

Vacancies in Public Office

The key provisions of the Mississippi Code dealing with vacancies in public office are Miss. Code Ann. §23-15-833 and §23-15-839 (Supp. 1993).

Section 23-15-833 designates the first Tuesday after the first Monday in November of each year as the “regular special election day” on which an election shall be held to fill any vacancy in County, County district or district attorney elective offices, except as otherwise provided by law.⁵⁵

Section 23-15-839 sets forth the procedure for filling vacancies in County or County district offices, procedures for a special election to fill such vacancy and the procedure where only person has qualified for candidacy in the special election.

This statute also provides that when a vacancy occurs in a County or County district office and the unexpired term is no longer than six months, the Board of Supervisors by order entered on its minutes, or by appointment of the Board President with the consent of the majority of the Board if the vacancy occurs when the Board is not in session, may fill the vacancy by an appointment which is then certified by the Clerk of the Board to the Secretary of State, and the appointee is then commissioned by the Governor to serve until a successor is elected as provided under the statute,

unless the regular special election day on which the vacancy should be filled occurs in a year in which an election would normally be held for that office as provided by law, in which case the person so appointed shall serve the unexpired portion of the term. Such vacancy shall be filled for the unexpired term by the qualified electors at the next regular special election day occurring more than ninety (90) days after the occurrence of the vacancy. The Board of Supervisors of the County shall, within ten (10) days after the happening of the vacancy, make an order, in writing, directed to the Commissioners of Election, commanding an election to be held on the next regular special election day to fill the vacancy.

This same statute provides that if only one person qualifies with the Commissioners of Election to be a candidate within the time provided by law, the Commissioners of Election will certify to the Board of

⁵⁵See *Rogers v. Holder*, 636 So. 2d 645 (Miss. 1994), for a comprehensive analysis of the various tests used to determine when a special election is required in the event of departures from Election Code requirements. In this case, after an incumbent Sheriff had contested the election of his challenger on the ground of fraud, the special tribunal found that the will of the voters could not be ascertained due to radical departures from the Election Code's mandatory provisions. A special election was held during the pendency of the appeal to the Mississippi Supreme Court by Order of Governor Kirk Fordice, resulting in the incumbent Sheriff receiving a majority of votes. The Supreme Court took judicial notice of the “clearly relevant” adjudicative fact that a special election was held and that the incumbent was declared the victor. See also *McIntosh v. Sanders* (candidate disqualification based on lack of residency in County); *Upton v. McKenzie* (executive committee review of County election, challenge based in part on disqualification of certifying attorney);

Supervisors that there is but one candidate and

thereupon, the Board of Supervisors shall dispense with the election and shall appoint the candidate so certified to fill the unexpired term. The clerk of the Board shall certify to the Secretary of State the candidate so appointed to serve in said office and that candidate shall be commissioned by the Governor. In the that no person shall have qualified at least sixty (60) days prior to the date of the election, the Commissioners of Election shall certify that fact to the Board of Supervisors which shall dispense with the election and fill the vacancy by appointment. The Clerk of the Board of Supervisors shall certify to the Secretary of State the fact of the appointment, and the person so appointed shall be commissioned by the Governor.

Removal From Office

Section 175 of the Mississippi Constitution of 1890 prescribes the mandatory penalty of removal from office upon conviction for wilful neglect of duty or misdemeanor in office. This constitutional provision, which provides the exclusive method of removal from office, states in its entirety:

All public officers, for wilful neglect of duty or misdemeanor in office, shall be liable to presentment or indictment by a grand jury; and, upon conviction, shall be removed from office, and otherwise punished as may be prescribed by law.

The principal statutory provision for removal of County officials from office is Miss. Code Ann. §25-5-1 (1979), which provides as follows:

If any public officer, state, district, County or municipal, shall be convicted in any court of this state or any other state or in any federal court of any felony other than manslaughter or any violation of the United States Internal Revenue Code, of corruption in office or peculation therein, or of gambling or dealing in futures with money coming to his hands by virtue of his office, any court of this state, in addition to such other punishment as may be prescribed, shall adjudge the defendant removed from office; and the office of the defendant shall thereby become vacant....

