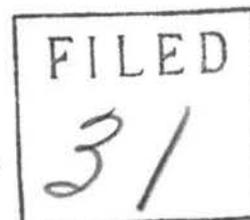


OFFICERS: County officer may be ousted for ^{willful} ~~lawful~~ neglect of duties or failure to personally devote his time to duties of his office.

April 11, 1945.



Honorable Robert H. Frost
Prosecuting Attorney
Plattsburg, Missouri

Dear Mr. Frost:

The Attorney General acknowledges receipt of your letter of April 2, 1945, in which you make the following request for an opinion:

"At the request of the County Court of Clinton County, I would like the opinion of your office on the following set of facts.

"Our County Clerk has taken employment with a private concern and is absent from his office for as long as two weeks at a time and then is only here for one or two days at a time. Of course I realize that as long as he has title to the office he is entitled to be paid but is the fact that he does take other employment and leaves the running of the office in the hands of a deputy, sufficient grounds for an action of ouster."

The statement of facts contained in your letter is entirely too brief for this office to make a determination of whether or not a submissible case of ouster exists against the county clerk. For this reason only the applicable law can be cited, leaving to you, with your better knowledge of the facts, the determination of whether or not a submissible case exists.

Section 12828, Article 3, Chapter 83, R. S. Mo. 1939, is a general section of the statute stating grounds for the

removal of county, city, town and township officers. This section applies where there is no special section, and is as follows:

"Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided."

This has been the law for many years and under the Constitution recently adopted will remain the law until July 1, 1946, unless sooner amended if it is in conflict with the new Constitution. Section 2 of the Schedule of the Constitution of 1945 provides:

"All laws in force at the time of the adoption of this Constitution and consistent therewith shall remain in full force and effect until amended or repealed by the general assembly. All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

A careful examination of the new Constitution fails to reveal any provision of it with which this law might conflict. In fact, Section 4 of Article VII, authorizes provision to be made for the removal from office of officers not subject to impeachment. Said section provides as follows:

"Except as provided in this Constitution, all officers not subject to impeachment

shall be subject to removal from office in the manner and for the causes provided by law."

So that Section 12828, supra, might well stand without amendment.

Attention is directed to one clause of Section 12828, supra, that which provides for the removal from office of an officer who fails to personally devote his time to the performance of the duties of his office. This clause follows Section 18 of Article II of the Constitution of 1875, and the Supreme Court in the case of State ex inf. McKittrick v. Wilson, 166 S. W. (2d) 499, l. c. 502, 350 Mo. 486, points out that this section of the Constitution was intended to prevent "farming out" the duties of an office to another for the convenience and profit of the officer. This case further points out that a failure by an officer to devote his time to the performance of the duties of his office may be excusable.

In the case of State v. Yager, 250 Mo. 388, an action to oust a sheriff for neglect of duty and failure to devote his time to the performance of his duties, the Supreme Court pointed out that a willful failure to perform the duties or to personally devote his time to the performance of the duties of his office, shall constitute grounds for removal.

If, under the provisions of the former constitution, a willful failure of an officer to personally devote his time to the performance of the duties of his office, constituted grounds for removal, it follows that the same would be true of the statute which makes the same thing a cause for removal.

Further in the Yager case, supra, the Court called attention to the fact that even though the duties were properly performed by a deputy, this would not excuse a willful failure on the part of the officer. A similar holding is found in the case of State ex rel. Tilley v. Slover, 113 Mo. 202, 20 S. W. 788.

In the case of Bakersfield News v. Ozark County, 338 Mo. 519, 92 S. W. (2d) 603, the Supreme Court in discussing the failure of an officer to perform a ministerial duty, used the following language (l. c. 522, Mo. citation):

April 11, 1945

"* * * If a public officer fails to perform mandatory ministerial duties, he may be compelled to do so by mandamus. If he 'be guilty of any willful or fraudulent violation or neglect of any official duty' he may be removed from office by the method provided in Sections 11202-11209, Revised Statutes 1929. He would be subject to criminal prosecution under Sections 3945-3950 and 10187, Revised Statutes 1929. * * *"

Your attention is also directed to the cases of State ex inf. McKittrick v. Wymore, 343 Mo. 98, 119 S. W. (2d) 941; State ex inf. McKittrick v. Graves, 346 Mo. 990, 144 S. W. (2d) 91 and State ex inf. McKittrick v. Williams, 346 Mo. 1003, 144 S. W. (2d) 998.

The settled policy of the State is that an officer may not be deprived of his office except for remissness in the performance of the duties of his office or for the conviction of a crime which demonstrates that he is unworthy to hold office, and if an officer has the required qualifications he can only be removed for misconduct connected with the performance of the duties of the office, except when by statute some other transgression is made as cause for removal. State ex rel. Attorney General v. Sanderson, 280 Mo. 258, l. c. 263.

Conclusion

From the foregoing it is the conclusion of this department that in a case not covered by a specific statute, a county officer may be removed from office for willful neglect of his duties or for willful failure to personally devote his time to the performance of his official duties. However, as previously pointed out, the statement of facts in your letter is entirely too brief for us to determine whether or not a submissible case exists against the County Clerk of Clinton County.

Respectfully submitted,

APPROVED:

W. O. JACKSON
Assistant Attorney General

J. E. TAYLOR
Attorney General