PUBLIC OFFICERS
SHERIFFS
CIRCUIT JUDGES

Approval by circuit judge of deputy sheriff appointment is discretionary. Mandamus will lie to correct abuse of this discretion.

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Honorable T. W. Dempsey
House of Representatives
Sixty-Fifth General Assembly
Jefferson City, Missouri

Dear Sir:

Your recent opinion request reads in part as follows:

> "I would like to have an official opinion on the following case.
>
> "Shortly after the general election in 1948, the Sheriff of St. Francois County gave Mr. Paul Berry a commission to act as a peace officer at a roadhouse on highway #61, five miles north of Farmington, three or four nights a week. This commission only applied to his duties as a peace officer at this particular place of business. However N. D. Houser of the 27th Judicial Circuit, refuses to certify the commission for Mr. Berry; * * * "

Though you have failed to state specifically the questions which you desire to be answered in this opinion, we assume them to be (1) whether or not a circuit judge is required by law to approve all deputy sheriff appointments made by the sheriff; (2) whether or not the failure to approve in this instance was proper; and (3) if improper, what remedy is available.

Since the deputy sheriff in this instance is appointed to assist the sheriff in the discharge of his duties relative to the enforcement of the criminal law, his appointment is authorized by Section 1 of House Bill No. 899, Laws of Missouri, 1945, page 1562, which reads as follows:

> "The sheriff in counties of the third class shall be entitled to such number of deputies and assistants, to be appointed by such official

> with the approval of the judge of the circuit court, as such judge shall deem necessary for the prompt and proper discharge of his duties relative to the enforcement of the criminal law of this state. The judge of the circuit court, in his order permitting the sheriff to appoint deputies or assistants, shall fix the compensation of such deputies or assistants. The circuit judge shall annually, and oftener if necessary, review his order fixing the number and compensation of the deputies and assistants and in setting such number and compensation shall have due regard for the financial condition of the county. Each such order shall be entered on record and a certified copy thereof shall be filed in the office of the county clerk. The sheriff may at any time discharge any deputy or assistant and may regulate the time of his or her employment."
>
> (Emphasis ours.)

It is specifically provided that the appointment of deputy be made by the sheriff with the approval of the Circuit Judge. If this approval be a mere ministerial duty on the part of the circuit judge, he would be required as a matter of course to approve all appointments made by the sheriff. However, we are of the belief that this approval is discretionary rather than ministerial in nature, and therefore the circuit judge is not required by law to approve all appointments.

Whether or not the word, "approval" contemplates a ministerial or discretionary act must be ascertained from the language of the statute which authorizes that approval. See Better Built Homes and Mortgage Company v. Nolte, et al., 211 Mo. App. 601, 249 S.W. 743; Baynes v. Bank of Caruthersville, 118 S.W. (2d) 1051. Section 2, supra, not only provides for the circuit judge's approval of the sheriff's appointment, but also permits him to fix the compensation to be paid the deputy as well as to allow such number of appointments as he shall deem necessary to be made. The circuit judge is also given the power to review annually or as often as necessary his order fixing the number and compensation of deputies. These latter duties undoubtedly demand discretionary action, which implies that the approval of the sheriff's appointment is likewise to be discretionary with the circuit judge.

This view is substantiated by the case of State ex rel. Pilkington v. Busch, 198 S.W. (2d) 1004, where a circuit judge would not approve an appointment of a deputy prosecuting attorney made by the

prosecuting attorney. There was a statute involved which provided that the appointment was not to take effect until approved by the judge of the circuit court. At l. c. 1005, the Supreme Court of Arkansas said:

> "The legislature did not intend that the duty imposed on a circuit judge in connection with the appointment of a deputy prosecuting attorney should be a merely formal or ministerial one. The word 'approved,' as used in the statute, connotes the exercise of discretion on the part of the judge.
>
> "The very act of approval, unless limited by the context of the statute providing therefor, imports the act of passing judgment, the use of discretion and a determination as a deduction therefrom. * * * "

Since the approval of the circuit judge is a matter lying entirely within his discretion, he cannot be controlled in any manner in the exercise of this discretion. His action can in no way be questioned nor can he be compelled to exercise the discretion in any certain way.

