

3318

§§3335.02, R.C., 1.24, R.C., SHOULD BE CONSIDERED A RESTATEMENT OF §4861, G.C., AND STILL APPLICABLE TO OHIO STATE UNIVERSITY TRUSTEES—A MEMBER OF THE BOARD OF TRUSTEES SERVES UNTIL HIS REPLACEMENT IS APPOINTED, AND CONFIRMED BY THE SENATE—WHEN THE TERM OF A BOARD MEMBER ENDS AT A TIME WHEN THE SENATE IS NOT IN SESSION A VACANCY IS NOT CREATED—§§3335.02, 1.24, R.C., 4861, G.C., ART. VII SEC. 2, O.C., ART. VII, SEC. 3, O.C., OPINION, 3901, OAG, 1923, §§12, G.C., 3.03, 3.01, R.C.

SYLLABUS:

1. Section 3335.20, Revised Code, should under the provisions of Section 1.24, Revised Code, be construed as a restatement of former Section 4861, General Code; and the provisions of the latter section should be considered as still applying to the board of trustees of Ohio State University.
2. Under the language of Section 4861, General Code, and Section 3.01, Revised Code, a member of the board of trustees of The Ohio State University serves until his successor is appointed, confirmed by the senate, and qualifies by receiving a governor's commission (Section 107.05, Revised Code) and taking the oath of office (Section 7 of Article XV, Ohio Constitution; Section 3.22, Revised Code).
3. Where the term of a member of the board of trustees of The Ohio State University appointed under Section 3335.02, Revised Code (Section 4861, General

Code), ends at a time when the senate is not in session, there is no vacancy created within the meaning of Section 3 of Article VII, Ohio Constitution, which would allow the governor to make a valid appointment without the advice and consent of the senate. (Opinion No. 390, Opinions of the Attorney General for 1923, page 306, approved and followed.)

Columbus, Ohio, October 4, 1962

Hon. Forrest G. Ketner, Board of Trustees
The Ohio State University, Columbus 10, Ohio

Dear Sir:

Your request for my opinion sets forth the following fact situation:

“‘B’ is a duly appointed, qualified and acting trustee of the Ohio State University. The fixed portion of his seven-year term of office expired on May 13, 1962, at a time when the Ohio Senate was not in session. ‘B’ has continued to serve as a trustee, pending the appointment and qualification of his successor. In July, 1962, the Governor nominated ‘L’ to succeed ‘B’ as a trustee of the University. At the time of this nomination the Senate was not in session, nor has it been since. Accordingly, ‘L’s’ nomination to the office of trustee has not been confirmed by the Senate. ‘B’ has not resigned his office as trustee and is available to serve until his successor is qualified.”

You then ask specific questions as follows:

- “1. What is the termination date of ‘B’s’ term of office?
- “2. When does ‘L’s’ term of office as a trustee begin?”

Section 3335.02, Revised Code, pertaining to the board of trustees of the Ohio State University, reads as follows:

“The government of the Ohio State university shall be vested in a board of seven trustees, who shall be appointed by the governor, with the advice and consent of the senate. One trustee shall be appointed each year for a term of seven years from the fourteenth day of May of such year. The trustees shall not receive compensation for their services, but shall be paid their reasonable necessary expenses while engaged in the discharge of their official duties.”

The predecessor section to Section 3335.02, Revised Code, is Section 4861, General Code. Said Section 4861 was changed to Section 3335.02, Revised Code, in the code revision bill of 1953 (House Bill No. 1 of the

100th General Assembly effective October 1, 1953), and some deletions were made from the law. In enacting said code revision bill, the legislature expressed the intention that the bill should not be construed to make any substantive changes in the law. In this regard, Section 1.24, Revised Code, enacted by House Bill No. 1, *supra*, provides:

“That in enacting this act it is the intent of the General Assembly not to change the law as heretofore expressed by the section or sections of the General Code in effect on the date of enactment of this act. The provisions of the Revised Code relating to the corresponding section or sections of the General Code shall be construed as restatements of and substituted in a continuing way for applicable existing statutory provisions, and not as new enactments.”

Accordingly, the provisions of Section 4861, General Code, as existing immediately prior to the enactment of Section 3335.02, Revised Code, should be considered to be still in effect. Said Section 4861, General Code, reads as follows:

“The government of the Ohio State University shall be vested in a board of seven trustees, who shall be appointed by the governor, with the advice and consent of the senate. One trustee shall be appointed each year for a term of seven years from the fourteenth day of May of such year, and serve until his successor is appointed and qualified. A vacancy in the office of trustee shall be filled by an appointment to be made in the same manner as an original appointment, but only for the unexpired term. The trustees shall not receive compensation for their services, but shall be paid their reasonable necessary expenses while engaged in the discharge of their official duties.”

