



Note:  
Statute amended in 1988

STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 88- 5

Mr. Gary L. Flory  
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Re: Cities and Municipalities -- Governmental Organization -- Consolidation of Operations, Procedures and Functions by a Political and Taxing Subdivision or by Two or More Subdivisions; Procedure; Elimination of Elective Office

Synopsis: Subject to compliance with mandated procedures which include electorate approval, the governmental organization act permits the elimination of an elected office and the assumption of its duties by one or more offices or agencies. The elimination of the office and the assumption of its functions and duties by other entities must further efficiency or avoid duplication and must not be a sham elimination of an elected office done to avoid civil service or tenure requirements. When the county commission possesses authority to create and appoint a county office, the consolidation statutes permit duties of an eliminated elected office to be transferred to that appointive office. K.S.A. 12-3906 may, however, allow other state agencies affected by the consolidation to place independent requirements on such delegations.

Pursuant to K.S.A. 25-314, an appointed term of office extends only until the date the office is abolished. Consolidation statutes do not allow premature divestment of the term of office of a person elected to that position. The election

statutes contain the authority and procedures allowing an elected term to be interrupted. Cited herein: K.S.A. 12-3901; 12-3903; 12-3905; 12-3906; 12-3907; 19-101a; 19-501; 25-312; 25-314.

Dear Mr. Flory:

As McPherson County Counselor, you inquire as to the procedures and legalities involved when implementing the governmental organization act, K.S.A. 12-3901 et seq. Specifically you inquire whether that act authorizes the consolidation of all of the functions of one office with some of the functions of a new second office, the new office being appointed by the county commission, if the elimination of the elective office from which all functions were transferred is approved by a majority of the county electors. Secondly, you ask whether, under a proper consolidation plan, an elective office can be eliminated under K.S.A. 12-3903 prior to the end of the elected term.

For purposes of clarity, we will address the issues thus raised in the following order: (1) Does K.S.A. 12-3901 et seq. permit the elimination of an elected county office; (2) if such an office is eliminated, what can be done with the duties of that office; (3) may the county commissioners create an office by appointment and allow that appointive office to perform some or all of the duties of an abolished elected office; (4) if an elected office is abolished pursuant to this act, when does the term of the officer expire.

The power that creates may also eliminate. See Aikman v. Edwards, 55 Kan. 751 (1895); State v. Kansas City, 50 Kan. 508 (1893); Attorney General Opinions No. 83-129, 82-78, 81-246, 80-98, 80-138, 80-144, 78-269, 75-453, 74-141. Article 9, § 2 of the Kansas Constitution states that "[T]he legislature shall provide for such county and township officers as may be necessary." K.S.A. 19-501 mandates the election of a county treasurer. Thus, the office of county treasurer is a statutory office, created by the state legislature. The legislature therefore possesses the authority to abolish this statutorily created office. It has delegated this authority to some extent in K.S.A. 12-3901 et seq.

K.S.A. 12-3903 provides for "the elimination of an elective office by consolidation under the provisions of this act. . . ." While this language creates a potential conflict with K.S.A. 19-501, statutes are presumed to have been passed

with full knowledge of all existing statutes on the same subject and repeal by implication is not favored unless the repugnancy between the two is so irreconcilable that the two cannot both be given force and effect. Elliot v. Luchanane, 1 Kan. 126 (1862); City of Kansas City v. Griffen, 233 Kan. 685 (1983); Matter of Suesz' Estate, 228 Kan. 275 (1980). Reading K.S.A. 12-3903 and 19-501 together and giving each force and effect, it can be seen that the election of a county treasurer is mandated by K.S.A. 19-501 unless that office has been eliminated pursuant to K.S.A. 12-3901 et. seq. Thus, provided all necessary procedures are followed, an elected office such as county treasurer may be eliminated under K.S.A. 12-3901 et seq.

The second issue concerns the assumption of duties previously performed by the eliminated office.

In a general sense, consolidation means "to unite or unify into one mass or body. . . ." Blacks Law Dictionary 279 (5th ed. 1979). Consolidation merges two into one and involves the surrender of power. State v. Richardson, 174 Kan. 283 (1953); 3 McQuillin, Dissolution and Reorganization § 8.21 (3rd ed. 1982); Attorney General Opinion No. 83-129. However, consolidation by unification or merger may refer to the transference of singular powers, procedures, or functions and not necessarily to the merger of two or more entire offices or agencies. K.S.A. 12-3901 states that the purpose of the consolidation act is to permit "consolidation of operations, procedures and functions of offices and agencies of such subdivisions which may be more efficiently and effectively exercised or provided by a single office or agency." (Emphasis added). K.S.A. 12-3903 permits consolidation of "any or all of the operations or functions performed or carried on by such offices or agencies. . . ." (Emphasis added). Pursuant to consolidation, K.S.A. 12-3906 and 12-3907 allow responsibilities to be shifted by performance, agreement or resolution. The aforementioned statutes appear to contemplate consolidation of either individual functions or, alternatively, the entire office.

