

CIRCUIT CLERK: Circuit Clerk cannot appoint deputy without approval of the Circuit Judge.

August 22, 1938



Mr. John E. Short
Circuit Clerk
Ray County
Richmond, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of August 6, 1938, requesting an opinion from this department, which is as follows:

"I would like an opinion in the matter of the paying deputies in the Circuit Clerk and Ex-Officio Recorder's office.

"I have three people working in the two offices. One has been working in the place of one who was deceased on the 25th of July, and not being under a court order of the Circuit Judge, would the county court have the right to issue a warrant to her for her services.

"I have not as yet appointed a successor to the man who passed away on the 25th of July and am using an extra girl to do the typing in the recorder's office, but she not having been approved by the Circuit Judge, I thought that before the warrant could be issued to this extra girl that it might be the Circuit Judge would have to make an order allowing her salary until I make an appointment."

Section 11680, R. S. Mo. 1929, reads as follows:

"Every clerk may appoint one or more deputies, to be approved by the judge or judges, or a majority of them in vacation, or by the court, who shall be at least seventeen years of age and have all other qualifications of their principals and take the like oath, and may in the name of their principals perform the duties of clerk; but all clerks and their sureties shall be responsible for the conduct of their deputies."

This section is the general law as to the appointment of deputies by every clerk, but the specific law as to the appointment of deputy circuit clerks in 1929 was Section 11812. Under Section 11812, the appointment of deputies was made by the circuit clerk and approved by the circuit court. Section 11812 was amended by the Session Laws of 1933, at page 369, which required the approval of the appointment of deputy circuit clerks by the county court. This session law was amended by the Session Laws of 1937, page 446, to be known as Section 11812. This section reads as follows:

"Every Clerk of a Circuit Court shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the Judge or Judges of the Circuit Courts, as such Judge or Judges shall deem necessary for the prompt and proper discharge of the duties of his office. The Judge or Judges of the Circuit Court, in its order permitting the Clerk to appoint deputies or assistants, shall fix the compensation of such deputies or assistants which said order shall designate the period of time such deputies or assistants may be employed. Every such order shall be entered of record, and a certified copy thereof shall be filed in the office of the County Clerk. The Clerk of the Circuit Court may at any time, discharge any deputy or

assistant, and may regulate the time of his or her employment, and the Circuit Court may, at any time, modify or rescind its order permitting an appointment to be made."

Under the amendment of Section 11812 in the Session Laws of 1937, the approval of the appointment of deputy circuit clerks must be made by the circuit judge or judges.

The term "court" as used in Section 11680, supra, refers to all courts of record, including the circuit court. It therefore appears, with reference to the appointment of deputy circuit clerks, that two acts are necessary, (1) the appointment of such deputy by the circuit clerk, and (2) the approval of such appointment by the circuit judge or judges.

The duty to appoint a deputy circuit clerk is placed upon the circuit clerk, and it is the duty of the circuit judge or judges to approve or disapprove such appointment.

Such is the construction placed upon a similar term "approved by the Court" in *Butler v. Sullivan*, 108 Mo. 630, l. c. 638. In that case the statute gave the county clerk the power to employ attorneys "with the approval of the county court" to aid the prosecuting attorney in the handling of tax suits. The Supreme Court, in construing this term in that case, l. c. 638, said:

"The statute neither authorizes the county court to employ counsel nor to charge the county with liability for his compensation. The power to employ an attorney is granted solely to the collector; this compensation and the liability therefor is provided for by the law. The only power granted to the county court is to approve or disapprove of such employment, and thereby fix the status of the attorney employed by the collector as to his right to such compensation when his right to, and the amount thereof, comes to be ascertained by the

court in which the tax suit is determined, and the liability therefor fixed by the final judgment of such court."

22 R. C. L., Section 84, page 433, makes this statement:

"Wherever, under a constitutional or statutory provision, the appointment is required to be made with the approval of some officer or body, such appointment must be approved before the person is legally entitled to the office."

In the case of State v. Stafford, 34 Pac. (2d) 1. c. 379, the court said:

"Thus it is apparent that the phrases used in the two constitutional provisions and that employed in the act creating the Bureau of Agriculture do not differ in effect, but under each the appointments under consideration come within the general rule that 'where a person is appointed to an office under a constitutional or statutory provision that the appointment may be made with the approval of some officer or body, such appointment must be approved before the person is legally entitled to the office, except in the case of such a vacancy in the office that the duties of the office are no longer being discharged.'"

In Apfel v. Mellon, 33 Fed. (2d) 1. c. 806, the court defines the term "approve" or "give approval" as follows:

"We agree with the contention of the appellees. The statute provides that an association formed under the act shall not become a body corporate until after the articles of association and organization certificate have been duly made and filed, and after the Federal

Reserve Board has approved the same and issued a permit to it to begin business. The word 'approved' naturally imports the exercise of judgment and discretion; and the power to approve ordinarily implies a power to disapprove.

