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December 20, 1990

ATTORNEY GENERAL OPINION NO. 90-137

The Honorable Michael J. Johnston
Senate Democratic Leader
Fourteenth District
P.O. Box A
Parsons, Kansas 67357-0040

Re: Elections--Filling Vacancies in Offices and
Candidacies--Procedure for Filling Vacancy in
District Office; State Representative; Member-Elect

Legislature--General Provisions; Miscellaneous
Provisions--Resignation of Member of Senate or
House of Representatives; Filing of Notice;
Member-Elect

Synopsis: A member-elect of the state senate or house of
representatives cannot resign such office until the
member-elect is entitled by law to possess it, has
taken the oath, has given the required bond, and
has entered upon the discharge of its duties.
However, under the provisions of L. 1990, ch.
130, § 11, a member-elect of the legislature may
provide notice to the secretary of state of the
member-elect's intent to resign provided the
resignation will become effective after the
member-elect has taken the oath of office and
entered upon the discharge of its duties. Cited
herein: K.S.A. 1989 Supp. 13-305; K.S.A. 13-513;
14-205; K.S.A. 1989 Supp. 14-308; K.S.A. 15-201;
K.S.A. 1989 Supp. 15-311; K.S.A. 19-504; 25-101b;
25-312; K.S.A. 1989 Supp. 25-312a; K.S.A. 25-1434;
25-1606; 25-2022; 25-3201; K.S.A. 25-3902, as
amended by L. 1990, ch. 130, § 4; 25-3902a, as
amended by L. 1990, ch. 130, § 5; K.S.A. 25-3903;

K.S.A. 25-3904; as amended by L. 1990, ch. 130, § 6; 25-3904a, as amended by L. 1990, ch. 130, § 7; 25-3905, as amended by L. 1990, ch. 130, § 8; 25-3906, as amended by L. 1990, ch. 130, § 9; K.S.A. 40-106; 46-142; 46-144; 46-146a; 54-106; 75-125; 77-109; L. 1990, ch. 130, § 11; Kansas Constitution, art. 1, § 11.

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Dear Senator Johnston:

As senator for the fourteenth district, you request our opinion regarding the ability of a member-elect to resign the office of state senator or state representative. Specifically, you ask whether a member-elect to the legislature who has received a certificate of election from the secretary of state may file a written notice of resignation from office prior to taking the oath of office if the effective date of the resignation is fixed for a time occurring after the person has become a member of the legislature.

As stated in K.S.A. 77-109, "[t]he common law as modified by constitutional and statutory law, judicial decisions, and the conditions and wants of the people, shall remain in force in aid of the General Statutes of this state. . . ." The rule seems to be that one who has been elected to an office cannot resign it until the time has arrived when the individual is entitled by law to possess it, has taken the oath, has given the required bond, and has entered upon the discharge of its duties. 63A Am.Jur.2d Public Officers and Employees § 173, 796. Therefore, without statutory authority stating otherwise, an individual elected on November 6, 1990, to serve as a member of the legislature beginning January 14, 1991, cannot resign the position of member of the legislature until the individual has taken the oath of office prescribed in K.S.A. 54-106 and has undertaken the duties of a member of the legislature.

A procedure to be followed in filling vacancies occurring at virtually every stage of a political contest and for every elected official is provided. See: Kansas Constitution, art. 1, § 11 (vacancies in executive offices); K.S.A. 1989 Supp. 13-305 (officers of cities of the first class); K.S.A. 13-513 (mayor or councilmember of cities of the first class); 14-205 (officers of cities of the second class);

K.S.A. 1989 Supp. 14-308 (mayor or councilmember of cities of the second class); K.S.A. 15-201 (officers of cities of the third class); K.S.A. 1989 Supp. 15-311 (mayor of cities of the third class); K.S.A. 19-504 (county treasurer); 25-101b (state treasurer); 25-312 (state or county elective office); K.S.A. 1989 Supp. 25-312a (judge of district court); K.S.A. 25-1606 (township officers); 25-2022 (local boards of education); K.S.A. 25-3902, as amended by L. 1990, ch. 130, § 4 (district office, including office of district judge, district magistrate judge, county commissioner, state representative, state senator, district attorney or county attorney); 25-3902a, as amended by L. 1990, ch. 130, § 5 (state board of education); K.S.A. 25-3903 (state legislature or state board of education); K.S.A. 25-3904, as amended by L. 1990, ch. 130, § 6 (candidacy for district office); 25-3904a, as amended by L. 1990, ch. 130, § 7 (candidacy for state board of education); 25-3905; as amended by L. 1990, ch. 130, § 8 (vacancies after primary election; governor and lieutenant governor); 25-3906, as amended by L. 1990, ch. 130, § 9 (vacancies in candidacies occurring after filing deadline and prior to primary); K.S.A. 40-106 (insurance commissioner); 75-125 (governor). However, no separate provision exists expressly establishing a procedure to be followed for providing a replacement for an individual who has received a certificate of election but who has not yet taken the oath of office. It will be necessary to determine, therefore, whether such individuals are included within any of the legislation cited above.

