

MAGISTRATES: Office of extra magistrate may be abolished without regard to term of incumbent.

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Hon. Emmett L. Bartram
Prosecuting Attorney
Nodaway County
Maryville, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Nodaway County now has two divisions of the Magistrate Court. Division No. 2 was created about two years ago by order of the Circuit Court. Nodaway County is a third class county.

"The Judge of this Division was just elected at the last General Election, that is in November of 1948. He now has qualified and has taken office pursuant to his election.

"The question before us is: Can Division No. 2 be abolished during the tenure of this Judge's term and if the Circuit Court Judge rules to abolish the office, would this automatically dispense with the county paying the salary of the newly elected Magistrate Judge after the order of decreasing the number of Magistrate Courts."

Section 18 of Article V of the Constitution, 1945, provides, in part:

" * * * According to the needs of justice the foregoing number of magistrates in any county may be increased by not more than two, or such increased number may be decreased, by order of the circuit court on petition, and after hearing on not less than thirty days public notice.
* * *"

Pursuant to this constitutional provision, the Legislature enacted the following provision (Laws of 1945, page 765, Section 1):

" * * * According to the needs of justice, in counties of more than 30,000 inhabitants, the foregoing number of magistrates in any county may be increased by not more than two, or such increased number may be decreased, by order of the circuit court, on petition of five hundred qualified voters of the county, and after hearing on not less than thirty days public notice to be published in some newspaper of general circulation in the county once each week for three consecutive weeks immediately preceding said hearing. No petition for additional magistrate shall be granted unless the circuit court finds from the evidence heard that the administration of justice requires that the number of magistrates be increased, and that the need for additional magistrate or magistrates is not temporary but appears to the circuit court that a permanent need exists. Such additional magistrates shall be appointed by the governor when authorized by proper order of the circuit court certified to him, and such appointee shall hold office until the next general election at which election a successor shall be elected to hold office for the unexpired term or full term as the case may be, said terms to be identical with that of other magistrates."

See State ex rel. Randolph County v. Walden, 357 Mo. 167, 206 S. W. (2d) 979.

The general rule concerning the abolition of public offices is set out in 42 Am. Juris., Public Officers, Section 33, page 904, as follows:

"The power to create an office generally includes the power to modify or abolish it. The two powers are essentially the same. * * *

"The power to abolish an office may be exercised at any time and even while the office is occupied by a duly elected or appointed incumbent, for there is no obligation on the legislature or the people to continue a useless office for the sake of the person who may be in possession thereof. By abolishing the office, the legislature does not deprive the incumbent of any constitutional rights, for he has no contractual right or property interest in the office. He accepts it with the understanding that it may be abolished at any time, and the tenure of the office is not protected by constitutional provisions which prohibit impairment of the obligation of contract. Clauses in a Constitution respecting the holding of offices in general by incumbents during their terms do not as a rule prevent the abolition of an office. Tenure of office and civil service statutes do not prevent a bona fide abolition of office."

See annotations 4 A. L. R. 224; 37 A. L. R. 819; 46 C. J., Officers, Section 30, page 935.

In the case of *State ex inf. v. Evans*, 166 Mo. 347, 66 S.W. 355, the court considered the question of the effect of an order of the county court made pursuant to Section 9079, R. S. Mo. 1899, separating the offices of circuit clerk and recorder of deeds, upon the right of the duly elected person holding both such offices to continue to do so until the expiration of the term for which he had been elected. In the course of its opinion the court stated, l.c. 356 (166 Mo.):

"The county of Crawford having a population of over ten thousand inhabitants on the sixth of November, 1901, and the county court having on that day made its order separating the offices of circuit clerk and recorder of deeds, and that order having been duly certified to the Governor and the Governor having appointed Thomas M. Wright recorder of deeds within and for said county until his successor shall be elected and qualified, it is obvious that the only question presented by the pleadings in this case is whether the respondent, the circuit clerk of said county, has such a vested right in and to the emoluments of the office of recorder of deeds for said county by virtue of his election as circuit clerk and ex officio recorder of deeds of said county, on November 8, 1898, that the order of the county court separating said offices and the appointment of the Governor can not affect his title thereto.

"It may be well to note that the statutory provisions found in sections 9079 and 9080, Revised Statutes 1899, were in force long prior to the election of respondent to the office of circuit clerk and ex officio recorder in November, 1898. A person in the possession of a public office created by the Legislature has no such vested interest or private property therein that it can not be modified or repealed by the Legislature which created it. Such offices are not held by grant or contract, but are subject to such modifications and changes as the legislative branch of the government may deem it necessary or advisable to enact, unless inhibited by the Constitution. This is the law of this State, and generally in the United States. (Atty.-Gen'l v. Davis, 44 Mo. l.c. 131.)

"As said by the Supreme Court of the United States in Butler et al. v. Pennsylvania, 10 Howard l.c. 416: 'The selection of officers, who are nothing more than agents

for the effectuating of such public purposes, is a matter of public convenience or necessity, and so, too, are the periods for the appointments of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to reappoint them, after the measures which brought them into being shall have been found useless, shall have been fulfilled, or shall have been abrogated as even detrimental to the well-being of the public It follows, then, upon principle, that in every perfect or competent government, there must exist a general power to enact and to repeal laws; and to create, and change or discontinue, the agents designated for the execution of those laws.'

* * * * *

"It necessarily follows that as Evans, the respondent, held an office created by the Legislature by virtue of being circuit clerk, the Legislature had the power in its wisdom either to abolish the office or to separate it from the office of circuit clerk and provide for its occupancy either by election or appointment, without infringing any vested right which he had therein."

Holding to the same effect is the case of Gregory v. Kansas City, 244 Mo. 523, 149 S. W. 466.

We feel that the principles above referred to apply in the situation which you have presented. The constitutional provision authorizing an increase in the number of magistrates at the same time authorizes a decrease. No limitation is placed upon the time of the exercise of such authority. Any person who accepts the position of additional magistrate must do so subject to the power of the circuit court, upon proper petition and notice, to abolish the office.

Of course, if the right to abolish exists and is exercised, the right to compensation would also cease inasmuch as it is an incident to the title to the office, and when the office no longer

exists there is no further right to compensation. 46 C. J.,
Officers, Section 234, page 1016.

Conclusion.

Therefore, it is the opinion of this department that the office of additional magistrate created in accordance with Section 18 of Article V of the Constitution, 1945, may be abolished, as provided by said section, without regard to the term of the incumbent in said office. We are further of the opinion that, upon the abolition of the office, the right to compensation no longer exists.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
Attorney General

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