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PUBLIC OFFICES—VACANCY, FAILURE OF GOVERNOR TO MAKE AN APPOINTMENT WHILE SENATE IN SESSION—GOVERNOR CANNOT MAKE VALID APPOINTMENT AFTER *SINE DIE* ADJOURNMENT OF SENATE— ASSISTANT DIRECTOR OF MENTAL HYGIENE AND CORRECTION—MAY PERFORM ALL DUTIES OF DIRECTOR—STATUS OF *DE FACTO* OFFICER MAY BE DETERMINED BY AUDITOR OF STATE, §115.32 R.C.

SYLLABUS:

1. When a vacancy occurs in the office of Director of the Department of Mental Hygiene and Correction the Assistant Director of the Department of Mental Hygiene and Correction performs all the duties and possesses all the powers of the Director of the Department of Mental Hygiene and Correction, but in no sense becomes Director of the Department of Mental Hygiene and Correction.

2. When, pursuant to Section 3.03, Revised Code, the governor is required to make an appointment while the senate is in session, the failure of the governor to do so while the senate is, in fact, in session, precludes him from making an appointment after *sine die* adjournment and during the subsequent recess of that body.

3. The determination of the status of an officer as *de jure* or *de facto* is a judicial function, but an administrative officer may properly challenge such *de jure* status by refusing to approve his claim for compensation; and following such successful challenge, and judicial determination of an officer's claim to office, the appointing authority should be permitted a reasonable time in which to make a new appointment. What constitutes a reasonable time is a question of fact in view of all the facts and circumstances of a particular case.

Columbus, Ohio, March 21, 1958

Hon. James A. Rhodes, Auditor of State
State House, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"On September 29, 1956, the Director of the Department of Mental Hygiene and Corection submitted his resignation to the Governor, which was accepted. Thereupon, the Assistant Director, pursuant to the provisions of Section 5119.02 became the Acting Director of the Department.

"On January 14, 1957, a change in the office of Governor and the position of Director of the Department of Mental Hygiene

and Correction became subject to the appointment of the Governor, in accordance with the provisions of Section 121.03 then in effect. The Acting Director, Dr. A, was replaced on September 23, 1957 by Dr. H as Director of the Department. At the time of his (Dr. H) appointment, Section 121.03, Sub-Section E, as amended, provided:

> 'The Director of Mental Hygiene and Correction shall be appointed by the Governor, with the *consent of the Senate,* and shall hold his office for a term of six years from the *date of appointment.*' (Underscoring the writer's).

"At the time of Dr. H's appointment, the 102nd General Assembly was not in session and the appointment of Dr. H has not been consented to by the Senate of Ohio. Nor was a name submitted to the Senate by the Governor during the session of the General Assembly for a person to serve as an appointee of the Governor under the provisions of Section 121.03 as it had been amended by House Bill 212 effective January 3, 1956. As the law now stands on the Statute books, the Director of Mental Hygiene and Correction holds appointment for a six year term from the *date of his appointment* by the Governor.

"In your opinion rendered April 10, 1957, (Informal Opinion No. 10) you held that the then Acting Director, Dr. A was validly holding the position as Acting Director as a de jure officer.

"A formal opinion is respectfully requested on the following questions:

> 1. Did Dr. A as Acting Director become the Director of the Department of Mental Hygiene and Correction when the Governor failed to appoint a Director during the time that the Legislature was in session?
>
> 2. If you hold that Dr. A was the Director of the Department, rather than Acting Director since you have held that he is de jure officer, did he hold this position for a six year term or did he serve 'at the pleasure of the Governor'?
>
> 3. Does Dr. H lawfully hold his position as Director since he was not so appointed until September 23, 1957, and his appointment has not been with the advice and the consent of the Senate?
>
> 4. If you hold that Dr. H is lawfully appointed Director, does he hold his term of office for a period of six years from the date of his appointment, namely September 23, 1957, or does he serve until the advice and consent of the Senate has been obtained?"

As to your first question in Opinion No. 1868, Opinions of the Attorney General for 1958, p. 157, addressed to you this date, the following statement appears in paragraph 1 of the syllabus:

> "When a vacancy occurs in the office of Director of Highways, the First Assistant Director of Highways performs all the duties and possesses all the powers of the Director of Highways, but in no sense becomes Director of Highways."

The same conclusion must be reached here since the statute, Section 5119.02, Revised Code, merely provides that the assistant director in case of vacancy in the office of director, shall "act" as "director." The word "act" negatives the notion you suggest of succession to the director's *office,* and the provision that he shall so act "in case of a vacancy" indicates that the vacancy continues to exist. There is, then, no actual succession to the office of director. Therefore, I adhere to the view expressed on this point in my Opinion No. 1868, *supra,* and it thus becomes unnecessary to consider your second question.

Your third question asks whether or not Dr. H "lawfully" holds the position of Director of the Department of Mental Hygiene and Correction. It, at once, becomes necessary to clarify the meaning of the word "lawfully" as you have used it. If, however, we assume for the moment that your question is directed to *de jure* status of Dr. H then the answer must clearly be in the negative.

The office of Director of the Department of Mental Hygiene and Correction became vacant on October 15, 1956, and there was a duty upon, and at that time a power in, the governor to fill the vacancy by recess appointment from that date until the 102nd General Assembly convened on January 7, 1957. Because the then governor failed to make the recess appointment, there remained a vacancy in the office when the General Assembly convened and the vacancy existed when the present governor was sworn in on January 14, 1957. There then devolved upon the new governor the mandatory duty and the full power under Section 3.03, Revised Code, to make an appointment and to fill the vacancy.

