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1. RECESS APPOINTMENT — STATUTORY REQUIREMENT APPOINTMENT BE MADE WITH ADVICE AND CONSENT OF SENATE — APPOINTMENTS MADE BY GOVERNOR AND REPORTED TO SENATE WHICH FAILED TO ACT—DE JURE TENURE OF INDIVIDUAL IN OFFICE TERMINATED UPON SINE DIE ADJOURNMENT OF SENATE SESSION IN WHICH APPOINTMENT REPORTED—SECTION 3.03 RC.

2. OFFICER APPOINTED FOR A STATED TERM—EXPIRATION OF TERM REAPPOINTED—SENATE FAILED TO ACT—OFFICER MAY CONTINUE IN OFFICE, SECTION 3.01 RC TO DATE OF SINE DIE ADJOURNMENT—INDIVIDUAL QUALIFIED ANEW, TOOK OATH OF OFFICE, FILED IT WITH SECRETARY OF STATE—SECTION 121.11 RC—TENURE OF OFFICE TERMINATED—FAILURE OF SENATE TO CONFIRM APPOINTMENT—NEW APPOINTMENT MUST BE MADE.

3. INTERPRETATION TERM "NEW APPOINTMENT"—SECTION 3.03 RC.

4. REAPPOINTMENT OF INDIVIDUAL TO OFFICE—SENATE FAILED TO ACT—OFFICE HELD UNTIL SUCCESSOR IS APPOINTED AND QUALIFIED, NOT FOR FULL TERM DESIGNATED IN APPOINTMENT—SECTION 3.01 RC.

5. SALARY PAID DE FACTO OFFICER CAN NOT BE RECOVERED BY PUBLIC AUTHORITIES WHERE OFFICER ACTED IN GOOD FAITH AND PERFORMED SERVICES FOR WHICH PAID.

6. PUBLIC POLICY—CONTINUED AND EFFECTIVE ADMINISTRATION OF STATE'S BUSINESS—TECHNICAL BARRIERS—PARTISAN CONSIDERATIONS—THERE SHOULD BE NO INTERVENTION COUNTER TO PUBLIC INTEREST.

SYLLABUS:

1. Where the appointment of an individual to an office, required by law to be filled with the advice and consent of the senate, is made and reported to the senate as provided in Section 3.03, Revised Code, and the senate fails to act thereon, the de jure tenure of such individual in such office terminates upon the sine die adjournment of the senate session in which such appointment is reported.

2. Where an officer has been appointed with the advice and consent of the senate for a stated term and his appointment as his own successor following the expiration of such term is reported to the senate which fails to act thereon prior to sine die adjournment, such officer will continue in office thereafter under the provisions of Section 3.01, Revised Code, only where his tenure on the date of such adjournment was by virtue of the provisions of that section; but where, following such reappointment the individual concerned qualified anew in such office by taking an oath of office and filing the same with the secretary of state as provided in Section 121.11, Revised Code, his tenure in office is controlled by the provisions of Section 3.03, Revised Code, and upon the failure of the senate to advise and consent to such appointment his de jure tenure is terminated as provided in such section and a "new appointment" must be made as therein provided.

3. The term "new appointment" as employed in Section 3.03, Revised Code, signifies the appointment of an individual other than the one as to whose appointment the senate fails to advise and consent as provided in such section, rather than the mere formality of re-naming the same individual to the same office.

4. Where the reappointment of an individual to an office in which he has previously been confirmed by the senate is reported to the senate, and that body fails to act thereon prior to sine die adjournment, and such officer on the date of such adjournment holds office by virtue of the provisions of Section 3.01, Revised Code, his continuation in office thereafter, as provided in such section, is "until his successor is * * * appointed and qualified," and not for the full term designated in such appointment.

5. Salary paid to a de facto officer cannot be recovered by the public authorities where such officer, acting in good faith, has actually rendered the services for which he was paid.

6. Public policy dictates the continued and effective administration of the state's business and neither technical barriers nor partisan considerations should be permitted to intervene counter to the public interest.

