

DEPUTY HEALTH COMMISSIONERS:

The County Court has discretion in appointment of Deputy Health Commissioners. State Board of Health has no power to make such appointment.

2-20
February 12, 1935.



Hon. L. O. Gillihan
Prosecuting Attorney
Daviss County
Gallatin, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of recent date requesting an opinion which reads as follows:

"I have been requested by our County Court to get an opinion from your office, construing Section 9025, page 271, 1933, Session Acts, entitled 'Deputy state commissioners of health - appointment - term - salary.', answering the following questions:

- "1. Is it necessary that the County Court appoint a deputy health commissioner?
- "2. If the County Court does not appoint such deputy health commissioner, does the State Board of Health have the power and authority to make such appointment and fix the salary to be paid him?
- "3. Is or is not the appointment of a deputy health commissioner left to the discretion of such County Court?"

In order to more clearly understand the intention of the Legislature, we set out Section 9025, R. S. Mo. 1929,

which reads as follows:

"At the first regular February term of the county court in each county of the state after this article becomes effective and at the regular February term of said county court every third year thereafter said court shall appoint a reputable physician as a deputy state commissioner of health for that county for a term of three years. In case of a vacancy in the office of the deputy state commissioner of health of a county, the county court shall at its next regular term of court appoint a reputable physician for the unexpired term. If the county court fails to appoint a deputy state commissioner of health as above provided at the February term of said court or at the next term following a vacancy, the state board of health shall appoint a reputable physician as deputy state commissioner of health for that county who shall serve until the county court of such county makes such appointment. The county court of any county upon appointing a physician as deputy health commissioner shall confer with such physician and agree with him as to his compensation and expenses for the performance of his duties as deputy state health commissioner of that county and such compensation and expenses shall be paid to him out of the county treasury of that county. If it becomes necessary for the State board of health to appoint a deputy state health commissioner, as above provided, said state board of health shall fix a reasonable compensation for such deputy state health commissioner and shall designate what shall be his reasonable expenses, all of which shall be paid out of the county treasury of the county of which he is deputy state health commissioner."

The foregoing section has been repealed and a new section, known as Section 9025, Laws of Missouri, 1933, page 271, has been enacted in lieu thereof. Said section reads as follows:

"At the first regular February term of the county court in each county of the State after this article becomes effective and at the regular February term of said county court every year thereafter, said court may appoint a reputable physician, as a Deputy State commissioner of health for a term of one year. In case of a vacancy in the office of the Deputy State Commissioner of Health of the county, the county court may at its next regular term of court appoint a reputable physician for the unexpired term. But the power of deciding whether or not such a deputy state health commissioner will be appointed shall be vested in the county court. If a county court of any county decides to appoint a deputy health commissioner, as empowered in this act, it shall agree with said commissioner as to the compensation and expenses to be paid for such services which amount shall be paid out of the county treasury of the county."

It will be noted that the old section uses the word "shall" throughout and that the new section uses the word "may" in place thereof.

57 Corpus Juris, Section 5, page 548, defines the word "shall" as follows:

"In common, or ordinary parlance, and in its ordinary signification, the term 'shall' is a word of command, and one which has always, or which must be given a compulsory meaning; as denoting obligation. It has a peremptory meaning, and it is generally imperative, or man-

datory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears; but the context ought to be very strongly persuasive before it is softened into a mere permission. And if any right to any one depends upon giving the word an imperative construction, when a right or benefit depends upon giving it a mandatory meaning, the presumption is that the word was used in that sense, and it cannot be given a permissive meaning merely; and when a right to a person or property is lost or destroyed by a failure to do an act within a limited time, it is given a mandatory effect; and it ought to be construed as meaning 'must', for the purpose of sustaining or enforcing an existing right, but need not be so construed for creating a new one."

The word "may" is defined in 39 Corpus Juris, Section 4, page 1393, as follows:

"The verb 'may' may be and usually is employed as implying permissive or discretionary, and not mandatory, action or conduct; or it may be employed as implying imperative or mandatory action or conduct. More specifically, 'may' has been construed sometimes to mean 'shall', and sometimes not to mean 'shall;' and sometimes to mean 'must', and sometimes not to mean 'must;' sometimes to mean 'must' or 'shall', and sometimes not to mean 'must' nor 'shall.' Whether the word is to be construed as mandatory or as permissive is to be determined in each case from the apparent intention as gathered from the context,

considering the whole instrument in which it is used; and it is always construed in a permissive sense unless necessary to give effect to the intent in which it is used."

From the foregoing definitions, it will be seen that the word "may" usually implies permissive or discretionary powers while the word "shall" is generally imperative or mandatory. It is apparent that under the old law, the Legislature intended to make it mandatory upon the County Courts to appoint deputy health commissioners and if they failed to do so, it was the duty of the State Board of Health to appoint same. A careful reading in comparison of the old section with the new makes it apparent that the Legislature intended, under the provisions of the new section, that the County Court should have the right to decide whether or not a Deputy State Commissioner of Health should be appointed. Not only does the Legislature use the word "may" throughout the new section, but it specifically provides that the power of deciding whether or not a Deputy State Commissioner of Health will be appointed shall be vested in the County Court. The further language used in said section, "If a county court of any county decides to appoint a deputy health commissioner" is conclusive evidence that the Legislature intended that the County Court should have the right to decide whether or not a deputy health commissioner is to be appointed.

The old section made it the duty of the State Board of Health to appoint a deputy health commissioner if the County Court failed to do so. The new section does not require the State Board of Health to appoint a deputy health commissioner under any circumstances and gives them no authority to do so.

We are therefore of the opinion that the appointment of a deputy health commissioner is to be left to the discretion of the County Court who may or may not appoint

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one as they deem best, and it is our further opinion that the State Board of Health does not have the power or authority to appoint a Deputy Health Commissioner when the County Court fails to do so.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JET/JLH:afj