

GENERAL ASSEMBLY:

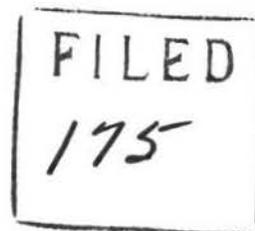
1. A member of the Missouri General Assembly who took office in January, 1973, cannot during the term for which he was elected accept the position of Director of Coordination of Technical Vocational Programs for the Department of Higher Education which position was created after January, 1973, because such acceptance would violate Article III, Section 12, Constitution of Missouri.

2. A resignation submitted to the Governor by a member of the General Assembly when the General Assembly is in session is invalid and a nullity and does not result in a vacancy in office.

OPINION NO. 175

July 10, 1975

Honorable James A. Noland, Jr.
State Senator, District 33
R.F.D. #1
Osage Beach, Missouri 65065



Dear Senator Noland:

This is in response to your request for an official opinion of the Attorney General upon the following questions:

"Does Article III, Section 12, Constitution of the state of Missouri, preclude a member of the legislature [specifically a member of the senate, elected on November 5, 1972], from accepting an appointment to a position of employment with the Coordinating Board for Higher Education, Head of the Department of Higher Education?"

"If so, can the senator's resignation as senator, tendered on June 18, 1975, to the Governor of the state of Missouri, be withdrawn?"

This question has arisen because you have accepted a position of employment with the Department of Higher Education. In telephone conversations with Dr. Jack Cross, Commissioner of Higher Education, we have attempted to ascertain the exact nature of this position and when it was created. As we understand the facts to be, you were appointed to the position of Director of Coordination of Technical Vocational Programs for the Department of Higher Education. As such, you are to be the staff person for the Coordinating Board for Higher Education who is responsible for

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the administration of the 1202 State Commission. The Coordinating Board for Higher Education has been designated by Governor Bond to be the 1202 State Commission pursuant to the provisions of Section 1202(a) of the Education Act of 1972 (Public Law 92-318) which is responsible for developing a state plan upon which it shall judge various grant requests by institutions in this state to receive federal funds under the provisions of Titles VI, VII, and X of the Higher Education Act of 1965 as amended by the Educational Amendments of 1972. The position as director was created by the Coordinating Board for Higher Education in August or September, 1974, as a result of internal restructuring of the department. You were the first person to hold this position. Prior to this time, the Coordinating Board for Higher Education had drawn upon its staff on an ad hoc basis to carry out its duties as the 1202 State Commission.

The Coordinating Board for Higher Education is the head of the Department of Higher Education. These two entities came into existence on July 1, 1974, as a result of Section 6 of the Omnibus State Reorganization Act of 1974 (C.C.S.H.C.S.S.C.S.S.B. No. 1, 77th General Assembly, First Extraordinary Session). Its predecessor, the Missouri Commission on Higher Education (Chapter 173, RSMo 1969) was abolished and was transferred by type I transfer to the Coordinating Board. In this regard it should be noted that the members of the Board are not the same as the old Commission on Higher Education and the duties of the Board have been substantially expanded.

It is further our understanding that, by letter dated June 18, 1975, and addressed to the Governor of the state of Missouri, you requested that the Governor "[p]lease accept my resignation as Senator of the 33rd senatorial district." No written correspondence, regarding your resignation, was submitted to any officer of the senate.

Article III, Section 12, Constitution of Missouri, 1945, provides:

"No person holding any lucrative office or employment under the United States, this state or any municipality thereof shall hold the office of senator or representative. When any senator or representative accepts any office or employment under the United States, this state or any municipality thereof, his office shall thereby be vacated and he shall thereafter perform no duty and receive no salary as senator or

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representative. During the term for which he was elected no senator or representative shall accept any appointive office or employment under this state which is created or the emoluments of which are increased during such term. This section shall not apply to members of the organized militia, of the reserve corps and of school boards, and notaries public." (Emphasis added)

The resolution of your first question is determined by the meaning and application attributed to the phrase, "[d]uring the term for which he was elected no senator . . . shall accept any appointive office or employment under this state which is created or the emoluments of which are increased during such term. . . ." Prior interpretations of Article III, Section 12, have concluded that said section renders a state senator ineligible to accept an appointive office but such section does not preclude him from accepting an appointment to fill a vacancy in an "elective office." See Attorney General Opinion No. 88, Gant, April 20, 1973. An office is obtained by appointment, where it is obtained by the exercise by the appointing authority of a delegated power. Said office is obtained by election where it is obtained through the direct choice of all members of the class or body from which the choice can be made. See Carter v. Commission on Qualifications of Judicial Appointments, 93 P.2d 140 (Cal. 1939). Since the position in question was obtained by appointment by the Coordinating Board for Higher Education rather than an election, we believe that the provisions of Article III, Section 12, Constitution of Missouri, would be applicable.

We must then determine whether this particular position falls within the proscription of Article III, Section 12. We conclude that it does. In Opinion Letter No. 355, Salveter, August 19, 1969, this office stated:

". . . the purpose of Article III, Section 12, appears to be to prevent the potential conflicts of interest which would arise if a senator or representative were to have other duties with respect to other governmental bodies, . . ."

Similarly, during the constitutional debates regarding Article III, Section 12, Mr. McReynolds, handling the file on behalf of the committee, stated the purpose of the proposed section to be inter alia:

". . . That a practice has grown up in the General Assembly where members of the General

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Assembly have, in the past accepted employment from the state and since they are called upon to vote upon appropriations and other matters which affect the policy of the particular departments, it was felt that a proper safeguarding of the rights of the departments and of the state in protection of itself and its interests should disqualify the members of the General Assembly from holding office of that kind or accepting employment or remuneration of that kind. . . ." Id. at 4720.

