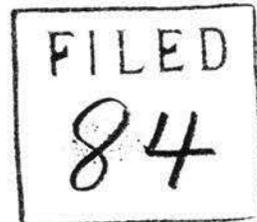


VACANCY IN OFFICE: Resignation of sheriff should be addressed to
SHERIFFS: County Court, and is effective upon its acceptance
NOMINATIONS: by such county court, but not before the time
SPECIAL ELECTIONS: specified in the resignation. No steps may be
RESIGNATION: taken to fill the vacancy prior to the effective
date of the resignation. When special election
is required, notice thereof must be published
at least once in some newspaper published in the
county at least 20 days before the date of election.
The county central committee of each political
party may nominate the candidate of such party
and independent candidates may also file for the
office by obtaining sufficient signatures on
nomination petitions.

June 13, 1961



Honorable Edward Speiser
Prosecuting Attorney
Chariton County
Salisbury, Missouri

Dear Sir:

You have recently requested an opinion as follows:

"I would like to have an opinion from your office in regard to proper procedure with respect to the following situation that confronts us in Chariton County.

Mr. Cleve Iman, elected, qualified, and acting sheriff of Chariton County, has indicated his intention to resign his office as sheriff effective July 1. He has filed with the Clerk of the County Court of Chariton County, a notice to that effect. This notice is addressed 'To Whom it May Concern'. The only authority I have been able to find in regard to procedure, is the authority contained in Section 57.080 of the Missouri Revised Statutes of 1959. This Section fails to state any particular procedure to be followed in effecting a resignation. I would like to have answers to the following inquiries:

1. We would like to know exactly to whom such resignation should be addressed, whether to the County Court, Governor, or possibly some other official.

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2. The steps or mechanics required in the acceptance of such resignation to make it effective.

3. Can such resignation become effective immediately upon filing same with the proper official, or does it become effective on its acceptance by the proper official, or is there a specific or minimum waiting period before it can become effective and the office thereby vacated.

4. In the event a period of time must elapse between the filing of the resignation and its effective acceptance, would it be proper to hold an election to fill the office prior to the acceptance of the resignation and its becoming effective. Also, is it proper to order the election and set the election machine in motion prior to the resignation becoming effective and the office becoming vacant.

5. Since the resignation is being filed at this time and assuming that the resignation became effective prior to a time which is more than nine months preceding the next regular election, which will be in August, 1962, the matter of procedure to be followed by the various parties that may desire to place a candidate on the ticket, or in case there are independent candidates, is a matter of much interest and concern. I would like to know the procedure to be followed by the political parties in placing a candidate on the ticket and also the procedure to be followed in placing the name of an independent candidate on the ticket.

6. When a special election is called to fill the vacancy by the resignation of the sheriff's office, how long must such election be advertised, how often must it appear in the weekly issues of our local papers, and must such advertisement be inserted in all the papers published in this county. We have three papers in this county and they are all published weekly."

It would appear from your letter that the sheriff of Chariton County has not yet resigned, but that he has merely given notice of an intention to do so at a later date. This opinion is written on the assumption that a resignation will be forthcoming from said sheriff expressly resigning from the office of sheriff.

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Article IV, Section 4 of the Constitution provides that the governor shall fill all vacancies in public offices "unless otherwise provided by law." Section 57.080, RSMo 1959, makes specific provision otherwise for filling a vacancy in the office of sheriff, and therefore the governor has no power to fill a vacancy in the office of sheriff. This statute provides in part as follows:

"Whenever from any cause the office of sheriff becomes vacant, the same shall be filled by the county court; if such vacancy happens more than nine months prior to the time of holding a general election, such county court shall immediately order a special election to fill the same, and the person by it appointed shall hold said office until the person chosen at such election shall be duly qualified, * * *"

As appears from the foregoing statute, the power is granted to the county court to fill a vacancy in the office of sheriff.

