

COUNTY OFFICERS - Prosecuting Attorney may tender resignation
to the Governor.

3/10

March 7, 1938



Honorable Edward L. Drum
Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri

Dear Sir:

We acknowledge your request for an opinion in your letters of February 27, 1938 and March 3, 1938, which said letters read as follows:

"Please provide me with a form and instructions, for an elective officer of this county, who desires to file his resignation of such office.

"To whom should such resignation be forwarded and is there any formal proceeding for such resignation to become effective."

"Referring to the enclosed letter, please be advised, the office referred to is Edward L. Drum, Prosecuting Attorney within Cape Girardeau County, Missouri, elected at General Election 1936, for a period of two years.

"I am contemplating running for Mayor of the City of Cape Girardeau. I intend to make the race and if elected, offer my resignation as Prosecuting Attorney, before qualifying as Mayor, which time for such qualification would be one week after general city election.

"Would this resignation take effect immediately upon filing it?"

Article XIV, Section 5, Missouri Constitution, sanctions the right of a Prosecuting Attorney to resign from office during his official term, and 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."

Article V, Section 11, Missouri Constitution, relating to filling vacancies in office, provides:

"When any office shall become vacant, the Governor, unless otherwise provided by law, shall appoint a person to fill such vacancy, who shall continue in office until a successor shall have been duly elected or appointed and qualified according to law."

We find no statutes in Missouri touching upon filling vacancies in the office of Prosecuting Attorney. Article V, Section 23, Missouri Constitution, provides as follows:

"The Governor shall commission all officers not otherwise provided for by law. All commissions shall run in the name and by the authority of the State of Missouri, be signed by the Governor, sealed with the Great Seal of the State of Missouri, and attested by the Secretary of State."

In the case of State ex rel. vs. Augustine, 113 Mo. 21, l.c. 24, the Supreme Court said:

"It is well established law, that, in the absence of express statutory enactment, the authority to accept the resignation of a public officer rests with the power to appoint a successor to fill the vacancy. The right to accept a resignation is said to be incidental to the power of appointment. ***

"By section 11, article 5, Constitution of Missouri, it is provided that: 'whenever any office shall become vacant, the Governor, unless otherwise provided by law, shall appoint a person to fill such vacancy,' etc. It seems that no provision exists in our statutes for filling the vacancy of county treasurer. Hence it follows that the power of appointment remains, as directed by the constitution, with the Governor. And the authority to fill the vacancy being with the Governor, here likewise rests the power to accept the resignation. In order then to create a vacancy in the office held by Augustine his resignation must have been lodged with the Governor, and by the Governor accepted. There being no particular mode pointed out by statute or by the Constitution, this resignation may be in writing or by parol. No particular form is required. It is only necessary that the incumbent evince a purpose to relinquish the office -- that this purpose be communicated to the proper authority, and that this resignation be accepted either in terms, or something tantamount thereto, such as appointing a successor, etc. ***

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"When this resignation shall have been communicated to the proper authority and the same shall be accepted -- whether formally or by the appointment of a successor -- it is beyond recall, it cannot then be withdrawn."

CONCLUSION

In view of the above citations, we are of the opinion that since no specific mode of resigning from the office of Prosecuting Attorney is pointed out in the Missouri Constitution or statutes, it is merely necessary that you evince to the Governor, by writing, or by parol, your purpose to relinquish your office. No particular form of resignation being prescribed by law, we cannot furnish you any form, as requested. Your resignation becomes effective whenever the Governor evidences his intention of accepting same by word or overt act, and the appointment of a successor to the office is all the overt act necessary to a valid legal acceptance of your resignation.

One holding the office of Prosecuting Attorney in Missouri, under our Constitution, as you do, holds over until his successor be appointed, should you tender your resignation.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

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