Section 3.03, Revised Code, reads as follows:

> "When a vacancy in an office filled by appointment of the governor, with the advice and consent of the senate, occurs by expiration of term or otherwise during a session of the senate, the governor shall appoint a person to fill such vacancy and forthwith report such appointment to the senate. If such vacancy

> occurs when the senate is not in session, and no appointment has been made and confirmed in anticipation of such vacancy, the governor shall fill the vacancy and report the appointment to the next session of the senate, and, if the senate advises and consents thereto, such appointee shall hold the office for the full term, otherwise a new appointment shall be made."

You will note in Opinion No. 1868, *supra,* addressed to you this date, a discussion of the so-called "otherwise" provision of the above section. The conclusion there reached is equally applicable in the present instance.

I further stated in that opinion that, in my view,

> "* * * when read in its entirety, Section 3.03, Revised Code, demands that whatever vacancies occur shall be filled expeditiously so that they may be submitted to the Senate for confirmation at the earliest opportunity."

Section 3.03, Revised Code, providing for appointments by the governor to fill vacancies with the advice and consent of the senate, is written in such a way as to impose upon the governor *first* the absolute mandate to fill the vacancies occurring when the senate is in session and forthwith seek the advice and consent of the senate. This is his *first* obligation and when considered in connection with the overriding requirement of the statute that *all* appointments are to be made with the advice and consent of the senate, it becomes clearly his *paramount* obligation, and where circumstances have impressed this paramount obligation upon him the condition of the second mandate of Section 3.03, Revised Code, never arises. I said in my previous Opinion No. 1868, *supra,* that where a statute involves reserved powers, "if susceptible to more than one interpretation (it) must be construed in such a way as to maintain the vital principle of reservation of powers." Admittedly the original vacancy in the office of the Director of the Department of Mental Hygiene and Correction occurred initially under a previous administration when the senate was not in session, but the fact unalterably remains, however, that when the present governor undertook the duties of his office, he was met with a vacancy, which, parenthetically, then appeared for the first time as to him, and which he failed throughout the remaining and greater part of the session of the senate to fill. This failure occurred in the face of what must be regarded as the paramount obligation of the chief executive, drawn from the language and the order of the mandatory portions of Section 3.03, Revised Code, to secure for the senate the reserved opportunity "to advise and consent."

The whole import of Section 3.03, Revised Code, is to assure senate action when it first becomes possible so to do and, as I have stated above, where the governor fails to make an appointment during a session of the senate the operative conditions of the second mandatory provision of Section 3.03, Revised Code, have not been met. Therefore, the power of the governor to make an appointment while the senate is in session never gives rise to the power to make a recess appointment.

Thus, in partial answer to your third question, it is my opinion and you are advised that the governor was without authority to appoint Dr. H to the position of Director of the Department of Mental Hygiene and Correction on September 23, 1957, since that office was vacant during the time the senate was in session, and no appointment was submitted to the senate.

It now remains to consider the effect of the appointment which the governor purported to make on September 23, 1957, in the absence of his power to make such appointment. It was stated in the *State, ex rel. Fangman* v. *Police Relief Fund,* 72 Ohio App., 51, at page 53:

> "The courts have held that to constitute an officer de facto of a legally existing office, it is not necessary he be appointed by one competent to vest in him good title to the office. It is sufficient if he holds office under some power having color of authority to appoint. If the office is provided by law, the officer has color of appointment and assumes to act as such officer, and is accepted and acknowledged by the public as such to the exclusion of all others, that is sufficient."

For a discussion of the process by which the *de jure* status of an officer is (1) determined, or (2) challenged, and the time within which an appointing authority may make a new appointment following such successful challenge, I refer you to the discussion in my Opinion No. 1869, Opinions of the Attorney General for 1958, p. 166, addressed to you this date.

Therefore, in answer to your third question, you are advised that the governor was under a mandatory duty to submit an appointment to the senate while that body was in session, and by reason of his failure to do so, he never acquired the power to make a valid appointment subsequent to the adjournment of the senate *sine die* and while the senate remains in recess. Any purported appointment made under such circumstances is invalid and whether such purported appointee is a *de facto* officer from

the time he entered upon the duties of the office to which he was purportedly appointed is a question for judicial determination.

In view of my answer to your third question, I cannot now specifically answer your fourth question since the exact status and term, if any there be, of Dr. H are subject only to judicial determination.

In specific answer to your enumerated questions, insofar as they may be answered in this opinion you are advised that:

1. When a vacancy occurs in the office of Director of the Department of Mental Hygiene and Correction the Assistant Director of the Department of Mental Hygiene and Correction performs all the duties and possesses all the powers of the Director of the Department of Mental Hygiene and Correction, but in no sense becomes Director of the Department of Mental Hygiene and Correction.

2. When, pursuant to Section 3.03, Revised Code, the governor is required to make an appointment while the senate is in session, the failure of the governor to do so while the senate is, in fact, in session, precludes him from making an appointment after *sine die* adjournment and during the subsequent recess of that body.

3. The determination of the status of an officer as *de jure* or *de facto* is a judicial function, but an administrative officer may properly challenge such *de jure* status by refusing to approve his claim for compensation; and following such successful challenge, and judicial determination of an officer's claim to office, the appointing authority should be permitted a reasonable time in which to make a new appointment. What constitutes a reasonable time is a question of fact in view of all the facts and circumstances of a particular case.

Respectfully,
WILLIAM SAXBE
Attorney General