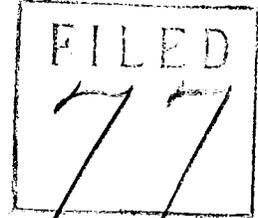


SHERIFFS: Special election to fill vacancy.

January 18, 1941

Hon. J. E. Rowland
Presiding Judge
County Court
Rolla, Missouri



Dear Sir:

This will acknowledge receipt of your letter of January 14, 1941, in which you request an opinion on four questions concerning a special election to be held in your county to fill a vacancy in the office of sheriff. The four questions you asked are herein set out, and are as follows:

"1. Shall candidates for the office of sheriff to be voted on at this special election be selected by the Central Committees of the 2 political parties and the names of the candidates so selected by the Committees certified to the County Clerk to be printed on the ballot, or if not by that manner, in what manner shall candidates for the office be officially placed on the ballot?

"2. Is it necessary to print and furnish ballots similiar to ballots used at the general election?

"3. Is it necessary to provide voting places in all the precincts of the county as in general elections and with the full number of judges and clerks as provided under the general election laws?

"4. Does the sheriff elected at this special election serve the full remaining 4 year term or does he serve only until the next regular general election?"

The office of sheriff is a constitutional office being provided for in Section 10, Article IX of the Constitution.

"There shall be elected by the qualified voters in each county on the first Tuesday next following the first Monday in November, A. D, 1908, and thereafter every four years, a sheriff and coroner. They shall serve for four years and until their successors be duly elected and qualified, unless sooner removed for malfeasance in office. Before entering on the duties of their office, they shall give security in the amount and in such manner as shall be prescribed by law, and shall be eligible only four years in any one period. Whenever a county shall be hereafter established, the Governor shall appoint a sheriff and coroner therein, who shall continue in office until the next succeeding general election and until their successors shall be duly elected and qualified."

And the filling of a vacancy occurring in the office of sheriff is also provided for in the Constitution, Article IX, Section 11.

"Whenever a vacancy shall happen in the office of sheriff or coroner, the same shall be filled by the county court. If such vacancy happen in the office of sheriff more than nine months prior to the time of holding a general election, such county court shall immediately order a special election to fill the same, and the person by it appointed shall hold office until the person chosen at such election shall be duly qualified; otherwise, the person appointed by such county court shall hold office until the person chosen at such general election shall be duly qualified. If any vacancy happen in the office of coroner, the same shall be filled for the remainder of the term by such county court. No person elected or appointed to fill a vacancy in either of said offices shall thereby be rendered ineligible for the next succeeding term."

In accordance with the last section above the General Assembly has enacted Section 11523, Article 2, Chapter 73, directing the method of filling a vacancy in the office of sheriff, this section is as follows:

"Whenever from any cause the office of sheriff becomes vacant, the same shall be filled by the county court; if such vacancy happen more than nine months prior to the time of holding a general election, such county court shall immediately order a special election to fill the same, and the person by it appointed shall hold said office until the person chosen at such election shall be duly qualified, otherwise the person appointed by such county court shall hold office until the person chosen at such general election shall be duly qualified; but while such vacancy continues, any writ or process directed to the said sheriff and in his hands at the time such vacancy occurs, remaining unexecuted, and any writ or process issued after such vacancy, may be served by any person selected by the plaintiff, his agent or attorney, at the risk of such plaintiff; and the clerk of any court out of which such writ or process shall issue shall indorse on such writ or process the authority to such person to execute and return the same, and shall state on such indorsement that the authority thus given is 'at the request and risk of the plaintiff;' and the person so named in said writ or process may proceed to execute and return said process, as sheriffs are by the law required to do. Such election shall be held within thirty days after the vacancy occurs, and the county court shall cause notice of the same to be published in some newspaper published within the county, and if there should be no newspaper published in said county, shall then give notice, by ten written handbills, posted up in ten of the most public places in the county, for twenty days prior to the day of holding such election. Upon the occurrence of such vacancy, it shall be the duty of the presiding justice of the county court, if such court be not then in session, to call a special term thereof, and

cause said election to be held in pursuance of the provisions of this section, and the election laws regulating general elections in this state."

It will be observed that this section requires the special election therein provided for to be held in accordance with the provisions of the section and the laws regulating general elections. Inasmuch as the laws regulating general elections provide for the furnishing of ballots by the county clerk, the erection of booths and for the appointment and qualifications of judges these provisions would necessarily have to be followed in a special election to fill a vacancy in the office of sheriff.

A search of the statutes reveals there are three methods of making nominations, by primary election in accordance with the terms of Article 5, Chapter 61, of the Revised Statutes of 1929. Inasmuch as by the terms of Section 10253 of this article and chapter it does not apply to elections to fill vacancies, there can be no election by primary election.

"Hereafter all candidates for elective offices shall be nominated by a primary election held in accordance with this article. This article shall not apply to special elections to fill vacancies, nor to county superintendents of schools, to city officers not elected at a general state election, to town, village or school district officers."

Section 10246 R. S. 1929, authorizes the making of nominations by the central committee of a political party to fill vacancies occurring after the holding of the primary election or where no one offers himself as a candidate. And this method is not available. In the case of State ex rel. v. Roach 269 Mo. 500, the Supreme Court in discussing the meaning of Section 5870 R. S. 1929, which is not section 10246, said at l. c. 504:

"The word 'Vacancies' used in this statute has reference only to vacancies upon the tickets nominated August 1st, and to no other vacancies.

There was no vacancy upon any ticket nominated August 1, 1916, and this part of the statute affords no authority for relator's nomination. There was no vacancy upon the ticket for this office because his office at the date of the primary was not an office to be filled and therefore could not have been upon such primary ticket."

This leaves as the only method of making nominations by certificate signed by the requisite number of electors in accordance with Article 4, Chapter 61, R. S. 1929, the number required being set out in Section 10241, which is as follows:

"The certificate of nomination of a candidate selected otherwise than by a primary shall be signed by electors resident within the district or political division for which the candidate is presented, to a number equal to two per cent, of the entire vote cast at the last preceding election in the state, the county or other division or district for which the nomination is made: provided that said signer shall declare in said certificate that they are bona fide supporters of the candidate sought to be nominated and have not aided and will not aid in the nomination of any other candidate for the same office."

As to how long the person elected at this special election shall hold the office of sheriff, the Constitution of Missouri in Section 11 of Article IX, supra, recognizes this right of the people to fill vacancies in elective offices by election and directs the filling of the office of sheriff as soon as possible by election. By general election if a general election is to be held within nine months after the vacancy occurs and if no general election is to be held within nine months after the vacancy occurs, then by special election. The person appointed by the County Court, in either event, to serve until a person is properly elected and to fill the vacancy and the person elected would serve until the end of the term.

"When the duration of the term is fixed, and also the beginning or ending, or both, a vacancy, if it occurs, is in the term of office as distinct from being in the office itself, and an appointment to fill such vacancy can only be for the unexpired portion." State ex rel. v. Smiley, 263 S. W. 825, 1. c. 827.

Hon. J. E. Rowland.

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CONCLUSION.

It is the conclusion of this Department that at a special election to fill the office of sheriff the nominations should be made by certificate signed by the required number of electors; that the law pertaining to the furnishing of ballots, erection of booths and appointment of judges as set out for the conduct of general elections should be followed; that the person elected should fill out the unexpired term.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney-General.

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

WOJ/mc