Columbus, Ohio, February 6, 1956

Honorable Frank J. Lausche, Governor, State of Ohio
Columbus, Ohio

Dear Governor Lausche:

Your request for my opinion reads as follows:

> "You, undoubtedly, know that the Senate of the Ohio General Assembly failed to act on the appointments which I made to certain statutory offices in the state administration.

> "The number of appointments that the Senate failed to either approve or reject was fourteen.
>
> "I do not know whether these appointees, in face of what occurred in the Senate, are legally entitled to continue in office. Would you please prepare for me an official opinion indicating whether or not these fourteen appointees can legally continue performing the work incident to the office to which they were appointed.
>
> "If it is your opinion that the Senate's failure to confirm is a legal bar to their continuance in office, then I would like to know whether under the Constitution and the Statutes I can reappoint them to the offices which they held prior to the Senate's failure to act."

In addition to your own inquiry I have for consideration that of the Hon. James A. Rhodes, Auditor of State, in which, in addition to the questions you have presented, the following query is made:

> "Whether or not the failure of the Senate to confirm vests in such appointees tenure for the full term to which they would be entitled had the Senate consented to their confirmation."

The statutes primarily involved in this situation are Sections 3.01 and 3.03, Revised Code. These sections provide:

> "Sec. 3.01. A person holding an office or public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws of this state."
>
> "Sec. 3.03. 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."

Section 3.03, supra, is a mere restatement of former Section 12, General Code, which section was under consideration in Opinion No. 2740, Opinions of the Attorney General for 1934, p. 762. The third paragraph of the syllabus in that opinion reads as follows:

"* * * 3. When an appointment is made by the Governor which is subject to the advice and consent of the Senate, *the failure of the Senate to confirm* such appointment while in special session *before adjourning* for several months does not constitute a rejection of such appointment and the appointee should continue in office unconfirmed until the Senate either acts on his appointment at such special session *or until such special session is terminated.*" .. (Emphasis added.)

In the course of this opinion, the Attorney General said, p. 771:

"* * * The foregoing section was considered in *State ex rel. vs. Johnson,* 8 C.C. (N.S.) 535. In this case, decided during the September term, 1906, the Governor had made an appointment June 1, 1905 to the office of supervisor of public printing which was subject to confirmation by the Senate. The facts as set forth in the opinion were that this appointment was not confirmed at the next session of the Senate which adjourned April 2, 1906. After quoting Section 12, supra, the court said:

"'*The last clause of the foregoing section* applies exactly to the circumstances of this case. The Senate did "*not* so advice and consent" to the second appointment; therefore Slater's legal incumbency immediately ceased.

"'It became the duty of the then governor at once to make a new appointment. Until this was done Slater was a *de facto*, but not a *de jure* official.'

"The journal of the Senate discloses that the adjournment of April 2, 1906, was an adjournment for a year and nine months. The legislature then adjourned to meet at ten A.M. on the first Monday in January, 1908, that legislature having held over until January, 1909. For all practical intents and purposes, therefore, the adjournment of April 2 was the same as a *sine die* adjournment, the legislature having adjourned until the beginning of the next biennium. Under authority of this case, therefore, it would appear that if the Senate finally adjourns without having affirmatively advised and consented to the appointment by the Governor, the effect of such failure to confirm is the same as though the Senate had rejected the appointment and it would then become the duty of the Governor to make new appointments. * * *" (Emphasis added.)

In the Johnson case, the gist of the ruling here pertinent is stated as follows:

"The Senate did *not* so advise and consent to the second appointment; therefore Slater's legal incumbency immediately ceased.

> "It became the duty of the then governor at once to make a new appointment. * * *"

This case appears to be the leading decision on the subject and I am unable to find that it has ever been overruled or questioned in subsequent decisions of the courts. For this reason, and because of the unambiguous language of Section 3.03, Revised Code, I am impelled to regard this decision as a proper statement of the law.

