

ELECTIONS: Relating to election to fill office of marshal and collector at Ellington, Mo. in April, 1934. City marshal of city of 4th class, when elected at special election, is entitled to fill out unexpired term of his predecessor.

3-17

March 16, 1934.



Hon. Carter M. Buford,  
Ellington, Missouri.

Dear Senator:

Your letter of March 15 addressed to Attorney General McKittrick has been handed to me for attention. The facts embodied in your letter are as follows:

"I would like to have an opinion from your department as to the following matter:

"At the regular city general election held in the city of Ellington, Mo. on April 4, 1933, a city marshal and collector, H.C. Long, was elected for a term of two years. On Sept. 3, 1933 Mr. Long died. A special election was called to elect a person to fill the vacancy. Copy of election notice is herewith attached.

(newspaper clipping here)

"At the special election B.W. McCormack was elected to the office of marshal and collector and qualified. At the meeting of the City Council, March 5, 1934, notice of the regular general city election was ordered published. Copy of notice is herewith attached.

(newspaper clipping here)

"Mr. McCormack, the present marshal and collector, contends that he was elected to fill the unexpired term of Mr. Long, and was not elected to serve only until the next general city election, and therefore no marshal and collector is to be voted for at the April, 1934 city election.

"The notice for the city election of April 1934

in relation to the election of the City Marshal and collector was based upon a section of the city ordinances which reads as follows:

**'Vacancy:** Should a vacancy occur in any city office by death, resignation, removal or otherwise; and should said vacancy be not more than six months from the next general election, the Mayor shall appoint some legally qualified citizen of the City of Ellington Missouri to fill said vacancy until the next general election for city officers. If such vacancy occur more than six months prior to any general city election, then, and in that event, a special election shall be called for the purpose of electing some person to fill said office until the next general election.'

In view of this particular provision of the city ordinances, we would appreciate an early opinion on this matter at your earliest convenience, both for the benefit of the city council and Mr. McCormack."

The election of city officers in cities of the fourth class, Ellington being in said class, is controlled by Sec. 6949, R.S. Mo. 1929, which is as follows:

"A general election for the elective officers of each city of the fourth class shall be held on the first Tuesday in April next after the organization of such city under the provisions of this article, and every two years thereafter; and all city elections shall be held under the provisions of Article II, Chapter 61, R.S. 1929, excepting the provisions of section 10208, and except that the judges of election in such city election shall perform all the duties of both the judges of election and clerks of election as prescribed in the state election laws, unless the city council shall provide for such clerks of election by ordinance. All duties specified in the state election laws to be performed by the constable or

sheriff shall be performed by the city marshal in the city elections; and all duties specified in the state election laws to be performed by the county clerk shall be performed by the city clerk in the city elections. The polling places for all elections in cities of the fourth class and the judges therefor shall be selected and specified by the respective boards of aldermen of such cities by resolution, ordinance or otherwise. The manner of making returns of such elections shall be prescribed by ordinance: Provided, that city organizing under the provisions of this article may elect a mayor and such other officers as may be necessary to carry this article into effect, who shall hold office until the first Tuesday in April thereafter and until their successors are elected and qualified."

When vacancies occur in any elective office, the vacancy is filled according to Sec. 6973, R.S. Mo. 1929, which is 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 hand-bills 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 aldermen 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."

We note in your letter that Mr. Long, the deceased marshal, was elected at the general election held on April 4, 1933. The Notice of City Election attached to your request states that "the regular municipal election for said city will be held on Tuesday, April 3, 1934", at which time all officers except the marshal and collector are to be regularly elected for full tenure of office. We are at a loss to understand why the marshal and collector were elected in April 1933, while the remainder of the officers are elected in the even years. In other words, why have not the marshal and collector been regularly elected along with the other officers?

In view of the facts as you present them, we must assume that had Mr. Long served his entire term, it would have expired on April 4, 1935. It appears that Mr. McCormack came into office under a special election, because of the fact quoted in Sec. 6973, supra, Mr. Long died more than six months before a general election. The ordinance states that he shall hold office until the next general election. We shall determine whether or not this ordinance is in conflict with the statute, i.e., Sec. 6973, supra, and the decisions of this state.

In the case of *The State ex rel. v. Spitz*, 127 Mo. 248, the court said (l.c. 252):

"The distinction to be found in the multitude of cases to be found on the question of filling vacancies seems to be this: Those cases which hold that one elected to fill an office which has become vacant takes for a full term are based either upon constitutional or statutory provisions which provide only for the length or duration which the incumbent may hold the office, whereas in every instance, so far as our research goes, in which the constitution or statute definitely and certainly prescribes not only the duration of the term but a fixed time for its beginning and ending, the holding has been that the incumbent's right to the office, whether he was elected to serve the whole term or to fill a vacancy therein, terminates with the fixed time prescribed for the ending of said term. As was said by this court both in *State ex rel. v. Ranson*, 73 Mo. 78, and *State ex rel. v. Stone-street*, 99 Mo. 361, 'the law favors uniformity, but uniformity can not be obtained except by the establishment of an inflexible rule.'\*\*\*\*\*"

