

SCHOOL : Induction of School Director into Armed Forces
DIRECTOR : does not affect his tenure of office.

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January 19, 1944 1-21



Mr. Glen Simpson
Superintendent, Sullivan County Public Schools
Milan, Missouri

Dear Mr. Simpson:

This will acknowledge the receipt of your letter of January 4, 1944, in which you request an opinion from this office. Omitting caption and signature, the full text of your letter is as follows:

"I have been asked to send the following question to you for your opinion.

"One of the schools of the county has one member of the six man board who has been inducted into the armed forces. His term expires in April, 1945. Should the board appoint some one to fill the vacancy until next school election, then elect a man to serve the remaining year, or does any vacancy exist?

"I will appreciate an early reply."

Directing our attention to those sections of our statutes involving the government, control and management of school districts, we find that at Section 10467, R. S. Mo., 1939, provision has been made for the organization of a school district. This section also outlines the procedure for the election of officers and specifically details the kind and character of records necessary for the transaction of business. Officers of the district are named and designated as directors. With respect to filling of vacancies which may occur in the board, we find a subsequent section applies.

Section 10468 R. S. Missouri, 1939, reads:

"The government and control of such town or city school district shall be vested in a board of education of six members, who shall hold their office for three years and until their successors are duly elected

and qualified, and any vacancy occurring in said board shall be filled in the same manner and with like effect as vacancies occurring in boards of other school districts are required to be filled, and the person appointed shall hold office till the next annual meeting, when a director shall be elected for the unexpired term. (R. S. 1929, Sec. 9327.)

In filling vacancies this section states "any vacancy occurring in said board shall be filled in the same manner and with like effect as vacancies occurring in boards of other school districts are required to be filled." This language directs us to another section of the statutes which is devoted exclusively to the filling of vacancies in Boards of Directors in all common schools of this state. The full text is as follows:

"If a vacancy occur in the office of director, by death, resignation, refusal to serve, repeated neglect of duty or removal from the district, the remaining directors shall, before transacting any official business, appoint some suitable person to fill such vacancy; but should they be unable to agree or should there be more than one vacancy at any one time, the county superintendent of public schools shall, upon notice of such vacancy or vacancies being filed with him in writing, immediately fill the same by appointment, and notify said person or persons in writing of such appointment; and the person or persons appointed under the provisions of this section shall comply with the requirements of section 10421, and shall serve until the next annual school meeting. (R. S. 1929, Sec. 9290.)

From our reading of the above we find that, if, and when, a vacancy occurs in the office of director,
1. By death, 2. Resignation, 3. Refusal to serve,
4. Repeated neglect. 5. Removal from the district,
the remaining directors shall appoint a suitable person to fill a vacancy.

It now becomes necessary to determine whether the induction of a director into the Armed Forces would create such a vacancy as contemplated in Sec. 10423, R. S. Mo., 1939.

Our Supreme Court has had occasion to pass on this question in two recent cases, State ex inf. McKittrick v. Wilson, 166 S. W. (2d) 499 and State ex rel. McGaughey v. Grayston, 163 S. W. (2d) 335. In the former case a circuit clerk had been inducted into the Armed Forces. The Governor appointed, after declaring a vacancy, a successor and a test suit filed in order that the Supreme Court pass on the question as to whether a vacancy had occurred in the office. This decision, which we shall quote at length, definitely states that induction into the armed services under the Selective Service Act, does not affect the title or compensation of the office.

In State ex inf. McKittrick v. Wilson, 166 S.W. (2d) 499, we find:

"* * * This is a proceeding in quo warranto instituted in this court by the attorney general as relator to determine respondent's right to hold the office of clerk of the circuit court of Henry County. The respondent was appointed to this office by the governor on April 4, 1942, and was commissioned 'to fill the vacancy in the office.' * * *

"The question for decision is whether Wall's induction into the army under the Selective Service Act resulting in his inability personally to perform the duties of his office caused him automatically to forfeit his office.

