

OPINION NO. 75-046

Syllabus:

1. Mr. Irving J. Franklin was a de facto member of the Ohio Real Estate Commission during the period subsequent to his appointment and prior to his filing of an oath, and his votes, as well as the actions of the Commission, during that period were valid.

2. Mr. Franklin's appointment was complete and irrevocable prior to the change in state administration and was not vacated by either the change of administrations or by the enactment of Am. Sub. H.B. No. 1199, effective March 4, 1975.

3. The appointments of Messrs. Don R. Goddard and Chester C. Sudbrack to the Ohio Real Estate Commission were effective immediately, and they assumed office and were legally entitled to vote as members of the Commission as soon as they performed all the acts necessary to qualify.

To: J. Gordon Peltier, Director, Dept. of Commerce, Columbus, Ohio
By: William J. Brown, Attorney General, July 7, 1975

You have requested my opinion on the status of several members of the Real Estate Commission as follows:

1. The status of Irving J. Franklin and his eligibility to serve as a commissioner during his second term of office, as well as the status of votes which took place on motions at the meetings during that time.

2. The status of Don R. Goddard and Chester C. Sudbrack and the status of their votes.

With respect to the first question it is my understanding that Mr. Franklin served on the Commission for a regular term which expired June 30, 1974. Pursuant to R.C. 4735.03 he

continued in office "subsequent to the expiration date of his term until his successor takes office, or until a period of sixty days has elapsed, whichever occurs first."

Mr. Franklin was subsequently reappointed to a second term and on November 12, 1974, this appointment was reported to Senate. You state, however, that Mr. Franklin did not subscribe to, or file with the Secretary of State, his oath of office as required by R.C. 4735.03, until April 21, 1975. Based on the foregoing facts you have in your letter of May 30, 1975 elaborated on your question concerning Mr. Franklin and set out three specific concerns:

1. Whether, from August 30, 1974 to April 21, 1975, Mr. Franklin was a duly constituted member of the Real Estate Commission.
2. Whether the change of state administration prior to the filing of the oath of office has any effect on the prior appointment.
3. Whether the fact that Am. Sub. H.B. No. 1199, specifically Section 3 thereof, became effective prior to the filing of the oath of office operated to create a vacancy in Mr. Franklin's position with the Commission.

While there appears to be some question as to whether or not Mr. Franklin filed an earlier oath and therefore qualified at an earlier date, it is undisputed that he did on April 21, 1975 file an oath of office for the position in question. Therefore, since your primary concern, as evidenced by your correspondence, appears to be the validity of Mr. Franklin's and the Commission's actions during this period, it may be assumed for purposes of this analysis that he did not file an oath until April 21, 1975.

With respect to your first question, R.C. 4735.03 requires a member of the Real Estate Commission to subscribe to and file his oath with the Secretary of State "before entering upon the duties of his office." This is a qualification for office which, according to State, ex rel. Brothers v. Zellar, 7 Ohio St. 2d 109 (1966), "relates to the acts which the appointee must perform before he is entitled to enter upon the duties of the office."

It is clear then that until he filed his oath as required by R.C. 4735.05 Mr. Franklin did not qualify, and was not legally entitled to vote as a member of the Commission. However, implicit in your question is the issue of the validity of his acts and the acts of the Commission prior to the time he qualified for office. Consequently, while his qualification for office and, therefore, his status as an officer de jure may be questioned as a result of this inaction, your first question also requires a consideration of his status as a de facto officer during this period.

In State, ex rel. Marshall v. Keller, 10 Ohio St. 2d 85 (1967), the Court had occasion to discuss what constitutes a de facto officer. In that case an appointee to the Industrial Commission had performed all acts necessary to qualify for office. However, the validity of his appointment had been challenged. Without resolving the question of whether the appointee was an officer de jure, the Court determined that he was at least an officer de facto and that his acts, as well as the acts of the commission of which he was a member, were valid. In defining a de facto

officer the Court referred to State, ex rel. Witten v. Ferguson, Aud., 148 Ohio St. 702 (1947), in which it was said at page 710 that:

" . . . [W]here an officer holds the office and performs the duties thereof with the acquiescence of the public authorities and the public and has the reputation of being the officer he assumes to be and is dealt with as such, he is, in the eyes of the law, a de facto officer."

