

MUNICIPAL CORPORATIONS:

No vacancy is created in office until officer's resignation is accepted, construction of statute 6973 R. S. Missouri, 1929.

RESIGNATION OF COUNCILMAN:

January 15, 1940

Hon. Paul J. Dillard
Prosecuting Attorney
Laclede County
Lebanon, Missouri



Dear Sir:

We are in receipt of your request for an official opinion, under date of January 11, 1940, together with a statement of facts thereto attached. Your question and statement of facts is as follows:

QUESTION

"Is the appointment of Claude O'Dell, by the mayor, on December 4th, 1939, to fill the vacancy created by the resignation of Alderman Elmer Holman July 19, 1939, in conformity with Ordinance No. 151 of the City of Lebanon, Missouri, and in conformity with Section 6973 R. S. 1929 (on which said ordinance is based) and as such appointee can he legally serve on said Board or should such vacancy created by the resignation of Alderman Elmer Holman, since it occurred more than six months prior to the general Municipal election in said City, to wit: April 1940, have been filled, if at all, by special election?"

STATEMENT OF FACTS

"Lebanon, Missouri is and was at all times herein mentioned a Municipal Corporation and City of the Fourth Class.

"At the regular Municipal Election held in said City in April 1938 Elmer Holman was duly elected as Alderman of the Second Ward. On May 2, 1938 he took the oath of office, qualified and from and after that date duly served on the Board of Aldermen until the 19th day of July, 1939 at which time he filed with the City Clerk the following resignation:

'July 19, 1939.

'Honorable Mayor and Board of Aldermen, City of Lebanon, Missouri.

'I hereby tender my resignation as Alderman from the Second Ward of the City of Lebanon, Missouri.

'To be effective from this date.

Elmer Holman,
Alderman.'

"On the same date, to-wit: July 19, 1939 the above resignation was read by the City Clerk, at a regular meeting of the City Council, to the Mayor and Board of Aldermen, and a minute made thereof.

"No action accepting or rejecting the resignation was taken by the Council but there is no ordinance of the City of Lebanon, designating or requiring

any action to be taken on presentation of a resignation of an elective officer of the said City.

"The said Elmer Holman from and after the said July 19, 1939 never attended any meeting, sat as a member of the Council nor did he after that date take any part whatever in any meeting of the Council. Neither did he, after said date, accept any pay as an Alderman. He actively ceased all connection as a member of the Board of Aldermen on said date.

"At the time that his resignation was read to the Council, the City Clerk informed the Mayor and Board of Aldermen, that under the City Ordinance, since this resignation occurred more than six months prior to the next general Municipal Election in said City, that in order to fill a vacancy, that a Special Election would have to be called.

"No action was taken by the Board of Aldermen to call a special election, and none was called or had and the seat of Alderman Holman remained vacant until the 4th day of December 1939 when the Mayor of the City of Lebanon, Missouri appointed Claude O'Dell as a member of the board of Aldermen and as Alderman from the Second Ward to fill the vacancy created by the aforesaid resignation of Alderman, Elmer Holman.

"The Ordinance that the City Clerk had reference to when he advised the Mayor and the Board of Aldermen on July 19th, 1939, at the time the resignation of Alderman Holman was read, is Ordinance No. 151 of the Ordinances of the City of Lebanon, Missouri, and which said Ordinance had been duly adopted and passed and was in

full force and effect at the time. A certified copy of said Ordinance is herein enclosed and made a part of this statement.

"The said Claude O'Dell, under the purported appointment made by the Mayor under date of December 4th, 1939 took oath of office, and has participated in one adjourned and one regular meeting of the City Council, acting in the capacity as an Alderman from the Second Ward.

"The minutes of the meetings of the City Council show that there were objections made to his appointment prior to the time that he took oath of office or participated in any meeting of the Council."

A public office may be abandoned. Abandonment is a species of resignation; resignation and abandonment are voluntary acts. The former is a final relinquishment to the non-user. See *McCall v. Cull*, Ariz. 75 P. (2d) 696, Words and Phrases, 4th Ed. ____.

In the case of *Commonwealth ex rel. Wootton*, (Ky.) Attorney General v. Berninger, 74 S. W. (2d) 932, the Court said:

"At the regular election held in the year 1933, Berninger was elected one of the commissioners of the city of Newport for a term of two years. Within the proper time he qualified by taking the necessary oath and executing the required bond, and entered upon the duties of his office on the first Monday in January, 1934. Thereafter, he attended the regular sessions of the board of commissioners and performed the duties of his office until January 30, 1934. On that day the board was in regular session

and he submitted to the board the following communication signed by him and addressed to the mayor and city commissioners: 'Accept my resignation as City Commissioner to be effective on this date, January 30, 1934.'