Also to consider in the instant matter are Sections 2 and 3 of Article VII, Ohio Constitution. Section 2 of Article VII reads as follows:

“The directors of the penitentiary shall be appointed or elected in such manner as the general assembly may direct; and the trustees of the benevolent, and other state institutions, now elected by the general assembly, and of such other state institutions, as may be hereafter created, shall be appointed by the governor, by and with the advice and consent of the senate; and upon all nominations made by the governor, the question shall be taken by yeas and nays, and entered upon the journals of the senate.”

Section 3 of Article VII reads as follows:

“The governor shall have power to fill all vacancies that may occur in the offices aforesaid, until the next session of the general

assembly, and, until a successor to his appointee shall be confirmed and qualified.”

The Ohio State University has been held to be a state institution within the provisions of Section 2 of Article VII, *supra*. *Neil v. Board of Trustees*, 31 Ohio St., 15, 21; *Thomas v. Board of Trustees*, 195 U.S. 207; Opinion No. 390, Opinions of the Attorney General for 1923, page 306, at 307. Thus, where a vacancy occurs on the board of trustees of The Ohio State University when the senate is not in session the governor may fill the vacancy until the next session of the general assembly, and until a successor to his appointee shall be confirmed and qualified. (Section 3 of Article VII, *supra*). Constitutional provisions naturally take precedence over statutory provisions where there is a conflict; thus, the provisions of Section 3 of Article VII, *supra*, govern over the provision of Section 4861, General Code, that a vacancy in the office of trustee shall be filled by an appointment to be made in the same manner as an original appointment, but only for the unexpired term, should it be determined that a conflict exists.

Under Section 3335.02, Revised Code, and under Section 4861, General Code, a trustee is appointed for a term of seven years. In the case at hand, the seven-year term of “B” ended on May 13, 1962, at a time when the senate was not in session. It thus remains to be determined whether the end of a seven-year term occurring when the senate is not in session constitutes a vacancy within the purview of Section 3 of Article VII, *supra*.

The identical question was considered in Opinion No. 390, Opinions of the Attorney General for 1923, page 306. In that instance, a Mr. Kettering had been appointed a member of the board of trustees of Ohio State University and filled out his full term in that capacity. Said full term ended when the senate was not in session and the question considered was whether the governor could validly appoint a successor to Mr. Kettering at that time. The syllabus of that opinion reads as follows:

“1. There is at this time no vacancy in the office of trustee of Ohio State University now held by C. F. Kettering, within the meaning of Sections 12 and 7942 of the General Code, or of Section 3 of Article VII of the Ohio Constitution, and a person appointed at this time by the governor without the advice and consent of the senate, could not lawfully assume the duties of the office.

"2. The senate is not, at the present time, 'in session', within the meaning of section 12 of the General Code, but that fact would not warrant the governor in making a so-called recess appointment of a successor to Mr. Kettering, for the reason that there is now no vacancy in the office to be filled.

"3. A vacancy in an office, appointments to which are subject to confirmation by the senate, does not occur at the expiration of the fixed portion of the term, in cases where there is no constitutional provision, preventing the incumbent from continuing in office thereafter, and the statutes under which he was appointed and confirmed, or which are applicable thereto, expressly authorize him to continue in office until his successor is appointed and confirmed.

"4. An appointment to office in 'anticipation of a vacancy' under section 12 of the General Code may only be made by the governor and senate—the governor nominating, the senate confirming—and not the governor alone."

Section 7942, General Code, referred to in Opinion No. 390, *supra*, was the predecessor of Section 4861, General Code, which was set forth earlier. The sectional number was changed in 1943, 120 Ohio Laws, 475, 595, but no change was made in the language of the section.

Section 12, General Code, also referred to in Opinion No. 390, *supra*, was the predecessor of present Section 3.03, Revised Code, the sectional number being changed in the code revision of 1953 (House Bill No. 1 of the 100th General Assembly). Said Section 3.03 reads 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 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."

The only difference between the above language and former Section 12, General Code, is that the former section contained the words "if the senate advise and consent thereto" where the present section reads "if the senate advises and consents thereto." I do not consider that this change in language made any substantive change in the law.

