

6225

TAX APPEALS, BOARD OF—MEMBER HOLDING OFFICE IN CONTINUATION OF ORIGINAL TERM—APPOINTED AS DIRECTOR OF DEPARTMENT OF PUBLIC UTILITIES OF MUNICIPAL CORPORATION—QUALIFIED AND ENTERED UPON DUTIES—OFFICE A POSITION OF TRUST OR PROFIT—MEMBER ABANDONED AND IMPLIEDLY RESIGNED OFFICE OF BOARD MEMBER AND MAY NOT THEREAFTER BE PAID SALARY OF ABANDONED OFFICE—SECTIONS 3.01, 5703.07 RC.

SYLLABUS:

Where a member of the Board of Tax Appeals, holding such office in continuation of his original term as provided in Section 3.01, Revised Code, accepts an appointment as director of the department of public utilities of a municipal corporation, qualifies therein and enters upon the duties thereof, such member is deemed to hold a "position of trust or profit" within the meaning of Section 5703.07, Revised Code, has thereby abandoned and impliedly resigned the office of member of such board, and may not thereafter be paid the salary of such abandoned office.

Columbus, Ohio, February 6, 1956

Hon. Edward J. Kirwin, Chairman, Board of Tax Appeals
Department of Taxation, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"On July 13, 1955, the Governor appointed J.J.S. as a Member of the Board of Tax Appeals for the six-year term ending on the second Monday in February, 1961, to succeed F.M.P., who was holding the office by virtue of being a 'hold-over' (See Ohio Attorney General Opinion No. 5122, dated April 28, 1955). The appointment of Mr. S. was confirmed by the Ohio Senate on July 13, 1955. However, as of this date Mr. S. has not taken the oath of office or given bond.

"Effective July 18, 1955, Mr. P. was appointed Director of the Department of Public Utilities of the City of Columbus and he qualified, entered the office and was placed on the city payroll as of that date.

“Under date of August 3, 1955, Mr. P. addressed a communication to the Board of Tax Appeals which I herewith inclose and which reads as follows:

“Under applicable statutes and a recent opinion of the Ohio Attorney General, I feel that I am entitled to full pay and compensation as a Member of the Board of Tax Appeals up to and including August 1, 1955.

“The last two weeks in July of 1955 can and should be classed as my vacation period.’

“In view of the above stated facts and of the opinion expressed by Mr. P that he should be paid for the full month of July, 1955, as a Member of the Board of Tax Appeals, we wish you to answer the following question:

“For what days during the month of July, 1955, should Mr. P. be placed on the pay roll as a Member of the Board of Tax Appeals?”

As pointed out in my opinion No. 5122, mentioned in your inquiry, the individual here concerned was serving, prior to the appointment and qualification of a successor, in a continuation of his original term of office by virtue of the provision of Section 3.01, Revised Code. This section reads:

“A person holding an office of 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.”

Because you indicate that Mr. S., who has been regularly appointed by action of the Governor with the advice and consent of the Senate, has not taken the oath of office, or given bond as required by Section 5703.07, Revised Code, it is clear that he has not “qualified” in the office within the meaning of Section 3.01, supra. It follows, therefore, that such appointment has not effected a termination of the tenure of the office by Mr. P. under the continuation provision noted above.

It is to be noted, however, that the new office in which Mr. P. qualified on July 18, 1955, is incompatible with that of member of the Board of Tax Appeals. In this connection Section 5703.07, Revised Code, provides in part:

“* * * Each member of the board, the commissioner, and each employee of the department of taxation shall devote his entire time to the duties of his office, and shall not hold any

position of trust or profit or engage in any occupation or business interfering with or inconsistent with his duty as a member, commissioner, or employee, or serve on or under any committee of any political party.”

It is quite plain that Mr. P.’s new office is one “of trust or profit” and this provision of incompatibility immediately raises the question whether the office previously held has not been forfeited through abandonment. The rule that abandonment of an office amounts to an implied resignation was recognized in *State ex rel. Witten v. Ferguson*, 148 Ohio St., 702, the syllabus in which reads in part as follows :

“1. A duly elected, qualified and acting judge of the Court of Common Pleas, on accepting a temporary appointment and entering service as an officer in the Army of the United States during World War II, impliedly resigns and abandons the office of judge.” * * *

In the course of Judge Sohngen’s opinion in this case, it was said, pp. 707, 708:

“The principle is firmly established that the acceptance by an officer of a second office which is incompatible with the one already held in a vacation of the original office and amounts to an implied resignation or abandonment of the same. Annotation, 100 A.L.R., 1162, and the authorities there reviewed.

“The relator could not under our Constitution have been an officer in the Army of the United States and a judge in the state of Ohio at the same time, and when he accepted a commission in the Army of the United States, he impliedly resigned from his office as judge of the Common Pleas Court and thus abandoned it.” * * *

In that case the officer concerned was permitted to receive the salary of the office after he had terminated his service in the second office and had resumed his duties under the first office under color of legal title. In the instant case the facts as I understand them do not involve any such attempt to resume service in the abandoned office and no claim can be advanced on the basis of the individual concerned being a de facto officer as was done in the *Witten* case. I must conclude, therefore, that by qualifying on July 18, 1955, in the second office Mr. P. abandoned and impliedly resigned the office of member of the Board of Tax Appeals.

As to the question of “vacation” pay, there is no authority in law for pay of any kind, whether or not during a leave of absence, after the

termination of tenure in an office for any "leave" must necessarily fall within the term of incumbency. Moreover, it is doubtful whether the leave provisions of Section 121.16, Revised Code, would be applicable in any event to a state officer serving during a definite term as distinguished from a state employee whose tenure is indefinite. It is generally recognized that a public officer, as distinguished from an employee, is entitled to his salary as a perquisite of his office based on the mere passage of time, and is not affected by his absence from his post of duty or failure to perform such duties. See 32 Ohio Jurisprudence, 1017, Section 156.

Accordingly, in specific answer to your inquiry, it is my opinion that where a member of the Board of Tax Appeals, holding such office in continuation of his original term as provided in Section 3.01, Revised Code, accepts an appointment as director of the department of public utilities of a municipal corporation, qualifies therein and enters upon the duties thereof, such member is deemed to hold a "position of trust or profit" within the meaning of Section 5703.07, Revised Code, has thereby abandoned and impliedly resigned the office of member of such board, and may not thereafter be paid the salary of such abandoned office.

Respectfully,
C. WILLIAM O'NEILL
Attorney General