Those individuals certified by the state board of canvassers as provided by K.S.A. 25-3201 et seq. who have not yet reached the date designated for taking the oath of office or whose election remains the subject of a contest pursuant to K.S.A. 25-1434 et seq. are members-elect of the legislature. See K.S.A. 46-142 et seq.; Rogers v. Shanahan, 221 Kan. 221 (1977). Such individuals are obligated to meet and caucus on the first Monday in December following election for the purpose of organizing the senate and the house of representatives. K.S.A. 46-142. Members-elect may also be called to attend orientation meetings or leadership conferences. K.S.A. 46-146a. Members-elect who attend the preorganizational meeting, orientation meetings, or leadership conferences are entitled to compensation for their services and reimbursement for their expenses at the same rates as are provided by law for attendance at sessions of the legislature. K.S.A. 46-144. Clearly, a member-elect of the legislature is required to undertake the duties of a member of the legislature prior to

taking the oath of office. However, as the act continues to recognize such individuals as members-elect, it is questionable as to whether the terms member and member-elect are synonymous.

There are no statutory definitions which would assist in determining whether a member-elect is to be regarded as a member for purposes of resigning the office of legislator. In the original enactment in 1968 of K.S.A. 46-142 et seq. it appeared that the legislature intended that the terms member and member-elect be interchangeable. See L. 1968, ch. 169. However, an amendment in 1975 deleted all references of the term member and replaced the term with member-elect. It is concluded therefore that the legislature recognized a distinction between a member and a member-elect and did not intend to confer additional privileges or duties upon a member-elect beyond those expressly conferred.

While case law regarding the proper construction of the term member-elect or member elect exists, the cases are specific to their situations and are of little assistance here. See Rogers, supra, 221 Kan. 221 ("member-elect" is an individual whose election is the subject of a contest; distinguished from "candidate"); Tucker v. Raney, 145 Kan. 256 (1937) ("member elect" includes individuals appointed to position); State Bank of Drummond v. Nuesse, 108 N.W.2d 283 (Wisc. 1961) (constitution of Wisconsin requires members of legislature to subscribe an oath or affirmation before entering upon duties of office; assemblyman-elect has no vote).

Therefore, because a member-elect lacks statutory authority permitting a member-elect to resign prior to taking the oath of office and undertaking the discharge of duties of the office, the common law remains in effect. A member-elect of the legislature cannot resign the position of member of the legislature until the individual has taken the oath of office prescribed in K.S.A. 54-106 and has undertaken the duties of a member of the legislature.

However, such prohibition does not preclude a member-elect of the legislature from providing notice of intent to resign at a date occurring after the member-elect has taken the oath of office and undertaken the discharge of duties of the office. Recognizing that it is in the public interest for an elected office to be filled, Rogers, supra, 221 Kan. at 227, the legislature enacted L. 1990, ch. 130, § 11, which states:

"When a written resignation from a district office as defined in K.S.A. 25-3901 and amendments thereto has been filed with the secretary of state or other officer provided by law, and at the time it is filed there is [sic] 10 or more days before it is to become effective, the county chairperson responsible for calling a convention for the purpose of filing [sic] the vacancy thereby created may call and hold the convention without further delay."

Thus, a member-elect of the legislature may submit at any time after receiving a certificate of election but prior to the date of taking the oath of office a resignation to become effective after the date of taking the oath of office and undertaking the discharge of duties of the office. L. 1990, ch. 130, § 11 permits the procedure for filling a vacancy in a district office as defined in K.S.A. 25-3901 to begin at the time such notice is provided. A member-elect, though not authorized to resign prior to taking the oath of office and undertaking the duties of a member of the legislature, may provide notice of the member-elect's intent to resign as a member of the legislature provided the resignation is to become effective after the member-elect has taken the oath of office and entered upon the discharge of its duties.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Richard D. Smith
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RTS:JLM:RDS:jm