

VACANCY: Members of Board of Aldermen in cities
of Fourth Class.

5-18

May 13, 1935



Mr. Roland Merrigan
City Clerk
Conception Junction, Missouri

Dear Sir:

We wish to acknowledge receipt of your letter
in which you state as follows:

"In our recent city election the two candidates who were placed on the official ballot for alderman of the First Ward refuse to qualify for the office. The Alderman who is now holding the office also refuses to continue to hold it. At the election the name of R. Merrigan was written in and received one vote. Could Mr. Merrigan qualify for the office or will it be necessary for us to hold another election to fill the vacancy."

Section 6094 Revised Statutes Missouri 1929,
provides how villages may become cities of the fourth
class thus:

"All towns not now incorporated in this state containing less than five hundred inhabitants, are hereby declared to be villages. Provided, that any village in this state now or hereafter having more than two hundred inhabitants may by majority vote of the

qualified electors therein elect to become a city of the fourth class."

The last national census shows that Conception Junction, Missouri had a population of 514, and to be incorporated. We assume that Conception Junction elected to become a city of the fourth class.

Section 6951 Revised Statutes Missouri 1929, sets out the terms of the elective officers thus;

"The following officers shall be elected by the qualified voters of the city, and shall hold office for the term of two years and until their successors are elected and qualified, to-wit: Mayor, marshal, collector and board of aldermen, and the board of aldermen may provide by ordinance that the same person may be elected marshal and collector, at the same election, and hold both offices and the board of aldermen may provide by ordinance for the election of city assessor, city attorney, city clerk and street commissioner, who shall hold their respective offices for a term of two years and until their successor shall be elected or appointed and qualified."

Under the above provision the members of the board of aldermen hold office for the term of two years and until their successors are elected and qualified.

Section 6963 Revised Statutes Missouri 1929, provides for the election of alderman thus;

"The board of aldermen shall, by ordinance, divide the city into not less than two wards, and two aldermen shall be elected from each ward by the qualified voters thereof, at the first election for aldermen in cities adopting the provisions of this article. At such election for

aldermen, the person receiving the highest number of votes in each ward shall hold his office for two years, and the person receiving the next highest number of votes shall hold his office for one year; but thereafter each ward shall elect annually one alderman, who shall hold his office for two years."

Section 5, Article XIV of the Constitution of Missouri, provides 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."

You state that two candidates refused to qualify for the office of alderman. Our court has held that such a situation does not create a vacancy in office; that the incumbent is entitled to hold office until a successor is elected or appointed and qualified.

In the case of State v. Brown 274 S. W. 965, l. c. 967, the court said:

"The law is well settled that, where a public officer is elected or appointed to hold office for a definite period, and until his successor is appointed or elected and qualified, failure to appoint or elect a successor at the end of such period does not work a vacancy. State ex rel. Luck, 18 Mo. 333; State ex rel. Stevenson v. Smith 87 Mo. 158. It follows that the incumbent properly holds until his successor is elected or appointed and qualified, and it is then only that his term expires. State

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ex rel. Robinson v. Thompson, 38 Mo. 192; State ex rel v. Ranson, 73 Mo. 78.

The law under which appellants were appointed fixed their terms of office at one year, and contemplated that at the end of that time new appointments would be made. But, since the appointing power might not be promptly exercised, to prevent a vacancy the law provided for the incumbents to hold over until their successors were appointed and qualified. This is a wise rule as applied to public officers, for thereby the public is protected from possible evils naturally attendant upon a situation wherein neglect and waste might result. This contingency, as contemplated by the law, enters into every such appointment, and it must be concluded that the time an incumbent holds over the designated period is as much a part of his term of office as that which precedes the date when the new appointment should be made. The authorities are uniform on this rule, and we think there can be no question about it."

Thus we see that the present incumbent would be entitled to hold office until his successor had been duly elected and qualified. However, you state that an alderman now holding the office refuses to continue to hold it and in such instance a vacancy would clearly exist.

You inquire as to whether the name R. Merrigan, whose name was written in and received one vote, could qualify for office in the place of two candidates who received the highest number of votes but did not qualify.

In an opinion rendered by this department addressed to Leo A. Politte, Prosecuting Attorney, a copy of which we are inclosing, a similar question was raised and we ruled as follows:

"We fail to find any provision in the statutes allowing those persons receiving the next highest vote to qualify as

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officers in cities of the Fourth Class, as suggested in your letter."

Section 6973 Revised Statutes Missouri 1929 provides as follows:

"If a vacancy occur in any elective office, the mayor or the person exercising the duties of the mayor shall cause a special election to be held to fill such vacancy, giving at least ten days' notice thereof by publication in some newspaper published in the city, or at least twenty handbills posted up at as many public places within the city: Provided, that when any such vacancy occurs 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 the mayor by appointment: Provided further, that any vacancy in the office of alderman which may occur within said six months preceding a general municipal election shall be filled in such manner as may be prescribed by ordinance. If a vacancy occur in any office not elective, the mayor shall appoint a suitable person to discharge the duties of such office until the first regular meeting of the board of aldermen, thereafter, at which time such vacancy shall be permanently filled."

From the foregoing, we are of the opinion that under the circumstances should the present incumbent resign or refuse to hold over until his successor is elected or qualified, then a vacancy exists and should

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be filled in accordance with the provisions of Section
6973 Revised Statutes Missouri 1929.

Respectfully submitted,

J. E. TAYLOR
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General.

JET
MW:LC

Inclosure