

ELECTIONS: Person appointed during Senate recess to fill
OFFICERS: vacancy on Kansas City Election Commission caused
by resignation entitled to pay.

February 9, 1950



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Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

"On June 30th, 1949, Governor Forrest Smith named four people to the Board of Election Commissioners of Kansas City, Missouri. Among those names was Elmo B. Hunter of Kansas City, Missouri. The names of all four members were submitted to the Senate by Governor Smith and were referred to the Senate Committee on elections. On July 1st, 1949, two of the names submitted were confirmed, namely, Ray Ecklund and Harold Marshall, and no action was taken by the Senate Committee with regard to the names of Mr. Hunter and the fourth appointee, Mr. Paul Walker. The Senate then recessed for the summer. On July 7th, 1949, Mr. Joseph Stewart, Democratic member of the Election Board who was holding over, resigned and his resignation was accepted on that date. On July 8th, 1949, while the Senate was in summer recess, Governor Smith appointed Elmo B. Hunter to the Election Board and issued him the usual commission. On that same date, he took the oath of office and otherwise qualified and entered upon the performance of his duties. He acted in all respects as a working member of the Election Board until November 8th, 1949, attending all meetings and otherwise performing the work of a member of the Board. On October 31st, 1949,

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the Senate reconvened from its summer recess and at the request of the Senate, Governor Smith resubmitted the names of Elmo B. Hunter and Paul Walker for confirmation. On November 8th, 1949, the Senate Subcommittee on Elections reported favorably to the Senate on Paul Walker and reported unfavorably on Elmo B. Hunter. Before any Senate action was taken with regard to that report, Governor Smith withdrew Mr. Hunter's name and as of that date Mr. Hunter ceased in the performance of any work under his interim appointment on the Board.

"Please advise whether or not the City of Kansas City may lawfully pay Mr. Hunter the statutory salary provided for a member of the Board of Election Commissioners of Kansas City, Missouri, for the time he performed his duties with that Board, namely, July 8th, 1949 to November 8th, 1949."

Section 12097 is a part of Article 23, Chapter 76 of the Revised Statutes of Missouri, 1939, which article relates to the holding of elections in cities of 300,000 to 700,000 inhabitants, and is applicable to Kansas City, Missouri. Said Section 12097 provides, in part, as follows:

"There is hereby created a board of election commissioners for each city that is governed by the provisions of this article, composed of four members. The first members of the Board of Election Commissioners shall be appointed as follows: Within sixty days after this article shall become effective, the Governor shall appoint, by and with the advices and consent of the Senate, for each of such cities four Election Commissioners, one of whom shall be by him designated as the Chairman of the Board, and another shall be by him designated as Secretary of the Board, which said Chairman and Secretary shall be of opposite politics. Said Election Commissioners, two of each party, shall be appointed for a term expiring January 15, 1941, and until their successors are commissioned and qualified. With the appointing

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and qualifying of the new election commissioners, as herein provided, the respective terms of office of any election commissioners appointed under any previous law applying to such city shall terminate. Successors shall be appointed in like manner for terms of four years, and until their successors are commissioned and qualified. Two of said election commissioners so appointed by the governor shall be members of the leading political party opposed to that to which the governor belongs. In case of a vacancy in said board from any cause whatever, it shall be filled by appointment for the unexpired term, in the same manner as in the case of original appointments, save that the appointee shall be a member of the same political party to which the person whom he may succeed belonged, and in no case shall more than two members of said board belong to the same political party. * * *"(Emphasis ours.)

It is the general rule, as stated in *Schulte v. City of Jefferson*, 273 S. W. 170, that:

"Where the appointment is made as the result of a nomination by one authority and confirmation by another, the appointment is not complete, until the action of all bodies concerned has been had, and the body which has been intrusted with the power of confirming appointments may reconsider its action before any action based upon its first decision has been taken."

In 42 Am. Jur. 962, Section III, it was said:

"Constitutional or statutory provisions may require appointments to public office or to certain designated offices to be approved or confirmed by some body other than the appointing power; and until this is done the appointee may not be legally entitled to the office, and the former incumbent of the office may hold over until such confirmation of his successor's appointment is had."

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The same rule is laid down in 46 C. J. , page 953. However, this rule applies when the confirming authority (in this case the Senate) is in session and there is an incumbent filling the office.

There are no cases in Missouri dealing with the question as presented in your request; that is, if there is "an absolute vacancy" as distinguished from a vacancy which is being held by the incumbent holding over after his term has elapsed. We do not in this opinion pass upon the situation as to whether the Governor may fill the vacancy without confirmation by the Senate when there is an incumbent holding the office (See 164 A. L. R., page 1249).

Mechem on Public Officers, page 67, par. 134, sets forth the rule as follows:

"It is frequently provided by the constitutions of the States, as by that of the United States, that the executive - the governor or president - shall have power to fill certain vacancies by appointments made 'by and with the advice and consent of the senate.' Where such a provision exists, the executive can only exercise the appointment without such advice and consent where, since the adjournment of the senate, a vacancy exists or has occurred (words held to mean the same thing) by the death or resignation of the incumbent or by the happening of some other event by reason of which the duties of the office are no longer discharged. If the senate be in session when the vacancy occurs, it can be filled only by and with the advice and consent of that body, unless the senate has adjourned before the vacancy is filled.

