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1. SCHOOL EXAMINERS, BOARD OF STATE—TERM OF OFFICE, FIVE YEARS—VACANCY—DIRECTOR OF EDUCATION SHOULD MAKE APPOINTMENT FOR UNEXPIRED TERM—UPON EXPIRATION OF SUCH TERM APPOINTMENT SHOULD BE MADE FOR FULL FIVE YEAR PERIOD.
2. WHERE NO APPOINTMENT MADE AT BEGINNING OF TERM OF OFFICE, APPOINTMENT MAY BE MADE LATER—INCUMBENT OF OFFICE SERVES UNTIL SUCCESSOR APPOINTED AND QUALIFIED—APPOINTMENT WHEN MADE MAY BE FOR UNEXPIRED PORTION ONLY OF THEN CURRENT TERM OF OFFICE—SECTION 8 G.C.

SYLLABUS:

1. The term of office of each member of the Board of State School Examiners is for a five year period, one beginning September 1 of each year and extending to and including the 31st of August, five years thereafter.

2. When a vacancy occurs in the office of State School Examiner, an appointment thereto should be made by the Director of Education for the unexpired term, and upon the expiration of the term an appointment should be made for a full five year period.

3. If, through inadvertence or otherwise, the appointing power fails to make an appointment to the State Board of School Examiners at the beginning of a term of office as fixed by law for said office, an appointment thereto may be made later, and in the meantime the then incumbent of the office continues therein, by virtue of Section 8 of the General Code of Ohio, until his successor is appointed and qualified. When the appointment is finally made it may be made for the unexpired portion only, of the then current term of office.

Columbus, Ohio, September 22, 1942.

Honorable Kenneth C. Ray, Director of Education,
Columbus, Ohio.

Dear Sir:

I have your request for my opinion, which reads as follows:

“Mr. H. was appointed a member of the State Board of School Examiners from September 1, 1931 to September 1, 1936. Mr. H. died in 1933, and O.E.H. was appointed to fill Mr. H's unexpired term. At the expiration of this term, in 1936,

no appointment was made, and O.E.H. served until September 1, 1938, at which time Mr. V. was appointed by E. N. Deitrich for a five year term from September 1, 1938, to September 1, 1943.

My question is relative to the legality of the five year term given Mr. V. Was it legal, or should he have been appointed to fill the unexpired term one year of which was served by Mr. O.E.H.?"

While it is not specifically so stated in your letter, I assume that Mr. V. was appointed as the successor to Mr. O. E. H.

The present law relating to the appointment of members of the State Board of School Examiners is contained in Section 7805 of the General Code of Ohio, the pertinent part of which reads as follows:

"There shall be a state board of school examiners, consisting of five competent persons, resident of the state, to be appointed by the state director of education. No more than three of them shall belong to the same political party.

The term of office of such examiners shall be five years. The term of one of the examiners shall expire on the thirty-first day of August of each year. Any vacancy shall be filled for the unexpired term."

Section 7805, supra, was enacted in 1935 (116 O. L., 548). At that time, former Sections 7805 and 7806, General Code which had been enacted in 1914 (104 O. L., 100) and which were in force in 1931, when Mr. H. was appointed, and in 1933, when Mr. O. E. H. was appointed to succeed Mr. H., were consolidated, and their provisions were incorporated in practically the same language, into present Section 7805 quoted above.

Formerly, and until 1884, a State Board of School Examiners existed by authority of an Act of the Legislature enacted in 1873 (70 O. L., 195, Section 85). As then created, the said board consisted of three members to be appointed by the State Commissioner of Common Schools, each for a term of two years. In 1884, the membership of this board was increased to five, each to serve by appointment of the State Commissioner of Common Schools for a period of three years (81 O.L., 95). The amendment of 1884 became Section 4065, Revised Statutes. This section was amended in 1888 (85 O.L., 330) and upon the codification of the statutes in 1910, said Section 4065, Revised Statutes as amend-

ed in 1888, was codified as Sections 7805 and 7806 of the General Code. Said Section 7806, General Code, then provided as follows:

Section 7806.

“The term of office of such examiners shall be five years. The term of one of the examiners shall expire on the 31st day of August of each year. When a vacancy occurs in the board, whether from expiration of the term of office, refusal to serve, or other cause, such commissioner shall fill it by appointment for the full or unexpired term, as the case demands.”

When the law was again amended in 1914 and 1935, the language of the sections with respect to the term of examiners, expiration thereof, and the filling of vacancies for unexpired terms was left substantially unchanged, the 1935 amendment simply providing relative to the filling of vacancies, that “any vacancy shall be filled for the unexpired term.”

