



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 87- 76

The Honorable Harold Guldner
State Representative, 122nd District
State Capitol, Room 174-W
Topeka, Kansas 66612

Re: Counties and County Officers -- County Attorney --
Vacancy in Office

Elections -- Filling Vacancies in Offices and
Candidacies -- Vacancy in Office of County Attorney

Synopsis: Kansas law provides that a vacancy occurring in the office of county attorney 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.

Authority and responsibility for calling a district convention is vested entirely in the county chairman, or alternatively in the county vice-chairman. Consequently, other members of the central committee, as well as registered electors of the county, have no power to force the calling of a convention. Cited herein: K.S.A. 19-715; 25-3901; 25-3902.

* * *

Dear Representative Guldner:

As state representative for the 122nd district, you request our opinion on several questions regarding the occurrence of a vacancy in the office of county attorney. You inform us that the Kearny County Attorney resigned on February 1, 1987, and that the District Judges of the 25th Judicial District, pursuant to K.S.A. 19-715(b), appointed a temporary county attorney on February 6, 1987. To this date, no convention has been called of the Republican Central Committee of Kearny County to make a nomination to the Governor of a permanent county attorney.

In order to answer your inquiry, it is necessary to examine relevant statutes which deal with vacancies in office. K.S.A. 19-715(a) provides in part:

"When a vacancy occurs in the office of county attorney, the vacancy shall be filled by appointment by the governor of a person elected by a district convention, in accordance with K.S.A. 25-3902 and amendments thereto."

Under the terms of K.S.A. 25-3901(a), a "district office" is defined to include the office of county attorney. K.S.A. 25-3902(a) provides in part:

". . . 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 . . . shall call a convention of all committeemen and committeewomen 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" (Emphasis added).

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

In light of these statutory provisions, you inquire when such a district convention should be called. Specifically, you ask whether there is a recommended time frame for calling said convention, or alternatively, whether the calling of a convention is left entirely to the discretion of the county chairman.

Attorney General Opinion No. 84-33 addressed the issue of when a district convention must be called to fill a district office. In considering this issue, we noted several things. First, 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 must be held. Second, K.S.A. 25-3902 uses the term "shall" in specifying the county chairman's responsibility to call the convention for that purpose. Third, the statute contemplates the inability or refusal of the chairman to call a convention and, in such case, transfers the responsibilities for calling the convention to the county vice-chairman, again using the term "shall" in specifying the vice-chairman's responsibilities. Finally, K.S.A. 25-3902 does not provide a consequence for failure to comply with its terms, and thus may be read as a directory, rather than a mandatory, statute. See e.g., In re Flournoy, 5 Kan. App. 2d 220 (1980).

In light of these statutory considerations, Opinion No. 84-33 concluded that "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."

We concur with this conclusion. We recognize that 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 do we believe any consequences will result from a failure to fill a vacancy in a district office. However, in our opinion, 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. See Attorney General Opinion No. 84-33.

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, 45 S.W.2d 846 (Ky. 1931).

The courts have 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, 278 N.E.2d 285, 293 (Ind. 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, 298 N.E.2d 42 (N.Y. 1973); 67 C.J.S. Officers, § 76.

Of course, the amount of time which may be considered reasonable and practicable to fill a vacancy in a public office depends upon the individual circumstances of each case. We believe this determination must be made by the county chairman, or alternatively by the county vice-chairman, who has been given the statutory authority and responsibility to call a district convention. K.S.A. 25-3902(a).

In light of our answer to your first question, we need not address your second and third questions at length. Under K.S.A. 25-3902(a), the county chairman, or the county vice-chairman, has sole discretion to decide when a district convention should be called. Since the statute establishes no time limit for filling a vacancy, nor penalties for failure to fill a vacancy, it does not appear there can be a refusal to

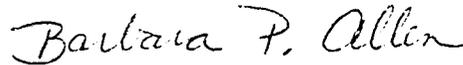
call a district convention under the statute. Further, K.S.A. 25-3902(a) gives only the county chairman, or the county vice-chairman, the authority to call said convention. Accordingly, in our opinion, other members of the central committee, as well as registered electors of the county, have no power to force the calling of a convention.

In summary, Kansas law provides that a vacancy occurring in the office of county attorney 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.

Authority and responsibility for calling a district convention is vested entirely in the county chairman, or alternatively in the county vice-chairman. Consequently, other members of the central committee, as well as registered electors of the county, have no power to force the calling of a convention.

Very truly yours,


ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS


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