BOARD OF ELECTION COMMISSIONERS: Authority to remove judges and clerks of election.

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Board of Election Commissioners,
Kansas City, Missouri.

Attention: Mr. Fred Bellemere, Chairman

Gentlemen:

Acknowledgment is herewith made of your letter of February 21, 1934, requesting the opinion of this office on the following matter:

> "We have been confronted with a question that I would like to have your opinion on. As you know, there is an election, both primary and general, in progress under our City charter for city officials. The primary is March 6th and the general election is March 27th.
>
> There has been a movement started here, known as the National Youth Movement and also as the Citizens Party. It has been called to our attention, by both of the dominant political parties that there are some instances where Judges and Clerks that hold commissions have deserted their respective parties and are now declaring themselves to be non-partisan. In your opinion, under the law, would the Board of Election Commissioners be justified in removing these Judges and Clerks who have, as above stated, deserted their parties in this election?
>
> I trust that you will let me have this opinion immediately as the time is very short and the question involved seems to be of importance to a large number of people here."

Article XVI of the Charter of Kansas City, Missouri refers to nominations and elections. A portion of Section 417 reads as follows:

> "All elections provided for by this charter, whether primary elections, elections for the choice of officers, or elections for the submission of questions to the voters, shall be conducted by the election authorities prescribed by law; and the provisions of the election laws of the state shall apply to all such elections, except as provision is otherwise made by this charter."

From this quoted section it is apparent that the city Charter provides that the election authorities prescribed by general statutory provisions shall conduct the city election. No attempt is made in any section or chapter of the city Charter to establish the qualifications of election officials. This has been left entirely to the Legislature. Some few matters have been specifically provided for in the Charter, such as the form of the ballot to be used in the municipal elections, but the charter provision in this respect is limited to the requirement that "ballots used in nominating and electing the Mayor, members of the Council and judges of the Municipal Court shall be without party mark or designation. ****" (Sec. 421)

This provision respecting the form of the ballot and providing that no party designation shall be placed thereon cannot in any way be construed as varying or affecting the qualifications required of persons appointed to act as judges or clerks of election, the Charter making no provision whatsoever for the appointment or qualification of judges, clerks or other officials of election. Absent any such provision, we are referred by the Charter itself (Sec. 417) to the general provisions of the election laws of the state applying to elections in cities of the class of Kansas City to find the governing provision on this question.

The general statutes respecting registration and elections in cities having over 100,000 inhabitants are found in Article XVII of Chapter 61, R.S. Mo. 1929. Section 10567 of this Article provides for the appointment of a Board of Election Commissioners for such cities, to be composed of four members of which the

> "chairman and secretary shall be of opposite politics, "

and

> "two of said election commissioners ****shall be members of the leading political party, politically opposed to that which the Governor belongs."

And that in case of a vacancy

> "the appointee shall be a member of the same political party to which the person whom he may succeed belongs,"

and that in no case shall

> "more than two members of said board belong to said political party."

Sections 10571 and 10572, R.S. Mo. 1929 provide for the selection of judges and clerks of election and require, among other things, that they be citizens of the United States and entitled to vote in the same at the next general election; that they

> "must either reside or be employed or have a place of business in the ward in which they are selected to act, "

and that they shall not have been

> "convicted of an offense punishable by imprisonment in the penitentiary, "

or

> "confined in any county jail, work house, penitentiary, or house of correction within five years prior to such election,"

and that

> "two judges and one clerk shall be selected from each of the two political parties of the State holding the highest number of votes at the last general election to serve in each precinct, who shall be recognized members of the party from which selected."

Section 10586 respecting registration, provides the procedure to be followed in registering voters, and in the second paragraph provides:

> "Two of said judges of election of opposite politics shall have charge of the registry books, and shall make the entries therein required by this article ****"

Section 10589 provides the duties of the clerks of election acting as precinct canvassers, as follows:

> "The two clerks of election of opposite politics, designated by the board of election commissioners, shall be constituted canvassers, ****"

and further provides that if a clerk fails to appear to canvas the precinct designated,

> "the chairman or secretary of the board of election commissioners of the same political faith as the canvasser failing

> to appear, or, after appearing, failing to complete said canvas, shall immediately appoint a canvasser of the same politics as the one absent or failing to act."