In the present case it appears that although Mr. Franklin may not have filed his oath until April 21, 1975, he did take part in meetings of the Commission on a regular basis during the preceding six months. It appears from the information you have provided that he was accepted without objection as a member of the Commission during this period, and that third persons acted in reliance on this status. It follows that he was a de facto officer.

With respect to the actions of a de facto officer, it is a well settled rule that they are valid as to the public and third persons. State, ex rel. Paul v. Russell, 162 Ohio St. 254 (1954); State, ex rel. Witten v. Ferguson, Aud., supra; State, ex rel. Wescott v. Ring, 126 Ohio St. 203 (1933). In State, ex rel. Paul v. Russell, supra, the Court discussed the nature of this rule and noted at page 257 that:

"It has been said that the doctrine of de facto officers 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. 43 American Jurisprudence, 225, Section 470."

Therefore, the acts of the Real Estate Commission during this period must be viewed as valid and are not subject to challenge on the basis of Franklin's failure to file his oath.

The second question is whether the change of state administration prior to filing the oath of office had any effect on the prior appointment. This question may be disposed of by reference to State, ex rel. Brothers v. Zellar, supra. In that case the Court distinguished between the appointment to an office and the qualification for that office. The appointment, it noted, refers to the acts of the appointing officer, whereas qualification relates to those acts which an appointee is required to perform before entering upon the performance of the duties of the office. See also, State, ex rel. Marshall v. Keller, supra.

It has been held that an appointment once complete is irrevocable. DeWoody, Dir. of Law. v. Underwood, 66 Ohio App. 367 (1940). Furthermore, where power is granted by statute to act for a period of time those lawfully in office may bind their successors. State, ex rel. Rees v. Winchell, et al., 136 Ohio St. 62, 65 (1939); Edwards v. Matthews, 100 Ohio St. 487 (1919). Thus when the making of an appointment is complete during the term of one governor, his successor is without authority to revoke that appointment.

In the present case the appointment of Mr. Franklin was complete and irrevocable prior to the change of state administration on January 13, 1975. Therefore, the change of administration was of no effect on the validity of the appointment.

The final question regarding the status of Mr. Franklin is whether the fact that Am. Sub. H.B. No. 1199, supra, specifically Section 3 thereof, came into effect prior to the filing of the oath on April 21, 1975, operated to create a vacancy in Mr. Franklin's position.

Am. Sub. H.B. 1199 had the effect of increasing the size of the Real Estate Commission from three to five members. Section 3 of the act reads:

"Section 3. Within ninety days after the effective date of this act, the Governor shall appoint the two additional members of the Ohio Real Estate Commission created by this act. The Governor shall, at the time of appointment, designate which member shall serve a term of four years and which shall serve a term of five years. Persons who are members of the Commission on the effective date of this act shall serve their original three-year term as provided in section 4735.03, and their terms are not extended two years by the provisions of this act."

The position in question is one of three already in existence at the time the act became effective. Section 3 merely states that members of the Commission on the effective date of the act shall serve their original three-year terms as provided in R.C. 4735.03. Thus the extension of terms to five years is not applicable to the current terms of members serving in the three original positions.

It is a basic rule of construction that words and phrases shall be read in context and construed according the rules of grammar and common usage. R.C. 1.42. However, there is nothing in Section 3 which may be construed as creating a vacancy in one of the three original positions merely because an appointee to the position had not qualified prior to the effective date of the act. Therefore, I must conclude in response to your third question that Section 3 of Am. Sub. H.B. 1199 did not create a vacancy in one of three existing positions to which a member had been appointed, but had not yet qualified.