We believe that the position as Director of Coordination of Technical Vocational Programs is a position of employment which has been created during the term for which you were elected. You were elected on November 5, 1972, for a term beginning on January, 1973, and ending January, 1977. Here, the Coordinating Board for Higher Education was created on July 1, 1974, which is within the four year period. Furthermore, this particular position did not even exist until the internal restructuring of the Department of Higher Education in August or September, 1974. And, you are the first person to hold such a position. Based upon the facts as we understand them, we believe that this is a position of employment which was created during the term for which you were elected. Consequently, we conclude that you were prohibited under Article III, Section 12, Constitution of Missouri, from holding such position.

The second question presented concerns whether a resignation submitted by a member of the General Assembly to the Governor on June 18, 1975, while the General Assembly is in session, is valid.

Article III, Section 20(a), Constitution of Missouri, provides, inter alia, that:

"The general assembly shall adjourn at midnight on June thirtieth in odd-numbered years until the first Wednesday after the first Monday of January of the following year, unless it has adjourned prior thereto. All bills in either house remaining on the calendar after midnight on June fifteenth in odd-numbered years are tabled. The period between June fifteenth and June thirtieth in odd-numbered years shall be devoted to the enrolling, engrossing, and the signing in open session by officers of the respective houses of bills passed prior to midnight on June fifteenth. . . ."

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Since the resignation in question was submitted prior to June 30, it was submitted while the General Assembly was in session.

Section 21.090, RSMo 1969, provides:

"If any member elected to either house of the general assembly resigns in the recess thereof, he shall address and transmit his resignation, in writing, to the governor; and when any member resigns during any session, he shall address his resignation, in writing, to the presiding officer of the house of which he is a member, which shall be entered on the journal; in which case, and in all cases of vacancies happening, or being declared, during any session of the general assembly, by death, expulsion or otherwise, the presiding officer of the house in which the vacancy happens shall immediately notify the governor thereof."

This section provides that when a resignation is submitted during any session, the member ". . . shall address his resignation, in writing, to the presiding officer of the house of which he is a member, . . ." As previously stated, the resignation in question was submitted to the Governor.

The question to determine is whether the provisions of Section 21.090 are mandatory or directory. In State v. Paul, 437 S.W.2d 98, 102 (St.L.Ct.App. 1969), the court stated that the ". . . Failure to follow a mandatory statute nullifies the proceeding to which it relates. . . ." Thus, if Section 21.090 is mandatory, the resignation, not having been submitted to the proper authority, would be a nullity.

The general rule, in this state and elsewhere, is that the mandatory or directory nature of a statute is determined from the legislative intent. This depends primarily on the purpose of the enactment. See State ex rel. Hopkins v. Stemmons, 302 S.W.2d 51 (Spr.Ct.App. 1957). When the purpose relates to the essence of the thing to be done the provision is deemed mandatory. See State ex rel. Hopkins v. Stemmons, supra. Here, the purpose of Section 21.090 is clear: to provide for a procedure whereby a member of the General Assembly shall submit his resignation.

Looking to the words used by the Legislature, it is noted that when the General Assembly is in session, the resignation shall be addressed and tendered to the presiding officer of the house of

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which he is a member. The word "may" is permissive only, but the word "shall" is mandatory. See State ex rel. Hopkins v. Stemmons, supra; Stanfield v. Swenson, 381 F.2d 755 (8th Cir. 1967). Furthermore, to hold that Section 21.090 is merely directory would render it meaningless, since its only purpose is to provide for a procedure for the tendering of resignations and the filling of vacancies in the General Assembly.

A case which must be mentioned and distinguished from the instant situation is State ex rel. Kirtley v. Augustine, 20 S.W. 651 (Mo. 1892). In Kirtley, the court held that where a county treasurer presents his written resignation to the county court under the misapprehension that it, and not the Governor, is the proper tribunal to receive it, and the resignation is accepted and with his consent is certified to the Governor who acts thereon by designating a successor, it is then too late to recall the resignation. The distinguishing factor in the instant situation is that the resignation in question was never submitted, in any form, to the proper authority, i.e., the presiding officer of the senate. Furthermore, Section 21.090, circumvents the common law procedures for resignation, in effect at the time of the Kirtley decision, and replaces them with mandatory procedures.

Since the language and presumed intent of the Section 21.090 indicates that said section is mandatory and since the resignation was not submitted to the proper authority, the resignation is a nullity.

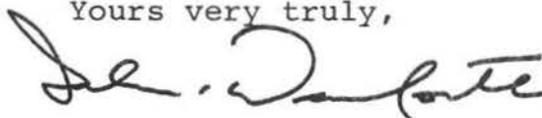
CONCLUSION

It is the opinion of this office that:

1. A member of the Missouri General Assembly who took office in January, 1973, cannot during the term for which he was elected accept the position of Director of Coordination of Technical Vocational Programs for the Department of Higher Education which position was created after January, 1973, because such acceptance would violate Article III, Section 12, Constitution of Missouri.
2. A resignation submitted to the Governor by a member of the General Assembly when the General Assembly is in session is invalid and a nullity and does not result in a vacancy in office.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Robert Sommers.

Yours very truly,



JOHN C. DANFORTH
Attorney General