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COMBINED NORMAL AND INDUSTRIAL DEPARTMENT OF WILBERFORCE UNIVERSITY—WHERE TERM OF MEMBER OF BOARD OF TRUSTEES EXPIRES—SENATE IN SESSION—ATTEMPT TO APPOINT TRUSTEE AFTER SENATE ADJOURNED—NO RECESS APPOINTMENT—APPOINTEE MUST BE CONFIRMED BY SENATE—OLD TRUSTEE SERVES UNTIL SUCCESSOR DULY APPOINTED AND QUALIFIED—SEE SECTION 8 G. C.

SYLLABUS:

Where the term of a member of the Board of Trustees of the combined Normal and Industrial Department of Wilberforce University expires during a session of the Senate, and no attempt to appoint a new Trustee is made until after the Senate has adjourned, there is no recess appointment and the person so appointed can not legally serve as a member of the Board of Trustees until his appointment has been duly confirmed by the Senate as required by law. In such case, by virtue of Section 8 of the General Code, the old Trustee serves until his or her successor is duly appointed and qualified.

COLUMBUS, OHIO, November 29, 1938.

Board of Trustees, Combined Normal and Industrial Department, Wilberforce University, Wilberforce, Ohio.

GENTLEMEN: This will acknowledge receipt of your recent communication. Your request reads in part, as follows:

“As a member of the Board of Trustees of the Combined Normal and Industrial Department of Wilberforce University, I am respectfully requesting your interpretation as to the Board of Trustees meeting held Tuesday, October 25, 1938. If necessary, please give a direct opinion as to the right of Rev. J. G. to a seat under the law.

* * * * *

Enclosed find a copy of the minutes of the Board of Trustees Meeting.”

From the minutes of the meeting and additional information sent in with your letter, I am advised that the term of Miss A., one of the Trustees of the Combined Normal and Industrial Department expired on June 30, 1938.

The last special session of the legislature was held from May 16, 1938 to July 8, 1938. When the Senate adjourned on the latter date no appointment of a new trustee had been made. On August 6th, the Governor appointed Reverend J. G., while the Senate was not in session. Although no confirmation of this appointment as required by law had been made, notice regarding it was given to the newspapers and also by letter addressed to the Board of Trustees of the Combined Normal and Industrial Department.

The facts presented in this situation are strikingly similar to those ruled upon in an opinion No. 2751 rendered by me on July 23, 1938. In that opinion the term of a trustee of a university expired while the Senate was in session and another person had been appointed by the Governor who sought to serve without required confirmation of the Senate.

In Opinion No. 2751, *supra*, Section 8 of the General Code and Sections 2 and 3 of Article VII of the Ohio Constitution were discussed and held applicable. The following paragraphs from Opinion No. 2751 present this discussion:

Section 8, General Code, 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.

It is to be observed that Section 8, *supra*, is of a general nature and that since there is no statutory provision that directly provides for a holding over where the term of a trustee of the University has expired and a new appointment has not been made, the provisions of Section 8, *supra*, are applicable, unless, ‘otherwise provided in the constitution.’

Sections 2 and 3 of Article VII of the Constitution of Ohio, read as follows:

2. 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.

3. 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.'

It is to be noted that Section 2 of Article VII, *supra*, provides that appointments of trustees of state institutions be made by the Governor, by and with the advice and consent of the Senate; that, Section 3 of Article VII, *supra*, relates to the filling of vacancies; and that, said sections 2 and 3, are nowise inconsistent with Section 8, General Code.

The only conclusion that can be gained from the provisions of Section 8, *supra*, is, that until the board of trustees of Kent State University have had notification in an official manner that a successor to Mr. John R. Williams has been appointed and qualified, the board of trustees has no authority to consider, or recognize, any person other than Mr. John R. Williams as being entitled to serve as a member of the board of trustees of Kent State University for that particular place on the board that Mr. John R. Williams now holds. It is my judgment that the provisions of Section 8, *supra*, are entirely responsive to the question presented in your letter. However, it may be added that no appointment of a trustee to replace Mr. John R. Williams will be valid without the advice and consent of the Senate."

The authority for recess appointments, under Section 12, General Code, was also discussed in this opinion, as follows:

"It is obvious from a reading of Section 12, *supra*, that a recess appointment can be made only when the vacancy occurs 'when the senate is not in session'; that, if the vacancy occurs 'during a session of the senate', as was the case herein, it is incumbent upon the Governor to 'appoint a person to fill such vacancy, and forthwith report such appointment to the senate'; and that, if the senate was in session when Mr. John R. Williams' term expired, and the Governor failed to make an appointment for the new term, the Governor cannot thereafter make a temporary appointment in recess."

The ruling enunciated in Opinion No. 2751, most certainly applies to the facts presented in your request. The newly appointed trustee, Reverend J. G. cannot legally serve as a member of the Board of Trustees of the Combined Normal and Industrial Department of Wilberforce University until he has been duly confirmed by the Senate as required in Section 7976, General Code, especially since said section expressly requires that the trustees of the Normal and Industrial Department of

Wilberforce University "shall be appointed by and with the consent of the Senate." This section reads as follows:

"The government of such department shall be vested in a board of nine trustees to be known as 'the board of trustees of the combined normal and industrial department of Wilberforce university.' Five members of such board shall be appointed by the governor, by and with the consent of the senate, and three members thereof shall be chosen by the board of trustees of the university. The president of the university shall be ex-officio a member of the board. The governor shall appoint one member of such board each year, who shall serve five years, and whose term shall begin upon the first day of July in such year. Such appointment shall be made during the session of the senate next preceding the beginning of such term."

There is no question of a recess appointment here, for at the time Miss A's term as trustee expired, the Senate was in session.

In view of these facts, I must affirm the conclusion reached by me on July 23, 1938, in opinion No. 2751.

It is therefore my opinion that where the term of a member of the Combined Normal and Industrial Department of Wilberforce University expires while the Senate is in session and no attempt to appoint a new Trustee is made until after the Senate has adjourned, there is no recess appointment and the person so appointed can not legally serve as a member of the Board of Trustees until his appointment has been duly confirmed by the Senate as required by law. In such case, by virtue of Section 8 of the General Code, the old Trustee serves until his or her successor is duly appointed and qualified.

Respectfully,

HERBERT S. DUFFY,

Attorney General.