2006

VACANCY OCCURRING ON THE RACING COMMISSION WHEN SENATE IS NOT IN SESSION—THE GOVERNOR SHALL FILL THE VACANCY AND REPORT THE APPOINTMENT TO THE NEXT SESSION—IF NOT APPROVED BY THE SENATE, THE GOVERNOR MUST APPOINT SOMEONE ELSE —§§3.01, 3.03, R.C.

SYLLABUS:

1. Under the provisions of Section 3.03, Revised Code, where a vacancy on the Racing Commission occurs when the Senate is not in session, the Governor shall fill the vacancy and report the appointment to the next session of the Senate; and when that session of the Senate is adjourned *sine die* without the Senate's advice and consent to such appointment, the Governor is required to appoint an individual, other than the one originally appointed, to the vacancy.

2. The appointment of Mr. Hoffheimer to the Racing Commission for a term ending April 1, 1963, having been submitted to the November, 1960, session of the Senate, for Senate advice and consent, and the Senate having adjourned *sine die* without advising and consenting to said appointment, the Governor now has a mandatory duty to appoint someone other than Mr. Hoffheimer to such position.

3. Mr. Hoffheimer's service on the Racing Commission since November 29, 1960, when the Senate adjourned without consenting to his appointment, has been under the provisions of Section 3.01, Revised Code, a as *de facto* officer "until his successor is appointed and qualified," and he may serve legally as a *de facto* officer until the Governor makes a *new* appointment to the position.

4. The term "new appointment" as employed in Section 3.03, Revised Code, signifies the appointment of an individual other than the one to whose appointment the Senate fails to advise and consent, rather than the mere formality of renaming the same individual to the same office; and Mr. Hoffheimer may not be renamed to the term for which he did not receive the advice and consent of the Senate at its November, 1960, session.

Columbus, Ohio, February 15, 1961

The Ohio Senate, State House
Columbus, Ohio

To the Senate:

Senate Resolution No. 21 of the 104th General Assembly, requesting an opinion of the Attorney General, reads as follows:

> "Requesting the Attorney General for a written opinion relative to the legal effect of the failure of the Senate to act upon

an appointment made by the Governor, requiring the advice and consent of the Senate.

"WHEREAS, Under section 3769.02 of the Revised Code, which became effective November 2, 1959, a state racing commission is created consisting of five members to be appointed by the Governor, 'with the advice and consent of the senate;' and

"WHEREAS, The Governor, Hon. Michael V. DiSalle, exercising his authority under this section appointed, subject to the advice and consent of the Senate, Mr. Harry M. Hoffheimer, Cincinnati, Ohio, as a member of the racing commission for a term beginning November 2, 1959, and ending April 1, 1963; and

"WHEREAS, The appointment of Mr. Hoffheimer, requiring, as noted, the advice and consent of the Senate, was first submitted on Monday, November 28, 1960, by the Governor to the Senate of the 103rd General Assembly meeting in Special Session; and

"WHEREAS, The standing committee on rules of the Senate, to which was referred the Governor's appointment of Harry M. Hoffheimer as a member of the racing commission for a term beginning November 2, 1959, and ending April 1, 1963, did not report back to the Senate any recommendation relative to the said appointment; and

"WHEREAS, The Senate of the 103rd General Assembly, meeting in Special Session, adjourned sine die on Tuesday, November 29, 1960, failed to act on the appointment of Harry M. Hoffheimer, although such appointment was duly submitted to the Senate by the Governor; and

"WHEREAS, Neither the Clerk of the Senate of the 103rd General Assembly nor the Senate rules committee gave any official notification to the Governor, Hon. Michael V. DiSalle, of the failure to act on or to submit the appointment of Harry M. Hoffheimer to the members of the Senate for confirmation during the aforesaid special session; and

"WHEREAS, The facts set forth in this resolution have raised grave doubts among some of the members in the Senate as to the precise legal status of Harry M. Hoffheimer in relation to his activities involving the racing commission; therefore be it

