

COURTS: Counties having more than one magistrate judge
DISTRICTS: are to be divided into districts as equal in
MAGISTRATE: population as may be determined by the body
STATUTES: authorized to make such division; but that the
discretion of such body is limited, and subject
to review by the Courts. The division of Jackson County into magis-
trate districts, the smallest district having a population of 49,105,
and the largest district having a population of 99,476 would be so
grossly unequal in population as to constitute an abuse of discretion
of the body making such division. That portion of Section 482.040,
RSMo 1949, requiring redistricting of county into magistrate districts
to be done within sixty days after order of the Circuit Court is
directory.



December 31, 1953

Honorable Wm. E. Tipton
Attorney, Board of Election Commissioners
County Courthouse
Kansas City 6, Missouri

Dear Sir:

By letter of December 5, 1953, you requested an official
opinion of this department as follows:

"Pursuant to our telephone conversation, I
am requesting a formal opinion on behalf of
the Kansas City Board of Election Commissioners
concerning the necessity for redistricting the
magistrate districts of Jackson County, Mis-
souri. Pursuant to a court order made by the
Honorable John R. James in the Circuit Court
in Independence, Missouri on October 10, 1953,
an additional magistrate district was created
for Jackson County.

"At the present time, there are six magistrate
districts; and the appointment of an additional
magistrate will increase the number to seven
districts.

"Under the provisions of Section 482.010, RSMo.
1949, the Kansas City Election Board and the
Jackson County Election Board met in a joint
session for the purpose of redistricting the
Jackson County magistrate districts. Also

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present at this meeting were the magistrates and their constables. It seemed to be the desire of the two Boards, the magistrates and constables that the districts be left the same within Kansas City and that the rest of Jackson County should be divided into two districts. The population in the magistrate districts, one to six inclusive, is as follows: (1) 79,330; (2) 88,590; (3) 99,476; (4) 87,961; (5) 87,468; the preceding districts being within the city limits of Kansas City; and (6) 98,210 being the remainder of Jackson County.

"We would like to know if, under the provisions of the above-quoted section, we would be able to divide the county into magistrate districts as suggested above; or whether we must divide the county into seven districts of equal population.

"The Section 482.010 also provides that this redistricting must be done within 60 days after the order of the court, and we would like to know if it would be possible to delay this for a period of time, taking into consideration that the Boards have already met and are presently working on the problem."

Article V, Section 18, Constitution of Missouri, 1945, provides for the establishment of magistrate courts and provides for increase in number of magistrates in any particular county, by order of the circuit court, as follows:

"Magistrate courts--probate judges--number of magistrates--salaries.--There shall be a magistrate court in each county. In counties of 30,000 inhabitants or less, the probate judge shall be judge of the magistrate court. In counties of more than 30,000 and not more than 70,000 inhabitants, there shall be one magistrate. In counties of more than 70,000 and less than 100,000 inhabitants there shall be two magistrates. In counties of 100,000 inhabitants or more there shall be two magistrates, and one additional magistrate for each additional 100,000 inhabitants, or major fraction

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thereof. According to the needs of justice the foregoing number of magistrates in any county may be increased by not more than two, or such increased number may be decreased, by order of the circuit court on petition, and after hearing on not less than thirty days public notice. The salaries of magistrates shall be paid from the source or sources prescribed by law. (Emphasis ours).

Article V, Section 19, Constitution of Missouri, 1945, provides for division of counties having more than one magistrate into districts:

"Magistrate districts--jurisdiction of district magistrates--organized magistrate courts.-- After each census of the United States the boards of election commissioners, or if none, the county courts, shall divide counties having more than one magistrate into districts of compact and contiguous territory, as nearly equal in population as may be, in each of which one magistrate shall be elected. Each of such magistrates shall have jurisdiction coextensive with the county, and the magistrates may organize into a court or courts with divisions." (Emphasis ours).

