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ATTORNEY GENERAL OPINION NO. 86- 121

Charles A. Peckham
Rawlins County Attorney
Rawlins County Courthouse
Atwood, Kansas 67730

Re: Counties and County Officers -- County
Commissioners; Powers and Duties -- Vacancies;
Residence Requirements; Rearrangement of
Commissioner Districts

Synopsis: K.S.A. 19-202 requires each member of the board of county commissioners to be a qualified elector and a resident of the district within the county that he or she represents. Such residency requirement is a continuing, as well as a preliminary qualification for the office. Accordingly, the office of county commissioner automatically becomes vacant upon the commissioner's moving to another commissioner district, even if his or her new residence is still located within the county in which said commissioner was elected to serve.

Furthermore, a board of county commissioners has the authority to rearrange its commissioner districts by county resolution, as long as the commissioners comply with the broad guidelines for redistricting contained in K.S.A. 19-204 and Kansas case law. The statute requires the board of commissioners to divide the county into commissioner districts which are "as compact and equal in population as possible." Additionally, the Kansas Supreme Court has imposed the requirement that the integrity of the boundaries of voting precincts be maintained. Absent an

intentional abuse of discretion, if a county adheres to these guidelines in rearranging its county commissioner districts, the commissioners may re-draw the commissioner district boundary lines as they see fit. Cited herein: K.S.A. 19-202; 19-204; 19-2608, repealed, L. 1976, ch. 129, §1; K.S.A. 1985 Supp. 77-201, as amended by L. 1986, ch. 211, §39; Gen. Stat. 1915, §2539; Kan. Const., Art. 4, §2; Art. 5, §1.

* * *

Dear Mr. Peckham:

As Rawlins County Attorney, you request our opinion on two questions regarding the residence requirements of county commissioners, and the rearrangement of county commissioner districts. Specifically, you inform us that one of the Rawlins County Commissioners recently bought a house which is outside his commissioner district, and that he intends to move there in September. You inquire first whether his office automatically becomes vacant upon his moving to another commissioner district. Second, assuming his moving to another district would result in a vacancy in the office, you inquire whether the county commissioners may re-draw the commissioner district boundary line in order to include the new residence of the commissioner within his original district, if the statutory requirements for equal population are met.

In order to respond to your inquiry, it is necessary for us to examine the statutes dealing with the powers and duties of county commissioners. In your letter to this office, you note that under the former K.S.A. 19-2608, it would appear that the office would not become vacant as long as the commissioner did not move from the county. Prior opinions of this office which have addressed that proposition, up to but not including Attorney General Opinion No. 79-267, were predicated on an interpretation of K.S.A. 19-2608, and concluded that, under the terms of that statute, a vacancy is not created on a board of county commissioners when a commissioner changes his residence from the district in which he was elected to another district within the same county. However, in 1976 K.S.A. 19-2608 was repealed (L. 1976, ch. 129, §1), and the statutes are now silent as to the effect a change of residence has on a commissioner's continued qualification for office.

The Kansas Constitution provides at Article 4, §2:

"Not less than three county commissioners shall be elected in each organized county in the state, as provided by law."

County commissioners are elected pursuant to K.S.A. 19-202, which in pertinent part provides:

"(a) The board of county commissioners of each county shall consist of three (3), five (5) or seven (7) qualified electors.

"(b) One (1) county commissioner shall reside in and represent each commissioner district within the county." (Emphasis added.)

The statute requires each member of the board of county commissioners to be a qualified elector and a resident of the district within the county that he or she represents. The term "qualified elector" is defined in Article 5, Section 1 of the Kansas Constitution, which provides in part:

"Every citizen of the United States who has attained the age of eighteen years and who resides in the voting area in which he or she seeks to vote shall be deemed a qualified elector."

It is clear that to be a qualified elector for the purposes of voting at the election of county commissioners, a person must reside in the appropriate county commissioner district. The term "residence" is defined in K.S.A. 1985 Supp. 77-201, twenty third, as amended by L. 1986, ch. 211, §39, which provides:

"'Residence' means the place which is adopted by a person as the person's place of habitation and to which, whenever the person is absent, the person has the intention of returning."

The effect of residence on a county commissioner's qualification for office was most recently considered in Attorney General Opinions No. 76-203 and 79-267 (copies enclosed). Opinion No. 76-203 was synopsized in part:

"Under K.S.A. 19-202, as amended by ch. 121, §2, L. 1976, a person elected to the

office of county commissioner may not qualify and assume the duties of that office unless and until that person establishes residence in the commissioner district which such person is elected to represent." (Emphasis added.)