Another decision which bears indirectly on the matter but incidentally contains the principle of law applicable in the case under discussion, is that of *Thornsberry v. City of Campbell*, 218 Mo. App., l.c. 362-363, wherein the Court said:

"The term of office of the marshal of a city of the fourth class is definitely fixed at a term of two years by the provisions of section 8402, Revised Statutes 1919. General elections for such cities are required to be held on the first Tuesday in April next after the organization of the city, and every two years thereafter. It may be taken for granted, therefore, that the election of the marshal in April 1921, was for a term ending in April, 1923. As heretofore noted, section 8422 provides that 'the salary of an officer shall not be changed during the time for which he was elected or appointed.' These different statutes, relating to cities of the fourth class, are in *pari materia* and should be construed together. (*State v. Hostetter*, 137 Mo. 636, 39 S.W. 270).

"The words 'time for which he was elected or appointed' as used in section 8422 must refer to the term of office, for there could be no other time. The term of office, is defined in section 8402, to which section 8422 necessarily alludes. But counsel contends the term of office is divisible and that section 8422 is personal only to the occupant of the office who was elected prior to the passage of the ordinance reducing the marshal's salary; that upon the resignation of the officer, the new ordinance would become effective as to any subsequent officer elected to fill the unexpired term. In other words, the ordinance, held in abeyance while the original officer continues in office, immediately becomes operative upon his resignation. We fail to see the logic of this argument. Such interpretation of section 8422, would destroy its object. Under that theory the city might pass an ordinance increasing the salary of an officer, who could then resign, be re-elected or appointed and thus receive the increased salary during his new or unexpired term. Likewise, under the provisions of section 8424, if the resignation occurs within six months of a general election, the mayor may appoint a successor to fill the unexpired term without calling an election; if such

appointment creates a new term the appointive officer would then be entitled to an increased salary in the event an ordinance had previously been passed so authorizing. While we have considered the proposition from the standpoint of a possible increase in salary, under the statute the same reasoning would apply to a decrease. But the term is fixed and the statute preventing a change in compensation is not, in our opinion, personal to the then occupant in office, but applies to any subsequent holder of the office during the same term. 'Each official term stands by itself. The constitutional provision forbidding an increase or decrease of compensation during a term of office has reference to the period fixed as a term by statute only, and in no wise refers to the individual who may incidentally happen to be the incumbent for more than one term.'

We also quote from the case of State ex rel. Rosenthal v. Smiley, 304 Mo. 549, wherein Judge Ragland said (l.c. 558-559):

"It will be observed that the statute prescribes only the length of the term of the office it creates; it contains no provisions as to when the time shall commence or when it shall end; nor does it contain any reference to unexpired terms or to the filling of vacancies. Under the rule of construction applicable to such a statute which has long obtained in this state it must be held that it was the legislative intent that the 'term' of office should consist of consecutive periods of two years, following each other in regular order, the one commencing where the other ends, and that the initial term should commence on the date of the appointment first made by the county court. When the appointing power named the first incumbent it thereby as effectually fixed the dates of the beginning and termination of the initial term of office, and of the subsequent terms as though they had been expressly prescribed by the legislature. (State ex. inf. v. Williams, 222 Mo. 268; State ex rel. v. Stonestreet, 99 Mo. 361.)

"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. This rule, which makes for uniformity and is in consonance with the general intent of our Constitution and legislative enactments, has had the repeated sanction of this court. (State ex rel. v. Spitz, 127 Mo. 252; State ex. inf. v. Williams, and State ex rel. v. Wilcox, supra) The only case cited by relator as announcing a different rule is State v. Corcoran, 206 Mo. 1. That case, however, is readily distinguishable from those just cited. The conclusion reached in the Corcoran Case was, as the court was careful to point out, based upon the peculiar and unusual wording of the statute then under review. The statute involved in the case at bar is almost identical in content with that considered in State v. Williams, supra, where the rule of construction just stated was emphasized and followed."

In the decision in the case of City of St. Louis v. Dreisoerner, 243 Mo. 217, this rule is laid down:

"In the exercise of its power, a municipal corporation can enact no statute which violates the Constitution of the State or the United States, or which contravenes the statutes and decisions of this state."

#### CONCLUSION

As stated in the beginning of this opinion, it must be borne in mind that there is an apparent conflict in the time of election of the marshal and collector, assuming that Mr. Long's election was regular and that he was legally elected for two years. In view of the foregoing decisions, we are of the opinion that Mr. McCormack would be entitled to fill out the unexpired term, but if this is the year for regular municipal elections, and the marshal and collector are to be elected this year along with the other officers, which is ordinarily the custom, then Mr. McCormack would, in order to hold the office, be compelled to be a candidate for the full tenure of the office.

Respectfully submitted,

OLLIVER W. NOLAN,  
Assistant Attorney General.

APPROVED:

Attorney General