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1. TAX APPEALS, BOARD OF—GOVERNOR AUTHORIZED, WITH ADVICE AND CONSENT OF SENATE, TO APPOINT THREE MEMBERS OF BOARD—APPOINTMENTS, TERMS OF SIX YEARS—APPOINTMENT OF NO EFFECT IF MADE WHILE SENATE IS IN SESSION UNLESS REPORTED TO AND CONFIRMED BY SENATE—RECESS APPOINTMENT.
2. EXPIRATION OF TERM OF MEMBER, BOARD OF TAX APPEALS—IF GOVERNOR GIVES NOTICE OF REAPPOINTMENT BUT FAILS TO REPORT REAPPOINTMENT TO SENATE, INCUMBENT IS SERVING PART OF ORIGINAL TERM—ENTITLED UP TO TIME OF CONFIRMATION BY SENATE ONLY TO SALARY AUTHORIZED BY LAW AT BEGINNING OF ORIGINAL TERM—SECTION 3.03 RC.

SYLLABUS:

1. Under the provisions of Section 5703.03, Revised Code, the governor is authorized with the advice and consent of the senate, to appoint three members of the board of tax appeals, such appointments to be for terms of six years, commencing on the day following the second Monday in February in the odd numbered years; but any such appointment, if made while the senate is in session, is of no effect until it is reported to and confirmed by the senate.

2. When upon the expiration of the term of a member of the board of tax appeals, the governor notifies him of his re-appointment, but does not report such appointment to the senate as required by Section 3.03 of the Revised Code, the incumbent of such office in continuing to perform the duties of his office, is serving a part of his original term, and is entitled up to the time of confirmation by the senate, only to the salary authorized by law at the beginning of his original term.

Columbus, Ohio, April 28, 1955

Board of Tax Appeals, State of Ohio
Columbus, Ohio

Gentlemen:

I have before me your communication requesting my opinion and reading as follows:

“The Board of Tax Appeals wishes to have your informal legal advice concerning the compensation to be entered on the payroll for one of its members.

"In February, 1950, there was a vacancy on the Board of Tax Appeals due to the death of Member Frank Fleming; and by recess appointment the Governor named Mr. P. to the expired term ending on the second Monday in February, 1955. His recess appointment was confirmed by the Senate of the 99th General Assembly in February, 1951.

"On February 19, 1955, a commission dated February 15, 1955, and signed by the Governor was delivered to Mr. P.'s office—the commission appointing Mr. P. to the 6 year term as a member of the Board of Tax Appeals for the term expiring on the second Monday in February, 1961. However, as of this date, this appointment has not been transmitted to the Senate for its confirmation.

"When Mr. P. was appointed and qualified as a member of the Board of Tax Appeals in February, 1950, the salary of members of the Board of Tax Appeals was \$6,000 per annum. Thereafter, effective in June in 1953, the salary of members of the Board of Tax Appeals was increased by the legislature to \$8,400 per annum.

"In view of the above state of facts we wish you to answer the following questions:

"(1) Up until the time that Mr. P. is confirmed by the Senate for the term expiring on the second Monday in February, 1961, should he be paid at the rate of \$6,000 per annum or at the rate of \$8,400 per annum?

"(2) Upon the confirmation of Mr. P. by the Senate of the 101st General Assembly, and in the event that your advice is that he should currently be paid at the rate of \$6,000 per year, should he be paid by supplemental payroll the difference between the two salaries from the date of appointment, to wit, February 15, 1955?"

Section 5703.03 of the Revised Code, 1464-6, G. C., reads as follows:

"The board of tax appeals shall be composed of three members, not more than two of whom shall be affiliated with the same political party. The governor, with the advice and consent of the senate, shall appoint three members of the board of tax appeals for terms of six years each, one commencing on the day following the second Monday in February in the year 1941 and in each sixth year thereafter, one commencing on the day following the second Monday in February in the year 1943 and in each sixth year thereafter, and one commencing on the day following the second Monday in February in the year 1945 and in each sixth year thereafter."

