

October 17, 1945.

Mr. J. E. McKenna
County Attorney
Fergus County
Lewistown, Montana

Dear Mr. McKenna:

You have asked me the following question:

When the State Examiner has started an examination of a county office and has filed with the board of county commissioners his verified preliminary report showing a shortage existing in the accounts of such county officer, is it then mandatory on the board of county commissioners to suspend such county officer from his duties and emoluments of said office pending the final examination of such office? And if upon the completion of the audit or examination of the accounts of such officer by the State Examiner, a shortage shall be found to have existed in the accounts of such officer on the date of the commencement of such examination, is the said office forfeited?

In answering your inquiry, I call to your attention Chapter 179, Laws of 1939, the pertinent part thereof being as follows:

"The state examiner shall have full power and authority to count the cash, verify the bank accounts and verify any and all accounts of any public officer whose accounts he is examining pursuant to law.

"Any . . . county . . . officer who shall refuse to accord the state examiner access during an examination of such officer's accounts, to his cash, bank accounts, or any of the papers, vouchers or records of his office, or if the state examiner after counting the cash and verifying the bank accounts of such officer shall find that a shortage exists in the accounts of said officer, the state examiner shall forthwith file a verified preliminary report showing . . . the existence of such shortage, and the amount or approximate amount thereof . . . with the board of county commissioners of the proper county if the officer be a county . . . officer . . .; upon the filing of such verified statement, such officer shall imme-

Opinion No. 81.

**State Examiner—Examiner, state—
Offices and Officials, County—County
Commissioners—Counties.**

Held: When the State Examiner starts his examination of a county office, and after counting the cash and verifying the bank accounts of such officer, he finds a shortage exists in the accounts of said officer, the State Examiner shall forthwith file a verified preliminary report showing the existence of such shortage and the amount or approximate amount thereof, with the board of county commissioners. Upon the filing of such verified statement, such officer shall immediately be suspended from the duties and emoluments of his office, and the board of county commissioners shall appoint some qualified person to such office, pending the completion of such examination. When the State Examiner completes the audit or examination of the accounts of a county officer and finds that a shortage existed in the accounts of such officer on the date of the commencement of such examination, the State Examiner must file with the board of county commissioners his verified final report, showing such shortage. Upon the filing of such report the officer whose accounts were short forfeits his rights to said office.

diately be suspended from the duties and emoluments of his office and . . . the board of county commissioners of the county in case of county . . . officers . . . shall appoint some qualified person to such office, pending the completion of such examination.

"Upon the completion of the audit or examination of the accounts of such officer by the state examiner, if a shortage shall be found to have existed in the accounts of such officer on the date of the commencement of such examination, the state examiner shall file, in the office of the . . . board of county commissioners of the proper county in case of a county . . . officer . . . a verified final report of the examination or audit, showing such shortage, whereupon the right of such officer to such office shall be forfeited, and such office shall thereupon become vacant as of the date of the suspension of such officer as hereinabove provided, and the person appointed to such office upon the suspension of said officer shall hold said office until the election and qualification of his successor, as provided by law." (Emphasis mine.)

The legislative intent expressed in the foregoing statute appears to be plain and unambiguous.

It is to be noted that the legislature has used the word "shall" in commanding the duty of each of the officers is to perform. When the State Examiner discovers a shortage in a county officer's accounts, he shall forthwith file a verified preliminary report showing the existence of such shortage with the board of county commissioners. Upon the filing of such verified preliminary report or statement such officer shall immediately be suspended from the duties and emoluments of his office, and the board of county commissioners shall appoint some qualified person to such office, pending the completion of such examination. Upon the completion of such examination or audit of the accounts of such officer by the State Examiner, if a shortage shall be found to have existed in the accounts of such officer on the date of the commencement of such examination, the State Examiner shall file, in the office of the board of county commissioners a verified final report

of the audit or examination showing such shortage, whereupon the right of such officer to such office shall be forfeited. Such office shall thereupon become vacant as of the date of the suspension of such officer, and the person appointed to such office upon the suspension of said officer shall hold said office until the election and qualification of his successor, as provided by law.

The chapter then provides that the officer whose right to such office has been forfeited may test the right of his successor by quo warranto in the district court.

Black's Law Dictionary defines the word "shall" as follows:

"'Shall', as used in statutes, contracts and the like is generally mandatory; citing many cases."

Especially is this true when directed to public officers for and in the public interest.

"The word 'shall' when addressed to public officials is mandatory." (McDunn v. Roundy, 191 Iowa 976, 181 N. W. 453, 454.)

"We must interpret the statute according to the context and the approved usage of the language (§15, Rev. Codes), which means according to the ordinary rules of grammar; and if thus regarded the words embody a definite meaning involving no absurdity or contradiction we may not add to nor take away from their meaning. State ex rel. Palagi v. Regan, 113 Mont. 343, 126 Pac. (2d) 818." (Steinbremer v. Love, 113 Mont. 466, 129 Pac. (2d) 101, 102.)

"No rule of construction can justify the disregard of the plain mandate of the law. 'In the construction of a statute the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit, what has been inserted'. (Sec. 10519, Rev. Codes 1921.)" (State ex rel. Magelo v. Indus. Acc. Board, 102 Mont. 455, 462, 59 Pac. (2d) 785.)

From the foregoing Chapter 179, Laws of 1939, as given us by the legislature, and the decisions of our court, and applying the rules of construction of statutes, it is my opinion that the

language of this chapter is mandatory on the State Examiner and on the board of county commissioners. When the State Examiner starts his examination of a county office, and after counting the cash and verifying the bank accounts of such officer, he finds a shortage exists in the accounts of said officer, the State Examiner shall forthwith file a verified preliminary report showing the existence of such shortage and the amount or approximate amount thereof, with the board of county commissioners. Upon the filing of such verified statement, such officer shall immediately be suspended from the duties and emoluments of his office, and the board of county commissioners shall appoint some qualified person to such office, pending the completion of such examination. When the State Examiner completes the audit or examination of the accounts of a county officer and finds that a shortage existed in the accounts of such officer on the date of the commencement of such examination, the State Examiner must file with the board of county commissioners his verified final report, showing such shortage. Upon the filing of such report the officer whose accounts were short forfeits his right to said office.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General