The synopsis to Opinion No. 79-267 reached a similar conclusion, but went on to provide:

"Residence in that district must continue throughout the term of office, and failure of a person to maintain such residency results in such person's disqualification to hold the office of county commissioner and creates a vacancy therein." (Emphasis added.)

We agree with the conclusion reached in those two opinions, and based upon the principles stated therein, as well as the other previously enunciated considerations regarding residency, it is our opinion that a person must be a resident of the county commissioner district in which such person is elected, in order to be qualified to serve as county commissioner in that district. Furthermore, we believe that such residency requirement is a continuing, as well as a preliminary qualification for the office. See State, ex rel., v. Stice, 186 Kan. 69 (1960); Bankers Service Life Ins. Co. v. Sullivan, 188 Kan. 783 (1961); State v. Bohannon, 421 P.2d 877 (1966); Phelps v. Shanahan, 210 Kan. 605 (1972). Accordingly, we conclude that the office of county commissioner automatically becomes vacant upon the commissioner's moving to another commissioner district, even if his or her new residence is still located within the county in which he or she was elected to serve.

Your second question assumes that moving to another commissioner district would result in a vacancy in the office, and inquires as to whether the county commissioners may re-draw the commissioner district boundary line to include the new residence of the commissioner within his original district, if the statutory requirements for equal population are met.

This particular question appears to be one of first impression in Kansas. However, a recent Attorney General Opinion, No. 86-70, addressed the issue of whether a county has the authority to rearrange its commissioner districts by county

resolution, thus shifting some electors from one commissioner district to another, with the result that certain electors' ability to vote or run for the office of county commissioner is affected. The opinion was synopsized in part:

"The Leavenworth County Board of County Commissioners has the authority to rearrange its commissioner districts by county resolution, as long as the commissioners comply with the broad guidelines for redistricting contained in K.S.A. 19-204 and Kansas case law"

The opinion found that there are only two relevant factors to be considered in determining whether the rearrangement of a county's commissioner districts is legal. First, the commissioners must comply with the broad guidelines for redistricting contained in K.S.A. 19-204. That statute provides at subsection (a):

"The board of county commissioners shall, on the day of the organization of the board or as soon thereafter as may be possible, meet and divide the county into three commissioner districts or such number of districts as is prescribed by resolution of the board, as compact and equal in population as possible, and number them, subject to alteration at least once every three years." (Emphasis added.)

Thus, the statute requires the board of commissioners to divide the county into commissioner districts which are "as compact and equal in population as possible." As stated in the statute, the commissioner districts are subject to rearrangement at least once every three years. In addition, the Kansas Supreme Court has noted that, in the rearrangement of commissioner districts, one other primary factor must be kept in mind in addition to compactness and equality of population. That is, in order to comply with the statutory guidelines for redistricting, the integrity of the boundaries of voting precincts must be maintained. Andrews v. Board of County Commissioners, 207 Kan. 549 (1971).

The synopsis of Opinion No. 86-70 concluded:

"If a county adheres to these guidelines in rearranging its county commissioner districts, the fact that the redistricting shifts some electors from one commissioner district to another, with the result that certain electors' ability to vote or run for the office of county commissioner is affected, will have no bearing on the legality of the county resolution."

Opinion No. 86-70 found that a board of county commissioners need only comply with the broad guidelines for redistricting contained in K.S.A. 19-204 and Kansas case law, in order to have the authority to rearrange its commissioner districts. We agree with the conclusion reached in that opinion, and find that, absent an intentional abuse of discretion, a board of county commissioners may rearrange its commissioner districts as it sees fit, as long as the broad guidelines for redistricting are complied with. We feel this conclusion is supported by decisions of the Kansas Supreme Court.

The State, ex rel., v. Osage County, 112 Kan. 256 (1922), was an original proceeding in mandamus dealing with the issue of redistricting. Plaintiffs brought suit after the board of county commissioners acted upon the advice of the attorney general and made an order redistricting the county. The action, which was brought to compel a further redistricting, was partially based on the claim that the order was "capriciously and arbitrarily made for the purpose of promoting the political interests of the present members of the board." Id. at 258. In response to this allegation, the Supreme Court of Kansas stated:

"The duty of determining how nearly the proposed districts shall approximate equality in population and compactness of territory is vested in the board of county commissioners. The real question for our consideration is whether the order redistricting the county was an abuse of that discretion." State v. Osage County, supra at 258. (Emphasis added.)