The writer of Opinion No. 390, *supra*, noted that the constitution makes special provision for the filling of "vacancies" in the office of trustees of state institutions (Section 2 of Article VII, *supra*) and that Section 12, General Code, (now Section 3.03, Revised Code), "might very properly be confined to vacancies other than those so specifically provided for." Said writer did not, however, rely on that argument for his conclusion but held that the expiration of a term of a member of the board of trustees when the senate was not in session did not create a vacancy which could be filled by recess appointment, and that the member whose term had expired continued to serve until his successor "also is duly appointed and confirmed or qualified." At pages 308 and 309 of Opinion No. 390, *supra*, it is stated:

"Is there a 'vacancy' in the office of trustee of Ohio State University by reason of the fact that the seven-year portion of Mr. Kettering's tenure may have terminated on May 13, 1923? His full tenure, as prescribed by section 7942, G.C. at the time of his appointment, and also now, was 'seven years from the 14th day of May of such year', and 'until his successor is appointed and qualified.'

"I gather from your letter and also assume that it is your understanding that a 'vacancy' occurs in an office, appointments to which are subject to confirmation by the senate, upon the expiration of the fixed statutory portion of the term, but such is not the case where there is no constitutional provision preventing the incumbent from holding over, and the statute or statutes applicable to his appointment expressly authorize him to continue in office until his successor is appointed and confirmed or qualified. The governor, upon the expiration of the fixed portion of the term, might be justified in making a nomination, but his nominee could not assume the office unless he was confirmed. And also, the governor and the senate, but not the governor alone, may make an appointment in anticipation of a vacancy (State v. Cowen, 96 O.S. at p. 285; State v. Howe, 25 O.S. 588), whereupon the confirmed appointee would be entitled to assume the office upon the expiration of the fixed portion of the incumbent's tenure. But in neither case could an unconfirmed appointee assume the office when it is in the possession of an incumbent entitled to hold it until his successor is confirmed by the senate.

"As we pointed out in a recent opinion addressed to you a few days ago, the law is well settled in this state that an office cannot be regarded as vacant while filled by one lawfully entitled to hold it; and that where the statute under which an incumbent has been duly appointed and confirmed by the senate, expressly

provides that his tenure shall be for a certain fixed period, and 'until his successor is duly appointed and confirmed or qualified', or words of similar import, the so-called hold over portion of his tenure is as much a part of his term as the fixed portion, and he is entitled to continue in the office until his successor also is duly appointed and confirmed or qualified.

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In reaching his conclusion in Opinion No. 390, *supra*, the then attorney general cited the case of *State v. Howe*, 25 Ohio St., 588, in which the first paragraph of the syllabus reads :

“Where an officer appointed by the governor, by and with the advice and consent of the senate, is authorized by law to hold his office for a term of three years, and until his successor is appointed and qualified, and no appointment of a successor is made by the regular appointing power at the expiration of his term of three years, the office does not become vacant; but the incumbent holds over as a *de jure* officer until his successor is duly appointed and qualified.”

State v. Howe was concerned with the then existing office of commissioner of the reform school for boys. The defendant in the case had commenced said office on April 16, 1872, the law providing for a three-year term. On April 9, 1875, the governor appointed a successor to the defendant for the term of three years from April 16, 1875. The senate was not in session. The question was whether the end of the three-year term created a vacancy which the governor could fill.

Pertaining to the office in question, Section 6 of the act of April 2, 1858, entitled “An act to provide for the establishment and government of reform schools,” as amended on the 27th day of March, 1866, read as follows :

“The board of commissioners shall continue to consist of those members now appointed for the period of their appointment, and their powers and duties shall be as designated by this act. Their successors shall be appointed by the governor, by and with the advice of the senate. One of their number being designated by the appointing power aforesaid, acting commissioner, and all of them to hold their office for three years from the day of their appointment, and until their successors are appointed and qualified, unless vacancies occur from death, resignation, or removal for cause, as herein provided.”

As to vacancies on the board of commissioners, Section 7 of the act of 1858 provided in part:

“* * * vacancies in it shall be filled as the original appointments are made, except when the general assembly is not in session, and then by the governor, until the 20th day of the next session of the general assembly.”

At pages 595 and 596 of *State v. Howe*, the opinion by McIlvaine, C.J., states:

“It is hardly necessary to deny, as no one contends, that a vacancy was created in the office by the mere appointment of a successor to the defendant. And it is almost as palpable, that if a successor had not been appointed, the defendant would have continued to hold, not merely as a *de facto* office but as an officer *de jure*. This must be so, if effect be given to the provision of the statute authorizing him to hold over his three years, until a successor shall be appointed and qualified. The successor here meant can not be the appointee of the governor alone, who comes into the office temporarily to fill a vacancy, but the appointee of the governor by and with the advice of the senate. Were it otherwise, it would be necessary to hold that a vacancy was created by an appointment to fill the vacancy, or that, in contemplation of law, an office is to be regarded as vacant while in the possession of an officer who is rightfully and lawfully entitled to hold it.