"It is our judgment that Wall did not forfeit his office by being drafted into the military service of his country. This would be equally true if he had volunteered for the duration, particularly in view of our universal military service.***

"Unless an office is abandoned or relinquished an officer is entitled to a trial on the charge of failing personally to devote his time to the performance of his duties. Such failure may be excusable. Speaking of the statutory duties to be performed by a sheriff this court has said: 'It was his duty under the law to be and remain in attendance upon the circuit court of this county when the same was in session, * * * unless by other pressing official duties, or by illness, or some other lawful reason he was prevented therefrom.' (Our

emphasis) State v. Yager, 250 Mo. 388, 157 S. W. 557, 561. Verily a public office is held on the implied condition that the officer will perform the duties belonging to it. However, Mechem in his work on Public Officers points out that generally it is a willful refusal to perform the duties of an office which works a forfeiture so that a judgment of ouster is necessary. The Statutes of some states specifically require such a judgment.

"We have held in a case similar to this where a circuit judge was called into active military service that Art. II, Sec. 18 of our Constitution, Mo. R. S. A. 'that no person elected or appointed to any office * * * shall hold such office without personally devoting his time to the performance of the duties to the same belonging,' was designed to prevent 'farming out' the performance of the duties of an office to another for the convenience or profit of the officer and did not apply to the situation we were there considering. State ex rel. McGaughey v. Grayston, Mo. Sup., 163, S. W. 2d 963. Consequently, such constitutional inhibition is not apposite here.

" Regardless of statutory provisions respondent insists that Wall legally vacated his office by going to war. This court has already said there is no technical or peculiar meaning to the word 'vacant'. It means empty, unoccupied, as applied to an office without an incumbent; an existing office without an incumbent is vacant. An incumbent of an office is one who is legally authorized to discharge the duties of that office. State ex rel. Sanders v. Blakemore, 104 Mo. 340, 15 S. W. 960. In the last war the county attorney of Saline County, Texas was drafted. It was claimed his office thereby became vacant. The court held otherwise. Hamilton v. King, Tex. Civ. App., 206 S. W. 953.

"We come to the conclusion that there is nothing in the law, constitutional, statutory or common, which requires us to hold that Wall has forfeited his office by becoming a soldier in the army. Therefore, the office was not vacant and the

appointment of respondent was unauthorized. * * *

In State v. Grayston, 163 S. W. (2d) 335, Judge Douglas has this to say:

"* * * The decision in this case turns on whether a judge of a circuit court who is called into the military service of the United States as a Colonel in the National guard thereby vacates his judicial position.

" The constitutional provision requiring personal performance was intended for another purpose. It was designed to prevent 'farming out' the performance of the duties of an office to another for the convenience or profit of the Officer. Temporary performance of the duties of a special judge are governed by law, not by the wishes of the regular judge.

" The situation we are considering is analogous to a leave of absence as that term is understood in the business world. The common meaning of the term signifies temporary absence from duty with an intention to return, during which time remuneration is suspended. We note with approval that Judge Watson has not drawn or received any salary as circuit judge since December, 1940. The fact that Judge Watson is unable personally to perform his judicial duties while in military service does not make his holding both offices incompatible under the circumstances. If the law did not permit a substitute to carry on the duties of the office in his absence a different question might be presented. We need neither discuss nor decide that. ***

"All citizens should be encouraged, however possible to aid their country. This is the National policy. Congress has said that National Guardsmen, entering from Federal employment will be restored to their civilian positions and asks private employ-

ers to make the same assurance where possible. This is all out war where 'every single man, woman and child is a partner in the most tremendous undertaking of our American history.' More man power is needed than ever before. Women are filling the depleted ranks in defense industries. No man should be hindered in helping his country.

"Whether filling a civil governmental office renders service as necessary as military service is not a question for the courts.

"The situation involved in this case presents practical considerations which may call for action by our Legislature or by the people in amending the Constitution. The court can but take the law as it finds it. And until either the Legislature or the people do adopt some new provision applicable to such situation, all the court can say is: Let no citizen be penalized because he is a patriot. Let us keep faith with those who fight for us. The motto on our great seal of State proclaims this. 'Let the Safety of the People be the Supreme Law.'

"Our writ in prohibition shall not issue."

CONCLUSION.

From our reading of the above it is the opinion of this department that the induction into the Armed Forces of a School Director does not affect his tenure of office. His office does not become "vacant" within the provisions of the statute and under the opinion as written in State v. Grayston, 163 S. W. (2d) 1. c. 341.

Mr. Glen Simpson

-7-

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Respectfully submitted

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APPROVED:

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