

CITY COLLECTOR: When special election may be called to fill office; authority to reduce compensation.

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April 29, 1937.



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Dear Sir:

This Department is in receipt of your request for an opinion for the Board of Alderman of the City of Glendale, Missouri, wherein you state as follows:

"The Board of Alderman of the City of Glendale has requested me to write you for an opinion about calling a special election for the offices of Collector and Police Judge in the City of Glendale.

"Glendale is organized as a city of the fourth class and on Tuesday, April 6th, 1937, it held its regular City election. The vote for the office of City Collector resulted in a tie. In the contest for Police Judge, it developed that the candidate receiving the highest number of votes was ineligible because he owed taxes to the City.

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"As far as I can determine, Section 6973 of the Revised Statutes of Missouri, 1929, is the only provision for calling a special election to fill offices in cities of the fourth class. Under authority of State ex rel. Crow vs. Kramer, 150 Mo.89, and State ex rel. Crow vs. Smith, 152 Mo.512, and numerous other cases which hold there is no vacancy while there is an incumbent in office to hold over, I have advised the Board that they have no authority to call a special election to elect persons to these offices.

"As authority to call a special election in case of a tie vote, my attention has been called to Section 10328, which will be found in Article 7 of Chapter 61, Revised Statutes of Missouri, 1929. It seems this section is modified by Section 10336, which states that Article 7 shall not apply to any election in cities of the fourth class or cities under three thousand inhabitants. Glendale is both a city of the fourth class and has less than three thousand inhabitants.

"In the event it is decided the incumbent Collector holds over, the Board of Aldermen has requested me to ask you if they have authority to reduce his compensation during the remainder of the time that he holds over. I have called their attention to Section 6971 Revised Statutes of Missouri, 1929, relating to cities of the fourth class, and to State ex rel. Stevenson vs. Smith, 87 Mo. 158, but the Board takes the position that this section does not apply because the Collector is only paid a commission on what he collects and does not receive a salary.

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"The Board of Aldermen of the City of Glendale respectfully requests an opinion from you concerning these three matters."

I.

Section 6951 R. S. Mo. 1929, provides for the election of a Collector in cities of the fourth class, and states in part that-

"The following officers shall be elected by the qualified voters of the city, and shall hold office for the term of two years and until their successors are elected and qualified, to-wit: * * * Collector * * * "

In the case of State ex inf. v. Smith, 152 Mo. 512, l.c.521, the court, in holding that in the case of a tie vote there was no vacancy in office, said:

"In the case at bar Haughton was appointed under section 7 of the Act of 1891, to fill the unexpired term of Sheehan, which ended at the regular election in 1898, and until his successor was duly elected and qualified. The attempted election of his successor in 1898 failed by reason of a tie vote. No successor was then elected and hence none qualified. Therefore no vacancy existed or occurred in the office. The effect was the same as if no election for a successor had been

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held in 1898. There being no vacancy there was no power in the judges named to appoint defendant to the office, either by virtue of the Act of 1891 or of any other statute, and hence their action was a nullity and defendant has no title to the office. Inasmuch as the Act of 1891 provided that there should be an election for justice of the peace, in St. Louis, at the regular election in 1894, 'and every four years thereafter', and inasmuch as there was in legal intendment no election held in the fourth district in St. Louis for justice of the peace in 1898, there has been no successor yet elected for Haughton, and as the purpose of the lawmakers is that there shall be uniformity in the time of electing all justices of the peace, and as there is no special statute covering cases like this, it follows that there can be no legal election held to elect a successor for Haughton until the regular election in the year 1902, and that he has a right to continue to hold the office of justice of the peace for the fourth district, in the city of St. Louis, until a successor is elected at that time, and thereafter duly qualifies, by virtue of his appointment until his successor is duly elected and qualified."

There being no vacancy in the office of City Collector by reason of the tie vote, the incumbent City Collector holds office until his successor is duly elected and qualified.

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It is the general law in this state that where no specific provision is made for special election, none can be called for that purpose.

In the case of State ex rel. Edwards v. Ellison, 196 S. W. 752, 271 Mo. 123, l.c. 129, the court said:

"It is the law of this State that "no election can be held unless provided for by law" (State ex rel. v. Jenkins, 43 Mo. l.c. 265), * * *"

And in the case of State ex inf. v. Dobbs, 182 Mo. 359, l.c. 367, the court said:

"A failure to elect at the time fixed by the statute, or the failure of the person chosen to qualify, will not, we think, authorize the holding of an election at any other time than that fixed by the act of the Legislature. (State ex rel. McHenry v. Jenkins, 43 Mo. 261; State ex rel. Attorney-General v. Thomas, 102 Mo. 85; In re Woolridge, 30 Mo. App. 618; Cooley's Constitutional Limitations (7 Ed.), 892; Mechem on Public Officers, secs. 141, 142."