Section 10602 provides for the filling of any vacancy upon the Board of Registry, and provides that the Board of Election Commissioners shall appoint

> "a judge of the same political party as the judge causing the vacancy, and to be selected by the commissioners of that party, ****"

Section 10603 provides for the delivery of poll books, ballot boxes, etc. on the day prior to the election, and provides in respect to the two registers:

> "one being received by the representative of one leading political party, and the other by the representative of the other leading political party. The ballot box of such precinct shall be delivered to one of said judges **** and the key or keys shall be given to a judge of the opposite party."

Section 10606 provides for the filling of a temporary vacancy in the position of judge or clerk, and provides that in such case

> "the judge or judges present and if none present, then the clerk present, representing the same political party as the person causing the vacancy, shall immediately fill, for the time, by the selection of a member of their party the place of such absent judge or clerk or vacancy ****"

and provides further that

> "the board of election commissioners upon receiving the notice of vacancy, shall appoint to fill the same a judge or clerk or deputy election commissioner of the same political party as the judge or clerk causing the vacancy, such appointee to be selected by the commissioners of that party. ****"

Section 10609 provides for the endorsement of the ballots before delivery to the elector and provides:

> "Before delivering any ballots to the electors the two judges of opposite politics **** shall write their names or initials upon the back of the ballots. ****"

Section 10619 provides for the proclamation of the count of the ballots and their return to the Commissioners, and provides that the voted ballots shall be placed in the ballot box and that

> "one of the judges, who shall represent the opposite political party from the one taking the ballot box, shall receive and hold the key thereto, "

and that

> "said two judges of opposite politics, shall immediately after the completing signing of the statements **** to together **** and deliver said ballots to said election commissioners."

From these various provisions which are found from the beginning to the end of Article XVII, it is very apparent that the purpose of the entire enactment was that the elections in these cities be conducted under the supervision of authorities appointed by the Board of Election Commissioners, and that these authorities be and remain at all times representatives of the two leading or major political parties of the State. It is certainly as essential that these authorities remain as representatives of their respective parties as it is that they be representatives at the time of their appointment. It is the established rule of this State that such a condition creates a non-partisan board of election.

In the case of State ex rel. Harvey v.Wright, a decision of the Supreme Court En Banc, reported in 251 Mo. 325, the Court had under consideration a section of the statutes practically identical with Section 10567, R.S. Mo.1929, and had before it the question as to whether or not a member of the Progressive Party was qualified to act as a Commissioner of Election in the City of St. Louis under the requirement that two members of the board should be members of the leading party politically opposed to that to which the Governor belongs. This section contained many similar provisions to the ones hereinbefore referred to as to the character of the board provided for in this section. The Court stated (l.c. 333):

> "The Act of March 27, 1911, now under discussion, by the first sentence thereof, recites as the object of the enactment, that 'there is hereby created a non-partisan board of election commissioners for each city governed by the provisions of this article'. Other provisions of this amendment of 1911 accentuate and make plain this legislative intention so to create such a non-partisan board. Clearly such a board could not be created and certainly perpetuated, unless the political eligibility of the members thereof were written into the law, and the Legislature so wrote this intent into this law in clear and unmistakable words."

And at page 336 the object of the Act is stated in the following words:

> "The point chiefly sought was a non-partisan board of election commissioners."