"On the reading of the communication by the clerk it 'was laid over indefinitely' by unanimous vote. No further action on the communication was taken by the board until its regular session held on March 13, 1934. Berninger was present on that occasion and presented and had read a communication stating in substance that he had been informed that his resignation was not effective for the reason that it had never been accepted by the board, and no successor was appointed or qualified to fill the office, and that he desired to withdraw the resignation, giving as his reasons the fact that his health had been restored by his recent vacation; that if his resignation became effective, it would mean considerable expense to the city in holding an election in November; and that he had received many communications from the business organizations of the city and petitions signed by many citizens of the community requesting his return. For these reasons he felt honor bound to continue in the office and perform the trust imposed upon him by the voters of the city. The communication was received by the board and ordered filed and spread upon its minutes. No further action was taken by the board. By reason of these facts the resignation was never accepted by the board or any officer, and no vacancy in the office ever existed or was attempted to be filled."

And the Court further said:

"* * * the resignation of a public officer does not become effective until accepted by the proper authority, or by equivalent action, such as the appointment of a successor. Tabor v. Webb, 227 Ky. 611, 13 S. W. (2d) 758; Patrick v. Hagins, 41 S. W. 31, 19 Ky. Law Rep. 482; Schaklett v. Town of Island, 146 Ky. 798, 143 S. W. 369, Ann. Cas. 1913C, 602; 46 C. J. 978, Sec. 129, note 40.

* * * * *

"Nor are we impressed with the argument that an officer has the absolute right to resign when he pleases, and that our rule infringes this right. The basis of the rule is that the right of the incumbent is subordinate to the right of the people to the maintenance of an orderly government. An able discussion of the question is found in the following language of Mr. Justice Bradley in Edwards v. United States, 103 U. S. 471, 473, 26 L. Ed. 314:

* * * * *

This being a case in which the officeholder filed his resignation but the same was not accepted, and the Court held:

"As Mr. Berninger's resignation never became effective by acceptance or otherwise, it follows that he had the right to withdraw his resignation and resume the duties of his office."

We set forth this case to show that the court's have ruled that the formal filing of a resignation is not enough where a person holds a public office and has the responsibility of carrying out the function and operation of government and maintaining public order, and that he still holds his office until his resignation is accepted, or in light of the above decision he would have a right to withdraw his resignation before the same had been formally accepted by the authorities who were by statute designated to accept the same.

In the case of *Tabor v. Webb, et al.* (Ky.) 13 S. W. (2d) 758, which statement of facts and opinion of the court we are herein setting out very fully due to the fact that we feel that you will not perhaps have this case before you. We hold that this case clearly states the law and is applicable to the situation and the statement of facts as set forth in your request. The Court said:

"On July 25, 1928, Milton Haywood and W. R. De Hart resigned as councilmen, stating in their resignations that they were to be immediately effective. At least one of these resignations was published in a local newspaper on August 2, 1928. The next regular meeting of the city council after these resignations were written was August 6, and on that day the council met, but, because the records were not on hand, they adjourned to meet again on August 13, at which date they accepted the resignations of Haywood and De Hart, and elected Dr. B. F. Morgan and Walter Abbott in their stead.

"One of the principal questions in this case is whether the resignations of Haywood and De Hart became effective on July 25, the date they were written, on August 6, the date they could have been accepted, or on August 13, the date they

were actually accepted, because, if these resignations did not become effective until accepted, then Abbott and Morgan were appointed less than three months before the election in November, 1928, and would therefore hold their places until the regular election in November, 1929, whereas, if these resignations became effective on the date they were written, July 25th, or August 6th, the date they could have been accepted, then these vacancies occurred more than three months before the November election, and they are vacancies which should be filled at that election. The answer is that there is no vacancy until the resignation is accepted. See Patrick v. Hagins, 41 S. W. 31, 19 Ky. Law Rep. 482; Shacklett v. Town of Island, 146 Ky. 798, 143 S. W. 369, Ann. Cas. 1913C, 602. This is the general rule, in the absence of a statute on the subject. 46 C. J. 978, Sec. 129, Note 40. The reason for this rule is well stated in Edwards v. U. S., 103 U. S. 471, 26 L. Ed. 314. It follows that the only vacancies to be filled were those of mayor and a councilman to take the place of W. H. Scott.