From the use by the Legislature of the language providing that the term of one such examiner shall expire on the 31st day of August of each year, and that vacancies shall be filled for unexpired terms in the enactment of 1888 and each subsequent amendment thereof, it is manifest that the Legislature intended that the time of service of the said appointees to the board should expire serially on the 31st day of each August, and that on that date, in each year, an appointment or re-appointment to the board should be made for five years. It follows that the “term of office” spoken of in Section 7805, General Code and in former Section 7806, General Code, is a five year period beginning on the first day of September of each year, and ending on the 31st day of August five years thereafter. The Legislature therefore clearly intended that one full term appointment be made each year.

The term of an office should not be confused with the tenure of an officer; they may or may not coincide. In Ohio Jurisprudence, Volume 32, page 1035, it is said that in general, the term of an office means the period of time for which an incumbent has a right to it. In Corpus Juris, Volume 46, page 963, it is said:

“The phrase ‘term of office’ is one generally used to mean the fixed period of time for which the office may be held, although it is also used to designate the period for which the office is actually held.”

In support of the text there are cited, among others, the cases of *People v. Sweitzer*, 280 Ill. 436, 117 N.E. 625; *Atlantic County v. Lee*, 76 N.J. Law, 327, 70 Atl., 925; *State v. Hingle*, 60 La. A., 380, 381.

In *People v. Sweitzer*, *supra*, it is said:

“The term of office as fixed by law is sometimes used interchangeably with the term or time of occupancy of the incumbent of such office, but it must be distinctly borne in mind that the term of office as fixed by law is entirely different from the period of time such office is held by the incumbent thereof, sometimes referred to as the term.”

In *State v. Hingle*, *supra*, the court said:

“Now the term of an office must be distinguished from the tenure of the incumbent. The term means the time during which the officer may claim and hold the office of right and fixes the interval at which the several incumbents shall succeed each other. The tenure represents the time during which the incumbent actually holds the office. The one has reference to the right to hold the office the other to the fact of holding it. Terms begin and end at fixed periods, and the several terms succeed each other at regular intervals and without intermission. On the other hand, a tenure has no fixed duration, it may be for a whole term or several terms, or it may be only for the unexpired portion of a term. It may even lap over from one term into another, as when an officer holds over until his successor qualifies. There may even be intervals between two tenures as when an officer resigns or dies and his successor is not appointed at once. One may hold office during a number of successive terms, yet there would be but one continuous tenure during the whole time.”

In the case of *State v. Knight*, 76 Mont., 71, 245 Pac., 276, it is said:

“‘Term of office’ describes the period during which the elected officer or appointee is entitled to hold the office, perform its functions, and enjoy its privileges and emoluments.”

The same thought is expressed by the court in *Wilson v. Shaw*, 194 Iowa, 23,33, 188 N.W. 940, where it is said:

“The term lives on even though the incumbent resigns, is impeached, or dies. Personality has nothing to do with the question.”

In view of the provisions of Section 7805, General Code, when considered in the light of the history of the legislation, it seems clear that

the particular term of office of State School Examiner, the incumbent of which office was Mr. O.E.H. by virtue of his appointment to fill the vacancy created by the death of Mr. H., expired August 31, 1936, and at that time it became the duty of the then Director of Education to appoint an examiner for the ensuing term of five years ending August 31, 1941. This was not done and the result was that Mr. O.E.H. continued in office by virtue of Section 8 of the General Code, until September 1, 1938, at which time the then Director of Education attempted to appoint Mr. V. for five years from that time, or until August 31, 1943. The effect of such an appointment, if it had been valid, would be that the term of two examiners would expire August 31, 1943 and the term of no one of them would expire August 31, 1946, which manifestly is not the intent of the law. No power is extended to the Director of Education to make five year appointments except as such five year terms coincide with a "term of office" as fixed by the Legislature. If an appointment were to have been made on September 1, 1938 to the office in question, it could lawfully have been for the unexpired portion, only, of the then current term of office, to wit, until August 31, 1941, at which time a succeeding term of office for school examiner began, and an appointment should then have been made for the full term of five years. The appointment of Mr. V. for five years on September 1, 1938 was unauthorized and as to the time beyond August 31, 1941, was inoperative. *State, ex rel. v. Taylor*, 15 O.S., 137.

The fact that an appointment was not made on September 1, 1941 for a five year period from that time, as should have been done, does not, in my opinion, preclude the making of the appointment at some later time. Such appointment, made at any time thereafter, however, must be for the unexpired portion only, of the five year term which commenced September 1, 1941, so that the term of such examiner will expire on August 31, 1946, as the law provides.

Respectfully,

THOMAS J. HERBERT
Attorney General.