And again, in considering the legislative intent in the enactment of this section, we find the following remarks (l.c. 338):

> "We are not able to see any reason why the provision contained in the first clause of the section under consideration should be invalid for any inherent or self-contained defects. This provision, in order to certainly secure a non-partisan board, in conferring on the Governor the privilege of appointment, coupled with the grant of the power of appointment certain conditions of qualification in the appointee, to-wit that two of them shall be from one party and two from another. Does this militate in any wise against that provision of our Constitution (Art. 3, Constitution of 1875) which requires the segregation of our tripartite governmental functions? We think not. We have seen that as to officers such as election commissioners, the Constitution has lodged in the Legislature the power of authorizing others to make appointments, or (that which is tantamount) the right of delegating by statute to some one else the ministerial power of appointment. It says in effect to the Governor: 'We have provided for certain officers whom we desire to have appointed; will you appoint them for us; ' doing so, in such wise as will effectuate our express intent of securing a non-partisan board?"

By these statements of our Supreme Court, it is apparent that this is not a bi-partisan board representing only the two parties to which its representatives have affiliated themselves, but that it is a non-partisan board to guarantee a fair election to all candidates, regardless of party affiliations.

The position of our Supreme Court on this issue is in harmony with decisions in other jurisdictions. In the well reasoned opinion of Judge Keeler in the case of Miner v. Marsh, 129 Atl. 547, the Supreme Court of Connecticut in passing upon this same issue said (l.c. 550):

> "Registrars of voters have numerous statutory duties in connection with the preliminaries of elections and their subsequent orderly conduct. The legal provision that in each town there shall be

> two is unquestionably based upon the experience that there will always be two parties of predominant size. Yet in the various towns of the state there have often been more than two political parties and in the larger towns for years ordinarily this has been the case, yet the law has not provided for as many registrars as there might be parties, being evidently founded upon the idea that two persons of opposed political preference acting accordingly to law, would suffice to protect the interests of all political groups."

Without question, judges and clerks of election are in exactly the same position as are the election commissioners. Similar provisions are required, to-wit, that there must be an equal division of the appointees between the two leading political parties. It is therefore our opinion, judging from the decision of the Supreme Court hereinbefore referred to, that the statutes require the appointment of two judges and one clerk from the Democratic Party and from the Republican Party to serve at the city elections.

That such a condition is a qualification or requisite to the filling of this position, has likewise been settled by the Wright Case, supra, wherein the Court considered the consideration to be given the requirement of the political faith of the appointee. At page 339 it is stated:

> "The condition attached of belonging to a certain indefinitely designated political party is a mere condition of qualification, no different in its last analysis from both the statutory and constitutional requirements of age and learning, and residence, as applied to a judge of a circuit court, and other courts of record (Constitution, Sec. 26, Art. 6; Sec. 3843, R.S. 1909); ***** Such conditions as to differing political faith as a requisite qualification for a membership on one of our many boards is almost the statutory rule rather than the exception. For example, this qualification inheres to the board of curators of the State University (Sec. 11098, R.S. 1909); to the regents of our several normal schools (Sec. 11067, R.S. 1909); to the State Board of Agriculture (Sec. 597, R.S. 1909); to the State Board of Horticulture (Sec. 605, R.S. 1909); to the State Capitol Commission (Laws 1911, p. 108); as we have seen to the Supreme Court Commissioners, and to others, too numerous to mention here. The reason for these several requisites of different party affiliations is the same as that under discussion here, viz: to procure non-partisan boards, in each case."

II.

Having determined that one of the qualifications of a judge or clerk of election is that he must be a known representative of one of the two leading parties, we are confronted with the question of what are the two leading political parties within the meaning of Sec. 10572. We first refer to the Wright Case, supra, wherein this identical question was presented. Respondent Wright had been appointed by the Board of Election Commissioners of the City of St. Louis as an admitted member of the Progressive Party. In the national elections the Progressive and the Democratic Parties were the two leading parties; however, in this state the election returns indicated that the Democratic and Republican Parties were the two leading organizations. The Court held that it was the two leading parties in this state who were entitled to representation, stating on page 342 as follows:

> "From this we know that the Democratic Party polled in this state at the last general election the greatest number of votes, followed by the Republican Party and the Progressive Party respectively in the order named. The leading party in this state politically opposed to that to which the Governor who appointed respondent belongs, is then the Republican Party, and not the Progressive Party to which respondent belongs."

