

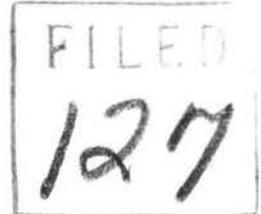
COUNTY AUDITOR: The office of county auditor in Cape Girardeau County will not exist until January 1, 1967. The Governor may make an appointment after that date to fill the vacancy.

Opinion 143-1967 (ltr)
should always be attached to this opinion when a copy is sent out.

OPINION NO. 127

March 21, 1966

Honorable Bill D. Burlison
Prosecuting Attorney for Cape Girardeau County
708 Broadway
Cape Girardeau, Missouri 63701



Dear Mr. Burlison:

Reference is made to your request for an official opinion of this department, reading as follows:

"The County of Cape Girardeau is expected to become Second Class effective January 1, 1967. Assuming this to be so, should a county auditor be elected in 1966 to take office January 1, 1967?"

"If it is not proper to elect an auditor in 1966, should he be elected in 1967, or would the governor make an appointment in 1967? Or would there be some other disposition of the problem?"

"This apparently requires an interpretation of Section 55.050, Missouri Revised Statutes - 1959."

In your letter you state that Cape Girardeau County, Missouri, is expected to become a second class county on January 1, 1967.

Enclosed herewith is an opinion issued by this office on December 22, 1964, in which it is ruled that the office of county auditor in a second class county is automatically created under Section 55.040, VAMS, on the day the county becomes a second class county and that the office becomes vacant on that date. This opinion further holds that on or after that date the Governor may appoint an auditor to fill such vacancy to serve until the end of the term.

You inquire whether a person may be elected in 1966, to assume the duties of auditor on January 1, 1967. In State ex rel Berry v. McGrath, 64 Mo. 139, a judge of a circuit court tendered his resignation to become effective at a later date. The question

Honorable Bill D. Burlison

was whether a person could be elected circuit judge prior to the effective date of resignation. The court held that a person could not be elected to an office before the office became vacant.

In State v. Kiburz, 208 S.W. 2d 285, the court held that when a new office is created a vacancy arises ipso facto, Section 55.050, RSMo 1959, provides for the filling of a vacancy in the office by an appointment by the Governor.

According to the information submitted Cape Girardeau County will not become a second class county until January 1, 1967. The office of county auditor in Cape Girardeau County will not exist until the county becomes a second class county. There is no office or vacancy to be filled until the office is in existence. There is no basis or reason for holding an election to elect a person to an office until the office exists. Therefore, a person cannot be legally elected as county auditor of Cape Girardeau County until January 1, 1967.

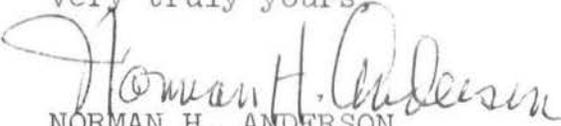
CONCLUSION

It is the opinion of this office:

- (1) That until Cape Girardeau County becomes a second class county there is no office of county auditor in said county.
- (2) That a person cannot be elected to the office of county auditor until the office is in existence.
- (3) That after the vacancy in the office is filled by the appointment of the Governor such appointee holds the office until the next general election as provided by Section 55.050, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Moody Mansur.

Very truly yours,


NORMAN H. ANDERSON
Attorney General

Enclosure:
Opinion No. 394 (1964)