Further in this opinion the court said:

"It was said in Woolridge's case, supra, that an election held at a time not provided for by law has no greater force than no election at all."

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Section 6973 R. S. Mo. 1929, provides for the calling of special elections in cities of the fourth class to fill vacancies in office.

"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 handbills 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 alderman 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 are of the opinion that there being no vacancy in the office of City Collector by reason of the tie vote, Section 6973 is not applicable, and further that inasmuch as there is no other applicable provision for the calling of a special election, the incumbent City Collector holds office until his successor is duly elected and qualified.

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We note the fact that Article 7 of Chapter 61, Sec. 10328 R. S. Mo. 1929, provides the proceedings to be followed in case of a tie in certain offices.

"If there shall be a tie of the votes given for any two of the candidates, except in cases otherwise provided by law, the clerk or justices casting up the number of votes, or a majority of them, shall issue their order to the sheriff of the county where the same may occur, directing him or them to issue his proclamation for holding an election agreeably to the provisions of this chapter; and in all cases of such special election, the clerks and justices, or a majority of them, when they issue the order to the sheriff, shall, in such order, state the day on which such election shall be held, giving reasonable time for the same to be promulgated."

However, Section 10356, R.S.Mo. 1929, states that Article 7 does not apply to any city of the fourth class or city under 300,000 inhabitants.

"This article shall not apply to election for public offices determined otherwise than by ballot, to township or village elections, to school elections, or elections of county commissioners of public schools, or elections for road overseers, or to any city election in cities of the fourth class, or city of under 3,000 inhabitants existing under any special law."

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From the foregoing we are of the opinion that a city of the fourth class may not call a special election for the office of City Collector where in the general election for such office a tie vote has resulted.

II.

Section 6972, R. S. Mo. 1929, provides for the election of police judges in cities of the fourth class.

"The mayor and board of alderman of cities of the fourth class may, by ordinance, provide for the election of police judges in such cities, who shall be elected at the regular city elections, and who shall, when so elected, have exclusive jurisdiction to hear and determine all offenses against the ordinances of the city in which he was elected: Provided, that when such police judges shall be so elected, then the jurisdiction in this article hereinafter conferred on the mayor to hear and determine cases for the violation of city ordinances shall be held to refer to the police judge elected under this section: Provided further, that in case of the absence, sickness, or disability in anywise of such police judge, or in case of vacancy in such office, the mayor shall perform all such duties until the disability is removed or the vacancy is filled."

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The City of Glendale, we assume, has provided for the election of police judge by ordinance.

Section 6949, R. S. Mo. 1929, provides for the election of officers of a city of the fourth class in part, 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."

The City of Glendale has by ordinance made the office of police judge an elective office, and we are of the opinion that the said office is to be elected under the provisions of Section 6949, supra. This Section requires an election at the general election held on the first Tuesday in April, after the organization of the city under the statute relating to cities of the fourth class, and every two years thereafter, but does not prescribe that the person so elected shall hold his office until his successor is elected and qualified.

In the Smith case, supra, the court, in holding that under the Constitution of Missouri all officers regularly elected or appointed to office, unless it is otherwise provided by law, hold until their successors are elected or appointed and qualified, said: (l.c.517)

"There is no merit in defendant's contention that under the Act of 1891, justices of the peace in St. Louis hold for a fixed term of four years, and not until their successors are elected and qualified. True the first section of that act requires an election at the general election in 1894

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and every four years thereafter, and does not prescribe that the person so elected shall hold until his successor is elected, but such a provision was not necessary in the statutes to accomplish this result, for section 5 of article XIV of the Constitution of Missouri provides: 'In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified.'" There is no contrary provision in the Act of 1891, hence Haughton's term continued until the regular election in 1898 and also until his successor should be duly elected and qualified, and such continuance after the election in 1898, was as much a part of his term as that which preceded that election."

In this connection we are pleased to enclose copy of an opinion rendered by this Department, Mr. Leo A. Politte, Prosecuting Attorney of Franklin County, under date of May 11, 1934, wherein it was held that in cities of the fourth class a candidate in arrears in city taxes on the day of election could not be elected to office.

No one having been elected to the office of police judge, we are of the opinion there is no vacancy in office, and that the present incumbent holds office, as in the case of the city collector, until his successor is elected and qualified. We are further of the opinion that there is no authority for the calling of a special election to fill the office.

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III.

Section 6971, R.S. Mo. 1929, provides for the fixing of the compensation of the city collector in cities of the fourth class:

"The board of aldermen shall have the power to fix the compensation of all officers and employes of the city, by ordinance. But the salary of an officer shall not be changed during the time for which he was elected or appointed."

It is contended that this section applies only to officers paid a "salary" and not a "commission" as is paid in the instant case, and therefore that the city collector's compensation can be reduced during the remainder of the time that he holds over.