"If the vacancy is accidental and occurs or exists while the senate is not in session, and the concurrence of the senate has not been had, the appointment is temporary and contingent upon confirmation. In the event that it is not confirmed by the senate at its next session, either because the name was not sent in or was rejected, the appointment becomes inoperative from the moment of the adjournment of that session or from the moment of its rejection, as the case may be."

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Section 4, Article IV of the Constitution of Missouri, 1945, provides:

"The governor shall fill all vacancies in public offices unless otherwise provided by law, and his appointees shall serve until their successors are duly elected or appointed and qualified."

The purpose and meaning of Section 4, Article IV, supra, is given in the case of State ex inf. Hadley ex rel. Wayland v. Herring, 208 Mo. 708, 106 S. W. 984, 1c.726, as follows:

"The framers of our Constitution when they drew section 11, article 5 thereof, were considering vacancies in public offices; they foresaw that for various reasons such vacancies were inevitable, and in order to prevent and provide for these vacancies as far as possible in order that the public good should not suffer thereby, they framed this section, and gave to the Governor the power to fill these vacancies when they were not otherwise provided for by law.* * The obvious purpose in conferring this authority upon the Governor was to prevent any interregnum in the office, and to have some person always authorized to discharge its duties. * * *"(Emphasis ours.)

In the present situation, Mr. Stewart, the predecessor of Mr. Hunter, had resigned and there was an absolute vacancy in the office, the duties of which no one was authorized to perform. When Mr. Hunter was appointed the Legislature was not in session, but was in recess. What was said in The People v. Fancher, 50 N. Y. 288, is especially applicable to the facts herein. In that case the Court of Appeals said:

"The evil to be guarded against by a temporary appointment was a vacancy in an important office, the duties of which cannot be performed by deputy or substitute. The remedy or preventive of the possible evil provided is an appointing power, capable of acting at all times and in any emergency, viz., the governor alone, if the senate is not in session; and the governor and senate, if that body is in session.

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"* * *But when the sittings are terminated by an adjournment for months, and the actual meeting or sitting of the body thus interrupted, although the session is continued, it cannot be said that the body is 'in session.'
* * *"

In the case of State ex inf. Major ex rel. Sikes v. Williams, 222 Mo. 268, 121 S. W. 64, the Supreme Court had before it for construction a law relating to the appointment of a factory inspector by "The Governor of the State, with the advice and consent of the Senate." While the court in its opinion construed a particular statute, still the reasoning set forth therein, we believe, applies to the facts at hand (Mo. l. c. 283):

"* * *The law does not contemplate that there can be no occupant of the office until both the Governor and Senate have acted. Were that true, in case of the death of an occupant at a time when the Senate was not in session, the business of the office would have to cease until the Senate met. Such was never in the minds of the members of the General Assembly. * * *"

In 17 American & English Annotated Cases, page 1006, the Williams case, supra, is reported, and in the annotation to said case the rule is stated that:

"A vacancy, caused by death, resignation, removal, or other cause, so that there is no one to perform the duties of the office, may be filled by appointment during a recess of the confirming body."

In State ex rel. Nagle v. Stafford, 34 P. (2d) 372, the Supreme Court of Montana, citing cases from eight other jurisdictions, including the Williams case, said, l. c. 379:

"* * *appointments under consideration come within the general rule that 'where a person is appointed to an office under a constitutional or statutory provision that the appointment may be made with the approval of some officer or body, such appointment must be approved before the person is legally entitled to the office, except in the case of such a vacancy in the office that the duties of the office are no longer being discharged. ' * * *"

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In view of the above authorities, it will be seen that where an appointment to an office must be made by the Governor, by and with the advice and consent of the Senate, in the case of an absolute vacancy caused by death or resignation of the incumbent during the time that the Senate is not in session, the Governor may make an interim appointment until the Senate convenes and either confirms or rejects the appointment.

Applying the above rule to the facts at hand, it would appear that when Mr. Hunter was appointed to the Board of Election Commissioners of Kansas City, Missouri, to fill the vacancy caused by the resignation of Mr. Stewart, in view of the fact that the Senate was not in session such appointment was proper and Mr. Hunter was a de jure officer during the time that he served. As such de jure officer, Mr. Hunter was entitled to the pay and emoluments of such office.

CONCLUSION

It is, therefore, the opinion of this department that a person appointed by the Governor to the Board of Election Commissioners of Kansas City, Missouri, to fill a vacancy caused by the resignation of one of the members, which appointment was made at the time the Senate was not in session, is a valid appointment. If the appointment is withdrawn before the Senate reconvenes and acts upon said appointment, then the person is entitled to the pay from the date that he was appointed until the date that his appointment was withdrawn.

Respectfully submitted,

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APPROVED:

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