Attention should be invited also to Opinion No. 322, Opinions of the Attorney General for 1923, p. 245, the syllabus in which is as follows:

> "1. The present member of the Public Utilities Commission, who was appointed by the governor and confirmed by the senate in 1917, and who has continued in office, to the present time under his original appointment, is now lawfully exercising the duties of the office.
>
> "2. When a vacancy occurs in the office of member of the Public Utilities Commission during a session of the senate, the governor is without authority to make a recess appointment, and a person who would be appointed by the governor under such circumstances could not lawfully assume the office. It is only in cases when a vacancy occurs when the senate is not in session, that a valid recess appointment may be made under section 12 of the General Code. * * *"

In that case, however, it is to be noted that the officer concerned had previously been appointed and confirmed by the Senate for a term which expired on a date when the Senate was actually in session, and it was thus impossible to apply the provisions of Section 12, General Code, now Section 3.03, Revised Code, since a recess appointment thereunder had not, and could not have been made. This opinion is, however, definite authority for the proposition that an incumbent who has been appointed and confirmed by the Senate for a definite term may continue in that office as provided in Section 3.01, Revised Code, former Section 8, General Code, following the expiration of such term, even though the nomination of a successor has been sent to the Senate and the Senate has failed to act thereon, provided such nomination is not such as to amount to a recess appointment. If such recess appointment of a successor is made, it is clear that Section 3.03, Revised Code, would apply since the provision in Section 3.01, Revised Code, for continuation in office is quite plainly limited by the proviso therein "unless otherwise provided in the constitution or laws of this state."

In the application of Section 3.03, Revised Code, we are concerned primarily, of course, with the language therein to the effect that (1) if the Senate advises and consents thereto (the Governor's recess appointment as reported to the next session of the Senate), such appointee shall hold office for the full term, and (2) otherwise a new appointment shall be made.

On the authority of the Johnson case and the 1934 opinion, cited above, it seems clear that as to any such recess appointments, reported to the Senate in the recent session, where confirmation was not had, the term of the appointees concerned must be deemed to have terminated with the *sine die* adjournment of the Senate without taking action to confirm. Because such term was terminated at that point, it necessarily follows that a vacancy in the office then again occurred, and such vacancy can now be filled by another recess appointment.

As to the possibility of reappointing to the same office those individuals who have thus failed of confirmation we are concerned with the effect of the final provision in Section 3.03, Revised Code, i.e., the "last clause" in former Section 12, General Code, thus referred to in the Johnson case, supra. Such "last clause" reads:

> "otherwise a new appointment shall be made."

It is the evident legislative intent, in providing for Senate confirmation of certain appointive offices, to give that body some voice in the matter of approving or rejecting particular individuals nominated for particular offices. This legislative objective would be nullified if the term "new appointment" were construed to refer only to the mechanical act of preparing a new instrument of appointment of the same individual to the same office following failure of confirmation and *sine die* adjournment of the Senate. That this was the view of the court in State ex rel. Allan v. Ferguson, 155 Ohio St., 26, is evident from the following language in the third paragraph of the syllabus, a statement in which all members of the court concurred:

> "* * * 3. Although appointments of the Governor to fill such vacancies must be submitted to the present session of the Senate and appointees whom the Senate fails or refuses to confirm may not thereafter continue as members of the commission, the interim appointees have power and authority in the meantime to act as a turnpike commission. * * *"

I am impelled to conclude, therefore, that in employing this term the legislature intended to require the making of an appointment which is "new" in the sense that it involves the appointment to a particular office of an individual other than the one who has failed of Senate confirmation.

Accordingly, it is my view that none of the individuals here involved who failed of Senate confirmation, and who was holding office under a recess appointment on the date of *sine die* adjournment of the Senate on January 18, 1956, may now be reappointed to the office he thus held.

It remains, therefore, to ascertain which of the fourteen individuals here involved were on that date holding office by virtue of a recess appointment, and which, if any, were then holding office by virtue of Section 3.01, Revised Code.

