

98.

THE OHIO SENATE—HAS LEGAL RIGHT TO CONFIRM APPOINTMENT OF ONE OF ITS MEMBERS TO THE TAX COMMISSION—CONFIRMED APPOINTEE MAY CONTINUE AS SENATOR SO LONG AS HE DOES NOT ACCEPT APPOINTMENT IN QUESTION.

SYLLABUS:

1. *The Ohio Senate has the legal right to confirm one of its members for an appointment to membership on the Tax Commission of Ohio so long as the office or emoluments thereof are not changed by the present legislature.*

2. *Such appointee, after being confirmed by the Senate, has the right to continue as a senator so long as he does not accept the appointment in question.*

COLUMBUS, OHIO, February 24, 1927.

HON. THOS. EDW. BATEMAN, *Clerk of the Senate, Columbus, Ohio.*

DEAR MR. BATEMAN:—I beg to acknowledge receipt of yours of February 17th, submitting the following questions:

"1. Has the Senate the legal right to confirm one of its members for an appointment to a commission?

2. Has such an appointee, after being confirmed by the Senate, the right to continue as a senator as long as he does not qualify as a member of such commission?"

From further information submitted, it appears that the appointment in question is one to membership on the Tax Commission and that the senator in question did not vote on his confirmation.

Section 19 of Article II of the Constitution of Ohio provides:

"No senator or representative shall, during the term for which he shall have been elected, or for one year thereafter, be appointed to any civil office under this state which shall be created or the emoluments of which shall have been increased during the term for which he shall have been elected."

Assuming that during the years 1927 and 1928—(a) there will be no change in the law creating the Tax Commission, and (b) there will be no increase in the emoluments of Tax Commissioner, such appointment will not violate the above quoted provision of the Constitution.

Section 15 of the General Code provides:

"No member of either house of the general assembly except in compliance with the provisions of this act shall: * * *

(3) Accept any appointment, employment or office from any committee or commission authorized or created by the general assembly, or from any executive, or administrative branch or department of the state, which provides other compensation than actual and necessary expenses.

* * * Any member of the general assembly who accepts any such appointment, office or employment shall forthwith resign from the general assembly and in case he refuses to do so, his seat in the general assembly shall be deemed vacant."

So long as the senator in question does not *accept*, either directly or indirectly, the appointment to the Tax Commission, he has a right to continue as a senator.

Section 2 of the General Code provides in part as follows:

“Each person chosen or appointed to an office under the Constitution or laws of this state * * * shall take an oath of office before entering upon the discharge of his duties.”

Section 1465-5 of the General Code provides:

“Before entering upon the duties of his office, each commissioner shall take and subscribe the constitutional oath of office and shall swear or affirm that he holds no other office of profit or any position under any committee of a political party; which oath or affirmation shall be filed in the office of the governor.”

Section 7 of the General Code provides as follows:

“A person elected or appointed to an office, who is required by law to give a bond or security previous to the performance of the duties imposed on him by his office, who refuses or neglects to give such bond or furnish such security, within the time and in the manner prescribed by law, and in all respects to qualify himself for the performance of such duties, shall be deemed to have refused to accept the office to which he was elected or appointed, and such office shall be considered vacant and be filled as provided by law.”

I do not find any provision requiring a person appointed as a member of the Tax Commission to accept or qualify within any stated time.

In the case of *State ex rel. vs. Nash, Governor*, 65 O. S. 549, 553, the Court said:

“An infirmary director must give bond before entering on the discharge of his duties. In this respect the law differs from that governing the bond of a sheriff, which prescribes that a sheriff shall give bond within ten days after receiving his commission and before the first Monday in January.”

In the case of *State ex rel. vs. Baldwin*, 101 O. S. 65, the court held that there was a vacancy on failure to qualify because Section 2634 of the General Code so provided. As I have pointed out, there is no similar provision in the case of a member of the Tax Commission.

In addition to the questions you have asked, there is at least a third question to which consideration should ordinarily be given, to wit: If the senator should fail for an unreasonable time to accept the appointment, would the appointment thereby be vacated?

While this question is pertinent here, I would prefer to answer that as an actual and real question rather than a moot one. Suffice it to say here that so long as neither the governor nor the senate objects, and so long as there remains on the Tax Commission a quorum capable of transacting business, I do not think the question can otherwise be raised.

Senator Edwards, whom your questions concern, informs me that it will be satisfactory with the governor if the senator should serve out the present session of the legislature. The governor's secretary has confirmed this statement. If the Senate makes no objection, it will be deemed to have consented.

Section 1465-6 of the General Code, provides:

"A majority of the Commission shall constitute a quorum to transact business, and any vacancy shall not impair the right of the remaining commissioners to exercise all the powers of the commission so long as a majority remains. Any investigation, inquiry or hearing which the commission is authorized to hold or undertake may be held or undertaken by or before any one member of the commission. * * *"

Section 8 of the General Code provides :

"A person holding an office of public trust shall continue therein until his successor is elected or appointed *and qualified*, unless otherwise provided in the Constitution or laws."

There being no contrary provision in the statutes in respect of the office of member of the Tax Commission, the present incumbent may hold the office until the senator in question qualifies.

Under Section 1465-5 of the General Code, before the senator may accept or qualify as such commissioner, it will be necessary for him to resign as senator.

Specifically answering your questions :

1. The senate has a legal right to confirm one of its members for an appointment to a commission so long as the commission is one which is not created or the emoluments of which shall not be increased during the term for which he shall have been elected to the general assembly.

2. Such appointee, after being confirmed by the senate, has the right to continue as a senator so long as he does not accept, directly or indirectly, the position to which he has been appointed.

Respectfully,
EDWARD C. TURNER,
Attorney General.

99.

THE OHIO SENATE—HAS LEGAL RIGHT TO CONFIRM APPOINTMENT OF A MEMBER OF THE OHIO HOUSE OF REPRESENTATIVES TO THE CIVIL SERVICE COMMISSION—CONFIRMED APPOINTEE MAY CONTINUE AS A MEMBER OF HOUSE OF REPRESENTATIVES SO LONG AS HE DOES NOT ACCEPT APPOINTMENT IN QUESTION.

SYLLABUS:

1. *The Ohio Senate has the legal right to confirm a member of the House of Representatives for an appointment as a member of the Civil Service Commission so long as the office or emoluments thereof are not changed by the present Legislature.*

2. *Such appointee, after being confirmed by the Senate, has the right to continue as a member of the House of Representatives so long as he does not accept the appointment in question.*

COLUMBUS, OHIO, February 24, 1927.

HON. THOS. EDW. BATEMAN, *Clerk of the Senate, Columbus, Ohio.*

DEAR MR. BATEMAN:—I beg to acknowledge receipt of yours of February 23rd, submitting the following questions: