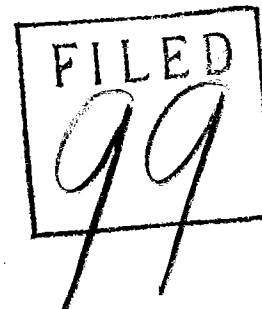


ELECTION CONTEST: Board of Election Commissioners of Kansas City, because of special statutes, may employ and pay extra help in conducting recount in gubernatorial contest.

April 23, 1941

4-24

Honorable J. E. Woodmansee, Chairman
Board of Election Commissioners
County Court House
Kansas City, Missouri



Dear Sir:

This Department is in receipt of your request for an official opinion, which request reads as follows:

"On April 17th, 1941, an opinion was given by Mr. Olliver W. Nolen of your office, to the effect that no money can be expended by County Clerks for the purpose of the recount in the pending gubernatorial contest.

"In behalf of the Board of Election Commissioners of Kansas City, Missouri, I am inquiring of you

"(1) Whether this ruling applies to this board whose expenses are borne, one-half by Kansas City, Mo., and one-half by Jackson County, Mo.?

"(2) If such ruling does not apply to this board, may this board incur additional expenses in connection with the gubernatorial contest, and require payment of same from Kansas City, Mo., and Jackson County, Mo.?

"(3) If such ruling does apply to this board, may the regularly employed assistants of this board perform the duties incident to the recount and for such services be compensated as for ordinary functions of the board?"

"May we have your opinion in this matter at your earliest convenience?"

We shall answer your questions in the order in which they are submitted.

As stated in your request, on April 17th, 1941, this Department rendered an opinion to the Honorable Marion Robertson, Prosecuting Attorney of Saline County, Marshall, Missouri, which held that the county clerk could not receive remuneration or compensation for additional expenses incurred in making a recount of the ballots in a gubernatorial contest. We further held that the county court could not use the funds of the county to compensate or to hire additional clerks or to pay the additional expense incurred by the recounting of the ballots. This opinion was based upon the general statutes applicable to county clerks and held that although the duty of recounting the ballots pursuant to a writ of the General Assembly was imposed upon the county clerk, still the statutes made no provision for compensation or remuneration and, therefore, the rendition of such services was deemed to be gratuitous. That opinion did not consider those counties and cities in which our General Assembly has, by statute, placed the duty of conducting the registration and election in the hands of a board of election commissioners. Therefore, our opinion to the Honorable Marion Robertson is restricted to those counties in which the duty is imposed upon the county clerk to make the recount and does not apply to those counties and cities in which this duty is imposed upon a board of election commissioners whose powers and duties are specifically provided for in such statutes relating to those counties and cities.

We next consider your second question, of whether the Board of Election Commissioners of Kansas City, Missouri, may incur additional expenses in connection with a gubernatorial

contest and require payment of same from Kansas City and Jackson County. Section 11647, R. S. Mo. 1939 provides as follows:

"Either house of the general assembly, or both houses in joint session, or any court before which any contested election may be pending, or the clerk of any such court in vacation, may issue a writ to the clerk of the county court of the county in which the contested election was held, commanding him to open, count, compare with the list of voters and examine the ballots in his office, which were cast at the election in contest, and to certify the result of such count, comparison and examination, so far as the same relates to the office in contest, to the body or court from which the writ is issued."

Section 11630, R. S. Mo. 1939 reads:

"The powers and duties herein given to and imposed upon the clerks of the county courts of the several counties shall be exercised in reference to the city of St. Louis and to Kansas City, and to any other city hereafter having a registration of voters by the board of election commissioners of such city."

In view of the above two sections it will be noted that it is the mandatory duty on the Board of Election Commissioners of Kansas City to open, count, compare and examine the ballots in their office which were cast at the election in contest

and they must certify the result of such count, comparison and examination to the General Assembly. While we find no cases which state explicitly that this duty is imposed upon the Board of Election Commissioners, still we believe that the statute is plain in its requirements and we direct your attention to the cases of State ex rel. Kaysing v. Ryan, 67 S. W. (2d) 983, 334 Mo. 743; State ex rel. Dawson v. Falkenhainer, 15 S. W. (2d) 342, 321 Mo. 1042; State ex rel. Funkhouser v. Spencer, 164 Mo. 123, 63 S. W. 1112; and Gant v. Brown, 238 Mo. 560, 142 S. W. 422, in which the writ was directed to the board of election commissioners to perform the duties imposed by what is now Section 11647.

