



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

January 3, 1990

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

ATTORNEY GENERAL OPINION NO. 90- 1

Delton M. Gilliland
Osage County Counselor
112 E. 7th Street
P.O. Box K
Lyndon, Kansas 66451

Re: Counties and County Officers -- Miscellaneous Provisions -- Resignations by County Officers; Acceptance and Withdrawal of Resignations

Synopsis: A resignation pursuant to K.S.A. 19-2606, to be effective, must be accepted by the governor. A resignation may be prospective, becoming effective, upon acceptance, at a future specified date. Once accepted, a resignation cannot be withdrawn. Based on the facts presented to us, a vacancy in the office of Osage county attorney will occur on January 9, 1990. A quo warranto action is the proper remedy to determine the right or title to a public office and to oust an incumbent who is holding the office unlawfully. Cited herein: K.S.A. 19-715; 19-2606; 25-3902; 60-1201; 60-1202; 77-109.

* * *

Dear Mr. Gilliland:

As the county counselor for Osage County, you have requested our opinion regarding the resignation submitted by the Osage County Attorney and subsequent letter withdrawing that resignation.

You have submitted the following facts for our consideration of this matter. In a letter dated October 17, 1989, the Osage County Attorney submitted to the Governor her resignation of that office to be effective January 9, 1990. The letter was delivered by first-class mail to the Governor's office and was received on October 18, 1989. On October 26, 1989, the county attorney then sent to the Governor a letter of that date withdrawing her resignation. The letter was delivered to the Governor's office certified mail, return receipt requested, and receipted for by the Governor's office on October 30, 1989.

You also inform us that you discussed this matter with the Governor's appointments office to determine the facts relevant to the two letters sent by the county attorney. We understand you were informed that the Governor's office placed its receipt stamp on the envelopes when the letters were received. The only other action taken by the Governor's office was that either the chairperson of the Osage County Republican Central Committee was notified of the resignation, or the county attorney was contacted and advised to notify the central committee. You state that you contacted the committee chairperson and that he told you that he had received no notice of the resignation.

Specifically, you ask our opinion on the following questions:

- "1. Would County Attorney Stewart's resignation have been effective on 9 January 1990 had it not been withdrawn?
- "2. Is County Attorney Stewart's attempted withdrawal of resignation, communicated to Governor Hayden by 26 October 1989 letter, effective to nullify the earlier resignation?
- "3. Assuming that the attempted withdrawal of resignation is ineffective and the County Attorney does not vacate the office on the effective date of the 17 October 1989 resignation, what action is available to the county if the County Attorney does not vacate the office on that date?"

Under common-law, public officers could not resign from office. 3 McQuillin, Municipal Corporations § 12.122 (rev. 3rd ed. 1982). K.S.A. 77-109 states that "the common law as modified by constitutional statutory law, judicial decisions, and the conditions and wants of the people shall remain in force in aid of the General Statutes of the

state. . . ." In regard to county officers, the common-law rule stated above has been changed as follows:

"All county officers who hold their office by election shall make their resignation to the officer or officers authorized by law to fill vacancies in such office."
K.S.A. 19-2606.

Vacancies in the offices of county attorney are "filled by appointment by the governor of a person elected by a district convention. . . ." K.S.A. 19-715. See K.S.A. 25-3902.

The common law provides that a resignation must be accepted by the proper authority before it is effective. 67 C.J.S. Officers and Public Employees § 102(a) (1978). The majority of jurisdiction have followed this rule. Annot. 95 A.L.R. 215 (1935). Kansas first recognized and adopted the common law rule in The State, ex rel., v. Clayton, 27 Kan. 442 (1881):

"The common-law rule that the resignation of a public officer is not complete until the proper authority accepts it, or does something equivalent thereto, obtains in this state. . . ." 27 Kan. 442 at Syl.

In Rogers v. Slonaker, 32 Kan. 191 (1884), the Kansas Supreme Court ruled:

"The rule in relation to the resignations of officers is, that such resignations take effect on their acceptance by the officer or officers authorized to fill the vacancy . . . and until accepted they are simply offers to resign." 32 Kan. at 193.

See The State, ex rel., v. Board of Education, 108 Kan. 101, Syl. ¶ 1 (1920); The State, ex rel., v. Board of Education, 106 Kan. 863, 865 (1920).

The Kansas statutes do not specify what constitutes "acceptance" of a resignation. The court has said:

"Any conduct on the part of the officers charged with the duty of filling the vacancy if one exists indicating a purpose

to accept it is sufficient, such as the appointment of a successor, or recognizing the existence of a vacancy, or in any manner treating the resignation as operative." The State, ex rel., v. Board of Education, 106 Kan. at 866.

In that case a member of a school board signed a letter of resignation and delivered it to the president of the board. The board did not take any action on the resignation letter, but chose a successor who was recognized by the board members as a member. The court said, "[S]uch recognition is tantamount to an acceptance of the resignation. . . ." Id. at Syl. This decision follows the court's ruling in The State, ex rel., v. Meek, 86 Kan. 576 (1912). In that case, where the district court judges had the authority to fill a vacancy in the office of county attorney, the judges did not make a formal acceptance of a resignation. However, the court stated that the judges treated the office as vacant "and this had the same effect as a formal acceptance." 86 Kan. at 583.

