

1938

ANTHONY WAYNE PARKWAY BOARD—MEMBERSHIP—NOT VACATED OR TERMINATED BY CHANGING OF TITLES—COMMISSIONER OF CONSERVATION TO CHIEF OF DIVISION OF WILDLIFE—STATE FORESTER TO CHIEF OF DIVISION OF FORESTRY—TRANSFER TO DEPARTMENT OF NATURAL RESOURCES—BY EXPRESS PROVISION OF LAW SAID OFFICERS “SHALL CONTINUE TO HOLD THEIR RESPECTIVE OFFICES FOR THE FULL TERM FOR WHICH THEY WERE SEVERALLY APPOINTED”—AMENDED SECTION 154-10c G. C.

SYLLABUS:

Membership on the Anthony Wayne Parkway Board was not vacated or terminated by the changing of the titles of the commissioner of conservation to Chief of the Division of Wildlife and of the state forester to that of Chief of the Division of Forestry, and their transfer to the newly created Department of Natural Resources. Said officers, by express provision of law, “shall continue to hold their respective offices for the full term for which they were severally appointed.” Section 154-10c, General Code, as amended.

Columbus, Ohio, June 23, 1950

Mr. Richard J. Lawwill, Director, Anthony Wayne Parkway Board
Ohio State Museum
Columbus, Ohio

Dear Sir :

Your request for my opinion reads as follows :

"This letter concerns the Anthony Wayne Parkway Board which was created by Amended Senate Bill No. 93, in 1947.

"In Section 3 of the Act, the members of the Board are defined and they are grouped as 'resident and qualified electors of the Anthony Wayne Parkway District' and 'The other five commissioners' who are members by reason of their positions as heads of state departments.

"It is with the latter group that the Board is concerned. Two of the department heads, the 'Commissioner of Conservation' and the 'State Forester' no longer exist as such due to the creation of the Department of Natural Resources.

"In the light of this change, the Anthony Wayne Parkway Board would like to have its position clarified. Following are several questions on which we would like to have an informal opinion rendered :

"1. Is it possible for the Board to carry on its business in a legal and proper manner with a membership which does not meet the specifications of the Act which created it ;

"2. Was membership in the Board carried over to their new positions by the former conservation commissioner and the state forester ;

"3. Should the tenure of these two be considered terminated and the vacancies filled in the manner prescribed in Section 4 of the Act ;

"4. Does the Director of the Department of Natural Resources have the authority to appoint these two men, or different ones, to fill the vacancies that now exist ;

"5. What amendment to the Act is required to submit to the next legislature in order to clarify the provisions of the Act?"

I fail to see, in answer to your first question, how the membership fails to meet specifications as set up by the Act. If reference to possible ineligible membership embraces the former commissioner of conservation, now the Chief of the Division of Wildlife, and the state forester,

now the Chief of the Division of Forestry, I am of the opinion that said officers are legal members of the board by virtue of their original appointment. It is true that subsequent to said original appointment, they have been transferred to a newly created state department and their duties expanded, but, the very act transferring them, Amended Senate Bill No. 13, approved May 9, 1949, and being Section 154-10c, General Code, reads as follows :

“The incumbents of those offices which are by this act transferred to the department of natural resources shall continue to hold their respective offices for the full term for which they were severally appointed, * * *.”

There has been no abolition of the duties of the offices of the state forester and the commissioner of conservation, but the titles of such officers have been changed, their duties enlarged and their offices transferred to a newly created department, namely: The Department of Natural Resources. In this instance the legislature, which had power to create the office of state forester and commissioner of conservation originally, have merely, under such original authority, changed the names of such offices and transferred them to another department.

There is no need to consider the former commissioner of conservation and the former state forester as “de facto” officers, for they are, in fact, “de jure” officers. However, if this question were considered, and it was concluded that the two officers in question were “de facto” officers, said determination would not make illegal the decisions reached by the Board during the time said officers were members of the Board.

In 43 Am. Jur., pages 224-225, Public Officers, Section 470, it is held :

“The de facto doctrine was ingrafted upon the law as a matter of policy and necessity, to protect the interests of the public and individuals involved in the official acts of persons exercising the duty of an officer without actually being one in strict point of law. It was seen that it would be unreasonable to require the public to inquire on all occasions into the title of an officer, or compel him to show title, especially since the public has neither the time nor opportunity to investigate the title of the incumbent. The doctrine rests on the principle of protection to the interests of the public and third parties, not to protect or vindicate the acts or rights of the particular de facto officer or the claims or rights of rival claimants to the particular office. The law validates the acts of de facto officers as to the public

and third persons on the ground that, although not officers de jure, they are, in virtue of the particular circumstances, officers in fact whose acts public policy requires should be considered valid.
* * *”

As to the business of the Board being legally transacted, let us consider further the question of a quorum. A quorum is such a number of members of a body as is competent to transact business in the absence of other members. (State, ex rel. Cline vs. The Trustees of Wilkesville Township, 20 O. S. 288, 293.) The word “quorum” in a general sense means a majority of the whole body. (Berlin et al. Nominations, 22 Pa. Co. Ct. R. 615, 617.)