The rule followed in Missouri is that a resignation, in order to be operative, should be communicated to the officer or body having the power to fill the vacancy. In State ex rel Buskirk v. Boecker, 56 Mo. 17, which involved the resignation of a county clerk, the Court held as follows:

"As by the terms of the law, the Governor alone has the authority to make the appointment in case of a vacancy, it would seem to follow, that in order to make the resignation operative, it should be addressed to him. This is unquestionably the general principle, that when power is bestowed upon a particular officer, when a vacancy occurs, to fill the same by appointment, that the resignation should be sent to him that he may accept it, and then proceed to the discharge of his functions in the premises."

In State ex rel Kirtley v. Augustine, 113 Mo. 21, 20 S.W. 651, the same principle was applied. The question there was when the office of county treasurer became vacant. The treasurer tendered his resignation to the county court, which had no authority to act upon it, but with the consent of the treasurer the resignation was certified to the Governor who then appointed a successor. Before the commission was actually issued, the treasurer attempted to withdraw his resignation. The court held that he could not do so. The court laid down the following rules of law which are applicable to the question you have posed:

"It is well-established law that, in the absence of express statutory enactment, the authority to accept the resignation of a public officer rests with the power to appoint a successor to fill the vacancy. The right to accept a resignation is said to be incidental to the power of appointment. 1 Dill. Mun. Corp. (3d Ed) § 224, Mechem, Pub. Off § 413; Van Orsdall v. Hazard, 3 Hill, 243; State v. Boecker, 56 Mo. 17. By section 11, art. 5, Const. Mo., it is provided that, "when any office shall become vacant, the governor, unless otherwise provided by law, shall appoint a person to fill such vacancy," etc. It seems that no provision exists in our statutes for filling the vacancy of county treasurer. Hence it follows that the power of appointment remains, as directed by the constitution, with the governor; and the authority to fill the vacancy being with the governor, here likewise rests the power to accept the resignation. In order, then, to create a vacancy in the office held by Augustine, his resignation must have been lodged with the governor, and by the governor accepted. There being no particular mode pointed out by statute or by the constitution, this resignation may be in writing or by parol. No particular form is required. It is only necessary that the incumbent evince a purpose to relinquish the office; that this purpose be communicated to the proper authority; and that this resignation be accepted either in terms, or something tantamount thereto, such as appointing a successor, etc. Edwards v. U.S., 103 U.S. 471, 474; People v. Board, 26 Barb. 502; Mechem, Pub. Off. § 414 et seq. When this resignation shall have been communicated to the proper authority, and the same shall be accepted, -- whether formally or by the appointment of a successor, -- it is beyond recall. It cannot then be withdrawn."

Inasmuch as the county court has the sole right to fill the vacancy by appointing some person to hold the office until such time as an election shall be held, it is the opinion of this office that the resignation of the incumbent sheriff should be addressed to the county court, and that such resignation to be effective should be accepted by the county court. Such acceptance should be noted by an order of record, although under the authorities the mere act of appointing a successor itself operates as an acceptance of the resignation. There are no particular steps or mechanics required in order to accept the resignation. As the Kirtley case holds, all that is necessary is that the incumbent

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communicate his purpose to relinquish his office to the proper authority and that such authority accept the same, either formally or by the appointment of a successor.

The foregoing cases point out that the word "vacant" means "empty, unoccupied, as applied to an office without an incumbent." "An incumbent of an office is one who is legally authorized to discharge the duties of that office." State ex inf. McKittrick v. Wilson, 350 Mo. 486, 166 S.W. 2d 499, 502. So long as there is an officer in possession of the office it may not be said to be vacant. Hence, if Mr. Iman resigns now, effective July 1, 1961, and this resignation is accepted, there would be no vacancy in the office prior to July 1. If on July 1 Mr. Iman should resign effective forthwith, even then there would be no vacancy until such time as the resignation was actually accepted.