When any such officer is found guilty of a crime which is a felony under the laws of this state or which is punishable by imprisonment for one (1) year or more, other than manslaughter or any violation of the United States Internal Revenue Code, in a federal court or a court of competent jurisdiction of any other state, the Attorney General of the State of Mississippi shall promptly enter a motion for removal from office in the Circuit Court of Hinds County in the case of a state officer, and in the Circuit Court of the County of residence in the case of a district, County or municipal officer. The Court, or the Judge in vacation, shall, upon notice and a proper hearing, issue an order removing such person from office and the vacancy shall be filled as provided by law.

Removal Cases Under §25-5-1 and §25-1-59

In *Cumbest v. Commissioners of Election of Jackson County*, 416 So. 2d 683 (Miss. 1982), the Mississippi Supreme Court reaffirmed the principal of law that a person removed from office under Section 175 of the Constitution and §25-5-1 has no right whatsoever to such office by virtue of his election thereto, and these statutory and constitutional mandates contain no provision for reinstatement in office after removal. The Court reasoned that when a public official is convicted of a crime in office, both the statute and the Constitution require that he be removed from public office in addition to whatever punishment he receives, and he is entitled to appeal from his conviction which may ultimately be overturned. Such public officer removed from office following his conviction in Circuit Court and pursuant to Section 175 and §25-5-1 “forfeits all of his rights to such office, regardless of what transpires on appeal. His right to such office for the remainder of the term to which he was elected is thereby extinguished....”

Rights of the Public

The rationale for the Court's decision was that while an officeholder has a material interest in his office and may have gained it only at a great personal sacrifice in time and money and may have served honorably and well for many years, and while his conviction may be completely overturned on appeal,

the citizenry of this state, however, have the compelling right to be represented by the public official whom they select by ballot and in whom they can repose confidence, unstained by any conviction. The public should not be required to suffer because of his conviction. They are entitled to know that whomever they elect to fill the vacancy created by such removal will keep the office for the entire interim period remaining in the term. On balance, the rights of the public far outweigh the rights of the public official to this office and its emoluments. A public office belongs to the people it serves.

No Opportunity for Hearing

In *Gerrard v. State*, 619 So. 2d 212 (Miss. 1993), Section 25-5-1 was held to mandate removal from office of a member of the County Board of Supervisors who was convicted of embezzlement, even though the Supervisor was not given the opportunity for a hearing, since the statute mandates the removal of officers found guilty of felonies, and thus the Board member would have been removed from office regardless of what would have occurred at a hearing.

In *Barlow v. Weathersby*, 597 So. 2d 1288 (1992), the Court held that the County Board of Supervisors could not refuse to reinstate the Clerk of the Board and the County Auditor, who had temporarily vacated his position, based on a claim of failure to perform his duties, without first giving the clerk a hearing regarding the claim.

Removal by Order of Supervisors

In *Moore v. Sanders*, 558 So. 2d 1383 (Miss. 1990), a County Supervisor was removed from office by an order of the County Board of Supervisors, finding that the Supervisor in question was no longer a

resident of the district from which he was elected, and the Board of Supervisors thereupon declared the office vacant. The Board's Order declaring the office vacant was made under the authority of Miss. Code Ann. §25-1-59 (1972), which provides in part that

if any state, district, County, County district or municipal officer during the term of his office shall remove out of the state, district, County or municipality for which he was elected or appointed, such office shall thereby become vacant and the vacancy be supplied as by law directed...

The Supervisor sought and was denied injunctive relief in Chancery Court, and the Mississippi Supreme Court affirmed, noting that he had a statutory method of appeal to the Circuit Court which afforded him a plain, adequate, speedy and complete remedy for a judicial determination of his right.