"Certain parties had nominated what they call a 'Citizen's Ticket' and put in nomination three men for councilmen, Freeman S. Webb, C. S. Cartee, and E. A. Garber. Of these, Cartee led the ticket, and received 395 votes. Certain other citizens nominated what they call the 'Independent Ticket.' They only nominated one candidate for councilman, and that was the appellant, Floyd Tabor, who received only 223 votes. There was only one vacancy to be filled, to fill that, C. S. Cartee was elected. The positions held by Dr. B. F. Morgan

and Walter Abbott could not be filled at the November election, 1928. Unless they have resigned, they are still legal councilmen of Olive Hill."

In the case of United States v. Green, 53 Fed. 769, l. c. 770, the facts were as follows:

"Mayor's office, Lathrop, Mo., Mch. 28, 1889. By call of the mayor, a special meeting of the city council was held this date. Mayor in the chair. Aldermen all present. The call for convening council was read and filed. M. A. Goff, Prest. of the board of aldermen, and alderman from the First Ward, tendered his resignation, which, upon motion, was accepted, to take effect upon adjournment. Wm. McK. Lowe, alderman from the Second Ward, tendered his resignation, and, upon motion, the same was accepted, to take effect upon adjournment. H. M. Freeman, alderman from the Second Ward, tendered his resignation, and, upon motion, the same was accepted by the mayor, to take effect after adjournment. J. C. Bohart then tendered his resignation as alderman from the First Ward, which, upon motion, was accepted by the mayor to take effect after adjournment. Council then, upon motion, adjourned sine die."

And the court held upon this statement of facts as follows:

"The resignation may be made to and accepted by the officers named; but, to become perfect, they depend upon and must be followed by an additional fact, to wit, the appointment of a successor, and his qualification. When it is said in the statute that the resignation may be thus accepted, it is like to the expiration of the term of office. In form the office is thereby ended, but to make it effectual it must be followed by the qualification of a successor."

and the holding was made having Section 5 of Article XIV of the Constitution of Missouri before the court, which said Section 5 of Article XIV reads as follows:

"In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

See also Section 6951, R. S. Missouri, 1929 and Section 6973, R. S. Missouri, 1929.

Therefore, in the light of these sections and the cases herein set forth, one is forced to the conclusion that when Elmer Holman, the duly elected and qualified alderman tendered his resignation as of June 19, 1939, as is set forth in this opinion, and that the same was tendered by the City Clerk at a regular meeting of the City Council to the Mayor and Board of Aldermen and a minute made thereof, but no action was taken at that time by said body, that said paper writing was nothing more than a tendered resignation and when the mayor failed to call a special election, which he without doubt had a right to do, because of the fact that said

tendered resignation was at a date which was more than six months before the date of the general election, that there was no formal acceptance of said attempted or tendered resignation in the light of the authorities. We are further forced to the conclusion that when the interim of time elapsed and no action having been taken by the mayor, or any person exercising the duties of mayor, and there remained a period of time which was within six months of the general election, then the last subdivision of Section 6973 R. S. Missouri, 1929, became controlling in the situation for the statute provides that no vacancy in the office of alderman which may occur within said six months preceding a general municipal election, shall be filled in such a manner as may be prescribed by the ordinances.

Turning to the statement of facts and ordinances as certified by Ralph Shafer, City Clerk of Lebanon, Missouri, we find that the city had this ordinance:

"Section 12. When a vacancy occurs in any Elective office, within six months of a general municipal election, no election shall be called to fill such vacancy, but the same shall be filled by the Mayor, or the person exercising the duties of Mayor, by appointment. This section shall apply to the members of the Board of Aldermen, the same as any other elective officers."

Thus, following Section 12 of Ordinance No. 151, we conclude under Section 6973, supra, that the city had a right to create and pass that part of the ordinance which is designated as Section 12. This being true, and the further fact being that the resignation of Elmer Holman, Alderman, still being before the city council, and having not been acted upon and the further fact being as shown by the statement that Elmer Holman had failed and refused since June 18, 1939 to attend any meetings had as a member of the council, or to take any part whatever in a meeting of the council after the said date, that the vacancy of Elmer Holman

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could be filled according to the terms of Section 6973, supra, and the authorities interpreted similar sections in different jurisdictions as are taken by this office as controlling and authority.

CONCLUSION

Therefore, in conclusion, this office is of the opinion that Claude O'Dell is the duly appointed and acting alderman of the City of Lebanon, Missouri.

Respectfully submitted,

B. RICHARDS CREECH
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

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