

590

CODE REVISION—SPEAKER OF HOUSE OF REPRESENTATIVES—AUTHORIZED TO APPOINT AS MEMBER OF COMMISSION OF CODE REVISION, TWO MEMBERS OF THE HOUSE OTHER THAN CHAIRMAN OF THE JUDICIARY COM-

MITTEE—WHERE VACANCY CAUSED BY RESIGNATION OF MEMBER, SUCH VACANCY SHOULD BE FILLED BY SPEAKER—SECTION 76-2, G. C., AMENDED SENATE BILL 208, SECTION 2, 121 O. L.

SYLLABUS:

Under the provisions of Section 76-2 of the General Code (121 O. L., Am. S. B. 208, Sec. 2), the Speaker of the House of Representatives is authorized to appoint as members of the commission of code revision two members of said House of Representatives other than the chairman of the judiciary committee and in the event of a vacancy caused by the resignation of one of such members so appointed such vacancy should be filled by the said Speaker.

Columbus, Ohio, November 26, 1945

Hon. Fred G. Reiners, Chairman, Commission of Code Revision  
Columbus, Ohio

Dear Sir:

I have before me your letter requesting my opinion and reading as follows:

“I am instructed to request of you, on behalf of the Commission of Code Revision, an opinion on the following matter:

Mr. Robert Moulton was appointed a member of the Commission by the Speaker of the House of Representatives, in accordance with Section 2 of Am. S. B. 208, 96th General Assembly. Mr. Moulton has recently been appointed Director of Commerce and has tendered his resignation as a member of the Commission of Code Revision.

1. Under the terms of the aforesaid Am. S. B. 208, has the Commission of Code Revision legal authority to accept Mr. Moulton's resignation?

2. If the Commission can legally accept the resignation, does the position on the Commission remain vacant, or is such position to be filled for the unexpired term?

3. If the vacancy on the Commission is to be filled, in whom does the power of appointment for the unexpired term rest?

If at all consistent with the duties of your office, we should like to have your opinion prior to the next meeting of the Commission on December 10th.”

The act to which you refer has been codified as Sections 76-1 to 76-8 of the General Code.

Section 76-1 provides as follows :

“The bureau of code revision in the legislative branch of the government of the state is hereby created, consisting of the commission of code revision, the director of code revision and the necessary assistants, clerks and employees.”

Section 76-2 reads as follows :

“The commission of code revision shall be composed of nine members, three of whom shall be members of the Senate, but not more than two of whom shall be laymen and not more than two shall be members of the same political party, appointed by the President pro tem. ; three of whom shall be members of the House of Representatives, but not more than two of whom shall be laymen and not more than two shall be members of the same political party, appointed by the Speaker; and three of whom, who shall be lawyers, and no more than two of whom shall be members of the same political party, appointed by the governor. The appointees of the Senate and House of Representatives shall include the chairmen of the respective judiciary committees. The chairman of the judiciary committee shall become a member of the commission upon his election or appointment as such chairman, and serve until the chairman of the judiciary committee of the next succeeding general assembly is elected or appointed, notwithstanding the adjournment of the general assembly of which he is a member and the expiration of his term as a member of such general assembly. The other members of the commission who are appointed from the Senate and the House of Representatives shall serve until their successors are appointed and qualified notwithstanding the adjournment of the general assembly of which they are members and the expiration of their terms as members of such general assembly. The term of office of the members appointed by the governor shall be six years, commencing on the first day of September in the odd numbered years, and until their successors are appointed and have qualified. A vacancy in the office of such a member shall be filled by the governor for the unexpired term as provided by Section 12 of the General Code.”

It will be observed that specific terms are assigned to the members of the commission who are to be appointed by the Governor and express provision is made for filling vacancies in his appointments, but no provision is made fixing the term of office for the members of the commission who

are to be chosen from the members of the Senate and the House of Representatives respectively, nor is anything said about a vacancy occurring among those members. It is provided that of the three appointees from the House of Representatives one is to be the chairman of the judiciary committee, and likewise, of the three from the Senate one is to be the chairman of the judiciary committee. It is further provided that such chairman is to serve until the chairman of the judiciary committee of the next succeeding General Assembly is elected or appointed, notwithstanding the adjournment of the General Assembly of which he is a member and the expiration of his term as a member of the General Assembly. It is further provided that:

“The other members of the commission who are appointed from the Senate and the House of Representatives shall serve until their successors are appointed and qualified notwithstanding the adjournment of the general assembly of which they are members and the expiration of their terms as members of such general assembly.”

