

1903.

APPOINTMENT—TERM OF OFFICE—BY GOVERNOR WITH ADVICE AND CONSENT OF SENATE—WHERE TERM EXPIRES, VACANCY CREATED WHEN SENATE NOT IN SESSION --GOVERNOR MAKES APPOINTMENT—REPORTED NEXT SESSION OF SENATE — APPOINTEE SHALL HOLD OFFICE UNTIL CONFIRMATION BY SENATE—IF CONFIRMED, TENURE, FULL TERM.

SYLLABUS:

1. *When the fixed portion of a term of office of an appointee, appointed to office by the Governor with the advice and consent of the Senate, expires when the Senate is not in session, the vacancy thereby created shall be filled by appointment by the Governor and such appointment reported to the next session of the Senate.*

2. *The person so appointed shall hold the office to which he was appointed until confirmation of his appointment by the Senate and if the Senate so advise and consent thereto, he shall continue in such office and hold the same for the full term.*

Columbus, Ohio, February 21, 1940.

Clement B. Edgar, O. D.,  
President, Ohio State Board of Optometry,  
307 Hippodrome Bldg., Cleveland, Ohio.

Dear Sir:

This will acknowledge receipt of your letter, wherein you request my opinion on the following facts and questions:

“The fixed portion of the term of Dr. W. J. Briggs as a member of this board expired on September 25, 1939, and on October 18, 1939, Dr. Ben Covert was named to succeed him by the Governor, such action being taken in vacation of the Senate, and Dr. Covert has, since that time, regarded himself as a legally qualified member of the board of optometry, and has assumed such duties as the successor to Dr. Briggs.

1. Did the membership of Dr. Briggs on the Board of Optometry cease at the time of the naming of Dr. Covert as his suc-

cessor, or is Dr. Briggs still a legally qualified member of the Board, empowered to act until such time as the Senate shall confirm the appointment?

2. In the event that Dr. Briggs is still the qualified member has this Board the right through its officers, to certify the payment of the compensation and expenses of Dr. Covert as a member for any duties performed as a member prior to his confirmation?

3. Are the acts of the board since October 18, 1939 which have been taken by the inclusion of Dr. Covert, and the exclusion of Dr. Briggs, lawful and binding in the event that it shall be found that Dr. Covert may not sit as a member of the board until he has been qualified?"

Section 1295-23, General Code, which deals with the appointment of members of the Board of Optometry, reads as follows:

"The governor, with the advice and consent of the senate, shall appoint a state board of optometry, consisting of five persons, citizens of Ohio, each of whom shall be a non-medical man or woman, actually engaged in the practice of optometry as defined in section 1, of this act, for five years next preceding his appointment.

Said board shall be appointed within thirty days after the taking effect of this act, one for the term of one year, one for the term of two years, one for the term of three years, one for the term of four years and one for the term of five years, who shall hold said office until their successors are appointed and qualified.

Thereafter, one member of said board shall be appointed each year for the term of five years, and shall hold said office until his successor is appointed and qualified.

No person so appointed shall be a stockholder in or member of the faculty, or of the board of trustees of any school of optometry, or serve to exceed two terms.

Vacancies on said board shall be filled by appointment by the governor in the manner hereinbefore provided."

It will be noted from the above section that appointments to the Ohio State Board of Optometry shall be for a term of five years, such appointments to be made by the Governor with the advice and consent of the Senate. You state that the term of Dr. W. J. Briggs expired on September 25, 1939, and that Dr. Ben Covert was appointed by the Governor on October 18, 1939 to succeed Dr. Briggs.

The 93rd General Assembly adjourned sine die on Wednesday, June 14, 1939. Therefore, the vacancy resulting by reason of the expiration of the term of Dr. Briggs occurred when the Senate was not in session.

The filling of vacancies by appointment of the Governor with the advice and consent of the Senate, when the Senate is not in session, is provided for in section 12 of the General Code, which 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 advise and consent thereto, such appointee shall hold the office for the full term, otherwise a new appointment shall be made.”

The language of the section above quoted is dispositive of your question in that it specifically provides that when a vacancy occurs by expiration of term at a time 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 if the Senate advise and consent thereto, such appointee shall hold the office for the full term; otherwise a new appointment shall be made.

It follows, therefore, that Dr. Covert may serve as a member of the Ohio State Board of Optometry until such time when the Senate is again in session and if at that time the Senate advise and consent to his appointment, he may hold office for the full five years; otherwise a new appointment will have to be made.

In view of the foregoing, and in specific answer to your question, it is therefore my opinion that the membership of Dr. W. J. Briggs on the Board of Optometry ceased on the date that Dr. Ben Covert was appointed by the Governor, and that Dr. Ben Covert has been since the date of his appointment a legally qualified member of the State Board of Optometry empowered to act as such until his appointment is reported to the next session of the Senate and if at such time the Senate shall advise and consent thereto, his term shall continue for the full five years.

Respectfully,

THOMAS J. HERBERT,  
Attorney General.