"RESOLVED, That the members of the Senate of the 104th General Assembly of Ohio adopt this resolution and in accordance with section 109.13 of the Revised Code, do hereby request your written opinion as to what is the legal effect of the facts set forth in the body of this resolution as they relate to the status of Mr. Harry M. Hoffheimer since the adjournment of the Senate sine die on November 29, 1960, and, in particular, as to the following propositions:

"1. Did the failure of the Senate of the 103rd General Assembly, meeting in special session, to act upon the appointment by the Governor of Harry M. Hoffheimer to the racing commission for the term beginning November 2, 1959, and ending April 1, 1963, constitute a rejection of his appointment?

"2. Can the appointee, Harry M. Hoffheimer, in face of what occurred in the Senate during the Special Session of the 103rd General Assembly, legally continue to serve as a member of the commission?

"3. If the failure of the Senate to confirm is a legal bar to the appointee's continuance in office, can the Governor reappoint him as a member of the commission?; and be it further

"RESOLVED, That the Clerk of the Senate transmit forthwith a duly authenticated copy of this resolution to the Attorney General, Mark McElroy."

Section 3769.02, Revised Code, as effective November 2, 1959, provides:

"A state racing commission is hereby established. It shall consist of five members, *appointed by the governor, with the advice and consent of the Senate.* * * *

"* * * * * * * * *

"* * * The first members shall be appointed as follows: two for a term ending April 1, 1961; two for a term ending April 1, 1963; and one for a term ending April 1, 1965. * * *" (Emphasis added)

Thus, as of November 2, 1959, there were five appointments to be made to the racing commission, and Mr. Hoffheimer received one of them, to a term beginning November 2, 1959 and ending April 1, 1963.

At the time that Mr. Hoffheimer was appointed, the Senate was not in session and his name could not, therefore, have been immediately submitted for confirmation. The procedure to follow in such an instance is, however, specifically set forth in Section 3.03, Revised Code, reading:

"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 conformed 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 office for the full terms, otherwise a new appointment shall be made. (Emphasis added)

The vacancy having occurred when the Senate was *not* in session, the Governor had a duty to fill the vacancy and report the appointment to the next session of the Senate. In accordance with this duty, the Governor named Mr. Hoffheimer to fill the vacancy and reported the appointment to the next session of the Senate, which session was a special session commencing on November 28, 1960 and ending on November 29, 1960. (The Senate adjourned *sine die* on November 29, 1960.) The Governor's report to the Senate in this regard is found on page 34 of the Senate Journal for November 28, 1960, and reads:

"To The Ohio Senate:

"I, Michael V. DiSalle, Governor of the State of Ohio, do hereby appoint, subject to the advice and consent of the Senate, Harry M. Hoffheimer, Cincinnati, Hamilton County as a member of the Racing Commission, for the term beginning November 2, 1959 and ending April 1, 1963.

"In Witness Whereof, I have hereunto subscribed my name and caused the Great Seal of the State of Ohio to affixed at Columbus, this 28th day of November in the year of Our Lord, One Thousand Nine Hundred and Sixty.

"(Seal) MICHAEL V. DiSALLE
Governor"

Senate Resolution No. 21 states that the Senate did not advise and consent to the appointment of Mr. Hoffheimer at the November, 1960, special session. Also, on reviewing the Senate Journal for the two days of the session, I find that such advice and consent was not given although the Senate approved the appointments of the other four members of the Racing Commission.

Section 3.03, *supra,* states that upon the Governor's report of appointment "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." It appears clear, therefore, that if the Senate does not advise and consent to such an appointment, a new appointment must be made; and it appears equally clear that the advice and consent must be given at the session at which the report of appointment is submitted to the Senate.