The term "recess appointment" has no legal significance, but it is popularly used, and used in this opinion, to signify one made under the following provision in Section 3.03, Revised Code:

> "* * * 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 * * *"

By referring to the provisions of Chapters 4121. and 4123., Revised Code, as amended effective October 5, 1955, and more particularly to Sections 4121.12, 4123.14, and 4123.15, Revised Code, it is clear that the offices of (1) administrator of the bureau of workmen's compensation, (2) member of the advisory council, industrial commission, and (3) member of any of the five regional boards of review, industrial commission, are offices newly created on October 5, 1955, the effective date of these enactments. There is no question, therefore, but that the appointments to these offices were made under the provisions of Section 3.03, Revised Code, and there is no basis for a supposition that the provisions of Section 3.01, Revised Code, would operate to continue them in office under the rule expressed in the 1923 opinion, supra, since these individuals have never been given Senate confirmation for a prior term as was the case in that instance. Falling in this category are (1) the appointee in the office of the administrator of the bureau of workmen's compensation, (2) seven appointees to the office of member of the advisory

council, industrial commission, and (3) four appointees to various regional boards of review, industrial commission.

In the case of Mr. Marion, appointed as director of the department of natural resources, a somewhat different situation is involved. I note in the Senate Journal, 99th General Assembly, 1951, p. 811, that on May 25, 1951 the Senate advised and consented to Mr. Marion's appointment to this office for a term ending on August 11, 1955. However, I observe that your report to the Senate of Mr. Marion's appointment to succeed himself in this office for the term ending August 11, 1961, is dated September 1, 1955; and I am informed that thereafter Mr. Marion executed an oath of office as to such term which oath was filed with the Secretary of State pursuant to Section 121.11, Revised Code, on September 12, 1955. In this connection it may be pointed out that the decision in State ex rel. v. Howe, 25 Ohio St., 588, can have no application to the case at hand for the reason that in that case a special statute authorized so-called "recess appointments" only in cases of vacancies caused by "death, resignation, or removal"; whereas in this case, Section 3.03, Revised Code, provides that recess appointments "shall" be made as to any vacancy which "occurs *by expiration of term* or otherwise." In this situation it is clear that although Mr. Marion was continued in office under the provisions of Section 3.01, Revised Code, for a short period following the expiration of his term on August 11, 1955, his tenure at the time his appointment was recently reported to the Senate for confirmation was under authority of Section 3.03, Revised Code; and in this instance also I must conclude that the requirement in that section that a "new appointment" be made is applicable.

In the case of Mr. Ronsheim, named by you on January 13, 1956 as a member of the natural resources commission for a term ending on the first Monday in January, 1963, I observe in the Senate Journal, 100th General Assembly (1953) p, 235, that the Senate advised and consented to his appointment for a term ending on the first Monday in January 1956, i.e., on January 2, 1956. It is clear that between that date and January 13, 1956, Mr. Ronsheim was continued in office under the provisions of Section 3.01, Revised Code. Moreover, I am informed that Mr. Ronsheim actually executed his oath of office, pursuant to this recess appointment, on January 19, 1956, the day following sine die adjournment of the Senate, and filed such oath in the office of the Secretary of State

on January 25, 1956. In this situation it is clear that his tenure in office as the time of such sine die adjournment was under authority of Section 3.01, Revised Code, rather than under Section 3.03, Revised Code. It follows, therefore, under the rule stated in the 1923 opinion, supra, that he may properly continue in office as provided in Section 3.01, Revised Code. In this case, therefore, apposite to Mr. Rhodes' additional query, such continued tenure would not be for the full term for which he was nominated but only "until his successor is * * * appointed and qualified" as plainly provided in Section 3.01, Revised Code.

In setting out the matter above, I have dealt with the questions of these appointees and their respective tenures in office as I understand the law to be. In all situations of this sort, we are always confronted with the problem of applying established legal principles to particular sets of facts as they are presently in existence.

It is my understanding that all of the individuals concerning whom you have inquired are presently performing the functions of their respective offices. This I believe is proper in the case of the recess appointees as well as in the instance of the officer whose tenure is under authority of Section 3.01, Revised Code, because the principle is well established that it is to the best interest of the public that every office which requires the performance of administrative duties should have-an incumbent who, at least as a de facto officer, is performing those duties.