Section 18 of Article V is implemented by legislative enactment of Section 482.010(3) as follows:

"According to the needs of justice, the foregoing number of magistrates in any county may be increased by not more than two, or such increased number may be decreased, by order of the circuit court, on petition of five hundred qualified voters of the county, and after hearing on public notice to be published in some newspaper of general circulation in the county once each week for three consecutive weeks immediately preceding said hearing. No petition for additional magistrate shall be granted unless the circuit court finds from the evidence heard that the administration of justice requires that the number of magistrates be increased, and that the need for additional magistrate or magistrates is not temporary but appears to the circuit court that a permanent need exists. Such additional magistrates shall be appointed.

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by the governor when authorized by proper order of the circuit court certified to him, and such appointee shall hold office until the next general election at which election a successor shall be elected to hold office for the unexpired term or full term as the case may be, said terms to be identical with that of other magistrates."

Section 19, Article V, has been implemented by legislative enactment of Section 482.040(3) as follows:

"When the number of magistrates in any county has been increased or decreased by order of the circuit court as provided by law, the board or boards of election commissioners, or if none, the county court, shall within sixty days thereafter redistrict said county into districts of compact and contiguous territory, as nearly equal in population as may be, in each of which one magistrate will be elected. Such districts may be altered after each United States decennial census as the administration of justice requires." (Emphasis ours).

Jackson County is to be divided into seven magistrate districts. Both the Constitution and statutes require such magistrate districts be of compact and contiguous territory, as nearly equal in population as may be. It is proposed to divide Jackson County into seven districts with the following respective population in each district:

Number one, 79,330.

Number two, 88,590.

Number three, 99,476.

Number four, 87,961.

Number five, 87,468.

Districts 6 and 7 having a combined population
of 98,210.

If we assume an equal division of population between Districts 6 and 7, each will have a population of 49,105. The question arises: Are these districts as near equal in population as may be. If all the districts were of precisely equal population, the total population of 541,035 divided by seven, equals approximately 77,291 people for each district. It is of course impractical to make such a precisely equal distribution of population, and such precise equality of distribution was not contemplated by the Constitution and statutes. An examination of the comparative

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populations of the proposed districts discloses that District Number 3 will contain a population greater than the combined population of both Districts 6 and 7, and that assuming Districts 6 and 7 to be equal in population, one, or either of such districts, will contain only 64% of the number of people that would be in each district, if there were a precisely equal distribution of the population of Jackson County. The Supreme Court of Missouri in State ex rel. Barrett v. Hitchcock, 241 Mo. 433, 457, 146 S.W. 40, declares redistricting to be a legislative matter:

"That the districting of the State into legislative, senatorial, congressional and judicial districts is the exercise of legislative authority, cannot be successfully questioned. All of the authorities so hold, and it has been the uniform practice in this and all other states, in so far as I have been able to ascertain; * * *."

The ability and authority of a legislative body to exercise its own judgment and discretion constitutes the essence, and distinctive character of a legislative body. Whether such legislative discretion can be reviewed by the Courts was decided in the Hitchcock Case, supra. In that case there was an attempt to mandamus the Circuit Judges of St. Louis to compel them to redistrict St. Louis into six senatorial districts of compact and contiguous territory, and of population as nearly equal as may be. The Court denied the Writ on two grounds, one, that the Judges were acting in a legislative capacity and thus were not subject to mandamus, and further, that a previous apportionment of the entire state into senatorial districts, was unconstitutional, null and void. Woodson, J., in discussing the discretion of any particular legislative body in redistricting stated l.c. 474:

"* * * I use the words 'limited discretion,' for the reason that the Constitution in express terms limits the discretion, by providing that the Legislature shall apportion the State into districts, but in doing so it shall make each district as nearly equal in population as may be, and that when a district is to be composed of more than two counties, they shall be as compact as may be convenient.

