



WILLIAM J. SCOTT

ATTORNEY GENERAL

STATE OF ILLINOIS

500 SOUTH SECOND STREET

SPRINGFIELD

62706

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FILE NO. S-898

COUNTIES:

Validity of Appointment to Fill
Vacancy on County Board Made after
60-Day Period for Filling Said
Vacancy has Passed

Honorable Dick Leiken
State's Attorney
Woodford County
Court House
Eureka, IL 51530

Dear Mr. Leiken:

I have your letter wherein you state in pertinent

part:

"The Woodford County Board has asked me to
determine the proper interpretation of Chap-
ter 34 Section 839 Illinois Revised Statutes,
referring to vacancies on the County Board.

* * *

The factual situation in Woodford County is
that a member of the Woodford County Board

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resigned on October 9, 1974. Within the 60 day period, on December 2, 1974, the Board met and nominated the individual who was later appointed on December 10, 1974. However, on December 2, 1974, no vote was had as the vote on appointment was tabled. On December 10, 1974, (which is 62 days after the October 9, 1974, resignation) the Board voted on and approved the new member who was previously nominated. * * *

My questions are as follows:

1. Can the actual approval of the appointee on December 10, 1974, be considered to have been made within the 60 day period since his name was placed in nomination earlier?

If the answer to the first question is that the appointment must be construed to have occurred after 60 days had passed, then I must ask the following questions:

2. May the County Board properly appoint a new member to fill a vacancy more than 60 days after the vacancy occurs?

3. If the County Board does not have the authority to appoint a member after the 60 days have passed, what action must be taken? Must the county hold a special election or does the office simply remain vacant for the remainder of the expired term?"

Section 25-11 of the Election Code (Ill. Rev. Stat.

1973, ch. 46, par. 25-11) provides:

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"When a vacancy shall occur in the office of County Commissioner in any county with a population of less than 500,000 inhabitants, within one year before the expiration of the term of such vacant office, the vacancy shall be filled by appointment, by the County Board of the county in which the vacancy exists, but if such unexpired term exceeds one year, the County Clerk, shall issue an order appointing a day for an election to fill such vacancy and cause notice thereof to be given as in other cases of election: Provided, that when a vacancy shall occur in the office of Sheriff, Coroner, Recorder of Deeds, County Treasurer, State's Attorney, County Clerk, or other county or precinct officer not otherwise provided for by law, at any time before the expiration of the term of such vacant office, such vacancy shall be filled by appointment, by the County Board of the county in which such vacancy exists, until the next general, county or precinct election when a successor shall be elected for the unexpired term or a full term as the case may require." (emphasis added.)

The filling of vacancies on county boards in counties having a population of less than 3,000,000 inhabitants and the township form of government is specifically provided for in "AN ACT relating to the composition and election of county boards in certain counties". (Ill. Rev. Stat. 1973, ch. 34, pars. 831 et seq.) Section 9 of said Act (Ill. Rev. Stat. 1973, ch. 34, par. 839, as amended by P.A. 78-1128, sec. 17) provides:

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"The members elected in April in 1972 and every 10 years thereafter to a county board in a county to which this Act applies shall determine by lot which members shall serve for 2 years and which for 4 years. Their successors shall be elected to a 4 year term. All terms shall commence on the first Monday in May in even-numbered years.

If a vacancy occurs on the county board, the presiding officer of the county board, with the advice and consent of the county board, shall, within 60 days of the date the vacancy occurs, appoint some person, possessing the qualifications of a board member, to serve until the next election of county board members in the county at which time an election shall be held to fill the vacancy for the unexpired term.

If a vacancy occurs in the office of chairman of the county board, the remaining members of the board shall elect one of the members of the board to serve for the balance of the unexpired term of the chairman." (emphasis added.)

The answer to your first question is in the negative.

As you indicate, a name was merely placed in nomination within the 60 day period but actual approval did not occur until after the 60 day period had passed. Appointment means "the designation of a person, by the person or persons having authority therefor, to discharge the duties of some office or trust."

(Black's Law Dictionary, 4th ed. 1968, p. 128.) If the board

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merely nominated a person within the 60 day period, said board clearly did not designate such person to discharge the duties of the office within the 60 day period.

