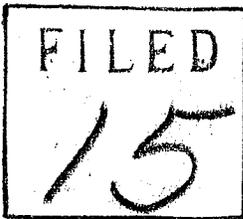


COUNTY OFFICERS:
OUSTER:

The amount of time which a county officer must personally devote to the duties of his office in order not to be subject to ouster from his office is a matter which must be determined upon the basis of the particular facts and circumstances in each case.



May 12, 1954

Honorable John F. Carmody
Prosecuting Attorney
Randolph County
Courtthouse
Moberly, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"The County Court of Randolph County, Missouri has directed me to request an official opinion from your office whether absence from the office of the County Treasurer, in a County of this class, for periods of more than short intervals by the incumbent is permitted?"

"When I use the term short intervals, I contemplate periods of less than 8 hours."

In a telephone conversation which we had with you soon after receiving your above letter, you informed us that your county treasurer did not have a clerk or deputy, that the treasurer herself was the only person in the office, and that when the treasurer was not personally in the office that the office was closed.

The duties of a county officer in respect to the duties of his office, from the standpoint of personally performing those duties, is set forth in Section 106.220 RSMo 1949, which reads:

"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 of 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,

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shall thereby forfeit his office, and may be removed therefrom in the manner provided in sections 106.230 to 106.290."

Section 54.100 RSMo 1949, reads:

"The county treasurer shall keep his office at the county seat of the county for which he was elected, and shall attend the same during the usual business hours. The county court shall provide said county treasurer with suitable rooms, and a secure vault in the courthouse or other building occupied by other county officers, and the county treasurer shall keep his office and records in such rooms and vault provided by the county court. He shall receive all moneys payable into the county treasury, and disburse the same on warrants drawn by order of the county court."

The most recent construction by the appellate courts of Section 106.220, supra, and Section 54.100, supra, was in the case of State ex inf. Taylor vs. Cumpston, 240 S.W. (2d) 877, which case was decided by the Missouri Supreme Court in 1951. In it the Attorney General of Missouri filed an action in quo warranto against the county treasurer and ex officio collector of Bates County, to remove that official from office on the ground that he had

"* * * failed to attend to the duties of said office during the usual business hours for the transaction of business therein and failed personally to devote his time to the performance of the duties of such office of County Treasurer and Ex Officio Collector and did and does willfully neglect and refuse to perform the official acts and duties which by law it was his duty to do and perform. * * * that on or about the 14th day of March, 1949, respondent entered into a contract of employment with what is known to relator as Skelly Oil Company,* * * so that on and after April 1, 1949 the performance of his duties thereunder occupied and consumed substantially the entire working time of respondent, including the usual business hours aforesaid,* * *."

At l.c. 879 of its opinion, the court further stated:

"* * * The execution of a contract with Skelly Oil Company was admitted, but respondent denied that his duties under said contract occupied his entire working time. Respondent further denied that he had 'failed, neglected or refused to attend his

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said office or to attend to the duties thereof or to personally devote his time to the performance of the duties thereof.' He alleged that 'all of the duties of the County Treasurer and Ex Officio Collector of Bates County, Missouri have been and are now being performed by him personally or under his immediate supervision and direction.'

"In reply to particular allegations in the answer, relator admitted that 'respondent is personally present in charge of said office all day long on Saturday of each week'; and 'that respondent frequently works in said office of County Treasurer before office hours, after office hours and on Sundays and holidays.'"

There was further testimony, which was not contradicted, that this officer at all times employed a deputy who kept the office open during usual business hours, and who promptly and efficiently discharged all the duties of the office. Just how much of his time the officer actually spent in the office was a matter of some dispute and doubt.

In its opinion denying ouster, the court said, in part, at l.c. 885:

"Relator insists that a finding that respondent has forfeited his office should be made, and that an order of ouster be entered. We do not think the words of Sec. 54.100, that 'the county treasurer shall keep his office at the county seat of the county for which he was elected, and shall attend the same during the usual business hours,' and the words of Sec. 106.220 'who shall fail personally to devote his time to the performance of the duties of such office' should be construed to require the actual continuous physical presence of the respondent in his office during the usual business hours or to require respondent to devote his entire time personally during such hours to the actual physical performance of the duties of the office on peril of forfeiture of his office. The sections have not been so construed and we think they should not be so construed. The authorities, however, are very limited.

"In the case of Fairly v. Western Union Telegraph Co., 73 Miss. 6, 18 So. 796, 797 it was held that a constitutional provision that no person shall hold an office of profit 'without personally devoting his time to the performance of the duties thereof' must be given a reasonable construction. The court said: 'if the public

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duties of an office require all the time of a public servant, then the whole time must be given. If all the time of the officer be not required for the complete and faithful execution of his trust, then he shall give such time and devote such service as shall suffice for the full and faithful discharge of the duties of his office.' In commenting upon the above case the court, in *Miller v. Walley*, 122 Miss. 521, 84 So. 466, 467, said: '* * * The decision does not hold that the entire time of the superintendent was to be devoted to the public office, but holds that only such time as the duties of the office required for a proper performance must be devoted to the duties of the office. This necessarily presents a latitude for differences and debate as to what time is required as a matter of fact.' In the case of *State v. Hinshaw*, 197 Iowa 1265, 198 N.W. 634, 637, in an action to require the State Fish and Game Warden to account for certain funds, the court said: 'There is no contention here that appellee neglected any of his official duties whatever, nor is there any claim that he misappropriated any of the property of the state. A public officer is not required to give every instant of his time to the public service in such a sense that he cannot, if wholly consistent with public duties, perform any other service or earn money from any other source. His first and paramount duty is to perform all of the requirements of his office, but he is not barred because he holds public office from investing his funds in a legitimate business enterprise, nor prohibited from receiving profits from an independent business in which he may have an interest.'

From the above, it seems to us to be clear that it would be impossible for this department, or for any court, to lay down a flat rule on this matter, and, for example, to say that a county officer could, with impunity, be absent from his office for one hour and forty minutes each day for four days in each week, but that if he were absent for one hour and forty-one minutes each day, four days in each week, he would be subject to custer under Section 106.220, supra.

In other words, each particular case must be decided upon the basis of its particular state of facts and circumstances. From the Cumpton case it would appear that a county officer does not have to

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spend all of the business day in his office, but how much time he must spend there in order to be within the statute is, as we said, a matter for determination in each case.

CONCLUSION

It is the opinion of this department that the amount of time which a county officer must personally devote to the duties of his office in order not to be subject to ouster from his office is a matter which must be determined upon the basis of the particular facts and circumstances in each case.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

HPW/ld

JOHN M. DALTON
Attorney General