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

> "* * * 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)

At page 771 of the 1934 opinion it is stated:

> "* * * 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 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. 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. * * *"

Of further significance in this question is the language of the Ohio Supreme Court as found in the third paragraph of the syllabus of the case

of *State, ex rel. Allen v. Ferguson,* 155 Ohio St., 26, decided March 7, 1951, reading:

> "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." (Emphasis added)

State, ex rel. Allen, supra, was concerned, in that regard, with appointments to the Turnpike Commission, which commission had been created by the 98th General Assembly in 1949, effective after *sine die* adjournment of the General Assembly (September 1, 1949). Appointments to the commission were made in 1949 by the then Governor (September 8, 1949). Since there were no special sessions in the 98th General Assembly, the next session of the Senate was the regular session in 1951 (99th General Assembly). After quoting Section 12, General Code, now Section 3.03, *supra,* the court said at page 33 of the opinion:

> "In our opinion, upon the effective date of the turnpike act, vacancies occurred on the commission created by that act and the Governor then had the right to fill those vacancies pursuant to the provisions of Section 12, General Code. See 42 American Jurisprudence, 978, Section 134. While the appointments of the Governor must be submitted to the Senate of the 99th General Assembly for confirmation, *and appointees whom it fails or refuses to confirm may not continue as members of the commission,* the interim appointees have power and authority in the meantime to act as a turnpike commission." (Emphasis added)

Referring directly to the first question of Senate Resolution No. 21, this question was considered by one of my predecessors in Opinion No. 6224, Opinions of the Attorney General for 1956, page 101, the first paragraph of the syllabus of that opinion reading:

> "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."

Beginning at page 104 of the 1956 opinion, and referring to the case of *State, ex rel. v. Johnson,* cited in Opinion No. 2740, *supra,* my predecessor stated:

"In the Johnson case, the gist of the ruling here pertient 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. * * *' "

In view of the clear language of Section 3.03, *supra,* and of the court rulings and past Attorney General opinions relating thereto and discussed above, I am of the opinion that the Senate's failure to advise and consent to the appointment of Mr. Hoffheimer before the *sine die* adjournment of its November, 1960, session, imposed a mandatory duty on the Governor to make a *new* appointment.

As to the meaning of the words of Section 3.03, *supra,* that "otherwise a new appointment shall be made," one would assume that, under the generally accepted meaning of the word "new," this means an appointment other than the one originally made. On this point, it is stated in the third paragraph of the syllabus of 1956 Opinion No. 6224, *supra:*

> "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."

And, at page 106 of the same opinion, it is stated:

> "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. * * *"

This was also the view of the court in *State, ex rel. Allen, supra,* as the language of the third paragraph of the syllabus of that case, set forth earlier, demonstrates.

I conclude, therefore, that upon the end of the November, 1960, session of the Senate, the Senate not having advised and consented to the

Hoffheimer appointment, the Governor had a mandatory duty to appoint someone other than Mr. Hoffheimer to the term in question.

I might note at this time that I am aware of the language of the first sentence of Section 3.03, *supra,* as to the procedure to follow where a vacancy occurs while the Senate is in session, and I am also aware of the ruling of the Supreme Court in *State, ex rel. Haines v. Rhodes,* 168 Ohio St., 165, as to the effect of that section. The *Haines* case concerned the right of a governor to fill a vacancy which had occurred while the Senate was not in session and no appointment had been submitted to the following session as required by law. The court held that such vacancy could be filled at the later date and based its decision on the premise that to hold otherwise would result in a ridiculous or absurd situation which must be avoided if reasonably possible. The court noted that if it held that the appointment was invalid, the Governor would have been precluded from making *any* appointment.

As to the instant case, my conclusion that the Governor must make a new appointment could not result in an absurd situation such as noted in the *Haines* case, *supra.* In the present case, the Governor very clearly may make an appointment; in fact, he has a mandatory duty to make a new appointment. Since the vacancy occurred while the Senate was not in session, the applicable part of Section 3.03, *supra,* is the second sentence. Moreover, the procedure in such second sentence has already been partially followed since the Governor filled the vacancy and reported the appointment to the next session of the Senate. In the *Haines* case, the question concerned whether *any* part of Section 3.03, *supra,* could be followed. In this case, the procedure of the second sentence of that section clearly applies; and I am of the opinion that the first sentence of that section has no application to this matter. There is no doubt that an appointment must be made, but such appointment must be a *new* appointment as discussed above.