There is no provision in our statutes which authorizes anyone to fill a vacancy prior to the time such vacancy actually exists. It is the fact of vacancy which creates authority on the part of the proper official or body to fill the same. The power granted to the county court by Section 57.080, RSMo 1959, comes into existence whenever the office of sheriff "becomes vacant". Hence, until such time as the vacancy actually occurs, the county court is without authority to act with respect to the office. In State ex rel Berry v. McGrath, 64 Mo. 139, the Court expressly held that a resignation to be effective on a future date did not take effect until such date no matter when it was accepted, and that the office did not become vacant prior to such date. The court ruled this matter as follows:

"* * *Now, notwithstanding the fact that Judge Henry's resignation was transmitted to the governor in July, 1876, he continued to be judge of the 27th Judicial Circuit until the 31st day of December, 1876. On that day, and not before, did his resignation take effect, no matter when it was accepted by the governor. From that day, and not before, did his office become vacant. * * *

In the Berry case an election was held prior to the effective date of the resignation, for the purpose of electing a successor. The court ruled that "it is quite plain that no election could be held * * * for a successor * * * until after the office * * * became vacant. * * * As the relator claims to have been elected prior to that time, he was elected before any vacancy existed and without authority of law."

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It is the further opinion of this office that no election may be ordered to fill the vacancy prior to the time such vacancy actually exists, and that cannot be until after the effective date of the resignation and its acceptance by the county court. Section 57.080, RSMo 1959, requires the county court to appoint some person whenever the office "becomes vacant", and then to call a special election (when the "vacancy happens more than nine months" before the next general election) to fill the "vacancy". This can mean only that there is no authority to act at all prior to the occurrence of the vacancy. This conclusion is fortified by the further provision that "upon the occurrence of such vacancy," the presiding justice of the county court must call a special term thereof if the court is not then in session for the purpose of causing the election to be held.

Under the facts stated in your request for an opinion, the resignation will be effective more than nine months prior to the time of holding the next general election, and therefore the statutory provisions applicable to calling a special election will become operative. In the meantime, and immediately upon the vacancy occurring, it is the duty of the county court to appoint some person to fill the vacancy in office until the election is held.

Section 57.080, RSMo 1959, provides with respect to the special election that it be held within 30 days after the vacancy occurs and that "notice" of such election be given. With respect to notice, it is provided only that the same shall be published in "some" newspaper published within the county. It is further provided that if there should be no newspaper published in the county then the notice shall be given by ten handbills posted in ten of the most public places in the county for twenty days prior to holding the election. The facts as stated in your letter disclose that there are three weekly newspapers in your county.

It is the opinion of this office that since the statute requires only that there be publication of "notice" in "some" newspaper, the statute will be complied with if the notice is published in any one of the three newspapers at least once. The statute does not expressly state the period of time prior to the election that such notice must be published, but since the statute does require handbills to be posted for twenty days prior to the holding of the election, it is the opinion of this office that the most reasonable construction of the language employed is the published notice must be given at least 20 days prior to the day of the election. We also deem it desirable that if possible the notice be published in each issue of the newspaper after the election is called and prior to the date of such election.

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Section 57.080, RSMo 1959, provides that the special election shall be held in pursuance of said statute and the laws governing general elections in this state. An examination of such laws discloses that there is no express provision which governs the procedure to be followed in placing the names of candidates on the ballot at a special election. Section 120.150, RSMo 1959, provides in part that political parties and individual voters to the number and in the manner specified in Section 120.140 to 120.230 may nominate candidates for public offices. In the case of State ex rel Preisler v. Toberman, 364 Mo. 904, 269 S.W.2d 753, l.c. 755, the court held that the provision of this statute as to "methods" of nominating candidates does not apply to established political parties. In this connection, the court held that "as to parties [the statute] merely says no more than that political parties may nominate candidates for public offices." This means that political parties have the statutory right to nominate candidates for a public office. However, the method of exercising such statutory right in the instant situation is not expressly provided for.

