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#99029

NO.
STATE OF NEBRASKA
OFFICIAL
JUL 16 1999
DEPT. OF JUSTICE

DATE: July 12, 1999

SUBJECT: Whether the Office of County Sheriff Can be Declared Vacant if a Sitting County Sheriff Will Not be Certified Within Eight Months of His Taking Office, as Required by Neb. Rev. Stat. 23-1701.01.

REQUESTED BY: James J. McNally, Wheeler County Attorney

WRITTEN BY: Don Stenberg, Attorney General
Jason W. Hayes, Assistant Attorney General

You have requested an Attorney General's opinion on whether the office of county sheriff can be declared vacant if a sitting county sheriff will not be certified within eight months of his taking office as required by Neb. Rev. Stat. § 23-1701.01 (Reissue 1997). You describe that the current Wheeler County Sheriff was elected last fall and entered office in January 1999, but will be unable to be certified within eight months of his taking office. The sheriff's inability to be certified within this period is due to his failure to pass the Nebraska Law Enforcement Training Center's entrance exam. This failure to obtain certification within eight months is the purpose of your request in order to determine if a vacancy can be declared that would enable a new county sheriff to be appointed.

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DISCUSSION

Section 23-1701.01 requires that each county sheriff elected to office in Nebraska must complete the Sheriff's Certification Course.[1] The statute provides:

> Each sheriff shall attend the Nebraska Law Enforcement Training Center and receive a certificate attesting to satisfactory completion of the Sheriff's Certification Course within eight months of taking office unless such sheriff has already been awarded a certificate by the Nebraska Commission on Law Enforcement and Criminal Justice attesting to satisfactory completion of such course or unless such sheriff can demonstrate to the Nebraska Police Standards Advisory Council that his or her previous training and education is such that he or she will professionally discharge the duties of the office.[2]

If a newly elected county sheriff does not obtain a certificate attesting to his completion of the Sheriff's Certification Course within eight months, the statute requires that a fine be imposed. The section calls for the following penalty:

> Unless a sheriff is able to show good cause for not complying with subsection (1) of this section or obtains a waiver of the training requirements from the council, any sheriff who violates subsection (1) of this section shall be punished by a fine equal to such sheriff's monthly salary. Each month in which such violation occurs shall constitute a separate offense.[3]

The statute does not remove a sitting county sheriff from office, but rather imposes a fine equal to the sheriff's monthly salary. The fine continues to be leveled each additional month until the sheriff has completed the Sheriff's Certification Course. The Council may

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1 Neb. Rev. Stat. § 23-1701.01 (Reissue 1997).

2 Neb. Rev. Stat. § 23-1701.01(1).

3 Neb. Rev. Stat. § 23-1701.01(2).

grant a waiver that would allow a county sheriff to forego the training requirements mandated within the eight month period.

Legislative debate gives some insight as to how this penalty was intended to be implemented. During floor debate, it was explained:

> After election, a sheriff is given a certain amount of time during which to go and take training in law enforcement principles and for every month that that sheriff does not take this training the punishment built into the law is forfeiture of a month's salary which would mean that a sheriff in effect would be serving for nothing.[4]

This penalty was intended to be imposed on a sheriff while he served his term in office for failing to complete the Sheriff's Certification Course.

There are no explicit provisions within § 23-1701.01 or other statutes that would allow a county sheriff to be automatically removed from office for failing to complete the Sheriff's Certification Course within the eight month requirement. The statute that determines if a vacancy in office has occurred is Neb. Rev. Stat. § 32-560 (Reissue 1998). This section provides, "[e]very elective office shall be vacant . . . upon the happening of any one of the following events at any time before the expiration of the term of such office . . . forfeiture of office as provided for by law."[5] Section 23-1701.01 requiring that the Sheriff's Certification Course be completed does not provide that a failure to obtain a certificate of completion results in a forfeiture of office. Thus, a vacancy fails to occur under § 32-560 because the law does not provide for a forfeiture of office.

CONCLUSION

The failure of a county sheriff to complete the Sheriff's Certification Course within eight months of his taking office, as required by Neb. Rev. Stat. § 23-1701.01, does not result in an automatic vacancy in office as defined by Neb Rev. Stat. § 32-560. A fine is imposed on a sheriff who fails to obtain certification within the eight month requirement that is equal to the sheriff's monthly salary. This fine continues to be leveled each additional month until the sheriff has completed the Sheriff's Certification Course. The imposition of

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[4] Floor Debate on LB 628, 86th Neb. Leg., 2nd Sess. 6857 (February 7, 1980) (Statement of Sen. Chambers). (Emphasis added).

[5] Neb. Rev. Stat. § 32-560 (8) (Reissue 1998).

this penalty does not result in a sheriff being automatically removed from office, which would allow the office to be declared vacant.

Sincerely,

Don Stenberg
Attorney General

Jason W. Hayes
Assistant Attorney General

Approved:

Attorney General

02-86-16