So that there may be no misunderstanding in respect to those who profess allegiance to a state political party, whether it be Democratic or Republican, and yet in a city election now profess to be supporting a ticket which is opposed to the ticket endorsed by the Democratic and Republican Parties, we unhesitatingly hold that they are members and supporters of the third party. Our position in this is sustained by the Supreme Court of Connecticut and of this State. It so happened that the situation presented in your request is very similar to the situation reported in the case of Fields v. Osborne, 21 Atl. 1070:

> "In respect to the first claim, the circumstances attending the origin and history of the 'Citizens' ticket are detailed in the finding. We extract such as are to the purpose. Pursuant to public notice a Republican caucas was held October 4 for the purpose of nominating candidates for the town offices to be filled at the town meeting aforesaid. Immediately after the caucas was organized, a plan for making up a Citizens ticket from candidates of all political parties, was advocated. After discussion it was voted that the Republican caucas adjourn, and that a Citizens caucas be organized. Thereupon, some ten or fifteen Democrats who were present, but had not participated in the proceedings, came forward and acted with the about fifty Republicans who were present, in nominating the Citizens ticket.

> The candidates nominated were Republicans, except those for town clerk, treasurer, and one grand juror, who were Democrats."

In passing upon the issue as to whether or not a political party had been formed, the Court stated (l.c. 1071):

> "We are abundantly satisfied from the facts stated in the findings that for the time being, and for the purposes of the election under consideration, and within the meaning of the law requiring the ballots to contain the name of the party issuing them, there was a Citizens Party in Branford. The element of time is not essential to the formation of a legal party. It may spring into existence from the exigencies of a particular election and with no intention of continuing after the exigency has passed. To hold the contrary would be to strike a blow at that independence in political action upon which the good government of a locality may depend."

The Supreme Court of Connecticut in the Miner Case, supra, affirmed this ruling and stated (l.c. 549-550):

> "The third claim of the respondents involves the rightful existence of the Independent Republicans as a political party. In the first place, the Independent Republican ticket occupied legally a place upon the official ballot. Those promoting its existence had complied with the law, and had received recognition at the hands of the secretary of state in conformity to the provisions of the statute. But counsel for the respondent insist that the names placed upon the ballot were placed there by persons whose names appeared upon the Republican caucas list and whose petition to the secretary had specifically stated that the signers were Republicans. It is not required that a new party applying for official recognition on the official ballot should issue forth from a cave of adullam, and be composed of malcontents of every political stripe. Further, by one of the provisions of general statutes, those appearing upon the Independent Republican ticket automatically separated themselves from the original Republican organization, each one of them by knowingly becoming 'a candidate for office upon the ticket of another party or organization', different

> from that to which each had formerly belonged. The new organization thus formed, even though it had its origin for the purposes of a particular election, without any intention of indefinite continuance, was entitled to privileges of a political party."

In an early North Carolina Case, Mullen v. Morrow, 31 S.E. 1003, passed upon by the Supreme Court of that state at the time of the rise of the Populist Party, a number of election registrars had been challenged for the reason that they did not qualify under the law of that state which provided that the election board "shall appoint one citizen and qualified voter for each of the political parties of and for each election precinct. ***** It appeared that one of the appointees attempted to qualify as a Republican registrar and contended that he was entitled to act as such fof the reason that he was a Republican in national politics, although, he was a Democrat in local politics. The Court removing this registrar, stated as follows (l.c. 1004):

> "J.P. Wilson says he is a Republican in national politics, but in state and county politics he votes the Democratic ticket. This, in my opinion, disqualifies him as a Republican registrar. It is like a juror, when two parties are on trial in the same case; though he may be favorably disposed as to one of them, if he has formed and expressed an opinion adverse to the other, he would be disqualified."

