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1. CONTROLLING BOARD—PRACTICE OF GENERAL ASSEMBLY, EACH BIENNIUM, TO ESTABLISH BOARD AND AUTHORIZE BOARD TO APPOINT COMPTROLLER—PERIOD DURING WHICH LIABILITIES MAY BE INCURRED UNDER GENERAL APPROPRIATIONS ACT—AMENDED HOUSE BILL 654, 98th GENERAL ASSEMBLY—POSITION NOT A CONTINUING PUBLIC OFFICE—NO HOLD OVER AFTER EXPIRATION OF TERM UNTIL SUCCESSOR ELECTED OR APPOINTED AND QUALIFIED—SECTION 8 G. C.
2. IN ABSENCE OF APPOINTMENT BY CONTROLLING BOARD TO POSITION OF COMPTROLLER, LEGAL TITLE TO POSITION CAN NOT BE ASSERTED.
3. PERSON WHO SERVES AS COMPTROLLER, NOT DULY APPOINTED TO POSITION FOR CURRENT BIENNIUM, MAY BE SAID TO BE A DE FACTO PUBLIC OFFICER.
4. DE FACTO OFFICER CAN NOT MAINTAIN AN ACTION TO RECOVER SALARY PERTAINING TO OFFICE—GENERAL RULE AND DECIDED WEIGHT OF AUTHORITY.

SYLLABUS:

1. Under the practice of the General Assembly providing each biennium for the establishment of the Controlling Board, and authorizing the Board to appoint a comptroller, for the period during which liabilities may be incurred under the general appropriations act (Am. H. B. 654, 98th General Assembly), the position of such comptroller is not a continuing public office to which applies Section 8 of the General Code, which authorizes public officers to hold over after expiration of their terms until a successor is elected or appointed and qualified.

2. In the absence of appointment by the Controlling Board to the position of comptroller as authorized and required by Am. H. B. 654, 98th General Assembly, legal title to said position cannot be asserted.

3. A person who performs the duties of a comptroller for the Controlling Board, but who has not been duly appointed to the position for the current biennium as required by Am. H. B. 654, 98th General Assembly, may be said to be a de facto public officer.

4. The general rule and decided weight of authority in this country is that a de facto officer cannot maintain an action to recover the salary pertaining to the office.

Columbus, Ohio, November 1, 1949

Hon. Joseph T. Ferguson, Auditor of State
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Under the provisions of Am. H. B. 654, approved on July 15, 1949, it is provided that the Controlling Board shall have the power to appoint its own comptroller who shall perform such functions as the Controlling Board may prescribe, in reference to the State School Foundation Program, included as a part of the appropriation made to the School Finance section of the Department of Education. The minutes of the present Controlling Board, which was created by the above act, fail to disclose the appointment of such comptroller to serve during the present biennium, or any portion thereof.

“It is my understanding and information, however, that the same employe who served as such comptroller during the previous biennium, is now continuing his identical duties under the title of comptroller, without any evidence that such employe by a vote of the required membership of the Controlling Board authorized such employment.

“In view of the foregoing, is such employe legally and properly serving as comptroller for the Controlling Board, and in the absence of evidence of his appointment in the minutes of such Controlling Board, is he lawfully entitled to draw his salary?”

Your question may be divided into two parts as follows: (1) Is the incumbent in the position of comptroller for the Controlling Board holding office legally; (2) If not, is he entitled to draw the salary of said office while performing the duties thereof?

The provision of Am. H. B. 654 of the 98th General Assembly, approved on July 15, 1949, to which you refer in your letter may be found at the bottom of page 81 and top of page 82 of the printed Act and reads as follows:

“The foregoing appropriations for H-8 Subsidy shall be expended subject to the approval of the Controlling Board as provided by law and the Controlling Board shall have the power to appoint its own comptroller, who shall perform such functions as the Controlling Board may prescribe and whose salary and travel expense shall be paid by the division of school finance.”

A similar provision is found in the School Finance appropriation for the 1947-48 biennium. See H. B. 496, 97th General Assembly, printed in "The Appropriation Acts of the 97th General Assembly of Ohio," page 238, at page 267.

I think it appropriate to point out that the Controlling Board exists from biennium to biennium pursuant to express authorization of the General Assembly. Provision for the Controlling Board to function during the current biennium is made by Section 4 of Am. H. B. 654, 98th General Assembly, which reads in part as follows:

"Section 4. During the period within which liabilities may be incurred under authority of this act, there shall be a controlling board, consisting of the governor or his director of finance if designated by the governor for such purpose, the attorney general or an employee in his department designated by him, and the auditor of state or an employee in his department designated by him, and the chairman of the finance committee of the House of Representatives and the chairman of the finance committee of the Senate.

"* * * The governor or the director of finance shall be president of the board, and the superintendent of the budget shall be secretary of the board.