However, should the circuit judge fail or refuse to exercise this discretion, that is, should he fail to approve or disapprove the appointment here under consideration, mandamus will lie to compel him to act and exercise his discretion in the matter. He will not be compelled to act in a certain manner, but will be ordered to take cognizance and perform his duty of exercising his discretion in the matter.

There is an exception to the rule that the action of a public official in a matter discretionary with him will not be interferred with, and that exception is stated in the case of State ex rel. v. Humphreys, 93 S.W. (2d) 924, l. c. 926, 338 Mo. 1091:

> " * * * * Mandamus will not lie to compel a person or officer to do something when action in the premises, on the part of such person or officer, is discretionary and not ministerial. State ex rel. Whitehead v. Wenom, 326 Mo. 352, 32 S.W. (2d) 59; State ex rel. Porter v. Hudson, 226 Mo. 239, loc. cit. 265, 126 S.W. 733; State ex rel. Pickering v. Willow Springs, 208 Mo. App. 1, 230 S.W. 352. <u>But such discretion cannot be arbitrarily exercised, that is,</u>

> exercised in bad faith, capriciously, or by simple ipse dixit. When so exercised, it is regarded that there was no discretion, recognized by law, and in such case mandamus will lie. State ex rel. Adamson v. Lafayette County Court, 41 Mo. 221, 222; State ex rel. Kelleher v. Board of President & Directors of St. Louis, Public Schools, 134 Mo. 296, 35 S.W. 617, 56 Am. St. Rep. 503; State ex rel. McCleary v. Adcock, 206 Mo. 550, 105 S.W. 270, 121 Am. St. Rep. 681; State ex rel. Dolman V. Dickey, 280 Mo. 536, loc. cit. 552, 219 S.W. 363; State ex rel. First National Bank v. Bourne, 151 Mo. App. 104, 131 S.W. 896." (Emphasis ours.)

The reason for this rule is given by the court in the case of State ex rel. v. Lafayette County Court, 41 Mo. 221. In this case the county court was asked to approve the bond given by the relator who had been duly elected sheriff of Lafayette County. The approval of the bond was a matter lying within the discretion of the county court. The relator alleged that the court's action in refusing to approve the bond constituted an abuse of their discretion. The court at l. c. 226 said:

> " * * * When the law devolves upon an officer the exercise of a discretion, it is a sound legal discretion, not a capricious, arbitrary, or oppressive one. In a case like the one presented here, if this court has no jurisdiction the petitioner would stand in the anomalous attitude of a person having a clear specific right, and yet be entirely remediless by law. A hostile court could remove any sheriff in the State and vacate his office by declaring his bond insufficient, and arbitrarily refusing to hear any testimony in regard to the solvency and pecuniary responsibility of his sureties. If the County Court acts independent of all supervision, and its discretion is exclusive and uncontrollable, the result above indicated may follow, and there is no redress. It is true that the judges may be punished for malfeasance in office, but that furnishes no remedy to the person unjustly deprived of his rights. A discretion delegated to an officer is a sound legal discretion, the meaning of which is well known and understood in the law, and is not an unlimited license to the officer to act and do as he pleases, irrespective of restraint. * * *"

In State ex rel. v. Bowman, 294 S. W. 107, the court held that mandamus would lie to compel the members of the Board of Education of a consolidated school district to maintain a high school within such district. The maintenance of the high school was a matter lying within the discretion of the school board, but that board had abused that discretion and mandamus issued compelling them to maintain a high school in their school district. See also State ex rel. v. Board of President and Directors of St. Louis Public Schools, 134 Mo. 296, 35 S.W. 617, and State ex rel. v. Adcock, 206 Mo. 550, 105 S.W. 270, in which cases mandamus was utilized to correct abuses of discretion on the part of public officials and boards.

Therefore, where discretion has been abused by a public official, the court may interfere and mandamus will lie to compel him to act properly. It should also be pointed out that a court called upon to issue a writ of mandamus has a discretion in determining whether or not the writ shall issue, even when a prima facie right thereto is shown. However, here again a sound legal discretion in accordance with established rules of law is required.

Conclusion

Therefore, it is the opinion of this department that the approval by the circuit judge of deputy appointments made by the sheriff lies within the sole discretion of said judge. The exercise of this discretion will be interferred with only where there is clear proof of an abuse of this discretion. Mandamus will lie to correct such abuse of discretion.

Respectfully submitted,

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APPROVED:

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