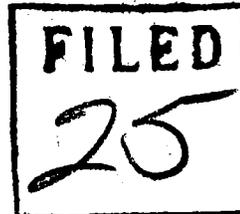


OFFICERS) Calling of County Collector, who is a member of
) the reserve, to active duty, does not cause vacancy
) in office.

August 29, 1950



Honorable Ralph H. Duggins
Prosecuting Attorney
Saline County
Marshall, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"This office desires the opinion of the Attorney General's office. The situation involves the following facts:

"Mr. Marcellus A. Gauldin, the present Collector of Saline County, Missouri was nominated at the August Primary as the Democratic candidate for this office to succeed himself. Nomination in Saline County is tantamount to election for this office. Mr. Gauldin is a member of the Naval Reserve but is not attached to any organized unit. He has just received directions to report for a physical examination to determine his fitness for active duty. He has received no orders as yet to report for active duty. Naturally he desires to make available to himself and his family the fees from the office in the event he is called into active service during his term of office, if there is any way possible for him to do so.

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"The opinion this office requests therefore is several fold, to-wit:

"(1) In the event a Collector is called to active duty in the armed forces, what procedure is followed with regard to the duties of the Collector.

"(2) Is his resignation mandatory.

"(3) In the event there is no resignation does the Collector designate an acting Collector or in the alternative does the Governor, acting upon recommendation of the County Committee, make any appointment.

"(4) Is any certain action necessary on the part of the collector to make effective his wish to retain control of the office during the period he is on active duty.

"We will appreciate your consideration of this matter and an opinion at your early convenience."

During the last war two cases were presented to the Missouri Supreme Court involving the question of the effect of induction into the armed forces of the United States upon a person's holding of public office. The first case was State ex rel. McGaughey v. Grayston, 163 S.W. (2d) 335. In that case Judge Ray E. Watson of the circuit court of Jasper County had been called into active service as a member of the Missouri National Guard. A special judge had been elected to hold court in his absence. Objection was raised to the jurisdiction to try the case on the ground that a special judge could not function under such circumstances, and a writ of prohibition was sought in the Supreme Court to prevent the special judge's acting. Relator's contention was set out by the court at 163 S.W. (2d) 1.c. 337, as follows:

"Relator contends that Judge Watson-as a National Guard Colonel in Federal ser-

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ice accepted 'an office of profit under the United States' while holding a State office which is forbidden by our Constitution. As a result, he insists, Judge Watson has forfeited his judgeship under the rule that the acceptance of a second office which is forbidden or incompatible to the office already held ipso facto vacates the first office. Therefore, if there is a vacancy in the office of circuit judge as distinguished from an absence, a special judge has no authority to act and his jurisdiction may be properly challenged."

The court concluded that Section 4 of Article 14 of the Constitution of 1875, now Section 9 of Article VII, Constitution of 1945, which prohibits a person's holding an office of profit under the United States from holding any office or profit under this state "was never intended to apply and does not now apply to the militiaman who enters the service of his country in time of emergency or war." (163 S.W. (2d) 1. c. 337.)

The court also considered the question of whether or not there was any common law incompatibility in holding both offices there involved and concluded that there was no legal incompatibility in holding both offices. The court further concluded that Section 18 of Article II of the Constitution of 1875 which required a person holding an office under the laws of this state to personally devote his time to the performance of the duties of such office did not prevent the judge's continuing to hold his office while serving in the armed forces. The court stated at 163 S.W. (2d) 1. c. 341 that this provision "was designed to prevent 'farming out' the performance of the duties of an office to another for the convenience or profit of the officer."

In the case of State ex inf. McKittrick v. Wilson, 166 S.W. (2d) 499, the clerk of the circuit court of Henry County had been inducted under the Selective Service Act into the Army of the United States. The question involved in the case was whether or not his induction under the Selective Service Act resulting in his inability personally to perform the duties of his office caused the clerk automatically to forfeit his office. The court concluded that induction did not cause

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the office to become vacant. The court stated, "We come to the conclusion that there is nothing in the law, constitutional, statutory or common, which requires us to hold that Wall has forfeited his office by becoming a soldier in the Army. Therefore, the office was not vacant and the appointment of respondent was unauthorized." (166 S.W. (2d) 1. c. 502.)

We feel that the decisions in the foregoing cases may be relied upon in answering your questions. Your first question is "What procedure is followed with regard to the duties of the Collector in the event of his being called into active duty in the armed forces?" In the Wilson case, supra, the circuit clerk had in accordance with the statute appointed a deputy to carry out the duties of his office during his absence. Section 11067, R. S. Missouri, 1939, authorizes a county collector to appoint deputies. Under the holding of the Wilson case, we believe that the appointment of a deputy or deputies to perform the duties of the office would be all that would be necessary.

Your second question is "Whether or not the resignation of the collector is mandatory upon his being called to active duty." There is no statutory or constitutional provisions making resignation mandatory under such circumstances.

Your third question is "Whether or not in the event there is no resignation, does the collector designate an acting collector or does the Governor, acting upon recommendation of the county committee, make any appointment." As for the first part of this question, there is no provision for the collector's designating an acting collector. However, as we have pointed out in answer to your first question, he may appoint a deputy to perform the duties of his office. As for action on the part of the Governor, under the holding of the Wilson case there is no vacancy existing in the office. The Governor is authorized under Section 11509, R. S. Missouri, 1939, to make an appointment to fill a vacancy in the office of county collector. However, no vacancy exists, and, therefore, the Governor is not authorized to act in the circumstances.

Your fourth question is "Whether or not any certain action is necessary on the part of the collector to make

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effective his wish to retain the office during the period that he is on active duty. There is nothing which the collector would be required to do other than designate a deputy to carry out the functions of the office.

CONCLUSION

Therefore, it is the opinion of this office that when a county collector, who is a member of the Naval Reserve, is called into active duty, he may designate a deputy to perform his duties in his absence on active duty; that the resignation of the collector is not mandatory; that in the event of no resignation the collector does not designate an acting collector but merely a deputy, and the Governor does not make any appointment inasmuch as no vacancy exists in the office, and that no certain action is necessary on the part of the collector to make effective his wish to retain the office while on active duty.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

RRW/feh