Other authorities are in accord with the above Kansas cases regarding acceptance of a resignation:

"Acceptance of a resignation need not be a formal rite; in such a case any action evidencing agreement is sufficient." 63 Am.Jur.2d Public Officers and Employees § 174 (1984).

"A resignation may be accepted, first, by a formal declaration, and second, by the appointment or election of a successor, or by acquiescence." McQuillan, Municipal Corporations, § 12.125 (rev. 3rd ed. 1982).

We have discussed this matter with the governor's appointments office and have confirmed their actions in regard to the letter of resignation they received from the Osage County Attorney. We understand it is standard procedure for the governor's office to stamp such letters as received and then to either notify the chair of the county political committee of the resignation and impending vacancy, or to contact the officer who sent the resignation and ask her or him to contact the political committee and inform them that a vacancy will occur. The governor's office does not send a letter formally accepting the resignation. However, we do not believe that is

necessary. In our opinion, the governor by the actions of his office has accepted the resignation in this case. The actions are standard procedure and are consistent in each situation. This procedure indicates that the resignation is treated as accepted and an impending vacancy in the office is recognized.

A resignation may be prospective becoming effective, upon acceptance, at a future certain date. 67 C.J.S. Officers and Public Employees § 102(b) (1978).

"When a resignation specifies the time at which it will take effect, the resignation is not complete until the date arrives."
63A Am.Jur.2d Public Officers and Employees § 173 (1984).

See The State, ex rel., v. Clayton, 27 Kan. 442 (the resignation to take effect upon the appointment of a successor). In answer to your first question, a resignation may be prospective and does not take effect until the specified date, even when accepted two and a half months before that date.

Your second question concerns the effect of a withdrawal of resignation. Under the common law, once a resignation was accepted it could not be withdrawn. 3 McQuillin, Municipal Corporations § 12.122 (rev. 3rd ed. 1982). There is authority for the proposition that the resignation of an officer effective at a future date may be withdrawn prior to the effective date after the resignation has been accepted. Annot., 132 A.L.R. 969, 973. However, the majority of jurisdictions follow the common law rule that once accepted, a resignation cannot be withdrawn. 63A Am.Jur.2d Public Officers and Employees § 175 (1984); 67 C.J.S. Officers and Public Employees § 104 (1978). See e.g., People ex rel. Coker v. Owen, 116 Ill.App.3d 506, 451 N.E.2d 1021 (1983); People v. Kemer, 167 N.E. 2d 555 (Ill. 1960); Redmon v. McDaniel, 540 S.W.2d 870 (1976); Rider v. City of Batesville, 220 Ark. 31, 245 S.W.2d 822 (1952).

The question was before the Oklahoma Supreme Court in Rogers v. Carleton, 110 P.2d 908 (1941). In that case a mayor submitted his resignation on July 18 to the city commission to become effective August 15. The commissioners accepted the resignation July 26. On August 9 the mayor filed a written withdrawal of the resignation. The court decided that, in the absence of statutory or other authority the common law would control. The court ruled:

"Where acceptance is necessary, a public officer who has tendered an absolute and unconditional resignation to take effect in the future cannot withdraw the resignation after it has been duly accepted by the proper authority even though the time at which it is to take effect has not arrived." 110 P.2d at 909.

In Fitzpatrick v. Welch, 527 P.2d 313 (1974), the Idaho Supreme Court followed the majority rule and stated policy reasons for doing so:

"A decision contrary to that reached by the Court today would promote uncertainty, doubt, confusion and perhaps needless litigation. If appellant or any other public officer were to be permitted once to indicate his lack of desire to hold an office and tender a resignation to be effective at some date in the future and then withdraw it, then logically he or any other person could do so a second, third, and fourth time at infinitum. Such conduct could be destructive of the orderly conduct of governmental affairs, the ability of an appointing authority to seek out and secure qualified persons to fill the purported vacancy, and, as mentioned before, to assure the public of adequate law enforcement." 527 P.2d at 315.

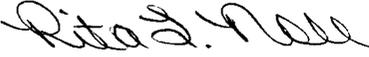
Kansas is without statutory or case law regarding the effect of a withdrawal of a prospective resignation after it has been accepted. In the absence of such authority, the common law prevails. K.S.A. 77-109. In addition, we agree with the policy reasons stated in Fitzpatrick v. Welch, supra. Therefore, it is our opinion that a resignation effective at a future date cannot be withdrawn prior to the effective date after the resignation has been accepted. In this case, since the resignation has been accepted, the letter of withdrawal is without effect.

In the situation before us, the resignation will become effective January 9, 1990. In your third question you ask what can be done if the county attorney does not vacate the office on that date. A quo warranto action brought by the

state is the proper remedy to determine the right or title to a public office and to oust an incumbent who is holding the office unlawfully. K.S.A. 60-1202(1). See State ex rel. Stephan v. Kansas House of Representatives, 236 Kan. 45, 52 (1984); State ex rel. Miller v. Richardson, 229 Kan. 234, 239-40 (1981); The State, ex rel., v. Wilson, 30 Kan. 661, 662 Syl. ¶ 5 (1883). See generally 65 Am.Jur.2d Quo Warranto § 18 (1972); 3 McQuillin, Municipal Corporations §§ 12.90, 12.91 (rev. 3rd ed. 1982). Proceedings based on quo warranto are codified in the Kansas statutes at K.S.A. 60-1201 et seq.

Very truly yours,


ROBERT T. STEPHAN
Attorney General of Kansas


Rita L. Noll
Assistant Attorney General

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