It is obviously true that the Board whenever it has had a membership of six members has had a majority of members of said Board and enough to carry on its matters legally, and whenever said number of members have been present at a Board meeting properly called, even though two of said members were the former conservation commissioner and the former state forester, the business transacted by the Board was legal and proper, all other factors being equal.

The second question asked here is also decided in the affirmative, and I am expressing the opinion that membership was carried over to the Board under their new titles, by the former commissioner of conservation and the former state forester. This opinion is again supported by Section 154-10c of Amended Senate Bill No. 13 as previously quoted, when it is stated in said section that:

“The incumbents of those offices which are by this act transferred to the department of natural resources shall continue to hold their respective offices for the full term for which they were severally appointed, * * *.”

It was the express intention of the legislature that these officers should continue to hold their offices and to continue to perform their original duties plus other duties assigned to them by the new law. It has been generally held that the power to create an office generally includes the power to modify or abolish it. (See, State, ex rel. Attorney General vs. Jennings, et al., 57 O. S. 415.) This power relates to state and municipal legislative bodies.

In 42 Am. Jur., 904, Section 33, Modification or Abolition of Offices, it is held:

“The power to create an office generally includes the power to modify or abolish it. The two powers are essentially the same. As stated above, the distinction drawn between offices of legislative creation and those created by the Constitution is one of location of power to alter or abolish. A constitutional office cannot be legislated out of existence, although a constitutional office or any other office may be abolished by constitutional provision. But where the office is of legislative creation, the legislature may, unless prohibited by the Constitution, control, modify, or abolish it whenever such course may seem necessary, expedient, or conducive to the public good. The power extends to the consolidation of offices, resulting in abolishing one and attaching its powers and duties to another. Even as to such offices, however, the circumstances may create an exception, as where the legislature makes a contract with the officer at a stipulated salary for his services during a specified period. * * *

“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. * * *”

Section 35 of this same volume of American Jurisprudence, found on page 906, reads in part as follows:

“Where an office is duly abolished by the legislature or the people, it ceases to exist and the incumbent is no longer entitled to exercise the functions thereof, or to claim compensation for so doing, unless he is under contract with the state so as to come within the protection of the constitutional inhibition against impairment of the obligation of contract. Since a de jure office is generally essential to the existence of a de facto officer, persons cannot act as de facto officers of an office which has been abolished.”

This is not the situation here. There has been no abolition of these two offices, for the incumbents continue to fill their offices at the same rate of pay as specially provided by the law.

I have no difficulty answering the third question negatively in view of the foregoing opinion rendered as to questions one and two.

As to your fourth question, I am of the opinion that the Director of Natural Resources does not have the direct power to appoint these two members in question. The Act creating the Anthony Wayne Parkway Board is found in Section 485-2 of the General Code, which specifically sets out that:

“* * * The five other commissioners shall be * * * the conservation commissioner, * * * the state forester * * * or such subordinate officials as each may designate in his stead. * * *”

To be sure, the Act designates who the five other members shall be. No provision is made whereby they shall be appointed, but the mere fact that certain persons hold certain offices makes them members of the Anthony Wayne Parkway Board. However, inasmuch as the Director of Natural Resources is given power under Section 154-10c, General Code, to appoint the chiefs of his various divisions, it is easily concluded that should there be created a vacancy in the office of the Chief of the Division of Wildlife or the Chief of the Division of Forestry, said Director would by appointment of a person of his own choice, on approval of the Natural Resources Commission, fill such vacancy, and the party succeeding to such vacancy would by virtue of his office become a member of the Anthony Wayne Parkway Board. To this end, the Director might, indirectly, through his power to fill vacancies, be said to have the power of appointing members of the Board. Otherwise, the incumbents of such offices, by virtue of being said incumbents, by operation of law, take their offices as members of the Board.

I feel no further action is necessary by the legislature to clarify the membership of the Board, but you may deem it appropriate to request the next legislature to provide that the Chief of the Division of Wildlife, formerly the conservation commissioner, and the Chief of the Division of Forestry, formerly the state forester, shall be members of the Anthony Wayne Parkway Board. This amendment would then directly point out these two officers as members of the Board.

In view of the foregoing, I am of the opinion that membership on the Anthony Wayne Parkway Board was not vacated or terminated by the changing of the titles of the commissioner of conservation to Chief of the Division of Wildlife and of the state forester to that of Chief of the Division of Forestry, and their transfer to the newly created Department of Natural

Resources. Said officers, by express provision of law, "shall continue to hold their respective offices for the full term for which they were severally appointed." Section 154-10c, General Code, as amended.

Respectfully,

HERBERT S. DUFFY,
Attorney General.