

PUBLIC ADMINISTRATORS: (1) Public Administrator-elect must
BONDS: give bond before he is qualified to
OFFICIAL BONDS: hold office. (2) Failure to give bond
OFFICERS: within time prescribed does not auto-
OFFICERS HOLDING OVER: matically vacate the office but may
be ground to declare office vacant by
legal procedure. (3) Until Public
Administrator-elect or another be-
comes qualified to hold the office,
the incumbent Public Administrator
continues to have the right to the
office.

OPINION NO. 196

June 1, 1965

Honorable Robert B. Paden
Prosecuting Attorney
DeKalb County
Maysville, Missouri



Dear Mr. Paden:

This official opinion is issued in response to your
request of April 13, 1965. You inquire:

"In the event that the person elected
to office as public administrator does
not provide a bond approved by the Pre-
bate Court on or before the first day
of January following his election does
the prior public administrator continue
in office or may the elected public ad-
ministrator qualify at some later date
for the office?"

You have also advised that the public administrator-
elect has been given the oath but has not yet filed a bond
and that no estate has yet been opened to which any public
administrator has been appointed.

Section 473.730, RSMo 1959, regarding public administra-
tors states:

"Every county in this state, and the
city of St. Louis, shall elect a public
administrator at the general election
in the year 1880, and every four years
thereafter, who shall be ex officio

public guardian and curator in and for his county. Before entering on the duties of his office, he shall take the oath required by the constitution, and enter into bond to the state of Missouri in a sum not less than ten thousand dollars, with two or more securities, approved by the probate court and conditioned that he will faithfully discharge all the duties of his office, which said bond shall be given and oath of office taken on or before the first day of January following his election, and it shall be the duty of the judge of the court to require the public administrator to make a statement annually, under oath, of the amount of property in his hands or under his control as such administrator, for the purpose of ascertaining the amount of bond necessary to secure such property; and such court may from time to time, as occasion shall require, demand additional security of such administrator, and in default of giving the same within twenty days after such demand, may remove the administrator and appoint another."

We shall consider your inquiry under three questions:
1) Is giving a bond necessary before a public administrator-elect is qualified for his office? 2) What effect is the time requirement of Section 473.730? 3) Does the incumbent public administrator have the right to the office pending qualification of the administrator-elect?

I.

It is our opinion that the provision of Section 473.730 regarding giving bond is mandatory. Until bond is given a public administrator-elect is not fully qualified to hold office.

" * * * the filing of an official bond is generally regarded as a necessary prerequisite to full title to an office, and is a condition precedent to the right of the person elected or appointed to be inducted into office, and without such bond one is not entitled to the

office and may not legally hold or discharge its functions. Thus a statute requiring an officer to make and file his bond before assuming the duties of his office has been held to be mandatory,
"67 C.J.S., Officers, §39.

Although there appears to be some authority to the contrary, the courts of most states consider that a statutory provision that bond be given is mandatory.

In Sandrowski v. Sandrowski, Mo. App., 93 S.W. 2d 81, the court considered a statute providing that special commissioners in partition suits shall file a bond "before entering upon the discharge of the duties of his office." The court held the requirement to be "absolutely mandatory."

In re Bank of Mt. Moriah's Liquidation, Mo. App., 49 S.W. 2d 275, also involved a statute similar to Section 473.730. The statute there considered provided that a village treasurer shall "before he enters on the duties of his office, enter into bond." The court said, l.c. 277:

"It is quite apparent that section 7155 is merely directory and that Downey (the treasurer) was a de jure officer, although he gave no bond. In any event he was a de facto officer. . . . So far as third persons and the public are concerned there is no practical difference between the acts of a de jure and a de facto officer."
(parenthesis added)

This case is seemingly contradictory to Sandrowski. However, we believe that the cases are distinguishable.

In the Mt. Moriah case the court was concerned with the rights of third parties arising from the acts of a public official who was fully qualified except for giving bond. The essential holding of the court was that so far as third parties were concerned, the official had at least de facto authority.

The Sandrowski case dealt more directly with the question of the qualification for office, which is the question we are here considering.

Whether the Mt. Moriah case be contrary or distinguishable, we are of the opinion that the Sandrowski rule should be applied here. That is, under Section 473.730 a public

Honorable Robert B. Paden -4-

administrator must give bond before he is fully qualified for office.

III.

You inform us that your public administrator-elect did not give bond "on or before the first day of January." Thus, we must consider the effect of his failure to give bond within the time prescribed by Section 473.730.

Generally, where a requirement is made as to the time of filing an official bond, the time provision is considered merely directory. 42 Am. Jur., Public Officers, Section 124.

Mere delay in qualifying where a time is prescribed does not cause a vacancy in the office unless the statute expressly provides such an effect. State v. Heath, Mo., 132 S.W. 2d 1001, 1003. Section 473.730 does not contain any forfeiture provision for failure to give bond by January first.

In State ex rel. Attorney General v. Churchill, 41 Mo. 42, the court considered a statute providing that a county treasurer shall give bond within ten days after his election. The court said, l.c. 43: "This provision of the statute is directory only. The matter of time was not essential to the validity of the bond, nor a condition precedent to the party's title to the office."

In State ex rel. Blankenship v. County Court of Texas County, 44 Mo. 230, the court held that failure to file a sufficient bond by a certain date did not work a forfeiture, but the officer could qualify by a later bond.

Therefore, where a public administrator-elect does not give bond on or before January first, he does not automatically forfeit his office but may qualify by giving bond thereafter. (However, since the giving of a bond is mandatory, the continued failure to give bond may be ground for declaring the office vacant by appropriate legal procedure. 42 Am. Jur., Public Officers, Section 135; 67 C.J.S., Officers, Section 41.)

III.

You further inquire as to whether the prior public administrator will continue in office.

Section 105.010, RSMo 1959, provides:

"All officers elected or appointed by the authority of the laws of this state shall hold their offices until their successors are elected or appointed, commissioned and qualified."

Since the administrator-elect will not be qualified until he files the required bond, the incumbent public administrator continues to have the right to the office.

The incumbent's right will terminate upon qualification by the administrator-elect. Or if the administrator-elect should fail to qualify and the office be declared vacant by a court of competent jurisdiction, then the incumbent's right terminates upon qualification by the person filling the vacancy.

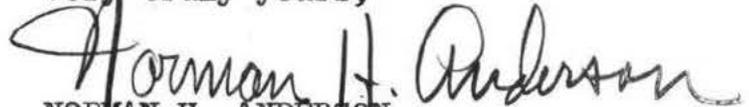
CONCLUSION

Therefore, it is the opinion of this office that:

- 1) Under the provisions of Section 473.730, RSMo 1959, a public administrator-elect must give bond before he will be qualified and entitled to hold office;
- 2) Failure to give bond within the time prescribed by Section 473.730 does not automatically vacate the office, however, continued failure to give bond may be ground for declaring the office vacant by appropriate legal procedures;
- 3) Until the public administrator-elect or another becomes qualified to hold the office, the incumbent public administrator continues to have the right to the office.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Louis C. DeFeo, Jr.

Very truly yours,



NORMAN H. ANDERSON
Attorney General