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FILLING WATERWAYS SAFETY COMMISSION VACANCY WHEN SENATE IS NOT IN SESSION—§§1507.061, R.C., (REPEALED 1961), AMENDED HOUSE BILL 379, 104th G. A., 1547.73, 3.03, 3.01, R.C.

## SYLLABUS:

1. Where the term of a member of the waterways safety commission, appointed pursuant to Section 1547.73, Revised Code, or former Section 1507.061, Revised Code, expires when the senate is not in session, a vacancy occurs within the purview of Section 3.03, Revised Code, and the governor is authorized to fill the vacancy and report the appointment to the next session of the senate.

2. Where the governor fills such a vacancy by appointment, the appointee takes office upon receiving the governor's commission (Section 107.05, Revised Code) and taking an oath of office (Section 1547.73, Revised Code).

Columbus, Ohio, December 4, 1962

Hon. Herbert B. Eagon, Director  
Department of Natural Resources, Columbus 15, Ohio

Dear Sir:

Your request for my opinion involves the following set of facts:

Two persons, "A" and "B," were appointed as members of the waterways safety commission to terms ending on the first Monday of February, 1962. At the expiration of said terms, those persons were not appointed to new terms, and on June 4, 1962, the governor made two new appointments to the new terms (To expire the first Monday of February, 1968).

The senate was not in session on June 4, 1962, and has not been in session since then.

The question here involved is whether the original appointees, "A" and "B," are still members of the commission in view of the fact that the appointments to the new terms have not been confirmed by the senate.

The original appointments were made under former Section 1507.061, Revised Code, which read until its repeal in 1961, in part, as follows:

"There is hereby created in the division of shore erosion, a waterways safety commission composed of the director of the department of natural resources and four members appointed by the governor with the consent of the senate, not more than two of such appointees shall belong to the same political party. Upon the taking effect of this act the governor shall appoint one member of the commission whose term shall expire on the first Monday of February, 1956; one member whose term shall expire on the first Monday of February, 1958; one member whose term shall expire on the first Monday of February, 1960; and one member whose term shall expire on the first Monday of February, 1962. Biennially thereafter one member shall be so appointed for a term of six years, commencing on the first Monday of February. The chief of the division of shore erosion shall act as secretary of the commission.

"In the event of the death, removal, resignation or incapacity of a member of the commission the governor, with the consent of the senate, shall appoint a successor to fill the unexpired term. The governor may remove any appointed member of the commission for misfeasance, nonfeasance or malfeasance in office.

"\* \* \* \* \* \* \* \*"

(126, Ohio Laws, 569, 570)

Amended House Bill No. 379 of the 104th General Assembly, enacted effective November 2, 1961 (129, Ohio Laws, 1350), repealed Section 1507.061, *supra*, but enacted Section 1547.73, Revised Code, reading in part:

"There is hereby created in the division of watercraft, a waterways safety commission composed of the director of the department of natural resources and four members appointed by the governor with the consent of the senate. Not more than two of such appointees shall belong to the same political party. On and after September 30, 1955, the governor shall appoint one member of the commission whose term shall expire on the first Monday of February, 1956; one member whose term shall expire on the first Monday of February, 1958; one member whose term shall

expire on the first Monday of February, 1960; and one member whose term shall expire on the first Monday of February, 1962. Biennially thereafter one member shall be appointed for a term of six years, commencing on the first Monday of February. The chief of the division of watercraft shall act as secretary of the commission.

“In the event of the death, removal, resignation, or incapacity of a member of the commission the governor, with the consent of the senate, shall appoint a successor to fill the unexpired term. The governor may remove any appointed member of the commission for misfeasance, nonfeasance or malfeasance in office.

“\* \* \* \* \* \* \* \* \*”

The effect of the above-noted change in law was to put the waterways safety commission in the division of watercraft rather than in the division of shore erosion where it had been but, with the change, the waterways safety commission remained the same as to membership and length of terms of members. Accordingly, even though Section 1507.061, *supra*, was repealed in 1961, “A” and “B” properly continued as members of the waterways safety commission to the end of their terms in 1962. The question to determine in this instance, therefore, is whether the end of those terms on the first Monday of February, 1962, created vacancies which could be filled by the governor.

