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ATTORNEY GENERAL OPINION NO. 91- 20

The Honorable Audrey Langworthy
State Senator, 7th District
State Capitol, Room 143-N
Topeka, Kansas 66612

Re: State Departments; Public Officers and Employees --
Public Officers and Employees; Miscellaneous
Provisions -- Appointment of Acting State Officers
to Certain Positions; Qualifications; Senate
Confirmation

Synopsis: An acting officer is a temporary placeholder who
occupies a position only until a permanent
appointment is made; certain acting officers are
statutorily limited to a term not to exceed 12
months. Absent legislation to the contrary, an
acting appointee need not meet the same statutory
requirements to qualify for a position as are
required for a permanent appointee. Generally, an
acting appointee should not be confirmed by the
senate as such confirmation is the final step in
completing a permanent appointment. Cited herein:
K.S.A. 75-4315a; 75-4315b; 75-5203.

* * *

Dear Senator Langworthy:

As State Senator for the 7th District, you have asked our
opinion regarding (1) whether an acting appointee must meet
the same statutory requirements as a permanent appointee for
an appointive position and (2) whether appointments made under

the title "acting" must be confirmed by the senate when such is required of a permanent appointee.

Initially we note that only one statute addresses the classification of acting appointees. K.S.A. 75-4315a provides:

"Whenever it is provided by law that the governor shall appoint the secretary of any department of state government or the chief administrative or executive officer of any other agency of state government or that the secretary of any department of state government shall appoint the director of a division, whether any of the positions designated herein are in the classified or unclassified service of the Kansas civil service act, and whether such department, agency or division has been specified by statute or authorized by statute to be established, the governor or departmental secretary may appoint an acting secretary, chief administrative or executive officer or director to serve for a period not greater than twelve (12) months. Any acting state director appointed under authority of this section shall have and exercise all the powers, duties and functions of the office in which he or she is acting. Subject to the approval of the state finance council, the governor or the secretary appointing an acting state officer shall fix the salary of the acting state officer if the position is in the unclassified service, and in no event shall the salary of the acting state officer be less than the amount the person appointed is receiving in such person's permanent state employment. If the person appointed serves as an acting state officer for more than six (6) months, such person shall be paid the minimum rate of compensation established for the position in which such person is acting if such minimum rate of compensation is more than the compensation such person is receiving immediately prior to the expiration of such six (6) month period. In the event the person appointed

as an acting state officer is in the classified service prior to such appointment, such person shall retain the right to return to his or her permanent classified status without loss of any civil service right and his or her service shall be deemed to be continuous."

In order to reach the questions you pose, we first examine the nature of the position of an "acting" state officer. Neither Kansas case law nor K.S.A. 75-4315a define this term. However, the phrase "acting officer" has been used to designate, not an appointed incumbent, but merely locum tenens (Latin for "holding the place"), who is performing the duties of an office to which he himself does not claim title. State ex rel. Gossett v. O'Grady, 291 N.W. 497 (Neb. 1940); State Bank of Williams v. Gish, 149 N.W. 600 (Iowa 1914).

Legislative history of K.S.A. 75-4315a also sheds light on the nature of an "acting" officer.

"Mr. Pitner stated the bill was introduced at the request of the Department of Administration and would provide for the existence of acting directors statutorily to serve in the absence of a division head. He noted the bill would restrict acting directors from being appointed for a term lasting more than 6 months. He presented amendments which would broaden the bill to include acting secretaries (attachment No. 2) and would clarify that these acting officers and executives would be unclassified and appointed with the knowledge they were not permanent." Minutes of Senate Committee on Federal and State Affairs, March 12, 1976 (emphasis added).

Further, the language of K.S.A. 75-4315a contemplates that an acting officer may be appointed from within an agency, such person temporarily serving in the acting position for a maximum of twelve months.

An acting officer is therefore a temporary place-holder subject to the twelve month limitation, occupying the

appointive position only until such time as a permanent appointment is made.

Turning now to your first question, we note that many Kansas cases indicate the legislature may constitutionally restrict, by way of statute, the gubernatorial choice of an appointee by imposing explicit qualifications such as limiting the choice to persons with certain educations, to residents of a particular geographic area, to members of a certain occupation, to persons of a particular political party, or to legislators. Leek v. Thomas, 217 Kan. 784, 807 (1975) (citations omitted). However, while the legislature has restricted the type of permanent appointee for various state offices, it has not generally done likewise regarding acting appointees. (Acting appointees for specific offices may have specific statutory limitations, but absent such specific limitations there is no general requirement for having the same qualifications as a permanent appointee to the same office.) The only general statutory restriction placed on an acting appointee is the twelve-month limitation of service. By the conclusion of that time frame a permanent appointment must be made by the appointing authority as the acting officer is merely a temporary place-holder. If the legislature wishes to require an acting appointee to have the same qualifications as a permanent appointee, the legislature can so direct. Presumably, the legislature has not so directed for all acting appointees because of the necessity of having a designated agency head at all times. Circumstances may be such that some time is needed to locate a properly qualified permanent agency head.

Absent legislative direction that an acting appointee possess the qualifications required of a permanent appointee, it is our conclusion that an acting appointee need not meet the statutory qualifications required for a permanent appointive position.

We note that Attorney General Opinion No. 90-80 also addressed in part the status of an acting director. However, the appointive position discussed therein was one made by the racing commission. Thus, K.S.A. 75-4315a which pertains only to certain acting appointments made by the governor and department secretaries was not applicable.

We now turn to the question of whether an acting appointee must be confirmed by the senate when such is required of a permanent appointee. K.S.A. 75-4315b(a) provides:

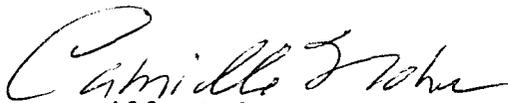
"All appointments of public officers which are subject to confirmation by the senate shall be received, considered and acted upon in the manner provided by rules of the senate. . . ."

From the foregoing statute it is clear that only appointments of public officers which are statutorily subject to confirmation by the senate are to be received, considered and acted upon by the senate. In such cases confirmation by the senate is the final step in completing the appointive process. In the absence of a specific statute to the contrary (e.g. K.S.A. 75-5203(c) providing for senate confirmation of an acting secretary of corrections), an acting appointee should not be confirmed by the senate as such appointment is not statutorily subject to senate confirmation.

In conclusion, absent legislation to the contrary, an acting appointee need not meet the same statutory requirements to qualify for a position as are required for a permanent appointee. An acting appointee should not generally be confirmed by the senate as such confirmation is the final step in completing a permanent appointment.

Very truly yours,


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