

OFFICERS: A county officer may serve as a city councilman if the two offices are not incompatible.  
ELECTIONS: If the candidate receiving the majority vote cannot qualify, there is no election and one receiving minority vote is not elected.

March 31, 1943



Mr. Alpha L. Burns  
Lawyer  
Marceline, Missouri

Dear Mr. Burns:

We are in receipt of your letter of March 25, 1943, requesting an opinion, which letter is as follows:

"I have two propositions for your opinion. First --- May one who is a county officer serve as city councilman in a city of the third class. See Section 18 --- Article NINE constitution of Missouri.

"Also when one is running and whose name is printed on a ballot in a city of the third class and whose name is on the ballot by petition and when this man is not qualified to serve and is not eligible to qualify under the law, and at the same election another name is written in for councilman and the name written is the only man eligible, and he has more votes than any one who is eligible, may be serve and qualify.

"I would appreciate this opinion at once as I may have a concrete case on each proposition."

We are unable to give you a definite opinion as to the first question contained in your letter, because

you do not designate what office the county officer is holding, who also is serving or attempting to serve as city councilman. However, I enclose herewith copy of an opinion rendered December 26, 1942, and addressed to Hon. William Barton of Jonesburg, Missouri, and written by Hon. W. J. Burke, Assistant Attorney General, and another dated December 21, 1942, addressed to Hon. Emory C. Medlin, Cassville, Missouri, and written by Hon. W. J. Burke, Assistant Attorney General. The court decisions cited in these two opinions have been again affirmed in the case of Bradley v. Page (Springfield Court of Appeals, 1942) 46 S.W. (2d) 208, l.c. 211, in which case the court held that one elected to the office of municipal judge did not abandon his claim to that office by accepting appointment in the department of streets.

The general statement of law answering the proposition contained in the second paragraph of your letter is found in 20 C.J., p. 207, par. 267, as follows:

"It is a fundamental idea in all republican forms of government that no one can be declared elected and no measure can be declared carried, unless he or it receives a majority or a plurality of the legal votes cast in the election. The fact that a plurality or a majority of the votes are cast for an ineligible candidate at a popular election does not entitle the candidate receiving the next highest number of votes to be declared elected; in such case the electors have failed to make a choice and the election is a nullity. \* \* \* "

The reasons for this rule of law is clearly presented in the language of the Supreme Court in the case of Sheridan v. City of St. Louis, 183 Mo. 25, l. c. 34-35:

"Notwithstanding some differences of opinion, arising partly from following English decisions which are

neither satisfactory in themselves nor adapted to our circumstances, the great weight of American authority supports the rule that where an ineligible person receives the highest number of votes, the votes cast for such person so far avail as to prevent the election of the qualified candidate who has received the next highest number of votes, unless there is some statutory provision declaring the votes cast for the ineligible person void. (See authorities collected in Cooley's Const. Lim., 781, and note; Dill. on Mun. Corp., sec. 135; In re Corliss, 16 Am. L. Reg. (N.S.) 15, and note.) Here, the case is of votes cast for a man known by the voters, when they voted, to be dead; and the facts appear at first sight, to present the typical instance put in the English cases of "voting for a dead man or the man in the moon." (Queen v. Mayor, 3 L.R.Q.B. 638; Regina v. Coaks, 3E. & Bl. 254; Rex v. Hawkins, 2 Dow 148.) It cannot here be urged that the person, though disqualified "is a person still." Yet, unless we depart from the principle upon which the only sound rule rests, we must hold that the ballots upon which was the name of Mr. Miltenberger are properly counted, not for himself, for he was not in existence, but against his opponent, so far as to render a new election necessary. The relator had no plurality of votes. The will of the electors was declared against him. He is not "the person having the highest number of votes," to whom the certificate must, under the statute, be given; for these words simply imply that the successful candidate shall be the choice of the majority of voters who vote. Thus the case contemplated by the statute is not met. Through the death of one of the candidates immediately before the polls are open, an exigency arises not contemplated by the law, and the obvious consequence is a new election. It

is not the accidental death of his opponent, but the votes of the electors, which should give the certificate to a candidate.' "

\* \* \* \* \*

"It thus clearly appears that the American rule and the rule in Missouri is that where the majority of the electors vote for an ineligible candidate, they do not thereby throw away their votes, and the eligible candidate who receives the next highest number of votes, being less than a majority, is not entitled to the office. \* \* \* "

The Sheridan case and others were affirmed by the Supreme Court in the case of State on inf. McKittrick, Attorney General, v. Cameron (Supreme Court en banc, 1938) 117 S.W. (2d) 1078, l.c. 1082, wherein the court said:

"\* \* \* Of course, every voter is presumed to know the law, but he is not presumed to know a candidate's qualifications for office, such as age, residence, want of naturalization, political or religious beliefs. State ex rel. Atty. Gen. v. Vail, 53 Mo. 97; Sheridan v. St. Louis, 183 Mo. 25, 81 S. W. 1082, 2 Ann. Case. 480, and cases cited therein. These cases further hold that if the candidate receiving the highest number of votes is not eligible to hold the office, the next high candidate is not, by virtue of this disqualification, entitled to the certificate of election. \* \* \* "

CONCLUSION

It is, therefore, our opinion: (1) That a county officer<sup>s</sup> can hold the office of city councilman in a city of the third class, if there is no conflict between the officers and if they are not incompatible; (2) that if a candidate receiving the majority vote is disqualified, or

Mr. Alpha L. Burns

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unable to qualify, the election is a nullity, and the candidate receiving the next highest vote may not qualify and serve as such officer.

Respectfully submitted,

LEO A. POLITTE  
Assistant Attorney General

APPROVED:

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ROY MCKITTRICK  
Attorney General