The above provisions do not expressly fix the terms of office of the members of the commission who are to be appointed from the Senate and the House of Representatives; but it appears to me that it was the intention of the General Assembly to make the terms of those appointees other than the chairmen of the respective judiciary committees, of indefinite and continuing duration, but subject to the will of the president of the Senate and the speaker of the House of Representatives, respectively, at the beginning of each biennial legislative session.

The law being silent as to the effect of a resignation of one of the members of the legislature from his membership on the commission, we must look to the general law to determine the effect of such resignation and the manner in which it must be filled. It is said in 43 American Jurisprudence, page 24:

“In the absence of a statutory direction, a public officer should tender his resignation to the tribunal having authority to appoint his successor, or to call an election to fill the office. A resignation tendered to an improper person or body is a nullity.”

In 32 Ohio Jurisprudence, page 1053, it is said:

“The authorities are uniform to the effect that, in the absence of statutory requirement, no particular form of resignation is

necessary; it need not be in writing and no special words are required. There must, however, be more than an intention on the part of a public officer to resign an office; the incumbent must evince a purpose to relinquish the office, which purpose must be communicated to the proper authority. The usual way is to convey the resignation to the person authorized to receive it and who has power to fill the vacancy. An intention to resign, if conveyed to anyone else, or a stranger, amounts to nothing."

While there is some dispute in the authorities generally, as to the necessity of the acceptance of a resignation, it appears to have been held by our Supreme Court that such acceptance is not necessary. It is stated in 43 American Jurisprudence, page 23, that there is a divergence of authority on this subject, but that the prevailing view is that in order to be effective the resignation must be accepted by competent authority either in terms or something tantamount to such acceptance, such as the appointment of a successor. In 32 Ohio Jurisprudence, page 1053, it is pointed out that the common law rule that a resignation is of no effect until accepted has been disputed by high authorities and the case of *Righter vs. State*, 51 O. S., 74, is cited in support of the proposition that such acceptance is not necessary. It was there held:

"By the rules of the common law, a resignation of an office does not take effect, so as to create a vacancy, until such resignation is accepted by the proper authority; but the common law in this regard is not in force in this state, to its full extent, and here a resignation without acceptance creates a vacancy, to the extent at least, of giving jurisdiction to appoint or elect a successor, unless otherwise provided by statute."

Whether or not some action must be taken by way of acceptance of a resignation, it appears to me that the commission is not the authority to whom a resignation should be tendered nor has it any power as a commission to accept the resignation or to fill the vacancy.

It is said in 46 *Corpus Juris*, page 975:

"In the absence of any constitutional or statutory provision, power to appoint to office is to be regarded as including the power to fill vacancies."

It is the settled policy of the law in Ohio to avoid vacancies in office. *State, ex rel. vs. McCracken*, 51 O. S., 123, 129; *State, ex rel. vs. Metcalf*, 80 O. S., 244, 263.

To that end the Constitution has made provision for filling certain vacancies and has left to the General Assembly the power to provide for filling vacancies where not specifically provided for in the Constitution. Article II, Section 27.

The manifest purpose of the General Assembly in enacting the law in question was to provide for a continuing body composed of equal representation from each branch of the legislature and from the legal profession outside of the legislature, who should exercise a continuous supervision over the preparation of new legislation and the classification and arrangement of new enactments with a view of eliminating uncertainties and inconsistencies in the statutory law. It appears to me to be quite necessary for the purpose of carrying out what the General Assembly fully intended, that this commission should be maintained from session to session in its full personnel, and that a vacancy occurring in the membership so far as it is composed of members appointed by either the speaker of the House of Representatives or the president of the Senate should be filled by the officer to whom the appointing power is committed.

Respectfully,

HUGH S. JENKINS

Attorney General