By the provision of Section 1464-8 of the General Code, which became effective August 16, 1947, the salary of members of the board of tax appeals was fixed at \$5,000.00, with the proviso that members then serving should receive \$6,000.00 until the end of their respective terms. By an amendment effective February 9, 1951, the salary was again fixed at the sum of \$5,000, but with the following proviso :

“Notwithstanding the foregoing provisions with reference to the salaries of the members of the board of tax appeals and the tax commissioner, for the period beginning with the effective date of this act and ending on June 30, 1953, or in the event there are any unexpired terms on said date said period shall continue for each of said terms until the expiration date thereof, the annual salary of each member of the board of tax appeals shall be six thousand dollars and the annual salary of the tax commissioner shall be nine thousand dollars.”

This statute in substantially the same language was carried into the Revised Code, as Section 5703.09, effective October 1, 1953, but by an amendment effective October 2, 1953, was changed to read as follows :

“Each member of the board of tax appeals shall receive an annual salary of eight thousand four hundred dollars.”

Accordingly, the salary of Mr. P. for the term for which he was first appointed, ending on the second Monday in February, 1955, was \$6,000, and the salary of the office for the term then beginning was fixed at \$8,400.00.

It will be observed from an examination of Section 5703.03, Revised Code, that “the governor, *with the advice and consent of the senate*, shall appoint” * * *. In the situation presented by your letter it appears that the governor has sent a commission to Mr. P., appointing him for the term beginning on the second Monday in February, 1955, but that nomination has not been concurred in by the Senate for the reason that it has not been presented to that body. Accordingly, it would appear on the face of the matter that the Governor has done nothing more than advise Mr. P. of his intention to appoint him to the new term. It is possible that the executive may change his mind, or delay further action until the Senate has adjourned. Under these circumstances it seems quite obvious that the appointment could not be said to have been completed, and that being the case Mr. P. could not enter upon the new term, but is serving a part of his original term merely as a “hold-over.”

Section 3.01 of the Revised Code, Section 8, G. C., provides 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 of this state.”

Section 3.03 of the Revised Code, Section 12, G. C., 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.”

An appointment made pursuant to this section while the senate is not in session, is commonly referred to as a “recess appointment.”

In Volume 43 American Jurisprudence at page 19, it is said:

“Not infrequently it is provided in the Constitution of a state that public officers shall continue in office after the expiration of their official terms until their successors are duly qualified. * * *

“Similarly, by statute or charter the term of an office may be designated as a given number of years and until the incumbent's successor is elected and qualifies. * * *”

Continuing at page 21, the author uses this language:

“The purpose of provisions authorizing public officers to hold over is to prevent a hiatus in the government pending the time when a successor may be chosen and inducted into office. While the authorities differ as to the effect of the provision, according to many authorities the effect of such provision is to add an additional contingent and defeasible term to the original fixed term, and to prevent the happening of vacancies in office except by death, resignation, removal, and the like. In other words, according to such authorities, there is no vacancy to be filled by the appointing power. *The period between the expiration of an officer's term and the qualification of his successor is as much a part of the incumbent's term of office as the fixed constitutional or statutory period.* This is true even where a person is elected his own successor.” (Emphasis added.)

The author cites among other authorities, the case of *State ex rel. Harper vs. Howe*, 25 Ohio St., 588, where it was held:

“1. 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.

“2. Section 20 of the second article of the constitution, which enjoins upon the general assembly the duty of fixing the term of office and the compensation of all officers not provided for in the constitution, imposes no restraint on the power of the general assembly to extend the tenure of an officer beyond his term, and until his successor is qualified, in a case where the duration of such tenure is not limited by the constitution.”

In the course of the opinion it was said by McIlvane, C. J.:

“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.” (Emphasis added.)