With respect to Messrs. Goddard and Sudbrack it may be noted that they were appointed to fill the two new positions on the Real Estate Commission created by the enactment of Am. Sub. H.B. 1199, which was effective March 4, 1975, thereby increasing the size of the Commission from three to five members. The Act amended R.C. 4735.03 to read in pertinent part as follows:

"There is hereby created the Ohio real estate commission consisting of five members who shall be appointed by the governor, with the advice and consent of the senate. Four members shall have been engaged in the real estate business in the state for a period of ten years immediately preceding the appointment. One member shall represent the public. Terms of office shall be for five years, commencing on the first day of July and ending on the thirtieth day of June. Each member shall hold office from the date of his appointment until the end of the term for which appointed. Of the

two newly created commission members, one shall be appointed for four years and the other shall be appointed for five years. No more than three members shall be members of any one political party. Each member, before entering upon the duties of his office, shall subscribe to and file with the secretary of state the constitutional oath of office. All vacancies which occur shall be filled in the manner prescribed for the regular appointments to said commission. Any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall hold office for the remainder of such term. Any member shall continue in office subsequent to the expiration date of his term until his successor takes office, or until a period of sixty days has elapsed, whichever occurs first. Annually, upon the qualification of the member appointed in such year, the commission shall organize by selecting from its members a president, and shall do all things necessary and proper to carry out and enforce Chapter 4735. of the Revised Code. A majority of the members of the commission shall constitute a quorum, but a lesser number may adjourn from time to time. Each member of the commission shall receive an amount fixed pursuant to section 124.14 of the Revised Code for each day employed in the discharge of his official duties, and his actual and necessary expenses incurred in the discharge of such duties."

In addition Section 3 of the Act, which I have already set out, provided that "[w]ithin ninety days after the effective date of this act, the Governor shall appoint the two additional members of the Ohio Real Estate Commission created by this act."

The fundamental issues raised by your question are when the terms of office of the two new commissioners commence and when they end. The issues arise as a result of conflict between the provision in R.C. 4735.03 that terms shall commence on the first day of July and the provision in the same section that a member shall hold office from the date of his appointment until the end of the term for which he was appointed. Furthermore, since Am. Sub. H.B. 1199 became effective March 4, 1975, Section 3, supra, by its own language requires that the two new commissioners be appointed well before the first day of July.

It is well settled rule of statutory construction that conflicting language must be harmonized wherever possible, and in the event of an irreconcilable conflict a specific provision controls over a general provision. R.C. 1.51. In the present case the General Assembly has expressed a clear intention that the newly created positions be filled by appointment as soon as possible. Since under the Supreme Court's ruling in State ex rel. Brothers v. Zellar, supra, an appointee assumes office upon qualification, the commissioners in question were legally entitled to vote as members of the Commission as soon as they performed all acts necessary to qualify, notwithstanding the provision in R.C. 4735.03 that terms commence on the first day of July.

In arriving at this conclusion I think it important to note that the designation of certain dates as the beginning and ending of terms and the stipulation that terms shall be for a specified number of years do not necessarily limit the actual time that a person appointed for a term may serve. See, for example, the

provision in R.C. 4735.03 that "[a]ny member shall continue in office subsequent to the expiration date of his term until his successor takes office, or until a period of sixty days has elapsed, whichever occurs first."

Similarly the time at which the two new commissioners' terms end is not mandated by the statute's designation of those terms as four and five years respectively. While such designations indicate the year in which the two commissioners' terms expire, there is nothing in either R.C. 4735.03 or Section 3, *supra*, which would require an exception to the date set out in R.C. 4735.03 for the expiration of members' terms.

I must, therefore, conclude in response to your second question that Messrs. Goddard and Sudbrack assumed office and were legally entitled to vote as members of the Ohio Real Estate Commission as soon as they performed all the acts necessary to qualify for office.

In specific answer to your questions, it is my opinion and you are so advised that:

1. Mr. Irving J. Franklin was a *de facto* member of the Ohio Real Estate Commission during the period subsequent to his appointment and prior to his filing of an oath, and his votes, as well as the actions of the Commission, during that period were valid.

2. Mr. Franklin's appointment was complete and irrevocable prior to the change in state administration and was not vacated by either the change of administration or by the enactment of Am. Sub. H.B. No. 1199, effective March 4, 1975.

3. The appointments of Messrs. Don R. Goddard and Chester C. Sudbrack to the Ohio Real Estate Commission were effective immediately, and they assumed office and were legally entitled to vote as members of the Commission as soon as they performed all the acts necessary to qualify.