The court then quoted from Hayes v. Rogers, 24 Kan. 143, 258 (1880):

"The statute gives the commissioners full power to make the change Large

powers are in this respect intrusted to them, as well as an almost unlimited discretion." (Emphasis added.)

In dealing with the specific contention that the board acted from personal and selfish motives in making the order and redistricting the county in order to secure the reelection of one of its members, the court stated:

"Commissioner districts are created merely to define the territory from which the voters are to select commissioners; they have no functions to perform as governmental agencies It is within the power of the board to alter the lines of a township at any time and without a petition asking such action." Hayes, supra at 263. (Emphasis added.)

The court concluded that the board of county commissioners was authorized to rearrange the county's commissioner districts even for purely political purposes, as long as the statutory requirements of "as compact and equal in population as possible" were met. (Citing Gen. Stat. 1915, §2539.) Accordingly, it would not issue the writ of mandamus to control the discretion vested in the board, absent proof by the plaintiff of an intentional abuse of discretion.

The most recent case in which the Kansas Supreme Court dealt with the issue of redistricting was the 1971 case of Andrews v. Board of County Commissioners, 207 Kan. 547. In that case, appellants' claims on appeal were first, that the statutory requirements as to compactness and equality of population had not been met, and second, that the commissioner districts were gerrymandered to prevent the citizens of Arkansas City from electing more than one county commissioner.

In dealing with the first claim, the court emphasized that what has been declared as the policy of the federal courts regarding reapportionment (i.e. "one man, one vote"), has long been recognized as the policy of the state courts, via K.S.A. 19-204. That is, when called upon, the Kansas courts have consistently enforced the requirement of the statute that each county be rearranged into commissioner districts which are "as compact and equal in population as possible." This decision reiterated the court's long-standing policy that county commissioner districts can divide a city and still meet the statutory requirement of compactness. Furthermore, in

order to comply with the statutory guidelines for redistricting, the court stated it must consider not only the requirement of compactness, but also the requirement that the integrity of the boundaries of voting precincts be maintained.

In examining the charges of gerrymandering, the court stated:

"In the absence of evidence of improper motives on their part[,] a plan which meets the statutory requirements of compactness and equality of population without violating the integrity of voting precincts should be approved, for no abuse of discretion on the part of the board can be presumed." Andrews, supra at 554.

The court emphasized that abuse of discretion must always be clearly established by those attacking the results of discretionary action of a governing body in order to establish the unreasonableness of the action. [Bodine v. City of Overland Park, 198 Kan. 371 (1967); Creten v. Board of County Commissioners, 204 Kan. 782 (1970)]. Taking into consideration its previous conclusions as to the compactness and equality of population in the commissioner districts, the court found the claim of gerrymandering to be without substantial merit.

In the absence of evidence of improper motives on the part of county commissioners, the Supreme Court of Kansas has consistently refused to interfere with the discretion vested in the board by the legislature to determine how boundary lines for county commissioner districts shall be drawn. In our opinion, the question of whether there has been an abuse of discretion can only be determined by a court of law. In that no abuse of discretion on the part of the board can be presumed, we believe that a county plan for redistricting which meets the statutory requirements of compactness and equality of population, and which allows the integrity of the boundaries of voting precincts to be maintained, should be allowed to stand.

In summary, K.S.A. 19-202 requires each member of the board of county commissioners to be a qualified elector and a resident of the district within the county that he or she represents. Such residency requirement is a continuing, as well as a preliminary qualification for the office. Accordingly, the office of county commissioner automatically becomes vacant upon the commissioner's moving to another commissioner

district, even if his or her new residence is still located within the county in which said commissioner was elected to serve.

Furthermore, a board of county commissioners has the authority to rearrange its commissioner districts by county resolution, as long as the commissioners comply with the broad guidelines for redistricting contained in K.S.A. 19-204 and Kansas case law. The statute requires the board of commissioners to divide the county into commissioner districts which are "as compact and equal in population as possible." Additionally, the Kansas Supreme Court has imposed the requirement that the integrity of the boundaries of voting precincts be maintained. Absent an intentional abuse of discretion, if a county adheres to these guidelines in rearranging its county commissioner districts, the commissioners may re-draw the commissioner district boundary lines as they see fit.

Very truly yours,



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