We will first consider whether that portion of time that the officer holds over until his successor is elected and qualified is part of the term of his office with reference to his compensation. The court, in the case of State ex rel. Stevenson v. Smith, 87 Mo. 158, in answering this question in the affirmative, said:

"To hold as is contended by the relator, viz: that after April 3, 1883, he administered the office, not as a part of his own term, but as a part of the term of his successor as to compensation, is to make a distinction without any substantial basis upon which it can rest."

We will now consider whether the term "salary" as used in Section 6971, supra, can be distinguished from the term "commission" so as to prohibit a change in the

amount of money to be received by the city collector during the time he holds office.

In the case of State v. Speed, 81 S. W. 1260, 1. c. 1263, 183 Mo. 186, 1. c. 198, the court, defining the term "salary", said:

"Thus in Burrell's Law Dictionary the word 'salary' is defined to mean, 'An annual compensation for services rendered; a fixed sum to be paid by the year for services,' and Anderson in his law dictionary gives this as one definition of the word, 'The per-annum compensation of men in official and in some other positions.' To the same effect is the language of this court in the case of Henderson v. Koenig, 188 Mo. 356. It is there said: 'Salary is regarded as a per-annum compensation.'

"Though we do not at this time undertake to assert that these definitions of the word salary are so well established and inflexible that it would be improper to say that its use could have reference to nothing else than a yearly or per-annum compensation, we do think that when the word salary is found in a legislative act as applied to one's compensation for official work done or required, it is so generally understood to apply to the officer's per-annum allowance, when not otherwise qualified, that we are justified in attributing that meaning to the word."

The term "salary" may then be regarded as a per-annum compensation, when not otherwise qualified.

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In the case of Purifoy v. Godfrey, 16 So. 701, l.c. 703, the court, in defining the term "commission", said:

"The word has no technical meaning. As to particular persons, when it is used to express compensation for services rendered, it denotes, as is suggested by the attorney general, a percentage on the amount of moneys paid out or received."

The term "salary" may be distinguished from the term "commission" in that it denotes a fixed sum as distinguished from a sum that may vary according to the amount of money paid out or received by an officer.

As pointed out in the Speed case, supra, the term "salary" has a particular meaning when not otherwise qualified, and we must, therefore, in determining the meaning to be given the term, look to the context of the statute. Thus in the case of Nudelman v. Thimbles, 40 S. W. (2d) 475, 225 Mo. App. 553, we find the court using this language:

"We concede that, in legal usage, the term 'legal representatives' ordinarily refers to executors and administrators, but that is not the only sense in which it may be employed. To the contrary, the meaning to be attached to the term in a particular instance will be determined from the context, and the intent with which the expression is used, and, if those considerations are such as to indicate a meaning different from the ordinary one, the courts will not hesitate so to construe it. 36 C. J. 978."

And in the case of O'Malley v. Continental Life Insurance Company, 335 Mo. 1115, 75 S. W. (2d) 837, the court lays down the following rule in determining the

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meaning of a particular word in a statute that is doubtful:

"In the consideration of this clause we apply the rule that 'Where any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubt may be removed by reference to associated words and the meaning of a term may be enlarged or restrained by reference to the whole clause in which it is used.' (25 R.C.L., sec. 239, p. 995.)"

It is to be noted that the section speaks of the fixing of the "compensation" of officers, and therefore reference must be had to the meaning of this word in order to determine how the term "salary" was intended to be used in the section.

In the case of State ex rel. Emmons v. Farmer, 196 S. W. 1106, 1. c. 1108, the court in holding that the term "compensation" as used in the Constitution, Article 14, Section 8, providing that the compensation of certain officers should not be increased during their term, was broad enough to include salaries, fees, pay or other remuneration for official services, said:

"Moreover, the language of the Constitution includes both fees and salary under the comprehensive term 'compensation,' as witness this language:

"The compensation or fees of no state, county or municipal officer shall be increased during his term of office.'
Sec. 8, art. 14, Const.

"Clearly fees are not salary; so if the provision of the section quoted supra includes salary at all--and no one would be so bold as to deny that it does--then the word 'compensation' is the generic term,

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and includes, as used in the above provision of the Constitution, salary, fees, pay, remuneration for official services performed, in whatever form or manner or at whatsoever periods the same may be paid."

23 A. & E. Ency. of Law, p. 585, in speaking of "compensation" as it relates to public officers, says:

"The term 'compensation' as here used includes all forms which the remuneration of public officers may take, whether salaries, or fees, or percentage commissions, or mileage, or special appropriations, or allowances for necessary expenses."

From a reading of the entire section it is evident that the term "compensation" includes within its meaning both "salary" and "commission", and further that the Legislature in its use of the term "salary" was referring to the term "compensation" and not using it in a strict sense and standing alone.

From the foregoing, we are of the opinion that the Board of Aldermen of the City of Glendale does not have the authority to reduce the compensation, be it paid by salary or commission, during the remainder of the time that the incumbent city collector holds over.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

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