"* * * The consent of not less than four members of the controlling board shall be required for any action of the board. The secretary shall make a record of each application received by the controlling board and of its action thereon and shall certify a copy of the record of each such action to the auditor of state and to the director of finance. All meetings of the board shall be open to the public."

In view of the express limitation upon the period of existence of the Controlling Board and of the position of comptroller, I believe the first part of your question is one of first impression in this state. Under ordinary circumstances where the question concerns holding over in a continuing office by an incumbent, Section 8 of the General Code would probably govern the situation. Said section provides, in essence, that a person holding public office shall continue therein until his successor is elected or appointed and qualified. I have not found any instance where Section 8, General Code, was applied to a public office of a specified limited existence. The cases which I have examined under said section involved public offices of a continuing nature. Upon analysis, I believe that a distinction must be made on that basis.

I would have difficulty in concluding that an incumbent in a position of a specified, limited duration would acquire rights to such position which extended beyond the duration thereof even when the legislature sees fit to re-create the position for an additional limited period. In legal effect there is no continuity either in the Controlling Board or in the position of comptroller here in question. The language used by the legislature providing for both, quoted above, does not indicate an intention to create offices of a continuing nature. The statutory provisions are precise and clear in their terms. A new position was in effect created by each act of the legislature and where the period for which the office was created expires, the office loses its existence.

With direct reference to the language used providing for the position of comptroller, I should like to point out that it is in terms "the Controlling Board *shall have the power to appoint * * **" As I read this provision, it is permissive, the Controlling Board has power to make the appointment, and in the absence of such appointment, there can be no comptroller.

It appears to be there are several points of similarity between the instant situation and when an office is abolished and the incumbent attempts to hold over. In this connection, I should like to refer to the following discussion of the effect of abolition of a public office, appearing in 32 O. Jur., *Public Officers*, Section 217, at page 1074:

"The effect of the abolition of an office always is to terminate the term of the incumbent, since he cannot be an officer or incumbent of an office which has ceased to exist; in other words, he cannot be a *de facto* officer of an office no longer in existence. He can recover no salary thereafter; and it is his duty to transfer to the proper authorities all property connected therewith."

The preceding discussion clearly indicates that if the Controlling Board has not duly appointed anyone to the position of a comptroller, there can be no one legally holding that position. This leaves the question as to whether or not the incumbent is entitled to receive the salary of the office while performing the duties thereof even though he has not been legally appointed to the office. This question can best be answered by phrasing it in terms of whether or not the acting comptroller could maintain an action to recover the salary pertaining to the position.

It is reasonably clear that the comptroller has the status of a *de facto* officer. See *State, ex rel. Witten v. Ferguson*, Aud., 148 O. S. 702,

72 N. E. 2d 886, for definition of the term and discussion thereof. On the question of whether or not a *de facto* officer may maintain an action to recover the salary of his office, the general rule and decided weight of authority in this country appears to be that he cannot maintain the action. The rule is stated as follows in 93 A. L. R. 258, at page 260:

“* * * the decided weight of authority is to the effect that a *de facto* officer cannot maintain an action to recover the salary, fees, or other emoluments attached to the office, even though he has performed the duties thereof. This rule has been stated in various ways.” (Citing the following Ohio cases; *State ex rel. Henry v. Newark*, 6 O. N. P. 523, 8 O. Dec. N. P. 344; *Luttner v. Cleveland*, 15 O. N. P. N. S. 517, 24 O. Dec. N. P. 341, modified on other grounds in 92 O. S. 493, 111 N. E. 280.)

The annotation from which the above quotation was taken is supplemental in 151 A. L. R. 952, 954. See also 32 O. Jur., *Public Officers*, Section 238, page 1092, where the general rule is discussed and explained.

In view of the preceding, in answer to your question, I am impelled to conclude:

1. Under the practice of the General Assembly providing each biennium for the establishment of the Controlling Board, and authorizing the Board to appoint a comptroller, for the period during which liabilities may be incurred under the general appropriations act, Am. H. B. 654, 98th General Assembly, the position of such comptroller is not a continuing public office to which applies Section 8 of the General Code, which authorizes public officers to hold over after expiration of their terms until a successor is elected or appointed and qualified.

2. In the absence of appointment by the Controlling Board to the position of comptroller as authorized and required by Am. H. B. 654, 98th General Assembly, legal title to said position cannot be asserted.

3. A person who performs the duties of a comptroller for the Controlling Board, but who has not been duly appointed to the position for the current biennium as required by Am. H. B. 654, 98th General Assembly, may be said to be a *de facto* public officer.

4. The general rule and decided weight of authority in this country is that a *de facto* officer cannot maintain an action to recover the salary pertaining to the office.

Respectfully,

HERBERT S. DUFFY,
Attorney General