I find in Opinion No. 322, Opinions of the Attorney General for 1923, at page 245, an opinion which involves questions very similar to those which you have presented. In the situation there presented it appears that one M. had been appointed and duly confirmed as a member of the public utilities commission for a term which had expired while the legislature was in session; and no new appointment having been made, he was continuing to perform the duties of the office. The governor submitted to the attorney general three questions, to wit:

“1. Whether Mr. M. is now lawfully serving as a member of the Public Utilities Commission of Ohio;

"2. Whether the governor may at this time lawfully make a so-called recess appointment of a successor to Mr. M.; and,

"3. Whether Mr. M. is entitled to receive salary at the rate of \$6,000 per annum covering the period of time from February 1st to April 30th, 1923."

It appears further that when his term began the salary of the office had been fixed at \$4,500.00 but during the term the salary had been raised to \$6,000.00. It was held as disclosed by the syllabus:

"2. When a vacancy occurs in the office of member of the Public Utilities Commission during a session of the senate, the governor is without authority to make a recess appointment, and a person who would be appointed by the governor under such circumstances could not lawfully assume the office. It is only in cases when a vacancy occurs when the senate is not in session, that a valid recess appointment may be made under section 12 of the General Code.

"3. A member of the Public Utilities Commission who continues in office after the prescribed statutory portion of his term, is not entitled to receive the increased salary provided for by a legislative act which was passed and became effective prior to the so-called hold-over portion of his term."

It would appear from the foregoing that under the circumstances stated in your letter Mr. P. could not take advantage of the increase in salary provided by the amendment of October 2, 1953. To do so would be clearly in violation of Section 20 of Article II of the Constitution which inhibits the change of "salary of any officer during his existing term."

The case of *State ex rel. Glander v. Ferguson*, 148 Ohio St., 581, laid down the rule that a statutory change made during the time an appointed officer was holding over after the expiration of his regular term, could operate to his advantage in case he was *subsequently* reappointed and his appointment acquiesced in by the Senate. The holding of the court in this respect is contained in the second syllabus reading as follows:

"2. The inhibition against change of salary of a public officer in Section 20, Article II of the Constitution of Ohio, does not apply to a person appointed to a partially expired statutory term, where the salary of the office is increased by statute effective during the preceding portion of such term and during the time such person was holding over in the office under his appointment thereto for the preceding statutory term."

It should be noted that the case only involved the right of relator to the increase granted by the statute from and after the time of his effective re-appointment. The court referred to and approved the decision in the case of *State ex rel. v. Howe, supra*, and after quoting the first branch of the syllabus said :

“It clearly follows that, unless otherwise expressly provided, the time of holding over by an elected or appointed officer *is a continuation of the old term and not a part of a new term.*”
(Emphasis added.)

Your second question as well as the first has, I believe, been sufficiently covered by what has been said. It seems quite obvious that since the appointee is holding over, is serving a part of his original term, and cannot enter upon his new term until confirmed by the senate, he cannot claim the increase for the period from the time when the governor advised him of his reappointment up to the time when his appointment to the new term became effective. To give him that benefit would clearly be a violation of the constitutional inhibition against a change in salary during the term of an officer.

Accordingly, in specific answer to the questions submitted, it is my opinion :

1. Under the provision of Section 5703.03, Revised Code, the governor is authorized with the advice and consent of the senate, to appoint three members of the board of tax appeals, such appointments to be for terms of six years, commencing on the day following the second Monday in February in the odd numbered years; but any such appointment, if made while the senate is in session, is of no effect until it is reported to and confirmed by the senate.

2. When upon the expiration of the term of a member of the board of tax appeals, the governor notifies him of his re-appointment, but does not report such appointment to the senate as required by Section 3.03 of the Revised Code, the incumbent of such office in continuing to perform the duties of his office, is serving a part of his original term, and is entitled up to the time of confirmation by the senate, only to the salary authorized by law at the beginning of his original term.

Respectfully,
C. WILLIAM O'NEILL
Attorney General