Since it is my opinion that the appointment did not occur until after the 60 day period had passed, it is necessary to answer your second question. The answer to said question depends on whether the language of the statute providing that the vacancy be filled within 60 days is mandatory or directory. It is my opinion that, while there is a mandatory duty to appoint, the provision that said appointment be made within 60 days is directory only.

A directory provision is one the observance of which is not necessary to the validity of the proceeding whereas a failure to follow a mandatory provision renders the proceeding to which it relates illegal and void. (Hester v. Kamykowski, 13 Ill. 2d 481.) In determining whether statutory provisions are directory or mandatory consideration must be given to the entire statute, its nature, its object, and the consequences which would result from construing it one way or the other.

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(Zbinden v. Bond County Community Unit School Dist. No. 2, 2 Ill. 2d 232; People v. Smith, 368 Ill. 328.) The language of a statute, however mandatory in form, may be deemed directory whenever the purpose of the General Assembly can best be carried out by such a construction. (People v. Elgin Home Protective Ass'n., 359 Ill. 379.) The word "shall", when used in a statute, is generally imperative but, depending on the legislative intent, it may be construed as meaning both "must" and "may". Cooper v. Hinrichs, 10 Ill. 2d 269.

As to statutes specifying that certain acts be performed by public officers within a designated period of time, a well established principle was cited in People v. Jennings, 3 Ill. 2d 125, at page 127:

"* * * The applicable rule was announced in French v. Edwards, 80 U.S. (13 Wall.) 506, 20 L.ed. 702, where the court observed: 'There are, undoubtedly, many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such, generally, are regulations designed to secure order, system and dispatch in proceedings, and by a disregard of which

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the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated.
* * *

In Carrigan v. Liquor Control Commission, 19 Ill. 2d 230, the statute in question provided that the Illinois Liquor Control Commission "shall" receive and consider an application for a rehearing within 20 days from the filing thereof with the secretary of the commission. The question was whether the language of the statute was mandatory or directory and whether the failure of the commission to pass upon the application within the prescribed time rendered its prior proceedings a nullity on the grounds that it had lost jurisdiction.

In holding that the provision that an application for rehearing be considered within 20 days after the filing thereof was directory only, the court cited a rule of statutory construction at page 233:

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"* * * Ordinarily a statute which specifies the time for the performance of an official duty will be considered directory only where the rights of the parties cannot be injuriously affected by failure to act within the time indicated. However, where such statute contains negative words, denying the exercise of the power after the time named, or where a disregard of its provisions would injuriously affect public interests or private rights, it is not directory but mandatory. * * *"

Thus, provisions regulating the duties of public officers and specifying the time for their performance are generally deemed to be directory only unless the statutes contain negative words denying the exercise of the power after the time named or unless a disregard of its provisions would injuriously affect public interests or private rights. (See, also, People v. Gibbs, 413 Ill. 154 (time for convening of grand jury); People v. Donaldson, 255 Ill. 19 (time for selection of grand jury); Whalin v. City of Macomb, 76 Ill. 49 (publication of city ordinances within one year after incorporation and every five years thereafter).) It has specifically been so held in regard to the time when or within which appointments to office are to be made. See,

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e.g., Greer v. Asheville, 114 N.C. 678, 19 S.E. 635.

Section 9 of the Act, supra, does not contain negative words denying the exercise of the power after the time named. Even if it could be said that a public or private interest would be injuriously affected by a disregard of the 60 day requirement, such injury would be slight when weighed against the consequences which would result from construing the 60 day requirement as mandatory. As noted above, such consequences are a pertinent consideration in determining whether statutory provisions are mandatory or directory. Zbinden v. Bond County Community Unit School Dist. No. 2, supra; People v. Smith, supra.

It would be absurd to construe the 60 day requirement as mandatory so that the presiding officer of the county board would be powerless to fill the vacancy after the 60 day period had passed. The public interest would be injured to a much greater extent were the office to remain vacant until the next election of county board members.

In conclusion, it is my opinion that, while the presiding officer of the county board with the advice and consent of the county board has the mandatory duty to fill a

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vacancy on said board by appointment, the requirement that such appointment be made within 60 days of the date the vacancy occurs is directory only. Consequently, an otherwise valid appointment made after the 60 day period has passed is valid. It is therefore unnecessary to answer your third question.

Very truly yours,

A T T O R N E Y G E N E R A L