

CITY ORDINANCES: Construction of the same in the manner of filling public offices.

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Mr. J. H. Campbell
Member of the City Council
Higginsville, Missouri

Dear Sir:

I hereby acknowledge your request for an opinion. Your request was in the following form:

"I am writing you in regard to a matter concerning our city.

The City of Higginsville has a municipal plant managed by a Board of Public Works appointed by the Mayor and has been so managed for the last seven years. The ordinance under which this board was appointed states specifically 'that no more than two members shall belong to any one political party'; but the mayor for some reason unknown to any one appointed three Republicans and one Democrat. I take the position that the whole proceeding is irregular and a violation of the ordinance under which they were appointed and for that reason is invalid."

In answering your query I have consulted McQuillin on Municipal Corporations, the second edition, which is a leading authority in the United States, and I find that it provides as follows: Section 424.

"The time and manner of the selection of municipal officers, either by election or appointment, their term in office, powers, duties and liabilities, their official oaths and bonds are regulated by the State Constitution, general laws, municipal charter and ordinances."

"The law usually prescribes the manner in which the municipal officers are to be elected or appointed, and such mode must, in substance be observed."

Section 448 provides as follows:

"The powers and duties of the mayor rest always entirely upon the proper construction of the charter and the ordinances or by-laws and municipal regulations passed in pursuance of such authority. He has no authority, except what is expressly and impliedly conferred upon him by the charter or the applicable law, or by the council or governing body acting within the scope of the law."

Section 472 provides as follows:

"There can be no appointment of an officer or employee in the public service without legal authority to make the appointment. If the appointment is unauthorized, ordinarily no subsequent declaration by municipal officers can validate it. The right to appoint the officer or employee must clearly appear from the charter or the legislative action applicable. It cannot be implied from the fact that the mayor who seeks to appoint is the chief executive officer. This power is usually regarded as one of the prerogatives of sovereignty. However, in the absence of the evidence to the contrary, a court will presume that the appointment was legally made."

In treating upon the topic "Public Offices" I find that Corpus Juris, Section 37, p. 937 provides as follows:

"The general provisions of the State Constitutions prohibit 'tests' for holding office are usually so construed as to prevent the requirement by the Legislature of religious or political qualifications. But a statute which provides for a board or commission of a certain number, no

more than a certain proportion of whose members shall belong to the same political party, is not regarded as providing a political qualification, and a statute authorizing the appointment of officers from the two leading political parties is not ~~the~~ unconstitutional on the ground that it forces an elector who might desire such an appointment to ally himself with the one or the other of the two dominant parties, thus destroying his free agency in matters political."

Corpus juris, Section 66, p. 953 provides as follows:

"It is essential to the validity of an appointment that there shall have been a compliance with such valid conditions and limitations as may have been imposed on the appointing power."

Article 14, Section 9 of Missouri Constitution provides

"The appointment of all officers not otherwise directed by this Constitution shall be made in such a manner as may be prescribed by law."

In the case of Wingate v. Woodson 41 Mo. 227 l. c. 330, our Supreme Court said:

"The power of the State to declare in its fundamental law, or, when that is silent upon the subject, by legislative enactment, what shall constitute the test of eligibility to office, is as clear and unquestionable as in the power to fix the qualification of voters."

In 2 Blackstones Commentaries 36, I find "office" defined thus:

"An office is the right to exercise ~~a private or public employment and to take the fees and emoluments thereto belonging.~~"

Our Supreme Court laid down the rule in State ex rel. v. Bus 135 Mo. 325 l. c. 331, as follows:

"A public office is defined to be the

right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of government, to be exercised by him for the benefit of the public. The individual who is invested with the authority and is required to perform the duties is a public officer."

Then again in State ex rel v. Hackmann 254 S. W. 53-300 Mo. 59 l. c. 67, our Supreme Court said:

"A public office is a charge or trust conferred by public authority for a public purpose, the duties of which involve in their performance the exercise of some portion of sovereign power, whether great or small. A public officer is an individual who has been elected or appointed in the manner prescribed by law, who has a designation or title given to him by law, and who exercises the functions concerning the office assigned to him by law."

In the case of St. Louis v. Sparks 10 Mo. 117 l. c. 121, our Supreme Court said:

"When the appointing power has made an appointment, and a person is appointed who has not the necessary qualifications required by law, the appointment is not, therefore, void. The person appointed is de facto an officer; his acts in the discharge of his duties are valid and binding. He may be guilty of usurpation, and be punished for acting without being qualified, but the peace and repose of society imperiously require that his official acts, so far as others are concerned, should be valid. This is true of the highest and lowest officers from the Governor to the constable. * * * A statute prescribing qualifications to an office is merely directory, and although an appointee does not possess the

the requisite qualifications, his appointment is not, therefore, void, unless it is so expressly enacted."

In State ex rel v. Newman 3 S. W. 849 - 91 Mo. 445, our Supreme Court said:

"The election of a person to an office who does not possess the requisite qualifications, gives him no right to hold the office. As, by reason of his disqualifications, the elector was not entitled to hold the office, surely he has no right, at the hand of the court, to be armed with a certificate of election--evidence of title to that to which he has no right!"

In State ex rel v. Draper 48 Mo. 213 l. c. 215, the Supreme Court said:

"The commission invested Vail with the title, and was prima facie evidence of his right to the office. It gave him the possession, and he could only be deprived or it or ousted upon due process, in the manner prescribed by law. He exercised its duties and privileges by color of law, and that was sufficient until some other person legally established a better and a higher right. * * * * If error was committed in the issuance of the commission to Vail, and Denning was the party justly and fairly entitled to the office, the court furnished the proper and appropriate mode for seeking redress. He should have proceeded at once by que warranto and settled his claims. This remedy the law points out."

The foregoing citation having imparted to us a fair knowledge as to what ~~one~~ "offices" and officers" within the contemplation of the law, we are of the opinion that the ordinance of Higginsville properly describes a constitutional office known as the Board of Public Works, which office is within the power of your Mayor to fill. This ordinance is a legislative act of your city and its construction should be by the rules governing the construction of legislative acts. The words of the ordinance

are not technical and their ordinary usual and natural meaning is necessarily their legal meaning. We cannot conceive how said ordinance could attain but one construction for it is written "that no more than two members shall belong to any one political party". It certainly cannot be said that the Mayor of Higginsville is legally empowered to fill the office with three Republicans and one Democrat by any forced construction of words. The ordinance expressly forbids.

It is our opinion that such an unauthorized appointment to office as you claim was made, is not absolutely void unless the ordinance so expressly enacts. Such an appointment is illegal, and anyone who holds said office or offices under such an unauthorized appointment is a usurper in office, holding the same contrary to the Missouri Constitution and the legislative act providing for said office. His commission by the Mayor is prima facie evidence of his right and title to said office. If error was committed in appointing members of said board, as stated in your letter, quo warranto proceedings can be started against said member and their legal right to the office can be judicially determined.

Respectfully submitted

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APPROVED:

ROY McKITTRICK
Attorney General

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