill a vacancy, such vacancies in public office are to be filled as soon as is reasonable and practicable to avoid leaving the office unoccupied for any extended period. Cited herein: Kansas Constitution, Art. 2, §9; K.S.A. 25-3901; 25-3902; 25-3903.

* * *

Dear Representative Cribbs:

As state Representative from the 89th District, you have requested an opinion from this office on certain matters relating to the filling of a vacancy in the office of a state senator.

You inform us that State Senator Billy Q. McCray of Wichita plans to resign his office in the near future and you inquire whether the statutory steps provided for filling the vacancy

created by his resignation are mandatory or optional requirements. In essence, you inquire whether it is necessary to fill the vacancy or whether it is permissible to wait until the next general election in November.

The Kansas Constitution at Article 2, §9 provides that all vacancies occurring in either house of the legislature "shall be filled as provided by law." K.S.A. 25-3903 provides in relevant part:

"Whenever a vacancy occurs in the office of state representative or state senator such vacancy shall be filled by appointment by the governor of a person elected to be so appointed by a district convention held as provided in K.S.A. 25-3902." (Emphasis Added.)

Under the terms of K.S.A. 25-3901(a), a "district office" is defined to include the office of state senator. K.S.A. 25-3902 provides in parts relevant here:

"(a) Except as provided in K.S.A. 25-312a, whenever a district convention is provided by law to be held to elect a person to be appointed to fill a vacancy in a district office, the county chairman designated in subsection (b) or (c) shall call a convention of all committeemen and committee-women of the party of the precincts in such district for the purpose of electing a person to be appointed by the governor to fill the vacancy. If such county chairman is absent or for any reason is unable to call, or refuses to call such convention, then the county vice-chairman shall call the convention and perform the other duties under this section required of such chairman."

After the convention is organized, the statute directs that "it shall" elect a person to be appointed by the governor to fill the vacancy.

We note that K.S.A. 25-3902 does not specify a time limitation in which a convention to elect a person to fill a vacancy in office is to be held. At the same time, the statute uses the term "shall" in specifying the county chairman's responsibility to call the convention for that purpose. In addition, the statute contemplates the inability or refusal of the chairman to call a convention and, in such case, transfers the re-

sponsibilities for calling the convention to the county vice-chairman, again using the term "shall" in specifying the vice-chairman's responsibilities. K.S.A. 25-3902, however, does not provide a consequence for failure to comply with its terms and thus, may be read as a merely directory statute. See e.g., In re Flournoy, 5 Kan. App. 2d 220 (1980). Clearly, the power provided to the members of a district convention by the terms of K.S.A. 25-3902 is not forfeited by failure to act within a certain time period, nor does the statute indicate that any consequences will attend a failure to fill the vacancy.

In our opinion, however, certain public policy considerations require that when the legislature provides that vacancies in certain public offices shall be filled and provides a method for so doing, such provisions should be utilized to fill the vacancy as soon as practicable after the vacancy occurs. A general rule stated at 67 C.J.S. Officers, §74 provides:

"The law abhors vacancies in public offices, and courts generally indulge in a strong presumption against a legislative intent to create, by statute, a condition which may result in an executive or administrative office becoming for any period of time, wholly vacant and unoccupied by one lawfully authorized to exercise its functions."

See also, Board of Trustees v. Kercheval, 242 Ky. 1, 45 S.W. 2d 846 (1931).

It is also held that vacancies in public offices should be filled as soon as is reasonable and practicable to avoid leaving the office unoccupied for long periods of time. As the Indiana Court of Appeals noted in Roberts v. State, ex rel., Jackson Co. Board of Comm'rs, 151 Ind. App. 83, 278 N.E. 2d 285, 293 (1972):

"The vacancy [in a public office] should be filled as quickly, as possible by a competent and qualified person and the office should not be permitted to go begging for proper authority while others . . . engage in political feuding, or deliberations at the expense, inconvenience and dismay of the taxpayers."

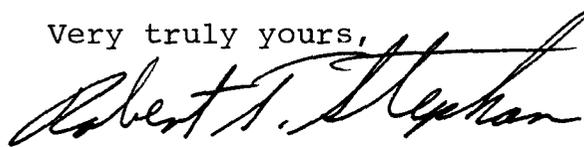
See also, Roher v. Dinkins, 32 N.Y.2d 180, N.E.2d37 (1973); 67 C.J.S. Officers, §76.

The amount of time which may be considered "practicable" or reasonable to fill a vacancy in public office depends, of course,

on the individual circumstances of each case. Obviously, circumstances may be imagined where the need to fill the vacancy is outweighed by other practical considerations. For example, a vacancy may occur in an elective office a short time before a general election in which a person will be elected to occupy the office. In such a case, the time necessary to complete the practical steps involved in filling the vacancy could well occupy the entire time between the occurrence of the vacancy and the regular election of a person to hold the office. It is our opinion, however, that in most circumstances the legislature did not intend for the provisions of K.S.A. 25-3902 to be long ignored when any extended vacancy in a district office occurs.

A state senator serves as a representative of the people of his district throughout the year and although his or her major responsibilities are confined to the months in which the legislature is in session, the duties of the office and the responsibilities to the people of the district extend throughout the year. In our opinion, public policy would dictate that such an important office should not long remain without an officeholder qualified and capable of carrying out its duties, functions and responsibilities. Nor should the persons served or represented by the office be required to suffer the inconvenience of the vacant office when proper procedures exist to permit filling the vacancy within a reasonable time. These conclusions find further support in the language of the applicable statutes and in particular, in the repeated use of the word "shall" to indicate that vacancy in such offices should be filled. Thus, although the legislature did not establish a time limit for filling a vacancy nor penalties or other provisions for failure to fill a vacancy, we do not believe that it intended for its pronouncements on the subject to be wholly ignored.

Very truly yours,



ROBERT T. STEPHAN
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Mary F. Carson
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