The primary election law contains provisions for filling vacancies in nominations. However, Section 120.300, RSMo 1959, provides in terms that Sections 120.300 to 120.650, RSMo 1959, (the entire primary law) "shall not apply to special elections to fill vacancies". The Supreme Court in State ex rel Wagner v. Patterson, 207 Mo. 129, 105 S.W. 1048, l.c. 1054, with respect to a special election to fill a vacancy in the office of sheriff so held as follows:

"During the oral argument of the cause some question was raised as to whether or not the general primary election laws enacted in 1907 (Laws 1907, pp. 263-270) would apply to this election, if ordered. In reply to that suggestion, we will state that section 1 of that act expressly exempts from its operation all special elections to be held to fill vacancies in office, which, of course, includes those held to fill vacancies in the office of sheriff."

Section 120.750, RSMo 1959, provides in part as follows:

"The central committee of a political party shall consist of the largest body elected for the purpose of representing and acting for the party in the interim between conventions of the party." * * *

Our Supreme Court has consistently ruled that statutory limitations upon the rights of political committees are not to be extended to

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prevent such committees from making nominations in any situation not expressly covered by the particular statutory limitations. Among such cases are State ex rel Hayden v. Thomas, 353 Mo. 332, 182 S.W.2d 584, State ex rel Shumard v. McClure, 299 Mo. 688, 253 S.W. 743 and State ex rel Punch v. Kortjohn, 246 Mo. 34, 150 S.W. 1060. In the Hayden case, an incumbent justice of peace died shortly after the primary election, thereby creating a vacancy in that office. No candidate was nominated at the primary because there was no vacancy and the incumbent had more than two years yet to serve. The statute had been amended to provide that vacancies occurring after the holding of any primary, and resulting from death or resignation and not otherwise, in said nomination of such party at the primary shall be filled by the party committee. Previous to the amendment the statute had given the central committee power to fill vacancies "where no person shall offer himself as a candidate before such primary." The court held, 182 S.W.2d 1.c. 586, that although the statute should be construed to further the legislative intent "to encourage the selection of candidates by the electors of a party rather than by the central committee", nevertheless "it does not follow that the central committee has been deprived of the power to select a party candidate for an office which must be filled at the general election, but which could not have been voted at the primary." The court ruled as follows:

"Our laws recognize political parties as useful adjuncts to our system of government. Accordingly, while preserving the right of candidates to run for office independently, we have enacted laws regulating nominations by political parties. It is the policy of those laws to require party nominations to be made by the electors of the party where possible, but we do not think the law prevents a political party from making nominations by its duly constituted committee when it has had no opportunity to make them by its electors at the regular primary. In other words, the state primary law is inapplicable to nominations for vacancies in office occurring too late to be voted on at the state primary. Formerly such vacancies were filled at special elections and nominations therefor were made by or under the direction of party committees. Under present statutes such vacancies are filled at the next general election, but Section 11546 still provides that the state primary law 'shall not apply to special elections to fill vacancies.' Considering all the statutes mentioned, we think the state primary law provides the method for nominations to all offices to be filled at the ensuing general election, except as to vacancies occurring too late to be voted on at the state primary."

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The foregoing cases constitute authority for the proposition that in all situations where the state primary law is not applicable to nominations for vacancies in office, party committees have the right to make such nominations on behalf of their respective parties. That is to say, where the rank and file of the party have no opportunity to nominate the candidate of such party, and the law specifies no other method, then the duly constituted committee of such party may make such nomination on behalf of the party.

It is the opinion of this office that inasmuch as the state primary law has no application to special elections, and there being no other statute which purports to deprive the county central committee of its power to represent and act for the party members in such situation, the county central committee of each of the established political parties in Chariton County is entitled to nominate the candidate of such party for the office of sheriff to be voted on at the special election to be held to fill the vacancy.