The second specific question of Senate Resolution No. 21 is concerned with the legality of Mr. Hoffheimer's service on the Racing Commission after the adjournment of the November, 1960, session of the Senate, since no new appointment was made upon the Senate's failure to advise and consent to the appointment, and since Mr. Hoffheimer has continued to serve on the commission since the end of the November, 1960, session. A somewhat similar question was considered in Opinion No. 6224, Opinions

of the Attorney General for 1956, *supra,* the fourth paragraph of the syllabus of that opinion reading:

> "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, as provided in such section, is 'until his successor is * * * appointed and qualified,' and not for the full term designated in such appointment."

Section 3.01, Revised Code, referred to in Opinion No. 6224, *supra,* reads as follows:

> "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."

In *State, ex rel. v. Johnson, supra,* the court stated:

> "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."

In view of the above, it would appear that Mr. Hoffheimer has served as a *de facto* officer since November 29, 1960, the date that the Senate adjourned *sine die.* That is, his service has been pursuant to Section 3.01, *supra,* "until his successor is * * * appointed and qualified," and not for the full term designated in the original appointment; and in view of said Section 3.01, he will continue to serve as a *de facto* officer until the required new appointment is made. As discussed earlier, the Governor had a mandatory duty to make a *new* appointment when the Senate did not advise and consent to Mr. Hoffheimer's appointment, and, since no *new* appointment has been made, such duty still exists.

The third specific question of Senate Resolution No. 21 has already been answered. That is, the Governor is required to appoint someone other than Mr. Hoffheimer to the term in question.

The argument has been raised that since some of the present members of the Senate are serving four year terms and were in office before the present session started, the Senate might now be considered a continuing body. That argument then goes on to say that, if the Senate is a continuing body, the November appointment of Mr. Hoffheimer could be considered

to be still pending before the Senate since the Senate did not formally disapprove the appointment. This argument ignores the fact that under Section 3.03, *supra,* the Governor must report his appointment to the next session of the Senate and if the appointment does not receive the advice and consent of the Senate *at that session* the Governor must make a new appointment. Even if the Senate were to be considered a continuing body, therefore, that would not affect the present case since the Senate *did not* advise and consent to the appointment at the November, 1960, session. I might note that each Senate which met regularly every two years in the past has been a continuing body for the two years of its existence. That is, there has been a regular session of each Senate and many Senates have had special sessions (as the 103rd). The fact that each such Senate was such a continuing body, however, did not mean that a Governor's report of appointment which had not been approved at a session of the Senate was still pending before the Senate in the event the Senate again met during the biennium. As demonstrated very clearly in *State, ex rel. Allen v. Ferguson,* Opinion No. 6224, and *State, ex rel. v. Johnson, supra,* upon such failure to confirm at the *session* in which the report of appointment is made, the Governor has a mandatory duty to make a new appointment.

To hold that a Governor's report of appointment, as in the instant case, would be pending from one session to the next, would render meaningless the requirement of Senate confirmation. Under such an interpretation it could always be claimed that a report of appointment would be pending until the Senate approved the appointment. Even if the Senate specifically disapproved an appointment, it could be argued that the Senate might reconsider its action at some future date and that, therefore, the matter would still be pending. I do not believe that the Legislature could have intended such a construction and, in view of the clear language of Section 3.03, *supra,* I am certain that such a construction is not warranted.

In view of the foregoing, therefore, I do not deem it necessary to the purposes of this opinion to decide whether the present Senate is a continuing body. (This question will, however, be thoroughly discussed in my answer to Senate Resolution No. 22 which resolution requested an opinion on that specific question.)