It is my opinion that these recess appointees may properly continue to perform the functions of their offices until their successors are appointed and qualified. In this connection I direct your attention to two opinions written by the Honorable Wade H. Ellis, one of which is set out in Opinions of the Attorney General for 1906 at page 168 and the other of which is set out in the same volume at page 182. In both of these opinions the then Attorney General had before him a question which was, in many ways, similar to the one that you have presented here. In each instance he held that the failure of the Senate to advise and consent to a recess appointment was a negative act only "which makes it the duty of the governor to perform the positive act of appointing" successors. The then Attorney General pointed out that the Senate is not given the summary power of removal and that its failure to approve cannot be interpreted as effecting an automatic removal from office.

Applying the principle set forth in those opinions to the factual situations at hand, therefore, it seems to me that the officers in question

would continue to perform their functions, at least as de facto officers, until such time as the governor has performed the duty enjoined upon him by statute, Section 3.03, Revised Code, of making new appointments.

The remaining question is the one presented by the inquiry of the auditor of state in which he has asked "whether * * * in those cases where such appointees are entitled to salaries * * * such salaries * * * may be paid * * *."

It is plain that if these officers should continue to discharge the duties of the offices concerned, and if they are paid the compensation provided therefor during the temporary period of their service between the sine die adjournment of the recent session of the Senate and the date on which their status as de facto officers is terminated by the making of a new appointment by the governor, as required under the provisions of Section 3.03, Revised Code, no finding for recovery of sums so paid could be made under the provisions of Section 117.10, Revised Code. See 43 American Jurisprudence, 239, Section 491.

This accords with the broad public policy that the constant, uninterrupted and effective administration of the State's business should be assured and neither technical barriers nor partisan political considerations should be permitted to intervene counter to the public interest. Thus, where such officer actually renders in good faith proper service in performance of his duties and is paid therefor, there can be no recovery of such remuneration from him by the public authority which has made such payment. This principle and the public policy upon which it is predicated is clearly recognized by the Supreme Court in its decision in the case of State ex rel. Witten v. Ferguson, 148 Ohio St., 702, 710, 711.

Accordingly, in specific answer to your inquiry, it is my opinion that:

1. Where the appointment of an individual to an office, required by law to be filled with the advice and consent of the Senate, is made and reported to the Senate as provided in Section 3.03, Revised Code, and the Senate fails to act thereon, the de jure tenure of such individual in such office terminates upon the sine die adjournment of the senate session in which such appointment is reported.

2. Where an officer has been appointed with the advice and consent of the senate for a stated term and his appointment as his own successor following the expiration of such term is reported to the senate which fails

to act thereon prior to sine die adjournment, such officer will continue in office thereafter under the provisions of Section 3.01, Revised Code, only where his tenure on the date of such adjournment was by virtue of the provisions of that section; but where, following such reappointment the individual concerned qualified anew in such office by taking an oath of office and filing the same with the secretary of state as provided in Section 121.11, Revised Code, his tenure in office is controlled by the provisions of Section 3.03, Revised Code, and upon the failure of the senate to advise and consent to such appointment his de jure tenure is terminated as provided in such section and a "new appointment" must be made as therein provided.

3. The term "new appointment" as employed in Section 3.03, Revised Code, signifies the appointment of an individual other than the one as to whose appointment the senate fails to advise and consent as provided in such section, rather than the mere formality of re-naming the same individual to the same office.

4. Where the reappointment of an individual to an office in which he has previously been confirmed by the senate is reported to the senate, and that body fails to act thereon prior to sine die adjournment, and such officer on the date of such adjournment holds office by virtue of the provisions of Section 3.01, Revised Code, his continuation in office thereafter, as provided in such section, is "until his successor is * * * appointed and qualified," and not for the full term designated in such appointment.

5. Salary paid to a de facto officer cannot be recovered by the public authorities where such officer, acting in good faith, has actually rendered the services for which he was paid.

6. Public policy dictates the continued and effective administration of the State's business and neither technical barriers nor partisan considerations should be permitted to intervene counter to the public interest.

Respectfully,
C. WILLIAM O'NEILL
Attorney General