"The words italicized show conclusively that it was not the intention of the framers of the Constitution to confer upon the Legislature the unlimited power and discretion to form the districts in such shapes and dimensions as it

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might, in its own opinion, deem proper, nor to give to each a population which it deemed best. Had the framers of the Constitution intended that the Legislature should apportion the State into districts according to its own free and untrammelled will, then they would not have used the words of restriction before mentioned. This is too plain for argument. Therefore, having seen that the authority and discretion of the Legislature is thus limited, it would be error to treat the proposition upon the theory that the Legislature had unlimited discretion in the matter; * * *" (Emphasis theirs).

In the Hitchcock Case the largest senatorial district proposed was to contain a population of 116,387, while the smallest senatorial district proposed was to contain 63,853 population, leaving a difference of some 52,534 in population between the largest and smallest districts. It should be noticed that these figures are roughly comparable to the population of the largest and smallest magistrate districts proposed. The Court invalidated the entire act of apportionment in the Hitchcock Case saying, l.c. 501:

"This one defect is sufficient to invalidate the entire act of apportionment; but we are not called upon to rest this opinion upon a single defect, for the record discloses the fact that the Legislature, as previously pointed out, grossly abused its discretion in the same manner as to several other districts, especially regarding the variation between the population of the largest and the smallest districts; also in failing to observe the constitutional requirements regarding the compactness of the districts." (Emphasis ours).

Thus it would appear by analogy with the Hitchcock Case, that it would be an abuse of discretion to have such a great variance in population of the magistrate districts.

Your second question inquires whether the redistricting must be done within sixty days after the order of the Court, as required by Section 482.040. In State ex rel. v. Holmes, 253 S.W. (2d) 402, the Supreme Court of Missouri in declaring that the time limitations in the School District Reorganization Act were directory, instead of mandatory stated, l.c. 404:

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"In determining whether either of the provisions of the schedule with which each relator failed to comply is mandatory or directory, the "prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished. Generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory." 25 R.C.L. Sec. 14 pp. 766, 767.' State ex rel. Ellis v. Brown, 326 Mo. 627, 33 S.W. 2d 104, 107.

'As a general rule, a statute which regulates the manner in which public officials shall exercise the power vested in them will be construed as directory rather than mandatory, especially where such regulation pertains to uniformity, order and convenience, and neither public nor private rights will be injured or impaired thereby. If the statute is negative in form, or if nothing is stated regarding the consequence or effect of non-compliance, the indication is all the stronger that it should not be considered mandatory.' Crawford's Statutory Construction, 1st Ed., 1940, Sec. 266, pp. 529, 530. See also State ex inf. McAllister ex rel. Lincoln v. Bird, 295 Mo. 344, 351-352, 244 S.W. 938, 939.

'For the reason that individuals or the public should not be made to suffer for the dereliction of public officers, provisions regulating the duties of public officers and specifying the time for their performance are in that regard generally directory. A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered a limitation of the power of the officer.' 3 Sutherland, Statutory Construction,

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3rd Ed., 1943, p. 102. See also St. Louis County Court v. Sparks, 10 Mo. 117; State ex inf. Gentry v. Lamar, 316 Mo. 721, 725, 291 S.W. 457, 458; State ex rel. Acom v. Hamlet, Mo. Sup. 250 S.W. 2d 495."

As the sixty-day time limitation does not relate to the essence of the redistricting, and nothing is stated regarding the consequence, or effect, of non-compliance, it is our opinion that the portion of Section 482.040 requiring redistricting within sixty days after the order of the Circuit Court is directory, rather than mandatory.

CONCLUSION

It is therefore the opinion of this office that, counties having more than one magistrate judge are to be divided into districts as equal in population as may be determined by the body authorized to make such division, but that the discretion of such body is limited, and subject to review by the Courts. It is the opinion of this office that the division of Jackson County into magistrate districts, the smallest district having a population of 49,105, and the largest county having a population of 99,476 would be such gross inequality of distribution of population as to constitute an abuse of discretion of the body(ies) making such division. That portion of Section 482.040, RSMo 1949, requiring redistricting of a county into magistrate districts to be done within sixty days after order of the Circuit Court is directory.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul McGhee.

Yours very truly,

JOHN M. DALTON
Attorney General

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