

March 9, 1962

FILED
96

Honorable Robert A. Young
Member, Missouri House of Representatives
First District, St. Louis County
3500 Adie Road
St. Ann, Missouri

Dear Mr. Young:

This letter of advice is addressed to the problems reflected by the questions posed by the Florissant Committee For Independent Freeholder Candidates and submitted with your letter of January 20, 1961.

Evidence at hand discloses that the City of Florissant, Missouri, is a special charter city, having been incorporated by special act of the legislature in 1857, and that such city desires to adopt a charter form of government under constitutional authorization found in Article VI, Section 19, Missouri's Constitution of 1945.

Information given to this office discloses that over thirty persons were nominated for the thirteen charter commission posts voted upon at the election held in Florissant on December 19, 1961. Article VI, Section 19, Missouri's Constitution of 1945, authorizing such election, specifically provides that "the thirteen candidates receiving the highest number of votes shall constitute the commission". The electorate was endeavoring to fill thirteen separate positions on the charter commission and the election of twelve of those members must be conceded because each of them had more votes than any other candidate. Two candidates were in thirteenth position because of a tie vote, and we must take notice of a rule stated in the following text from 29 C.J.S., Elections, Section 244:

"Where the vote results in a tie, and no provision is made by law for determining who shall be declared elected in such case, there is no election."

Article VI, Section 19, Missouri's Constitution of 1945, requires that the charter commission posts be filled in the initial instance, by election, and contains no provision directing how a tie vote is to be resolved. We have not found any statutory directive disclosing how such tie vote is to be treated.

In the case of State ex inf. Crow, Attorney General v. Kramer, 150 Mo. 89, the Supreme Court was considering the affect of a tie vote in an election for county clerk, and spoke as follows at 150 Mo. 89, l.c. 100, 101:

"The fact that provision was made as to ties for sheriff and coroner, and no such or other provision made for ties for county clerks, is a very conclusive demonstration that the framers of the constitutional amendment did not intend that ties for county clerks should be determined in any manner by the county court or any one else, for if they had so intended they would have said so in express terms as they did respecting sheriffs. As they did not do so, it is plain that instead of its being an oversight, it was their intention to require the people to elect, and if there was a tie, there was no election, and the legal consequences ensued." (Underlining supplied)

The principal laid down in State v. Kramer, supra, is to be applied to our factual situation insofar as it involves the thirteenth position to be filled on the charter commission and is not to be applied to defeat the election of twelve members of the commission whose vote margin was certain, and not subject to challenge by any of the other nominees running for seats on the commission.

A close analogy to our factual situation is found in the case of Beeler v. Loock, 135 S.W. 2d 644, where the Court of Civil Appeals of Texas was reviewing an election contest arising over the election of school trustees. The facts in such case disclosed that there were fourteen candidates for the seven places to be filled on the board of trustees being elected for the first time. Each of five candidates received vote margins over their opponents which ruled out any question of their right to become trustees. Three candidates received the same number of votes, or 113 each. In such election contest a retabulation disclosed that seven persons were actually elected to the board of trustees but the appellate court did announce this principal at 135 S.W. 2d 644, l.c. 647:

"In the present instance, however, the fact that candidates might receive an equal number of votes, there being seven places, and not merely one, to fill, could not result in the election being void merely because two or more may have received an equal number of votes."

The charter commission to be established under authority found in Article VI, Section 19, Missouri's Constitution of 1945, is to be composed of the "thirteen candidates receiving the highest number of votes". The case of State ex inf. Crow, Attorney General v. Towns, 153 Mo. 91, l. c. 109, treats the word "elected" in the following language:

"In State ex rel. v. Kramer, 150 Mo. 89, it was expressly held that where the Constitution provides that an officer shall be elected, it meant the act of choosing, performed by the qualified electors, and that where the electors failed to make a choice, no appointment could be made to the office unless expressly authorized by the Constitution."

In view of the interpretation of the word "elected" as spelled out in the foregoing quotation from State v. Towns, supra, it must reasonably be concluded that twelve of the thirteen members to compose the charter commission were chosen and elected on December 19, 1961, and that the only vacancy on the commission results from the failure to choose and elect the thirteenth member. In the absence of a directive as to how this single vacancy is to be filled we conclude that it must be filled by another election.

Having answered the first question posed by the Florissant Committee For Independent Freeholder Candidates, we next outline answers to questions numbered 2, 3 and 4, as follows:

2. While the election of twelve members of the Commission on December 19, 1961 is not subject to challenge, the formal functioning of the Commission must await the election of its thirteenth member.

3. a and b. A special election should be held at the earliest convenient date to fill the thirteenth position on the Commission, giving due consideration to the time required for ordinance passage and the mandatory period of thirty days preceding the election after which no nominating petitions may be filed.

c. There is not sufficient time, in our belief, to hold the election on April 3, 1962. However, it could be held at the special bond issue election in May, 1962.

d. Scheduling the special election to fill the vacancy now existing on the Commission for May, 1962, would not involve an unreasonable delay in such matter.

e. No runoff election is to be conducted between the parties who tied for the thirteenth position on the Commission.

f. Since no runoff is permitted, this question requires no answer.

g. Any and all persons seeking the thirteenth place on the Commission must file new nominating petitions, and this applies to the two persons who tied at the election held December 19, 1961.

4. a and b. A charter framed by the Commission must be submitted to the electorate within one year after the Charter Commission has been fully formed by election of its thirteenth member, and not less than 30 days subsequent to completion of the charter.

Yours very truly,

THOMAS F. EAGLETON
Attorney General