“Much stress is laid by the relator on the significance of the word *term*—a word not used in the statute, however; and the claim is that the office became vacant on the 16th of April, 1875, by reason of the expiration of the defendant’s term of office. Let it be conceded that the defendant’s term was limited to three years, from April 16, 1872; it is nevertheless true that the same statute which imposed the limitation also provided that the right of the defendant to hold the office should continue thereafter until his successor was appointed and qualified. *Qui hoeret in litera, hoeret in cortice*.

“The plain and obvious import of the language of this statute is, that a vacancy shall not occur at the end of three years from the incumbent’s appointment. It is true, a successor may be appointed by the governor, by and with the advice of the senate, either before or after the expiration of the three years; and when so appointed and qualified, the right of the incumbent to hold the office ceases whenever the three years from the date of his own appointment have elapsed. In such case, there is no interregnum or vacancy in the office. It passes in succession. The end of one tenure, and the beginning of the next, occur at the same instant. But if no successor be qualified, the old incumbent continues in office, not as a mere *de facto* officer or *locum tenens*, but as its

rightful and lawful possessor until such successor be duly appointed and qualified.”

It will be noted that *State v. Howe, supra*, was concerned with an interpretation of Sections 2 and 3 of Article VII, Ohio Constitution, just as is the instant matter. Also, while different statutes were involved from those here considered, the court did not limit its discussion to the effect of those statutes but dealt generally with the question of what constitutes a vacancy.

Under *State v. Howe* and Opinion No. 390, *supra*, when a term expires at a time when the senate is not in session and the law provides that the incumbent shall serve until his successor is appointed and qualified, a vacancy does not occur within the purview of Section 3 of Article VII, Ohio Constitution, so as to empower the governor to make an appointment without the consent of the senate.

Section 4861, General Code, which, as discussed earlier, should be considered to still be applicable, provides that a trustee shall be appointed for a term of seven years and shall serve until his *successor* is appointed and qualified. Section 3.01, Revised Code, a general statute, also provides:

“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.”

It is true that Section 3.03, Revised Code, refers to the case where a vacancy occurs “by expiration of term or otherwise” thus implying that an expiration of term creates a vacancy which can be filled by the governor by recess appointment. Said Section 3.03 is a general statute, however, and must yield to the special provisions of Section 4861, General Code, where there is a conflict, and here it will be noted that a trustee serves until his *successor* is appointed and qualified, the use of the word “successor” obviously referring to the appointee who is appointed, qualified, and confirmed by the senate. Thus, I concur with my predecessor in Opinion No. 390, *supra*, that mere expiration of term when the senate is not in session does not create a vacancy in the office of trustee within the meaning of Section 12, General Code (Section 3.03, Revised Code), or of Section 3 of Article VII, *supra*.

In view of the foregoing, “B” will continue to serve in the office of trustee until a successor is appointed, confirmed by the senate, and quali-

fied for office. As to qualification, I note that an appointee must receive a governor's commission (Section 107.05, Revised Code), and must take an oath of office (Section 7 of Article XV, Ohio Constitution, Section 3.22, Revised Code), before commencing his duties.

In summary, it is my opinion and you are advised:

1. Section 3335.02, Revised Code, should, under the provisions of Section 1.24, Revised Code, be construed as a restatement of former Section 4861, General Code; and the provisions of the latter section should be considered as still applying to the board of trustees of Ohio State University.

2. Under the language of Section 4861, General Code, and Section 3.01, Revised Code, a member of the board of trustees of The Ohio State University serves until his successor is appointed, confirmed by the senate, and qualifies by receiving a governor's commission (Section 107.05, Revised Code) and taking the oath of office (Section 7 of Article XV Ohio Constitution; Section 3.22, Revised Code).

3. Where the term of a member of the board of trustees of The Ohio State University appointed under Section 3335.02, Revised Code (Section 4961, General Code), ends at a time when the senate is not in session, there is no vacancy created within the meaning of Section 3 of Article VII, Ohio Constitution, which would allow the governor to make a valid appointment without the advice and consent of the senate. Opinion No. 390, Opinions of the Attorney General for 1923, page 306, approved and followed.

Respectfully,

MARK McELROY

Attorney General