Another argument raised on the present question is that the Governor, in his November, 1960, call for a special session, did not include confirmation of Senate appointments as a subject to be considered at the session and that, therefore, the Hoffheimer appointment was never legally before

the Senate. Pertinent in this regard is Section 8 of Article III, Ohio Constitution, reading:

> "The governor on extraordinary occasions may convene the general assembly by proclamation and shall state in the proclamation the purpose for which such special session is called, and no other business shall be transacted at such sepcial session *except that named in the proclamation, or in a subsequent public proclamation or message* to the general assembly issued by the governor during said special session, but the general assembly may provide for the expenses of the session and other matters incidental thereto." (Emphasis added)

While the Governor did not include Senate confirmation in his original proclamation, he did send a message to the Senate (set forth earlier) reporting the appointment of Mr. Hoffheimer for Senate advice and consent, and I am of the opinion that said message constituted a "message to the general assembly" within the purview of Section 8, *supra.* Thus, I conclude that the report of appointment of Mr. Hoffheimer was properly before the November, 1960, session of the Senate.

In the sixth "WHEREAS" clause of Senate Resolution No. 21, it is stated that the Governor did not receive any specific official notification that the Senate did not advise and consent to the Hoffheimer appointment. While this may be a fact, I do not see where it has any bearing on the present question. There is no provision of law requiring the Senate to so notify the Governor just as there is no requirement that he be specifically notified of what appointments were approved. The Senate Journal, of course, contains a record of Senate actions and clearly shows that Mr. Hoffheimer's appointment was not approved. In any event, whether the Governor was or was not notified, is not relevant to the question.

Senate Resolution No. 21 also states that the appointment in question was referred to the Rules Committee of the Senate, which committee did not report any recommendation as to the appointment, and the theory has been advanced in this regard that one committee should not have the power to speak for the Senate. As to this argument, I might note that the Senate always has the authority to require that any matter pending in a committee be brought before the full Senate for consideration. Thus, where the full Senate does not require that a pending matter be brought before it, it must be assumed to have acquiesced in any action, or non-action, taken. In any event, however, Section 3.03, *supra,* does not require that the Senate must take affirmative action to disapprove an appointment. It does

require that the appointment must receive the advice and consent of the Senate or else a *new* appointment shall be made. Thus, since in this case the Senate did not give its advice and consent to the appointment, the appointment is invalid and a new one must be made.

In conclusion, therefore, it is my opinion and you are advised:

1. Under the provisions of Section 3.03, Revised Code, where a vacancy on the Racing Commission occurs when the Senate is not in session, the Governor shall fill the vacancy and report the appointment to the next session of the Senate; and when that session of the Senate is adjourned *sine die* without the Senate's advice and consent to such appointment, the Governor is required to appoint an individual, other than the one originally appointed, to the vacancy.

2. The appointment of Mr. Hoffheimer to the Racing Commission for a term ending April 1, 1963, having been submitted to the November, 1960, session of the Senate, for Senate advice and consent, and the Senate having adjourned *sine die* without advising and consenting to said appointment, the Governor now has a mandatory duty to appoint someone other than Mr. Hoffheimer to such position.

3. Mr. Hoffheimer's service on the Racing Commission since November 29, 1960, when the Senate adjourned without consenting to his appointment, has been under the provisions of Section 3.01, Revised Code, as a *de facto* officer "until his successor is appointed and qualified," and he may serve legally as a *de facto* officer until the Governor makes a *new* appointment to the position.

4. The term "new appointment" as employed in Section 3.03, Revised Code, signifies the appointment of an individual other than the one to whose appointment the Senate fails to advise and consent, rather than the mere formality of renaming the same individual to the same office; and Mr. Hoffheimer may not be re-named to the term for which he did not receive the advice and consent of the Senate at its November, 1960, session.

Respectfully,
MARK MCELROY
Attorney General