Section 120.180, RSMo 1959, provides the method for placing the names of independent candidates on the ballot. It provides in effect that such nominations may be made by nomination petitions signed by qualified voters of the county, equaling not less than 2% of the number of voters who voted for county officers at the next preceding general election. The form and content of such petitions are set forth in Sections 120.190 to 120.210, RSMo 1959.

It is to be noted that Section 120.220, RSMo 1959, provides that petitions for nomination for county offices shall be filed with the county clerk "at least seventy-eight days previous to the day of election." In the opinion of this office, said Section 120.220, RSMo 1959, has no application to special elections, and that the clear intent thereof is that it apply only to general elections for which the normal primary elections are to be held. The time provision of said section fits into the pattern whereby party nominations for candidates to be voted on at such general elections are also made well in advance of the general election. In any event, we believe that such time provisions are directory insofar as they may be held applicable to special elections. Our Supreme Court in *State ex rel Borgelt v. Pretended Consolidated School Dist. No. 3 of St. Charles County*, 362 Mo. 249, 240 S.W.2d 946, 1.c. 950, has laid down the following rules in construing statutes:

"The primary purpose of statutory construction is to ascertain and give effect to the expressed legislative intent. * * * Generally statutory provisions relating to the essence of the thing to be performed or to matters of substance are considered mandatory, while those which do not relate to the essence and where compliance is merely a matter of convenience rather than substance are considered directory."

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In State ex rel Ellis v. Brown, 326 Mo. 627, 33 S.W.2d 104, the foregoing principle was applied by the Supreme Court in holding that a statutory provision requiring persons seeking registration as absentee voters to appear before the board of election commissioners on designated days of the week prior to the election was directory.

If the time limitations contained in Section 120.220, RSMo 1959, are held to be mandatory as applied to special elections, such a construction would raise serious constitutional doubts as to the validity of the statute. Inasmuch as a special election for the office of sheriff must be held within 30 days after the vacancy occurs, then it would never be possible for an independent candidate to ever have his name on the ballot if the statute were held applicable. The constitutional guaranty of free and open elections contained in Section 25, Article I of the Constitution is held to guarantee the right of every eligible person to become a candidate for an office. This principle was recently stated in Preisler v. City of St. Louis, 322 S.W.2d 748, l.c. 753 as follows:

"We agree that every eligible person has the right under the constitutional guaranty of free and open elections to become a candidate for office, Preisler v. Calcaterra, 362 Mo. 662, 243 S.W. 2d 62, 64; State ex rel Haller v. Arnold, 277 Mo. 474, 210 S.W. 374, 376 [3]; and that restricting that constitutional right in such a manner as to effectively deny or improperly impede it is a violation of the guaranty, State ex rel. Preisler v. Woodward, 340 Mo. 906, 105 S.W.2d 912, 914 [4,5]; State ex rel. Haller v. Arnold, supra, 210 S.W. 376 [2]."

CONCLUSION

It is the opinion of this office as follows:

1. The resignation of a sheriff should be addressed to the county court.
2. Said resignation is effective upon its acceptance by the county court but not before the time expressed in said resignation.
3. No particular steps or procedure is required in order to accept such resignation, but preferably the acceptance should be by an order to such effect entered of record.

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4. No steps may be taken to fill the vacancy or to nominate candidates, preliminary or otherwise, until such vacancy actually occurs, which cannot be prior to the effective date of the resignation.

5. When the office of sheriff becomes vacant the county court is required to appoint some person to fill such vacancy until a successor is duly elected and qualifies. Where the vacancy occurs more than nine months before the next general election, a special election must be called within 30 days after the vacancy occurs. Notice of such special election must be published at least once in some newspaper published in such county, and the first such publication must be made at least 20 days before the date of the election.

6. The county central committee of each political party may nominate the candidate of such party for the office of sheriff, and independent candidates may also file for such office by obtaining the requisite number of signatures on nomination petitions.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Joseph Nessenfeld.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JN:ms

By Julian L. O'Malley
Assistant Attorney General,
Acting Attorney General