Section 3.03, Revised Code, reads, in part, 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* \* \* \* 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.  
\* \* \*”  
(Emphasis added)

Section 3.03, *supra*, assumes that the expiration of term creates a vacancy and, under that section, the expiration of term of a member of the waterways safety commission, said expiration occurring when the senate is not in session, would create a vacancy which the governor could fill without senate confirmation.

Also to consider, however, is the fact that Section 1547.73, *supra*, (and its predecessor Section 1507.061, *supra*,) specifically states when the governor may appoint a successor to fill an unexpired term on the waterways safety commission. Such an appointment may be made “in the event

of the death, removal, resignation, or incapacity of a member of the commission." As to this, while there is no provision for an appointment when a member's term expires, I do not believe that this creates a conflict with Section 3.03, *supra*, regarding a vacancy occurring by expiration of term. Rather, I am of the opinion that the two sections may be read together to ascertain the intent of the legislature.

The governor's power under Section 1547.73, *supra*, to fill a vacancy, clearly pertains to a vacancy occurring *during* a member's term. In this regard, it will be noted that a successor is appointed "to fill the unexpired term." On the other hand, when a term ends, there is no unexpired term to which a successor could be appointed; there is only a new term. Accordingly, I conclude that the fact that Section 1547.73, *supra*, provides specific instances where the governor may fill vacancies, not including expiration of term as such an instance, does not preclude the governor from making an appointment under Section 3.03, *supra*, to fill a vacancy which, under the latter section, occurs by expiration of term.

Where under Section 3.03, *supra*, the governor does make an appointment to fill a vacancy occurring when the senate is not in session, the appointee must take an oath of office (Section 1547.73, *supra*) and receive a governor's commission (Section 107.50, Revised Code) to qualify. Upon such qualification, the appointee takes office and the tenure of the incumbent ends.

I might note at this time that I am aware of the provisions of Section 3.01, Revised Code, which reads:

"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 of this state."

In the instant case, however, it is "otherwise provided" in the laws of this state that the governor may make a new appointment when a term expires, Section 3.03, *supra*, being the specific provision. Accordingly, Section 3.01, *supra*, could not be construed to allow "A" and "B" to continue in office until their successors are appointed and confirmed by the senate.

I further note that the present question is not analagous to that which I considered in my Opinion No. 3318, issued on October 4, 1962. In that opinion I held that the expiration of the term of a member of the board of

trustees of Ohio State University, occurring when the senate is not in session, does not create a vacancy which can be filled by the governor without senate confirmation. The filling of such vacancies is, however, provided for by the Ohio Constitution, which is not true in the present case. Also, the statute concerned in that opinion, Section 3335.02, Revised Code (Section 4861, General Code), expressly provides that a trustee serves until his *successor* is appointed and qualified, and I held that special provision to be an exception to Section 3.03, *supra*. No such express provision is involved in the present matter, however, and it is clear that Section 3.03, *supra*, governs.

As to the instant question, therefore, I conclude that the persons appointed on June 4, 1962 were lawfully entitled to assume the duties of members of the commission upon qualifying by receiving the governor's commission and taking the proper oath; and that the tenure of the persons originally appointed ended upon such qualification. (Here I assume that, as to the June 4 appointments, the governor's commission has issued and that the oath was taken.)

I note, however, that the appointments made on June 4, 1962 must be reported to the next session of the senate, and that if these appointments are not then approved by the senate, new appointments must be made. Section 3.03, *supra*; Section 21 of Article II, Ohio Constitution.

In conclusion, it is my opinion that you are advised:

1. Where the term of a member of the waterways safety commission, appointed pursuant to Section 1547.73, Revised Code, or former Section 1507.061, Revised Code, expires when the senate is not in session, a vacancy occurs within the purview of Section 3.03, Revised Code, and the governor is authorized to fill the vacancy and report the appointment to the next session of the senate.

2. Where the governor fills such a vacancy by appointment, the appointee takes office upon receiving the governor's commission (Section 107.05, Revised Code) and taking an oath of office (Section 1547.73, Revised Code).

Respectfully,

MARK McELROY

Attorney General