"To 'approve' or give 'approval' is in its essential and most obvious meaning to confirm, ratify, sanction, or consent to some act or thing done by another. The word 'approve' does not, *ex vi termini*, necessarily import the exercise of discretion, but from the connection in which the term is used it often involves the idea of discretion and adjudication, and is seldom construed as requiring a mere ministerial act. 4 C. J. 1464."

In the case of *State v. Standard Oil Company*, 16 S. W. (2d) 1. c. 582, the court said:

"The word 'direct' has many meanings, but, as used here, we think it means that, when the tax commission, on investigation, finds that a suit should be instituted, it has the authority to cause the Attorney General to institute such a suit, and the word 'approved' necessarily implies the exercise of discretion on the part of the tax commission in permitting such a suit to be instituted."

The city ordinance of the City of Jefferson provides that when a vacancy exists or shall occur in the regular police force of this city, it shall be the duty of the marshal, with the advice and consent of a majority of the members elected to the city council, to appoint some suitable and competent person to fill such vacancy. In the case of *Schulte v. City of Jefferson*, 273 S. W. 1. c. 170, the marshal of said city appointed the plaintiff a regular city policeman, but the city council refused to confirm said appointment. Plaintiff brought suit against the city to recover salary alleged to be due from defendant for performing the services of a police officer. The court, 1. c. 172, said:

"It is well settled--

"Where the appointment is made as the result of a nomination by one authority and confirmation by another, the appointment is not complete, until the action of all bodies concerned has been had, and the body which has been intrusted with the power of confirming appointments may reconsider its action before any action based upon its first decision has been taken.' 13 Cyc. p. 1372; Meachem's Public Office and Officers, Secs. 114, 124; 22 R. C. L. p. 433, Sec. 84.

"Plaintiff was not a de jure officer until at least confirmed by the council. If anything at all, he was a de facto officer, and such officer is not entitled to the emoluments of the office. 29 Cyc. 1393; Sheridan v. City of St. Louis, 183 Mo. 25, 39, 40, 81 S. W. 1082, 2 Ann. Cas. 480; Luth v. Kansas City, 203 Mo. App. 110, 113, 218 S. W. 901; Throop on Public Officers, Sec. 517."

In the case of Huls v. Lawrence, 300 S. W. 1. c. 1018, the court states:

"The word 'approves' carries with it the idea of doing something more than merely substituting the answers of the jury for the judgment of the court. It shows that he did something more than to formally or mechanically, so to speak, accept the opinion of the jury."

The meaning of a power or duty conferred upon an official to approve or disapprove another official act, is set out in Makenson v. Dillon, et al., 171 Pac. 673, 1. c. 676, in the following language:

"The grant to New Mexico is to be effectuated by selection, not only of these lands granted in quantity, but also as indemnity, and they are to be

selected under the direction and subject to the approval of the Secretary of the Interior. The words 'subject to the approval' we do not regard as giving the Secretary of the Interior discretion to arbitrarily refuse a selection for no reason at all. These words are to be understood to mean that the Secretary of the Interior shall investigate and pass upon and render judgment as to whether the lands selected are within the terms of the grant, and, if so, it is his duty to list them to the State."

Although the 1937 Session Laws, page 446, provide that the circuit clerk shall be entitled to such number of deputies and assistants, to be appointed by such official, with the approval of the judge or judges of the circuit court, as such judge or judges shall deem necessary for the prompt and proper discharge of the duties of his office, yet the circuit clerk is limited in the appointment of his deputies by the County Budget Act of 1933, page 340, Missouri Statutes Annotated, Par. 12126a, page 6433.

In answering your request, I am presuming that your budget was approved by the budget officer, and in that case the Budget Act would not affect the appointment as set out in your request. This was so held in *State ex rel. Hill v. Thatcher*, 94 S. W. (2d) 1053.

I am also presuming, under the facts set out in your request, that you do not desire your present appointee as a permanent appointment, but only for a short period. As a suggestion, it would be proper to appoint your present employee, who you state has not been approved by the circuit judge, and have the approval made by the circuit judge, and later on make a permanent appointment of the deputy whom you desire to take the place vacated by the death of your former deputy. It has been held that the circuit clerk may discharge his deputy at any time and appoint another in his or her place.

In the case of *Horstman v. Adamson*, 101 Mo. App. 119, l. c. 124, the court said:

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"The rule is well established that an appointment to office for a definite term confers upon the incumbent the right to serve out the full official period, unless forfeited by misconduct, for the permanence of the official tenure negatives the authority of the appointing power of removal at will. But where the law conferring the authority, under which the appointment is made, is silent as to any limitation of the right of removal, and the official term is unlimited, the absolute power of removal is an incident to the power of appointment to be invoked and applied at pleasure, without notice, and without legal liability for the results. These principals have been frequently recognized in numerous decisions, alike by the Federal courts as well as by the courts of many States, including our own."

CONCLUSION

In view of the above authorities, it is the opinion of this department that the county court cannot issue a salary warrant to the extra girl appointed by you in your office until this appointment as a deputy circuit clerk is approved by the circuit judge of your district.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:HR