Examining the statutes relating to the duties and powers of the Board of Election Commissioners of Kansas City, we take judicial notice of the fact that Kansas City is a city with a population of 400,000 and, therefore, falls in the purview of the statutes relating to the registration and election in cities of 300,000 to 700,000 (Sections 12095 to 12194, R. S. Mo. 1939). Section 12097 provides in part as follows:

"There is hereby created a board of election commissioners for each city that is governed by the provisions of this article, composed of four members. * * * * * Said board shall have the right to employ such assistants, clerks, stenographers, typists, or other employees, equally divided between the two parties to which the election commissioners belong, from time to time as may be necessary promptly and correctly to perform the duties of office under the direction of the board. * * * * *

Section 12184, R. S. Mo. 1939, provides the compensation for the commissioners' assistants and provides in part as follows:

"* * * All additional assistants, if any, shall receive not to exceed six dollars per day for the time actually employed. * * * All expenses incurred by said board of election commissioners and all costs and expenses of registration and election in such cities shall be paid one-half out of the city treasury and one-half out of the county treasury. * * *"

Section 12187, R. S. Mo. 1939 provides that the "commissioners shall audit all the claims of the judges and clerks of elections and all other claims under this article, and shall draw a warrant therefor upon such county and/or city treasury, as the case may be."

The power of the board to hire help is dealt with in the recent case of State ex rel. Volker et al. v. Kirby, 136 S. W. (2d) 319, in which case Judge Ellison, in the concurring opinion, said:

"* * * Here we have a board charged with supervision over registrations and general, special, municipal and primary elections. The dates for all of these elections except the special elections are fixed by other laws. Knowing that they occur quadrennially and biennially, and that after the initial registration the duties of that work must settle down to a routine increasing some prior to elections, it is evident that the activities of the board will fluctuate greatly, sometimes as a result of an unforeseeable event such as a special election. The size of the working force must be adjusted to those changes. In making them the board of election commissioners does not act at pleasure, but as

an administrative agency working in a limited field under pressure of external conditions contemplated by the Act. * * *

(Underscoring ours.)

It appears thus that this is an "unforeseeable" event, mentioned in the above case, which would require additional help to be employed by the Board.

Reviewing what has been said above, it will be seen that the statutes impose upon the Board of Election Commissioners of Kansas City the duty of opening, counting, comparing and examining the ballots in their office which were cast at the election in contest and this is mandatory and must be done. The statutes further provide that the Board may employ assistants and employees to carry out the duties imposed upon them by law and provide for compensation for such assistants and employees.

Therefore, since compensation has been provided for, the rule announced in *Nodaway County v. Kidder*, 129 S. W. (2d) 857, cited in our opinion of April 17th, 1941, which is as follows:

"The general rule is that rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. * * *"

can be applicable to the facts in the instant case and we therefore rule that extra clerks may be employed by the Board of Election Commissioners of Kansas City for the purpose of carrying out the writ of the General Assembly in connection with the gubernatorial contest now pending.

The answer to your question as to whether such expenses may be paid by Kansas City and Jackson County, we believe is answered by Section 12184, R. S. Mo. 1939, and by the Kirby case, *supra*, in which it is said:

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"The maintenance of an election board is a state function. Indeed, respondent does not contend that the maintenance of such a board is not a state function. If a state function, the legislature has the authority to compel the city and county to join in providing for said maintenance. * * *"

Referring to your third question, irrespective as to whether or not our ruling of April 17th, 1941, is applicable to Kansas City, it would naturally follow that the regularly employed assistants and clerks of the Board may receive their salaries or compensation, as for the ordinary functions of the Board, in like manner as the County Clerk receives his salary as County Clerk irrespective of the fact that he may be performing additional duties with reference to the recount for which no additional compensation is provided.

As noted above, the Legislature has provided no compensation to the county clerks for the additional assistance required in recounting the votes in the gubernatorial contest. However, the Legislature has heretofore specifically provided for extra and additional assistants for the Board of Election Commissioners of Kansas City. We can only construe the statutes as they are written, and this apparent injustice in the future may be corrected by a specific statutory enactment by the General Assembly allowing compensation to the county clerks for this work.

Respectfully submitted,

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APPROVED:

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