Our own Supreme Court in passing upon the question as to whether a Progressive Republican could qualify as a Republican under the election statutes, stated in the Wright Case, supra, (l.c. 341-342):

> "We have in the record, however, the clear cut charge that respondent is a member of the Progressive Party, as well as his frank admission of the truth of this charge. Canwe say in the light of this that respondent is a Republican? Would it not be tantamount to saying that black is white? While appointments to office have been known to change the political complexion of men, respondent stands here solemnly averring that he has not been so affected. Relator inquires with some considerable degree of pertinence whether, if the Legislature had required the appointment of a male to this office and the Governor had appointed and the

> Senate had confirmed a female, would 'she' have become a male ipso facto, to the extent of precluding judicial determination of the fact? We think not, though conceding that if the record were silent on this point of party or of sex, a Progressive might be changed to a Republican and a female to a male within the law's purview from the application of the presumption of 'right and solemn performance of a duty enjoined'"

We therefore conclude that the Citizens ticket and the organization supporting it is to be considered as any other political organization or party within the purview of the applicable election laws

III.

We shall now pass to the provision for the removal of such judges as have lost their qualifications and their right to act. At the beginning it should be stated that without question judges and clerks of elections are public officers and the position which they hold is an office. This issue is determined in the case of State ex rel. Mosconi v. Maroney, 191 Mo. 531. In determining this issue the Court stated (l.c. 546):

> "It is a part of the functions of state government to provide elections for public officers and to furnish suitable officers for putting in operation such provisions. We have in this cause the relators who have been duly appointed judges and clerks of election intheir respective precincts, occupying positions created and conferred by law. Their right and authority to perform the duties incumbent upon them eminates from the legislative grant of the state government. The duration of their terms definitely fixed; their duties plainly marked out, which are of great public importance and clearly for the benefit of the public. The emoluments of the office held by them, as well as certain privileges and immunities, such as exemption from jury service, are fully provided for; hence, it is apparent that in the positions occupied by relators, there are embraced 'the ideas of tenure, duration, emolument, and duties', which are essential requisites in order to constitute the position of judges and clerks of election 'an office' within the well

understood meaning of that term."

Accordingly, such officers can only be removed in accordance with the recognized rules pertaining to the removal of public officials. Section 10567 provides among other things that

> "Two of the commissioners of opposite political parties shall have the power on any day of registration, revision of registration or election, to remove any judge or clerk who in their opinion is failing to perform his duty."

This gives the board a summary power to remove a judge or clerk for malperformance or non-performance of duty on registration or election day, but cannot be construed as authorizing a removal at any other time or under any other conditions.

Sections 10573, 10574, 10602, 10608 and 10589 grant certain powers of removal to the Board of Election Commissioners, none of which are applicable here. Possessing only the authority to make the removals provided for in the foregoing sections, the Board is without power to remove judges and clerks for other reasons.

> "If notwithstanding the term, provision is made for a removal upon certain conditions, or for certain reasons, there can be no valid removal pending the terms unless such conditions or reasons appear, either presumptively or otherwise."
>
> State ex rel. v. Maroney, supra.

The decision of this case is consistent with the established law in this State and in harmony with the decisions of the Supreme Court of the United States, as first established by the ruling of that eminent jurist, Chief Justice Marshall, in the celebrated case of Marbury v. Madison

The situation in the case here under consideration is analogous to the condition arising in the event an officer has been appointed or elected, one of the requisites being that he be a resident of the district from which he is elected. After election he removes to another county or district and therefore forfeits his office. It would seem that the requirement of residence or place of business in the precinct from which the judge is appointed is a similar qualification to the requirement that he represent the party from which he is chosen.