Some language contained in the act indicates that only one entity survives the consolidation. However, nothing in the consolidation act absolutely mandates that every function of an eliminated office must henceforth be performed by a sole surviving office or agency. We believe that the singular language contained in the act refers to each surviving individual function, procedure or duty. Our position is supported by the practicalities involved in carrying out the

intent of the act. Reorganization laws are ordinarily liberally construed for promotion of legislative policy, 3 McQuillin § 8.22, and the legislative history of this act indicates that its purpose is to insure the ability of local governments to further effect economies, improve efficiency and avoid duplication. See K.S.A. 12-3901. These goals may not always be best served by one office assuming all of the duties of an eliminated office. If that were the procedure mandated by the consolidation act, in some instances it could result in a more inefficient government due to the inability of the surviving office to perform twice the duties. Further, a contrary conclusion would seem to promote consolidation plans which merely replace an elective office with an appointive office, a situation other jurisdictions have disallowed. (See case law cited under the third issue.) If the consolidation promotes efficiency or avoids duplication and is carried out pursuant to procedures mandated by K.S.A. 12-3901 et seq., we see no impediment to allowing the duties of an eliminated office to be assumed by more than one office or agency.

The third issue is whether the county commissioners may appoint a new office to succeed to some or all of the duties of an eliminated elective office.

K.S.A. 12-3901 et seq. refers to the surviving "office or agency", indicating an alternative. Local governments and authorities have long had the authority to create public agencies and hire employees in furtherance of administering county business. Controlling authority must be consulted to ascertain whether a particular county position may be created by appointment and, if so, by whom the appointment may be made. 20 C.J.S. Counties §82 (1940). If the county commission possesses the authority to create and appoint persons to a county agency, the consolidation act allows duties to be shifted to that appointed agency. Nothing in K.S.A. 12-3901 et seq. dictates that duties of an eliminated elected official must be performed by another elected official.

This interpretation is not without exception, however. Consolidation cases from other jurisdictions question consolidation that eliminates an elected office and replaces it with an appointive office to avoid civil service or tenure requirements. See Shawnee v. Hewett, 130 P. 546 (1913); Miller v. State ex rel. Peek, 29 So.2d 411, (Ala. 1947); Phoenix v. Powers, 113 P.2d 353 (Ariz. 1941); Rextrew v. Huntington Park, 128 P.2d 23 (Cal. 1942);

Somerville v. District Ct., 57 NE 2d 1 (Mass. 1944); State ex rel. Thein v. Milwaukee, 281 NW 653 (Wis. 1938). These and other cases frown on an elected office being eliminated merely to be replaced by an appointive office which exactly duplicates the eliminated office. The purpose of the elimination then appears to be avoidance of tenure and civil service requirements and not the promotion of efficiency. A consolidation in which a newly created single entity assumes every function or duty of the eliminated office could give rise to suspicions that such an improper purpose exists. Further, pursuant to K.S.A. 12-3906 other governmental agencies must be consulted if consolidation affects those agencies. Thus, other agencies may independently place requirements upon the performance of certain duties. (See Attorney General Opinion No. 74-141).

The final issue raised concerns the timing of consolidation and its effect upon an elected term.

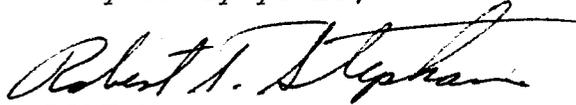
K.S.A. 19-101a seventh makes all counties subject to all legislative acts concerning elections. K.S.A. 25-301 et seq. establishes terms of office. K.S.A. 25-314 provides:

"Any of said officers that may be elected or appointed to fill vacancies may qualify and enter upon the duties of their office immediately thereafter, and when elected they may hold the same during the unexpired term for which they were elected, and until their successors are elected and qualified; but if appointed, unless otherwise provided by law, they shall hold the same only until their successors are elected and qualified. Appointment to fill a vacancy in an office which is to be abolished shall extend until the date of such abolition, and only until such date. (Emphasis added).

An appointed official currently holds the position of McPherson County Treasurer. By virtue of language contained in K.S.A. 25-314, that appointed term extends only until the date that the office is abolished. It is our opinion that this is not the case when dealing with an elective term of office. The consolidation act does not in and of itself cut short the term of an elected officer. Such a divestment of an

elective term must occur pursuant to procedures set forth in the election statutes.

Very truly yours,



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