In the case of Yonkey vs. State, 27 Ind. 236, the Court discussed the effect upon the right of Yonkey to hold the office to which he was elected, by his ceasing to be a resident of the county. At page 240 we find the following statement:

> "Section six of the sixth article of the constitution of Indiana provides that 'all county, township and town officers shall reside within their respective counties, townships and towns, and shall keep their respective offices at such places therein, and perform such duties, as may be directed by law.' If, then, Yonkey, in December, 1863, ceased to reside in Clinton county, as alleged, he thereby abondoned and forfeited the office, and it became vacant; and any subsequent claim, or attempt of any one, as Yonkey's deputy, to hold the office or discharge the duties thereof, would be without right and a usurpation. See Medley vs. The Commissioners of Franklin County, 4 Blackf. 116; The State vs. Jones, 19 Ind. 356; The State vs. Allen, 21 Ind. 516." * * * * *

It is the rule that these qualifications are not only required at the time of appointment but that they must continue during the tenure of the office. In the early case of People vs. Mayworm, 5 Mich. 146, the ruling is there stated, l. c. 147:

> "This appointment appears to have been regular. But it is not enough that an officer appointed for a temmporary purpose, should show a legal appointment. The usurpation charged is a continuing usurpation, alleged to exist in the month of June, 1857, several months after the commencement of a new statutory term. The rule is well settled, that where the State calls upon an individual to show his title to an office, <u>he must show the continued existence of every qualification necessary to the enjoyment of the office.</u>"

This rule is again affirmed in the case of Attorney General vs. Baker, 219 Mich. 629, l. c. 635:

> "A person who has been legally elected and qualified for an office does not necessarily continue therein during the prescribed term. Resignation, ceasing to be a resident, acceptance of an incompatible office, or removal therefrom may terminate his incumbency. <u>Defendant was required to show by his plea the continued existence of every qualification to hold the office he claimed the right to.</u>" * * * *

Having concluded that a forfeiture of office exists and that the board of election commissioners are without statutory authority to remove those claiming the position, we refer to Section 1618 R. S. Mo. 1929. This section provides that an action in quo warranto may be brought against any person who shall usurp, intrude into or unlawfully hold or execute any office or franchise.

One of the more recent cases wherein this section was considered is that of Civic League vs. City of St.Louis, 223 S. W. 891. In that case Henry L. Weeks had been holding the position of Superintendent of Excavations in the City of St.Louis. The city charter provided for an examination to be held and an eligible list to be prepared containing the names of those having the requisite qualifications. One W. J. McKenzie had been certified as eligible but the street commissioner refused to appoint him and retained the defendant Weeks. The Court held that injunction was not the proper remedy to correct the situation and particularly pointed out what is now Section 1618 R. S. Mo. 1929, as the proper procedure:

> "The jurisdiction of a superintendent of excavations in the city of St.Louis is coextensive with the boundaries of said city. He has superintending control over all excavations therein. He is paid out of the treasury of said city, and from its funds. His duties relate to the public welfare of said municipality, and we can conceive of no good reason for holding that the provisions of the statute, heretofore quoted, should not apply to this office, as well as to any other office of said city. The statute, supra, affords a speedy and complete remedy, without resorting to a court of equity. Under its provisions, the right of the incumbent to hold the office can be inquired into, and his removal obtained, if he is wrongfully holding same. The fact that the incumbent is holding said position at the pleasure of the street commissioner presents no obstacle in the way of contesting his right to hold the position under above statute." * * * * * *The above statute is not only sufficient to cover the present case, but it has been the established doctrine of this court from its earliest history that an information in the nature of a quo warranto was a proper remedy to determinedthe title to an office." * * * *

In view of the foregoing, it is the opinion of this department that the Board of Election Commissioners has no power or authority to remove judges and clerks of election after they have once been finally appointed except for failure to appear and perform their duties on registration and election days, there being no statutory provision granting this power.

However, if it be a fact that certain judges and clerks of election are no longer qualified to act as they no longer are "known representatives" of the two leading political parties of this state, (affiliation with the two leading political parties of the state being mandatory) then these judges and clerks are unlawfully holding their respective offices and are subject to an appropriate legal action in quo warranto to oust them from their respective offices.

Respectfully submitted,

ROY McKITTRICK,
Attorney General.

RM:M-H